



Neutral Citation Number: [2023] EWCA Crim 1196

Case No: CAO NO: 2023/021148/A1

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT, SITTING AT STOKE ON TRENT
THE HON MR JUSTICE PEPPERALL
21GN6269120

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2023

Before :

Dame Victoria Sharp, President of the King's Bench Division
Lord Justice Holroyde, Vice-President of the Court of Appeal, Criminal Division
and
Mrs Justice Lambert

Between :

CARLA FOSTER
- and -
REX

Appellant

Respondent

Barry White (instructed by **Registrar for Criminal Appeals**) for the **Appellant**
Robert Price (instructed by **Complex Casework Unit, West Midlands**) for the **Respondent**

Hearing dates : 18 July 2023

Approved Judgment

This judgment was handed down remotely at 2.30pm on 18th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp, P.:

1. On 6 March 2023, at the Crown Court sitting at Stoke on Trent, Carla Foster pleaded guilty to administering poison with intent to procure her own miscarriage, contrary to section 58 of the Offences against the Person Act 1861 (count 2 on the indictment). On 12th June 2023, for that offence she was sentenced at the same court to 28 months' imprisonment. She had earlier pleaded not guilty to a charge of child destruction contrary to section 1(1) of the Infant Life (Preservation) Act 1929 (count 1 on the indictment). No evidence was offered against her on count 1, and a not guilty verdict was entered pursuant to section 17 of the Criminal Justice Act 1967.
2. Ms Foster's application for leave to appeal against sentence was referred to the Full Court by the Registrar. At the hearing of the application on 18 July 2023, we gave leave to appeal, quashed the sentence of 28 months' imprisonment and substituted for it a sentence of 14 months' imprisonment, suspended for 18 months, with a rehabilitation activity requirement of up to 50 days. The operational period of suspension was 18 months from the date when Ms Foster was sentenced. The effect of our decision was that Ms Foster was immediately released from custody.
3. We gave brief reasons for our decision at the hearing and said that full reasons would be given in a judgment to be handed down in due course. This is that judgment.
4. Carla Foster is now 45. She was 44 at the time of sentence. Up until the events with which this appeal is concerned, she was a person of good character and lived a useful and law-abiding life. She has three children with her long-term partner, Stephen Birks. These children were born in 2001, 2005 and 2009 after uneventful pregnancies. Her middle child is autistic. During a period of separation from her partner, she had brief relationships with two men, and in about late September or early October 2019 became pregnant by one of them, though she did not know by which one. She subsequently moved back with her partner for the sake of her children when lockdown began (so that both parents could have unrestricted access to them) but concealed the pregnancy from him.
5. As was to emerge from later investigations by the police, Ms Foster made web searches in February 2020 about how to conceal her pregnancy, and later in February and throughout March and April, about miscarriages, how to procure a miscarriage, how to obtain abortion pills, and how to have an abortion at home. Such searches included "how not to look pregnant" (in February), "how to have an abortion without going to a doctor" (in early March), "how to injure yourself to lose a baby" and "how to do your own miscarriage at home" (all in late March).
6. It was clear from some of the search terms used that Ms Foster knew she was in an advanced state of pregnancy, and certainly, by late April 2020, that she was more than 24 weeks pregnant. On 24 April 2020 for example, her search was: "I need to have an abortion but I'm past 24 weeks". In a text conversation with a friend at about the same time, Ms Foster said: "I'm too old and I don't want to be a single mum". In late April, Ms Foster repeatedly searched online for abortifacient drugs. By early May 2020, Ms Foster had ordered such drugs online; though these did not arrive until after she had been provided with such drugs by the British Pregnancy Advisory Service (BPAS).

