Neutral Citation Number: [2022] EWCA Crim 1751

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203301/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 21 December 2022

Before:
LORD JUSTICE SINGH

MR JUSTICE SPENCER

MR JUSTICE GOOSE

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

REX
V
MICHAEL FRANCIS EGAN

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MR J SMITH appeared on behalf of the Solicitor General.
MR I JAMES appeared on behalf of the Offender.

J U D G M E N T

(Draft for Approval)

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of His Majesty's Solicitor General for leave to refer sentences which are regarded as being unduly lenient under section 36 of the Criminal Justice Act 1988 ("the 1988 Act").
2. In the Crown Court at Norwich, on 17 October 2022 (the day when his trial was due to begin) the respondent pleaded guilty to three counts, two of child cruelty and one of assault occasioning actual bodily harm. He was sentenced by Mr Recorder Hardy KC to a total sentence of 2 years' imprisonment suspended for 2 years. He was also ordered to pay a contribution towards the prosecution costs in the sum of £1,000. No requirement was attached to the suspended sentence order, for example by way of an unpaid work requirement.
3. The principles to be applied on an application under section 36 of the 1988 Act are well established and have been summarised as follows:
    (1) The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
    (2) A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.
    (3) Leave to refer a sentence should only be granted by this Court in exceptional circumstances and not in borderline cases.
    (4) Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into gross error: (see for example Attorney-General's Reference (Azad) [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10, at paragraph 72 in a judgment given by the Chancellor of the High Court.

4. In giving the judgment of this Court in Attorney-General's Reference (No 4 of 1989) (1990) 90 Cr App R 366 at page 371, Lord Lane CJ said that:

> "... even where this court considers that a sentence was unduly lenient, it has a discretion as to whether to exercise its powers."

5. An example where this Court took that course is provided by Attorney-General's References Nos 8, 9 and 10 of 2002 (Mohammed) [2003] Cr App R(S) 57 (see paragraph 21 in the judgment given by Kennedy LJ)

6. We should also mention Attorney-General's Reference No 132 of 2001 (Bryn Dorian Johnson) [2002] EWCA Crim 1418; [2003] 1 Cr App R(S) 41, in which the judgment of this Court was given by Potter LJ. At paragraph 24, he said that the purposes of the system of Attorney-General's References include:

> "... the allaying of widespread concern at what may appear to be an unduly lenient sentence, and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type."

The Facts

7. The facts, which are not in dispute in the present proceedings, can be taken from the Final Reference by the Solicitor General to this Court at paragraphs 12-23. The respondent offender fell to be sentenced for offending against the victim, Ms Lake, between 1988 and 1993. At the time the offender was in a relationship with her mother. During the period of the offending he was aged between 42 and 47 years. During that period Ms Lake was aged between 11 and 15. The offender had been in a relationship and was later married to her mother since around 1986, when Ms Lake was aged 9. Ms Lake

alleged that from earlier on in the proceedings the offender subjected her to physical and mental abuse which she described as "physical mental terror and literally hell on earth".

8. We will turn to the facts of the three relevant counts. Count 2 reflected abuse at the hands of the offender at the family home, when Ms Lake was aged between 11 and 13. She made a complaint about the treatment she had suffered at his hands to her school when she was 11. The offender was brought to school and the complaint outlined to him. It does not appear that any formal action was taken. After returning home the offender told her that he would make her pay and struck her to the stomach. No injury was caused. The offender also subjected Ms Lake to mental abuse, calling her a "rape baby" and telling her that both she and her brother were supposed to have died in a fire at the family address. He would only permit her to have cold showers and would often wake her by tipping cold water over her. She began to wake early in order to avoid being woken in this way.
9. No minimum number of occasions were specified in the indictment and count 2 was opened at the sentencing hearing on the basis that the offending reflected in that count was mostly of a verbal demeaning nature and did not lead to serious injury.
10. Count 4 reflected a single assault on Ms Lake when she was aged 12 or 13. She had taken an ice lolly from the freezer without permission. When confronted by the offender she ran to her room and slammed her door. He walked to her room, grabbed her by the hair and pulled her to the floor. He then kicked her repeatedly as she curled into a ball on the floor. Whilst kicking her he was wearing boots. She described the offender as putting "the fear of God" into her and thinking that she was going to die. The next day the pain in her ribs was so bad that she was unable to put a shirt on or bend over. She was unable to attend school. Her ribs were bruised and she was unable to take a full

breath. She coughed up blood.

