Neutral Citation Number: [2022] EWCA Crim 1251

Case No: **202103928 A2**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM **Kingston upon Hull Crown Court**

HHJ J THACKRAY QC
T20217020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2022

Before :

LORD JUSTICE HOLROYDE
MR JUSTICE SWEENEY
and
MR JUSTICE EYRE

- -

Between :

Regina — **Respondent**

- and -

COLE JARVIS — **Appellant**

- -
- -

Mr Richard Wright QC (instructed by **Barker & Copeman**) for the **Appellant**
Mr Jason Pitter QC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : **12 May 2022**

- -

Approved Judgment

MR JUSTICE SWEENEY:

Introduction

1. This is an appeal against sentence by leave of the Single Judge.

2. On 6 October 2021, at the conclusion of his trial before HHJ Thackray QC and a jury in the Crown Court at Kingston-upon-Hull, the appellant (who was aged 21 at the time of the offence, and had no previous convictions) was convicted of the murder of Connor Lyons (who was aged 17) on 18 or19 January 2021.

3. On 12 November 2021 the appellant (by then aged 22) was sentenced by the judge to life imprisonment with a minimum term of 25 years.

4. The Ground of Appeal is that the sentence was manifestly excessive for the following reasons:

(1) The judge made findings of fact that were not reasonably available to him on the evidence.

(2) In consequence, he adopted the wrong starting point.

(3) He gave too much weight to the aggravating factors.

(4) He gave insufficient weight to the mitigating factors.

(5) He arrived at a minimum term that was, standing back from the case and looking at it in the round, simply far too long.

The prosecution case

5. At around 8.15 in the morning of Tuesday 19 January 2021, the body of Connor Lyons was found lying in the mud on the bank of the River Hull, near Thomas Clarkson Way in Hull.

6. The cause of death was drowning. However, there was also evidence of strangulation via pressure to the neck that was, of itself, potentially fatal and, in any event, likely to have rendered Connor unconscious. There were indications from the injuries resulting from the strangulation that a ligature (such as a piece of rope) had been used, or that someone's arm had been put around Connor's neck. The strangulation had been an integral part of the drowning – with one scenario being that Connor had been rendered unconscious and left (deliberately) vulnerable to drowning, and another being that he had been directly held under water in that process and drowned.

7. The person responsible for the murder was the appellant. He and Connor were known to each other, and had a difficult relationship. The appellant was the last person known to

have been seen with Connor before he was killed, and in the area where Connor's body was later discovered . The appellant's actions afterwards made plain that he was not expecting to see Connor again, which was consistent with him knowing that Connor was dead or soon would be. He had strangled Connor with the intention to kill or to cause grievous bodily harm, and had believed that that was he had achieved. In simple terms, he had left Connor for dead.

8. The relationship between the appellant and Connor, which had begun about 6 months before the murder, could, at best, be described as volatile. Some perceived it as fractious, with them fighting "like cat and dog". Others perceived it as being more one sided and dominated by the appellant, with the suggestion being that the appellant bullied Connor - including being physically aggressive towards him. In particular, there had been an incident not long before Connor's death when he had complained that the appellant had struck him with a bar or bat. The volatility of the relationship was also apparent from telephone messages between the two of them. It was accepted that Connor could not be said to have been always outwardly in fear of, or cowed by, the appellant. It was clear that, at times, he was able to give verbally as good as he got.

9. Another feature of the relationship between Connor and the appellant was that they would quite often go "lamping" together, including in the area of the River Hull.

10. In the evening of Monday 18 January 2021 Connor had ridden his 'Scott' bicycle to the appellant's address, taking his dog (to whom he was devoted) with him. At approaching 8pm, he and the appellant had set off on foot from the appellant's address to go "lamping" with the appellant's lamp / torch. They were wearing their waterproofs. The appellant's clothing included khaki outerwear and distinctive Nike trainers. They also had Connor's dog with them. Together, they had headed towards the River Hull. The 'Scott' bicycle was left at the appellant's address.

