Neutral Citation Number: [2019] EWCA Crim 1568

Case No: 201901101 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOLVERHAMPTON
Mr Justice Jeremy Baker
Indictment no: T20187131

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 September 2019

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON THE LORD BURNETT OF MALDON
THE HON MR JUSTICE WARBY
and
THE HON MR JUSTICE EDIS

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Between:

R	**Respondent**
- and -	
Ayman Aziz	**Applicant**

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- -

Adam Kane QC and Charnjit Jutla for the **Applicant**
Louise Oakley for the **Respondent**

Hearing date: 25 July 2019

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Approved Judgment

The Lord Burnett of Maldon:

Introduction

1. Ayman Aziz is now aged 17. On 14 December 2018, after a trial in the Crown Court at Wolverhampton, he was convicted by a jury of the rape and murder of a 14-year-old girl. On 22 February 2019, he was sentenced by the trial judge, Mr Justice Jeremy Baker. The judge imposed the mandatory sentence of detention at Her Majesty's pleasure for murder, pursuant to section 90 of the Powers of Criminal Courts (Sentencing) Act 2000. He specified a minimum term of 19 years. A sentence of ten years' detention was passed for the rape, to be served concurrently.

2. An application for leave to appeal against sentence was referred to the Full Court by the Registrar. On 25 July 2019, after hearing argument on that application, we announced our decision to refuse leave. We now give our reasons for that decision.

3. We also heard argument on a challenge to the decision made by the trial judge at the time of sentence, to lift a reporting restriction order he had made before trial, prohibiting the identification of Aziz as the defendant in the case. As will be apparent already, we dismissed that challenge. Our reasons for that decision are set out at the end of this judgment.

Facts

4. In the early morning of 12 April 2018, a dog walker saw what he initially thought was a blow-up doll resting on a park bench in the heart of West Park, Wolverhampton. When he realised that the figure was the body of a young girl, he called the emergency services. She was in a kneeling position, with the top half of her body draped over the arm of the bench. She was naked from the waist down and the clothing on the top half of her body had been pulled up, exposing her breasts. It was quickly established that the girl, who was later identified as Viktorija Sokolova, was dead and that she had suffered serious head injuries.

5. Viktorija had been friends with Aziz. He was born on 21 January 2002 and so was 16 years and three months at the time. They had lost touch for a while but were in contact again just over a week before Viktorija's death. On 11 April 2018, she told others that she was going to meet a friend in "the black house", referring to a pavilion in West Park. Facebook messages revealed that she and Aziz had agreed to meet up that evening, to chat, "smoke weed", and to discuss travelling down to London together the following day. CCTV and telephone evidence indicated that Aziz had arrived at the park shortly before Viktorija. His phone was switched off 45 minutes later, and he left the park some two hours after he had arrived.

6. Forensic examination indicated that the fatal attack had taken place inside the pavilion. A large pool of Viktorija's blood was found on the floor, and staining was found on a bench and panelling to the back of the pavilion. There was also a bloodstained baseball cap and a hoop earring. There were drag marks on the floor and what appeared to be drag marks leading in the direction of the bench where the body was found. Items of her clothing and her phone were found distributed around the park.

7. The post mortem examination revealed that Viktorija had been subjected to a sustained and ferocious attack to the head, involving a large number of blows (the forensic report said a minimum of 21). Some of the injuries were consistent with the use of a weapon like a hammer. The force of the attack was such that it caused multiple fractures to the underlying skullcap and facial skeleton. Further examination revealed Aziz's semen in the rectum and anus of the deceased, consistent with anal intercourse having taken place.

8. He accepted that he had met the deceased in the park on the night she died and said that they had engaged in consensual sexual activity. He denied that he had assaulted her and said that she was alive and well when he had left her in the park. The defence case, put by Aziz's Counsel to witnesses called by the Crown, was that someone else had killed Viktorija. Examination of his phone revealed that from the time he re-established contact with Viktorija he had accessed material about anal sex, including pornographic videos depicting it. There was also evidence of searches for films about submissive girls.