11. A medical record from 23 February 1990, when she was aged 12, showed that she had attended her GP complaining of coughing up blood although the notes do not indicate that an examination was made of her ribs.

12. Count 6 reflected an incident which occurred when the family had moved to Winterton-on-Sea. Ms Lake was then aged between 13 and 15. The offender told her that he wanted to test her pain threshold. He asked her to hold out her hand in a fist and then lit a cigarette. He told her he was going to burn her. He then put the cigarette out on her hand. She still bears the scar on her hand.

13. In 1992 the offender was convicted of inflicting grievous bodily harm against Ms Lake (that is not the subject of the present proceedings). She would say that at the trial she was told not to mention the other abuse she had suffered at the offender's hands. Ms Lake thereafter decided not to make further complaint to the police for fear of upsetting her mother and because she felt that she had been able to make peace with it.

14. In 2017 her mother died. In 2018 Ms Lake did make a complaint to the police, however she did not feel able to pursue the allegations. She decided to do so in 2020, when a formal account was taken from her. The offender was then investigated and interviewed on 12 November 2020, and charged by postal requisition on 25 November 2021.

15. In interview the offender denied the offending. He stated that he would never kick anyone in the ribs, denied all the allegations and accused Ms Lake of lying.

16. There was a victim personal statement before the court, to which we also have had regard. For the avoidance of doubt we make it plain that we have not had regard to a more recent victim personal statement which it was accepted on behalf of the Solicitor General was not something that he could rely upon in making the present application,

although it was indicated on his behalf that if the court were minded to take the view that the sentence should be referred to this Court, then in its discretion, it was something that could be taken into account. For the avoidance of doubt we make it clear that we have, with respect, not taken it in to account. For reasons that will become apparent it is not going to be material to the outcome of this case.

The Procedural History

17. Originally in this case before the Crown Court the offender faced a four count indictment alleging two counts of cruelty to a person under 16 years and two counts of assault occasioning actual bodily harm. On 16 February 2022 the offender entered not guilty pleas to that indictment. On 24 March 2022 an expanded and particularised seven count indictment was lodged in place of the earlier four count indictment. At a plea and trial preparation hearing on 25 March 2022 the offender was re-arraigned on that seven count indictment and pleaded not guilty to all seven counts. The trial date was set for 17 October 2022.

18. On 17 October 2022 (the first day scheduled for the trial) there were hearings which took place before the trial got underway. We have had regard to a transcript of those parts of the proceedings. It is clear from the early part of the transcript that the Recorder had invited counsel into court, and this was all recorded in open court, as he put it "just to make the enquiry as to whether there is any possibility of a resolution of this case without the jury." At that stage, counsel for the defence, who has also appeared before this Court, Mr James, was present but counsel for the prosecution, Mr Potts, was not. Nevertheless, as we understand it, what occurred in Mr Potts's absence was later relayed to him. What is clear from the transcript is that the court then reconvened at 12.10 pm,

by which time Mr Potts was present.

19. It is also clear that the court clearly had a number of other matters including trials listed at that time. The Recorder indicated at page 5F-G of the transcript that the position was that he would give a Goodyear indication "but only whatever your bottom line is (inaudible)", that being a reference to Mr Potts, counsel for the prosecution. The Recorder then adjourned proceedings until later in the day. Counsel indicated that they hoped to be able to come in before the short adjournment. It is clear from the transcript that the court then did reconvene at 12.49 pm. There was then some discussion as to where various offences might fall within the categories set out by relevant Sentencing Guidelines. At page 9B of the transcript the Recorder indicated that:

> "I would be looking at a sentence of something in the region of three years' imprisonment in total."