7. On 6 May 2020, Ms Foster called BPAS and spoke to a nurse practitioner. Her purpose in doing so, was to obtain abortifacient drugs. She was told by the nurse practitioner to whom she spoke, that receiving abortifacient drugs by post was only an option for those with pregnancies of less than 10 weeks' gestation. The information given by Ms Foster, which she knew to be false but confirmed to the nurse practitioner was accurate, led the nurse practitioner to calculate that Ms Foster's pregnancy was 7 weeks and 4 days gestation.
8. BPAS then posted a Medabon pack containing 1 mifepristone tablet and 4 misoprostol tablets to Ms Foster's home address. Ms Foster took the mifepristone tablet on 9 May, and 4 misoprostol tablets in the afternoon of 11 May. The searches she made on the internet at this stage, indicated a belief that she was then 28 weeks' pregnant.
9. On 11 May, at about 4.25 pm, Ms Foster called emergency services. She said she was 28 weeks pregnant and suspected she was having a miscarriage. Paramedics attended. Ms Foster told them a false story: that she had suffered a miscarriage in August or September 2019, and had been told she was not pregnant; her GP thought she had not expelled the miscarriage and had prescribed medication to flush out her insides. Based on what they were told and a swift physical examination, the paramedics did not believe Ms Foster was pregnant and left. At 6.39 pm, Mr Birks called '999' and said Ms Foster thought she was in labour. Ms Foster's daughter, subsequently named Lily, was born during the course of the call. Paramedics attended within 20 minutes. Lily was not breathing when she was delivered. Nevertheless paramedics attempted resuscitation. Prior to the attendance of the paramedics Mr Birks had also attempted to resuscitate Lily. Lily was taken by ambulance to hospital and pronounced dead at 7.45pm. Ms Foster was also taken to hospital, where she remained for treatment consequent on the delivery.
10. A subsequent post mortem examination determined Lily was between 32- and 34-weeks' gestation at the time of delivery and that the cause of her death was a combination of stillbirth and maternal use of abortifacients. 32 weeks prior to 11 May 2020 was the end of September 2019.
11. From the account given by Ms Foster and Mr Birks after the delivery (both at home and when taken to hospital) – and having spoken to medical staff - the police initially formed the view this was a tragic incident with no suspicious circumstances. On the 12 May 2020 however, Ms Foster made admissions to the hospital staff and then to the police that she had not told the truth in that account. She said this was because she had not yet told Mr Birks (about the circumstances of her pregnancy) and did not want him to find out when police and medical staff were present. Ms Foster's first police interview was a voluntary one and took place 4 days after the stillbirth. At that interview, at which she was unrepresented, she gave the police a partial and inconsistent account of what had happened. She admitted she had contacted BPAS as she wanted an abortion, and had obtained abortifacients through the post, which she had then taken. She said she did not realise how pregnant she was until she had felt the head of the baby, but could have conceived in October or Christmas 2019.
12. A police investigation was then commenced. Ms Foster's next police interview was on 16 December 2021, a year and a half therefore after the stillbirth. This too was a voluntary interview. At this second interview, having been told that a doctor considered Lily was delivered after at least 32 weeks' gestation, Ms Foster said she did not think

she was that far gone, and she had subsequently calculated she was 24 or 26 weeks pregnant when she took the abortifacient drugs. Ms Foster admitted she had lied to BPAS about how pregnant she was to ensure they sent the tablets to her, and that she had first found out she was pregnant in December 2019 when she took a pregnancy test. Ms Foster said she had not seen a doctor about her pregnancy because she was embarrassed; and she had been cautious about what she had said to the paramedics because she had not wanted Mr Birks to know that she had had sexual intercourse with someone else. She accepted she had told the 999 operator she was 28 weeks' pregnant and that she was past the legal limit for an abortion when took the abortifacient drugs.

13. Ms Foster was first notified of the fact that she was to be prosecuted for the offence of child destruction by a postal requisition dated 16 June 2022, and her first appearance before a magistrates' court took place on 19 June 2022. No plea was entered and no indication of plea was provided, pending the preparation of expert reports, prosecution papers and mental health assessments. She pleaded not guilty at the Plea and Trial Preparation Hearing ("PTPH") in the Crown Court on 18 August 2022. The case was adjourned for trial. In a note prepared by defence counsel (Mr Barry White) for the PTPH, Mr White asked whether the Crown had given consideration to a charge under section 58 of the Offences Against the Person Act 1861. On 1 February 2023, following discussions between counsel, it was confirmed that Ms Foster was willing to plead guilty to the section 58 offence; and following further discussions it was confirmed she was willing to do so on a 'full facts' basis, and no basis of plea would be advanced on her behalf. The indictment was then amended by the addition of count 2, and Ms Foster pleaded guilty to that count on 6 March 2023 (the prosecution having taken the view there was little practical difference between counts 1 and 2).
14. The sentencing judge had a number of sources of information for the purposes of sentence. He had a detailed prosecution opening note and response from the defence, a short format pre-sentence report, two expert psychiatric reports commissioned by the defence and the prosecution respectively and three character references for Ms Foster (from Mr Birks, from the biological father of Lily, and from a teacher of her son with autism). The author of the pre-sentence report noted that Ms Foster was preparing herself for a prison sentence, and believed she deserved to go to prison; but whilst such an outcome might be deemed appropriate for the offence, there were more effective community-based alternatives that would enable Ms Foster to continue with her current parental responsibilities whilst ascertaining the therapeutic intervention she needed. The author recommended a community-based order for up to two years. As for the expert psychiatric reports, in a report dated 31 March 2023, Dr Gupta, instructed by the defence concluded that Ms Foster presented with longstanding difficulties with her mental health and had developed various dysfunctional personality traits and maladaptive ways of coping. He said she suffered from emotionally unstable personality disorder and required treatment, and that she was extremely vulnerable and should receive treatment in a supportive community setting. From a clinical perspective, prison was unlikely to provide such a supportive setting and may contribute to the worsening of her mental health. The prosecution expert, Dr Kennedy, in his report dated 27 May 2023, noted that Ms Foster exhibited symptoms consistent with emotionally unstable personality traits. However in his view, it was somewhat difficult to make a diagnosis of emotionally unstable personality disorder. He too considered she would struggle in prison and would benefit from psychological treatment.

