



Neutral Citation Number: [2023] EWCA Crim 790

Case No: 202301664 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WARWICK
HER HONOUR JUDGE BERTODANO
23N51364522

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2023

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE JACOBS
and
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(Recorder of Sheffield)

REFERENCE BY THE ATTORNEY -GENERAL
UNDER S.36 CRIMINAL JUSTICE ACT 1988

Between:

REX

Appellant

- and -

JACK HARTLAND

Respondent

Joel Smith for the Solicitor General
Ian Speed for the Respondent

Hearing date: 29 June 2023

Approved Judgment

LORD JUSTICE STUART-SMITH:

1. His Majesty's Solicitor General applies for leave to refer a sentence which he regards as unduly lenient. We give leave.
2. The offender pleaded guilty to three counts, with four other counts on the indictment being left on the file on the usual terms. He pleaded guilty to counts 4 and 7, which were offences of non-fatal strangulation and assault occasioning actual bodily harm, at the PTPH. At that point he maintained a not guilty plea to count 1, which was a charge of coercive and controlling behaviour. The trial was fixed for the week of 15 May 2023. On 17 April 2023 he changed his plea on count 1 to a plea of guilty. Sentence was passed by Her Honour Judge de Bertodano in the Crown Court at Warwick on 21 April 2023 as follows:
 - i) On count 1, which was an offence of controlling or coercive behaviour in an intimate or family relationship contrary to s.76(1) and (11) Serious Crime Act 2015, on his plea of guilty he was sentenced to a community order, which we shall detail in a moment.
 - ii) On count 4, which was a count of intentional strangulation contrary to s.75A(1) (a) Serious Crime Act 2015, on his plea of guilty he was again sentenced to a community order, as below.
 - iii) Lastly on count 7, which was an offence of assault occasioning actual bodily harm contrary to s.47 Offences Against the Person Act 1861, upon his plea of guilty he was sentenced to a community order, as below.

The community order, which ran concurrently on each of the three counts, was a community order for 2 years, with a rehabilitation activity requirement for 15 days. Other ancillary orders were made to which we do not need to refer.

The Facts

3. In briefest outline, the case concerned a prolonged period of coercive and controlling behaviour with persistent domestic abuse. Count 1 was based on coercive and abusive behaviour over about a year, which became progressively more serious after about August 2022 and which culminated in two particularly serious incidents on 21 and 23 November 2022, those incidents being the subjects of counts 4 and 7.
4. We shall refer to the victim as 'J'.
5. The offender and J met in late 2019. J was a friend of the offender's sister. They began a relationship in February 2020 which had initially been a happy one. The offender moved into J's family home in February 2020, at a time when the UK was experiencing the first Covid lockdown measures.
6. J fell pregnant in January 2021. She was particularly unwell during the pregnancy and was regularly hospitalised. Around this time the offender showed signs of jealousy towards J's relationship with her mother. Weekly verbal arguments began to develop. The offender then lost his employment, which caused financial difficulties and further

arguments.

