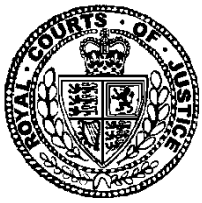

Neutral Citation Number: [2024] EWCA Crim 1498

Case No. 202400806 A2

IN THE COURT OF APPEAL
ON APPEAL FROM THE CROWN COURT AT MANCHESTER
MRS JUSTICE YIP
T20237046

Royal Courts of Justice
The Strand
London WC2A 2LL

Date: 5 December 2024

Before:

THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
BARONESS CARR OF WALTON-on-the-HILL
MR JUSTICE LAVENDER
and
MR JUSTICE MURRAY

- -

Between:

EDDIE RATCLIFFE

Applicant

- and -

REX

Respondent

- -
- -

Richard Littler KC and Steven Swift (instructed by **Stephensons Solicitors LLP**) for the **Applicant**
Deanna Heer KC and Cheryl Mottram (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 5 December 2024

- -

APPROVED JUDGMENT

This judgment was handed down at 2:30pm on 5 December 2024 in Court 4 and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Lady Carr of Walton-on-the-Hill, LCJ

(1) Introduction

1. On 11 February 2023 Scarlett Jenkinson, who was then 15 years and 8 months old, met Brianna Ghey, who was 16 years and 3 months old, in Culcheth, near Warrington. The two girls knew each other from school. Also with Scarlett was her long-term friend, the applicant, Eddie Ratcliffe, who was 15 years and 7 months old. The three of them walked to a location in Linear Park. The applicant had brought with him a hunting knife, which he had purchased on 1 January 2023. He and Scarlett used that knife to stab Brianna 28 times to the head, neck, chest and back, killing her.

2. Scarlett and the applicant each pleaded not guilty to Brianna's murder and at their trial each denied stabbing Brianna, accusing the other of doing so. On 20 December 2023 the jury found both Scarlett and the applicant guilty of Brianna's murder. After being convicted, Scarlett has admitted her guilt, but, when interviewed by a probation officer, the applicant maintained his claim that he had not stabbed Brianna.

3. The trial judge, Yip J, set out details of the murder in her sentencing remarks, which have been widely published and are still available. We do not repeat them here; rather we deal with relevant aspects of the facts as they arise in due course. As the judge identified, this was a brutal and shocking murder, resulting from a sustained and very violent assault. The case was unusual, not least because of the youth of the assailants and their victim and the viciousness of the assault, but also because of the graphic and sinister messages that passed between Scarlett and the applicant in the build-up to the attack, and their cold and callous behaviour in the aftermath. As for Brianna, as the judge said:

> "Brianna was only 16 years old when she was killed. She had her whole life ahead of her. Brianna had some struggles that made her vulnerable, but she was supported by a loving family who wanted nothing but the best for her. Sadly, no one will ever know what she would have achieved in her life. Even though her life was so short she made an impact. Her family remember her for her laughter, for being full of life and as a good listener. Their loss is unimaginable, but they have bravely and movingly painted a picture of Brianna…"

4. On 2 February 2024 Scarlett and the applicant were sentenced to be detained at His Majesty's pleasure, within a minimum term in Scarlett's case of 22 years and in the applicant's case of 20 years, in each case less the time which they had spent in custody on remand.

5. The applicant now applies for leave to appeal against the minimum term imposed on him. His application has been referred to the Full Court by the Registrar.

6. We draw attention to the fact that on 27 November 2023 Yip J made an order in the King's Bench Division of the High Court of Justice prohibiting until further order the publishing or broadcasting of the names, photographs or images of any of the children (other than Brianna) referred to in the trial (save that, with the exception of Scarlett's boyfriend, they might be referred to by their first initial). She lifted reporting restrictions on the identity of Scarlett and the applicant with effect from the time of sentence.

(2) The Sentencing Hearing

(2)(a) Information Available to the Judge

7. At the time of sentence, the judge had the advantage of having heard both the evidence against Scarlett and the applicant, and their own evidence at trial. She also had before her a great deal of other information. This included the statements from Brianna's family members. Neither Scarlett nor the applicant had any previous convictions,

cautions, reprimands or warnings. There were pre-sentence reports prepared by probation officers and there was a host of medical reports for each of them.

8. The pre-sentence report on the applicant revealed that he had told the probation officer that he had not stabbed Brianna. The judge said that this was not a truthful account.

9. In the applicant's case, the judge considered the following medical reports, several of which had been prepared in advance of trial in connection with the question of fitness to plead, but none of which had been relied on at trial:

(1) 3 April 2023: psychological report from Dr Tim Diggle, a consultant clinical psychologist.

(2) 7 April 2023: intermediary report from Dani Williams.

(3) 21 April 2023: psychological report from Dr Louise Bowers, a forensic psychologist.

(4) 30 April 2023: psychiatric report from Dr Lucy Bacon, a consultant forensic psychiatrist.

(5) 24 May 2023: interim psychiatric report from Dr Michael Crawford, a consultant adolescent and forensic psychiatrist.

(6) 23 May 2023: letter from Dr Sarah Mack, the principal clinical psychologist at Barton Moss Secure Care Centre, where the applicant was detained.