15. Prior to the sentencing hearing the judge had also been sent a letter dated 6 April 2023, headed “Mitigation on behalf of Carla Foster”, the ‘liaison author’ of which was Dr Jonathan Lord. Dr Lord is the Co-chair of the Royal College of Obstetricians and Gynaecologists (RCOG) and the NHS clinician representative NICE (National Institute of Clinical Excellence) for abortion care guidelines. We shall return to this letter (which we shall call the Doctors’ letter) below.
16. There are no sentencing guidelines for offending contrary to section 58 of the Offences Against the Person Act 1861. In the absence of such guidelines, the judge considered the decision of the Court of Appeal, Criminal Division in *R v Catt* [2013] EWCA Crim 1187 to be useful guidance. He considered harm was high because Lily had been stillborn. Having regard to what was said in *Catt*, culpability was also high because of the length of gestation, the fact that Ms Foster knew the pregnancy was beyond the legal limit for abortions of 24 weeks and the fact that she had lied to bring herself within the telemedical services for early medical abortions. Also relevant was Ms Foster’s considerable previous obstetric experience and the fact that some planning had been involved, albeit it had been somewhat chaotic.
17. On the basis of this assessment, the judge reached a provisional sentence of five years’ imprisonment (and said that had the Court of Appeal in *Catt* applied the approach in the current general guidelines, he anticipated it would have reached a higher provisional sentence before considering the mitigation available to Ms Catt). He identified a number of mitigating factors. Ms Foster was 44 and had no previous convictions; the offence was committed against the backdrop of the first, and most intense phase of lockdown at the start of the Covid-19 pandemic when Ms Foster had moved back in with her long-term but estranged partner while carrying another man’s child; and she was in emotional turmoil as she sought to hide the pregnancy. The judge said Ms Foster was not suffering from any serious mental illness at the time of the offence, but he accepted there was evidence of emotionally unstable personality traits and that she was deeply remorseful, wracked by guilt and suffered from depression. He also accepted she was a good mother to three children (one of whom had special needs) who would suffer from her imprisonment. Balancing these features of the case, he considered the appropriate sentence after a trial would have been three years imprisonment. The sentence of 28 months’ imprisonment was arrived at after giving Ms Foster 20 per cent credit for her plea. Amongst the many tragedies of the case, the judge said, was that had Ms Foster indicated her guilty plea at the earliest opportunity, the sentence he was obliged to pass, would have been capable of being suspended.
18. Subsequently, the defence lodged an application that the court should reconsider its sentence pursuant to section 385 of the Sentencing Act 2020 (which provides that the Crown Court may vary or rescind a sentence at any time within 56 days of sentence). The application was made on the basis that there were two issues in mitigation that may not have been fully advanced or taken into consideration. These were the long period of delay, not of Ms Foster’s making, in prosecuting the case; and the (related) absence of reports on Ms Foster’s mental health nearer the time of the offending. In a written ruling the judge refused the application. He said he had taken the delay into account in determining the appropriate sentence and it was his view that the doctors were properly able to consider Ms Foster’s mental health in their recent reports, despite the passage of time between the offending and their engagement with her for the purposes of preparing those reports.

19. In order to place Ms Foster’s offending in context is necessary to say something, in brief, about the law. The offence to which Ms Foster pleaded guilty, section 58 of the Offences Against the Person Act 1861, is headed “Administering drugs or using instruments to procure abortion”. As amended that section provides that:
- “Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable ... to be kept in penal servitude for life...”¹
20. As the prosecution recognised, there is an overlap between the section 58 offence and the offence of child destruction contrary to section 1 of the Infant Life (Preservation) Act 1929, as procuring a miscarriage so as to kill a child capable of being born alive may amount to both offences.
21. Both provisions however are subject to the Abortion Act 1967 (“the 1967 Act”: all reference to this Act are to its amended form, unless otherwise stated) which legalises abortion in certain circumstances (abortion being the termination of an established pregnancy, where established is taken to mean that the embryo has implanted in the uterus²). The 1967 Act does this by providing that a person shall not be guilty of an offence relating to abortion, including an offence contrary to section 58 of the Offences Against the Person Act 1861 or an offence under the Infant Life (Preservation) Act 1929 i.e. child destruction, when a pregnancy is terminated by a registered medical practitioner in accordance with the provisions of the 1967 Act; and by providing that for the purposes of the law relating to abortion, anything done with intent to procure a woman’s miscarriage is unlawfully done unless authorised by section 1 of the same Act: see sections 1(1) and 5 of the 1967 Act.
22. There are limited circumstances specified in the 1967 Act (by section 1(1) (b), (c) and (d)) in which a termination of a pregnancy after it has exceeded the twenty-fourth week would not be contrary to the provisions of the 1967 Act. None of these circumstances applied to Ms Foster.
23. Nor, self-evidently, was it open to Ms Foster to take advantage of the provisions in the 1967 Act governing the termination of an unwanted pregnancy within the first ten weeks of gestation by taking abortifacient drugs (an early medical abortion) or of recently introduced temporary provisions which enabled (subject to conditions) such drugs for an early medical abortion, to be posted to and taken at the woman’s home -

¹ References to penal servitude for life are to be construed as reference to imprisonment for life or any shorter term: see the Criminal Justice Act 1948, section 1(1).