9. Facebook messages on Aziz's phone had been deleted, as had records of calls to and from Viktorija. Examination of his brother's phone disclosed evidence that, in the early hours of 12 April 2019, shortly after Aziz returned from the park, he and his brother had been researching how to delete Facebook accounts. The same phone had been used to film details in the "Notes" app on Aziz's phone, where logon details for several applications were stored. His phone was switched off at 03:29 on 12 April and remained switched off for over a day.

Sentence

Reports

10. The judge adjourned sentence to allow for the preparation of a pre-sentence report and psychiatric evaluation. When he came to sentence Aziz, two months after conviction, he had a pre-sentence report written by two social workers from the Wolverhampton Youth Offending Team. It reported a troubled background, involving racial abuse, physical attacks, and bullying. Aziz had not engaged with school, and his mental health had declined. From around the age of 15 he reported hearing voices and having hallucinations. His lifestyle around the time of the offence appeared to have been heavily burdened by his mental health and associated incapacity.

11. The judge had a report from Dr Tina Irani, Consultant Child and Adolescent Forensic Psychiatrist. Dr Irani was instructed on behalf of Aziz. In addition, he had a report from Dr Nina Champerani, prepared on the instructions of the Court. Dr Champerani is a Consultant Child and Adolescent Psychiatrist. Both psychiatrists described symptoms of psychosis and paranoia, and they agreed that the applicant met the criteria for a diagnosis of paranoid schizophrenia.

12. Dr Irani reported that Aziz was unable to give a clear account of his mental state at the time of the offending. She said that there was some basis for suggesting he may have been non-compliant with his medication. He was likely to have had some symptoms of a psychotic nature at the time of the offences, and there was clear evidence of his being mentally unwell soon after coming into custody. But it was difficult to ascertain what impact his mental illness may have had on his behaviour at the relevant time. Dr

Champerani offered no assessment of Aziz's mental state at the time of the offences. She said that, without a clearer account of the nature and severity of his mental state, it was unclear whether there was a link between his mental disorder and offending.

Sentencing remarks

13. Established sentencing principles required the judge to set a minimum term which reflected the overall seriousness of the offences, taken together, imposing a concurrent determinate sentence for the rape offence. He described as carefully planned what had taken place over two hours in the park. Aziz had arranged to meet Viktorija in an isolated situation, late at night. He found that the internet research and the injuries subsequently inflicted indicated a plan to rape her anally, and then to batter her to death with a weapon that Aziz had brought with him. He described the injuries and the damage they had caused, noting that her breasts and torso had been marked with a butterfly configuration, which indicated that her body had been in contact with a corrosive fluid, such as her own vomit. There were no injuries to her hands, indicating that she had no opportunity to defend herself.

14. The judge referred to the steps taken by Aziz after the event to prevent the police from connecting him with the deceased, and to dispose of evidence implicating him as the person responsible for the offences. The judge was referring to the disposal of clothing, which must have been covered in blood, and the murder weapon, which was never identified.

15. The sentence for rape was arrived at on the basis that the offence fell within Category 1A of the guideline, with a starting point of 15 years' custody and a range of between 13 and 19 years, for an adult offender. Applying the Sentencing Council guideline for sentencing children and young people, the sentence was reduced to one of ten years.

16. The judge identified the statutory starting point for the minimum term of 12 years, given Aziz's age: Criminal Justice Act 2003, Schedule 21 paragraph 7. He identified six aggravating factors: (i) a significant degree of planning and pre-meditation, including the taking of a heavy blunt force weapon, such as a hammer, to the scene; (ii) the vulnerability of the victim because of her age and her domestic circumstances; (iii) the sexual motivation for the murder, including the anal rape; (iv) the brutal nature of the attack; (v) the degrading position in which the body was abandoned after the attack; and (vi) the significant attempts to dispose of incriminating evidence. Four mitigating factors were identified: (i) a lack of previous convictions; (ii) Aziz's age, to the extent it had not already been taken into account in the starting point; (iii) the instability in his upbringing; and (iv) the mental disorder from which he suffered. In relation to that last factor, the judge referred to the psychiatric reports, stating that although the applicant's mental state at the time of the offending may have been a contributory factor, "I do not consider that there is sufficient evidence before me to conclude that it had the effect of significantly reducing your culpability". He observed that this approach was supported by the planning and preparation before the offences, and the nature and extent of the steps taken afterwards to dispose of incriminating evidence.