20. He made it clear that that would be the maximum sentence and would be contingent on pleas the same day. At page 10E of the transcript Mr James, counsel for the defendant, indicated that he understood that credit might nonetheless be "significant and forthcoming" and the Recorder responded: "Yes and I stay true to that".
21. At the top of page 12A of the transcript, in words which are to some extent inaudible, the Recorder indicated that he regarded the case as:

> "... just by virtue of the defendant's age, the history of the offending and by virtue of the application of the (inaudible), just falling within the zone as described (inaudible)."

22. At the hearing before us it has been clarified that that was a reference to the possibility

that the eventual sentence in total might be within the zone where a suspended sentence order could be imposed, in other words a sentence of no more than 2 years' custody. Counsel for the defence, Mr James, then at page 12C of the transcript said that he was going to ask for his client to be re-arraigned on three counts, that is counts 2, 4 and 6. That is what happened. The defendant pleaded guilty to those counts.

23. The question then arose of whether the defendant should be sentenced that day or there should be an adjournment, for example, for a pre-sentence report to be obtained. The Recorder expressed the view (at the bottom of page 13H of the transcript) that he thought it was in everyone's interests that the matter should be disposed of on that day. This had the consequence, as will become apparent, that, for example, the victim was not present at the time of sentence. It also meant that the court did not have the advantage of a pre-sentence report, which might have been able to go into more detail on matters such as whether the respondent had expressed remorse at his offending.

24. The respondent was then sentenced as follows: on count 2, cruelty to a person under 16 contrary to section 1(1) of the Children and Young Person's Act 1933, there was a sentence of 18 months' imprisonment suspended for 24 months; on count 4, assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861, there was a sentence of 18 months' imprisonment suspended for 24 months, made concurrent; and on count 6, another count of cruelty to a person under 16, there was a sentence of 24 months' imprisonment suspended for 24 months, again made concurrent. That therefore made a total sentence of 24 months' imprisonment, as we have said, suspended for 24 months. A costs order was made, as we have said, for the sum of £1,000.

The Sentencing Process

25. The respondent was born on 13 December 1945 and was 76 years of age at the date of conviction and sentence. He has one previous conviction (in 1992) for inflicting grievous bodily harm contrary to section 20 of the 1861 Act. That offending was also against Ms Lake. In September 1991 the offender deliberately pushed a drinking cup into her eyebrow and drawing blood. Medical notes before the court indicated that on 26 September 1991 she was taken to hospital where a Charge Nurse recorded "attended for laceration to eyebrow. Step father threw cup at her". The injury was treated with five sutures. Ms Lake was then 14 years of age. The offender was fined £500. Ms Lake stated in her victim personal statement that she was prevented from speaking about the broader abuse at the time of the first case. As a child she was unable to understand why she had been subject of abuse and hatred.
26. The Recorder's sentencing remarks were brief. We have seen the transcript of the sentencing hearing and the sentencing remarks appear at page 7A-F. The Recorder told the respondent that over the course of a number of years he had engaged in a campaign of relentless sadism against a poor, harmless, vulnerable, defenceless little girl. The experience he had inflicted on her was truly heinous and unspeakable and his conduct despicable and shameful, as he recognised.
27. In her victim impact statement the victim had said: "He will die without a care in the world, knowing he got away with it" but the Recorder told him: "... you haven't got away with it; everyone knows what you did, because you've been forced to admit it".
28. The Recorder did not specify precisely what discount he gave to the sentences that would otherwise have been imposed to reflect the guilty pleas. As Mr Smith has reminded us on behalf of the Solicitor General, if the Recorder was complying with the relevant

guideline issued by the Sentencing Council, the maximum to which the respondent would have been entitled by way of discount would have been 10 per cent.