7. J gave birth to the couple's son in October 2021. In the immediate aftermath of the birth, the offender remained supportive and loving, but arguments began to develop thereafter. In particular, the offender would be verbally aggressive towards J when woken in the morning, calling her names including, "stupid bitch", "whore", "useless", "pathetic", "disgusting", a "liar" and a "terrible mother". J described the verbal abuse as lasting "around 6 months non-stop". The offender was at this time still living in J's family home with her parents.
8. As a result (and after J's parents intervened on her behalf when the offender became abusive) the offender was asked to leave the family home. The offender, and two days later J, moved into the offender's grandmother's home in July 2022. Around a month later, they moved into their own flat.
9. After the couple moved into the flat, the offender became increasingly aggressive, both verbally and physically. During the period between August and November 2022 the offender would regularly physically abuse J. This included pulling her hair and assaulting her causing bruising. He would also on occasion prevent her from leaving the flat. The offender would blame J if he had lost something, telling her to, "Find it or I'll do you in". J became timid and changed her behaviour so as not to annoy the offender. She also cut herself off from family and friends as the offender did not like them.
10. J did not report the assaults to her family or the authorities and the offender would often apologise and appear contrite, only to continue his behaviour later.
11. On one occasion when J had left the flat to visit her parents with their young son in a pushchair, the offender chased after her, elbowed her to the jaw, and knocked her to the floor. As she lay on the floor the offender told her to "get up off the floor or I'll kick you".
12. In November 2022 the offender's behaviour got even worse. On 21 November 2022, J and the offender argued over the messy state of their flat. The argument was prolonged - perhaps for 4 hours. During the argument the offender pulled J's hair and began "throwing [her] around the room". She fled the flat, barefoot, and left her son in the room with the offender.
13. When J returned to the flat, she tried to encourage the offender to smoke some cannabis, believing that this would calm him down. The offender, however, kicked J to the leg and pinned her to the floor. He then choked her, preventing her from breathing. J pleaded for the offender to stop and not to kill her. The offender then let go but continued to shout. J, who by this point was suffering a panic attack, crawled to the bathroom. The offender followed her and put his foot in the door and followed her inside. Whilst J's memory is patchy of what happened thereafter, she recalls telling the offender that she wanted to die, to which the offender replied, "For someone who wants to die you sure were begging for your life 10 seconds ago". J also recalls holding their baby child whilst the offender punched her all over her body, and trying to strangle her, whilst accusing her of "using [their son] as a shield". The offender then left to buy cannabis and, when he returned, he apologised. This incident was reflected in count 4,

alleging intentional strangulation.

14. On 23 November 2022, the offender appears to have become convinced that J had hidden some cannabis. He insulted her, calling her "stupid", and kicked her to the ribs, winding her. As she got up, the offender kicked J to the back, making her strike her head against the door. J fled the flat and ran to a local park.
15. The offender found J in the park and told her to come back and find his cannabis, saying, "You need to come and find my shit right now. I'm going to count to five. I'll hit you. I don't care if anyone sees." J ran away again.
16. When J returned to their flat, the offender was inside but would not let J in. After banging on the door and trying to gain entry through a bathroom window, J banged on the window, breaking it, which angered the offender. The offender let J into the house but continued to shout at her. J telephoned her mother and told her to ring the police as she had been hit. The offender responded by punching J to the face, knocking her to the floor and briefly rendering her unconscious. A ring that the offender was wearing left an imprint on J's eye. We have seen images of the injury to the eye that were in evidence, as well as injuries to the neck, chin, chest and arms. The assault was reflected in count 7 on the indictment, alleging assault occasioning actual bodily harm.
17. Some further photographs of J were taken subsequently on 28 November 2022, which showed her with a bruise to the eye and marks to her neck. Taken together, these images give a clear picture of a young woman who has been subjected to a prolonged, determined and shocking assault in the overall context of domestic abuse.
18. J's mother telephoned the police. By the time the police attended the address the offender had left. He was arrested later that day and told the police, "I shouldn't be here. She broke into my house so I went for her and punched her. She was in the wrong for coming into my house."
19. Count 1, alleging controlling and coercive behaviour, reflected the routine demeaning and abusive language used by the defendant during the relationship, as well as the physical assaults (by means of hair pulling, kicking and punching) and preventing J from leaving the flat. This included the other assaults inflicted on 21 and 23 November. There were images of injuries inflicted by the offender or of assaults before the court. There were multiple images of bruising and other injuries, and a video showing an incident in which the offender punched J to the face on 1 November 2022. There was nothing to provoke the attack.
20. J attended her GP on 30 December 2022. The GP recorded that J was still suffering left-sided jaw pain from the assaults inflicted in November. She was diagnosed with temporomandibular joint dysfunction, told it could take some time to feel better, and advised to maintain a soft diet and take painkillers.
21. J's mother provided a statement to the police in which she described hearing the verbal abuse of the offender towards J and noticing bruising to J's body, which J attempted to cover up whilst J and the offender were in their relationship.
22. In interview, the offender accepted slapping J on 23 November but not punching her.

He accepted that he would lose his temper with J but blamed her for being able to wind him up. He was asked about events on 21 November and said that he had pushed J in retaliation for her having pushed him. He accepted having grabbed her throat but maintained that this was an accident. He denied any kicks.

