Neutral Citation Number: [2019] EWCA Crim 2286

Case No: 2019 02801, 01613 & 03764

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT
HHJ Leonard QC; HHJ S Davis; HHJ Bayliss QC
T20167532; T20187147; T20190325

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE FULFORD
and
THE RT HON LORD JUSTICE HOLROYDE

- -

Between:

PS **ABDI DAHIR** **CF**	**Appellants**
- and -	
THE QUEEN	**Respondent**

(Transcript of the Handed Down Judgment.
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Official Shorthand Writers to the Court)

Yusuf Solley (instructed by **Tuckers Solicitors**) for the **First Appellant**
Peter Eguae (instructed by **National Legal Service Solicitors**) for the **Second Appellant**
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Anthony Orchard QC (instructed by **CPS Appeals Unit**) for the **Respondent**

Hearing date: 11th December 2019

Judgment
As Approved by the Court

The Lord Burnett of Maldon:

1. These three cases, otherwise unconnected, raise issues about proper approach to sentencing offenders who suffer from autism or other mental health conditions or disorders. The court heard submissions from all counsel on the issues of principle and practice that arise. Further submissions on each of the individual cases were then heard. We reserved our decisions. This is the judgment of the court in relation to all three cases.

2. Reporting restrictions apply in two of the cases. PS is now aged 17. Pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999, until he attains the age of 18, no matter may be included in any publication if it is likely to lead members of the public to identify him as a person concerned in these proceedings. CF is also now aged 17. A similar restriction applies in his case.

3. In addition, the victims of CF's offences are entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during the lifetimes of each of those persons no matter may be included in any publication if it is likely to lead members of the public to identify her or him as a victim of the offences.

Introduction

4. On 19 June 2017 PS was convicted at the Central Criminal Court of offences of murder, wounding with intent and attempted wounding with intent. Those offences were committed on 18 November 2016, when PS was aged 14 years 4 months. He was 15 when on 24 July 2017 he was sentenced for the offence of murder to be detained at Her Majesty's pleasure, with a minimum term of 14 years less the days he had spent remanded in custody awaiting his trial. PS now seeks leave to appeal against his sentence on the basis of medical evidence obtained after his conviction and sentence, which shows him to suffer from Autism Spectrum Disorder. His application for a lengthy extension of time for leave to appeal against sentence has been referred to the full court by the single judge.

5. On 4 October Abdi Dahir, now aged 31, was convicted in the Crown Court at Isleworth of an offence of causing grievous bodily harm with intent committed on 6 April 2018. He was sentenced to 14 years' imprisonment. Mr Dahir submits that the sentence was manifestly excessive in length, having regard to the psychiatric evidence which was before the sentencing judge. That diagnosed Mr Dahir as suffering from a number of mental disorders including a complex post-traumatic stress disorder ("PTSD"). He appeals against his sentence by leave of the single judge.

6. CF pleaded guilty, in the Crown Court at Leeds, to sexual offences which he had committed between March and October 2018, when he was aged 15 to 16. His three victims were boys aged 6 and 13, and a girl aged 8. On 30 September 2019 he was sentenced to a total of 5 years' detention pursuant to section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. CF submits that his sentence was manifestly excessive in length on a number of grounds, including a failure by the judge to take into account the effects of CF's autism. His application for leave to appeal against sentence has been referred to the full court by the Registrar.

General observations

7. Before considering the individual cases in any detail, we make some general observations.

8. Mental health conditions and disorders may be relevant to sentencing in a number of ways. First, they may be relevant to the assessment of the offender's culpability in committing the crime in question. By section 143(1) of the Criminal Justice Act 2003,

> "In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused."

That statutory requirement to consider culpability and harm is reflected in the stepped approach to sentencing which is set out in the offence-specific definitive sentencing guidelines issued by the Sentencing Council. Where an offender suffers from a mental health condition or disorder, the sentencer must consider whether it affected culpability by, for example, impairing the offender's ability to exercise appropriate judgment, or to make rational choices, or to understand the consequences of his actions, or whether it caused the offender to behave in a disinhibited way. Where the offender's mental condition has been exacerbated by a failure to take prescribed medication, or by "self-medication" with controlled drugs or alcohol, the sentencer will consider whether the offender's conduct was wilful or arose, for example, from a lack of insight into his condition. When considering matters of this nature, the sentencer will be focusing on the offender's mental health at the time of the offence.

9. Secondly, mental health conditions and disorders may be relevant to the decision about the type of sentence imposed, in particular a disposal under powers contained in the Mental Health Act 1983. Where a custodial sentence is necessary, mental health conditions and disorders may be relevant to the length of sentence and to the decision whether it can properly be suspended. In these respects, it is the offender's mental health at the time of sentence, rather than at the time of the crime, which must be considered. In accordance with the principles applicable in cases of physical ill-health, mental health conditions and disorders can only be taken into account in a limited way so far as the impact of custody is concerned. Nonetheless, the court must have regard both to any additional impact of a custodial sentence on the offender because of his mental health, and to any personal mitigation to which his mental health is relevant.