29. Finally, in his sentencing remarks the Recorder said:

> "Many people will regard a suspended sentence as far too soft in the circumstances, but I see no point in putting you in prison as an old man; what has come out into the public domain by way of knowledge is punishment enough, and a greater punishment than any other punishment the court could impose. You are leaving this court with your head hung [in] disgrace, as a coward and a sadist."

Relevant Sentencing Principles

30. The relevant sentencing principles are not, as we understand it, in dispute between the advocates appearing before this Court. It is well established that in cases of this kind, which concern offences which took place a long time ago, the sentence imposed must be limited to the maximum sentence which was available at the time. However, the appropriate sentencing range should be assessed against the guidelines which are currently in force (see R v H [2012] 2 Cr App R(S) 21), in particular at paragraphs 12 to 16. As Lord Judge CJ observed in that case at paragraph 47:

> "Sentence will be imposed at the date of sentencing hearing, on the basis of the legislative provisions then concurrent, and by 'measured reference' to any definitive sentencing guidelines relevant to the situation revealed by the established facts."

31. As the Lord Chief Justice explained in that case, it would be wholly unrealistic to attempt an assessment of sentence by seeking to identify what the sentence was likely to have been if the offence had come to light at or shortly after the date when it was committed and that due allowance for the passage of time may be appropriate.

32. The relevant Sentencing Guidelines issued by the Sentencing Council which are now in place are the following. There is a Guideline in relation to Assault Occasioning Actual Bodily Harm with effect from 1 July 2021. We will refer, in due course when we summarise the submissions we have heard, as to where the offence in this case fell by reference to that Guideline.
33. There is also a Guideline issued in relation to the offence of Child Cruelty with effect from 1 January 2019. Again we will refer to the relevant part of that Guideline in summarising the submissions which we have heard.

Submissions on behalf of the Solicitor General

34. On behalf of the Solicitor General, Mr Smith submits that the sentence imposed was unduly lenient and failed to take proper account of the nature of the offences and their aggravating features. He reminds this Court that the fact that an indication was sought as to the likely sentence prior to the entering of a plea will not ordinarily act as a bar to the subsequent referral of that sentence under section 36 of the 1988 Act (see R v Goodyear [2005] EWCA Crim 888; [2005] 1 WLR 2532 at paragraph 71 in the judgment given by Lord Woolf CJ). He has also reminded us today of what was said by the Lord Chief Justice, in particular at paragraphs 65 and 70. At paragraph 65 Lord Woolf observed that an advocate acting for a defendant is personally responsible for ensuring that his client fully appreciates that (a) he should not plead guilty unless he is in fact guilty and (b) any sentence indication given by a judge remains subject to the entitlement of the Attorney General to refer an unduly lenient sentence to the Court of Appeal.
35. At paragraph 70 Lord Woolf set out the responsibilities of the advocate for the prosecution at the sentencing hearing. It is unnecessary for present purposes to set out

what is said there, but we have had regard to it. In particular Mr Smith has observed that the role of prosecution counsel is a relatively limited one and it is not, as he put it, to engage in "haggling" about the appropriate sentence.

36. By "measured reference" to the Sentencing Guidelines currently in force Mr Smith submits as follows:

1. Count 2 fell within culpability category B, that is prolonged and multiple incidents of cruelty, offending falling between categories A and C. He submits that given the contents of the victim impact statement, including the life-long anxiety or depression and difficulty suffered by the victim in her own relationships and parenting, the harm would fall either at the top of the category 2 or the bottom of category 1. Mr Smith reminds us that the Guidelines suggest that the appropriate sentence for an offence at the bottom of category 1B or the top of category 2B is in the region of 2 to 2½ years' imprisonment after trial.
2. Count 4 fell within category 1A of the Guideline for assault occasioning actual bodily harm. The offending falls within harm category 1 because of the serious psychological harm and substantial impact on the victim, not only psychological but causing the coughing up of blood and her inability to attend school afterwards. Culpability falls within category A because of the vulnerability of the victim who was then 12 years old, as she curled up in a ball as the offender kicked her repeatedly. Such offending attracts a starting point of 2 years and 6 months' custody after trial. Further, submits Mr Smith, the offending was aggravated by the breach of trust and the use of a weapon, namely a shod foot.
3. Count 6 fell within culpability category A because of the gratuitous degradation and sadistic behaviour and the use of a weapon, namely the lit cigarette. The harm fell

