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IN THE COURT OF APPEAL

CRIMINAL DIVISION

**[2022] EWCA Crim 1333**



No. 202202462 A3

Royal Courts of Justice

Friday, 23 September 2022

Before:

LADY JUSTICE CARR  
MR JUSTICE GRIFFITHS  
MR JUSTICE HILLIARD

**ATTORNEY GENERAL'S REFERENCE:  
Under Section 36 Of The Criminal Justice Act 1988**

REX  
V  
BEN SEAN SOLOMON

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MR C SHERRARD KC appeared on behalf of the Appellant.

MS S PRZYBYLSKA appeared on behalf of the Respondent.

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**J U D G M E N T**

LADY JUSTICE CARR:

**Introduction**

- 1 We have before us an application by the Attorney General for leave to refer a sentence on the basis that it is unduly lenient. The offender is Ben Sean Solomon, now 35 years old. We grant leave.
- 2 Solomon was charged with blackmail contrary to s.2(1) of the Theft Act 1968 and assault occasioning actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861. The victim in each case was a former partner. The two had been in a relationship which the victim ended. Solomon reacted by threatening to send videos of the two of them having sex to her friends, family, colleagues and former colleagues if she did not pay him money. He was arrested, interviewed and bailed by police in relation to the offence of blackmail.
- 3 Whilst on bail, he and the victim rekindled their relationship. He went to her house one night but was aggrieved when she would not have sex with him. The next day he prevented her from leaving the house and assaulted her over a period of over two hours, throttling her to the point of unconsciousness at one stage, slapping her and pulling her hair out by the roots. She suffered scratching and bruising and in her victim impact statement said she had been diagnosed after the incident with post-traumatic stress disorder, albeit neither the diagnosis nor the link to the assault were accepted by Solomon.
- 4 Having originally pleaded not guilty, on the third day of trial in February 2022 before HHJ Mousley KC ("the judge"), and after the victim had given oral evidence in chief, he changed his pleas to guilty. He did so after seeking and being granted an indication of sentence in accordance with *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 WLR 2532 ("*Goodyear*").
- 5 The judge indicated a maximum sentence of two years' custody on both counts ("*the Goodyear* indication"). Solomon was re-arraigned, pleaded guilty and the jury was invited to and did return guilty verdicts.
- 6 On 8 July 2022 the judge sentenced Solomon to 18 months' imprisonment for the assault and six months' imprisonment to run concurrently for the blackmail. For the purpose of the Sentencing Council Guideline for Assault ("the Guideline") he adopted a categorisation of 2A. A five-year restraining order was also imposed.
- 7 The submission for the Attorney General is that the sentence for the blackmail offence was unduly lenient. On one view, there should have consecutive sentences; but, on the basis of concurrent sentences, whilst indicating that he would treat the blackmail as a factor aggravating the assault, the judge adopted a sentence identical to the starting point for a Category 2A assault. Moreover, it is said that the judge wrongly categorised the assault offence as Category 2A when it was 1A offending, particularly where there was bruising and swelling to the neck and a diagnosis of PTSD. The overall custodial sentence, submits the Attorney General, should have been in the region of three to three and a half years. Despite the *Goodyear* indication, in all the circumstances of the case, the overall interests of justice are said to permit us to exercise our discretion to interfere with and increase the sentence below.