10. Thirdly, mental health conditions and disorders may be relevant to an assessment of whether the offender is dangerous as that term is defined for sentencing purposes in Chapter 5 of Part 12 of the Criminal Justice Act 2003. Fourthly, they may need to be taken into account in ensuring that the effect of the court's sentence is clearly understood by the offender and in ensuring that the requirements of a community order or an ancillary order are capable of being fulfilled by the offender. These third and fourth aspects do not arise for consideration in the present cases. We focus on issues relating to culpability and to the length of custodial sentence.

11. The Sentencing Council has recently consulted on a draft guideline setting out overarching principles in relation to the sentencing of offenders with mental health conditions and disorders. The Council is currently considering amendments to the draft in the light of the responses to the consultation. It is working towards a definitive guideline setting out overarching principles which will be applicable when sentencing adult offenders. It is well established that a draft guideline, even if included in a consultation paper, should not be used by a sentencer. It is only when a definitive guideline comes into effect that it should be used as a sentencing guide (see, eg, *Boakye* [2013] 1 Cr App R (S) 2 and *Connelly* [2018] 1 Cr App R (S) 19).

12. We nonetheless point out that although there is as yet no overarching principles guideline, the mental health of the offender is a factor which sentencers are required to consider at Step 1 or Step 2 of the process set out in offence-specific guidelines. For example, in the guideline for offences of causing grievous bodily harm with intent, one of the lower culpability factors at Step 1 is "Mental disorder or learning disability, where linked to commission of the offence"; and one of the factors mentioned at Step 2 as reducing seriousness or reflecting personal mitigation is "Mental disorder or learning disability, where not linked to the commission of the offence". In the guideline for offences of causing or inciting a child under 13 to engage in sexual activity, contrary to section 8 of the Sexual Offences Act 2003, mental health is not mentioned at Step 1, but one of the mitigating factors at Step 2 is "Mental disorder or learning disability, particularly where linked to the commission of the offence".

13. In addition, the "General guideline: overarching principles", which came into effect on 1 October 2019 and which provides guidance on the approach to be taken where there is no definitive guideline specific to the offence under consideration, identifies "Mental disorder or learning disability" as a factor reducing seriousness or reflecting personal mitigation.

14. Moreover, at Step 2 of the sentencing process, there is important additional information about common mitigating factors to be found in the expanded explanations which now form part of the offence-specific guidelines. These too came into effect on 1 October 2019 and so were not available to the judges sentencing in these cases. In the digital guidelines which are to be found on the Sentencing Council's website, the expanded explanations are accessed by clicking on the appropriate link. In the standard practitioners' textbooks, a table of expanded explanations is included in the relevant sections of both Archbold (as Annex A to the sentencing guidelines supplement) and Blackstone (as the opening pages of the section of the supplement which contains the guidelines).

15. Expanded explanation M16 provides further information about mental disorder or learning disability. There is a link to it from each of the mitigating factors referred to in paragraphs 12 and 13 above. It begins by explaining the distinction between mental disorders and learning disabilities. It alerts sentencers to the fact that not all such disorders and disabilities are visible or obvious. The expanded explanation continues as follows:

> "A mental disorder or learning disability can affect both:
>
> 1. the offender's responsibility for the offence, and

2. the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports (including from court mental health teams) in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence. This may be because the condition had an impact on the offender's ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.

A relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);

In considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.

2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender: a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order."

16. In relation to young offenders, the overarching principles guideline "Sentencing children and young people" states at paragraph 1.12 that as part of its duty to have regard to the welfare of the young offender, the court should ensure it is alert to any mental health problems or learning difficulties/disabilities.

17. It will be apparent from all of the above that sentencing an offender who suffers from a mental disorder or learning disability necessarily requires a close focus on the mental health of the individual offender (both at the time of the offence and at the time of sentence) as well as on the facts and circumstances of the specific offence. In some cases, his mental health may not materially have reduced his culpability; in others, his culpability may have been significantly reduced. In some cases, he may be as capable as most other offenders of coping with the type of sentence which the court finds appropriate; in others, his mental health may mean that the impact of the sentence on him is far greater than it would be on most other offenders.

18. It follows that in some cases, the fact that the offender suffers from a mental health condition or disorder may have little or no effect on the sentencing outcome. In other cases, it may have a substantial impact. Where a custodial sentence is unavoidable, it may cause the sentencer to move substantially down within the appropriate guideline category range, or even into a lower category range, in order to reach a just and proportionate sentence. A sentence or two in explanation of those choices should be included in the remarks.

19. The court will be assisted by a pre-sentence report and by appropriate psychiatric or psychological reports. It is important, when such reports are commissioned, that the issues to which they are relevant should be clearly identified. For example, a report directed to the issue of dangerousness may provide only limited assistance on the issue of culpability; and vice versa. It follows that, as with all matters of case preparation, early identification of the real issues is important.

