IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 438

No. 202002231 A2

Royal Courts of Justice

Friday, 5 March 2021

Before:

LADY JUSTICE CARR
MR JUSTICE WILLIAM DAVIS
MR JUSTICE CALVER

REGINA
V
RAFFAELE ESPOSITO

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MS F. ARSHAD appeared on behalf of the Appellant.
MR P. JARVIS appeared on behalf of the Respondent.

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J U D G M E N T

LADY JUSTICE CARR:

Introduction

1 On 20 December 2002 in the Crown Court at Liverpool before Royce J ("the Judge") the appellant, then aged 26 and now aged 44, was convicted of two counts of murder alongside his co-accused Sean Jackman ("Jackman"). Both were sentenced to life imprisonment.

2 In January 2003 the Judge reported to the Home Secretary that in his view the minimum term to be served before the appellant was eligible to apply for release should be set at 19 years. No term was in fact set by the Home Secretary. Rather, the appellant's case was referred to the High Court for the minimum term to be set pursuant to s.276 and para.6 of Sch.22 of the Criminal Justice Act 2003 ("Sch.22") ("the 2003 Act"). On 18 October 2007 the Judge specified that the minimum term should be 19 years (less five months and 25 days) to reflect the period spent on remand.

3 The appellant now appeals against the minimum term pursuant to para.14 of Sch.22 by leave of the Single Judge who also granted the necessary extension of time.

4 The basis of the appeal is that the appellant, being a Sch.22 transitional case prisoner, has shown exceptional progress in his life sentence such as to merit a reduction in the minimum term. It engages the unusual review jurisdiction said to exist (as identified in *R v Gill* [2011] EWCA Crim 2794 ("*Gill*")) in relation to those given a mandatory sentence of life imprisonment before the implementation of the 2003 Act. This appeal has been expedited as the minimum term is about to expire in June of this year.

5 For the purpose of resolving the issues before us, we have had the benefit of able written and oral submissions from Ms Arshad for appellant and Mr Jarvis for the respondent.

The Facts

6 On the evening of 18 June 2002 Francis Perry ("Perry") and Paul Hagan ("Hagan") were staying with James McElhenny, a friend of the appellant, at an address in Derby Road. The two men went to a nightclub where Perry and Hagan chatted with the appellant's sister and girlfriend. Their behaviour is said to have angered the appellant. Shortly before 2.00 a.m. the appellant told his girlfriend to accompany Perry and Hagan in a taxi back to Derby Road. The appellant recruited Jackman, who worked as a doorman at a nightclub in Southport and was a close friend of his, to help him attack Perry and Hagan.

7 When the appellant and Jackman arrived at Derby Road, Perry and Hagan were in a drunken and defenceless state. The appellant and Jackman subjected them to an attack of the most extreme brutality, involving the use of a baseball bat. A third man, Joseph Sammon ("Sammon"), arrived at a stage when Hagan and Perry appeared to him to be dead, but Jackman was still swinging the baseball bat. Hagan received 12 head injuries, including several skull fractures and numerous injuries to his legs, trunk and arms, including defensive injuries. His left testicle was completely blackened by a severe blow.

8 Perry received 28 head and neck injuries, including several skull fractures. His head had been driven down into his spine. The pathologist said that his head injuries were of such severity as normally to be seen only in high-speed motorcycle crashes. He had numerous injuries to his trunk, legs and arms. There were a series of parallel knife wounds on his face and arms and some defensive injuries. Both Hagan and Perry died of these injuries.

9 Blood was found all over the walls and the ceiling of the room. One or both of the appellant and Jackman had urinated extensively on both Hagan and Perry. The attack had lasted at least 20 minutes and probably longer. There was evidence before the court of moaning, crying and hitting sounds during the 20-minute period.

10 Jackman, the appellant and Sammon made off, Jackman and the appellant going to London before returning to the Stockport area.