11. Connor did not return. At around 10.15pm a man driving along Thomas Clarkson Way, not far from where Connor's body was later discovered, saw the appellant, who was accompanied only by Connor's dog (which was later found outside Connor's address), crossing the road. CCTV footage also captured the appellant shortly thereafter - walking alone towards the area of his home.

12. Towards 11pm, the appellant made a telephone call attempting to sell Connor's 'Scott' bicycle, which he said that he had bought from Connor earlier in the day.

13. Thereafter, the appellant used Connor's bicycle to go and meet (in various combinations and locations) with friends or associates, including Tyler Dunn (who was aged 14).

14. To cover up his actions, the appellant lied - saying that he had the 'Scott' bicycle because Connor had sold it to him for an amount of cannabis, and that he had been out to the shops and had taken "the dog" for a walk . However, Tyler Dunn noticed that the appellant's clothes and trainers were covered in mud and sodden, and samples later taken from them were found to match mud and water from the area where Connor's body had been found. Further, the appellant told the others that "Connor did not want to join them" and "He's been really down lately, saying he's gonna kill hisself". The appellant also floated the idea that (for various reasons, including a drug debt) Connor may have been attacked by others. According to one witness, Kourtney Turner, the appellant also produced a piece of blue rope from one of his pockets and half-joked "This is what we tie people up with" – which was an important slip given that a piece of rope that was later found in the garden area of the appellant's home was found to have Connor's DNA on it, consistent with it having been used as a ligature.

15. The appellant persistently tried to sell Connor's 'Scott' bicycle, and then locked it in the shed at his grandmother's address – from where it was ultimately recovered.

16. On 20 January 2021, the appellant was arrested in connection with the theft of the bicycle and the earlier assault. He lied during the course of interview, including:

(1) Stating that he had not seen Connor for 2 weeks and giving a lot of false detail about when he had last seen him.

(2) Denying having Connor's bike at all, by any means – including not having ridden it on 18 January 2021.

17. Once the full picture had emerged from the examination of Connor's body, the appellant was arrested for murder. In interview, other than denying any involvement in the death at all, he exercised his right not to answer questions.

18. The prosecution made clear that they could not say precisely what had happened when Connor and the appellant were out of CCTV range, nor precisely why the appellant had assaulted or killed Connor. They underlined that they did not have to, but asserted that It may have been one of those disputes that the appellant and Connor were capable of having, with the appellant's anger having boiled over in that moment.

19. The prosecution asserted that it was a proper inference that the appellant had assaulted Connor, and that when he had done so he had intended to cause at least really serious harm. In short, he had killed Connor and had known or believed that he had done so afterwards.

20. The following were said to be some of the matters that would assist the jury in being sure of guilt, namely that the appellant had :

(1) Returned from the area of where Connor's body was later found alone - apart from Connor's loyal dog.

(2) Made immediate and persistent attempts to sell Connor's bicycle and had thereafter attempted to distance himself from it.

(3) Told lies that evening in relation to Connor, in particular the reference to Connor wanting to kill himself, and as to what the appellant himself had been up to.

(4) Lied in interview when he knew that he must have been the last, or one of the last, people to have been with Connor.

21. There was also prosecution evidence that:

(1) During the course of their relationship, there was a message from the appellant to Connor to the effect of "wait to see what you will get".

(2) Connor had an £800 bracelet that he had been given for Christmas, and which he always wore, but it had not been found on his body or at the scene.

(3) Nor was Connor's mobile phone, which he habitually had with him, found on his body or at the scene.

(4) The appellant had disposed of his own mobile phone.

22. However, it is clear that the prosecution took the considered view that:

(1) The message had to be considered in the context of serious threats uttered by Connor in messages from him to the appellant.

(2) It was not unusual for Connor and the appellant to be in the River Hull "lamping", and thus this could not be said to be a case of the appellant luring Connor to the scene after pre-planning to do so.

(3) It could not be said precisely what had transpired that had led to the killing. It did, however, come with the background of the relationship – the dynamic of which was well evidenced.

(4) Although the appellant had sought to make some gain from the fact of the killing in relation to Connor's bicycle, it was not appropriate to make a particular motive a pre-requisite for consideration of the allegation of murder. Indeed, robbery / theft of Connor's bracelet and mobile phone was not an allegation that, applying the appropriate criteria, the prosecution felt able to responsibly advance.