## **The facts in detail**

- 8 Solomon and the victim were in a relationship for about nine months from May 2020. They did not live together, but they spent time at each other's houses. The victim ended the relationship on Saturday, 6 February 2021, after which she drove Solomon to the port so he could get the ferry home. Her evidence at trial was that he was someone who alternated between begging her to change her mind and being verbally aggressive. She blocked his telephone number. Solomon began to leave WhatsApp voice messages for the victim. Initially, he complained that the breakdown in the relationship was her fault.
- 9 On 9 February 2021 he began to send messages to her about money, telling her in terms that if she did not repay £150 he had spent on clothes and trainers as presents for her he would send videos that he had taken of them having sex together to her employer, ex-work colleagues, friends and family. The victim had consented to the recording of the videos at the time during their relationship, although Solomon had previously indicated that he had deleted the videos.
- 10 We have listened carefully to the WhatsApp messages. They are vicious, abusive and threatening in their terms. By way of example only, in one of the messages he said this:
- "I swear on my baby brother's grave, if you do not send me the £150 you owe me for those clothes and trainers I will send all of those videos to your bosses and your ex-bosses and everyone that knows you, because you are a fucking fat slut and you treated me like shit and there is no way at all that you are going to treat me the way you have done and get away with it. If I am not recompensed by 9 o'clock tomorrow morning, I will release the videos. Your life will be ruined, believe me."
- 11 In another he said:
- "I swear to God, if you haven't paid me back the money that you owe me then I will send all those videos everywhere. I will get arrested. There is five people waiting to send them. You will not live this life like this. You're a fucking tramp. You're a fucking bucktoothed slag who I made lose loads of weight because you were fucking overweight. I passively aggressively made you lose weight because you fucking weren't fit for purpose. Look at you now. Look at you now. You look great. Thank you. I know. Thank you. Send me the £150...Test me. Test me. See what happens."
- 12 Another short message:
- "Send my money cunt".
- 13 In total Solomon sent seven messages on the night of 9/10 February 2021. The next day the victim telephoned 101 for advice. She gave an initial account later that day. She played the voice messages saying she did not believe that Solomon would send out any videos. She did not want to make a formal complaint at that stage.
- 14 On 12 February the victim unblocked Solomon's telephone number and spoke to him briefly, saying that she did not want to get back together with him. He sent her further messages on 14 February and she blocked his number again.
- 15 Unbeknown to the victim, on 9 February Solomon had sent emails to her work email address attaching copies of the videos that he proposed to send. He also sent a screenshot from her employer's website showing the identity of her colleagues. He sent further emails

on 10 and 11 February apologising for his earlier emails and telling her to “forget the threats”. He said that he loved her and could not eat or sleep. The victim did not read these emails until she logged into her work account a week later, on 16 February. Now realising that Solomon did have the videos he claimed to have, she was sufficiently concerned to go to the police that day to make a formal complaint and give a witness statement. She showed the police the videos and played them the voice messages - to her obvious distress.

16 Solomon was arrested on suspicion of blackmail later that day. His telephone and laptop were seized. He said:

"I deleted everything. I know I shouldn't have sent them."

17 He was interviewed under caution. He said that his behaviour had been “completely unacceptable” and that if he “got done for the blackmail” he would be sent down from university. He said he was “pissed out of his head” when he sent the messages and he was sorry he had done it. He had not sent the videos on to anyone else. He was released on police bail with conditions not to contact the victim or to go to her house.

18 On 14 March 2021 the victim accidentally “liked” a post by Solomon on Pinterest, causing a notification to be sent to him. She sent a follow up message explaining her mistake and saying that she would tell the police so that they would not think that he had breached his bail conditions. He asked her not to tell the police and they ended up speaking on the telephone and Solomon apologised. They began to see each other again in person.

19 On 17 March 2021 the victim made a withdrawal statement.

20 On 11 April 2021 Solomon and the victim exchanged messages agreeing to meet that evening. The victim then sent Solomon a message seeking to cancel that meeting saying she was too tired and felt low. He called her and said:

"Are you fucking joking? I just want to have sex with you. I don't care."

21 She was upset that he did not care about her state of mind. He went to her house, arriving later that evening, smelling of alcohol. She went to bed. He came into her bedroom repeatedly, ranting at her and calling her a slut. She telephoned her father and he ended the call. Eventually, they both went to sleep.

22 The next morning, 12 April, Solomon said that he had called in to work sick. He started drinking at 9am. He drank half a bottle of wine from the victim's kitchen, then went out and bought a bottle of vodka which he drank and then found a bottle of gin in the kitchen which he drank too. The victim was working from home and repeatedly asked him to stop drinking. At some point he collapsed in her bedroom and fell asleep and she urged him to sleep it off.