17. Bearing all those matters in mind, the judge concluded that the aggravating factors would have justified a minimum term of 24 years, but in view of the mitigating factors, the appropriate minimum term was one of 19 years.

The grounds of appeal

18. Mr Kane QC, presenting the application on behalf of Aziz, has not sought to criticise the judge's overall approach, the sentence for rape, or the identified aggravating and mitigating factors. He has focused his grounds of appeal on three main areas.

19. First, Mr Kane submits that the judge paid insufficient regard to the intention of Parliament in setting the statutory starting point for those aged under 18 at 12 years, regardless of the nature of the offence. He argues that the judge erred in his willingness to "float free" from the statutory starting point, which properly reflects the overarching significance of immaturity, against which every feature of aggravation has to be measured. To have purposive effect, the 12 year starting point must exert a substantial "drag" on aggravating features.

20. Secondly, he submits that the judge's approach to Aziz's mental health focussed too much on whether it was causative of the offending and too little on the overall mitigation which his mental disorder afforded him.

21. Thirdly, Mr Kane submits that the judge paid too much attention to Aziz's chronological age, and insufficient to his developmental immaturity. His emotional and educational deprivation should have received greater recognition, and more weight sentencing.

22. In support of these grounds, Mr Kane has helpfully extracted key passages from the pre-sentence report, the report of the intermediary who helped the applicant during the trial, and the psychiatric reports. These extracts conveniently accompanied his written Skeleton Argument for the hearing.

Discussion

23. *R v Markham and Edwards* [2017] EWCA Crim 739 [2017] 2 Cr. App. R. (S.) 30 was an appeal which considered the minimum terms ordered in respect of juveniles and also the question whether they should remain anonymous. The appellants, both aged 14 at the time of the offending, had carefully planned and ruthlessly carried out the murder of Edwards' mother and sister (aged 13) in their beds, using knives and, in the case of the sister, also smothering her with a pillow. They spent the next 36 hours watching films, having sex, and drinking alcohol. Minimum terms of 21 years, before reduction for guilty pleas, were upheld.

24. The Court rejected a submission, advanced on behalf of Markham, that the judge had paid insufficient attention to the statutory starting point and approached the case in the same way as he would have done if sentencing an adult. At [53], the Court referred to the "free-standing approach" identified by Parliament for the sentencing of children and young persons under Schedule 21:

> "… It is clear that this is intended to reflect the different place from which sentencing children and young persons for murder should start. It identifies a starting point of 12 years, whatever the category of murder into which the case would fall ... which can then be varied up or down according to the aggravating and mitigating factors by taking them into account 'to the extent that

> it has not allowed for them in its choice of starting point' (para 8 of Schedule 21)."

The court agreed with the sentencing judge that the offending in that case was considerably aggravated by planning, the use of knives taken to the scene, the circumstances in which the murders were committed and the behaviour afterwards. Even allowing for the mitigating psychiatric and psychological problems, an increase from 12 to 21 years was neither wrong in principle nor manifestly excessive.

25. Aggravating and mitigating factors do not lead to a rigid arithmetical increase or decrease in a minimum term but require a subtle evaluation by the sentencing judge.

26. In the present case, the overall increase, after balancing aggravating and mitigating factors, was from 12 to 19 years. We do not consider that to be arguably wrong. It sits comfortably with the approach in *Markham.* That was a case of double murder, one victim being a child. But the offenders in that case were 14. In the present case, there was a range of specific aggravating factors. The murder was carried out with a weapon brought to the scene for the purpose; there was sexual motivation, and the additional offence of rape; there was a sadistic element to the offending; the victim was subjected to mental and physical suffering over a prolonged period. It is legitimate to keep in mind that the sadistic and sexual elements of this offending would have led to a starting point for someone aged 21 or more of a whole life term (under paragraph 4(2)(b) of Schedule 21) and, for one aged 18 to 21, a starting point of 30 years (paragraph 5(2)(e) and/or (h)). The judge did not overlook the statutory starting point. Although the sentence is a substantial one, we do not consider it arguable that the sentence "floated free" of the starting point required by paragraph 12 of Schedule 21.