(5) Hence they did not advance the case on the basis that it was a murder done for gain.

The appellant's case

23. The appellant's case was that he was not involved in the fatal events at all. He and Connor had gone out together, and when they had parted Connor had been fine.

24. He did not give evidence.

Submissions prior to sentence

25. The judge gave advance notice to counsel that he did not readily accept the prosecution case that there was no pre-planning, and that the murder was not motivated by gain.

26. In their written submissions on sentence, the prosecution re-iterated their case (as summarised in para 22 above, including that this was not a murder for gain) and submitted that:

(1) The case fell within para 5 of Schedule 21 to the Sentencing Act 2020, and thus attracted a minimum term starting point of 15 years.

(2) Whilst the prosecution case had always been that a ligature may have been used, if the court was satisfied that that was the case, that was more properly a significant aggravating factor than a feature causing the starting point to move up a category. In the overall context of the case, the ligature could not be properly proved to have been "brought to the scene" in the sense that the legislation intended (i.e. that it was brought to the scene intending to commit an offence, or to have it available for use as a weapon).

(3) Whilst none of the statutory aggravating factors in Schedule 21 were present, the following additional aggravating factors were:

(i) The history of the relationship in which the appellant (who was 4 years older) had been described, in broad terms, as being a bully.

(ii) The use of a ligature - if the court concluded that such was used.

(iii) The fact that the appellant had exploited Connor's death by seeking to sell the bicycle.

(iv) The court could conclude that the appellant had been responsible for the disappearance of other items of Connor's property, but that might not add significantly to the brazen efforts to dispose of the bicycle.

(v) Seeking to sell the bicycle in the immediate aftermath demonstrated both an absence of remorse and a callous desire for personal profit – with the timing of the first attempt at sale of the bicycle demonstrating that it was not motivated simply by a desire to evade arrest.

(vi) The appellant had made deliberate attempts to mislead , both in the immediate aftermath to Tyler Dunn and others, and subsequently to the authorities, by positing the idea that Connor may have taken his own life, and / or that he had been the victim of attack by others for various reasons, including drug debt.

(vii) The appellant's attempt to conceal evidence by hiding the bicycle and disposing of his own mobile phone.

(4) Whilst an intention to cause grievous bodily harm was a potential mitigating factor, there was evidence on which the court could conclude that there was an intention to kill – particularly if the court found that a ligature had been used. Even if there had not been an intention to kill, the court should consider whether leaving Connor in an obviously vulnerable state would tend to offset any such mitigation.

(5) The other potential mitigating factors were that:

(i) It was acknowledged that there was no evidence to suggest that this was a premeditated act, but it could not be said that it was truly spontaneous.

(ii) The appellant was only 21 at the time of the offence.

27. In the defence Sentencing Note, it was submitted that the correct starting point for the minimum term was 15 years. Whilst it was conceded that the court was not bound by the views of the parties, it was underlined that, to adopt a higher starting point, the court would have to be sure, to the criminal standard, that the features that justified the adoption of that starting point were present in the case. In this case, it was submitted, the Court might consider that a number of features might apply, but it could not be sure that they did.

28. As to murder for gain and a consequent 30 year starting point, the court was invited to take a step back from the case and to consider the proposition that this was one of those exceptionally rare cases in which such a starting point applied. Doing so, it was submitted, would reveal that this was not such a case – indeed that such a starting point would be out of all proportion to the facts of the offence. It was also underlined that the prosecution had not put the case upon the basis that it was a murder for gain, and still did not suggest that it was such. The callous sale of property belonging to Connor after his murder was not evidence that this was a murder committed for gain.

29. It was underlined that there were no statutory aggravating factors, and it was not accepted that the court could be sure that a ligature was used. Further, it was argued, the attempted sale of the bicycle did not, in and of itself, aggravate the offence of murder. Whilst the actions of the appellant after the murder might be said to reveal a callous attempt to cover his own tracks and conceal evidence, that was one indivisible aggravating factor.