² *R v Secretary of State for Health* [2002] 2 FLR 146

the so-called “pills by post” scheme.³ These temporary provisions (made permanent from 30 August 2022⁴) had been introduced by amendment to the 1967 Act during the Covid-19 pandemic, with effect from 30 March 2020. They changed the definition of an approved place to receive treatment for ending a pregnancy to make the home of a pregnant woman an approved place for taking approved abortifacients, provided they had been prescribed following an online or telephone consultation with a medical professional; and defined a registered medical professional’s home as a suitable place to have the consultation and to prescribe the drugs.

24. The judge in this case took account of the guidance given in the Sentencing Council’s General guideline: overarching principles (“the overarching guideline”). This says that where there are no sentencing guidelines for a particular offence, account must be taken of the statutory maximum sentence for the offence (in this case, life imprisonment), any sentencing judgment of the Court of Appeal, Criminal Division, for the offence, and any definitive sentencing guidelines for analogous offences. In that context, the judge decided there were no materially analogous guidelines, and placed considerable weight on the approach of the Court in *Catt*.
25. In *Catt*, a sentence of eight years’ imprisonment for administering poison with intent to procure a miscarriage contrary to section 58 of the Offences Against the Person Act 1861 was reduced to three years’ and six months’ imprisonment on appeal. The court held that the judge’s starting point of 12 years, before full credit for plea, was manifestly excessive. The appropriate starting point was in the region of 5 years, reduced to three years and six months imprisonment after giving credit for plea.
26. The appellant, Mrs Catt, was 36 and married with two children aged nine and eight. Her obstetric history was complex and as the court described it, threw out the potential for “disturbance, misery and entrenched problems”. During three of four pregnancies, she had concealed her pregnancy; her first child to which she gave birth when she was 21, was given up for adoption; the following year she had an abortion at 24 weeks; two years later, she presented at hospital and asked for a termination but the pregnancy was too far advanced. She had also had a lengthy affair, which covered the period of conception. The appellant’s internet searches showed she had searched for information about termination from an early stage of her pregnancy, and about illegal abortion and the consequences of procuring one. She had also visited the Marie Stopes clinic and the Pregnancy Advisory Service. She then purchased online and took an abortifacient drug, and subsequently lied to the authorities about what she had done. The aggravating features were that termination was at full term; the body was never recovered; there was careful planning; acquisition of the abortifacient; and the criminal acts were done despite considerable experience of pregnancy and its range of consequences. The mitigating features were the plea of guilty; the psychiatrist’s view that the appellant’s emotional attachment to children in utero was difficult; the appellant’s remorse; and

³Prior to 30 March 2020, the first pill of the relevant combination of abortifacient drugs, could only be taken at a hospital or registered clinic, following a medical consultation. The second pill could be taken within 24 to 48 hours, at home or during a second visit to a clinic. The abortifacient drugs in question are Mifepristone and Misoprostol. When dispensed as a Medabon combination pack, Mifepristone is usually taken up to 48 hours before Misoprostol. Misoprostol is taken if the delivery of the foetus has not occurred following the taking of Mifepristone.

⁴ See sections 1(3B) to (3D) of the 1967 Act, inserted by the Health and Care Act 2022 ss 178(4), 186(6) and SI 2022/734, reg 4 (with regs 13, 29 and 30).

that she had two young children to whom she was a good mother and whose development would be adversely affected by her absence from the family home.