(7) 7 July 2023: psychological assessment by Professor Stuart Brody.

(8) 16 July 2023: psychiatric report by Dr Crawford.

(9) 28 August 2023: 2nd psychological report by Dr Bowers.

(10) 6 September 2023: psychiatric report by Dr Henry Ashcroft.

(11) 4 October 2023: email from Dr Crawford.

(12) 15 November 2023: speech & language therapy report by Asma Khanum.

(13) 15 November 2023: addendum psychological report by Dr Diggle.

(14) 16 November 2023: email from Dr Crawford.

(15) 20 November 2023: intermediary update.

(16) 22 January 2014: email from Dr Crawford.

10. Like the judge, we have considered carefully all of these reports. We do not propose to summarise them, but rather refer to relevant aspects as they arise in due course. We note at this stage that, following his detention, the applicant was diagnosed with mild autistic spectrum disorder ("ASD") and that, following his conviction, he has developed severe anxiety and (involuntary) selective mutism.

11. The judge was also provided with sentencing notes by the respondent and by defence counsel and she heard and considered their submissions at the sentencing hearing.

(2)(b) The Role Played by the Applicant

12. The judge said this in her sentencing remarks:

> "Beyond being sure Eddie inflicted some of the wounds I cannot be sure precisely who did what. That does not matter for today's purposes. I sentence you on the basis that both of you played a full part in killing Brianna and both intended she should die."

13. The judge considered both the nature of the relationship between the applicant and Scarlett and the communications passing between them before the murder. She concluded as follows in relation to the applicant:

> "It would, in my judgment, be wholly wrong to treat you as being under Scarlett's control. I also reject the idea that you only helped so Scarlett would help with your approaches to the girl. On the other hand, I acknowledge that you were not the driving force behind the plan to kill Brianna, Scarlett was."

(2)(c) The Starting Point

14. The judge was obliged to identify the appropriate starting point for the minimum term in accordance with Schedule 21 to the Sentencing Act 2020 ("Schedule 21"). It was conceded on behalf of the applicant that the appropriate starting point was 17 years, as provided for in paragraph 5A of Schedule 21 for defendants who were 15 or 16 when the offence was committed and who took a knife to the scene intending to commit an offence. However, the Crown submitted that the seriousness of the offence was "particularly high", in the sense in which that term is used in paragraph 3(1)(a) of Schedule 21, with the result that the appropriate starting point provided for in paragraph 5A of Schedule 21 for defendants who were 15 or 16 when the offence was committed was 20 years.

15. Paragraph 3(2) of Schedule 21 provides, insofar as is relevant, as follows:

> "Cases that (…) would normally fall within sub-paragraph (1)(a) include—
>
> …
>
> (e) a murder involving sexual or sadistic conduct,
>
> …
>
> (g) a murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation…"

16. The respondent submitted that Brianna's murder fell within sub-paragraph 3(e) and/or (g). This was not accepted for the applicant. The judge concluded that, so far as Scarlett was concerned, this was a murder involving sadistic conduct. There is no challenge to that conclusion on this appeal. The judge then said this in relation to the applicant:

> "Eddie, although your motives may not have been the same, you knew what Scarlett wanted to do and why. You understood her desire to see Brianna suffer. You actively participated in this brutal murder knowing the sadistic motives behind it and you cannot avoid the consequences just by saying you did not have the same desires."

17. As to whether the murder was aggravated by hostility related to sexual orientation, it is relevant to note that Brianna was transgender, in that she was born male, but by the time of her death she was receiving hormone therapy and was living, dressing and referring to herself as female. The applicant did not know Brianna, but had been told about her by Scarlett and had been told that she was transgender. The judge considered the applicant's messages about Brianna and concluded as follows:

> "I find also that you, Eddie, were motivated in part by hostility towards Brianna because she was transgender. You dehumanised Brianna by constantly referring to her as it and your messages about wanting to see if she would scream like a man or a girl and really wanting to see what size dick it had, along with checking the night before the killing that Brianna was coming show your own interests in killing Brianna linked to your hostility towards her as a transgender person. Just as you knew of Scarlett's motives, she knew of yours, although I cannot go so far as to say she used your transphobic attitude to get you involved.
>
> I therefore find that you both took part in a brutal and planned murder which was sadistic in nature and where a secondary motive was hostility towards Brianna because of her transgender identity."

18. Accordingly, the judge decided that the appropriate starting point in the case of both Scarlett and the applicant was 20 years.

(2)(d) Aggravating Factors

19. Paragraph 7 of Schedule 21 provides as follows:

> "Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point."

20. Paragraphs 9 and 10 of Schedule 1 contain non-exhaustive lists of aggravating and mitigating factors.

21. The judge identified the following aggravating factors in the present case:

(1) There was a significant degree of planning and premeditation. This started with Scarlett, but the applicant joined in.

(2) Scarlett had tried on an earlier occasion to poison Brianna. The applicant encouraged further attempts at poisoning, but that did not happen.

(3) Both Scarlett and the applicant were involved in a failed attempt to lure Brianna to Linear Park on 28 January 2023, with a view to killing her.