27. Contrary to Mr Kane's submissions, we regard the judge's approach to the applicant's mental health as being beyond reproach. Among the non-exhaustive list of mitigating factors set out in paragraph 11 of Schedule 21 is "(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957), lowered his degree of culpability." The reference is to the partial defence to murder of diminished responsibility, which was not relied on by this applicant. The finding that the psychiatric evidence did not permit a conclusion that the applicant's mental disorder reduced his culpability was open to the judge on the evidence. Indeed, we cannot see how he could properly have reached any other conclusion, given the uncertainty expressed by the experts. Mr Kane submits that the mental disorder should nonetheless have had a mitigating impact. We accept that. The sentencing remarks show that the judge took it into account. We are satisfied that it would be wrong to interpret the sentencing remarks as first introducing mental illness as a mitigating factor, and then ruling it out altogether on the basis that it did not reduce culpability. In our judgment, the reduction of five years for mitigation must be taken to reflect the mental disorder, as well as the other mitigating factors listed by the Judge.

28. One of those factors, expressly referred to by the Judge, was the instability of the applicant's background. This was a matter that may have provided some explanation for his offending and afforded some personal mitigation. Aziz's background and development were reflected in the various reports before the judge and taken into account.

29. The question for us is whether the minimum term was arguably manifestly excessive. Whilst it is undoubtedly the case that a 19 year minimum term is long in the context of a 16 year old murderer, we are unpersuaded that it could arguably be described as such. The severity of the sentence flows from the weight which the judge attached to the truly dreadful nature of the offending and his legitimate assessment of the true level of culpability.

Identification

Merits

30. Section 45 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act") gives the court power to prohibit the publication of matters identifying children and young persons who are "concerned in" criminal proceedings as victims, witnesses, or defendants, in the Crown Court, and other courts other than the Youth Court (where reporting restrictions are automatic, unless the court orders otherwise). Section 45, which came into force in April 2015, replaced the previous statutory regime. By section 45(3) of the 1999 Act, the court may

> "direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in *any publication* if it is likely to lead members of the public to identify him as a person concerned in the proceedings" (our emphasis)

31. In deciding whether to make a direction under section 45(3), the court must have regard to the welfare of the child or young person concerned: section 45(7). Orders are commonly made under section 45(3) before a child or young person is tried on indictment. That is what the judge did in this case on 26 November 2018.

32. After Aziz's conviction, the Express and Star Newspaper submitted written representations, inviting the judge to consider lifting the reporting restriction. The newspaper identified relevant principles and authorities. These included *Markham*, where, after Edwards' conviction for murder, Haddon-Cave J lifted a section 45 direction. This Court upheld his decision.

33. The judge granted the newspaper's application and made what the statute calls an "excepting direction". Its effect was to discharge the section 45(3) direction in its entirety. He gave his reasons in writing.

34. The judge stayed his excepting direction until after the disposal of a claim by Aziz for judicial review of his decision. That claim was brought. Permission to apply for judicial review was granted and an interim anonymity order made. The claim was stayed to allow the appointment of a litigation friend. Aziz's judicial review challenge to the excepting direction has been put before this court, as happened in *Markham*, and is challenged directly in the sentence appeal.

35. Section 45 contains two powers to make an "excepting direction". Each allows the court to "dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3)". Both powers were invoked by the Express and Star in this case. The first is provided for by section 45(4), which allows

the court to make an excepting direction where "it is satisfied that it is necessary in the interests of justice to do so." The second power is conferred by section 45(5). This allows the court to dispense with restrictions imposed by a direction

> "if it is satisfied
>
> (a) that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and
>
> (b) that it is in the public interest to remove or relax that restriction;
>
> but no excepting direction shall be given under this subsection by reason only of the fact that the proceedings have been determined in any way or have been abandoned."