30. Further, it was submitted that the court could not be sure of an intention to kill, or that the murder was premeditated (given that it had all the appearance of a spontaneous outbreak of violence). In addition, the appellant was a young man, and the court could infer that he lacked maturity.

31. Against that background, and in conclusion, it was repeated that the appropriate starting point was 15 years, and it was accepted that there was some justification for a modest uplift from that starting point, but no more than that.

The judge's sentencing remarks

32. The judge began by underlining that Connor had been a young man with everything to live for, and that he was making plans for the future. He had been described as a lovable, chilled out, lad. He was kind and caring and loved his dog, which he took everywhere with him. He had not had a problem with anyone other than the appellant, who had bullied and

assaulted him in the weeks and months prior to his death. His loss had been devastating to his family and many friends, as attested to in their Victim Personal Statements.

33. Having referred to the advance notice that he had given to counsel, and reminded himself that the criminal standard applied, the judge said that he had not the slightest doubt that before the appellant had set out that evening he had planned to rob Connor of his mobile phone, his expensive bracelet and his bicycle, and that at the scene of the robbery, if not earlier, the appellant had formed the intention to kill Connor in order to avoid detection. The judge continued:

"*Both of those conclusions are, in my judgment, inevitable inferences following a careful analysis of the evidence, having had the advantage of hearing the evidence at trial. Court of Appeal decisions have made it clear that I am entitled to form my own judgment having heard the evidence on whether the murder was or was not done for gain, irrespective of the position of the prosecution. You could so easily have been charged with an offence of robbery, but it matters not that the prosecution did not charge that offence. Equally it matters not how the prosecution put the case during the trial and I am certain that no prejudice arises from that fact, in that your defence was straightforward in that you denied any involvement in the killing…"*

34. The judge continued that there were two issues that he had to resolve – firstly the issue of pre-planning and secondly, whether the offence was committed for gain. He explained that In their regard he had taken into account the following background matters:

(1) The messages that were exchanged between the appellant and Connor in the summer of 2020 which, though distant in time, were relevant - particularly one which involved a sinister threat, namely "*Carry on testing me, see where it gets you*". Others revealed that the appellant had sold a motorbike belonging to Connor, and had thereafter refused to return it, or to pay the money back.

(2) The evidence of Tyler Dunn (which, the judge said, was very impressive, balanced, fair and undoubtedly reliable) to the effect that the appellant had been really nasty to Connor, including kicking him and slapping him in the face, albeit that, despite that, Connor had spent time with the appellant (no doubt because the appellant was an older male and, on some occasions would be nice to him) - which had been of crucial importance to his conclusions.

(3) About a week or two before the murder there had been another fallout because the appellant had refused to return a bicycle, or part of a bicycle, to Connor – who had attended the appellant's home, with some kind of instrument, to retrieve his property, but had been overpowered by the appellant who had struck him to the head with a weapon of his own. There was also agreed evidence that, as on the night of the murder, the appellant had fabricated an allegation that Connor had exchanged his bicycle for cannabis. However the truth was that, on both occasions, the appellant had taken Connor's property because he could - as Connor was not physically robust enough to challenge him.

35. Against that background, the judge continued, he had reached the following conclusions:

(1) He was certain that the appellant had intended to take Connor's property from him that evening on the pretence of going "lamping". He had lured Connor to a remote area, and it was significant that he had not taken his dog with him. The length of time that the appellant had spent with Connor before killing him reflected no more than the appellant maintaining the pretence of "lamping" until the opportunity arose to rob him of his possessions, his phone, and his bracelet, and then to kill him.

(2) Whilst he could not be sure that, before getting to the scene, the appellant had intended to kill Connor, he was sure that having robbed Connor of his property, and realising that, on this occasion, he could not avoid detection, the appellant had then formed the intention to kill, which he had given effect to by strangling Connor with a ligature.

(3) Within a very short time, the appellant had obtained Connor's bicycle, which Connor had left at the appellant's home, and had set about trying to sell it – not appreciating how well known and distinctive to others that it was.

(4) The appellant had hidden Connor's bracelet and phone, and had disposed of his own mobile phone.

