Neutral Citation Number: [2024] EWCA Crim 509

Case No: 202302641 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NOTTINGHAM
MRS JUSTICE TIPPLES DBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2024

Before :

LORD JUSTICE SINGH
MR JUSTICE JAY
and
THE RECORDER OF NORTHAMPTON (HHJ RUPERT MAYO)
sitting as a Judge of the Court of Appeal (Criminal Division)

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Between :

REX	**Respondent**
- and -	
JAMIE EDWIN BARROW	**Appellant**

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- -

Chris Henley KC and **Andrew Wesley** (instructed by **VHS Fletchers**) for the **Appellant**
Simon Ash KC and **Sarah Knight** (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 19 April 2024

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Approved Judgment

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Lord Justice Singh:

Introduction

1. This is an appeal against sentence brought with the leave of the single judge.

2. On 4 July 2023, in the Crown Court at Nottingham, the appellant (then aged 31) was convicted of three counts of murder (Counts 1, 3 and 5 on the indictment); and one count of arson, being reckless as to whether life was endangered, contrary to section 1(2) and (3) of the Criminal Damage Act 1971 (Count 7). No verdict was taken on Counts 2, 4 and 6, which were alternative counts, and the appellant was discharged on those counts.

3. On 7 July 2023 the appellant was sentenced by Tipples J ("the judge") as follows. For each of the three counts of murder there was a mandatory sentence of life imprisonment, with a minimum term to be served of 44 years (less 224 days spent on remand), all made concurrent. For the offence of arson, being reckless as to whether life was endangered, there was a concurrent sentence of 10 years' imprisonment.

4. This appeal arises from the horrific deaths of three innocent people, two of them very young children. We express our sincere sympathy to their family. Nothing in this judgment should be taken in any way to detract from the gravity of the offences committed by this appellant.

Factual background

5. The appellant lived in a flat next to the deceased, C1, C2 and C3, and had done so for around seven years. C1 was the mother of C2 (aged 3) and C3 (aged 19 months). In the early hours of Sunday, 20 November 2022, whilst the deceased were sleeping, the appellant set fire to their flat by pouring petrol through the letterbox and setting the flat alight. Shortly after the fire began, the alarm to the flat sounded and screams were heard from inside. All three occupants of the flat died of smoke inhalation as a result of the fire.

6. At the time of the fire C1's husband, and the father of the children, was living and working in the United States of America. He was in the process of arranging for C1, C2 and C3 to join him there, and an appointment had been arranged at the American embassy for the end of November, which was the final stage of the immigration process.

7. Four days before the fire, C1 and her children went to stay with C1's parents. They returned on Saturday, 19 November at around 4.30pm. Around two hours later the appellant left his flat and purchased six cans of beer at a convenience store. Just under four hours later, at 10.40pm, the appellant visited a different shop and purchased another four cans of beer. After returning to his flat, the appellant stayed there until shortly after 3.00am on Sunday, 20 November.

8. During the time in his flat, the appellant exchanged messages with two friends. In one of those messages was an image of the appellant's cuts from self-harming. The Prosecution case at trial was that the appellant occasionally experienced urges to be

violent and, when he did, he sometimes responded by self-harming. Further, when he felt stressed, he responded by starting fires and watching them, to alleviate that stress. In the hours before he started the fire at the flat, the appellant was drinking heavily, experienced urges to be violent and shortly before 3.00am decided to act on those urges.

9. The appellant took a household cleaning bottle, removed the nozzle and used a plastic tube to syphon petrol from his motorbike into the bottle. The bottle had a slim neck and was able to fit through a letterbox. He put on a pair of plastic medical-type gloves and walked across the yard to the deceased's flat, where he wedged the letterbox open and poured petrol through the letterbox and set fire to it.

10. CCTV footage was seized during the investigation into the fire and, while there was no footage showing the front door to the deceased's flat, there was significant footage obtained from a camera outside one of the other flats. The footage showed a flare of light at 3.13.10; the alarm to the flat sounded at 3.13.27; there was screaming and banging from the flat between 3.13.49 to 3.13.55; further screaming occurred at 3.15.22; and at 3.15.55 a second flare of light was seen.

