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Case No: 202403824 A1
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**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM Nottingham CC**
**Mrs Justice Tipples**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2024

**Before :**

**LORD JUSTICE WILLIAM DAVIS**
**MR JUSTICE BENNATHAN**
and
**HIS HONOUR JUDGE DEAN KC**

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**Between :**

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| **REX** | **Appellant** |
| **- and -** | |
| **BGI** | **First Respondent** |
| **CMB** | **Second Respondent** |

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**Paul Jarvis** (instructed by **Attorney General**) for the **Appellant**
**Rachel Brand KC and Justin Jarmola** (instructed by **Sundip Murria (Wolverhampton) Solicitors**) for the **First Respondent**
**Paul Lewis KC and Amir Riaz** (instructed by **Riaz Law Solicitors**) for the **Second Respondent**

Hearing date: 19 December 2024

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# Approved Judgment

This judgment was handed down remotely at 12.30pm on Thursday 19th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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The offenders are the subject of orders under section 45 of the Youth Justice and Criminal Evidence Act 1999. The orders are in identical terms, namely "No matter relating to the youth may be published that would identify them, including their name, address, any educational establishment or any workplace they attend, and any picture of them. This order lasts until the youth reaches the age of 18. No matter relating to the defendant in the proceedings, shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him in the proceedings." We shall refer to the offenders as BGI and CMB.

**LORD JUSTICE WILLIAM DAVIS :**

1. On 10 June 2024 at the conclusion of a trial before Mrs Justice Tipples and a jury two 12 year olds to whom we shall refer as BGI and CMB were convicted of murder. CMB also was convicted of having a bladed article. BGI had pleaded guilty to that offence at an earlier stage of the proceedings. On 27 September 2024 in the Crown Court at Wolverhampton sitting in Nottingham BGI ("the first offender") and CMB ("the second offender") were detained during His Majesty's pleasure in relation to the offence of murder. The judge ordered a minimum term of 8 years 6 months less 315 days spent on remand. No separate penalty was imposed in relation to having a bladed article.

2. HM Solicitor General has applied to this court for leave to refer the sentences as unduly lenient pursuant to section 36 of the Criminal Justice Act 1988. The application is in respect of the minimum term in the case of each offender.

**Factual background**

3. The first offender was born on 1 September 2011. The second offender was born on 29 July 2011. They are friends. They went to the same school. Shortly after 8.15 p.m. on 13 November 2023 they were together in a park in the Wolverhampton area. One of them had a large machete with a blade approximately 15 inches long. Acting together they killed a 19 year old male who was on a bench with a friend. Their victim was stabbed in the back with the machete. The wound penetrated deep into the victim's body. He also sustained a serious wound to the head. At their trial each offender blamed the other for inflicting the fatal wound. The independent evidence did not point to one offender rather than the other being responsible. The jury convicted both offenders. They were satisfied that the offenders were acting jointly.

4. The victim was Shawn Seesahai. His home was in Anguilla. His family still live there. He was in this country partly for education and partly to have treatment for his eyesight. On 13 November 2023 he was visiting Wolverhampton with a friend. In the early evening they were sitting on a bench in the park to which we have referred. There came a point at which they left the bench and went for a short walk. As they set off they passed the offenders. Shawn Seesahai did not know the offenders. They did not know him. After a few minutes Shawn and his friend came back to the bench. By now the offenders were on the bench. Shawn and his friend asked them to move. Without any warning Shawn was attacked with the machete. He was dead within a very short time of the attack. The offenders left the park.

5. The offenders had gone to the park together at some point after the end of the school day. Before meeting the second offender, the first offender had retrieved the machete which was used to kill Shawn from under his bed at home. He had bought it the previous month from a friend for £40. It was kept under his bed so that his grandmother with whom he lived would not find it. He left his home with the machete hidden under the tracksuit he was wearing. After the weapon had been used to kill Shawn, the first offender took the machete away. It had blood on it. He went home and used bleach to clean the blade. The machete was found under his bed by the police.

6. The offenders were arrested within a day or two of the murder. They were interviewed by the police. They answered no comment to all questions.

**The criminal proceedings**

7. The offenders appeared at the Youth Court on 17 November 2023. They were sent for trial at the Crown Court. They were arraigned on 8 April 2024. It was on that date that the first offender pleaded guilty to having a bladed article. The trial concluded on 10 June 2024.