(4) Brianna was vulnerable and was picked on because Scarlett and the applicant thought that she would be an easy target.

(5) Scarlett abused the trust which Brianna placed in her as a friend and the applicant knew that Scarlett was doing this.

(6) The brutality of the murder, the use of the knife, the sadistic motive and the transphobic hostility had been taken into account in identifying the starting point, but taken together they illustrated how serious this offence was, even in the context of the category of murders whose seriousness was particularly high.

(7) The murder was committed in broad daylight in a park where other people were around.

(2)(d) Mitigating Factors

22. As for mitigating factors, the judge bore in mind previous good character. The judge said that she had considered everything that she had read. She also acknowledged the progress that the applicant had made in detention, which included passing his GCSEs, starting to study for his A levels and starting speech and language therapy. She took account of the applicant's good behaviour in detention and the evidence from the pre-sentence report that there was a hope that he may one day be rehabilitated.

23. The judge considered the many medical reports about the applicant. She looked at them from several different perspectives:

(1) In relation to maturity, the judge said that the applicant was less mature than many others within the 15 to 16 age category and that his thinking skills were less developed in several areas.

(2) However, the judge concluded that the applicant's autism and associated limitations did not significantly lower his culpability for Brianna's murder. In particular, the judge said as follows:

> "I bear in mind that it is difficult for a proper assessment to be made as to the impact of your ASD while you continue to deny what you did, but I am confident from all I have seen that you knew very well that what you were doing was terribly wrong and that you were capable of saying no to Scarlett."

(3) On the other hand, the judge recognised that the applicant's experience of custody would be made more difficult by his autism, his severe anxiety and his selective mutism.

(2)(e) The Judge's Conclusions

24. The judge said that, as she was required to do, she had weighed all of the aggravating and mitigating factors for each of Scarlett and the applicant. Before announcing the sentences which she imposed, she added the following:

> "In Scarlett's case the aggravating features are significant and would have led to a substantial uplift to the starting point but for the mitigation, particularly that relating to maturity and mental disorder. There must still be an uplift, but it will be moderated.
>
> In Eddie's case I find that the balance to be struck between aggravating factors, which are not quite as high as in Scarlett's case, and the mitigation I have identified is such as to cancel each other out. In saying that I have taken account of all the medical evidence and accept the diagnosis of ASD has some impact, but the extent to which it reduced your culpability in the circumstances of this offending is limited.
>
> This was undoubtedly a very serious offence with multiple aggravating factors. That is the context in which I impose minimum terms which are lengthy for offenders of your age, albeit significantly less than an equivalent sentence for an adult."

25. It will be noted that, as is common, the judge did not attribute particular values to individual aggravating or mitigating factors, nor to the aggravating factors or the mitigating factors as a whole, but instead expressed an overall conclusion on the question whether: (i) (as in Scarlett's case) she considered that the aggravating factors outweighed the mitigating factors; (ii) she considered that the mitigating factors outweighed the aggravating factors; or (iii) (as in the applicant's case) she considered that the aggravating and mitigating factors were evenly balanced.

(3) The Parties' Submissions

26. The proposed grounds of appeal are as follows:

(1) The imposition of a minimum term of 20 years was "manifestly excessive".

(2) The judge erred in determining a 20 year "starting point" for Eddie as well as Scarlett.

(3) The judge failed to reflect the age and level of maturity of the applicant when determining the appropriate "starting point."

(4) The judge erred in increasing the starting point to a notional level reflecting aggravating features disproportionately against the applicant.

(5) The sentence imposed does not sufficiently reflect the personal mitigation advanced on behalf of the applicant based upon his ASD diagnosis and significant impairments in functioning.

(6) The judge failed to sufficiently distinguish between the role and culpability of Scarlett and the applicant.

(7) The judge failed to structure and fully give reasons in her sentencing remarks which makes it impossible to gauge the different levels of uplift and downward adjustment for the respective aggravating and mitigating features. Figures are arrived at but it is not possible to understand the path or reasoning leading to the figure for either Scarlett or the applicant.

27. We will address each of the proposed grounds of appeal in turn, save for ground 1, which is in substance a summary of the alleged effect of the other grounds.

28. We note that, although repeated reference has been made to the minimum term imposed on Scarlett, Mr Littler KC and Mr Small for the applicant confirmed that they are not advancing disparity as a distinct ground of appeal.

(3)(a) Ground 2

29. In submitting that the judge erred in determining a 20 year starting point for the applicant as well as for Scarlett, it is said that:

(1) In relation to the judge's finding that this was a murder involving sadistic conduct, the judge wrongly chose the same starting point (of 20 years) for both Scarlett and the applicant based equally on their sadistic motivations/conduct, when the evidence showed that they were far from equal.

(2) In relation to the judge's finding that this was a murder aggravated by hostility related to sexual orientation, and by reference to various communications between Scarlett and the applicant and to the various reports on the applicant:

(a) the true motives for killing Brianna were:

(i) in Scarlett's case, to avenge herself on an individual whom she perceived to be a threat to her relationship with her boyfriend; and

(ii) in the applicant's case, to please Scarlett and thereby obtain her help in forming a relationship with a girl in whom he was interested; and

(b) there was no evidential basis for the judge's finding that a secondary motive for the murder was hostility towards Brianna because of her transgender identity.