23. There was a victim personal statement before the court from J in which J said that the offending had impacted her in "every way". She struggles to sleep and has nightmares. J and the offender's young son suffer from night terrors. J suffers from anxiety and has been told she may have PTSD. Her eye continues to twitch after the assault inflicted on her on 23 November. Due to her jaw pain she was unable to eat Christmas dinner properly. She no longer talks to her friends and has shut off all her social media accounts. Her relationship with her family has become strained. She has also been left in debt as the offender and she had taken on a number of hire purchase payments for which she has been left responsible. The offender's family have cut J off altogether.

The Offender

24. The offender was born on 29 May 2001. He was therefore 21 when sentenced and is now 22. He was of previous good character.
25. There was a pre-sentence report. The author of the report concluded that:

"It is evident that [the offender] does hold underlying attitudes which influence how he behaves when he is feeling aggrieved with an intimate partner. These are likely to, in part, stem from his childhood experiences. It is important that he seeks to address those beliefs if he is not to continue forming dysfunctional relationships."

The offender was assessed as posing a high risk of serious harm to known adults, specifically J. He was also assessed as posing a high risk of spousal abuse. The author of the report noted that the offender did not present as immature for his age, but that he was still a young man. The author felt it was important that the offender "receives intervention now to try to address this pattern of behaviour". The report therefore recommended a community order with a rehabilitation activity requirement to support the offender's completion of a "Better Building Relationships" programme, if the court was considering an alternative to immediate custody.

26. For the purposes of this Reference we have been provided with a progress report which assesses the offender's engagement with the Probation Service so far as positive. Various additional interventions are suggested and the author of the report expresses the opinion that "a custodial sentence would significantly disadvantage [the offender] and delay the opportunity for him to complete essential rehabilitative work that he can put into practice in the community whilst also being carefully monitored".

The Legal Framework

27. Coercive or controlling behaviour contrary to s.76 Serious Crime Act carries a maximum sentence of 5 years' imprisonment.
28. The Sentencing Council's definitive guideline for controlling or coercive behaviour in

an intimate or family relationship applies to all offenders sentenced on or after 1 October 2018. It therefore applies to the offender.

29. Pursuant to the guideline, the assessment of seriousness should be made by reference to the culpability of the offender and the harm caused. The guideline divides the offence into two categories of harm (1-2) and three categories of culpability (A-C).
30. Harm falling into category 1 is characterised by:
 - i) Fear of violence on many occasions;
 - ii) Very serious alarm or distress which has a substantial adverse effect on the victim; and/or
 - iii) Significant psychological harm.
31. Offending falling into the highest category of culpability, category A, is indicated by:
 - i) Conduct intended to maximise fear or distress;
 - ii) Persistent action over a prolonged period;
 - iii) Use of multiple methods of controlling or coercive behaviour; and/or
 - iv) Conduct intended to humiliate or degrade.
32. Offending falling in category 1A of the guideline attracts a starting point of 2 years and 6 months' imprisonment and a sentencing range of 1-4 years.
33. Intentional strangulation contrary to s.75A(1)(a) Serious Crime Act 2015 carries a maximum sentence of 5 years' imprisonment. There is no guideline for the offence of intentional strangulation. However, 18 days before the sentencing hearing in this case, the Court of Appeal gave guidance as to the approach to be taken for sentencing this offence in *R v Cook* [2023] EWCA Crim 452. In particular at [4], [14] and [16] the court said:

"4. The absence of any reference to injury or harm was deliberate. The act of strangulation inevitably creates a real and justified fear of death. The victim will be terrified and often will be unconscious within a relatively few seconds if pressure is maintained. There is real harm inherent in the act of strangulation.

...

14. The judge was entitled to have some regard to the guideline in relation to assault occasioning actual bodily harm. Intentional strangulation, by definition, involves an assault. The maximum sentence for both offences is the same, namely five years' imprisonment. However, the judge was neither required, nor entitled, to do anything more than have some regard to the assault guideline. As we have explained, the offence of intentional strangulation does not, as an element of the offence, include any element

of physical or psychological harm. To seek to set the starting point for the offence by reference to actual harm is wrong in principle.

...