Sentence

11 When sentencing the appellant, the Judge described these murders as brutal, callous and vicious. The deceased men had been begging for their lives. The appellant had shown no mercy. A sentence of life imprisonment was imposed.

12 In his report in January 2003 the Judge noted the multiple aggravating features, including premeditation, humiliation, discussion and agreement to kill in the face of a man on his knees begging for his life, and by way of mitigation the fact that the appellant was 26 years old and of previous good character. The Judge, as we have said, recommended a minimum term of 19 years, describing the appellant as someone with a "callous and ruthless streak" and when in drink a capacity for extreme violence. The appellant was the orchestrator of the attack. No remorse was apparent.

13 When setting the minimum term, the Judge referred to his earlier recommendation. He referred to the written representations of the appellant, in which the appellant expressed disgust at the part he had played, but refuting the suggestion that he had recruited Jackman or taken any part in urinating over the deceased. It was said for him that the minimum term should be in the 15- to 19-year bracket. The Judge took into account victim personal statements. He considered the minimum term that would have been imposed had the murders taken place after the 2003 Act had come into force. There were two murders which involved a high degree of sadistic conduct, so there was a strong argument that the appropriate starting point would be a whole life order. On any view, under Sch. 21 of the 2003 Act, the minimum term would not have been less than 30 years.

14 It was borne in mind that the minimum term could not be greater than that under the practice followed by the Secretary of State before December 2002. It was likely, in the Judge's view, that the Secretary of State would have adopted his recommendation of 19 years. This was a truly terrible case. The Judge was wholly unpersuaded there should be any reduction from the 19-year term and so he set the minimum term to which we have already referred.

Grounds of appeal

15 On this appeal Ms Arshad submits that the appellant can be said to fall into the very small category of those transitional cases where, should he meet the standard, he can apply to have his minimum term reduced on the grounds of exceptional progress such as to merit a reduction. This is, in her words, a case where the appellant in question could simply not have done more in the last decade of his time in prison.

16 Reliance is placed on the progress made by the appellant as summarised in a Parole Board Panel decision in April 2018. There it is recorded that the appellant had always admitted playing a substantial role in the attack and having used a baseball bat on at least one of the victims. He had shown real remorse and was open in taking responsibility for what had occurred, having devoted a great deal of time to reflect on the events of the night in question

and their effects on the victims and their families. There had been no sign of violence or loss of temper or use of drink or drugs throughout his sentence.

17 In the early years of his sentence the appellant had completed CALM, ETS and a number of substance and victim awareness programmes. Between 2008 and 2011 he had undergone one-to-one work with a psychologist. His custodial conduct from the outset had been of a high standard. He was re-categorised as a Category C prisoner as early as 2008/2009, by which time he had started on an Open University undergraduate course in law.

18 He was transferred to HMP Oakwood in 2013 where his conduct continued to be exemplary. He obtained an upper second class Honours degree in law in July 2016 and completed other educational and vocational courses, including Fine Cell Work. His excellent conduct had been maintained throughout his sentence and he had been an enhanced prisoner for many years. He had played a leading role in important and highly pro-social activities. He had set up house block initiatives. At HMP Rye Hill he had helped to establish and then work with a scheme called Last Chance, arranging visits by potential or young offenders. Its aim is to persuade young people away from a life of crime. He had been a Samaritan listener and a distance learning mentor.

19 Significantly, and as rightly emphasised by Ms Arshad, in November 2015 he had set up a body called Your Consultation Group. It offers advice and assistance to prisoners and staff on legal matters and prison policies - a major operational undertaking. Ms Arshad explains that this is a service provided across the prison estate to prisoners and staff alike. Further, the appellant had been involved in proposed drafting changes to the group and been involved in a project which had been commended by the Prison Reform Trust. He had worked with charities and also the Criminal Case Review Commission arranging surgeries for prisoners who wished to engage with the CCRC and facilitating a visit to HMP Oakwood by the chair of the CCRC. The appellant had spent two years on the prison council and headed up the prison newspaper.