within the upper boundary of category 2 or at the lower end of category 1. Offending straddling the boundary of categories 1A and 2A would attract a sentence in the region of 4 years after trial. Further, submits Mr Smith, the offending was aggravated by the breach of trust.

37. It is acknowledged that the offender has not offended since 1992. He was entitled to some reduction to reflect this and to reflect his work with the terminally ill. However, this must be set against the fact that his previous conviction was for a further assault against the same victim. Mr Smith also accepts that the offender was entitled to some reduction in the overall sentence to reflect his age, but there was no evidence of infirmity or a serious medical condition associated with age. Although the offender did mention a heart condition which had apparently led to heart attacks in 2000, there was no medical evidence before the court about this.

38. Turning to the lapse of time and bearing in mind what was said by this Court in H, Mr Smith submits that this has no material impact on the offender's culpability in the present case. He was at the time of the offending an adult man in his 40s with no issues as to maturity. He was further in a position of trust. Further, Mr Smith submits the fact that attitudes may have changed is plainly of no moment (compare R v Forbes [2016] EWCA Crim 1388; [2017] 1 WLR 53 at paragraph 4(1)). In any event, it could not properly be said that sadistic or gratuitous violence involving, for example, the infliction of a burn with a lit cigarette on a child would have been tolerated in the early 1990s any more than it would be today.

39. Mr Smith fairly acknowledges that the total sentence imposed would nevertheless have to respect the principle of totality. One could not simply add up the three individual sentences which would otherwise have been imposed. In conclusion Mr Smith submits

that a sentence of 2 years' imprisonment suspended for 2 years was inadequate to reflect the gravity of count 6 taken alone let alone that of the conduct concerned as a whole.

40. Having decided not to impose consecutive sentences he submits that the judge was required to increase the "lead sentence" to reflect the gravity of the overall offending but failed to do so. Furthermore, had the judge imposed an appropriate sentence to reflect the gravity of the offending a suspended sentence would simply not have been open to him.

Submissions for the Respondent

41. On behalf of the respondent Mr James submits that there was more mitigation available to the offender than has been accepted by Mr Smith. The defendant was aged 76. Not only had he abstained from further offending but he had led an industrious life in the valuable and demanding role of a palliative carer looking after vulnerable people. Coupled with a long and successful marriage his achievements demonstrated his true rehabilitation, a feature which is relevant to the decision to suspend the custodial sentence and is consistent with the Guideline on Imposition of Community and Custodial Sentences. Further, the offender was not responsible for the complainant's delay in reporting these matters which resulted primarily from her desire not to upset her mother.
42. Mr James submits that overall the Recorder correctly recognised the considerations which were relevant to the sentencing of historical offences. The sentences, he submits, fell within the ranges identified in the applicable contemporary guidelines and the decision to suspend the sentence was justifiable in light of the respondent's guilty pleas,

his age, his character since the commission of these offences and his rehabilitation.

43. Mr James has also drawn this Court's attention to the decisions of this Court in Mohammed (supra) and Attorney-General's References Nos 86 and 87 of 1999 (Webb and Simpson) [2001] Cr App R(S) 141. In Webb and Simpson, in the judgment of Kennedy LJ, there was reference to an earlier decision of this Court in Attorney-General's References Nos 80 and 81 of 1999 (Thompson and Rogers) [2000] Cr App R(S) 138 (see paragraphs 27-29). In particular, the point was made in that earlier case that there may be circumstances in which it would be unfair to increase a sentence on a reference such as this because of the conduct of the prosecution at the sentencing stage.