16. In view of the inherent conduct required to establish this offence a custodial sentence will be appropriate, save in exceptional circumstances. We consider that ordinarily that sentence will be one of immediate custody. The starting point will be 18 months' custody. In this instance the offender was a man, and the victim was a woman. As we have noted, the offence is much more often committed by a man against a woman, however the starting point will be the same irrespective of the gender of the perpetrator. The starting point may be increased by reference to the following factors, this list not being exhaustive:

- i. History of previous violence. The significance of the history will be greater when the previous violence has involved strangulation.
- ii. Presence of a child or children.
- iii. Attack carried out in the victim's home.
- iv. Sustained or repeated strangulation.
- v. Use of a ligature or equivalent.
- vi. Abuse of power.
- vii. Offender under influence of drink or drugs.
- viii. Offence on licence.
- ix. Vulnerable victim.
- x. Steps taken to prevent the victim reporting an incident.
- xi. Steps taken to prevent the victim obtaining assistance.

Statutory aggravating factors will apply:

- (a) Previous convictions, having regard to (a) the nature of the offence to which the conviction relates, and its relevance to the current offence; and (b) the time that has elapsed since the conviction.
- (b) Offence committed whilst on bail.
- (c) Offence motivated by or demonstrating hostility based on any of the following characteristics, or presumed characteristics of the victim, disability, sexual orientation, or trans-gender identity."

34. Assault occasioning actual bodily harm contrary to s.47 Offences Against the Person Act 1861 carries a maximum sentence of 5 years' imprisonment.
35. The Sentencing Council guideline "assault definitive guideline" applies to all offenders sentenced after 1 July 2021. It therefore applies to this offender.
36. The guideline relating to assault occasioning actual bodily harm contrary to s.47 Offences Against the Person Act 1861 divides the offending into three categories, depending upon the harm inflicted and the culpability of the offender. Category 1, greater harm, is indicated by serious physical injury or serious psychological harm and/or other substantial impact on the victim. Factors which are indicative of higher (category A) culpability include, victim obviously vulnerable due to age, personal characteristics or circumstances, strangulation or asphyxiation, and/or prolonged or persistent assault.
37. Offending involving greater harm and medium culpability attracts a sentence range of 36 weeks to 2 ½ years with a starting point of 1 year and 6 months. Offending involving greater harm and high culpability attracts a sentence of 1 year and 6 months to 4 years' imprisonment with a starting point of 2 years and 6 months.
38. The Sentencing Council's "Overarching Principles: Domestic Abuse" guideline applies to all offenders sentenced on or after 24 May 2018, and therefore applies to this offender. The guideline provides at [7] and [8]:

"7. 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.

8. Domestic abuse offences are regarded as particularly serious within the criminal justice system. Domestic abuse is likely to become increasingly frequent and more serious the longer it continues, and may result in death. Domestic abuse can inflict lasting trauma on victims and their extended families, especially children and young people who either witness the abuse or are aware of it having occurred. Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked physical, psychological, sexual, emotional or financial abuse that has a particularly damaging effect on the victims and those around them."

39. The Sentencing Council guideline on the imposition of community and custodial sentences provides that:

“Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.

For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing."

40. By virtue of s.208(10) and (11) Sentencing Act 2020 the court must, when imposing a community order, include at least one requirement imposed for the purpose of punishment, unless the court also imposes a fine or unless exceptional circumstances apply to the offence or offender which make it unjust to impose punishment or a fine. A rehabilitation activity requirement is not a requirement imposed for punishment: see *R v Gregson* [2021 Cr App R (S) 3]. Indeed, "It is not sufficient ... that something has the purpose of punishment. Parliament clearly intended that there must be an additional requirement which *will* punish an offender. This can be, for example, an unpaid work requirement or a curfew requirement": see *R v Singh* [2022] 1 Cr App R (S) 48 at [31].