20. As one of the cases before us illustrates, difficulties may arise because there is nothing particular which prompts consideration of whether a mental health condition or disorder may be relevant to sentence. Both practitioners and judges should be alive to that possibility in adult offenders. So far as children and young persons are concerned, in accordance with the applicable guideline, where a serious offence has been committed by a young offender, both the court and those representing him must be alert to the possibility that mental health may be a relevant feature of the case. The younger the offender, and the more serious the offence, the more likely it is that the court will need the assistance of expert reports.

21. One of the cases before us illustrates another situation which may arise, namely that reports obtained post-conviction reveal features of the offender's mental health which are relevant in the ways which we have identified, but which conflict with the case which the offender had advanced at trial. In such situations, in accordance with established principles, the sentencer must of course remain true to the jury's verdict; but within those confines form his or her own view as to the proper basis for sentence.

22. We turn to the individual cases.

The case of PS

23. PS was 14 at the time of his offending. He was associated with a gang based on an estate in Hendon. His older brother was a member. Members of that gang had been injured in incidents in August and on 16 November 2016. On 18 November 2016 PS travelled with three others by taxi to Harrow, a distance of about seven miles. One of the others ("M") was also aged 14. The prosecution case was that they were intent on revenge for the earlier incidents. All four got out of the taxi in Harrow, but PS waited near it whilst the others walked away. The prosecution alleged that he was acting as a lookout, ready to provide back up if necessary and ensuring that the taxi did not leave. Within a very short time, two young men were attacked with knives. One sustained wounds to his stomach and arms whilst the other escaped injury when a knife cut his jacket but missed his body. A third victim was then stabbed in the back by M, causing injuries from which he died three days later. PS and his companions then got back into the taxi and returned to their estate.

24. When PS was arrested on 21 November 2016 a search of his bedroom, which he shared with his brother, revealed four knives, though none could be connected to the stabbings. PS made no comment when interviewed under caution.

25. At trial, PS and M were convicted of the three offences to which we have referred. PS was convicted on the basis of his participation in a joint enterprise. A third defendant was acquitted. The fourth suspect had fled after the stabbings and had not been arrested.

26. PS had one previous conviction. On 11 May 2016 a juvenile court made him the subject of a referral order for 12 months, with a parenting order for 12 months, in respect of a robbery to which he had pleaded guilty at an earlier hearing. The robbery had been committed when PS was aged 13.

27. A detailed pre-sentence report was prepared by the Youth Offending Service. In giving his account of events to its author, PS continued to maintain his innocence. The author felt he had acted on feelings of loyalty towards and protection of his associates. She noted that PS's older brother was also closely linked to the gang and had himself been stabbed twice in the previous year.

28. The author also noted that when PS was a child he had witnessed domestic violence and his parents had separated in circumstances which led to PS displaying behavioural difficulties. For a short time he was referred to the Child and Adolescent Mental Health Service ("CAMHS"). He had been permanently excluded from school during his secondary education. However, after attending a Pupil Referral Unit and making impressive progress, he had been reintegrated into mainstream education and was attending school prior to his arrest for these offences. He had been put forward to sit his GCSE exams one year ahead of his age group. This was an unusual history for an offender, which showed that PS had "the ability to conform to boundaries and to achieve academically if he chooses to do so". She assessed him as having the potential to change and develop as he matured.

29. In his sentencing remarks, the judge referred to the seriousness of the crimes and the aggravating features, which were –

> "the degree of planning involved; that this was carried out by three of you; three people were wounded during the attack, one of them fatally; it is gang-related violence; two knives were brought to the scene; it was dark by the time the attack took place; it was in a busy public area, where there were many members of the public, and there were children present; and there was no sign of remorse."

Strictly speaking, the last represents the absence of a mitigating factor.

30. The judge referred to schedule 21 to the Criminal Justice Act 2003. He noted that for an adult offender, the starting point for the minimum term to be served for the offence of murder would have been 25 years. That would have been significantly increased because of the aggravating features. The starting point for offenders aged under 18 was, however, 12 years. He then had to consider the aggravating features, and any mitigating factors including the young age of the offenders.

31. In M's case, the judge found that the fatal stabbing had been inflicted with intent to kill. He noted that M had specific learning disability and emotional behavioural difficulties which had made him susceptible to the influence of an older gang member; but he concluded that those features did not provide a great deal of mitigation. He referred to the dreadful violence which M had witnessed as a child in his native country, which must have had an effect upon him, and noted features which gave some hope for the future. He took into account that M had been "mixing with the wrong people through your cognitive difficulties".

32. Turning to PS, the judge observed that there was no evidence that he had a knife on him, and he took into account that PS had not used a knife; but, he said, the jury's verdict established that PS was "just as much a part of the group who carried out the murderous attack as the others". He took into account that PS had been involved with the gang since at least 2014 and so was entrenched within it, and that he was subject to a referral order at the time of these offences. He accepted that PS, because of his young age, would not have had the power to make decisions within the gang and would have been under the influence of those more senior. He took into account PS's troubled upbringing and accepted that his behaviour may have been influenced by the fact that his older brother became his role model after their father had left the family home.