36. Decisions under these provisions call for the exercise of judgment, requiring the court to balance the competing claims of privacy, a child's welfare and open justice: *Markham* [75], [83-84]. We discuss the jurisdiction to review a decision of this kind at [51] to [57] below, where we also refer to the powers conferred on an "appellate court" by section 45 of the 1999 Act. When considering a challenge to a decision on such an issue, the court (whether by way of appeal or judicial review) will respect the trial judge's assessment of the weight to be given to particular factors, interfering only where an error of principle is identified or the decision is plainly wrong. It is for that reason that this Court emphasised in *Markham* at [84] that,

> "for the future, submissions in this area of the law should focus on the facts of the particular case relevant to the exercise of the court's judgment, rather than the siren calls of abstract principles that have already informed the approach which the courts adopt."

37. The previous legislation governing the anonymity of children in criminal proceedings was section 39 of the Children and Young Persons Act 1933 ("the 1933 Act"). There is a body of authority on the right approach to orders under section 39 of the 1933 Act, which also applies to applications under section 45 of the 1999 Act: see *R v H* [2015] EWCA Crim 1579 [2016] 1 Cr. App. R. (S.) 13 at [8]. The general principles established under section 39 were summarised by Simon Brown LJ in *R v Winchester Crown Court, ex p B (A Minor)* [1999] 1 WLR 788:

> "(i) In deciding whether to impose or thereafter to lift reporting restrictions, the court will consider whether there are good reasons for naming the defendant. (ii) In reaching that decision, the court will give considerable weight to the age of the offender and to the potential damage to any young person of public identification as a criminal before the offender has the benefit or burden of adulthood. (iii) … the court must "have regard to the welfare of the child or young person." (iv) The prospect of being named in court with the accompanying disgrace is a powerful deterrent and the naming of a defendant in the context of his

> punishment serves as a deterrent to others. These deterrents are proper objectives for the court to seek. (v) There is a strong public interest in open justice and in the public knowing as much as possible about what has happened in court, including the identity of those who have committed crime. (vi) The weight to be attributed to the different factors may shift at different stages of the proceedings and, in particular, after the defendant has been found, or pleads, guilty and is sentenced. It may then be appropriate to place greater weight on the interest of the public in knowing the identity of those who have committed crimes, particularly serious and detestable crimes. (vii) The fact that an appeal has been made may be a material consideration."

38. In *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 [2005] 1 AC 593 the House of Lords considered the impact of the Human Rights Act 1998. A decision to refuse an injunction prohibiting the identification of a woman charged with the murder of her infant child was upheld. The aim had been to protect her surviving son from emotional harm. The application thus involved a conflict between the rights protected by Articles 8 and 10 of the Convention. At [17] Lord Steyn (with whom the other members of the House agreed) identified four key propositions:

> "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

39. Lord Steyn went on to refer to "the general rule" of open justice, and to emphasise its importance.

> "18 … the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. …
>
> 30. … A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law. It is, however, not a mechanical rule. The duty of the court is to examine with

> care each application for a departure from the rule by reason of rights under article 8."

40. In *Re S,* the criminal defendant was an adult, and anonymity was sought for the benefit of someone else. But in *Markham*, at [76] to [87], this Court reviewed the principles in the context of a child defendant, an excepting direction under section 45, Article 3 of the UN Convention on the Rights of a Child, and other relevant international instruments concerning the administration of juvenile justice. Key features include the following:

    (1) The general approach to be taken is that reports of proceedings should not be restricted unless there are reasons to do so which outweigh the legitimate interests of the public in receiving fair and accurate reports of criminal proceedings and knowing the identity of those in the community who have been guilty of criminal conduct and may, therefore, present a danger or threat to the community in which they live: *R v Leicester Crown Court ex p S (A Minor* [1993] 1 WLR 111, 156 (Watkins LJ); *Markham* [80].

    (2) The fact that the person before the court is a child or young person will normally be a good reason for restricting reports of the proceedings in the way permitted by the legislation; and it will only be in rare cases that a direction under section 45(3) will not be given or, having been given, will be discharged: ibid.

    (3) Very great weight must be given to the welfare of such a child or young person. Power to dispense with anonymity must be exercised with very great care, caution and circumspection; the court must be clear in its mind why it is in the public interest to dispense with the restrictions, which will very rarely be the case: *McKerry v Teesdale and Wear Valley Justices* (2000) 164 JP 355 [2001] EMLR 5, *Markham* [81].