23 At about 2pm, he woke up and he started to abuse the victim verbally, calling her a slut and saying that she would never find anyone like him again. She asked him to leave and he refused. She said she would call her father and retreated to her bedroom. Solomon followed her into the bedroom. He picked her up. He threw her, causing her to bump her head and elbow on the floor. He put his hands around her neck and, not for the first time, as we shall see, began to throttle her. She could not breathe and struggled to get free. He was shouting abuse into her face. He let go and slapped her across the face. She got up and ran downstairs making for the front door. He chased her. As she reached the front door, he grabbed a handful of her hair and pulled her back. He threw her to the floor. A hank of hair was later found by the front door. He climbed on top of her and began to throttle her again. She could not breathe. He let go and left her gasping and crying on the floor. He took the

key to the door and went into the kitchen. She was shaking and in shock. She went into the garden. Solomon came outside and said "I love you." She said, "You do not do that to someone you love". He went inside. She followed him and told him to leave. She asked him to leave again. He lunged at her, grabbed her throat and squeezed. He let go and slapped her face. The victim made repeated attempts to get hold of the door key, her mobile telephone or the panic alarm with which the police had provided her after the blackmail. On each occasion Solomon stopped her and throttled her with his hands around her neck. At one point, he said:

"I'll choke you and have sex with your dead body."

24 The victim asked him again to leave, but he grabbed her by the throat. The victim came to on the ground in a pool of water with Solomon a few feet away. She inferred that she had lost consciousness.

25 Finally, at about 4.30pm, she managed to reach the panic alarm and activated it. The police arrived about five minutes later. Solomon was saying to the victim:

"Tell them everything is all right."

26 She was very upset and told the officers what had happened. She had scratch marks to the right side of her face and bruising and swelling to her neck, arms and legs and she invited an officer to feel a large lump on her head. She was trying to drink water but her throat was too painful for her to be able to swallow. There were signs of a struggle: water on the floor, clothes and cat food scattered about and a hank of hair, as we have said, on the floor.

27 Solomon was arrested and cautioned. He had to be physically restrained from approaching the victim and he kept shouting her name. He was aggressive and made offensive comments to the officers. He was taken to a police station, interviewed under caution the following day, giving a prepared statement in which he essentially denied making any assault and said in fact it was she, the victim, who had assaulted him numerous times. He had only defended himself by restraining her. He had not locked her in.

### **The trial and circumstances of the *Goodyear* indication**

28 The trial commenced on 9 February 2022 and the victim gave oral evidence-in-chief. The following day Solomon's counsel and solicitors withdrew due to professional embarrassment and fresh counsel, Mr Murray, was appointed to cross-examine the victim. The judge adjourned the trial in order to allow Mr Murray time to prepare. Solomon then asked formally to instruct Mr Murray and new solicitors, a request to which the judge acceded, with legal aid being transferred.

29 Early the next day, 11 February, Mr Murray sought from the judge a *Goodyear* indication on the basis that pleas would be entered on the basis that Solomon had only grabbed the victim's neck and not slapped her, nor had he made a comment about draining her blood. In a written submission anticipating the request for a *Goodyear* indication, Mr Murray stated that, on the basis of brief discussions with the Crown, it appeared to be "common ground" that the assault would be a Category 2 harm case for the purpose of the Guideline. He suggested that culpability was Category B. As for the blackmail offence, reference was made to *R v Roberts* [2019] EWCA Crim 1931 where at [35] Simon LJ had identified relevant factors as including the relationship between the amount of money demanded and the means available to pay it, and the psychological harm done and intended to be done. It was suggested by Mr Murray that the offending here was more analogous with the offence of disclosing private sexual photographs and films with intent to cause distress under s.33 of

the Criminal Justice and Courts Act 2015, an offence carrying a maximum sentence on indictment of two years' imprisonment.

30 At the oral hearing before the judge it was suggested that the slapping was immaterial to sentence since culpability was A in any event. The judge also confirmed that Solomon would have to accept responsibility for "the injuries that were suffered", but noting that he did not have any evidence yet of full victim impact. The judge recognised that there would need to be further information before any sentencing exercise could take place, but, nevertheless, agreed to give a *Goodyear* indication as to the maximum sentence.