33. The judge went on to say:

> "In your favour, I take into account what you have achieved at school after a disruptive start and the extremely positive reports from your teachers. You have continued to progress within the Oakhill Secure Training Centre. You have an ambition to go to university, and that is a very positive side of your character. Your counsel has urged me to take the following into account: your lesser role in what took place and you did not possess a weapon yourself; your immaturity; your place in the hierarchy of the gang; your empathy with your victims and their families; and finally, your high level of intelligence and how that might affect your future."

34. In those circumstances, the judge imposed the minimum term of 14 years for murder with no separate penalty for the other two offences. He imposed a minimum term of 16 years on M, less the days spent on remand in custody.

35. Prosecuting counsel raised with the judge that there had been a finding of a murderous intent on the part of M, but that no specific reference to that point had been made in PS's case. The judge replied –

> "No, it follows that one follows the other."

36. Other than the mention in the pre-sentence report of the period of referral to CAMHS when PS was young, no reference was made during the sentencing process to his mental health. Nor was any reference made to it when an unsuccessful application was made for leave to appeal against conviction, or when that application was unsuccessfully renewed to the full court on 23 May 2018. PS's mental condition had not been identified as relevant to the sentencing process.

37. Thereafter, new counsel was instructed. A clinical psychologist who assessed PS at Oakhill diagnosed Autism Spectrum Disorder. A report has now been obtained from Dr Anderson, a consultant clinical and neuropsychologist. The matters raised in that report are also relied on in support of a pending application to the Criminal Cases Review Commission, but we are here concerned only with their relevance to PS's sentence.

38. Dr Anderson assessed PS in September 2019 and concluded that he has for many years suffered from mild Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder ("ADHD"). The combination of those developmental disorders results in poor consequential thinking skills. PS's inflexible thinking,

> "… substantially contributes to his impulsive acting out when he feels he has been threatened and his inability to resist poor leadership from others. His logical reasoning skills are too weak to process consequential pathways when he believes he is under threat. He then acts out emotionally and impulsively at such times."

39. Dr Anderson also assessed PS as a vulnerable person who in prison is at risk of depression and self-harm, with a risk also of suicide, because he "cannot navigate the prison systems in which he finds himself".

40. PS now applies for a long extension of time (nearly 2 years) to apply for leave to appeal against sentence, and for leave to rely on the report of Dr Anderson as fresh evidence. Mr Solley submits that if the judge had known what is now known about PS's Autism Spectrum Disorder and its effect on his cognition and communication, he would have been assisted to determine that a much shorter minimum term was appropriate. He submits that the Autism Spectrum Disorder is relevant to the proper assessment of PS's culpability because it affected his decision making, his ability to read a situation, his liability to be influenced by others, his consequential thinking and his presentation. Knowledge of the diagnosis would have enabled the judge to put PS's decision-making and behaviour into its proper context. It would also have altered the judge's view that the offences were aggravated by a lack of remorse. Mr Solley relies on the fact that one of the mitigating factors listed in paragraph 11 of Schedule 21 to the Criminal Justice Act 2003 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."

He submits that if the judge had had the assistance of Dr Anderson's report, he would have taken a different view of PS's culpability and would have drawn a greater distinction between the length of the minimum terms of PS and M.

41. The respondent does not oppose the application for Dr Anderson's report to be received as fresh evidence.

42. We address first a discrete point relating to PS's intention. With respect to the judge, the short exchange to which we have referred at [31] above leaves some doubt as to how he approached this issue. Where a defendant is charged with murder on the basis of a joint enterprise, it is sufficient so far as his mental state is concerned, for the jury to be sure that he shared in an intention either to kill or to cause really serious injury. It is not necessarily the case that all those involved in a joint enterprise have the same intention. In particular, where the fatal injury is inflicted by a defendant who intends to kill, it does not necessarily follow that all who are guilty of being involved in a joint enterprise with him to commit murder also intended to kill, as opposed to

intending to cause really serious injury. The short exchange suggests that the judge took the view that because M intended to kill his victim so too must PS have done. With respect, that does not follow. On the other hand, if the judge was making a specific finding of an intention to kill in PS's case, the evidential basis for that finding was not identified. For our part, we can see no evidential basis for it. Mr Orchard QC reminded us that the prosecution had not opened the case on that basis. Mr Solley rightly points out that there cannot have been a joint intention to kill shared by all who were in the taxi before the stabbings, because one of them was found not guilty. He submits that PS's actions as lookout did not give rise to any safe inference that he intended one or more of his companions to kill rather than to cause really serious injury. We therefore conclude that PS should have been sentenced on the basis that a significant mitigating factor contained in paragraph 11 of Schedule 21, namely

> "(a) an intention to cause really serious bodily harm rather than to kill"

was present. That factor should have been taken into account as reducing the minimum term.