    (4) It is not the case, however, that the welfare of the child or young person will always trump other considerations. Even in the youth court, where the regime requires that proceedings should be held in private, with the public excluded, the court has power to lift restrictions. When a juvenile is tried on indictment in the Crown Court there is a strong presumption that justice takes place in open and the press may report the proceedings, as made clear by the House of Lords in *Re S*: *Markham* [82].

41. Applying these principles to the facts of *Markham,* this Court had little difficulty in concluding that the decision of the trial judge could not be faulted. The case was exceptional on its facts. It would have been hard if not impossible to understand the sentencing remarks without identification of the defendants. There was no new evidence before the court to justify the conclusion that lifting anonymity would cause harm to either appellant, and no evidence that reporting of their identities would affect their future rehabilitation, and thus be contrary to their welfare.

42. In the present case, the judge set out the relevant statutory provisions and referred to authority on the importance of open justice, including *Re S*. He identified the competing considerations. On the one hand, he noted the court's duty to have regard to the welfare of the child, and to treat the best interests of the child as a primary consideration; the child's Article 8 rights; and the principal aim of the youth justice system, namely to

prevent offending by children and young persons. On the other hand, he identified the Article 10 right to publish full reports of criminal trials, the valuable deterrent effect which identification of those guilty of serious crimes may have, and the rights of members of the community in Wolverhampton to know the identity of the perpetrator of such serious crimes.

43. The judge recorded that, on any view, the offences committed by Aziz were exceptionally serious and shocking in their planning, the length of time over which they were committed, and their brutality. Aziz had been diagnosed as suffering from paranoid schizophrenia, but the judge did not consider there was sufficient evidence to conclude that this significantly reduced his culpability, which might have been a factor in favour of maintaining anonymity. He acknowledged that Aziz had reported receiving threats when in custody due to the nature of his offending but noted that Dr Irani referred to only one attempted assault. There was no evidence of suicidal ideation. The risk of harm within the prison estate could not be excluded, but the judge concluded that his Article 2 rights (the right to life) were not engaged, and he was unpersuaded that Aziz was at any greater risk than others. He was also unpersuaded that the loss of anonymity would have a significant detrimental effect on his treatment and/or rehabilitation. The judge noted that the existing order would expire in any event in January 2020, when the appellant turned 18. He considered it to be of relevance in the context of such serious offending "that the accused… will in any event lose his anonymity in less than a year and ... will remain in custody for a substantial period of time." He concluded that both section 45(4) and section 45(5) applied.

44. Mr Kane advances five grounds of appeal. First, he submits that the judge failed to have due or any regard to the recommendations of Dr Irani and the authors of the pre-sentence report for retaining anonymity. Secondly, that he failed to have due or any regard to concerns expressed by Dr Irani, Dr Champerani, and the authors of the pre-sentence report about Aziz's increasing paranoia, hypervigilance and anxiety, and the prospect that he might relapse into psychosis. Thirdly, Mr Kane submits that the judge erred in regarding the lack of any causative link between the paranoid schizophrenia and the offending as a weighty factor in deciding whether to lift the reporting restriction. Ground four is that, in consequence, the judge failed to have sufficient regard to Aziz's welfare.

45. We will return to the fifth ground and consider first, and compendiously, these four.

46. In our judgment, these criticisms are ill-founded. The judge was well aware of the need to have regard to the welfare of the offender. He had adjourned sentence for the express purpose of obtaining psychiatric reports, and a pre-sentence report. His ruling on the Express and Star's application began by referring to these reports. We see no basis for the assertion that he failed to have regard to the contents of those documents. On the contrary, his ruling contained an evaluation of the psychiatric evidence, its impact on culpability, and the risks of harm to the appellant. We have carefully reviewed the material that was before the Judge. His approach to the evidence cannot be faulted. The reality is that the majority of the evidence of threats or actual harm amounted to self-reporting by an individual diagnosed as suffering from paranoid delusions. Neither the experts nor the authors of the pre-sentence report were able to provide cogent evidence that identification of Aziz would cause or risk significant harm to his health or wellbeing.