31 Prosecuting counsel observed that the victim had given evidence about the slap. The police had seen and felt bumps on her head and a clump of her hair had been found. She agreed though that the slapping would make no difference to sentence. She told the judge that there was long term psychological harm. The victim was now on an increased dose of antidepressants. She had been particularly affected by having to give evidence. She wanted to make an impact statement. There then followed this exchange:

"Ms Daulton: ... In relation to sentencing guidelines, I know my learned friend has outlined where he sees it sitting in the document he has sent you. The Crown feels very strongly that it is culpability A ...

His Honour Judge Mousley: 2a, yeah.

Ms Daulton: 2a, yes, with a number of aggravating features, particularly the fact that he was on bail for the blackmail offence at the time --"

32 The judge was then referred to Banks on Sentence in relation to the blackmail offence. After discussion about the circumstances of the blackmail offence, the judge then indicated a maximum sentence of two years' imprisonment if Solomon pleaded guilty to both counts. That indication was met with silence, neither counsel commenting on the level of sentence indicated. Mr Murray sought time to take instructions, a request which was granted, and subsequently Solomon pleaded guilty.

## **The sentencing process**

### The victim

33 In her evidence-in-chief on 10 February the victim had said that she had ended her relationship with Solomon because he was emotionally controlling and abusive, verbally abusive, and had become physically abusive over time. She had not known if the threats were empty or real initially, but upon discovery of the emails and voicemails became petrified by the blackmail. She was emotionally broken and had been prescribed antidepressants. She suffered the scratching and bruising to her jaw, shoulder, left forearm, under her chin, chest, elbow and legs as a result of the assault.

34 She made a detailed victim impact statement dated 28 March. During her nine-month relationship with Solomon, he had crushed her self-esteem. He constantly criticised her body, took photographs of her when she was sleeping and sent them to her later with uncomplimentary comments. She had lost almost a third of her already low body weight during their relationship, which he encouraged her to believe was a good thing. He would not tolerate any dissent and she lived in fear of upsetting him. He behaved in a violent and emotionally controlling way. He was physically powerful and would become aggressive without warning. The offence on the indictment was not the first time that he had physically assaulted her. He accused her of infidelity on a regular basis. She was afraid to socialise or see her family. She had been outgoing but had become withdrawn. She felt isolated,

depressed and anxious. She said that after the assault she had been diagnosed with post-traumatic stress disorder and her dosage of antidepressants had been increased. She had struggled to leave the house for weeks afterwards and had flashbacks to Solomon choking her. She suffered nightmares for months and was frightened that Solomon would find her and attack her. She now found work very difficult.

### Solomon's personal circumstances

- 35 As to Solomon's personal circumstances, he had five convictions for seven offences, none of which were violent, but they did include offences of burglary, theft and amphetamine possession. Further, Solomon had a Scottish conviction from 2015 for behaving in a threatening or abusive manner likely to cause fear or alarm committed in a domestic context, for which he was fined. As at the date of sentence, the offender was the subject of proceedings in the Magistrates' Court where ultimately he pleaded guilty to two offences of assault by beating in September 2021. The outcome was not known to the judge at the time of sentence and, therefore, could not play any part in the sentencing exercise below. The victim, however, was Solomon's new partner following the victim and there were striking similarities with Solomon in drink abusing his partner verbally and physically, including by grabbing and squeezing her neck in a series of sustained assaults. Again, Solomon had pleaded guilty during the trial.
- 36 In terms of reports, a short format pre-sentence report was prepared. Solomon had earlier in his life joined the Royal Navy, but had been discharged whilst being diagnosed with multiple sclerosis. He was now an apprentice quantity surveyor training at Plymouth University. It was noted that his discharge from the Navy had led to a reduction in income and his self-perceived status. It was considered likely that his frustration and anger arose out of the course that his life had taken, which had leaked into his relationship with the victim. A difficult childhood was described, with both parents being heavy drinkers and having an abusive relationship. They separated when he was only nine. He claimed that the blackmail offence was caused by taking anabolic steroids (although he had in fact stopped taking those in January 2021). He was reluctant to discuss the offending in detail, but sought to portray the victim in a negative light, referring to her mental health and claiming that she had been unfaithful to him.
- 37 Not surprisingly, the Probation Officer commented on Solomon's limited insight and the role of alcohol in the offending. She rejected the suggestion that the blackmail offence was the result of steroid misuse and the assault the result of excessive drinking. She commented on the planning and calculation involved in the blackmail offence and considered that the trigger was his anger at the victim ending their relationship; his aim was to punish, control and humiliate her. The assault was the result of his anger at the victim refusing to have sex with him and his discovery, on his account, that she had had sex with his friend. He held "strong offence-supportive attitudes and distorted entitlements/beliefs regarding his intimate relationships". The author of the pre-sentence report expressed concern that after expressing remorse for the blackmail in the first police interview, Solomon had gone on to carry out the assault that he did. Solomon was assessed as posing a high risk to his sexual or romantic partners, but a low risk to general members of the public. He posed a medium to high risk of re-offending, owing to his previous offending.
- 38 There were five personal character references for Solomon, although some went as far back as 2016. There was also evidence of a potential job offer. It was said that Solomon was now abstaining from alcohol and working as a live-in carer.