36. In support of those conclusions, the judge relied on a number of features of the evidence, namely:

(1) Tyler Dunn's evidence as to the state of the appellant's clothing and footwear, combined with the results of the scientific examination of them, were, no doubt, the result of the appellant holding Connor down in the water at the time that he was strangling him, or thereafter when he was partly or fully unconscious.

(2) As a friend of Connor's, the appellant had inevitably known that Connor had such an expensive bracelet, and the appellant had had plenty of time to hide it, and Connor's phone, before his arrest - just as he had tried to do in relation to the bicycle.

(3) The fact that, shortly after the murder, the appellant had told Tyler Dunn that Connor had been suicidal earlier in the evening demonstrated, in the clearest manner, that the appellant had known that Connor was dead. The reason that the appellant had known that was because he had killed Connor, and had intended to do so by strangling him and holding him down in the water until he had drowned. Equally damningly, by inventing to his girlfriend that other males had been on the scene, the appellant had been planting the seed that Connor may have been murdered by someone else.

(4) After the killing the appellant had set about trying to cover his tracks by trying to sell Connor's bicycle, and then by hiding it in his grandmother's shed. He had also disposed of his own mobile phone, no doubt because of incriminating material on it.

(5) After the killing and later in the evening, based on the evidence of Kourtney Turner (which the judge accepted, despite some inconsistency with the evidence of others) the appellant had produced the piece of rope that he had used to strangle Connor, saying "*This is what we tie people up with"* – which was a careless but revealing comment, given that similar rope was found at the appellant's home with Connor's DNA on it. The judge had no doubt that the appellant had taken the rope with him to the scene intending to use it upon Connor to assist in stealing his property, at the very least by restraining him with it. The appellant had formed the intention to kill at the scene.

(6) The appellant had lied to the police as to when he had last seen Connor, and to others as to what he had been doing and how he had come into possession of Connor's bicycle. He had concocted a number of cynical fabrications, which had involved setting up a defence in advance of the body being found. Further, he had fabricated the assertions that Connor was suicidal; that Connor was upset at not receiving compensation; that others had arrived on the scene; and that Connor had enemies, who included Scousers and people from Orchard Park.

37. Context, the judge continued, was everything, and the context in the appellant's case painted a very clear picture of the motive for the killing, as did the detail of all the features which the judge had identified. Further, the judge observed that in his closing speech, Mr Wright QC, on the appellant's behalf, had submitted that it could inevitably be inferred that the obvious motive for the killing was robbery - which was, the judge said, a well-founded submission, with which he, and he was sure the jury, had agreed . The fact that it was the appellant who had killed Connor substantially strengthened the inference of robbery – because of the background between them and the other features which the judge had set out.

38. Thus, the judge concluded, the seriousness of the murder was particularly high because it was a murder done for gain in the furtherance of the robbery, and therefore attracted a starting point of 30 years for the minimum term.

39. The judge recognised that adopting a starting point of 30 years eliminated some aggravating factors, but said that, whilst he was careful to avoid double counting, that did not require him to disregard all the other aggravating factors, which were as follows:

(1) The appellant had killed Connor against the background of having bullied him, assaulted him, and stolen his property over the previous 6 months or so.

(2) The appellant had deliberately targeted Connor because of his vulnerability.

(3) The robbery was planned – which was clearly indicated by the ligature being taken to the scene by the appellant – with, at the very least, the intention of restraining Connor.

(4) The appellant had lured Connor to a relatively remote area late at night.

(5) The appellant had made various attempts to cover his tracks by inventing fictitious stories, and by disposing of the property that he had stolen, by repeated attempts to sell Connor's bicycle and then by hiding it, and by disposing of his own mobile phone.

40. The judge then found the following mitigating factors:

(1) The appellant had not formed an intention to kill until after he had arrived at the scene.

(2) The fact that the appellant had been aged 21 at the time of the offence.

(3) The fact that the appellant had no previous convictions.

41. The judge then imposed the sentence of life imprisonment, with a minimum term of 25 years. He did not explain the reduction in the minimum term from the 30 year starting point.