44. In Thompson and Rogers**,** Lord Bingham said at page 145:

> **"... it is clearly understood as a duty of prosecuting counsel to draw the judge's attention to authority of which the judge... should be aware. There can never be any obligation to acquiesce in an indication given by the judge to which the Crown takes exception."**

45. A little later at page 146 he had said:

> **"We have to remember that prosecuting counsel was instructed by the Crown Prosecution Service who are responsible to the Attorney General who is now making this application."**

46. At paragraph 31 in Webb and Simpson, Kennedy LJ said:

"... we consider that where an indication is given by a trial judge as to the level of sentencing, and that indication is one which prosecuting counsel considers to be inappropriate or would have considered to be inappropriate if he or she had applied his mind to it, prosecuting counsel should register dissent and should invite the attention of the court to any relevant authorities as indicated by the Lord Chief

Justice in the case of *Thompson and Rogers.* Otherwise if the offender does act to his detriment on the indication which has been given, this court may well find it difficult to intervene in response to a Reference made by the Attorney General."

47. Having said that Kennedy LJ could see no reason, on the facts of that particular case, to regard the decisions as fettering the Court's right to grant the Attorney General the leave which he sought.

General Observations

48. We would, before we turn to our assessment of the particular facts of the present application, make three general observations. The first is to stress again what this Court has said on numerous occasions previously as to the importance of complying with the formal procedures which are required for Goodyear indications. Those procedures were set out in Goodyear itself and have subsequently been set out in detail in a relevant Practice Direction. They are well known to practitioners and should be at the forefront of the minds of everyone concerned. We regret to say that in the present case the relevant processes were not fully complied with in the present case. For example, there are indications that, to some extent at least, the possibility of a Goodyear indication was initiated by the judge rather than coming immediately by way of an application on behalf of the defence. Furthermore, the usual procedure for setting out the application in writing and giving notice was not complied with.
49. The second matter is this. As we have already said, even in a case where this Court concludes that there has been an unduly lenient sentence in the sentencing court, the Court retains a discretion whether in fact to increase that sentence on a Reference to it. Nevertheless that is a discretion; there are no absolute rules. We have been shown some

examples of where this Court has exercised that discretion not to increase a sentence, but it by no means follows that it will always exercise that discretion against the Attorney General or Solicitor General. Everything depends on the particular facts of the case and whether it would be unjust to increase the sentence having regard to all the relevant circumstances. Those circumstances can include, for example, the conduct of the prosecution in the sentencing court. Suffice it to say that on the facts of the present case we have come to the conclusion that there was no positive endorsement by counsel for the prosecution of the approach which the Recorder was intending to take. Nor, on a fair reading of the transcript as a whole, can we see any reason to think that prosecution counsel was giving even tacit acquiescence to what the judge was proposing to do.

50. In our view, what prosecution counsel, Mr Potts, was seeking to do at the time is precisely what he was required to do in accordance with what this Court had said in Goodyear, namely to assist the court, for example, by reference to relevant guidelines.

51. The final observation is this. Double jeopardy can sometimes play a part in this Court's consideration of the factors which it must take into account in deciding whether to increase a sentence or not (see Attorney-General's Reference Nos 14 and 15 of 2006 (French and Webster) [2007] 1 Cr App R(S) 40 at paragraph 60 in the judgment of Lord Phillips CJ). But it by no means follows that because a sentence was suspended in the court below that this Court is not able to increase a sentence to one which could not be suspended if that is ultimately the right conclusion to which the Court should come.