## The Sentence

- 39 In sentencing, the judge referred to Solomon's "appalling behaviour". He referred explicitly to the slapping of the victim during the course of the assault. He noted the significant effect of the offending on the victim. He referred to the conclusion of the pre-sentence report's author indicating a significant risk of re-offending and a risk of causing serious harm to partners. The judge considered that the whole course of conduct could be reflected in the sentence for the assault. It involved high culpability with strangulation and a prolonged assault and the causing of significant harm and psychological trauma to the victim, which the judge considered fell into Category 2 for harm. He described it as harm falling between Categories 1 and 3. The starting point in the judge's assessment was therefore 18 months' imprisonment with a range of 36 weeks to two and a half years. The judge said that the offence of assault was aggravated by the previous convictions in 2015 and 2016 and the fact that the assault was in breach of police bail. It was further aggravated by the history of blackmail and the abuse of the victim and by the domestic context. Finally, Solomon was drunk at the time of the offence.
- 40 The judge identified the mitigating factors as being the evidence of good qualities in personal references, Solomon's work to get a degree and qualifications, his recent engagement with mental health services and the fact that he had stopped drinking. The judge indicated he would give no reduction for a plea entered mid-trial. The least sentence, said the judge, that he could impose was one of 18 months' imprisonment. He considered that sentence could not be suspended due to the evidence of risk. The sentences imposed were therefore one of six months' imprisonment on Count 1 for blackmail and 18 months' imprisonment on Count 2 concurrent. A restraining order prohibiting contact with the victim and excluding Solomon from the street where she lived was imposed for a period of five years.

## The parties' submissions in summary

- 41 We record at the outset our appreciation of the excellent submissions we have received both orally and in writing from both counsel before us, Ms Przybylska for the Attorney General and Mr Murray for Solomon.
- 42 For the Attorney General, Ms Przybylska submits that the sentence in relation to the blackmail was unduly lenient. On one view the sentences imposed ought to have been consecutive. They did not arise out of the same incident or facts, nor was this a series of offences of the same or a similar kind. But if the judge chose not to impose a consecutive sentence, it became necessary to adjust the sentence on the assault to reflect the seriousness of the overall offending. Although the judge indicated that the blackmail offence was a factor aggravating the assault, he in fact imposed a sentence that was identical to the starting point for a Category 2A assault. Moreover, the offence of assault occasioning actual bodily harm was wrongly categorised by the judge, submits Ms Przybylska. Bruising and swelling to the neck is serious in the context of the assault offence. The seriousness of the harm caused became even more apparent once the victim impact statement was available, indicating a diagnosis of PTSD following the assault. So the submission is that harm should have been categorised at 1 not 2.
- 43 If the approach of imposing a sentence on the assault and a concurrent sentence on the blackmail was to be followed, the starting point for the sentence on the assault in isolation should have been 2 ½ years' imprisonment, with a range of 1 ½ years to four years. The sentence should then have been increased, it is submitted, within the range to reflect the multiple aggravating factors: the blackmail offence, the fact that Solomon was on bail, his previous convictions, the domestic context of the offence, the efforts made by Solomon