47. The justification for identifying the perpetrator of a serious crime could be thought weaker if his offending resulted from, or his culpability was significantly reduced by, paranoid schizophrenia. The judge was right to assess whether the evidence suggested this was so, and to give the mental illness less weight because it did not. That did not involve disregarding that same factor when it came to the issue of welfare. In our judgment, these four grounds of appeal amount, in reality, to a complaint about the way in which the judge struck the balance. The arguments advanced on behalf of Aziz naturally focus on one side of the balance, namely his interests. The judge was concerned also with the public interest. In our judgment there was no legal error in his approach.

48. Ground five, in its written form, was that the judge had no regard to a "core defence submission", that the 11 months for which the existing section 45(3) direction would endure would protect the appellant whilst he underwent secure hospital assessment so that "the merits of a s 11 Contempt of Court Act extended anonymity order could be assessed." It was submitted that the judge was wrong to proceed on the assumption that anonymity would necessarily fall away when the appellant reached 18.

49. There is no doubt that a reporting restriction under section 45 ceases to have effect when the subject of the restriction reaches the age of 18: *R (JC) v Central Criminal Court* [2014] 1 WLR 3697 [13], [39] and *Markham* [89]. Mr Kane did not press the submission that section 11 of the Contempt of Court Act 1981 conferred power to make an "extended anonymity order". Section 11 applies "where a Court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court." This presupposes a power to keep information private, and the exercise of that power to prevent that information being disclosed even to those in court. Where, as here, Aziz's identity was made public in open court, an order under section 11 cannot be made.

50. The submission developed in oral argument. Realistically, the only application that could be made in anticipation of Aziz's majority is for what might be called a "Venables" or "Mary Bell" Order; that is to say, an injunction against all the world grounded in a compelling need to protect a notorious criminal against vigilante action that threatens his personal safety or wellbeing (see *Venables v News Group Newspapers Ltd* [2001] Fam 430, *X, a woman formerly known as Mary Bell v O'Brien* [2003] EMLR 37 (both decisions of Butler-Sloss P)). Such orders are exceptional: see the discussion in *RXG v Ministry of Justice* [2019] EWHC 2026 (QB) at [32] to [35] (a judgment handed down shortly after our decision in this case). Mr Kane did not withdraw this ground of appeal. That said, no application for such an order has ever been intimated in this case and there was no evidential basis before the judge for supposing that, if made, such an application would succeed. The facts of this case are very far removed from those in which such an order could be made. The judge was justified in proceeding on the assumption that anonymity would soon fall away. He was entitled to take the view that continued anonymity was not warranted, in order to allow what could only be a relatively short period of treatment and assessment.

Jurisdiction

51. We return to the question of jurisdiction. This is an issue on which we heard no argument. Our conclusion on the substance of the challenge to the judge's decision to make an excepting direction means that whether we consider the matter as the Court of

Appeal Criminal Division by way of appeal or as a Divisional Court determining the claim for judicial review the outcome is the same. Either or both fail.

52. There is extensive jurisprudence on the issue of how a decision to permit the naming of a convicted child may be challenged, including *R v Lee* [1993] 1 WLR 103, *R v Manchester Crown Court ex p H (A Juvenile)* [2000] 1 WLR 760, *R v Marine A* [2013] EWCA Crim 2367 [2014] 1 WLR 3326 [30] to[32], [38] to [48], *Markham* [2], and *R v McGreechan (Ryan)* [2014] NICA 5 [2015] NI 44 [16] to [24], Arlidge Eady & Smith on Contempt 5th ed paras 8-78 to 8-80, and Court of Appeal Criminal Division, A Practitioner's Guide 2nd ed (2018) para 13. A review of these sources shows that, despite the terms of section 29(3) of the Senior Courts Act 1981, (excluding matters relating to trial on indictment from the supervisory jurisdiction of the High Court), in England and Wales a decision which has the effect of discharging an anonymity order under section 45 of the 1999 Act may be challenged in judicial review proceedings, at least when it is made after conviction: see, in particular, the decisions of the Court of Appeal in *Lee* and the Divisional Court in the *Manchester Crown Court* case.

53. In *McGreechan* the Court of Appeal of Northern Ireland concluded that judicial review was not available in that jurisdiction in the same way.