8. At the sentencing hearing the judge had a victim personal statement from Shawn's mother. She described her son's murder as tragic and senseless. She was utterly heart-broken. Her family had been devastated by his death. Whenever she closed her eyes all she imagined was her son's last moments and how scared he must have been. She described her son as humble, helpful and hardworking. He was a confident young man with a promising future. She struggled to come to terms with the fact that she would never see him again.

9. In relation to the first offender there was a pre-sentence report and a clinical psychologist's report. The pre-sentence report said that the first offender had been diagnosed with ADHD in 2022. The assessment of the authors of the report was that he "seems to function at a lower level than his chronological age both in terms of understanding and emotional literacy". They reported that Children's Services had been involved with him and his family since he was very young. From his early years he had experienced violence within the family home. Those concerned with the first offender's welfare had been and remained concerned about the impact of his fractured childhood. They considered that developmental trauma was very likely to have affected adversely his cognitive development and his ability to regulate his emotions and to take informed decisions. The report described the first offender as having extremely complex needs. He had self-harmed in the past. The clinical psychologist concluded that the first offender was particularly vulnerable and immature. She assessed his verbal reasoning skills as being on a par with a typical 10 year old. There was evidence from the National Counter Trafficking Centre that the first offender was the victim of forced criminality. There was a conclusive grounds decision from the competent authority to that effect. The authors of the pre-sentence report confirmed this from their own knowledge.

10. There was pre-sentence report in relation to the second offender. This indicated that he had had an unsettled childhood in that he had moved to the UK from the West Indies when he was very young and that his family had moved around within the UK once they had arrived. He had changed schools regularly. His parents had separated at one point. He had spent some time in a refuge. By the date of the sentencing hearing his family were more settled and he had their support. The authors of the report had met him three times before preparing it. They assessed his maturity in this way: "Whilst he presents a resilient exterior and can display a maturity and sensitivity beyond his years as a 12-year-old he is unlikely to have the emotional capacity to process everything that has happened." The report noted that the second offender was making very good progress in the secure accommodation in which he had been held since his arrest.

11. In sentencing the offenders the judge said that she had to set the minimum term in relation to each offender by looking at them on an individual basis. She referred to the

factors to be considered by reference to the Sentencing Council guideline Sentencing Children and Young People ("the Children guideline"). In terms of factors common to both offenders the judge found that the attack was carried out jointly by them. The fact that there were two individuals acting together aggravated the offence. A mitigating factor was the lack of premeditation.

12. Dealing with the first offender the judge noted the conclusions of the reports as we have outlined above. By reference to those matters she determined that his emotional maturity and developmental age were less than his chronological age. He had suffered multiple traumas throughout his life. His culpability was reduced by these factors. Taking into account all that she knew about him, the judge found that the appropriate minimum term before any deduction of days on remand should be 8 years 6 months.

13. In relation to the second offender the judge noted the various upheavals to his family which had disrupted his childhood. Although he was doing well in his secure accommodation, it would take time for him to mature emotionally and developmentally. The judge acknowledged that there was no evidence that his emotional maturity was not lower than his chronological age. Taking everything she knew about the second offender into account, the judge fixed the minimum term at 8 years 6 months.

**The submissions of the parties**

14. The Solicitor General was represented by Paul Jarvis. His core submission was, at the outset of determining the appropriate minimum term in a case of murder, the sentencing court must identify the appropriate starting point only by reference to the relevant part of Schedule 21 of the Sentencing Code. In the case of offenders under the age of 18, the starting points are in the table set out at paragraph 5A of the Schedule. Where an offender is 14 or under and the offence would fall within paragraph 4(1) of the Schedule if the offender had been an adult, the starting point is 13 years. Mr Jarvis submitted that, once the starting point is identified, there is no scope to modify it by reference to the offender's age, maturity or role in the offence. He said that the judge adopted this approach when she said (at 3H of the transcript) "this case falls within paragraphs 5A and (iv) of the Code which means that as the defendants were 14 or under at the date of the offence the starting point is thirteen years. The starting point reflects the seriousness of the offence."