30. Reliance was placed on the whole of the communications between Scarlett and the applicant before the murder and to what the applicant said both in interview and in evidence.

31. Although not a submission made below, Ms Heer KC and Ms Mottram for the respondent submitted that the seriousness of Brianna's murder was not just particularly high, it was "exceptionally high" in the sense in which that expression is used in paragraph 2(1)(a) of Schedule 21. For this purpose we were referred to paragraph 2(2) of Schedule 21, which provides as follows:

> "Cases that would normally fall within sub-paragraph (1)(a) include—
> (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
> (ba) the murder of a child involving a substantial degree of premeditation or planning, …"

32. The significance of this distinction is that in the case of a defendant who is an adult at the date of their offence, paragraph 2 of Schedule 1 provides that the appropriate starting point for an offence whose seriousness is exceptionally high is a whole life order. However, such orders cannot be imposed on defendants who were under 18 when they committed the offence. In the case of defendants who were 15 or 16 when they committed their offence, paragraph 5A of Schedule 21 does not provide a starting point for offences whose seriousness is exceptionally high.

33. In any event, it was submitted for the respondent that the seriousness of Brianna's murder was at least particularly high, since:

(1) Taken as a whole, the evidence demonstrated that the applicant repeatedly stabbed Brianna, in the presence of Scarlett, knowing that she derived pleasure from what he was doing, having encouraged her and planned with her to commit the offence.

(2) The messages exchanged by the applicant and Scarlett were such that the judge was entitled to conclude that the applicant was hostile towards Brianna due to her transgender identity and that his participation in the killing was motivated in part by that hostility.

34. Reference is made to s. 66 of the Sentencing Act 2020, which provides, insofar as is material, as follows:

> "(1) This section applies where a court is considering the seriousness of an offence which is aggravated by—
>
> (e) hostility related to transgender identity.
>
> …
>
> (2) The court—
>
> (a) must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and
>
> (b) must state in open court that the offence is so aggravated…
>
> (4) For the purposes of this section, an offence is aggravated by hostility of one of the kinds mentioned in subsection (1) if—
>
> (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—
>
> …
>
> (v) the victim being (or being presumed to be) transgender, or
>
> (b) the offence was motivated (wholly or partly) by—

…

(v) hostility towards persons who are transgender.

(5) For the purposes of paragraphs (a) and (b) of subsection (4), it is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph."

(3)(b) Ground 3

35. In submitting that the judge failed to reflect the age and level of maturity of the applicant when determining the appropriate starting point, it is argued that Scarlett had far greater culpability than the applicant, which should have been reflected in different starting points.

36. In response, the respondent submits that the 20 year starting point was justified for the applicant and that, whilst Scarlett introduced the idea of killing and was found to be the driving force behind the plan to kill Brianna, the evidence demonstrated that the applicant actively encouraged her and assisted equally in the planning, making clear his own desire to stab Brianna with his knife and inflicting at least the majority of the fatal wounds.

(3)(c) Ground 4

37. In submitting that the judge erred in increasing the starting point to a notional level reflecting aggravating features disproportionately against the applicant, it is submitted for the applicant, by reference to the aggravating factors identified by the judge, that:

(1) The applicant's involvement in the planning was limited to agreeing to become involved and bringing the knife.

(2) The applicant was not involved in Scarlett's earlier attempt to kill Brianna by poisoning her.

(3) The applicant had never met Brianna before, was unaware of her vulnerability and was not in a position of trust towards her.

38. It is also submitted that the judge appeared to have "double-counted" the factors which had been relied on to justify the 20 year starting point.

39. The respondent counters that the judge correctly identified the aggravating factors as they applied to the applicant and, in particular, that:

(1) The applicant was involved in planning the murder.

(2) The murder was committed in broad daylight in a public park.

(3) The judge recognised that Brianna's vulnerability was a factor which applied principally to Scarlett, although the applicant admitted in interview that by the time Brianna arrived he knew that she was timid and did not like being out in public.

(4) The judge recognised that Scarlett's previous attempt to poison Brianna was not an aggravating factor in the applicant's case.

(3)(d) Ground 5

40. In submitting that the sentence did not sufficiently reflect the personal mitigation advanced on behalf of the applicant based upon his ASD diagnosis and significant

impairments in functioning, it is said for the applicant that the judge did not makes any downward adjustment for the applicant's ASD and did not make sufficient downward adjustment for the applicant's level of maturity.

41. Reference is made to *Attorney General's Reference (R v SK)* [2022] EWCA Crim 1421, in which Davis LJ said (at [27]):

> "The table set out in paragraph 5A of Schedule 21 of the 2020 Act cannot be determinative of the appropriate starting point in any given case. First, the section of the table applicable to this offender applies to those aged 15 or 16 i.e. those who have just passed their 15th birthday and those approaching their 17th birthday. Very different considerations may apply to an offender in the first group as opposed to those in the second. We are not concerned with a 15-year-old. How the minimum term in the table would apply to such an individual will have to await a case involving a 15 year-old. Second, and of direct relevance to this case, the principles set out in *Peters* [2005] 2 Cr. App. R. (S.) 101 remain valid, in particular what was said at [11]:
>
> > "Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity.""