43. As to the more substantial issue raised in respect of PS's mental disorders, we are satisfied that Dr Anderson's report satisfies the criteria in section 23 of the Criminal Appeal Act 1968 and should be admitted as fresh evidence. We accept the submission that the diagnosis of Autism Spectrum Disorder and ADHD is relevant to the assessment of PS's culpability. We further accept that those conditions significantly reduced PS's culpability in playing the role he did in the joint enterprise. The minimum term imposed by the judge was in our view a stiff one even on the information known at that time. In the light of the fresh evidence which we now admit, we are satisfied that it was manifestly excessive in length.

44. The murder and the associated stabbing and attempted stabbing were very grave offences, of a kind which gives rise to much public concern. A young life has been needlessly and brutally ended, and we have well in mind the loss and anguish suffered by the family and friends of the deceased. The minimum term has to reflect the seriousness of the overall offending, and must be substantial even in the case of a 14-year old child whose role was limited by comparison with that of his co-accused M. We are nonetheless satisfied that in the circumstances now known, the minimum term imposed by the judge must be reduced. It is in our view appropriate that PS's minimum term should be significantly shorter than M's, because in addition to the material distinction between their roles, and the distinction between them in terms of their respective intentions, it is now clear that PS's mental disorder is a significant factor in sentencing in his case, whereas the judge found M's mental health to be of limited relevance. If the expert evidence which is now available had been available to the judge, which of course it was not, it would have supported a reduction in the minimum term. When all the mitigating factors which we have identified are taken into account, including the absence of intent to kill, it is clear that they outweigh the undoubted aggravating features and result in the appropriate minimum term being below the statutory starting point of 12 years.

45. For those reasons, we grant the applications for an extension of time and for leave to appeal against sentence. We receive the report of Dr Anderson as fresh evidence. We quash the minimum term of 14 years imposed below and substitute a minimum term

of 10 years, less the days which PS spent remanded in custody. As before, there will be no separate penalty for the other two offences.

The case of Abdi Dahir

46. We turn to the case of Abdi Dahir. The material facts are these. The appellant had previously told his friend Assad Hussein that he was "on his list" and that he would kill him. Mr Hussein ignored the comment at the time. On 6 April 2018 the appellant attacked him with a broken bottle. The attack took place outside Mr Hussein's home. It resulted in multiple lacerations of his right cheek and the left side of his face. Unsightly scarring remains. In his victim personal statement, written some six months after the offence, Mr Hussein described the continuing effects of the attack and the injuries he sustained. His sleep is disturbed by nightmares; he does not feel safe; he feels unable to trust others and he is embarrassed when people stare at his scars.

47. The appellant had been sentenced on 21 occasions for a total of 37 offences, including offences of violence, disorder and damage and also offences of dishonesty. His most recent offence of disorderly behaviour was in August 2016. He had served a number of short custodial sentences of which the most recent was imposed in 2014.

48. The judge was initially minded to sentence the appellant immediately after conviction, but was persuaded by counsel that reports should be obtained. At the sentencing hearing on 29 March 2019 he had the assistance of a pre-sentence report, a short report from a Forensic Mental Health Practitioner who works at Westminster Magistrates' Court, and a comprehensive report by Dr Whitaker, a psychiatrist and psychologist.

49. The pre-sentence report noted that both the appellant's parents had been killed in Somalia when he was very young, and that until the age of 10 he had been raised there by members of his extended family, including a man by whom he was physically abused. He had a long-standing alcohol problem and lived a chaotic lifestyle which appeared to revolve around drinking and socialising with other alcohol users. The majority of his offending had been committed under the influence of alcohol. The author noted that the appellant had been drinking for about 10 hours before he committed the offence, and the appellant said that he would not have acted as he did if he had not been under the influence of alcohol. The author of the report found it unclear whether the appellant's mental health had affected his behaviour.

50. Dr Whitaker's report was largely directed to the issue of dangerousness. He had assessed the appellant on two occasions in February 2019. The appellant told him further details about trauma he had suffered in his childhood, including repeated displacement during the civil war in Somalia, seeing dead bodies in the street, and being repeatedly raped over a period of two years at a school. Medical records available to Dr Whitaker showed that in 2014 the appellant had suffered a brain injury when he was assaulted, following which he suffered cognitive deficits. The appellant suffered further trauma in 2017 when he witnessed deaths in the Grenfell Tower fire.

51. Dr Whitaker's diagnosis was of complex PTSD, the effects of which included emotional lability and dyscontrol and which was the driver of his substance abuse (which appeared to be mainly for the purpose of "self-medication") and offending

behaviours. In addition, he diagnosed a number of secondary disorders: substance-abuse disorder, a sleep disorder, a mood order with cycling mood-states, a psychotic disorder and a cognitive disorder. He was critical of the way in which the appellant had been treated by various public services over the years and thought it "barely imaginable" that his PTSD had not previously been diagnosed.

52. Dr Whitaker found that the appellant is aware of his mental condition and does not deny or minimise his symptoms. He has generally been able to establish and maintain positive working relationships with clinicians and has a cooperative and hopeful attitude towards treatment. He has shown repeated efforts to be pro-active in gaining treatment.