20 In 2018 the Parole Board panel described the appellant's custodial history as "outstanding." It also referred to a risk assessment in November 2017 when it was concluded that the risks of violence posed by him had reduced to the point where they could be assessed as low in open conditions or in the community and that his remaining risks could be safely managed in open conditions. He was recommended for transfer to open prison (although we note that one offender manager assessed the appellant's risk to the public as medium rather than low at this stage). In August 2018 the governor at HMP Oakwood described the appellant as having made an "outstanding" contribution to the prison.

21 At HMP Leyhill the appellant had been involved in developing induction and information booklets. He had acted as a monitor in education and as an adviser to the prison advice centre. Prior to lockdown, he was permitted to work in the community and to engage in home visits at maximum frequency and duration. He is currently a member of the Covid 19 Forum. He tried to set up Your Consultation Group at HMP Leyhill, but was told originally that the timing was not right; matters have then been overtaken by the circumstances of the pandemic. Further, throughout the appellant has been involved in fundraising for a number of different charities, including the Red Cross and Acorns charity for terminally ill children.

22 Ms Arshad emphasises the difficulties that have arisen out of the pandemic, not only in terms of the appellant's opportunities in the prison estate, but also in terms of getting recent updates on his progress from the prison governor. As indicated, she points in particular the appellant's involvement in Your Consultation Group, in the Prison Reform Trust and

suggests that even in lockdown the appellant has continued to do everything that he possibly could, for example through Fine Cell Work.

23 For the respondent Mr Jarvis identifies that it is arguable that the review jurisdiction identified in *Gill* is inconsistent with the earlier authorities and, in particular, dicta in *R v Caines* [2006] EWCA Crim 2915 ("*Caines*") and para.14 of Sch.22. On this analysis, given that the appellant does not challenge the decision of the Judge in 2007 to set the minimum term at 19 years on the basis that that period was either manifestly excessive or wrong in principle at the time, this court has simply no jurisdiction to review that minimum term now and to adjust it to reflect any exceptional progress.

24 If there is such jurisdiction, then the progress in prison must be truly outstanding. Only then will it be exceptional. Good behaviour alone is not sufficient. In considering whether progress is exceptional, it is helpful for this court to have observations from the governors of the appellant's last two prisons, not only detailing the appellant's own progress, but also offering some comparative evidence by reference to other prisoners in similar situations. Mr Jarvis queries whether or not the appellant's progress can be said to be genuinely exceptional on the facts here. His progress may have been very good indeed, even excellent, but it has not been exemplary and not truly genuinely exceptional. He draws our attention to three particular factors in addition. Firstly, by reference to the latest report from the appellant's probation officer, he queries whether or not the appellant has in fact shown the true insight that has been suggested. The Judge clearly found that this was a premeditated attack arising out of a plan which the appellant had hatched. It is clear from the latest reports, and elsewhere, that the appellant does not accept this. His position is that he was simply angered when the two men came to his flat in Derby Road. The question raised is whether or not the appellant has accepted full responsibility for his part in what were, of course, extraordinarily serious attacks. Secondly, Mr Jarvis emphasises that there is still no comparative evidence comparing the appellant with other prisoners and nothing substantive from the governor of the appellant's current prison at HMP Leyhill. Thirdly, Mr Jarvis refers to the latest risk assessment as to the risk posed by the appellant. It is not as straightforward as might be suggested for the appellant, with references, for example, to the appellant being vulnerable still to the influence of peers and being assessed as a medium risk to members of the public.

25 In response to these last three points Ms Arshad states the question of risk is not a matter for this court, but rather one for the Parole Board. The question for us is whether or not the appellant can be said to have made exceptional progress. Secondly, if there were any real concerns about the appellant's insight, he would not have been allowed to complete the offender behaviour work and courses that he has. Thirdly, not least in these circumstances of the current pandemic, it is entirely understandable for the appellant's current prison governor to rely on the views of the appellant's probation officer. She points out that all efforts have been made on behalf of the appellant to obtain the fullest and most up to date information possible for the benefit of this court today.