42. In response, the respondent submits:

(1) The judge was entitled to conclude that the applicant's culpability was not significantly reduced by his ASD.

(2) While the applicant's ASD was capable of having an effect on his developmental age, Dr Crawford's view was that it was at the mild end of the spectrum and this was consistent with his presentation at trial.

(3) The judge considered the effect of the applicant's ASD on his ability to cope in detention.

(3)(e) Ground 6

43. It is said for the applicant that the judge failed sufficiently to distinguish between the role and culpability of Scarlett and that of the applicant but, as we have noted, counsel confirmed that they were not relying on disparity as a ground of appeal.

44. The respondent disputes this, submitting that the judge considered carefully the differing roles of the defendants and that, having heard the trial and seen Scarlett and the applicant give evidence, she was in the best position to do so.

(3)(f) Ground 7

45. It is submitted for the applicant that it is impossible to gauge from the sentencing remarks the different levels of uplift and downward adjustment accorded by the judge for the respective aggravating and mitigating features. The respondent argues that the judge's sentencing remarks were sufficient to explain her approach.

(4) Analysis

(4)(a) Relevant Statutory Provisions

46. Section 37 of the Crime and Disorder Act 1998 provides as follows:

> "(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.
>
> (2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim."

47. Section 58 of the Sentencing Act 2020 provides as follows:

"Nothing in this Code affects the duties of the court—

(a) to have regard to the principal aim of the youth justice system (which is to prevent offending (or re-offending) by persons aged under 18: see section 37 of the Crime and Disorder Act 1998);"

48. Section 59 of the Sentencing Act 2020 provides, insofar as is material, as follows:

"(1) Every court—

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) …

(2) The duty imposed by subsection (1) is subject to—

…

(i) section 321 and Schedule 21 (determination of minimum term in relation to mandatory life sentence);"

49. In a case such as the present, there is no offence-specific sentencing guideline, but the guidelines on *Sentencing Children and Young Persons* and on *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments* ("the Mental Health Guideline") are applicable, subject to Schedule 21.

50. Section 321 of the Sentencing Act 2020 provides as follows:

"(1) Where a court passes a life sentence, it must make an order under this section.

(2) The order must be a minimum term order unless the court is required to make a whole life order under subsection (3)."

51. The effect of sub-paragraphs 321(3) to (3B) is that a whole life order cannot be imposed on an offender who was under 18 when the offence was committed.

52. In relation to minimum term orders, s. 322 of the Sentencing Act 2020 provides as follows:

"(1) This section applies where a court passes a life sentence for an offence the sentence for which is fixed by law.

Minimum term

(2) If the court makes a minimum term order, the minimum term must be such part of the offender's sentence as the court considers appropriate taking into account—

(a) the seriousness of—

(i) the offence, or

(ii) the combination of the offence and any one or more offences associated with it, and

(b) …

Determination of seriousness

(3) In considering the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, under—

…

(b) subsection (2) (determining the minimum term),

the court must have regard to—

(i) the general principles set out in Schedule 21, and

(ii) any sentencing guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21.

Duty to give reasons for minimum term order or whole life order

(4) Where the court makes a minimum term order or a whole life order, in complying with the duty under section 52(2) to state its reasons for deciding on the order made, the court must in particular—

(a) state which of the starting points in Schedule 21 it has chosen and its reasons for doing so, and

(b) state its reasons for any departure from that starting point."

53. We have already set out or summarised above the relevant provisions of paragraphs 2, 3 and 5A of Schedule 21.

54. Section 52 of the Sentencing Act 2020 (which is referred to in section 322(4)) provides materially as follows:

"(1) A court passing sentence on an offender has the duties in subsections (2) and (3).

(2) The court must state in open court, in ordinary language and in general terms, the court's reasons for deciding on the sentence."

"(5) Subsections (6) to (9) are particular duties of the court in complying with the duty in subsection (2).

Sentencing guidelines

(6) The court must identify any sentencing guidelines relevant to the offender's case and—

(a) explain how the court discharged any duty imposed on it by section 59 or 60 (duty to follow guidelines unless satisfied it would be contrary to the interests of justice to do so);

(b) where the court was satisfied it would be contrary to the interests of justice to follow the guidelines, state why."

(4)(b) The Determination of the Appropriate Starting Point

55. It is apparent from s. 322 of the Sentencing Act 2020 (and, in particular, s. 322(4)(a)) that the first step for a judge sentencing in a case such as this is to choose one of the starting points in Schedule 21 as the appropriate starting point. A starting point is, as its name suggests, only a starting point in the sentencing exercise. This is emphasised by paragraph 8 of Schedule 21, which provides as follows:

> "Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order."

56. We add that it is unhelpful, and can be confusing, to refer to anything other than the starting point chosen from Schedule 21 as the "starting point" in any particular case.

57. It follows that grounds 2 and 3 of the proposed grounds of appeal are premised falsely:

(1) If 20 years is the appropriate starting point in the applicant's case, having regard to the matters set out in paragraphs 3 to 5A of Schedule 21, it does not cease to be so merely because Scarlett's culpability was greater than that of the applicant. In those circumstances, the role played by each of Scarlett and the applicant in

the murder would be a matter to be taken into account when considering the aggravating and mitigating factors.