The Judge's Sentencing Remarks

41. In her recital of the background facts the judge noted that the relationship had started well but deteriorated after J became pregnant and gave birth to their child. There had been many incidents during which the offender had been violent to J and many of these incidents had taken place in front of their baby son, including incidents of violence while she was holding or shielding the baby. The judge described the incidents forming the basis of counts 4 and 7 as "really serious". If you put your hands around someone's neck, whatever your intention, you can kill them. It is terrifying to be deprived of air in that way and it can be fatal." The offender's counsel, Mr Speed, had submitted that this coercive behaviour had happened in the context of a loving relationship. The judge's response was that this made matters worse because J had trusted the offender and wanted to do her best to keep their relationship going and keep the family together - a point that emerges very clearly from the statement she gave to the police on 23 November 2022.
42. The judge described the effect of the offender's conduct on J as "really serious", not just physically but psychologically in the ways we have summarised above. Turning to the available mitigation, she recognised that the offender is a young man who had never been in trouble with the police before and she relied upon the PSR as showing that he had some insight into the issues he needed to confront. She noted that the offender had been remanded in custody for 5 months (the equivalent of serving a 10-month sentence).
43. The judge then turned to the relevant guidelines. Dealing first with count 1, she regarded it as a case of higher culpability, being persistent, over a prolonged period, with multiple methods of controlling and coercive behaviour that was intended with its violence to maximise fear and distress. It was also a case of higher harm because of significant psychological harm and because J was in real fear of violence on many occasions. This meant that the starting point was 2 ½ years with a category range of 1 ½ to 4 years.
44. The judge next considered count 7, the offence of assault occasioning actual bodily harm. Under the relevant assault guideline she assessed it as a case of higher culpability: J was obviously vulnerable because of her position as a woman in her own

home looking after a baby child. It was also category 1 for harm. Accordingly, the starting point for that offence was also 2-and-a-half years with a range of 1-and-a-half to 4 years.

45. Turning to the offence of strangulation, there was no guideline and the judge was not referred to *Cook*, which had only recently been decided and may not have been widely available. She therefore had regard to how the offence would have been treated if it had been charged as another offence of assault occasioning actual bodily harm. Had that been the case, she held that it would clearly be high culpability and also category 1 harm. On that basis the starting point would again be 2-and-a-half years with a range from 1 to 4 years.
46. Turning to the issue of totality, the judge decided that it would be appropriate in this case to pass concurrent sentences and to treat count 1 as the lead offence. She then said:

"The lead offence on this is the controlling and coercive behaviour. It must be higher in the range. When I am sentencing it concurrently to two other serious offences, even for a man of good character as you are it is 40 months after trial, 32 months on your guilty plea with a 20 per cent credit for when you entered that plea.

For the two specific matters, the assault and the strangulation, I have said that they both fall into the top category. It must be towards the top end when I am looking at the two offences even for a man of good character. For those two it would also have been 40 months after trial but it is thirty on your guilty plea at the plea and trial preparation hearing."

It therefore appears that at this stage the judge's approach was that she moved up from 30 months as the starting point for count 1 to 40 months, which was to take account of the need to reflect counts 4 and 7 and also the fact of his relative youth. She then gave a reduction of 20 per cent for his late plea on count 1, leading to a notional sentence of 32 months.

47. Turning to counts 4 and 7, she again moved up from the notional starting point of 30 months on each to a notional sentence of 40 months to reflect the seriousness of the conduct on each count and the aggravating and mitigating features, before adjusting back down to 30 months for each offence by giving a 25% reduction for his pleas of guilty to those counts at the PTPH. The judge then said:

"The reason that I say all of that is not because I think that everyone is following that. It is because I have to go through the guidelines so that if this ever goes to a higher court, they can see I have done that. The figure that you want to know, and everyone else in this court wants to know, is what I consider to be the appropriate sentence. The appropriate sentence is 32 months' imprisonment."

48. However, having identified what she considered to be the "appropriate sentence" in this way, the judge then continued as follows:

"I have in front of me a young man who has served a 10-month sentence. You know as well as I do that 32 months is too long to suspend, but I have to take a view where I see what is going to be best for the protection of the community. It seems to me that the way that I should deal with that is this. I am going to keep this case to myself. If there is any breach of the order that I am now about to make, you will come back in front me and you will remember what I have said, which is that the appropriate sentence is one of 32 months' imprisonment which is too long to suspend. Therefore, I am not going to make a suspended sentence order. I am going to make a community order. The point of that is to acknowledge the fact that you have spent a long time now in prison, that you want to deal with your issues and that it is better for everyone if you can deal with your issues. So this gives you a chance to do that. It will be a two-year order. The most important thing about it is that you address your issues with regard to domestic abuse.