15. Mr Jarvis went on to argue that the judge's assessment of aggravating factors failed to include the fact that the murder had occurred in the presence of others. Shawn was killed in full view of his friend and of others in the park at the time. The judge also did not refer to the action of the first offender in taking the machete home where he cleaned it with bleach. That was an attempt to cover up what had happened. Further, the judge had referred to the lack of premeditation as a mitigating factor. Mr Jarvis submitted that this was of limited value. The offenders had gone to the park when they had a machete with them. They had created the circumstances in which the fatal attack was possible.

16. In relation to the first offender Mr Jarvis argued that there should have been an uplift from the starting point of 13 years to take account of the aggravating factors before any reduction for mitigation. He said that the fact that someone was young and immature did not necessarily diminish that person's culpability for what they had done. In this

case the judge was satisfied that there was an intention to kill Shawn. That meant that the first offender had a clear awareness of the consequences of his actions. Moreover, the judge mitigated the sentence to allow for the lack of premeditation. This accounted for the first offender's lack of ability to regulate his emotions. To use that factor to reduce culpability involved double counting. Taking all those matters into account, a downward adjustment of 4 ½ years was excessive. The resulting minimum term was unduly lenient. It was not a sentence reasonably open to the judge: *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41.

17. In respect of the second offender, Mr Jarvis submitted that his position was very different to that of the first offender. He was not immature for his age. He did not suffer from complex needs and developmental trauma. Whatever the position of the first offender, the minimum term in the second offender's case should have been greater. An individualistic approach to the sentencing of children may lead to different sentences for offenders jointly responsible for an offence. That ought to be the situation here. Even if the minimum term in the first offender's case was not unduly lenient, it was clearly unduly lenient for the second offender to be made subject to the same minimum term.

18. On behalf of the first offender, Rachel Brand KC (who appeared at the trial) argued that the minimum term was fixed by the trial judge. She had heard all of the evidence. In her sentencing remarks she set out the relevant matters. It was not suggested that she had engaged in an impermissible approach at any point. Ms Brand stressed the immaturity of the first offender and the developmental issues affecting him. The judge was entitled to make a substantial downward adjustment from the starting point in paragraph 5A. She had a duty to impose the shortest possible minimum term. She did not fail in that duty. In her written submissions Ms Brand invited us to consider the eventual outcome in terms of sentence in relation to the two boys convicted of the murder of Jamie Bulger, namely a minimum term of 8 years.

19. The second offender was and is presented by Paul Lewis KC. He adopted Ms Brand's submission about the overall approach of the trial judge. He met the suggestion that a distinction could be drawn between the respondents to the disadvantage of the second respondent by pointing out that the first respondent was responsible for purchasing the knife which he had chosen to bring to the scene. He also was the person who had taken away the knife and cleaned it with a view to destroying evidence. Thus, there was no proper basis for distinguishing between the two offenders vis-à-vis the minimum term to be applied.

**The legal framework**

20. It is important to remember how the starting points in Schedule 21 are to be applied. When the statutory starting points were introduced by the Criminal Justice Act 2003, it was a complete departure from the sentencing practice in relation to murder which had obtained hitherto. At an early stage this court explained how the starting points were to be used. In Jones [2005] EWCA Crim 3115 the then Lord Chief Justice said this:

> "The guidance given by Schedule 21 is provided to assist the judge to determine the appropriate sentence. The judge must have regard to the guidance, but each case will depend critically on its particular facts. If the judge concludes that it is appropriate

> to follow a course that does not appear to reflect the guidance, the judge should explain the reason for this….. The starting points give the judge guidance as to the range within which the appropriate sentence is likely to fall having regard to the more salient features of the offence, but even then, as paragraph 9 [as it then was – now paragraph 8] recognises, "detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), [emphasis ours] or in the making of a whole life order". The starting points must not be used mechanistically…."

This explanation was given in relation to the starting points as they applied to adult offenders. The principles apply equally to young offenders.

21. Until 2022 the only starting point in relation to offenders under 18 was 12 years. The Police, Crime, Courts and Sentencing Act 2022 changed the position for children convicted of murder. Paragraph 5A was added to Schedule 21. This created a sliding scale of minimum terms for children of different ages. The scale corresponded to the different levels of minimum terms applicable to adults. Where an adult has taken a weapon to the scene intending to commit an offence or to have it available for use as a weapon, the starting point will be 25 years. In relation to a child, the starting point will vary depending on their age. The lowest starting point on the sliding scale in those circumstances is 13 years which applies to offenders aged 14 or under.