53. In his sentencing remarks the judge described the attack on Mr Hussein as a "sustained and dreadful assault" in which the appellant had repeatedly used the broken bottle to cut Mr Hussein's face, holding him down and slashing as he tried to defend himself. The evidence did not permit any clear finding on when or how the bottle became broken. There had been some planning, as the previous remark about Mr Hussein being "on the list" showed, and during the attack the appellant had said more than once that he was going to kill Mr Hussein. The motive was unclear, although the appellant had been drinking. He had waited until others had left before setting upon Mr Hussein.

54. By reference to the guideline applicable to offences of causing grievous bodily harm with intent, the judge found it to be a category 1 case with a starting point of 12 years' custody and a range from 9 to 16 years. The previous convictions were an aggravating feature. Having read Dr Whitaker's report, and the other reports, he did not find the appellant to be a dangerous offender. In those circumstances the judge imposed the sentence of 14 years' imprisonment.

55. On the appellant's behalf, Mr Eguae submits that the sentence was manifestly excessive. He suggests that the judge considered Dr Whitaker's report only in relation to the issue of dangerousness and failed to give sufficient weight to it in relation to an assessment of the appellant's culpability. Mr Eguae refers to the Step 1 and Step 2 factors in the guideline in which the offender's mental health is mentioned (see [12] above) and submits that the mental health issues of the appellant were unusual and should have been given greater weight.

56. We agree that there is merit in these submissions. In the definitive guideline, category 1 comprises offences involving both greater harm and higher culpability; category 2 includes offences in which there is greater harm and lower culpability. This offence clearly involved greater harm because it was a sustained assault and the judge was entitled also to find, as he appears to have done, that it caused injury which was serious in the context of the offence. The higher culpability factor of use of a weapon was present. The judge was therefore entitled to find that the case fell into category 1. However, on Dr Whitaker's evidence, the lower culpability factor of mental disorder linked to the commission of the offence was also present. The judge was not obliged to put the offence into category 2, because he was entitled to conclude that on balance it was a category 1 case; but the appellant's mental health was an important factor in the case. Whether at Step 1, as a balancing of factors indicating different categories, or at Step 2 when considering the mitigation, it should have resulted in a significant downward movement from the starting point. Moreover, the report of Dr Whitaker

and the pre-sentence report contained significant personal mitigation which had also to be taken into account, again justifying a downward movement from the starting point. A further factor in the appellant's favour was that he had undoubtedly made genuine attempts, both before and after the offence, to seek appropriate medical help, including seeking to be admitted to hospital immediately before the offence. We note that the appellant's prescribed medication was not renewed on the day before the offence, that he went to his GP after the offence, and that he was then admitted to hospital (where he was later arrested). The appellant's previous convictions were an aggravating feature, as was his intoxication; but in the light of the evidence of the link between the appellant's mental health and his alcohol problem, we do not think those features added greatly to the seriousness of the case. With respect to the judge, we agree with Mr Eguae that he appears to have focused on the issue of dangerousness and, having made the finding which was favourable to the appellant, did not go on to take into account the significance of the report in other respects.

57. We conclude that when due weight is given to the reduction in the appellant's culpability consequent upon his mental disorder, the appropriate custodial term was one of 10 years, which lies near the boundary between category 1 and category 2. We do not think the appellant could have complained if the judge had found him to be a dangerous offender; but the judge did not do so, and it is not appropriate to revisit his finding on appeal.

58. We therefore allow this appeal. We quash the sentence of 14 years' imprisonment imposed below and substitute a sentence of 10 years.

The case of CF

59. We turn finally to the case of CF. He was 15 and 16 when he offended. He pleaded guilty to seven sexual offences:

i) Counts 1 and 2: causing a child under 13 to engage in sexual activity, contrary to section 8 of the 2003 Act. The victim of these offences was a young boy, R. On 14 October 2018, when R was aged 6, his father went to R's bedroom, where the boys had gone to play, and saw that R's penis was in CF's mouth. It later emerged that CF had behaved in a similar way on about five previous occasions, some of which were when R was aged 5. Medical examination showed that R had bruising of the shaft of his penis and an abrasion of a testicle. Count 1 was a specimen charge reflecting four offences, count 2 related to the specific offence witnessed by R's father.

ii) Counts 3, 4 and 5: two offences of sexual activity with a child, and one of engaging in sexual activity in the presence of a child, all three offences being contrary to section 13 of the 2003 Act. The victim of these offences was H, a boy aged 13. Count 5, the first of the offences in time, involved CF masturbating himself to ejaculation in the presence of H. Count 4 involved CF telling H to "suck him off" and putting his penis in H's mouth. There was no ejaculation, and CF stopped when H asked him to. Count 3 involved CF putting H's penis into CF's mouth.

iii) Counts 6 and 7: two offences of sexual assault of a child under 13, contrary to section 7 of the 2003 Act. The victim of these offences was L, a girl aged 8.