27. The court in *Catt* acknowledged the case involved a difficult sentencing exercise with help from neither jurisprudence nor statute. The court also referred to the need in a novel case to reach a view on culpability and harm (the harm being the extinguishing of a young life before it had begun); but also the desire of the court to achieve a just outcome and the need to have regard in particular to the appellant's two young children, and husband.
28. As for this court's view, we consider that in cases of this nature, there will often be substantial personal mitigation to balance against the seriousness of the charge; and that an immediate custodial sentence in such cases is unlikely to provide a just outcome. And this was precisely the case here.
29. Prior to the Covid-19 pandemic an individual in Ms Foster's position would have been seen in a clinic to discuss their decision to terminate a pregnancy. However the events we have described, occurred during the height of the first lockdown, when Ms Foster did not have any access to the sort of support and counselling that was available to women in her situation in normal times. It also obvious from the evidence that throughout this period she was in emotional turmoil.
30. After Lily's birth, and whilst still in hospital, Ms Foster made admissions to the hospital staff and then to the police in her voluntary first interview at which she was unrepresented – 4 days after the stillbirth– and which ultimately led to her prosecution. It must be doubtful whether she would have been prosecuted but for those admissions.
31. In addition, there was the issue of delay. The overarching guideline makes clear, reflecting settled previous practice, that amongst the factors that can reduce seriousness or reflect personal mitigation is an unreasonable delay in proceedings since apprehension which is not the fault of the offender; and that this can be taken into account to reduce the sentence if this has had a detrimental effect on the offender. The guideline also notes that no fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case. As this court pointed out in *R v Beattie-Milligan* [2019] EWCA 2367, such delays can put extra strain on a defendant, particularly where, not just the defendant but also their family, will be affected, and can cause injustice to both sides, particularly in a sensitive case.
32. In this case the delay between offence and charge were substantial as was (though to a lesser extent) that between charge and sentence. After the admissions made by Ms Foster in her first police interview, there was more than a two-year delay before she was first notified by a postal requisition that she would be charged. Whilst appreciating the impact of the Covid pandemic on the prosecuting authorities, given the admissions already made by Ms Foster and the availability of the evidence from BPAS and from the post-mortem, this delay was not the responsibility of Ms Foster and was, objectively speaking, unreasonable. As for the further period of delay before Ms Foster was sentenced, some of the latter period of delay was inevitable in our view, in a sensitive and difficult case such as this one, in circumstances where there had been a two-year gap between the material events and notification of charge and where it would have been important to ensure that proper reports were prepared on Ms Foster's mental health so she could properly be advised in relation to her plea. In the event, the result of all

this was that Ms Foster was sentenced for procuring her own miscarriage more than three years after that miscarriage had taken place.

33. There will, no doubt, be many cases in which such delays have a limited impact on a defendant and their family. It is clear from the evidence that this was not the position here. Ms Foster was a woman of previous good character, indeed of positive good character and this was her first engagement with the law in any circumstances. The pre-sentence report author noted in April 2023 that Ms Foster was very emotional throughout the interview, and that she had expressed deep and genuine remorse for her actions, which she said would haunt her forever and had experienced extreme trauma “in the aftermath of the reality of her actions”.

34. The letter from Mr Birks, her former partner (with whom she had continued to live) was thoughtful and impressive. It provided evidence of the personal difficulties Ms Foster experienced when she was pregnant as well as during the three years between the offending and sentence. It said in part:

“Covid lockdown restrictions added pressure to an already difficult time. Along with financial strain, Carla struggled emotionally nursing her mother through her fight with cancer until she unfortunately passed away. Carla was having constant stomach pains. She had an ovarian cyst while she was pregnant and needed a hysterectomy just after she lost Lily. I believe Carla has suffered some kind of depression at some point each time she has been pregnant. The last three years have been very difficult. Her mental health and outlook on life has progressively diminished since she lost Lily. I’m aware Carla has attended counselling and has been prescribed anti-depressants by her doctor. Knowing this case could be made public and the implications we could face compounds fear anxiety, stress and uncertainty for Carla and our family.”

35. Mr Birks also said this about Ms Foster, and the impact of a custodial sentence on the family and in particular her son with autism.

“Carla is decent, hardworking and trustworthy. She currently works part time at ... a charity for dogs. She also had a successful cleaning business in and around the village. Customers became friends and spoke very highly of Carla whenever we would meet. Carla developed her own local business so she could take care of our children, she insisted on a good work/home balance because our middle son...has Autism and relies on her for care and support. He becomes anxious and upset about unfamiliar situations and stressed and overwhelmed with the slightest change in his routine. It takes him longer to understand information and we fear even minor changes could lead to problems with his mental health. His mother is involved in all parts of his daily life and gives [her son with autism] the essential support he needs, he relies on her a lot...I would find it difficult to work full time and look after our three sons. Our family is very reliant on Carla. Any sentence would have a detrimental impact on the family’s stability and finances, emotionally and mentally, especially [her son with autism] who would suffer greatly if his mother is sent to prison. Carla is aware she made a bad decision and will live with regret, guilt and loss for the rest of her life. She is ready to accept the consequences for her decision, but I feel like since she lost Lily, and how life is now, she has suffered enough.

I'm pleading with the court to show leniency...Carla is an upstanding member of the community. Irreplaceable in everyday life. Generous and thoughtful. Kind and caring a brilliant mother to our three sons."