I am looking now to the probation report. There will be a 15-day rehabilitation activity requirement. That is to support your completion of the Building Better Relationships Programme. The point of that is to make sure that when you are in future in a relationship you are in a position where you never again treat a woman in the way that you treated the mother of your child in this case. It is your choice now whether you do that or whether you go back to prison. That is a choice for you to make. You now know what it is like being in prison. I suspect you do not want to spend another single day in there. That is the choice that you can make. If you breach this order, then you know that it will be a very lengthy sentence indeed."

49. A little later, having discovered the offender had trained to be a chef, the judge said:

"All right. I am not going to make an unpaid work order. The reason for that, Mr Hartland, is you need to go and get a job, get some paid work, start paying some child support and get your life back on track. I am very much hoping that you and I do not meet again. If we do, if you come back to court, it will be me. It will not be another judge. I am reserving this to myself and I will pass that 32-month sentence.

... If you breach that order by not doing what [probation] say, if you commit any further offences in the next two years, you're in breach of the community order and you know what I'll do."

50. On 5 June 2023 the case was brought back before the judge under the slip rule because of the absence of a punitive element to the community sentence she had passed. The judge expressed the view that the time the offender had spent in custody was an exceptional circumstance within the meaning of 208(10) Sentencing Act 2020.

The Solicitor General's Submissions

51. The Solicitor General starts by endorsing the judge's categorisation of counts 1 and 7 as category 1A, with the consequential starting points and ranges that the judge identified.

In relation to count 4, by reference to the decision in *Cook*, the Solicitor General submits that the appropriate starting point was 18 months. The aggravating features are identified as being the history of violence, the presence of the baby child and the offending in the family home, which the Solicitor General submits would justify a significant upwards adjustment before consideration of personal mitigation and credit for the offender's guilty plea. The Solicitor General submits that the judge's notional sentence on count 4 of 40 months before reduction for plea was, in the light of *Cook*, "somewhat severe but not improperly so".

52. In broad terms, therefore, the Solicitor General's criticisms are not based on the judge's initial categorisation of the offences so much as on what the judge did thereafter.
53. First, the Solicitor General submits that the judge failed to have adequate regard for totality. Taking count 1 as the lead case, had it stood on its own the prolonged seriousness of the coercive behaviour and the identified aggravating features should have caused an upward movement from a starting point of 2-and-a-half years (30 months). There then had to be a further adjustment to take into account the separate criminality of counts 4 and 7. The Solicitor General submits that there is little or no mitigation apart from the offender's age, and that a final sentence of 40 months before reduction for plea, representing a total upward movement before reduction for plea of 10 months, is an inadequate reflection of the seriousness of counts 4 and 7.
54. Second, it is submitted that the imposition of a community order was wrong because only an immediate sentence of custody could appropriately be imposed. It is submitted that a community sentence could not on any view provide sufficient restriction of the offender's liberty by way of punishment while addressing the rehabilitation of the offender.
55. Third, the Solicitor General submits that the effect of what the judge did was to impose a sentence of 32 months suspended for 2 years. This emerges from her insistence that any breach will be brought back before her, and that if he was brought back, "I will pass that 32-month sentence". The Solicitor General submits that such a sentence is an unlawful circumvention of s.277 Sentencing Act 2020, which governs the length of suspended sentences.
56. Fourth, the community sentence which the judge passed had no punitive element. A rehabilitation activity requirement is not a punitive element and the Solicitor General submits that there were no exceptional circumstances in the present case.

The Offender's Submissions

57. In his written submissions, Mr Speed relied, as he did before the judge, on the offender's previous good character, limited credit for his pleas of guilty, and the fact that the offender had already spent 21 weeks in custody when sentenced. He submits that the judge's decision and sentence were well considered and well thought out and should not be disturbed. In oral submissions today, that were as clear as they were concise, he emphasised the marked effect that the offender's time in custody on remand had had upon him, which had enabled him, Mr Speed, to submit that there were exceptional circumstances in this case such that it was not necessary to impose any other punitive element as part of the community sentence that the judge would impose.