Submissions on appeal

42. We are grateful to Mr Wright QC (for the appellant) and Mr Pitter QC (for the respondent) both of whom appeared below, for their submissions.

43. As to the principles to be applied, Mr Wright began by drawing attention to two authorities, namely *King* [2017] 4 WLR 95, and the then recent case of *Turner* [2022] EWCA Crim 617.

44. In *King*, this Court identified three clear principles in relation to the determination of the factual basis upon which to impose sentence after a trial, namely that:

(1) If there is only one possible interpretation of the verdict(s) the judge must sentence on that basis.

(2) If there is more than one possible interpretation of the verdict(s), the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to impose sentence.

(3) If there is more than one possible interpretation and the judge is not sure of any of them, he must pass sentence on the basis of the interpretation (whether in whole or in part) most favourable to the defendant.

45. In *Turner*, in which (without giving advance notice to the parties and contrary to the prosecution's position) the trial judge found that the appellant had digitally penetrated the anus of one of the victims on two occasions, Warby LJ, giving the judgment of the court, said, at para 33:

"*A judge sentencing after a trial is entitled to make findings of fact provided (i) they are not inconsistent with the jury's verdicts; (ii) the evidence allows her to be sure of the facts, and (iii) a fair procedure is followed. The judge is not bound by the way that the prosecution chooses to present its case. But in this case not only did the Crown never suggest that a finding of digital penetration should be made, the parties were, and remain, agreed that the evidence did not justify such a finding. There has been no detailed exploration of the evidence in the course of this appeal, but on the basis of what we have seen we think the parties are likely to be right about this…*"

46. Mr Wright next referred to the cases cited in Archbold at paras 5A-307 & 318 and, in particular, to *Khan* [2010] 1 Cr.App R (S.) 1 – the judgment in which is to the effect that where conduct has been the subject of specific scrutiny at trial the judge may, provided that he is satisfied that it has been established to the criminal standard, take that conduct into account when passing sentence, notwithstanding that it might have formed the subject of a separate count, unless reliance on that conduct would be inconsistent with the verdict(s). Further, Mr Wright highlighted the view of the editors that *Khan* is inconsistent with other authorities which are to the effect that an offender must be sentenced only for offences of which he has been convicted, or which he has admitted either by plea or by asking for the

offence(s) to be taken into consideration – see e.g. *Canavan, Kidd, Shaw* [1998] 1 Cr.App.R. 79, *Davies* [1998] 1 Cr.App.R. (S.) 380 and *Oakes* [2013] 2 Cr.App.R. (S.) 22.

47. Mr Wright then submitted that there was no tension between the identified authorities, and underlined that, in the instant case, the mere absence of an acquisitive offence on the indictment did not, in and of itself, prevent a conclusion by the judge that the murder was for gain. Mr Wright explained his reasoning, as follows:

(1) It is a fundamental principle that a court cannot sentence a defendant for a criminal offence of which he has not been convicted – whether by verdict, plea or via it being taken into consideration.

(2) However, there is an important distinction between sentencing for an offence of which a defendant has not been convicted, and determining (as in the appellant's case) the factual basis upon which to impose sentence for an offence of which he has been convicted.

(3) Thus, in the latter situation, even when the factual basis, in and of itself, could have been charged in the indictment, that did not prevent sentence being imposed on that basis, provided that a fair procedure was followed.

(4) However, consistent with *Davies* (above), it is not open to a court to impose sentence on a factual basis which amounts to an altogether more serious offence, or one of a wholly different character, in respect of which a jury's verdict could have been sought.

(5) Equally, when the prosecution makes a deliberate decision to accept pleas, or to proceed to trial on lesser charges, it is not open to the court to sentence upon the basis that amounts to a more serious offence – there being no difference in this regard between a trial and a *Newton* hearing.

(6) The fairness of the process will be important, and in the instant case the judge gave advance notice of his concerns, and gave the parties a fair opportunity to address him in relation to them.

48. In support of the Ground of Appeal, and in the combination of his written and oral submissions, Mr Wright argued, amongst other things, that:

(1) The prosecution, led by experienced Queen's Counsel, had made a deliberate decision not to indict an allegation of robbery or theft, because there was insufficient evidence to found such a Count, or to prove either offence, and any application to add such a Count would inevitably have failed.