36. The judge said in response to the request for reconsideration of the sentence, that he had taken the issue of delay into account when sentencing Ms Foster. The issue of delay did not feature to any extent and only tangentially however in the submissions from the prosecution and the defence at the sentencing hearing, and was not mentioned in the judge's otherwise very detailed sentencing remarks. From this we infer it was not accorded any real weight in mitigating the severity of the sentence that was imposed.
37. As for the impact on Ms Foster and her family, and in particular, on Ms Foster's son with autism, the fact that someone is a sole or primary carer for dependent relatives is a factor identified in the overarching guideline as a factor reducing seriousness or reflecting personal mitigation. The online version of that guideline provides a link to an expanded explanation of that factor, which amongst other things emphasises the need for a court to have all relevant information about dependent children before sentencing. It is also important to note that all guidance from the Sentencing Council, whether offence specific or overarching, includes a reference to the Equal Treatment Bench Book before giving specifics in relation to the subject-matter of the particular guidance itself.
38. The overarching guideline is no exception to this. It says at the outset, that "Guideline users should be aware that the Equal Treatment Bench Book [to which a link is provided] covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system." And that "It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings." These are important words.
39. In the context of this case, we would draw particular attention to the sections of the Equal Treatment Bench Book headed "Women as offenders Who is in prison?" (at paras 115 to 130) and "Dependants and primary carers" (at paras 131 to 135). These sections obviously need to be read as a whole and considered in the context of the specific facts of the individual case, but they say, in part:

"116. As is stated in the Introduction to this Bench Book, true equal treatment may not always mean treating everyone in the same way. Treating people fairly requires awareness and understanding of their different circumstances, so that that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage. The previous life experiences of women offenders, their reasons for offending, their offending patterns, the impact of custodial sentences on themselves and their dependants, and the long-term effect of prison sentences all tend to differ between men and women.

"117. The women's prison population in England and Wales more than doubled between 1995 and 2010 – from under 2,000 women to over 4,000 at any one time. As at 27 March 2020, there were 3,641 women in prison, about 5% of the total prison population in the UK."

...

121. Women's offending is commonly linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt:85 • Figures from Liaison and Diversion services showed that 69% of adult females in police custody in 2017 had mental health needs. • About half of female prisoners are identified as suffering from anxiety and depression, more than double the rate identified in men. • 46% of female prisoners have reported having attempted suicide at some point in their life, compared with 21% of male prisoners and 6% in the general population....

The impact of imprisonment on women

122. Custody can exacerbate mental ill health, heighten vulnerability and increase the risk of self-harm and suicide. Although women make up approximately 5% of the prison population, they accounted for 18% of all self-harm incidents in the year ending September 2019. From 2010 – 2020, there were 100 deaths of women within prison, 37 of which were self-inflicted...

123. The impact of imprisonment on women, more than half of whom have themselves been victims of serious crime, is especially damaging and their outcomes are often worse than men's...

...

125. Community orders can fulfil the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime...

126. Research suggests that women released from prison are twice as likely to reoffend as a comparable cohort of women given community orders... The National Offender Management Service (now HM Prison and Probation Service) says it supports the reduction of the number of women sentenced to custodial sentences in appropriate cases by developing robust community sentences tailored to the needs of the individual women.

127. Alternatively, if a prison sentence is necessary, strong personal mitigation or a realistic prospect of rehabilitation might suggest it is appropriate to suspend the sentence.

128. There is also power to defer passing sentence for up to 6 months under the Powers of the Criminal Courts (Sentencing) Act 2000, e.g. to allow an offender to undergo addiction or mental health treatment prior to sentencing.

129. In June 2018, the MOJ launched a ‘Female Offender Strategy’ – a wide-ranging scheme aimed at keeping women out of prison through early intervention, partnership working, rehabilitative support and fewer women serving short custodial sentences...

130. The strategy notes that custody is particularly damaging for women and that good community management can in many cases be far more effective. It expresses a view that short custodial sentences should be viewed as a last resort. Decisions on sentencing nevertheless remain the province of judges and magistrates.

Dependants and primary carers

131. The existence of dependent children is a factor relevant to sentencing. Sentencing guidelines say being a sole or primary carer for dependent relatives can be a mitigating factor. It is therefore important that courts are informed of the defendant’s domestic circumstances and determine sentence following the steps in *R v Rosie Lee Petherick* [[2012] EWCA Crim 2214].. Indeed, where the offender is on the cusp of custody and there would be an impact on dependants which would make custody disproportionate, a community order should be imposed rather than a custodial sentence.

132. Sentencing defendants with dependent children or other relatives also engages their right to family life under article 8 of the European Convention on Human Rights, as well as the article 8 rights of those dependants. Imprisonment interferes with, often severely, those rights. In such cases, it is appropriate to ask whether the interference is proportionate giving the various factors including the purpose of sentencing.

133. It is not sufficient to say that the offender should have considered the impact on the children before committing the offence. The court has an independent responsibility to consider the dependants’ rights.

134. Women are much more likely to be primary carers, with children far more directly affected by a prison sentence as a result. A fifth of women prisoners are lone parents and around 17,200 children are separated from their mothers by imprisonment every year. Only 9% of children whose mothers are in prison are cared for by their fathers in their mother’s absence, and only 5% remain in their own home while she is

imprisoned...Mothers experience significant emotional distress as a result of separation from their children which prisons are not equipped to deal with.

135. Women tend to be imprisoned further from home than men, due to the small number and geographical spread of women's prisons. On average, women are imprisoned 64 miles away from home. In Wales, currently there are no women's prisons. This affects the maintenance of relationships, and means fewer visits being made by children to see their mothers..."