54. Whether the Court of Appeal Criminal Division has concurrent jurisdiction in all circumstances is less clear. Such jurisdiction is not conferred by the Criminal Appeal Act 1968: see *McGreechan* at [16] to [19], following the English authorities on this point. As Simon Brown LJ pointed out in the *Winchester Crown Court* case, there was no power to entertain any appeal against a reporting restriction order imposed in the Crown Court under section 39 of the 1933 Act until Parliament legislated in 1988. Section 159(1) of the Criminal Justice Act 1988 filled that gap. It provides:

> "A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against— … (c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings; and the decision of the Court of Appeal shall be final."

55. This does not say that a person aggrieved by an order *discharging* or *revoking* a reporting restriction may appeal. In *McGreechan*, the Northern Irish Court of Appeal concluded that it was obliged by section 3 of the Human Rights Act 1998 to read additional words into s 159(1)(c), so as to confer a right of appeal against such a decision, in that jurisdiction: see [24]. But as we have noted, that court's starting point was that under the law of Northern Ireland, unlike that of England and Wales, judicial review was unavailable: see [13] to [15]. Resorting to the interpretative power in section 3 of the 1998 Act would not be necessary in this jurisdiction.

56. Section 45 of the 1999 Act itself confers powers on an "appellate court". They include the power to revoke a direction under section 45(3) (see section 45(9)), and the power to revoke an excepting direction (see section 45(10)). These powers are not expressed to be limited to the revocation of directions or excepting directions made by the appellate court itself. The report of *Markham* does not spell this out, but we infer that the appellants in that case were invoking the power conferred by section 45(10). We do

not cast doubt on the legitimacy of that approach. An "appellate court" for this purpose is defined by section 45(11):

> "In this section *"appellate court"*, in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal."

In *Markham* the Court gave leave to appeal against sentence (and indeed allowed the appeal in one respect). There was no doubt that it was "dealing with an appeal". The question arises whether, given that we refused leave to appeal against sentence, we are in the same position. The Criminal Appeal Act 1968 differentiates between what constitutes an appeal and what constitutes an application; and the phrase "decision of the Court of Appeal on appeal" in section 33 of that Act refers only to a decision following the grant of leave: *R v Garwood (Reece)* [2017] EWCA Crim 59 [2017] 1 WLR 3182. We express no view on whether similar reasoning applies to the phrase "dealing with an appeal" in section 45(11) of the 1999 Act, except to note that it may need consideration in future. It may be that it should be understood as encompassing applications for leave to appeal. Yet circumstances will arise in which a convicted youth has no complaint at all about the sentence imposed in the Crown Court but nonetheless wishes to challenge a decision allowing him to be named; or as in this case, has an application for leave to appeal against sentence which fails but wishes to challenge his being named. There is little doubt that multiple proceedings are untidy and expensive.

57. It may become necessary to revisit whether decisions in the Crown Court in this area are properly subject to judicial review, and the relationship between the various provisions to which we have referred conferring power of the Court of Appeal Criminal Division. In the circumstances, not having granted leave to appeal, we reconstitute ourselves as a Divisional Court and deal with this issue in the judicial review. We lift the stay on those proceedings, treat this appellate hearing as the substantive judicial review, and dismiss that claim, discharging the anonymity order granted in those proceedings.

58. Any applications for costs in the judicial review proceedings should be made in writing and will be disposed of without a hearing.

59. There are two short points we wish to add.

(1) The first concerns the form of the order originally made by the judge. It was recorded as follows:

> "1. That no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of any child or young person in the proceedings, either as being the person by or against, or in respect of whom the proceedings are taken, or as being a witness therein.
>
> 2. That no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid.

Except insofar (if at all) as may be permitted by the court."

This form of order prohibits reports in newspapers but not in any other form of publication. We strongly suspect the order was based on a template created some time ago, reflecting the old regime under the 1933 Act. If so, such templates should be updated. Newspapers are but one medium for publication. The protection was, no doubt, intended to be wider. There is no suggestion that other publishers took advantage of the narrowness of the order, but in the future those concerned with applications for directions of this kind should be alert to ensure that they are framed in appropriate terms.

(2) Secondly, it appears that no formal order was drawn up to reflect the decision of the trial judge to make an excepting direction. It should have been.