(2) There was, in short, no evidential basis upon which to be sure that this was a murder for gain.

(3) In Opening (as summarised in para 18 above) the Prosecution had made clear that they could not say precisely what had happened once the appellant and Connor were out of camera sight, nor precisely why the appellant had killed Connor, but had suggested that it may be that they had had one of their disputes and that the appellant's anger had boiled over. It was said to be a proper inference that the appellant had assaulted Connor, intending at least really serious bodily harm.

(4) The telephone evidence showed that the decision to meet up on the fatal evening had originated from the deceased, which was inconsistent with any pre-planned intention by the appellant to kill and to cover it up. Equally, there was a gap of around three hours in the CCTV coverage, there was no direct evidence of the use of a ligature, and there was evidence from a number of other witnesses that the item referred to by Kourtney Turner was not rope and was orange in colour.

(5) By the end of the trial the prosecution's position had not changed. They had sensibly conceded in their Note for Sentence that it could not be said that the appellant had lured Connor to the scene on the basis of pre-planning; nor could it be said precisely what had transpired that had led to Connor's death. However, it did come with the background of the dynamic of the relationship between the two of them; and that the appellant had either killed Connor by strangling him and holding him in the water, or deliberately leaving him in a state where he was vulnerable to drowning, having first strangled him.

(6) The prosecution and the defence were in agreement that the appropriate starting point for the minimum term was 15 years – which represented the fair application of the criminal standard of proof to the facts of the case.

(7) In addition to concluding that the appellant had murdered Connor for gain, the judge had made other factual findings that had not represented the prosecution case (as advanced at any stage) – in particular that:

(I) The entire trip that night had been a ruse as part of a plan to lure Connor to a remote area to rob him.

(ii) The appellant had used a ligature.

(iii) The appellant had taken the ligature in order to rob Connor

(iv) The appellant had intended to kill Connor.

(8) On the evidence, none of those conclusions had been reasonably open to the judge. The facts that he found bore no resemblance to the case that had been litigated before him and, whilst it was accepted that the factual basis for sentence was ultimately a matter for the judge, that did not mean that he was able to conceive of a set of circumstances that might have occurred and convert them into a safe finding that they had occurred by no more than the repeated declaration that he was sure about them.

(9) The judge's approach had the appearance of pre-determining that he wanted to take a higher starting point than that advocated by the parties, and then seeking a justification for doing so.

(10) There was also an element of double counting of the aggravating factors.

49. Mr Pitter, in the combination of his written and oral submissions, accepted that the fact that no acquisitive offence was charged did not, in and of itself, preclude the judge's finding that this was a murder for gain – which is simply an example of murders of particularly high seriousness. Mr Pitter also accepted that the judge was not bound to accept the approach of either party, and that (having heard the case) he had a wide latitude, subject to being sure, as to the facts that he found. However, that latitude was not completely unfettered and had to be properly founded. As to that, Mr Pitter underlined, amongst other things, that:

(1) The rope, which the prosecution had always maintained may have been used as a ligature, was consistent with the normal type of item that the appellant would have had with him, and it was not entirely clear how the judge had reached the conclusion that it was a necessary instrument to tie Connor up as part of the robbery.

(2) It was not unusual for the appellant and Connor to be "lamping" in the vicinity of the murder scene, which would tend to undermine any assertion of luring there. The evidence was that they had behaved earlier that evening as they would have done normally – which included Connor leaving his bicycle at the appellant's home whilst they were out.

(3) There was no direct evidence as to what had happened at the scene. However, there was some evidence from the appellant's girlfriend (whose statements were read) of messages that he had sent her which were indicative of him having got into a physical altercation with "people" he was with at the time - which must have been a veiled reference to Connor.