40. *Petherick* concerned the potential impact of imprisonment on a female defendant and her two-year old child for whom she was the sole carer. That case was decided 12 years ago and prior to the publication of the Equal Treatment Bench Book in its current iteration and some of the guidance from the Sentencing Council to which we refer in this judgment. But the authors of the Equal Treatment Bench Book are right to direct attention to the importance that should be attached to the principles set out in *Petherick* by sentencers in the Crown Court.
41. As Hughes LJ, the then Vice-President of the Court of Appeal, Criminal Division, emphasised in *Petherick* at paras 17 to 24:
- i) First, the sentencing of defendants, inevitably engages not only their own article 8 right to family life but also those of their family, and that includes (but is not limited to) any dependent child or children; and the same will apply in some cases to an adult for whom a defendant is a carer and whether there is a marital or parental link or not.
 - ii) Second, the right approach in all article 8 cases is to ask these questions: A. Is there an interference with family life? B. Is it in accordance with law and in pursuit of a legitimate aim within article 8.2? C. Is the interference proportionate given the balance between the various factors? In sentencing, the first two questions are usually straightforward. It is the third question that calls for careful judgement.
 - iii) Third, where there are dependent children that is a relevant factor to sentencing.
 - iv) Fourth, it follows that a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.
 - v) Fifth, the legitimate aims of sentencing which have to be balanced against the effect a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. Moreover, not only society but

also children have a direct interest in society's climate being one of moral accountability for wrongdoing. It also needs to be remembered that just as a sentence may affect the family life of the defendant and of his/her innocent family, so the crime will very often have involved the infringement of other people's family life.

- vi) Sixth, it will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.
 - vii) Seventh, the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver.
 - viii) Eighth, in a case where custody cannot proportionately be avoided, the effect on children or other family members might afford grounds for mitigating the length of sentence, but it may not do so. If it does, there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.
42. We would add two further points about the imprisonment of female offenders. First, because there are comparatively few female prisons, women held in custody may often be a long distance from their families, which may add to the adverse consequences for them and for the children deprived of their care. Secondly, in accordance with long established principles, the conditions in which prisoners are confined can properly be taken into account in sentencing, including in deciding whether to suspend a sentence. Judges can and in our judgment should therefore keep in mind that the impact of a custodial sentence is likely to be heavier during the present circumstances of overcrowding in the female estate than it would otherwise be: see *R v Manning* [2020] EWCA Crim, 592 dealing with a different but analogous issue and *R v Ali (Are)* [2023] EWCA Crim 232.
43. Returning to the present case, Mr Birks' letter gave some information about the position of the family from which certain common-sense conclusions could be drawn. But it does not appear that there was any other information on this topic or any real focus during the course of the sentencing hearing itself on the impact of her imprisonment on the family (in particular Ms Foster's son with autism) and how they would manage in Ms Foster's absence when Mr Birks was working fulltime. In the circumstances, the judge did not receive as much assistance as he should have done, in formulating and addressing the question he had to consider, namely whether the sentence that he was contemplating was a proportionate way of balancing the effect on Ms Foster's family with the legitimate aims that sentencing must serve. In consequence, it does not appear that the important issues raised when the court is contemplating a custodial sentence for a woman or for any person with caring responsibilities, received the degree of attention that they demanded.
44. We of course acknowledge that task of any sentencing judge in relation to an offence where there are no offence specific sentencing guidelines, and a paucity of decided

cases on appeal, is a difficult one. That is particularly so where the offence raises difficult and sensitive issues, as those committed by women under section 58 (or under section 1 of the Infant Life (Preservation) Act 1929) generally do. In that context, previously decided cases on appeal can undoubtedly provide a useful resource. But we would counsel against an overly prescriptive or mechanistic approach in circumstances where the weight to be given to the individual features of such offending can vary to such a significant extent, and where there are so few decided cases on appeal.