Discussion and Conclusion

58. We have read the transcript of the whole sentencing hearing. It is plain that the judge was attempting an unorthodox approach that would encourage the rehabilitation of this young offender. The ultimate question is whether that approach and its implementation were open to her or whether, as the Solicitor General submits, it led her to impose a sentence that was unduly lenient and which this court should increase.
59. We accept the judge's guideline categorisation of the offences under counts 1 and 7. We also accept that having not been referred to *Cook*, the judge's approach in treating count 4 by reference to the assault guideline was appropriate and that the assessment on that basis that the case would have been categorised as being a case of high culpability and category 1 harm was correct. We, however, approach count 4 in the light of *Cook*.
60. The helpful guidance in *Cook* should be followed unless and until it is superseded by the provision of a definitive guideline or decision of a higher court. Two observations may be made that are relevant to this case and more generally. First, the guidance in *Cook* leads to a starting point of 18 months rather than the 2 ½ years derived from applying the assault guideline as the judge did. Second, as we have set out above, the court noted at [4] of *Cook* that the absence of any reference to injury or harm in the statutory definition of non-fatal strangulation under s.75A Serious Crime Act 2015 was deliberate and that in addition to the terror likely to be experienced by the victim "There is real harm inherent in the act of strangulation". Subsequently at [14], the court said that "to seek to set the starting point for the offence by reference to actual harm is wrong in principle". This guidance reflects what had been said in [4]: that the offence of non-fatal strangulation is serious and that real harm is inherent in the offence. It will therefore not be open to a defendant to submit that the starting point should be less than 18 months because the victim was particularly robust or relatively unaffected by the strangulation.
61. That does not, in our judgment, mean that the level of harm inflicted on the victim by strangulation is irrelevant to an assessment of the seriousness of the offence, even though it is not specifically mentioned in the non-exhaustive list of potentially relevant factors provided at [16] of *Cook*. Where harm, either physical or psychological, is caused which is over and above that which is inherent in the offence, that should in an appropriate case be treated as an aggravating factor that may influence the court's assessment of the seriousness of the offending and cause an upward adjustment from the 18-month starting point. Such an assessment will be carried out on a case-by-case basis. Where the only offence before the court is an offence under s.75A, the assessment may be relatively straightforward. We would only caution that in a case such as the present, where there has been a prolonged period of coercive conduct, with multiple acts of violence as reflected in counts 1 and 7, it may not be realistic or possible to attribute specific elements of the overall harm suffered by the victim to the strangulation alone.
62. In our judgment even though it would not be possible to attribute specific harm to the strangulation offence rather than the other offences for which this offender must be sentenced, the strangulation offence in the present case inevitably contributed to the overall harm suffered by J, which must be reflected in the aggregate sentence passed by

the court.

63. We would not wish to discourage the passing of sentences that have as an objective the reform or rehabilitation of an offender, but, as has repeatedly been emphasised, there are other important objectives which must be borne in mind when sentencing an offender. One of those objectives is the achievement of a measure of consistency. In other words, if a court is intending to pass a sentence which is significantly out of line and in that sense inconsistent with the normally applicable principles and guidelines, it must be done with extreme care, clear justification, and cogent explanation.
64. While understanding the judge's wish to give the offender a final chance and to do so by keeping the prospect of a prison sentence in reserve against the possibility of further offending, we are driven to the conclusion that this sentence was not merely lenient but unduly so. Each of the three offences passed the custody threshold by a significant margin. Each was an offence to which the Overarching Principles of the Definitive Guideline on Domestic Abuse were directly applicable. On the judge's own assessment, the appropriate sentence for each offence viewed singly was longer than 2 years, so that the question of suspending the sentence of imprisonment, which had been urged on the judge by Mr Speed, could not arise. Taking count 1 on its own, this was serious and prolonged coercive behaviour, using multiple methods of control, including multiple acts of violence towards a vulnerable woman who was either pregnant or, later, shielding her baby. We agree with the Solicitor General's submission that a notional sentence approaching or in the region of 40 months was called for before reduction for personal mitigation and plea on count 1 alone. On count 7 taken alone, we agree with the judge that an appropriate sentence could be in the region of 40 months before credit for personal mitigation and the guilty plea was given.
65. While the application of the guidance in *Cook* leads to a starting point of 18 months rather than the 30 months taken by the judge, the seriousness of the offence, given the history of previous violent domestic abuse, the presence of the child, the fact that the attack was carried out in J's home, the offender's abuse of power and J's vulnerability lead us to conclude that an appropriate sentence before reduction for plea could have been close to 40 months. Any difference in approach does not affect our overall view of the seriousness of this offending.
66. It follows, in our judgment, that the judge failed to have due regard to totality when settling on a prospective total sentence based on 30 months for the lead offence. We bear in mind at all times the offender's relative youth and his previous good character. Those features would justify some reduction. Had the offender been even slightly older, we consider that the least sentence that the judge could properly have passed on count 1 as the lead offence (ie taking into account counts 4 and 7) was one of 48 months after taking into account aggravating and mitigating factors but before reduction for plea. Allowing a reduction for plea of 20 per cent would lead to a sentence in the region of 38 months. Because of his relative youth, we consider that a court could reasonably have made a further slight reduction to a sentence in the region of 36 months. Any further reduction, in our judgment, leads to a sentence that does not adequately reflect the persistent gravity of the offender's conduct and its effect on J.