(2) In choosing 20 years as the appropriate starting point, the judge took account of the applicant's age to the extent provided for by paragraphs 3 to 5A of Schedule 21, since those paragraphs provide for different starting points in the case of offences of particularly high seriousness committed by defendants who are 18 or older (30 years), 17 (27 years), 15 or 16 (20 years) or 14 or younger (15 years). Once the appropriate starting point has been chosen, the offender's age and maturity may be a matter to be taken into account when considering the aggravating and mitigating factors, but they do not affect the choice of the appropriate starting point. As was said in *R v Peters* [2005] 2 Cr. App. R. (S.) 101, at [12]:

> "The first stage in the process nevertheless remains the prescribed statutory starting point. This ensures consistency of approach, and appropriate adherence to the relevant legislative provisions. Sch. 21 does not envisage a moveable starting point, upwards or downwards, from the dates fixed by reference to the offender's 18th or 21st birthdays. Nor does it provide a mathematical scale, … The principle is simple. Where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a substantial, or even a very substantial discount, from the starting point may be appropriate. …"

58. We consider that the judge was entitled to choose 20 years as the appropriate starting point in the applicant's case for both of the reasons that she gave.

(4)(b)(i) Murder involving Sadistic Conduct

59. In *R v Bonellie* [2009] Cr App R (S) 55 (at [16]) it was said that:

> "Sadly, it is often the case that those who attack others derive pleasure from so doing. Many a person kicking someone else on the ground derives such pleasure. A person, too, may gain pleasure from baiting a vulnerable individual,

> or showing off to his friends. That is not enough, in our view, to bring the case within subs. (e) [of paragraph 3(2) of Schedule 21]. That subsection contemplates a significantly greater degree of awareness of pleasure in the infliction of pain, suffering or humiliation, perverted though the pleasure we have described may be."

60. We have considered the messages exchanged by Scarlett and the applicant before the murder, including not only those highlighted by the respondent but also the other messages which provide context. Those messages make clear that Scarlett's motivation in proposing the murder was the pleasure which she intended to derive from Brianna's suffering. The applicant was fully aware of this and actively participated in a brutal murder which must indeed have caused Brianna to suffer before she died. In those circumstances, the judge was entitled to conclude that the applicant took part in a murder involving sadistic conduct.

(4)(b)(ii) Murder Aggravated by Hostility related to Sexual Orientation

61. Paragraph 3(2)(g) of Schedule 21 does not require that the murder was motivated solely or primarily by hostility related to sexual orientation. Rather, what is required is that the murder was aggravated by hostility related to sexual orientation. As set out in s. 66(4)(b)(v), it is sufficient if the murder was motivated wholly or partly by hostility towards persons who are transgender.

62. The judge found as a fact that the murder was partly motivated by such hostility on the applicant's part. This court will not interfere with a finding of fact made by the sentencing judge unless the court is satisfied that no reasonable finder of fact could have reached that conclusion: see, for example, *R v Cairns* [2013] 2 Cr App R (S) 73 at [10]. Having regard to the messages sent by the applicant in advance of the murder, it is clear that the judge's finding was one which was open to her. As for statements

made by the applicant in interview or in evidence, these have to be seen in the context that the applicant gave a false account of the murder in evidence which was rejected by the jury.

(4)(b)(iii) Paragraph 2 of Schedule 21

63. We do not propose to engage directly with the respondent's submission that the seriousness of this murder was exceptionally high. The judge did not sentence on that basis, but rather on the basis that the seriousness of this murder was particularly high and had a number of aggravating factors. For present purposes, the respondent's submission in relation to paragraph 2 serves primarily to emphasise that there were aggravating factors in this case, including the fact that this was a murder of a child, which paragraph 2 of Schedule 21 shows to be a particularly serious aggravating factor.

(4)(c) Aggravating and Mitigating Factors

(4)(c)(i) Aggravating Factors

64. We consider that the judge was entitled to take into account the aggravating factors which she identified:

(1) It is clear from the messages exchanged by Scarlett and the applicant that there was a significant degree of planning and premeditation. The judge recognised that the planning started with Scarlett, but was entitled to take account of the fact that the applicant joined in and with creativity. For instance, the applicant proposed the use of code words.

(2) The judge recognised that it was an aggravating factor in Scarlett's case that she had tried on an earlier occasion to poison Brianna. The judge also noted that the applicant had encouraged further attempts at poisoning, but recognised that that did not happen.

(3) The judge was entitled to conclude that both Scarlett and the applicant were involved in a failed attempt to kill Brianna on 28 January 2023.

(4) It was an aggravating factor that Brianna was vulnerable and was picked on because she would be an easy target, but the judge rightly recognised that this was primarily an aggravating factor in Scarlett's case. On the other hand, as the respondent has pointed out, the mere fact that Brianna was a child can be seen as a significant aggravating factor, to which the judge did not refer, although she could have done.