45. In *Catt* for example, the court considered the appellant's previous obstetric history to be an aggravating feature of the offending, because the criminal acts were done despite considerable experience of pregnancy and its range of consequences. Our approach however to the relevance of that issue in this case (and if the issue is looked at more generally) is not the same. Taking the general issue first, the absence of obstetric experience in a young person charged with a section 58 offence could well amount to a strongly mitigating feature. It does not follow however that the presence of an obstetric history (something most women have) would aggravate the seriousness of the offending, without more. Similarly, whereas in *Catt* the disposal of the body was a significant aggravating factor (as it prevented post mortem examination with its potential to determine the cause and timing of the death) a court sentencing a young person, who in the agony of the moment disposed or attempted to dispose of the body to which they had just given birth, might very well take a very different view.
46. Turning then to the resolution of this case, we consider that the judge for the most part correctly identified the factors relevant to sentence, but that that the provisional sentence he arrived at – before taking account of the mitigating features - was too high. We also differ from the judge in the adjustment to be made for the mitigating features that were present in this case. As it was expressed in *Catt*, the harm consisted of the extinguishing of a young life before it had begun. As for culpability, as the judge said, there was the length of gestation, the fact that Ms Foster knew the pregnancy was beyond the legal limit for abortions of 24 weeks and had also lied to bring herself within the services provided by BPAS for early medical abortions. As the judge also said, there was some degree of planning, albeit it was somewhat chaotic. We would add that what planning there was (for obtaining the abortifacients) occurred over a relatively short period of time (between late April and early May); and had to be seen against a background of emotional turmoil and prolonged indecision over many months.
47. The judge said there were no additional aggravating factors. We agree. There was, however, a constellation of exceptionally strong mitigating features, some of which we have highlighted above. Ms Foster was a woman of middle age, with no previous convictions and of positive good character. The events in question happened at the height of the pandemic and the most intense phase of the lockdown during an extremely stressful period of her life when she did not have available to her the support mechanisms normally available to a woman in her position. Though she was not suffering from a serious mental illness at the time, there was evidence of an emotionally unstable personality and there is no doubt that she suffered emotional turmoil throughout. Ms Foster made admissions at an early stage, and it is doubtful she would have been prosecuted had she not done so. In the aftermath of the stillbirth, she was traumatised, and as the judge put it, wracked by guilt and depressed. She was deeply and genuinely remorseful, something noted by the police in her interviews, and by the probation officer who prepared her pre-sentence report. That remains the case today.

The overall delay in the proceedings was unreasonable; it meant she was not sentenced until three years after the stillbirth, and as can be seen from Mr Birks' letter, this period of delay has had a very serious effect on her. Finally of course, Ms Foster is the mother of three children for whom she has primary caring responsibilities. And when considering the length of any custodial sentence, it was important to factor in the effect this would have on her family life, and on that of her children (in particular on her son with autism, who is especially dependent on his mother).

48. When considering what is a just outcome, the court always has to consider which of the five purposes of sentencing it is seeking to achieve through the sentence (the punishment of offenders, the reduction of crime (including by deterrence), the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by the offence: see the Sentencing Act 2020, section 57(2) and the overarching guideline). We had this very much in mind.
49. Though the offence itself was a serious one, and crossed the custody threshold, this was, as we said at the hearing of this appeal, a very sad case that called for compassion, not punishment. And it was one where no useful purpose was served by detaining Ms Foster in custody.
50. After assessing harm and culpability, our provisional starting point was one of three years imprisonment, which was reduced to one of 18 months having regard to mitigation, and then to one of 14 months after giving Ms Foster 20 per cent credit for her plea. The length of this sentence meant it could be suspended and we considered that it should be suspended. We have already referred to the exceptionally strong mitigation. Rehabilitation had already been achieved. Ms Foster presented no risk to her family or the wider public, and there was no prospect of a repetition of this offence. By the time of the hearing before us, it was obvious that custody had had a severely detrimental effect on Ms Foster and on her family. The rehabilitation activity requirement of up to 50 days provided her with an opportunity for various interventions in relation to the offence, designed to assist her, including counselling.
51. We turn finally to the Doctors' letter. Its co-signatories with Dr Lord were the President of the Royal College of Obstetricians and Gynaecologists, the President of the Faculty of Sexual and Reproductive Healthcare, the President of the Faculty of Public Health, a Past President of the Royal College of Obstetricians and Gynaecologists, the Chief Executive of the Royal College of Midwives, a consultant gynaecologist who is the clinical lead for the NICE abortion care guideline and the co-chair of BSACP (the British Society of Abortion Care Providers) who is also a consultant in sexual and reproductive health.
52. The letter was lengthy. In summary, it said that the provision of a remote consultation care abortion pathway (or telemedicine) had been one of the single greatest advances in the provision of abortion care, since abortion was legalised in 1967, delivering significant medical advantages and improving access to abortion for the most vulnerable girls and women and significantly reducing the numbers of women seeking illicit sources of abortion medication. The authors said they were fearful that a custodial sentence for Ms Foster would risk deterring the most desperate and vulnerable from accessing regulated healthcare. They also asked the court to consider anonymising Ms Foster's case, given the stigma attached to abortion care and pleaded for leniency for Ms Foster. They asked too for an opportunity to address the court on sentence.

53. We endorse the judge's response to this letter. He was right to say that this form of special pleading was inappropriate. The same would have true of a letter from a group campaigning for more restrictive laws on abortion, calling for a deterrent sentence in this case and asking for an opportunity to address the court too. It is disappointing and concerning that the authors, all eminent in their own professional fields, did not understand this. Our democratic society of course allows for the open expression of different views on the merits of any sentence that is passed, and we do not doubt that the authors of the letter have the serious concerns to which they refer; but the duty of the independent judiciary, in accordance with their judicial oath, is to sentence according to the law and to apply the law to the facts of the individual case before them, rather than be swayed by the views of special interest groups, however eminent and well-intentioned they may be.