Our Assessment of the Present Case

52. In the circumstance of the present case we have reached the conclusion that the total sentence passed in this case was unduly lenient. It ought to have been well above the

2-year sentence that is capable of being suspended as a matter of law. The respondent's conduct was cruel over a prolonged period against a child. It was, on at least one occasion, sadistic as the Recorder rightly described it. The offending took place over a long period (of some 5 years) and involved separate incidents. The sentences could not properly be made concurrent but even if they could have been, the sentence for the offence taken as the lead offence therefore ought to have been much higher to reflect the overall gravity of the offending.

53. We have well in mind the principle of totality, the lapse of three decades since the offending, the respondent's age and other mitigating circumstances as well as his guilty pleas albeit they were late in the day. Nevertheless, in our view, the total sentence does have to be significantly longer than that passed in the Crown Court.

Conclusion

54. For the reasons we have given, we grant the application to refer these sentences to this Court under section 36 of the 1988 Act. On that Reference, we quash the sentence on count 4 (the offence of assault occasioning actual bodily harm). That sentence is to be increased from 18 months' imprisonment to 30 months' imprisonment. Importantly, we make that sentence consecutive to the other sentences. We make it clear that therefore the two remaining sentences remain as they were; that is on count 2 the sentence remains at 18 months' imprisonment, but that is consecutive to the one which we have just indicated on count 4 and the sentence for count 6 remains one of 24 months' imprisonment. We make it clear that that remains concurrent. That makes a total of 48 months or 4 years in total. Since that sentence is of a length which cannot be suspended, it follows that the respondent must surrender to custody.

LORD JUSTICE SINGH: Mr Smith, first of all can I check, is there anything that you need to draw to our attention?

MR SMITH: No.

LORD JUSTICE SINGH: Secondly, either through you or perhaps the Associate's assistance we need to be clear about what the process is now for ordering surrender to custody.

MR SMITH: My Lord must order the offender to surrender to custody and give a time by which to surrender. The relevant custody suite is Great Yarmouth. It is customary, in my experience, to give the offender until 5o'clock this afternoon to surrender himself and your clerk may be in the best position to assist with that.

(The Bench conferred with the Associate)

MR SMITH: Forgive me, there is one other matter which has been drawn to this Court's attention by the Registrar which is as to when the sentence should commence.

LORD JUSTICE SINGH: Given that the respondent is not in custody and is not present at the hearing, subject to my Lords' views, it seems to me that we should specify that the sentence commences from the date that he surrenders to custody, which of course should be later today.

MR SMITH: It should.

LORD JUSTICE SINGH: Subject to anything else that anyone may wish to draw to our attention, we therefore order that the respondent must surrender to custody at Great Yarmouth police station by 4.00 pm today, that is 21 December 2022.

MR JUSTICE SPENCER: Mr Smith, are we confident that Great Yarmouth police station is operating all round the clock?

(The Bench conferred with the Associate)

MR SMITH: I could not have shared that confidence.

LORD JUSTICE SINGH: I am very grateful to both counsel. I am sorry that the hearing has taken longer than it was estimated to take but that is in importance of the issues.

MR JAMES: I wonder whether if I could be forgiven one matter that causes me concern?

LORD JUSTICE SINGH: Of course, yes.

MR JAMES: Your Lordship no doubt remember that Mr Egan, as part of his sentence, was ordered to pay a significant amount of costs. It seems that in light of the decision of today that will become rather impracticable for him and I wondered whether it was the Court's intention to leave that part of the sentence unlawful.

MR SMITH: My Lord, it is within this Court's power to impose a costs order alongside a custodial sentence. I am afraid I do not know when the deadline was given for the costs order to be satisfied.

MR JUSTICE SPENCER: Twelve months' custody; there was discussion at the lower hearing.

MR SMITH: In which case it is entirely the gift of the Court. The Court has a discretion as to whether to make an order for costs and alongside the custodial sentence or whether or not to. I have to say, in my experience, often sentencing court's habit is not to order costs when immediate custody is imposed.

(The Bench Conferred)

LORD JUSTICE SINGH: In the circumstances of this case we have come to the conclusion that we should exercise our discretion to lift that costs order.

Thank you both very much for your assistance.

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