during the assault to prevent the victim from leaving. All of these factors would bring the offending towards the top end of the range for Category 1A. The mitigating factors are said to be remarkably limited. Solomon claimed to have stopped drinking alcohol and had made some efforts to engage with mental health services, but all of that has to be taken into account in the context of what was a detailed pre-sentence report setting out Solomon's lack of empathy and lack of insight into the causes of his offending, his efforts to blame his drug and alcohol use for the offending and his attempts to blacken the victim's character.

44 Thus, the overall submission for the Attorney General is that the custodial sentence ultimately should have been in the region of three to three and a half years, at least double that which was in fact imposed.

45 As for the *Goodyear* indication, that should not prevent this court from curing the error. The mis-categorisation was that of the judge, not prosecuting counsel. She did not help the judge, but, equally, she did not directly influence the decision. She did submit, it was said, that it was inappropriate to proceed to a *Goodyear* indication without full information. Whilst prosecuting counsel must bear some responsibility for the situation, it is apparent from the transcript that the hearing as a whole was fluid and discursive and must have been difficult. This was a serious case. The sentence fell substantially short of what would have been reasonable in the circumstances. The overall interests of justice permit us to interfere with and increase the sentence.

46 For Solomon, Mr Murray submits that, whilst the overall sentence of 18 months' imprisonment could be considered lenient, it was not unduly so and should stand. The judge was best placed to determine the sentence and, given the nature of the *Goodyear* indication and the unique procedural history of the case, it would be unfair to resile from it. If it was premature for a *Goodyear* indication to be given, or if there was an issue with the categorisation of harm, this was something for prosecuting counsel to raise. The sequence of events created a legitimate expectation on the part of Solomon that the ultimate sentence would not exceed two years' imprisonment.

47 So far as the blackmail is concerned, Mr Murray urges that this was no typical blackmail offence - with only seven messages, a small volume over a compressed period of time, followed by statements by Solomon that he had not meant what he had said.

48 Further, as for the assault, the assault offence was correctly categorised by the judge. The bruising and swelling to the neck were an almost inevitable consequence of the strangulation, a feature reflected in high culpability. The diagnosis of PTSD was unsupported. It was never admitted and, in any event, not clearly attributable to the indicted offences, as opposed to other alleged incidents and behaviours from Solomon. It formed no part of the case against Solomon until seven weeks after his guilty pleas. Mr Murray emphasises that a sentencing court must not make assumptions unsupported by evidence about the effects of an offence on the victim.

49 If there is to be no interference with the judge's categorisation of harm on the assault offence, Mr Murray ventures that there can be no possible basis for interference with the sentence on the basis that it is unduly lenient. Concurrent sentences were appropriate on the facts. Some of the alleged aggravating features relied upon by the Attorney General, says Mr Murray, are of limited impact and there was extensive personal mitigation. Reference is made to time spent on conditional bail with multiple restrictions, employment as a live-in carer and his studies, a bleak childhood and the fact that he was lightly convicted. Further, Solomon had voluntarily sought to address factors linked to his offending.