(4) The background between the appellant and Connor was punctuated by aggression and violence, principally from the appellant. The relationship was abusive and had, as a feature, the appellant taking or keeping Connor's property. Such occasions were not "robberies" but were rather the appellant exploiting the dynamic of the relationship, especially when they fell out. That militated away from a "robbery" in particular in relation to pre-planning, but towards the appellant taking advantage of the relationship when the chance arose (e.g. when Connor was killed). In short, the appellant did not need to lure Connor away in order to have access to and steal his property . He would routinely do so in the knowledge that Connor could, or would, do little about it. The best illustration of which was the fallout a week or so before the killing when the appellant had refused to return property belonging to Connor.

(5) The appellant's message to the effect "*wait to see what you will get*" had to be considered in the context of serious threats uttered by Connor.

(6) The appellant's attempts to sell Connor's property after the killing, and the various lies that he told, were consistent with prior behaviour - when the appellant had taken Connor's property, without the need to have seriously harmed him or to commit any form of robbery. They were also inconsistent with a clearly formed plan.

(7) It was against that background that the prosecution had not sought to make a particular motive a pre-requisite for consideration of the allegation of murder. It was not an allegation that the prosecution had felt able to responsibly advance applying the appropriate criteria and given the impact that it could have had on the case more generally. Given that that had been the principled and reasoned approach at trial, it was not appropriate to assert otherwise at this stage.

(8) The respondent maintained that that the correct starting point for the minimum term was 15 years.

(9) The judge found that there was a plan to lure Connor to the scene to rob him, but that the intention to kill had only been formed after the robbery and after the realisation that the appellant could not otherwise avoid detection. Such findings were not consistent with murder for gain, but rather murder to evade detection "after the event".

(10) The respondent remained of the view that from a starting point of 15 years there were a number of aggravating factors (as set out in the combination of paras 26(3) & 39 above above) which would have substantially increased the ultimate minimum term. The ultimate assessment was a matter for this Court.

Discussion

50. There was no Pre-Sentence Report, and we agree that it was not necessary to obtain one.

51. The judge presided over the appellant's trial, and was thus in a very good position to determine, to the criminal standard, the factual basis upon which to impose sentence. As *Turner* (above) underlines, a judge is not bound by the way that the prosecution puts its case. Equally, the judge gave advance notice to the parties that he did not readily accept the prosecution case that there was no pre-planning and that the murder was not motivated by gain, and he ensured that a process which was fair to both sides was followed before he determined those issues. Equally, we agree with the parties that, in the particular circumstances of this case, the absence of a charge of robbery or theft did not, in and of itself, preclude a finding that this was a murder done for gain. However, the findings of fact made by the judge had to be properly founded.

52. The critical findings of fact were that:

(1) Under the pretence of going "lamping", the appellant had planned from the outset to lure Connor to a remote spot, and there to rob Connor of his mobile phone, bracelet, and bicycle, and had taken a length of rope with him to assist in the robbery.

(2) At the scene the appellant had maintained the pretence of "lamping" until the opportunity had arisen to carry out the robbery.

(3) Having robbed Connor, and realising that, this time, he could not avoid detection, the appellant had then formed an intention to kill, and had strangled Connor with a ligature and had held him down in the water until he drowned.

53. We observe that this was a tenuous basis upon which to decide that this was a murder done for gain, which thus attracted a 30 year starting point. In any event, we agree with the measured submissions made on behalf of the Respondent that, save for the finding of the use of a ligature in the course of the murder, and of an intention to kill, the critical findings of fact were not properly founded.

54. It follows that the starting point for the minimum should have been 15 years, and that we must balance afresh the aggravating and mitigating factors.

55. The aggravating factors were the manner of the killing; the background of bullying etc; the stealing of the bicycle and the immediate attempt to sell it; and the various attempts by the appellant to cover up what he had done - including the suggestion of possible suicide. The mitigating factors were limited to the appellant's age (though the judge did not find him to have been immature for his age) and the appellant's lack of previous convictions (which was of little weight given the background of bullying etc).

56. In our view, the aggravating factors significantly outweighed the mitigating factors, and should have resulted in an increase from the starting point of 15 years to an ultimate minimum term of 21 years.

Conclusion

57. For the reasons set out above, we quash the minimum term of 25 years, and substitute for it a minimum term of 21 years. To that extent, this appeal is allowed.