CF touched her vulva over her clothing (count 6) and her bottom over her clothing (count 7).

60. All of these offences were committed against children who, although younger than CF, were his friends, and at times when he was playing with them either in their homes or in his. He had no real friends of his own age and often played with his younger brother (aged 12) and other younger children. All of the victims lived near CF's home. The father of one of the victims described CF as immature: although by then aged 16, "he seems much younger and doesn't act his age".

61. Victim personal statements made by the parents of the victims showed that these offences had caused great distress and serious harm. R's mother described him as having become clingy to his father. He would not go into his bedroom unless accompanied by his father. On three occasions he had harmed himself at school. He became frightened if he saw a member of CF's family. H's mother described him as having become scared of people, including older children. He did not like being in crowds and panicked if he saw people behaving in a rowdy manner. He was embarrassed to talk about what had happened. L's mother was also adversely affected. The shock of what occurred had interfered with her eating. For about two months she had been scared to visit her aunt's home where the offences had been committed. Once, she started to shake when she chanced to see CF at a local park.

62. A pre-sentence report prepared by a member of the Youth Offending Team indicated that CF did not accept responsibility for his offences and seemed not to understand either the seriousness of his offending or its potential consequences. The report referred to testing which had shown that CF had an IQ of 75 indicating a low level of functioning, only five higher than the level (70) which would indicate a learning disability. The author of the report suggested a Youth Rehabilitation Order with appropriate requirements.

63. The court also had a psychological report, based on assessments carried out in April 2019, which diagnosed that CF suffers from autism. The authors of this report noted that although CF's full-scale IQ score was 75, his verbal comprehension score was particularly low, placing him within the second percentile. His working memory score was also within the second percentile, suggesting that CF was functioning at the level of an average seven-year-old. The speed at which he is able to process simple or routine information without making errors placed him at the sixth percentile. An estimate of his general ability placed him within the tenth percentile. The authors of the report concluded that whilst CF did not meet the criteria for a learning disability, and his abilities may improve over time, he presently has deficits in his verbal memory and ability to sequence information and has raised levels of anxiety. Their opinion was that CF –

> "… should be considered to be a boy with significant difficulties in terms of his cognitive abilities and as such will require intensive input to support him to achieve educationally and to build skills in his area of deficit."

64. In his sentencing remarks the judge noted that CF had not admitted the offences when interviewed under caution and had not pleaded guilty at the first opportunity. Having regard to the times at which pleas were entered, he reduced the total sentence he

would have imposed after trial by one-sixth. He had regard to the Sentencing Council's definitive guideline on "Sentencing children and young people", and to the adult guidelines relevant to specific offences. He placed the offences against R in category 1B of the adult sentencing guideline, with a starting point of 11 years' custody and a range from 10 to 15 years. Viewed in isolation, none of the other offences would necessarily have resulted in a custodial sentence; but CF had offended persistently, and against three children. The judge accepted that CF was himself a very vulnerable individual, whose behaviour fitted a diagnosis of autism, but was satisfied that CF knew what he was doing and knew he was doing wrong. He concluded that nothing less than a substantial term of detention under section 91 of the 2000 Act could be justified. The judge said:

> "I have reduced the sentence by one-sixth, reduced it of course to take account of the mitigating factors, but had you been an adult it would have been twelve years. I have reduced it to half of that to take account of your youth, and the least sentence I pass on you therefore is one of five years' detention."

65. In those circumstances the judge imposed concurrent sentences of five years' detention on each of counts 1 and 2, with concurrent terms of six months' detention on each of the other counts.

66. The judge also made a restraining order which prevented CF from approaching the homes of his victims. The judge accepted that a practical consequence of this order would be that CF would not be able to return to his mother's home.

67. On behalf of CF, Mr Collins submits that the total sentence was manifestly excessive in length. He challenges the judge's categorisation of the offences against R under the relevant adult sentencing guideline, the weight given to CF's autism and general functioning, the level of credit given for the guilty pleas and the proportionality of the restraining order.

68. In addition to the material which was before the judge, we have been assisted by a report provided by CF's Case Manager at the Young Offender Institution where he is detained. This shows that CF was anxious, nervous and vulnerable on arrival. It gives a stark illustration of the consequences of the intellectual limitations described in the psychologists' report. On arrival, it was explained to CF that boys who have committed sexual offences usually avoid disclosing the nature of their crimes because of the risk of being targeted by others. He was advised to adopt a cover story involving a different type of crime. CF said that he understood; but when he was first pressed by other young offenders to tell them the nature of his crimes, he immediately did so. The result was that he was confronted by others and had to be moved to a different part of the institution for his own safety. He was accommodated in a unit catering specifically for young offenders who would struggle to cope in a normal custodial setting. Even there, CF has appeared vulnerable and introverted. He needed help with simple matters such as completing his menu sheets or understanding the system for making phone calls to his mother. He has relied on staff "100% for everything". The author of the report concluded:

> "So it is fair to say that [CF] is probably the most vulnerable YP on a unit with 48 vulnerable YPs on it."