## Discussion

- 50 References under s.36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type: see *Attorney General's Reference No.132* [2001], *R v Johnson* [2002] EWCA Crim 1418, [2003] 1 Crim App R (S) 41 at para.25. We remind ourselves that the hurdle for appellate interference to be justified is a high one. The sentence in question must be not only lenient, but unduly so.
- 51 Assault occasioning actual bodily harm carries a maximum sentence of five years' imprisonment. Blackmail carries a maximum sentence of 14 years' imprisonment. In relation to the assault, the court was obliged to have regard to the Guideline. High culpability offences include those where there is strangulation, suffocation or asphyxiation, a prolonged or persistent assault and a vulnerable victim owing to age, personal characteristics or circumstances.
- 52 The Guideline provides for three levels of harm. Offences causing Category 1 harm are where there is "serious physical injury or serious psychological harm and/or substantial impact upon the victim". Category 3 harm is "some level of physical injury or psychological harm with limited impact upon the victim". Category 2 harm falls between Categories 1 and 3. The starting point for Category 1A offending is 2 ½ years' imprisonment. The starting point for Category 2A offending is 1 ½ year's imprisonment with a range of 36 weeks to two and a half years.
- 53 Like the judge, we consider that the Sentencing Council Guideline on Domestic Abuse was applicable. Solomon's offending was set in the context of his intimate relationship with the victim. That guideline states:
- "The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them."
- 54 On the question of totality, the relevant Sentencing Council Guideline provides:
- "All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence."
- 55 Assuming for a moment that it would not be right or just to permit the Attorney General to go behind the apparent agreement by prosecuting counsel before the judge that the assault was Category 2A offending, then on any proper view it was offending right at the top of Category 2A. There was high Category A culpability, given the strangulation and suffocation, in what were in fact prolonged and persistent assaults inside the victim's house lasting hours, including in her bedroom. Solomon repeatedly constricted the victim's throat, on one occasion to unconsciousness. We do not consider that the fact that no weapon was used, a Category C factor, meaningfully diminishes the level of culpability in any way. There was also high Category 2 harm with bruising and swelling to the neck and, putting PTSD to one side, on any view the assault had a very real impact on the victim.

- 56 There were further multiple aggravating features: Solomon's previous convictions, the commission of the assault offence whilst on bail for the blackmail, the domestic context, the steps taken by Solomon to prevent reporting, and the fact that he was under the influence of alcohol at the time. There is in our judgment only limited mitigation, given the clear lack of empathy. There were some character references, although they were largely out of date and many did not address Solomon's clear offending history both before and after the index events.
- 57 In our judgment, for the assault alone, a custodial sentence in the region of 27 months was justified.
- 58 Adopting the judge's structure of concurrent sentences, there then needed to be a material increase to reflect the blackmail offending, which amounted to additional grave criminality. The seriousness of offending such as blackmail has been consistently recognised by the courts, not least because of the considerable distress that such offending causes to its victims. The threats of disclosure here were particularly unpleasant, not only in their menacing, threatening and abusive tone and content, but also in terms of the extent of disclosure threatened - not only to friends and family, but also work colleagues. The threats were always potentially real, and confirmed as real the moment the victim opened her work email on 16 February 2021 and saw the attachments.
- 59 In our judgment, to reflect Solomon's overall criminality, a sentence of not less than three years' imprisonment was required. It would have been in the interests of justice to go outside the range for Category 2A offending, given the imposition of a concurrent sentence on the blackmail count. We would therefore conclude, without any need to interfere with the categorisation of harm on the assault, that the overall sentence of 18 months' imprisonment was not only lenient, but unduly so.
- 60 The question remains for us as to whether, despite this conclusion, we should interfere, given the *Goodyear* indication. As identified in *Goodyear* and set out in the Criminal Practice Direction at CPD7 Sentencing C, any basis of plea must be reduced into writing: see *Goodyear* at [66]. Prosecuting counsel should refer the judge to their statutory powers and any relevant sentencing guidelines or authorities. Prosecuting counsel should not do or say anything that indicates or conveys support for or approval of the indication given: see *Goodyear* at [70]. An indication once given is binding on a judge, save in exceptional circumstances. Defence counsel is personally responsible for ensuring that, amongst other things, their client fully appreciates that any sentence indication remains subject to the entitlement of the Attorney General to refer an unduly lenient sentence to the Court of Appeal: see *Goodyear* at [65b)].
- 61 Consistent with the quality of his representation of Solomon throughout, Mr Murray confirmed to us that he discharged this duty and advised Solomon appropriately that any sentence indication would be subject to the entitlement of the Attorney General to make a reference application. If counsel for the prosecution has addressed their responsibilities in accordance with *Goodyear*, the discretion of the Attorney General to refer a sentence is wholly unaffected by the advance sentence indication process: see *Goodyear* at [71].
- 62 The position on the facts here of course is more complicated. In *Attorney General's Reference R v Powell* [2017] EWCA Crim 2324, [2018] 1 Crim App R (S) 40 this court considered the position where on a reference the Attorney General seeks to depart from a prosecution concession as to categorisation made when the judge gave a *Goodyear* indication. The court identified the following:

- i) Where an erroneous concession as to categorisation is made by prosecuting counsel in the context of a *Goodyear* hearing, closer consideration will be required than in ordinary circumstances.
- ii) Following *Goodyear* at [71], if prosecuting counsel has done anything which may indicate or convey support for or approval of the sentence indication, the court will consider on a case-by-case basis in the light of everything said and done by prosecuting counsel whether to interfere with and increase the sentence.