22. This court has considered the effect of the starting points in paragraph 5A. In SK [2022] EWCA Crim 1421 the court had to consider the sentence imposed on an offender aged 16 at the date of the offence. He had taken a weapon to the scene and had used it to kill someone. One issue was whether the starting point (which was predicated on age) also encompassed maturity of a young offender. The court stated that 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."

This was quoted with approval in *Kamarra-Jarra* [2024] EWCA Crim 198. In that case the Lady Chief Justice went on to say: "As has been said repeatedly, the starting points in paragraphs 2 to 6 of Schedule 21 are not to be applied mechanistically, but in a flexible way so as to achieve a just result."

23. Paragraph 5A would create serious problems if the starting points referable to those of different ages were to be applied mechanistically. Taking the starting points where the offender has taken a weapon to the scene as an example, there is a starting point of 23 years where the offender is aged 17, 17 years for those aged 15 or 16 and 13 years for offenders aged 14 and under. Was it intended that these starting points should not be subject to adjustment before consideration of aggravating and mitigating factors? That was not the conclusion in Hunt [2024] EWCA Crim 629 where the court said this:

> "The issue which arises in this case is the divergence between the minimum terms for a 14 year old, albeit one close to their 15th birthday, and for a 17-year-old who has another six months to go until their 18th birthday. Applying paragraph 5A arithmetically leads to a 10-year difference in the minimum terms for a murder committed using a weapon brought to the scene. This divergence is not the result, as it used to be, of a single starting point for the minimum term applying for every offence of murder committed by an offender under 18. Rather, the divergence is the result of the statutory scheme designed to cure what was seen to be the potential injustice created by a single minimum term for offenders under 18 when the offence was committed. The proposition being argued in this case must be that the statutory scheme itself is unjust. In oral argument Miss Jones on behalf of Tyler Hunt invited us to find that the table in Schedule 21 paragraph 5A does not reflect a case where different age groups appear together. We do not accept that proposition. Very many, if not almost all cases of murder, involving those under 18 are cases where two or more such young people are charged together. The notion that Parliament set out this schedule simply to deal with cases where a single offender was being sentenced is not tenable. Had that been Parliament's intention it would have said so in clear terms.
>
> It seems to us that the answer to the conundrum is what was said in *Kamarra-Jarra*. A judge sentencing two offenders for an offence of murder where both were under 18 when they committed the offence must look beyond mere chronological age. We take the ages of Hunt and D as an example. It might be that the older offender took the leading role in the offence and demonstrated a level of maturity at or beyond his chronological age, whereas the younger offender played a subsidiary part in the offence and lacked maturity. In those circumstances it may be that little adjustment would be needed to the starting points in paragraph 5A, prior to the consideration of other aggravating and mitigating factors. Where the younger offender showed maturity and played an active role in the murder, as opposed to the lesser role being played by an immature older offender, the position will be different. It will always be a matter for the judgment of the sentencing judge to balance the different factors to achieve a just result whilst taking into account the statutory framework provided by paragraph 5A."

24. Mr Jarvis argued that these various authorities now must be subject to what was said in Ratcliffe [2024] EWCA Crim 1498. We note that the judgment in that case was delivered by the Lady Chief Justice who also gave the judgment in Kamarra-Jarra. Mr Jarvis pointed to what was said at [57]:

> "(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 [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. …"

These observations were made in the context of an argument that, of the two offenders before the court, one was more culpable in terms of her instigation of and participation in the offence. The proposition was that this should have been reflected in different starting points. That proposition was clearly misconceived. There was no reason to apply a different starting point to an offender who was of a similar age and level of maturity as the offender said to be the leading light in the killing. The court in *Ratcliffe* cited *Peters* which remains the foundation of the court's approach to starting points when dealing with children and young people.

25. The starting point with which we are concerned relates to all offenders aged 14 and under. It would be contrary to good sense and experience of how children change between the ages of 10 and 14 to apply a starting point of 13 years to every child from the age of criminal responsibility up to those about to reach their 15th birthday. It may be that it is not a debate worth having given that the huge differences between a 10 year old and a 14 year old might be accommodated by dealing with them via mitigating factors. However, as a matter of principle and having regard to the way in which starting points in Schedule 21 are to be applied, we conclude that the starting point for offenders aged 14 and under must not be applied mechanistically. Cases in which offenders will be as young as 12 at the date of the offence will be very rare. That does

not mean that the principle should not be applied properly. This principle should apply at all levels of the starting points in paragraph 5A.

**The application of the principles to this case**

26. We are not assisted by reference to the minimum term imposed in relation to two offenders who committed a murder in 1993. This predated the implementation of Schedule 21 by over 20 years. The sentencing landscape is very different in 2024. Minimum terms for the offence of murder now are generally far in excess of minimum terms as they were in 1993. That was the clear intention of Parliament when it enacted Schedule 21. Whether the legislature appreciated the effect that Schedule 21 would have on sentencing generally is not for us to say. We must reflect the legislative intention. Having said that, the introduction of paragraph 5A of the Schedule 21 recognises that, when an offender is very young, the appropriate minimum term will be dramatically shorter than that to be applied to an offender only four or five years older. The concept of a 12 year old offender being made the subject of a minimum term less than half of that which would apply to a 17 year old is consistent with the legislation.

27. We do not agree with the submission that the starting point for the minimum term for an offender who was only just 12 at the date of the offence will be that identified in paragraph 5A for an offender aged 14 and under. Rather, it must be adjusted to reflect the age of the offender, namely barely 2 years over the age of criminal responsibility. In this case we consider that the judge would have been entitled to take a starting point of 11 years. In the case of the first offender his culpability was significantly reduced by the various factors set out in the reports available to the judge. The starting point required downward adjustment accordingly. We do not agree with Mr Jarvis's analysis on this point. The fact that the judge found that the offenders intended to kill Shawn does not mean that the first offender had any true appreciation of the consequences of his actions. Moreover, the absence of premeditation did not take account of the first offender's inability to control and regulate his emotions. However, we are satisfied that there were aggravating factors in respect of the first offender. Although the offenders were jointly in possession of the machete (as the jury's verdicts showed), the first offender was the one who had purchased it. He had gone home from school and taken it out with him when he went to meet the second offender. He had taken it away from the scene of the murder and cleaned off the blood. In consequence an uplift in the minimum term was appropriate. In our judgment the outcome ought to have been a minimum term in respect of the first offender of 10 years less time on remand. That would have reflected the balance of aggravating and mitigating factors.

28. The second offender's minimum term could not reduced to the same extent as the first offender by reference to lack of maturity and the other matters set out in the reports concerning the first offender. Nonetheless, there was mitigation to be found in some aspects of his upbringing and in the way in which he had approached his time in custody. In respect of the latter feature, the judge was right to acknowledge this as something which required some modest reflection in the minimum term to be imposed. The aggravating factors which required an uplift in the case of the first offender did not apply to the second offender. As a result we find that the judge was right to apply the same minimum term to both offenders. Where we depart from her is in relation to the length of that minimum term. It should have been 10 years less time on remand for the second offender also.

29. This was an enormously difficult sentencing exercise. We take into account that it was conducted by a High Court Judge who had seen and heard the offenders give evidence in the trial. The judge could not draw on any authority to assist her in identifying how and where the minimum term ought to be fixed. This was a case without parallel in recent times. We agree with the judge that an individualistic approach was essential. That was the approach mandated by the Children guideline which the judge was required to follow. Our view is that such an approach ought to have led to minimum terms greater than those she imposed.

30. In a case where determinate terms had been imposed, a sentence of 8 ½ years' custody rather than 10 years' custody almost certainly would not be unduly lenient. This is not such a case. Each offender will have to serve the entirety of the minimum term. Moreover, an increase in the minimum term of 18 months is of real significance in the context of what are relatively short minimum terms by comparison with the great majority imposed pursuant to Schedule 21. It follows that we conclude that (a) the minimum terms imposed were unduly lenient and (b) we should not exercise our residual discretion to leave the sentences unaltered.

**Conclusion**

31. We shall quash the minimum terms imposed by the judge. In the case of each offender we shall substitute a minimum term of 9 years 50 days. This takes account of the time spent on remand which must be deducted from the period which otherwise would be fixed as the minimum term.