(5) It was an aggravating factor in Scarlett's case that she abused the trust which Brianna placed in her as a friend, but the judge was also entitled to take account of the fact that the applicant knew that Scarlett was doing this.

(6) In accordance with usual sentencing practice, the judge was entitled to take account as an aggravating factor of the fact that there was more than one factor making the seriousness of this offence particularly high.

(7) It was an aggravating factor that the murder was committed in a park where other people were around.

65. We will return to the question of the weight which the judge gave to the aggravating factors.

(4)(c)(ii) Mitigating Factors

66. It was a mitigating factor for both Scarlett and the applicant that they were of previous good character, but, as the judge observed, this had to be viewed in the context of their very serious offending and the contents of the messages between them which preceded the murder. The judge also treated as a mitigating factor the applicant's good behaviour in detention and the prospect that he might one day be rehabilitated. We are pleased to see from up-to-date reports prepared for this court that this positive behaviour has continued; the applicant is to be commended for his attitude and positive involvement in education, therapy and engagement with intervention programmes.

67. In our judgment, the heart of the proposed appeal is the challenge to the judge's consideration of, and the conclusions that she drew from, the medical reports about the applicant. The judge rightly identified three potential mitigating factors (including those relating to the applicant's ASD): immaturity, reduced culpability and increased hardship in detention:

(1) As to immaturity, this is addressed in the guideline on *Sentencing Children and Young Persons*. This court said in *R v Kamarra-Jarra* [2024] EWCA Crim 198 at [33] that:

> "Age governs the normal starting point for a minimum term, but not the assessment of culpability by reference to maturity. The court is always obliged to look beyond mere chronological age."

(2) As to culpability, paragraphs 10 to 13 of the Mental Health Guideline provide as follows:

> "10. The sentencer should make an initial assessment of culpability in accordance with any relevant offence-specific guideline, and should then consider whether culpability was reduced by reason of the impairment or disorder.
>
> 11. Culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour.
>
> 12. In some cases, the impairment or disorder may mean that culpability is significantly reduced. In other cases, the impairment or disorder may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required.
>
> 13. The sentencer, who will be in possession of all relevant information, is in the best position to make the assessment of culpability. Where relevant expert evidence is put forward, it must always be considered and will often be very valuable. However, it is the duty of the sentencer to make their own decision, and the court is not bound to follow expert opinion if there are compelling reasons to set it aside."

(3) As to increased hardship in detention, paragraph 22 of the Mental Health Guideline provides as follows:

> "… Where custody or detention is unavoidable, consideration of the impact on the offender of the impairment or disorder may be relevant to the length of sentence and to the issue of whether any sentence may be suspended. This is because an offender's impairment or disorder may mean that a custodial sentence weighs more heavily on them and/or because custody can exacerbate the effects of impairments or disorders. In accordance with the principles applicable in cases of physical ill-health, impairments or disorders can only be taken into account in a limited way so far as the impact of custody is concerned. Nonetheless, the court must have regard both to any additional impact of a custodial sentence on the offender because of an impairment or disorder, and to any personal mitigation to which their impairment or disorder is relevant."

68. We consider each of these factors in turn.

(4)(c)(ii)(1) Immaturity

69. In terms of his chronological age when he committed the offence, i.e. 15 years and 7 months, the applicant was a little below the mid-point of the category of 15- and 16-year-olds to whom the 20 year starting point applied. As for his maturity, the judge recognised that the applicant was less mature than many others within the 15 to 16 age category and that his thinking skills were less developed in several areas. It is submitted, in effect, on behalf of the applicant that this did not go far enough in recognising the applicant's immaturity, as disclosed by the medical reports.

70. We have carefully considered those reports, while bearing in mind that the judge also had regard to all of the other evidence, including the messages sent by the applicant to Scarlett and the evidence which he gave in the witness box. Many of the reports were prepared for purposes other than assessing the applicant's maturity or culpability, such as assessing his fitness to plead, including his ability to give instructions and to participate in his trial. They note that the applicant had had no involvement with mental health services before the murder and that he had been attending a normal school, whereas his arrest and detention had led to anxiety and consequent difficulties in communication.

71. In his first report, Dr Diggle said that the applicant met the criteria for ASD, but was less certain that his difficulties would meet the criteria for core autism. Dr Bowers drew attention to "the wide difference between [the applicant's] high level of intellectual functioning (key strength) and his deficits in social and emotional functioning (significant weakness)." She noted that his arrest, interview and detention had been distressing life events, which had made him shut down emotionally and withdraw

socially, which in turn made it difficult to assess his mental state, as he would not engage with her. Measures of his cognitive abilities ranged from average to extremely high. He was compliant. He had the capacity to understand why it was wrong to kill people.

72. Dr Bacon also said that she had no concerns about the applicant's ability to understand that killing was morally wrong or that it was illegal. She said that the applicant:

> "is an intelligent young man who has functioned well academically and who has not had overt major problems with functioning in other domains during his life, up to now."

73. In his first, interim, report Dr Crawford agreed with the diagnosis of ASD, adding that he had found no evidence of a significant mood disorder or of psychosis. Professor Brody agreed with others that the applicant was fit to plead. In his second report, Dr Crawford added that:

> "I would place [the applicant's] autism spectrum disorder at the mild end of the spectrum. I base this opinion on a number of factors. There is no learning difficulty, Eddie has mastered speech and language, (notwithstanding that he has stopped speaking at present), and he has functioned adequately both socially and in school despite his obvious deficits in social interaction, reciprocal communication, and restricted patterns of interest, behaviour and activity."

74. Dr Bowers' second report was primarily concerned with the applicant's ability to participate in his trial and with responding to Professor Brody's report. Dr Ashcroft agreed with the diagnosis of ASD and added that the applicant was displaying significant impairments relating to anxiety. In his addendum report, Dr Diggle said that:

> "Several areas of [the applicant's] functioning are more like that of a much younger child (perhaps a seven- or eight-year-old) than that of a 16-year-old. These features include a lower-than-expected ability to:

a. Express what he thinks and his ability to articulate his ideas,

b. Understand what is in the mind of others and how they might feel,

c. Predict not only what others think but what others might do,

d. To engage in social problem solving and to think creatively,

e. Draw upon a bank of experience to problem solve resulting in his being socially naïve,

f. Engage in social problem solving; dealing with social complications is difficult,

g. Go to others for help when faced with a problem,

h. Recognise social responsibility and show naivety or have a less mature outlook on what society expects of him,

i. Understand the fine meaning and the contextual information of social communication,

j. Use all the information received and instead only use some of the information looking at an issue in a black and white way,

k. Understand his own emotions and others,

l. Accurately assess whether he can trust someone,

m. Have the social ability to form sexual relationships (despite having the same sexual interest as other 16-year-old boys)."

75. In her report, Ms Khanum said that the applicant was suffering from selective mutism. In an email sent after the defendants' conviction, Dr Crawford reported that in his opinion there had been no significant change in the applicant's state of mind, wellbeing, or autism since the trial.

76. None of these reports expressly addressed the question of the applicant's level of maturity at the time of the murder and several of them recognised the significant change in the applicant's condition following his arrest and detention. Understandably, Dr Diggle's addendum report was relied on in support of the proposed appeal, but the judge was entitled to assess that alongside the other evidence in the case, including the evidence from various reports that the applicant was intelligent and had functioned well academically and that he knew that killing was wrong, as well as the evidence of the messages which he sent before the murder.

77. Looking at the evidence overall, we do not consider that the judge was wrong to conclude that the applicant's immaturity was a mitigating factor, while not regarding it as such a powerful mitigating factor as contended for on behalf of the applicant.

(4)(c)(ii)(2) Culpability

78. The judge concluded that the applicant's culpability was not significantly reduced by the applicant's autism and associated impairments. In reaching that conclusion, she relied on her assessment that the applicant knew very well that what he was doing was terribly wrong and that he was capable of saying no to Scarlett. As with the assessment of the applicant's immaturity, this assessment was based not only on the medical reports, but also on the other evidence, and we consider that it was an assessment which the judge was entitled to make.

(4)(c)(ii)(3) Increased Hardship in Detention

79. No complaint was made about the judge's decision to recognise that the applicant's experience of custody would be made more difficult by his autism, his severe anxiety and his selective mutism.

(4)(d) Aggravating and Mitigating Factors: Reasons

80. By ground 7 of the proposed grounds, counsel for the applicant contend, in effect, that the judge was obliged to specify the amount by which she increased or decreased the minimum term from the starting point either by reference to the aggravating (or mitigating) factors as a whole or even by reference to individual aggravating (or mitigating) factors. Although it is the case that some judges do this from time to time,

we do not consider that a sentencing judge is required to do it. Indeed, this practice can, in some cases, give the false impression that sentencing is a mathematical exercise rather than an exercise in judgment.

81. The two figures which a sentencing judge is required to specify in a case such as the present are the appropriate starting point chosen from Schedule 21 (see s. 322(4) of the Sentencing Act 2020) and the minimum term actually imposed. In requiring the judge to give reasons for her sentence, including, in particular, her reasons for any departure from the starting point of 20 years for the minimum term, s. 52(2) and 322(4) of the Sentencing Act 2020 require the judge to identify the aggravating and mitigating factors which she has taken into account, but they do not require her to attribute values to individual factors or to the aggravating (or mitigating) factors as a whole.

82. The judge in the present case clearly identified the aggravating and mitigating factors to which she had regard. Having done so, she indicated her conclusion on the question whether she considered that the aggravating factors outweighed the mitigating factors, or vice versa, or whether they were evenly balanced. We do not consider that she was required to do more than this in order to comply with her duty to give reasons.

(4)(e) Aggravating and Mitigating Factors: The Judge's Conclusion

83. The essence of the proposed appeal is that the judge was wrong to conclude in the applicant's case that the aggravating and mitigating factors balanced one another out. Having considered all of those factors and the parties' submissions in relation to them, we have concluded that this was an assessment which the judge was entitled to make.

(5) Summary

84. For all of these reasons, we have concluded that it is not arguable that the applicant's minimum term was either manifestly excessive or wrong in principle. We refuse leave to appeal. We express our gratitude to all counsel and solicitors concerned for the clear and helpful way in which their cases have been presented in this difficult, unusual and distressing case.