67. We can see no justification for passing a community sentence in the face of this prolonged, violent domestic abuse. Nor in truth did the judge articulate any reason for not passing the immediate custodial sentence that was necessary on the facts of this case. The restriction of the offender's liberty by the sentence passed by the judge was minimal and not commensurate with the seriousness of the offender's conduct by a large margin. While we accept that there could in theory be circumstances in which a period spent in custody on remand might be or contribute to exceptional circumstances making it unjust for the court to impose a requirement for the purpose of punishment, this was not such a case.
68. As will be obvious, the level of custodial sentence that should have been in contemplation meant that the question of suspending a sentence did not arise. We have, however, had regard to the guideline on the imposition of community and custodial sentences, and can find nothing other than a speculative hope of rehabilitation that lends any support to the idea that an immediate custodial sentence was not the only appropriate punishment. We accept the Solicitor General's submission that the sentence passed by the judge was an unwarranted form of suspended sentence. We also accept his submission that the sentence passed was in any event defective because of the failure to include a requirement imposed for the purpose of punishment. This is, however, a secondary consideration as this was offending for which only an immediate custodial term was appropriate.
69. For those reasons we consider that the minimum aggregate sentence that could have been imposed without being unduly lenient was one of 3 years' imprisonment. We achieve that by quashing all the sentences passed and substituting a sentence of 3 years on each count concurrent. Time spent on remand would count towards the sentence. We should emphasise that in our judgment this was the least sentence that could properly be imposed. The judge could have imposed a significantly longer sentence without any question arising of the sentence being manifestly excessive.

MR SMITH:

Two matters flow from that judgment. The first is that the offender will have to surrender to custody. His local police station is Coventry Central. That appears to be open to today until 10 pm and it will fall on my Lords to give a time by which he must surrender.

LORD JUSTICE STUART-SMITH:

2 pm, subject to anything Mr Speed may say in response.

MR SMITH:

Perhaps I will give way to my learned friend on this issue first.

LORD JUSTICE STUART-SMITH:

Mr Speed, 2 pm?

MR SPEED:

We are in contact with Mr Hartland and we will convey the court's wishes that he surrenders before 2 pm.

LORD JUSTICE STUART-SMITH:

It is not exactly a wish; it is going to be an order. If for any reason it is incapable of being complied with then he should take immediate steps to apply for an extension.

MR SPEED:

Very good, my Lord.

LORD JUSTICE STUART-SMITH:

Thank you. Second?

MR SMITH:

The second matter is by virtue of Schedule 3-paragraph 10 of the 1988 Act the sentence that this court has just passed is deemed to have started on the date of the sentencing hearing in the court below unless the court orders otherwise. So I would seek an order from this court that the sentence would be deemed to start today. Of course time spent on remand will count. What that will avoid is the time between 21 April and today's date counting as time served.

LORD JUSTICE STUART-SMITH:

Mr Speed, any observations?

MR SPEED:

No. That seems extremely fair to me, my Lord.

LORD JUSTICE STUART-SMITH:

Time to run from today.

MR SMITH:

Thank you.