63 Relevant factors may include:

- i) Whether the possibility of a reference is mentioned during the *Goodyear* hearing and whether it is suggested that the offender was not made aware of the possibility prior to pleading guilty (although it is clear that a failure to point this out does not of itself prevent this court from increasing a sentence on a reference: see *Attorney General's Reference No. 48* [2006], *Farah* [2006] EWCA Crim 2396, [2007] 1 Crim App R (S) 90 at [20] to [23]);
- ii) Whether prosecuting counsel's mischaracterisation influenced the judge's decision;
- iii) Whether prosecuting counsel said anything to convey acceptance or approval of the indication given;
- iv) Whether prosecuting counsel intervened when an inappropriate indication was given;
- v) The overall interests of justice, involving a consideration not only of the offender's position, but also that of the victim and the wider public interest in just and proportionate sentences being imposed for serious crime.

64 We do not consider that it would be just to interfere with the judge's categorisation of harm on the assault offence. The offending may have fallen into Category 1 offending, but prosecuting counsel clearly appeared to agree with categorisation 2 and, amongst other things, the victim's diagnosis of PTSD and its attribution was the subject of challenge. There was no medical evidence one way or the other. The question of Category 1 harm was not explored fully before the judge, as it undoubtedly would have been had there not been agreement on Category 2.

65 However, as indicated already, even adopting Category 2 harm, the sentence imposed was unduly lenient. We consider that it is not only open to us to interfere with the length of the sentence imposed, but right that we should do so. Prosecuting counsel gave no express endorsement to the length of sentence identified by the judge in the *Goodyear* indication. She was merely silent. She had made it clear that a victim impact statement was not yet available. She did not propose a maximum custodial sentence of two years. Indeed, she had indicated that it was Category 2A offending with multiple aggravating features. It was a fast-moving and fluid hearing which amounted to more of an extended and often interrupted conversation between the parties and the judge than a formal structured process. Further, as indicated, Solomon was made well aware prior to pleading guilty of the possibility of a reference by the Attorney General. There can be no complaint by reference to legitimate expectation in circumstances where an application for a reference is made.

66 We therefore consider that it is in the overall interests of justice to interfere with the length of sentence imposed, taking into account Solomon's position, that of the victim and the wider public interest. The sentence imposed was unduly lenient and it is right in all the circumstances that the gravity of the overall offending is duly marked.

## **Conclusion**

67 We therefore allow the reference. The sentence on Count 2 will be quashed and in its place will be substituted a sentence of three years' imprisonment, of which Solomon will serve half in custody.

68 The circumstances of this case provide a salutary reminder of the difficulties that can arise in the context of *Goodyear* indications, unless the relevant requirements are complied with: see also by way of example the recent case of *R v AB & Ors* [2021] EWCA Crim 2003. The judge was clearly and commendably endeavouring to assist the parties in proceeding to give the indication that he did, but it was not an easy or simple sentencing exercise, as the transcript of what was a lengthy discussion with the parties at the time reveals. As was said in *Goodyear* at [74], a judge is most unlikely to be able to give an indication, even if one is sought, in complicated or difficult cases, unless issues between the prosecution and the defence have been addressed and resolved. Judges should ensure that they are armed with all relevant information, including any victim impact statements, before agreeing to give any indication, given the significance of such a step. A *Goodyear* indication is only as safe as the foundation upon which it is built. Further, prosecuting counsel should guard against the giving of any appearance of endorsement or concession expressed or implicit in respect of any indication being given.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge