Neutral Citation Number: [2020] EWCA Crim 1676

Case No: 202000049/A3; 202000278/A1; 202000773/A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
THE HON. MR JUSTICE EDIS, T20197142
ON APPEAL FROM CROWN COURT AT MANCHESTER
HHJ GODDARD QC, T20187415 & T20197580
ON APPEAL FROM CENTRAL CRIMINAL COURT
HHJ MOLYNEUX, T20177377

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2020

Before:

THE RT HON THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON DAME VICTORIA SHARP DBE,
PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE RT HON LORD JUSTICE FULFORD,
VICE PRESIDENT OF THE CRIMINAL DIVISION
THE HON MR JUSTICE CHOUDHURY
and
THE HON MRS JUSTICE CUTTS DBE

Attorney General's Reference No 688 of 2019 (Joseph McCann)

Attorney General's Reference No 5 of 2020 (Reynard Sinaga)

Regina

-and-

Manish Shah

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The Solicitor General in person (Mr M Ellis QC MP) and Ms S Whitehouse QC on behalf of the Attorney General
Mr J Sidhu QC & Mr Carl Woolf (instructed by **Noble Solicitors**) on behalf of the Offender **Joseph McCann**
Mr R Littler QC & Mr J Greenhalgh (instructed by **Keith Dyson Solicitors**) on behalf of the Offender **Reynhard Sinaga**

Ms Z Johnson QC & Mr J Woodbridge (instructed by **Radcliffe Le Brasseur Solicitors**) for the Appellant **Manish Shah**
Ms R Cottage QC & Mr T Nicholson (instructed by **Appeals Unit, Special Crime Division**) for the **Respondent in the appeal of Manish Shah**

Hearing dates: 14 & 15 October 2020

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Approved Judgment

The Lord Burnett of Maldon CJ:

Introduction

1. Her Majesty's Solicitor General seeks leave to refer the sentences of two unconnected prolific sexual offenders (McCann and Sinaga) to the Court of Appeal on the grounds that their multiple life sentences with minimum terms of 30 years are unduly lenient. He submits that the scale and nature of the offending calls for whole life tariffs to be attached to the life sentences. We have been unable to accept that submission but conclude that the minimum terms should be raised to 40 years. The third case before us is an application for leave to appeal by a doctor convicted of multiple sexual offences against his patients. He was sentenced to life imprisonment with a minimum term of 15 years. We give leave to appeal but dismiss the appeal.

McCann

The Background

2. On 6 December 2019, following a trial at the Central Criminal Court before Edis J and a jury, Joseph McCann was convicted on each of 37 counts with which he was charged. These comprised seven offences of kidnapping, 10 of false imprisonment, seven of rape, one of causing a person to engage in sexual activity without consent, one of attempting to kidnap, three of assault by penetration, one of causing a person to engage in sexual activity without consent, one of rape of a child under 13, three of causing or inciting a child under 13 to engage in sexual activity, one of sexual assault and two of committing an offence with intent to commit a sexual offence.

3. On 9 December 2019 he was sentenced to life imprisonment with a minimum term of 30 years for all the offences save for the lesser sexual offences for which he was sentenced to concurrent determinate terms.

The Facts

4. McCann was released on licence from prison on 15 February 2019, having served part of a three-year sentence imposed in 2018 for an offence of burglary and other offences. He had been sentenced to an indeterminate sentence in 2008 for an offence of aggravated burglary.

5. Over a period of approximately two weeks in April and May 2019 he abducted seven female victims between the ages of 13 and 71 and attempted to abduct another. In addition, he held a mother and her two children captive in their own home. Seven of the victims, including two children were seriously sexually assaulted in the course of violent attacks.

6. Miss A, aged 21 years, was walking home alone from a nightclub in Watford in the early hours of 21 April 2019. She was abducted at knifepoint by McCann who bundled her into a car. He threatened to stab her if she tried to get away and to hit her if she did not stop crying. As he drove, McCann falsely claimed that Miss A, whom he called Hayley, had done something to his little sister. Having parked the car in a library car park he told her that some men were going to come to beat her up, but this would not happen if he told them that she had slept with him and taken cocaine. He made her

expose her vagina and took photographs of her in a state of undress which he said he would send to the men. He made her take cocaine and told her he had a gun. Eventually McCann drove her back to the place of her abduction and allowed her to retrieve her bag. She showed him her driving licence to prove that she was not Hayley. This revealed her home address. McCann drove there and raped her on her own bed. He told her he had a knife in his pocket. He did not use a condom and ejaculated inside her. Finally, he let her go at just after 09.00. She had been falsely imprisoned for over five hours.

7. At just after midnight on 25 April 2019, Miss H was on her way home having worked late. As she neared her house, McCann grabbed her and put his hand over her mouth, saying he would stab her if she did not stop screaming. He dragged her to a car and drove off. Thereafter Miss H was captive in the car for fourteen hours. She was raped repeatedly by penetration of her mouth, vagina and anus. McCann hit her and threatened to smash a vodka bottle in her face. He made her masturbate in front of him, masturbate him and lick and digitally penetrate his anus. He digitally penetrated her vagina and anus. He made her urinate on him. He urinated into her mouth and made her drink his urine. He threatened to make her eat his faeces. He made her call him "daddy" and say that she was a child. He threatened to stab her boyfriend and her flatmate on learning of their existence. He said he wanted to be taken to her home. At one point the offender parked near a school and said that he wanted to rape a child. He raped Miss H there. He threatened to put her into a canal to wash away his DNA. He said he would never release her. During the morning of 25 April 2019, he made her get out of the car, buy food and use a cash machine for him. He kept watch on her to prevent her getting away or alerting others as to what was happening.

8. Just after midday on 25 April Miss S, aged 21, was walking on a street in north London with her 18-year-old sister. McCann pulled up beside them and pulled Miss S into the car. He also tried but failed to abduct her sister. Miss H was still in the car. Over the next two hours Miss S was raped and sexually assaulted. The two women were forced to engage in sexual activity with each other. McCann told Miss S that if she caused trouble, he would slit her throat and throw her in the river. He made death threats several times to both women. Despite Miss S telling him that she was a virgin as a result of her religious beliefs, he hit her until she removed her clothes. He orally raped her, digitally penetrated her anus and squeezed her breasts hard. He struck her when she said it was painful. He made her masturbate him.

9. The two women were able to escape when Miss H hit McCann hard over the head with a vodka bottle. They knew that he was planning to book into a hotel room for two nights where he would further assault them. He chased them as they ran away but gave up when some builders on a nearby construction site intervened.

10. All further attacks occurred on 5 May 2019 by which time McCann was in the Manchester area.

11. In the early hours of that morning McCann met Miss CH, who was very drunk, in a bar. He joined her in a taxi and went back to her home with others. By 07.00 he was alone with her and her daughter LH (aged 17) and son DH (aged 11). He tied up CH with electrical flex restraints. He then sexually assaulted her children in another room but in the presence of each other. In the case of LH, he repeatedly orally raped her and digitally penetrated both her vagina and anus, causing lacerations to her anal margin. In the case

of DH, he orally raped him, forced DH to put his penis in the offender's mouth, digitally penetrate the offender's anus and lick his bottom. The incidents ended when, at about 10.20, LH jumped naked from an upstairs window, fracturing her heel as she did so, and sought help. She and her brother had by then been assaulted for over three hours. The offender escaped from the scene.

12. Three hours later at 13.30, Miss B, aged 71 years, was in her car in a supermarket car park having completed some shopping. McCann got into the front passenger seat, punched her hard in the face and told her to drive. He said he had a knife and had just killed someone. For the next five hours she was imprisoned in her car. During that time he orally raped her and touched her vagina, speaking of oral and anal penetration.

13. McCann then drove Miss B's car. At about 15.30 he pulled up beside three 13-year-old children, Miss SA and two boys. He falsely told them that he knew they had been sending threats to his sister on social media and ordered them into the car. The two boys were released nearby. With Miss B driving, the offender sat with Miss SA. He told her that she was his hostage, that he loved her and that she was now his girlfriend. He kissed her and touched her breasts under clothing. Traces of his semen were later found on her trousers. Shortly before 18.00 both Miss B and Miss SA were able to escape with the help of members of the public at a service station. By this time Miss B had been falsely imprisoned for four and a half hours and Miss SA for two and a half. The offender drove off in Miss B's car.

14. Just over half an hour later McCann abducted two 14-year-old girls, Miss J and Miss CA, from the street. He pulled up beside them, shouted that they had been bullying his sister and ordered them into the car, threatening that he would kill them if they did not. He stopped at a service station where he bought condoms before driving off. By this time, the police were looking for the car. There was a police chase which resulted in McCann crashing the car into another vehicle. He made good his escape but was caught that evening when the taxi he was travelling was stopped at a police roadblock. He fled from the taxi but was captured in fields nearby and arrested.

The Impact Statements

15. In impact statements the victims each spoke of the devastation the assaults had wreaked upon their lives. One described her life as she knew it being totally taken away from her. Another victim spoke of her aspirations in life, both big and small, and her vision of the future having been violently taken from her. Generally, the victims live daily with the trauma which has impacted adversely on their ability to go out, sleep, work, socialise or otherwise live a normal life. Some have had to move from previously loved homes.

16. The offender has 19 previous convictions for 37 offences. These are mainly for offences of dishonesty, including burglary, aggravated burglary for which he had been made the subject of imprisonment for public protection and for driving offences. He has no previous convictions for sexual offending.

The Aggravating and Mitigating factors.

17. The Solicitor General highlights the following aggravating factors:

i) There were eleven victims.

ii) The victims included three children.

iii) The offences spanned fifteen days.

iv) The attacks on the victims were sustained, with repeated assaults.

v) The offender used violence over and above what was required to carry out the assaults.

vi) Two of the children and one of the adult victims were attacked in their own homes.

vii) Some of the victims were subjected to additional humiliation by being forced to perform sexual acts in the presence of each other.

viii) One victim was subjected to additional degradation by being forced to drink the offender's urine.

18. There were no mitigating factors.

The Sentencing Remarks

19. In sentencing McCann, the judge described his offending as "a campaign of rape, violence and abduction of a kind which I have never seen or heard of before." He concluded that McCann was very dangerous to people weaker than himself and a "classic psychopath". He did not consider that McCann would cease to be dangerous until old age deprived him of the strength to commit violent offences. The offences taken together were so serious that a life sentence was justified and required. The judge considered whether a whole life tariff should be imposed and concluded that it should not. In so finding he bore in mind that his function was to impose the appropriate punishment on the defendant and, when that was served, the Parole Board would ensure the public are protected. The judge found it difficult to see how McCann could ever safely be released but that would be a decision for the Parole Board if he applied after the expiry of the minimum term. Decades would have elapsed by that time and it was perhaps just conceivable that there may be evidence that safe release was possible.

20. In coming to the appropriate minimum term, the judge identified a notional determinate sentence of 45 years' imprisonment. The judge noted that, had he not considered a life sentence appropriate, he would have sentenced McCann to an extended sentence of imprisonment. He would have served two thirds of that sentence before he was eligible for parole. On this basis he reduced the notional determinate term not by one half but by one third, arriving thereby at the tariff of 30 years' imprisonment.

Sinaga

The Background

21. Following four trials in the Crown Court at Manchester before Judge Goddard Q.C., Reynhard Sinaga was convicted of 136 offences of rape, in relation to 44 victims, together with eight offences of attempted rape, two of assault by penetration and six

offences of sexual assault. The scale of the offending and the nature of the evidence meant that the prosecution had to be split into separate trials.

22. By way of detail, on 10 July 2018, at the conclusion of the first of four trials, Sinaga was convicted of 40 sexual offences, comprising 31 offences of rape by penetration of the anus against 11 victims, two offences of attempted rape and six offences of sexual assault. On 17 December 2018, he was sentenced for those offences to life imprisonment with a minimum term of 15 years (less days spent on remand).

23. On 7 May 2019, Sinaga was convicted at the end of the second trial of a further 55 sexual offences comprising 49 offences of rape by penetration of the anus, relating to 13 victims, five offences of attempted rape, and one offence of assault by penetration. On 21 June 2019, he was sentenced to life imprisonment with a minimum term of 20 years.

24. On 4 October 2019, Sinaga was convicted at the end of the third trial of a further 26 offences of rape relating to nine victims and assault by penetration.

25. On 20 December 2019, he was convicted at the end of the fourth trial of a further 30 offences of rape, relating to 12 victims. On 6 January 2020, he was sentenced on trials three and four to a total sentence of life imprisonment with a minimum term of 30 years.

26. These offences were committed over a period of two and a half years between 1 January 2016 and 2 June 2017.

The Facts

27. Sinaga is now aged 37. He was a mature student in Manchester at the time of these offences. He lived throughout the relevant period in a flat near the centre of Manchester and very close to a nightclub which many of the victims had attended.

28. He would walk the streets in this area in search of victims. He targeted intoxicated males in the early hours of the morning, aged generally in their late teens and early 20s. He convinced them to accompany him to his flat nearby using a number of pretexts. Once at his address, each of the males was then given a drug, found by the judge to be a date-rape drug. Once the drug took effect and rendered the victim unconscious, Sinaga anally raped and/or sexually assaulted them. On occasion, the assaults involved kissing the victim's navel and mouth and kissing and licking his nipples, but assaults perpetrated in this way were infrequent, and in many cases the activity involved anal penetration alone. Most of the victims were subjected to multiple rapes and/or assaults, with some being raped repeatedly within the space of a few hours. Sinaga did not wear a condom when committing all but one of the rapes, and he ejaculated into and onto the anuses of his victims on many occasions.

29. These rapes and assaults were filmed and/or photographed by Sinaga using two mobile telephones, and the recorded images were downloaded to other devices. The footage recovered from these phones shows that the victims were clearly unconscious, non-responsive, and in some cases snoring, whilst they were raped and sexually assaulted.

30. As well as filming and photographing his victims, Sinaga took "trophies" of his assaults, including items of personal property belonging to the victims and screenshots of their Facebook profiles.

31. Each of the victims suffered a degree of memory loss after the event with the majority being unaware that they had been sexually assaulted. Many awoke feeling disorientated and confused, with some, clearly oblivious to what Sinaga had done, even thanking him for having taken care of them in their intoxicated state. Several of the victims were physically injured during penetration, and one, who suffered from Crohn's disease, had his injured anus penetrated whilst the offender tampered with his ileostomy bag.

32. The offences only came to light when, on 2 June 2017, one victim regained consciousness whilst Sinaga was positioned naked on his (viz. the victim's) back. The latter fought him off and reported the matter to the police. When first interviewed about the incident that led to his arrest, Sinaga said that the victim had agreed to participate in a role play in which he would pretend to be asleep whilst engaging in sexual activity. This encapsulated his defence, and he gave evidence to this effect at two of the trials. He made no comment during later police interviews.

33. The police were able to identify many of the other victims from, amongst other evidence, the images on Sinaga's mobile telephones and from the trophies that he retained. These other victims only discovered what had happened to them when contacted by the police. The psychological harm to the victims has been significant, and notably profound in some cases. A number have felt unable to tell their families and close friends about what happened to them, others have become depressed and one has seriously contemplated suicide as a result of the offender's actions.

34. The Pre-Sentence Report obtained after Sinaga's first conviction concluded that he:

> "[…] presents a very high risk of serious harm […] I am unable to conclude that Mr Sinaga is anything other than extremely dangerous. His level of denial and the additional trials that are pending make it unlikely that the Prison or Probation Services will make any progress with him in the foreseeable future."

The Aggravating and Mitigating Factors

35. The Solicitor General highlights the following aggravating factors:

    i) The victims, who were specifically targeted, were particularly vulnerable, given their state of intoxication and the fact that they were alone late at night.

    ii) The victims in all but a very few instances were subjected to repeated attacks.

    iii) Sinaga used a date rape drug to facilitate the offences; these are drugs which pose a risk of serious harm as well as leading to a complete lack of memory.

    iv) Sinaga, in a small number of the offences when it was required, forcibly held the victim.

    v) The offences were recorded on his mobile telephone.

vi) Sinaga took 'souvenirs' in some cases, including a watch and a driving licence.

vii) The offences involved a very significant level of planning.

viii) The period for which the victims were kept at Sinaga's address was prolonged, in one case amounting to some 8 hours.

ix) Sinaga did not wear protection when penetrating most of the victims' anuses with his penis.

x) He ejaculated on a number of occasions.

xi) One victim suffered anal injury, evidenced by Sinaga wiping blood from his anus while committing the offence.

xii) Many victims suffered severe psychological harm.

xiii) At least one victim has experienced thoughts of self-harm and attempted suicide.

36. Prior to these offences, Sinaga had no previous convictions. It was accepted that there were no mitigating factors apart from his age and previous good character.

The Sentencing Remarks

37. In sentencing Sinaga at the end of trial four, the judge noted that she was "unaware of any other case of sexual offending of this scale and magnitude". The judge concluded that the degree of harm and culpability was such that the offences fell within the highest category of the relevant Sentencing Guidelines. None of the aggravating features identified by the prosecution was challenged by the defence, and the judge found that there was little to be said by way of mitigation.

38. The judge concluded (as she had done after the earlier trials) that Sinaga posed "a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences", and that he was therefore dangerous. The judge was further satisfied that the seriousness of the offences was such that a sentence of life imprisonment was justified. The judge then considered whether a whole life sentence should be imposed, but concluded, on the basis of the authorities, that this was a "borderline case", and declined to pass such a sentence. Instead, having arrived at a notional determinate sentence of 60 years, the judge fixed the minimum term to be served at 30 years.

Shah

The Background

39. Following two trials at the Central Criminal Court before Judge Molyneux which concluded on 19 December 2018 and 10 December 2019, Manish Shah was convicted, overall, of 90 sexual offences in relation to 24 victims. These comprised 53 offences of assault by penetration and 37 offences of sexual assault. The scale of his offending meant that the prosecution had been split into two separate trials.

40. On 7 February 2020, following the second trial, he received a sentence of imprisonment for life with a minimum term of 15 years on counts 4 and 22 from the first trial and count 18 from the second trial. There were concurrent determinate sentences of imprisonment on the other counts from the two trials.

The Facts

41. The offences took place between 2009 and 2013 when the applicant was a General Practitioner at the Mawney Road Medical Centre in Romford. He joined the practice as a partner in 2004. He was the practice lead in family planning, contraception and gynaecology.

42. In June 2013 two complaints by female patients led to the applicant being suspended from the practice and to a police investigation which found that between June 2009 and July 2013, he had carried out unnecessary breast, vaginal and rectal examinations of 24 female patients, two of whom were aged under 18 and two under 16 years. The examinations were a device by which he was able to perpetrate these sexual assaults.

43. The applicant selected young and vulnerable women and gained their trust. He persuaded the victims to submit to intimate examinations by telling them that he cared about them and that he would carry out tests which other doctors would not undertake because he had special skills. He persuaded some younger patients to allow breast examinations by telling them of younger patients who had recently discovered they had cancer and persuading them that they were at high risk of the disease. In other cases, Shah pretended to carry out cervical smear tests but did not send samples to the laboratory. He falsified patients' records to create the impression that they had requested procedures when in fact they had agreed to this happening following lies that he told them.

44. The examinations comprised inappropriate touching, intimate questions or comments, and the removal of gloves during intimate procedures. The applicant derived sexual pleasure from the examinations. One victim noted he had an erection during the incident.

The Impact Statements

45. Impact statements from the victims speak of the effect of the applicant's conduct towards them. They speak of the destruction of trust and their inability to have faith in others, in particular male doctors. Some have been unable to have necessary medical interventions because of the lasting sense of violation. Similarly, relationships have suffered, some victims have experienced mental health problems, and pregnancy and childbirth have become a source of anxiety.

The Pre-sentence Report

46. Shah had no previous convictions. The applicant maintained that he was innocent of any wrongdoing. Assessment tools indicated that he was at low risk of reoffending. However, the author of the report took a different view. In her view, whilst the tools were useful in assessing the risk of reconviction, they did not account for the prolific nature of the applicant's sexual offending. His offences were committed over a protracted period against multiple victims, some of whom were under 18 years of age

at the time the offending began. This increased the risk of further criminality. The author took into account that the offending occurred in the course of the applicant's work as a GP which he would not be permitted to continue after his release from custody. She nonetheless considered him to pose a significant risk of serious harm to members of the public by the commission of further specified offences and therefore to be dangerous within the meaning of the Criminal Justice Act 2003. This was for several reasons. First, the applicant had exploited the vulnerabilities of his patients, manipulating and grooming them into allowing intimate examinations. He has thinking distortions in his attitude towards women which require further exploration after sentence. Second, given the prolific nature of his offending, there is a risk of further similar offences should he again find himself in a position of trust with access to vulnerable women. Third, the applicant chose to deceive his colleagues by falsely representing that his patients had requested the examinations in question indicating the extent of the planning in relation to these offences. Given his denial of any sexual motivation and his lack of insight into his behaviour she concluded that "it is possible that he could seek to put himself in a position when he can again groom women."

The Sentencing Remarks

47. The judge placed "most if not all" of the offences within category 2A of the relevant Sentencing Council Guideline. She found particular vulnerability vis-à-vis each victim because of their personal circumstances and, as patients undergoing a medical procedure, the abuse of trust was a common feature. She determined there had been a significant degree of planning and grooming. There were additional aggravating factors, such as the feature that many women were targeted because of their personal circumstances, details of which Shah had researched from their medical notes. There were some Category 1 features. The judge found that Shah used his good character to facilitate his conduct and this mitigating factor did not, therefore, justify a reduction to what would otherwise be the appropriate sentence. She recognised that the applicant had observed the terms of his bail for five years, had the support of his family and was unlikely to practise as a doctor in the UK again. The judge was nonetheless in "no doubt" that he posed a significant risk of serious harm by the commission of further specified offences. She observed that the full scale of his offending may not yet be known. The fact that the applicant would no longer practise as a doctor was, in her view, insufficient to protect the public. She considered that it was not yet possible to determine how long he would remain a danger. He had demonstrated attitudes which needed to be examined. His risk and the trigger factors needed to be explored before the danger he posed could be safely managed. The judge considered all the sentencing options and recognised that a life sentence was one of last resort. However, this disposal was necessary in the present case. Had this been a determinate sentence it would have been one of 30 years' imprisonment. The judge halved this figure to arrive at a minimum term of 15 years.

The Relevant Sentencing Regime

48. The starting point is section 225 of the Criminal Justice Act 2003 ("the 2003 Act") which is restricted to defendants over the age of 18 who are convicted of "serious offences". The section applies when the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by him or her of further specified offences (the "dangerousness test") and the offence they have committed is one which carries life imprisonment as its maximum sentence. If the court considers

that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, then the court must impose a sentence of imprisonment for life. "Serious offences" are defined as specified violent, sexual or terrorist offences which are punishable for someone over 18 by life imprisonment or imprisonment for a determinate period of 10 years or more (section 224(2) of the 2003 Act).

49. If the seriousness of the offence does not justify a life sentence, the court should consider whether the criteria for the imposition of an extended sentence pursuant to section 226A of the 2003 Act are made out, deciding whether condition A or B in section 226A(1) to (3) is met. Condition A is that at the time the offence was committed, the defendant had been convicted of an offence listed in schedule 15B. Condition B is that if an extended sentence was imposed, the appropriate custodial term would be at least 4 years. If either of these conditions is met, the court may impose an extended sentence of imprisonment (section 226A(4)). It is clear, therefore, that an extended sentence is not mandated even if the criteria are met.

50. In the cases of McCann and Sinaga it has not been suggested that life sentences under section 225 were inappropriate. This point, however, is taken on behalf of Shah.

51. Having passed a life sentence under section 225, given the sentence is not fixed by law, the court needs to determine whether section 82A(4) of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act") applies. Under section 82A(4), the court should consider whether the seriousness of the offence or the combination of the offence and one or more offences associated with it leads the court to the opinion that the early release provisions shall not apply, resulting in a whole life order. Otherwise, the court will order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (the "early release provisions") shall apply to the defendant as soon as he or she has served the part of the sentence which is specified by the judge (section 82 A(2)). In fixing the appropriate part of the sentence to be served, the judge shall take into account the seriousness of the offence and the credit that should be afforded to periods of remand in custody and whilst on bail (in the latter case, if it was subject to certain types of condition), along with the early release provisions for determinate sentences in section 244(1) of the 2003 Act.

McCann and Sinaga: The Release Provisions

52. Ms Whitehouse QC, following the Solicitor General in the cases of McCann and Sinaga, submits that we should take into account the current release provisions for extended sentences, where prisoners serve at least two thirds of the custodial term, rather than the release provisions for determinate sentences, where they usually serve half. However, for the reasons set out in *Attorney General's Reference (No.27 of 2013) (R v Burinskas)* [2014] EWCA Crim 334; [2014] 2 Cr App R (S) 45 at [37] we do not accept the submission:

> "37. There is an argument that if the alternative to a life sentence is an extended sentence rather than a determinate sentence then it is the extended sentence, with its longer time to serve, that should form the basis of the calculation of the minimum term in a life sentence. That would reduce the notional determinate sentence by one-third rather than one-half and would lead to an

> increase in the minimum term to be served in life cases of one-third. There are four difficulties with that approach:
>
> (i) an extended sentence is not necessarily an alternative to a life sentence under s.225;
>
> (ii) an extended sentence is not an alternative to a life sentence imposed under s.224A;
>
> (iii) the sentencing judge must compare the early release provisions at s.244(1) —which are concerned with determinate sentences; and
>
> (iv) a measure which increases minimum terms in life sentences by one-third is, in our judgment, a matter for Parliament."

53. Section 244 of the 2003 Act provides, with some exceptions, that a fixed-term prisoner must be released after serving half of a sentence. Similar provisions (sections 263 and 264 of the 2003 Act) apply the same approach to the total length of multiple sentences, having regard to whether they are concurrent or consecutive. There are statutory changes now in effect or pending to which we return at [62] and [65] below.

54. Against that statutory background, the courts have provided guidance about how sentencing judges should "take into account" the early release provisions for determinate sentences in section 244 of the 2003 Act. Although section 244 would appear to afford judges a wide margin of discretion, the jurisprudence indicates that the court should only depart from setting the custodial period as a half of the sentence in "exceptional circumstances".

55. In *R v Szczerba* [2002] EWCA Crim 440; [2002] 2 Cr. App. R. (S.) 86 Rose LJ VP indicated at [33] to [35] that whether the requisite custodial period was a half or two-thirds of the determinate term, or somewhere between the two, is a matter for the exercise of the sentencing judge's discretion, which must be exercised in accordance with principle. The court accepted that a half is normally the correct figure but that exceptional circumstances may make more than appropriate. The court indicated it would not be helpful to seek to list all the circumstances in which the sentencing judge's discretion could properly be so exercised. If a judge specifies a higher proportion than one-half, he or she should always state the reasons for so doing. It follows that the court did not attempt to circumscribe when exceptional circumstances will arise.

56. In *R v Jarvis* [2006] EWCA Crim 1985 the appellant pleaded guilty to one count of kidnapping, two counts of robbery and one count of rape. He had a lengthy criminal record which included offences of rape, robbery, taking a child without lawful authority, various acquisitive offences and manslaughter. The offences before the court were committed whilst on licence for the latter offence having been released from a sentence of 7 years' imprisonment. The judge fixed the minimum term of the life sentence for the rape at two-thirds (resulting in a minimum term of 7½ years' imprisonment). This court considered that the exceptional circumstances of the case justified departing from the one-half approach, namely the offending whilst on licence (see [19]).

57. A further example of the infrequent occasions when this court has been asked to consider a departure from the historic one-half figure was *R v Rossi* [2014] EWCA Crim 2081; 2015 1 Cr App R (S) 15 (the judge chose 12 years rather than 9 years, the latter representing one-half of the notional determinate sentence). The appellant was charged with offences of attempted robbery, having a firearm with intent to commit an indictable offence and illegally possessing ammunition. The context was a failed attempt to access the safe at a bookmaker when he was wearing a balaclava and wielding a double-barrelled sawn-off shotgun. He had a lengthy criminal record which included three offences of attempted murder, various robberies or attempts, serious assaults and firearms offences. He had previously served two life sentences imposed in 1984 and 2001. In giving judgment, Wyn Williams J observed in the context of assessing the offender's culpability:

> "22. […] In the combined experience of this court we have never encountered a case in which an offender has been released on two separate occasions from life sentences imposed on two separate occasions, for a catalogue of very serious offences, and yet that offender has gone on to commit yet further very serious offences within about 16 months of his last release. Those offences in themselves justified the imposition of yet a further life sentence. In our judgement, that history amply justified departing from the normal practice of specifying that the minimum term to be served should be one-half of the notional determinate sentence."

58. It has been suggested (see the commentary in the Criminal Law Review 2015, 4, 294 to 297) that in *Rossi* the court engaged in double counting when it relied on the offender's previous convictions twice in calculating the overall sentence – once in the calculation of the notional determinate term and then again in the determination that the minimum term should be greater than one half. However, the court dealt expressly with this issue:

> "23. […] At the stage of fixing a notional determinate sentence after a trial, the judge is simply seeking to assess a sentence which is commensurate with the offender's culpability and he is also of course entitled to take account of relevant antecedent history. At the stage of fixing the minimum term, the judge is looking at whether or not exceptional circumstances exist which would justify departing from a conventional rule of practice. For the reasons we have sought to explain, in our view there were ample reasons which would justify departing from the rule in this case."

59. Similarly, it has been suggested that "the rationale for setting the minimum term at more than one-half of the notional determinate term can only be justified where it is necessary to avoid a period of that sentence being subsumed by another and that such circumstances will be exceptionally rare" (see Archbold Criminal Pleading Evidence and Practice 2020 5A-717). This in our judgment would conflict with authorities such as *Jarvis* and *Rossi* and artificially limit the category of exceptional circumstances which in *Szczerba* was expressly left open. Rose LJ in that case identified two examples

which had arisen in argument in which a period more than one half may well be appropriate and then added:

> "34. There may well be other cases, apart from these two examples, in which it is appropriate to specify a period greater than one-half. It would not, in our judgment, be helpful to seek to list all the circumstances in which the sentencing judge's discretion can properly be so exercised."

60. When "taking into account" the early release provisions for determinate sentences judges, in the great majority of cases, have adopted the one-half approach; but this does not mean that, when justified, the court cannot reflect the culpability of the offender both in the length of the notional determinate sentence and in the way the minimum term is calculated, for instance in order to capture the exceptional seriousness of the offence or offences. This does not involve "double counting" but instead provides a staged approach that enables the court to impose appropriate punishment. A defendant's grave antecedents or the extent and seriousness of the offence or offences for which he or she is to be sentenced may be relevant, first, to the length of the determinate term and, secondly, to whether there are persuasive circumstances that justify a departure from the usual one-half approach. As was said by this court in *R v Martin and others* [2016] EWCA Crim 474, the judge should explain the justification for departing from the usual approach of fixing the minimum term at one-half (see [16]).

61. Before leaving this issue, we note three matters of context.

62. First, with effect from 1 April 2020, in relation to a defendant serving a fixed-term sentence of seven years or more for a relevant violent or sexual offence (an offence listed in Part 1 or 2 of schedule 15 to the 2003 Act for which a sentence of life imprisonment may be imposed) which was imposed on or after that date, the requisite custodial period is two thirds (not a half) (see the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 SI 2020/158). These sentences for McCann and Sinaga, for offences which overwhelmingly came within Part 1 or Part 2, were imposed before that date.

63. Secondly, the Divisional Court in *Regina (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin); [2020] 1 WLR 3932 considered whether the Terrorist Offenders (Restriction of Early Release) Act 2020 ("the 2020 Act) (which inserted section 247A into the 2003 Act) is incompatible with articles 5, 7 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The effect of the changes to the legislation for the claimant was that instead of being automatically released without reference to the Parole Board at the halfway point of his sentence, his case would be referred at the two-thirds point of his sentence to the Parole Board, which would not direct his release unless satisfied that it was no longer necessary for the protection of the public that he should remain in custody. In obiter remarks at paragraph 31 the court observed:

> "Since 1 April 2020, under the 2020 Order, sexual and violent offenders are not entitled to automatic release until the two-thirds point of their sentences. A court will be entitled to take this into account under section 82A(3)(c) when setting the

> minimum tariff period in respect of a discretionary life sentence."

64. *Khan* is different from the present cases (McCann and Sinaga) and from *Burinskas* because the 2020 Act introduced new release provisions for certain terrorist offences such as in the case of *Khan*. At the time of sentencing McCann and Sinaga there had been no change to the release provisions applicable to the offences with which they were charged.

65. Thirdly, we note that as amended by section 19 of the Criminal Justice and Immigration Act 2008, from a day to be appointed, section 82A will require the specified period to be fixed at one half of the notional determinate term unless the offender was aged 18 or over at the time of the offence and either the exceptional seriousness of the offence would not otherwise be adequately reflected, or the period specified would have little or no effect on the time spent in custody. In these two circumstances the court will be able to specify a period between one half and the full term of the notional determinate term.

66. The position, therefore, is that the significant changes to the release provisions which have either been recently implemented or are awaiting implementation will have a considerable impact on the position of individuals convicted of a wide range of serious offences.

McCann and Sinaga: The Test on References by the Attorney General

67. The nature of the test on granting leave was stated in *Reference by the Attorney-General under section 36 of the Criminal Justice Act 1988 (No.3 of 1989)* (1990) 90 Cr App R 358, Lord Lane CJ at page 364. The court "agreed entirely" with the submission that leave should only be granted in exceptional circumstances and not in borderline cases. This approach was endorsed relatively recently in *Attorney General's Reference (R v Howard)* [2016] EWCA Crim 1511; [2017] 1 Cr App R (S) 8 at [27]. On the substance, Hughes LJ at paragraph 19 in *Attorney General's Reference (No. 60 of 2012)* [2012] EWCA Crim 2746 said:

> "The procedure for referring cases under section 36 of the Criminal Justice Act 1988 is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result."

Sinaga: The Timing of the Attorney General's Reference

68. There is an issue whether the Attorney General's reference in Sinaga, which seeks to refer the sentences across all four trials, is in time in respect of the first two trials. Paragraph 1 of schedule 3 to the Criminal Justice Act 1988, ("schedule 3(1)") provides that:

> "Notice of an application [by the Attorney General] for leave to refer a case to the Court of Appeal under section 36 above shall be given within 28 days from the day on which the sentence, or the last of the sentences, in the case was passed"

69. The sentences in trials one and two were passed on 17 December 2018 and 21 June 2019 respectively. No notice of application was made within 28 days of those dates. The only application before the court is one made within 28 days of 6 January 2020, the date on which the sentences in trials three and four were passed. Notwithstanding that, the Solicitor General submits the sentences passed in trials one and two may also be the subject of the reference. He submits that the sentences passed after trials three and four represented "the last of the sentences, in the case," where the "case" is to be construed broadly to include all four trials.

70. The Solicitor General draws support for that submission from *Attorney General's Reference (Bashir)* [2019] EWCA Crim 1229, in which the first of three co-offenders was sentenced in January 2019 and the remaining two offenders in March 2019. The court proceeded to hear the Reference even though the notice of application was not given until after the later sentences had been passed. The Solicitor General further submits that there is a proper basis for construing schedule 3(1) broadly in the present application given that Sinaga could have been tried for all the offences in one trial, that is in one "case". The only reason for splitting them into four was to avoid the trials becoming too unwieldy.

71. Mr Littler Q.C., on behalf of Sinaga, submits that the reference to "the last of the sentences in the case" means the last of the sentences arising out of the trial and can include situations where a defendant is subject to several sentences passed on separate occasions or where a number of defendants are sentenced at different times, Bashir being an example of the latter. It does not include sentences passed in separate earlier proceedings where the victims and offences were different.

72. The term "case" is not expressly defined in the Criminal Justice Act 1988. However, section 35 of the CJA 1988, which deals with the scope of Part IV of that Act, so far as is relevant, provides:

> "35. Scope of Part IV.
>
> (1) A case to which this Part of this Act applies may be referred to the Court of Appeal under section 36 below.
>
> (2) Subject to Rules of Court, the jurisdiction of the Court of Appeal under section 36 below shall be exercised by the criminal division of the Court, and references to the Court of Appeal in this Part of this Act shall be construed as references to that division.
>
> (3) This Part of this Act applies to any case:
>
> (a) of a description specified in an order under this section; or
>
> (b) in which sentence is passed on a person—
>
> (i) for an offence triable only on indictment; or
>
> (ii) for an offence of a description specified in an order under this section.

[…]"

73. The orders made under this section therefore describe the cases within scope as being ones "in which sentence is passed". This tends to suggest that the case is the trial or proceeding at the conclusion of which a sentence (or sentences) is (or are) passed. That interpretation is supported by the provisions of section 36(3)(b) Criminal Justice Act 1988, which similarly treat a "case" as being the same as the "proceeding" in which a sentence is passed. Section 36 provides:

> "36. Reviews of sentencing.
>
> (1) If it appears to the Attorney General—
>
> (a) that the **sentencing of a person in a proceeding in the Crown Court** has been unduly lenient; and
>
> (b) that the case is one to which this Part of this Act applies,
>
> he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may—
>
> (i) **quash any sentence passed on him in the proceeding**; and
>
> (ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.
>
> …
>
> (3) For the purposes of this Part of this Act **any two or more sentences are to be treated as passed in the same proceeding if they would be so treated for the purposes of section 11 of the Criminal Appeal Act 1968**.
>
> […]" (emphasis added)

74. Section 11(7) of the Criminal Appeal Act 1968 ("section 11(7)") provides:

> "(7) For the purposes of this section, any two or more sentences are to be treated as passed in the same proceeding if –
>
> (a) They are passed on the same day: or
>
> (b) They are passed on different days but the court in passing any one of them states that it is treating that one together with the other or others as substantially one sentence."

75. In our judgment, the upshot of these provisions is that a "case" is a "proceeding" in which sentence is passed, and that a "case" for these purposes does not comprise different proceedings in which sentences are passed, save where, as provided for by

section 11(7)(b), the court expressly states that it is treating a particular sentence together with others as substantially the same sentence.

76. In Sinaga, the sentences passed after trials one and two were not made in the same proceeding as those passed after trials three and four as they were not passed on the same day and the judge did not state that the sentences on the latter occasion were to be treated together with others as substantially the same sentence. The judge imposed separate additional life sentences for the offences in respect of which the offender was convicted in the later trials. The convenience of splitting the prosecution into four trials, each based on different victims and evidence, does not mean that they form part of the same "case" within the meaning of Schedule 3(1).

77. Accordingly, we reject the Solicitor General's submission that the later sentences can be treated as the last of the sentences in the case (within the meaning of Schedule 3(1)). Bashir does not assist the Solicitor General because that was a case where all of the sentences were passed in a single case or proceeding and where, but for one of the defendants having absconded and one sentence having to be adjourned, all the sentences would have been passed on the same day. The Attorney General's application is therefore out of time insofar as it seeks to refer the sentences passed in trials one and two but is in time in respect of the sentences in trials three and four. In our view, this conclusion is of little practical effect given that the judge, in sentencing for the offences of which Sinaga was convicted in trials three and four, properly approached the sentence by reference to what he would have received had he been sentenced for all offences together (hence the longer sentence on these offences). We approach the reference on the same basis.

McCann and Sinaga: Discussion

78. In both these cases the Solicitor General submits that the exceptional seriousness of the offending calls for a whole life tariff.

79. McCann had a bad criminal record prior to the present matters, consisting of 19 previous convictions for 37 offences, although none involved sexual offending. Instead, most notably they included crimes of dishonesty, such as burglary and aggravated burglary. In 2008 he had received an indefinite sentence of imprisonment for public protection for an aggravated burglary (a sentence no longer available). McCann's case is rendered exceptional because of the nature, extent and seriousness of the present offending. There were eleven victims, including three children. The offences extended over fifteen days. The individual attacks were sustained and involved repeated assaults. Some of the victims were held in terrifying circumstances over a long period of time, having been kidnapped and/or falsely imprisoned. In most cases they were subjected to terrifying threats, including on more than one occasion the suggestion that the victim or victims would be killed. McCann used violence very significantly in excess of what was required to carry out the assaults. Two of the juvenile victims and one of the adults were attacked in their own homes. Some of the victims were subjected to additional humiliation by being forced to perform sexual acts in the presence of each other. One victim experienced the additional degradation of being forced to drink McCann's urine.

80. Sinaga, described by the judge as an evil sexual predator, had been convicted over 4 trials of a total of 136 offences of rape, in relation to 44 complainants, together with 8 offences of attempted rape, 2 counts of assault by penetration and 6 offences of sexual

assault. These offences were committed over a period of two and a half years between 1 January 2015 and 2 June 2017. He targeted his victims, who were evidently vulnerable, given their state of intoxication and the fact that they were alone late at night. They were mostly subjected to repeated attacks. Sinaga used powerful drugs to render them unconscious, which risked causing them serious harm (viz. the "narrow margin between a euphoric high, unconsciousness and death" according to the forensic toxicologist) and resulted in a wholesale lack of memory. He held his victims down when necessary. He recorded the offences on his mobile telephone and stole 'souvenirs' such as a watch and a driving licence. Sinaga planned these offences with care and was able to hold his victims for substantial periods, in one case 8 hours. Sinaga only once wore protection and he ejaculated on multiple occasions having penetrated the anuses of the victims, one of whom suffered injury. Once the offences were revealed, many of the victims suffered severe psychological harm and at least one contemplated self-harm and suicide.

81. Mr Sidhu Q.C. on behalf of McCann recognises these were extremely serious offences, for which there were several aggravating features and no mitigation. He acknowledges that this case falls outside the Rape Guideline issued by the Sentencing Council. He does not contest the finding of dangerousness, the imposition of a discretionary life sentence or the decision of Edis J that the minimum term should be two-thirds of the notional determinate term. Instead, his submissions are directed at resisting the suggestion of the Solicitor General that this should have been a whole life term under section 82A(4) of the 2000 Act. His starting point is to invite the court to "look sideways" at the regime for sentencing those convicted of murder, and particularly paragraph 4(1) of schedule 21 to the 2003 Act. This reserves whole life terms for murder to cases of exceptionally high seriousness, usually characterised by the murder of one or more people when there was a substantial degree of premeditation or planning, the abduction of the victim or sexual or sadistic conduct; the murder of a child involving the abduction of the child or sexual or sadistic motivation; the murder of a police or prison officer in the course of his or her duty; murder done for the purpose of advancing a political, religious or ideological cause; or murder by an offender previously convicted of murder.

82. For Sinaga, Mr Littler Q.C. argues that the application turns on the single question whether the last resort sentence of a whole life order should be passed in a case where the individual offences fall below the exceptionally serious category which hitherto has always involved murder, but when the level of offending and the number of offences is said to justify such a step. A whole life term has never been imposed in a non-homicide case simply on the basis that the defendant is a prolific offender. He submits that a total sentence of life imprisonment with a minimum term of 30 years' imprisonment, reflecting a notional determinate sentence of 60 years' imprisonment, was not unduly lenient. The judge, furthermore, carefully explained her reasons for not imposing a whole life order:

> "I have reviewed the authorities in relation to whole life sentences. Whole life sentences are extremely rare, and I understand that a whole life order has never been made in a case other than one involving murder. Whilst these offences collectively and individually are of the utmost seriousness and in my view did involve a risk to life given the evidence of Dr

> Elliott, the features of torture and violence are absent, and did not involve death or lasting serious physical injury. You are clearly well versed in the necessary doses and mercifully none of the victims suffered any lasting serious, physical effects. The sole feature that would allow the court to contemplate the passing of a whole life order would be the vast scale of your offending which now involves 48 victims, some 23 in these two trials. This is in my view a borderline case as described in the authorities, and as such I must therefore shrink back from passing a whole life order."

83. In a case of multiple murder which preceded the 2003 Act, Lord Bingham of Cornhill C.J. observed in *R v Secretary of State for the Home Department, ex parte Hindley* [1998] QB 751 at 769:

> "I can see no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving life long incarceration for purposes of pure punishment."

Lord Steyn, giving the leading judgment in the House of Lords ([2001] 1 AC 410) had specifically agreed with this observation (at page 416) and went onto say at page 417:

> "There is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence."

84. In *R v Neil Jones* [2005] EWCA Crim 3115; [2006] 2 Cr App R (S) 19 Lord Philips C.J. said:

> "10. The scheme of Sch.21 is that the judge first determines the starting point and then considers whether it is appropriate to adjust the sentence upwards or downwards to take account of aggravating or mitigating factors. This approach is manifestly not possible in respect of a whole life order. A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life. Often, perhaps usually, where such an order is called for the case will not be on the borderline. The facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. Indeed, if the judge is in doubt this may well be an indication that a finite minimum term which leaves open the possibility that the offender may be released for the final years of his or her life is the appropriate disposal. To be imprisoned for a finite period of 30 years or more is a very severe penalty. If the case includes one or more of the factors set out in para. 4(2) it is likely to be a case that calls for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty."

85. Similarly, in *R v Simon Tyler Wilson* [2009] EWCA Crim 999; [2010] 1 Cr App R (S) 11, Lord Judge C.J. expressed a similar view thus:

> "14. We accept the argument that, even when a mandatory life sentence is required, a whole life order is very rarely made. The same holds good in the case of a discretionary life sentence. It remains a sentence of last resort for cases of the most extreme gravity."

86. Later in *R v Oakes* [2012] EWCA Crim 2435; [2013] QB 979; [2013] 2 Cr App R (S) 22, Lord Judge returned to this issue in the context of cases of murder and schedule 21 when he stated:

> "29. […] the whole life order, the product of primary legislation, is reserved for the few exceptionally serious offences in which, after reflecting on all the features of aggravation and mitigation, the judge is satisfied that the element of just punishment and retribution requires the imposition of a whole life order. If that conclusion is justified, the whole life order is appropriate: but only then. It is not a mandatory or automatic or minimum sentence."

87. Finally, in *R v Andrews* [2015] EWCA Crim 883; [2015] 2 Cr App R (S) 40, this court reviewed all the cases in which whole life orders have been made and sustained. Treacy LJ, giving the judgment of the court, observed:

> "35. We have had the benefit of extensive analysis of those cases in which whole life orders have been made and sustained. There are a little over 50 such cases. As was observed at [101] of Oakes, among the cases where whole life orders have been imposed, none can be found in the context of sexual crime where one or more of the victims had not been murdered. This analysis includes the case of R. v John Taylor [2006] EWHC 2944 (QB) which on proper analysis falls within this category. Although the door is not conclusively shut to the imposition of a whole life order in serious cases, not involving a homicide, the practice of this court to date has been against the imposition of such a sentence in a non-homicide case." (emphasis added)

88. The effect of these decisions is to leave open the possibility that a whole life term could be attached to a discretionary life sentence, but there is a principled reason for reserving the most serious sentences to cases of murder, save in the most exceptional circumstances. It is trite, but true, that murder is the most serious offence in the criminal calendar because it involves the deliberate taking of life with intent to kill or the taking of life with intent to cause serious harm. It is generally sentenced much more severely than manslaughter where the necessary intent is absent or a statutory partial defence to murder operates. It is usually sentenced more severely than attempted murder, although for that offence there must be an intent to kill. The reason for the difference is the very high value accorded by the common law to life itself and its deliberate taking by murder. Schedule 21 to the 2003 Act demonstrated the will of Parliament to mark the distinctive aspects of murder with minimum sentences that

resulted in a step change from what went before. In *Hindley* Lord Bingham and Lord Steyn had recognised that incarceration for the rest of an offender's life was a viable option for the worst cases of murder. The range of cases has been expanded by Parliament but that does not mean that the underlying principled difference between cases of murder and others should be diluted.

89. A whole life order is the severest sentence available. Save in the limited circumstances identified in *R v McLoughlin* [2014] EWCA Crim 188, [2014] 1 WLR 3964 at paragraphs [19] to [36] (compassionate release) it removes any prospect of being released. We see no reason to depart from the longstanding approach approved over decades by this court not to attach a whole life tariff to a discretionary life sentence save in wholly exceptional circumstances. We endorse the line of authority which does not shut the door to a whole life tariff in a case not involving murder. The infinite variety of circumstances which give rise to serious offending make it impossible to identify such cases in advance, but we give an indication of the circumstances that might justify such a sentence. We can envisage circumstances where murders of similar exceptionally high seriousness to those listed in paragraph 4(1) of schedule 21 to the 2003 Act, are substantively planned to a point close to execution (conspiracy to murder or attempted murder) but the crime does not occur because the enterprise is foiled or prevented by some fortuitous intervening event. Examples might include when a bomb planted on a commercial airliner fails to explode or does so without causing sufficient damage to bring it down; similarly, a bomb in a public place does not achieve the wicked aim of those who planned or planted it; or intervention by the authorities prevents an act of mass-murder. There will be other cases that do not involve a planned homicide of this kind which will merit a discretionary whole life term but, as Lord Phillips observed in *Neil Jones*, when they occur the need for such a sentence will be clear.

90. Otherwise, a determinate term of appropriate length will meet the requirements of retribution and punishment. The offending in the cases of McCann and Sinaga, very serious indeed though it is does not, in our judgment, call for either to receive a whole life tariff. This is not to minimise the seriousness of their offending but instead to ensure that the most severe sentence in our jurisdiction is reserved, save exceptionally, either for the most serious cases involving loss of life, or when a substantive plan to murder of similar seriousness is interrupted close to fulfilment.

91. We are thus unable to accept the submission of the Solicitor General and Ms Whitehouse that these offenders should have received a whole life tariff. However, that is not the end of the matter. Their alternative submission is that the 30-year minimum terms were nonetheless too low, and by a wide margin.

92. In the collective experience of this court the cases of McCann and Sinaga, albeit very different on their individual facts, come within the category of the most serious cases involving a campaign of rape to have been tried in England and Wales. Under the Sentencing Council's Definitive Guideline for Rape, a Category 1A offence (the highest category) has a category range of 13 to 19 years and a starting point of 15 years for a single offence. The Guideline notes that:

> "Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate." Where a court is of the view that a sentence of 20

> years and above may be appropriate, it would be imposing a sentence outside of the offence range for a single offence and therefore would be departing from the Guideline to that extent."

93. The judges in these two cases had no guidance available from this court in cases of similar severity, in particular multiple sexual and associated offending at a level beyond that previously encountered. They approached their task with conspicuous care and clarity. The question remains whether in the truly exceptional circumstances of these cases, the substantial minimum terms should have been significantly higher, as a matter of principle.

94. In the case of McCann, we note the number of offences, the short timespan over which they were committed, and the gratuitous, sadistic violence used. Rape is self-evidently a serious offence, and the collection of offences of which McCann was convicted (which also included kidnapping, false imprisonment and child sex offences), when viewed as a whole, constitute truly grave criminality. The judge sentenced him to 33 life sentences for this offending, together with 4 determinate sentences. Similarly, for Sinaga the unique extent of his offending (for which on the present trials he received 56 life sentences, together with 8 determinate sentences), the humiliation he inflicted on his victims, the health risks he created and the extent of the planning means that his case, along with that of McCann, is to be placed in a bracket of cases of this kind of the utmost seriousness. Neither man has shown any remorse and the long-term psychological damage for at least some of the victims in both trials is profound and will only be understood in the years to come. Notwithstanding the considerable differences between the two cases, we consider they equally merited a notional determinate term of 60 years' imprisonment, as identified in the case of Sinaga and in place of the notional sentence of 45 years' imprisonment indicated for McCann.

95. These two cases are paradigms of the circumstances which justify a departure from the usual position of fixing the requisite custodial period at a half of the determinate term. We agree with Edis J in McCann's case that a custodial period of two-thirds is necessary, but we express this step as being required for both offenders to ensure that the proper requirements of punishment are met for these unique crimes rather than by reference to the release provisions for an extended sentence. In these circumstances we grant leave to refer these sentences, and vary the life sentences in each case, by substituting minimum terms for McCann and Sinaga of 40 years. The multiple life sentences remain and whether either is in fact ever released will depend upon the assessment of risk by the Parole Board at the end of the minimum terms.

Shah: The Submissions

96. There are five grounds of appeal advanced in this application for leave to appeal against sentence.

97. In support of the first ground of appeal, Ms Zoe Johnson Q.C. argues that the judge, in passing a life sentence, failed to pay sufficient regard to the applicant's lack of previous convictions, the suggested lack of danger he poses to the public in the future and the availability of other appropriate sentences. He is 50 years old and was previously a man of good character. She submits that the judge wrongly decided that because his character and standing had been used to facilitate his offending, these factors would not operate in the usual manner to reduce his sentence. She stresses that he gained the trust

of his patients because he was a doctor, not because he was of good character. Ms Johnson relies on the number of examinations which were anyway necessary and appropriate; what is suggested to have been the "restrained" nature of his crimes; and the contention that given he will never practise again, he no longer poses a threat to the public, bearing in mind the context of his offending.

98. Ground two is that the judge wrongly considered the fact that the applicant faced outstanding allegations from several women. Ms Johnson suggests that the judge was wrong to refer to a continuing police investigation into sexual offences.

99. Ground three suggests that the judge should have treated the probation officer's assessment that the applicant is dangerous with caution given the conclusion did not reflect the results of the measures that had been used to assess dangerousness.

100. In ground four, Ms Johnson challenges the judge's finding that the "breach of trust was at least as damaging as the use of violence". She submits that this operated unfairly to the applicant's disadvantage because violence or threats of violence, or the lack of this ingredient, is relevant to considering the correct category of harm. She suggests the judge should have separated the abuse of trust and the presence, or absence, of violence.

101. Ground five is an omnibus ground. In all the circumstances, it is contended that the notional determinate term of 30 years was manifestly excessive, not least because the penetrative offences were only committed with the applicant's fingers or a speculum as part of a recognised medical procedure. The judge also ignored what Ms Johnson describes as the "great paradox" in the case, namely that as well as abusing his patients for his own sexual gratification the applicant was also providing them with good medical care.

102. Ms Rosina Cottage Q.C. for the respondent supports the approach taken by the judge.

Shah: Discussion

103. This applicant's offences spanned a period of just over 4 years, and his criminality was on a very significant scale. His thinking was distorted to such an extent that he sought to normalise prolific offending in gross breach of trust against young girls and women attending his practice. He had planned the offences; he manipulated his patients and, for some of them, their parents; he deceived his professional colleagues and falsified records; and his behaviour was the result of sexual desire and a wish to control and humiliate women. In our judgment the court was entitled to determine that the fact that the applicant will not practise again was insufficient to protect the public, given, amongst other factors, the scale and persistence of this offending: 90 sexual offences perpetrated against 24 women, two of whom were under the age of 16 and two were under the age of 18. The circumstances of this offending do not preclude the real possibility of the applicant finding other opportunities to commit serious sexual offences against women and girls. It was open to the judge to determine that the applicant was dangerous and there was no reliable assessment of the length of time he would remain a danger.

104. Whilst the applicant is correct to submit that good character is a factor to be considered as a mitigating factor, in this case it was to a significant extent outweighed by the

aggravating factor of the extent to which his standing as a doctor, which in part depended on his good character, was used to perpetrate these offences.

105. Furthermore, we are unimpressed with the submission that the "restrained" nature of these offences provided the applicant with mitigation given that if he had behaved in a less cautious way his criminality would have become evident at an earlier stage and he would have been unable to continue offending. More "overt" sexual offending risked a complaint being made to the authorities.

106. It was inevitable that the judge would have in mind that the determination of charges relating to a further 29 complainants remained outstanding, the applicant having been sentenced by agreement at the end of the second trial, before these additional matters were resolved. The judge, furthermore, was aware of two pending investigations. Whilst the judge had been told that a part of the wider investigation by the Metropolitan Police involved examinations of young children, as Ms Cottage observes, she had no further information on this issue. The assessment of risk carried out by the judge was overwhelmingly based on the offending proved against the applicant and we consider her conclusions in this regard were entirely supportable. The judge did not suggest the outstanding investigation was an aggravating factor or in any way sentence the applicant for offences of which he had not been convicted or admitted.

107. Neither the judge nor the author of the pre-sentence report was bound by the results of the Offender Assessment System which assists in the identification of the risk of reconviction and the risk of serious harm presented by the offender. The Offender Group Reconviction Scale, the Risk of Serious Recidivism score and the Risk Matrix 2000 all placed him at low risk of reoffending. As the probation officer explained, "Whilst these tools are useful in assessing the risk of re-conviction and I would concur that his is at a low risk of committing offences generally, they do not account for the prolific nature of Dr Shah's sexual offending. […] The assessment of dangerousness in this case is not an easy one, whilst Dr Shah is a man of previous good character […] he has exploited his position to systematically abuse multiple victims over a long period of time. Having heard both trials the Court will be in the best position to assess Dr Shah's motivation. However, […] he meets the Courts criteria for dangerousness." As emphasised in *R v Almoshaweh* [2016] EWCA Crim 1910, the results of the technical assessment tools in a pre-sentence report are not to bind the sentencing judge, who should look at the report as a whole and form his or her own view (in that case having seen and heard the appellant during the trial) (see [16] and [17]) on all available material. It our view, the judge's conclusion that the applicant is dangerous was unimpeachable, as was her decision that the criteria for a life sentence were made out.

108. During the sentencing remarks the judge observed that the breach of trust in this case was at least as serious as the use of violence. We agree with Ms Cottage that this was no more than an expression of the conclusion of the judge that the most serious aggravating feature of the applicant's offending was the gross breach of trust. Having outlined the serious adverse psychological impact, the offending had had on some of the complainants, it was in her view comparable to cases when violence is used. This did not, as suggested by Ms Johnson, conflate considerations of harm with those of culpability within the Sentencing Guidelines.

109. The central issue on this application in our view is whether a notional determinate term of 30 years was manifestly excessive. The judge was, we have rehearsed, sentencing

for 90 offences committed against 24 women over a period of 4 years, many of which carried a maximum of life imprisonment. We have already identified in detail the nature of the offending and the way in which it was perpetrated. Although some of the examinations had medically useful results, that does not detract from the true nature and purpose of the applicant's activities. He needed to remain an effective medical practitioner to continue this criminality. The impact on the victims has been very considerable and, in some cases, long lasting. Offending of this scale must be met with a substantial punishment, and although 30 years is undoubtedly a lengthy notional determinate sentence, given the sheer scale of this criminality we are unable to conclude that it was manifestly excessive.

110. The crimes against the individual victims can be described in different ways, but we do not consider there is any substance in Ms Johnson's suggestion that the judge materially misrepresented the nature and impact of these offences and there is no substance in the complaint that she made factual findings that were substantively erroneous. In this context the judge placed proper reliance on the contents of the Victim Personal Statements, in terms of the impact of the offending, regardless of whether there was supporting medical evidence.

111. We think it appropriate to grant permission to appeal, given that issues raised in Ground 5 were arguable, but we dismiss this appeal against sentence.