Discussion and Analysis

The Jurisdiction Issue

26 Some legislative background is necessary in order to understand the jurisdictional issue. In 2002 the setting of the minimum term that a defendant convicted of murder must spend in prison pursuant to his life sentence before being eligible for release on licence was a matter for the Secretary of State, informed by a recommendation from the trial judge and the views of the Lord Chief Justice. The 2003 Act came into force on 18 December 2003. It was introduced following the House of Lords decision in *R (on the Application of Anderson)*

v Secretary of State for the Home Department [2003] 1 App Cases 837 in which Lord Bingham said that the Secretary of State should:

> "...play no part in fixing the tariff of a convicted murderer, even if he does no more than confirm what judges have recommended."

27 S. 269 of the 2003 Act provides that where a defendant is sentenced to a mandatory term of life in custody on a day on or after the commencement date when the minimum term would be set solely by the court, having regard to the general principles contained in Sch.22. Sch.22 of the 2003 Act contains transitional provisions to the following effect:

> "(a) Where the life sentence prisoner had been told by the Secretary of State what his minimum term was (see para.2(a) of Schedule 22) then paragraph 3(1)(a) permits the prisoner to apply to the High Court for a review of that minimum term.
> (b) Where the life sentence prisoner has not been told by the Secretary of State what his minimum term would be (see paragraph 5 of Schedule 22) then paragraph 6 requires the Secretary of State to refer his case to the High Court for a judge to set the minimum term."

28 In this case by the time that the 2003 Act came into force the Secretary of State had not responded to the Judge's recommendation in January 2003 and, accordingly, para.6 of Sch.22 applied. Thus, on 18 October 2007 the Judge set the minimum term at 19 years.

29 The appellant now appeals pursuant to para.14(1) of Sch.22 which provides:

> "14(1) A person who has made an application under paragraph 3 or in respect of whom a reference has been made under paragraph 6 may with the leave of the Court of Appeal appeal to the Court of Appeal against the decision of the High Court on the application or reference."

30 *Caines* was a case under para.3 of Sch.22. The Court of Appeal stated:

> "38. We must draw some disparate threads together. The transitional provisions create an unusual responsibility for a judge. He has to decide the application by assessing the seriousness of the offence in the context of the statutory guidance in schedule 21, whilst simultaneously looking back to judicial recommendations made when a variety of different sentencing regimes existed, without addressing precisely what they were. Certainly he is not confined to and would be misdirecting himself if he simply replaced the original minimum term fixed by the Secretary of State with the original judicial recommendation. In any event the trial judge and Lord Chief Justice may have recommended different tariff periods. He is not conducting an appeal from the judicial recommendations, or the decision of the Secretary of State, nor passing sentence as such. Nevertheless although he did not preside over the original trial, his decision will impact directly on the date when the prisoner may be released on licence. Plainly the process is properly identified as a review, but it is not a judicial review in the formal sense. Schedule 22 (14) (1) describes the process as a decision and creates a process for appeal to the Court of Appeal Criminal Division, or indeed Reference by the Attorney General. In view of its characteristics, and the nature of the process, the decision should be treated as a sentencing decision..."

31 The Court of Appeal concluded that any reduction to allow for exceptional progress was to be made against the notified minimum term (as opposed to the term which would have applied under Sch.21: see [48] to [50]. This is where the High Court Judge in that case had erred. The Court of Appeal then addressed the approach to be taken on any appeal against the review decision of a High Court Judge as follows:

> "45. We acknowledge the inevitable difficulties, and indeed some illogicality, in re-examining the tariff fixed for the purpose of punishment and deterrence by reference to exceptional behaviour post sentence, a hesitation reinforced by the absence of any direct or express indication to this effect in the carefully structured statutory guidance. Nevertheless, for the reasons we have identified, our hesitation is alleviated. We emphasise first, that every prisoner serving a mandatory life sentence since 1997 has spent a significant part of the sentencing period under a regime in which exceptional progress provided a recognised basis for a reduction in the minimum term, second, that the review required by schedule 22 is unusual and specific for transitional purposes, and that the exclusion of the Secretary of State (who would otherwise have continued to allow for exceptional progress against the minimum term) is deliberate, and third, that the decision consequent on an application under schedule 22 is a sentencing decision to which normal sentencing principles apply. Accordingly in our judgment, exceptional progress in prison may be taken into account for the purposes of resetting the minimum term.
> ...
> 54. Responsibility for operating the transitional provisions is vested with High Court judges. This court will continue to apply the conventional approach to appeals against these decisions. We shall not interfere unless the result is manifestly excessive or wrong in principle, or in the case of a reference, unduly lenient. Save on well established principles, there should be no interference with findings of fact, whether adverse or favourable to the prisoner."

32 In *R v Sampson* [2006] EWCA Crim 2669 the Court of Appeal applied the same principles as identified in *Caines* to references under para.6 of Sch.22.

33 The position in *Gill* was different to that in *Caines*. In *Gill*, as in this case, the appellant relied on exceptional progress since the original minimum term had been set. The Court of Appeal held that it had jurisdiction to review the minimum term pursuant to Sch.22 on its proper construction. It could adjust the minimum term downwards on the basis of exceptional progress in custody without examining whether the original minimum term was manifestly excessive or wrong in principle. Lord Judge Chief Justice said this at para.1:

> "…..The reality, therefore, is that the court is conducting a review of sentence by assessing the conduct of each appellant long after he was sentenced, rather than examining whether the sentence was manifestly excessive or wrong in principle. The Court of Appeal Criminal Division is not a court of review; it is a court of appeal. This jurisdiction therefore is unusual and we shall explain in due course how this surprising responsibility came about."

34 At first blush this might be thought not to sit easily with [54] of *Caines*. However, we consider that the cases are in fact consistent. Both in *Caines* and in *Gill* the court considered

that exceptional progress in prison may be taken into account for the purpose of resetting the minimum term: see *Caines* at [45] and *Gill* at [21]. The approach to be taken will then depend on whether the appeal is against a minimum term set by a High Court Judge having considered the question of exceptional progress (in which case the conventional approach to appeals applies), or whether the appeal relates to a minimum term set without consideration of any exceptional progress (in which case the unusual review jurisdiction is engaged).

35 In the case of the very small number of Sch.22 transitional cases where after the minimum term had been set the appellant had made exceptional progress in custody and has not previously made any appeal against the setting of the minimum term, it makes sense that para.14(1) of Sch.22 should entitle the Court of Appeal as part of the appeal to conduct the necessary review as to whether there should be a reduction in the minimum term to reflect the appellant's exceptional progress long after sentence.

36 The Court of Appeal in *Gill* identified the practical considerations driving this interpretation of the legislation at [19] and [20]. Almost inevitably, defendants in cases of this seriousness are liable to remain in prison for long periods and so a reduction in the minimum term to reflect exceptional progress should not realistically be considered until towards the end of the minimum period. Thus, the process should be delayed until it becomes realistic to seek to provide a measured answer to the question of exceptional progress, inevitably, many years after the time for appeal has expired. By normal standards, it would require an extraordinary extension of time when, in any circumstances other than the present, an application for such would almost invariably by bound to fail. At the same time, if it were refused, it would remain open to the appellant to refer the case for the consideration of the Criminal Cases Review Commission exercising its own jurisdiction.

37 However, the court considered that all this seemed unnecessarily complicated:

> "Better by far for the court to face up to the practical realties and on the basis of an appellate jurisdiction in an appropriate case when the minimum term has been assessed in accordance with either para.3 or para.6 of Sch.22 to conduct the necessary review. That is what we have done in these cases."

38 The respondent submits that the approach in *Gill* gives rise to anomalies:

> "There is obviously a difference between (i) the Court of Appeal allowing an appeal against sentence where that sentence was manifestly excessive or wrong in principle at the time it was imposed and then taking into account exceptional progress in prison when deciding what sentence to substitute for the sentence passed below, and (ii) the Court of Appeal reviewing a sentence under paragraph 14(1) of Schedule 22 many years after the minimum term has been set by the High Court judge then reducing that minimum term solely on the basis that the defendant has made exceptional progress in prison since it was set."

39 Recognition of the review jurisdiction in *Gill* also places defendants, it is said, sentenced before 18 December 2003 at a particular advantage when compared to their modern counterparts. So, for example, a defendant sentenced to life imprisonment for murder in 2000, and for whom the Secretary of State had set a minimum term of 25 years, could apply to a High Court Judge under para. 3 in 2010 to seek a downward adjustment of the tariff on grounds of exceptional progress. If the High Court Judge made that adjustment the same defendant could appeal that determination out of time in 2020 on the basis of exceptional progress since 2010 as well. The same defendant convicted in 2005 would have no

opportunity to invite a High Court Judge to reconsider his minimum term and the only way in which the Court of Appeal would do so would be on a standard appeal against sentence.

40 However, the Court of Appeal expressly recognised these anomalies (see *Gill* at [27]) and the difficulties and illogicalities (see *Caines* at [45]) but it has, nonetheless, chosen to interpret the statute so as to allow it to do precisely that: review the sentence in this limited category of transitional cases. While the jurisdiction is unusual, one can see the obvious good sense of interpreting the statute in this way in these cases as a reduction in the minimum term to reflect exceptional progress cannot realistically be considered until the end of the minimum period.

41 The respondent also criticises what is said to be the suggestion in *Gill* that once exceptional progress is established it is mandatory as opposed to permissible to make due allowance for it. Referring to *Gill* at para.18:

> "18. No further citation from the numerous authorities referred to in our papers is necessary. In summary, consequent upon the complications which arose while Anderson was making its way to its conclusion in the House of Lords, and the end of the system by which the Secretary of State finally determined the tariff period which was remedied in Sch.22 of the 2003 Act, it has been established that the interests of justice require that for cases falling within Sch.21, the High Court, or this court on appeal, should consider and reflect on evidence of exceptional progress in prison and, where it is established, make due, but as we shall see, modest allowance for it against the minimum term. So far, so good."

42 We do not consider, on a proper reading of *Gill*, that the Court of Appeal was saying that it is mandatory to make a reduction on account of exceptional progress. It stated only that "due" account was to be given. It referred without demur at [14] to the decision in *Caines* that exceptional progress whilst in custody “may” be taken into account.

Substantive merits

43 We turn then to the substantive merits of the appeal. The Court of Appeal in *Caines* dealt with the standard to be met (as approved in *Gill* at [29] to [30]):

> "52. ….Good behaviour is not enough to constitute exceptional progress. We agree that the standard should be very high: the progress must be exceptional, outstanding, and bearing in mind that it provides the basis for a reduction in a period fixed for the purposes of punishment and deterrence, so it should be. Even where the necessary high standard is reached, the impact on the total tariff period is likely to be very modest. The longest reduction so far has not exceeded two years, and in the significant majority of cases where exceptional progress has been established, the reduction has been for one year. It also appears, and logically it is plain, that such progress falls to be considered when the minimum period is coming towards its end. Finally, it is a prerequisite to any reduction that the risk assessment should be favourable.
>
> 53. In future, when the court is considering whether exceptional progress has been made, it would be helpful for the information to include the observations from the governors (or the governor's representative) of the last two prisons in which the offender was serving his sentence. The information should not merely be directed to the governor's overall view of

> the progress of the individual offender, but should also provide assistance on how that progress should be assessed by comparison with other similar prisoners. Furthermore, the court should be provided with a satisfactory risk assessment. Evidence of remorse, if genuine, may tend to confirm that the level of risk posed by the prisoner has been reduced to negligible levels, but its absence is simply one factor to be taken into account in the risk assessment. At the same time those responsible for the assessment should bear in mind that an intelligent or manipulative life prisoner may appear to have made exceptional progress when, in reality, he represents a continuing danger."

44 This court has no real detail as to the appellant's progress in custody before 2008, by which time he reached HMP Rye Hill. He was then moved in or about 2013 to HMP Oakwood when he became a Category C prisoner. Since October 2018 he has been at HMP Leyhill as a Category D prisoner.

45 There is no question but that the appellant's conduct whilst in prison has been very good if not excellent. The April 2018 Parole Board Panel letter speaks of "exemplary conduct" at HMP Oakwood and an outstanding custodial history. His achievements are on any view impressive, not least his law degree, his participation in the Last Chance scheme and, perhaps particularly, the creation of the Your Consultation Group. These are all matters of which he can be justifiably proud and which stand very much to his credit. However, the question for us is whether or not the very high standard of exceptionality is met.

46 *Cairns* emphasises the importance of progress in the most recent custodial setting. We consider in particular the most recent material available to us. In September 2019 the appellant's offender supervisor at HMP Leyhill reported that there had been no issues with his custodial behaviour, that he worked to good effect, had received positive feedback from staff, attendance record and performance standards. He had enhanced status and often went above and beyond to maintain that status. He had demonstrated good insight into his risk factors and awareness. In a letter dated 19 May 2020 the governor expressed confidence that the picture painted there was accurate. Gaining Category D status three years before tariff expiry was, he said:

> "..usually the sign that a person had progressed well in custody."

47 This to our minds does not speak of exceptionality. Most recently, on 3 March 2021, the head of the Offender Management Unit at HMP Leyhill provided a copy of the Sentencing, Planning and Review Report dated December 2020 prepared by the same offender supervisor ahead of the appellant's pending parole hearing. She indicated that the appellant had demonstrated good insight into the serious harm he had caused with genuine remorse; had no proven adjudications; had achieved enhanced prisoner status with above and beyond activities and positive behaviour for quality attitude; had gained employment in recycling; was a good timekeeper; polite; had displayed positive attitudes; had joined the prison advice centre as a peer mentor; had sorted diary systems and started on some policy work for the CCRC. His work there was said to be exemplary. He was said to have adjusted well to open conditions, had coped well with the recent death of his mother, with no reported issues as to his day or overnight releases. He had started a new relationship with a lady whom he had known for many years and a prison officer described his behaviour on an escorted release as impeccable. The offender supervisor assessed the appellant as posing a medium risk of serious harm to members of the public. She supported release in the following terms:

> "[The appellant] has been in prison for 18 and a half years, two years having been spent in open conditions prior to his tariff date. He has made excellent progress, demonstrating effective risk reduction and compliant attitudes which bode well in the future. I am also satisfied that he has been sufficiently tested and unlikely to pose an imminent risk of serious harm to the public unless there is a sufficient change in his circumstances, which is not evident at this point. I am of the opinion that [the appellant] can be effectively managed in the community with the robust risk management proposed for him and on that basis I am supporting release."

48 In our judgment, and without wishing in any way to underplay the many positive aspects of the appellant's past performance and contributions whilst in custody and even taking into account the impact of the recent pandemic, the broad picture painted by those at HMP Leyhill is not one of exceptionality, but rather one of a person quietly and determinedly working his way towards release on licence, as one would expect. Whilst again no bar to making a finding of exceptional progress, it is relevant to record the matters recorded in the most recent reports as to the appellant's position as to the extent of his offending and the fact that the level of risk that he is said to pose remains assessed at medium so far as members of the public are concerned.

49 In short, the appellant's progress in prison has been very good if not excellent, but there is in our judgment insufficient evidence to allow it to cross the threshold of exceptionality such as to merit a reduction in the minimum term of 19 years imposed. For these reasons, we dismiss the appeal.

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