69. There is no doubt that CF's case gave rise to a difficult sentencing process. He has committed serious offences which have caused serious harm. However, paragraph 1.1 of the overarching principles guideline "Sentencing children and young people" makes clear that when sentencing offenders aged under 18, the court must have regard to the principal aim of the youth justice system (namely, to prevent offending by children and young people) and to the welfare of the young offender. At paragraph 1.2, the guideline explains that whilst the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the young offender, as opposed to offence-focused. The sentence should focus on rehabilitation where possible and the court should consider the likely effect of the sentence on the young offender and any underlying factors contributing to the offending.

70. In addition, the guideline "Sexual offences: Sentencing children and young people" emphasises at the outset that the sentencing of young offenders for sexual offences involves a number of different considerations from adults:

> "The primary difference is the age and level of maturity. Children and young people are less emotionally developed than adults; offending can arise through inappropriate sexual experimentation; gang or peer group pressure to engage in sexual activity; or a lack of understanding regarding consent, exploitation, coercion and appropriate sexual behaviour."

The guideline continues with a non-exhaustive list of background factors which may have played a part in leading a young person to commit sexual offences. One is "communication or learning disabilities or mental health concerns".

71. In CF's case, the nature of the offending (committed by an adolescent when playing with much younger friends) was clearly suggestive of inappropriate sexual experimentation by an immature and vulnerable offender. The expert assessment of CF's behaviour as fitting Autism Spectrum Disorder, and his particular limitations as identified in the psychologists' report, were clearly important factors to be taken into account in relation both to CF's culpability and to the likely impact on him of a custodial sentence. Both of the guidelines which we have mentioned at [69] to [70] above required a careful assessment of CF as a young offender with particular difficulties. We agree with the judge that the seriousness of the offending was such that a custodial sentence, although always a last resort for a young offender, was necessary; but we see force in counsel's submission that insufficient weight was given to CF's mental disorder and intellectual problems in determining the length of that sentence. In our judgment, CF's problems were relevant both to his culpability and to the impact upon him of a custodial sentence.

72. Paragraphs 6.46-6.47 of the overarching principles guideline, "Sentencing children and young people", say that when considering a relevant adult guideline-

> "… the court **may** feel it appropriate to apply a sentence broadly within the region of half to two-thirds of the adult sentence for those aged 15-17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the

> appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.**
>
> 6.47 The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range. …"

In the present case, even after the decision had properly been reached that a custodial sentence was unavoidable, the evidence as to CF's mental disorder was an important factor which made it necessary to give less weight to the guideline appropriate to adult offenders and more weight to the individual circumstances of the young offender's case. Moreover, his developmental age and maturity was an important feature.

73. There are further reasons why in CF's case it was not appropriate to assess the length of sentence largely by reference to the adult offence-specific guideline. First, in the adult guideline for offences contrary to section 8 of the 2003 Act, which can only be committed against a child aged under 13, the sentencing levels take into account the inevitable difference in age between the adult offender and the child victim. True it is that there are cases in which that difference is relatively small; and true it is that in the offences against R and L, there was a significant difference in age between CF and his victim. Nonetheless, when considering the appropriate length of custodial term for an offender who was only 15 or 16 at the time of offences of this type, it is inappropriate simply to take a fraction of the sentence which would be imposed on an adult, without also reflecting on the fact that the latter's sentence takes account of an important feature which is absent from the young offender's case.

74. Secondly, section 13 of the 2003 Act has the effect that for offences contrary to sections 9 to 12 of the 2003 Act, the maximum sentence for a young offender is limited to 5 years' custody, rather than the 14 and 10-year maxima applicable to adult offenders. That provision does not apply to offences contrary to section 8, but it is in our view another statutory recognition that when dealing with sexual offending, the court must be careful not to treat the young offender as if he or she were simply a reduced-size version of an adult offender committing similar offences.

75. We would add that in any event, we respectfully disagree with the judge's categorisation of the offences against R as involving category 1 harm on the basis of a combination of category 2 factors including that the victim was "particularly vulnerable due to extreme youth". In the context of an offence which can only be committed against a child aged under 13, we do not regard the ages of 5 or 6 as being "extreme youth".

76. We have said enough to indicate, in respectful disagreement with the judge, that we consider the total sentence imposed on CF was manifestly excessive. In our judgment, the appropriate total sentence, before giving credit for guilty pleas, was three years' detention. Giving credit of a sixth for the guilty pleas, as the judge did, we conclude that the appropriate total sentence is two and half years' detention. We do not vary the restraining order because the pre-sentence report made clear that the

appellant's mother was moving house. The circumstances had made it impossible for her to remain a neighbour of the victims.

77. We therefore allow this appeal. We quash the concurrent sentences of 5 years' detention imposed below on counts 1 and 2, and substitute for them concurrent sentences of detention pursuant to section 91 of the 2000 Act for two years and six months. The concurrent sentences of six months detention on each of the other counts remain unaltered.