11. As the fire took hold, the smell of smoke spread to nearby houses. People at a party nearby smelt it and they and other neighbours could see the smoke billowing out of the property and called 999. The first call to 999 was at 3.17am. CCTV showed the appellant walking away along a path at approximately 3.18.44. Cell-site data placed the appellant's phone nearby from around 3.07 until 3.15am and thereafter (from 3.21am) in an area consistent with the route the CCTV showed the appellant walk after leaving the area of the deceased's flat. The Prosecution case at trial was that the appellant had therefore stayed in the area of the flat for approximately five and a half minutes and watched the fire take hold.

12. People from the party ran to the flat and made attempts to kick the door open, having noticed a pushchair outside it and believing a young child might be inside. Firefighters arrived within minutes of the first phone call and made their way inside the flat. Such was the heat that the thermal imaging camera on one of the firefighters' uniforms stopped working. The bodies of the deceased were taken outside; C2 had been found lying next to C1 on the floor next to the sofa and C3 was found in her cot. All three were unconscious. Shortly afterwards the police and paramedics arrived; the police evacuated residents from nearby flats and the paramedics attempted CPR.

13. The appellant returned to the scene at 3.33am, some 15 minutes after leaving. He walked along the alley at the back of the flats and spoke to two officers. He explained which flat he lived in and asked whether he could go in. He stayed in the area for 45 minutes and spoke to several police officers, interactions which were recorded by their body-worn video cameras. The appellant was calm.

14. The deceased were taken to hospital, where they were pronounced dead.

15. The appellant and others who had been evacuated from their flats were moved to a communal area at Nottingham Trent University. A housing officer visited them and the appellant asked whether he could be rehoused if there was smoke damage to his flat and whether he could claim compensation if any of his personal property had been damaged.

16. At 4.00pm on 20 November an officer telephoned the appellant and said that the police were investigating the fire and were seeking information from the people who lived nearby. The appellant agreed to speak to the officer and arranged to meet at the appellant's aunt's flat. Shortly afterwards, the appellant left his aunt's flat and returned home. Police attended the appellant's flat at around 5.25pm, having been directed there by the appellant's aunt. Whilst there the appellant said he needed to tell them something about the flat, held out his hands so as to be handcuffed and said: "Can you get me out of here without being killed". The appellant was then arrested and taken to the police station. He answered "no comment" in interview and refused to give the police his PIN to unlock his phone.

17. From the scene of the fire and the appellant's flat the following was discovered:

    (i) A plastic bottle that had contained petrol was recovered from a bin outside the appellant's flat. The spray nozzle belonging to the bottle was found in the appellant's kitchen.
    (ii) A measuring jug and plastic tubing were found on the ground next to the appellant's motorbike.
    (iii) An empty plastic petrol container, that had contained petrol, was found outside the appellant's flat.
    (iv) The black jacket worn by the appellant in the CCTV footage was analysed and found to have sustained heat damage.
    (v) Three plastic bottles that contained residual amounts of petrol, two of which bore the appellant's finger or palm prints, were found in the ground floor storage area of the flats.

Psychiatric evidence

18. Dr Vivek Furtado gave evidence at the trial. He is a forensic psychiatrist, approved under section 12 of the Mental Health Act 1983 and had been instructed by the Prosecution. Dr Furtado had also been provided with a psychiatric report by Dr N M J Kennedy, who had been instructed by the Defence.

19. The appellant told Dr Furtado the following in interview:

    (i) He had been sexually abused as a child. He lived with his mother until he was 8, with his grandmother until he was 14 and then in care homes until the age of 18.
    (ii) During his time in care he was disruptive, angry and violent and would go from zero to 100 very quickly and was violent towards others. He spent time in isolation at a behavioural unit and was suspended and excluded from school a number of times.
    (iii) He spoke about a number of occasions over the course of his life where he had used violence against other people, an account also given to Dr Kennedy.
    (iv) He had a seven year old son who had recently had an accident requiring hospital, around the end of October and early November. He had looked after his son for two weeks after his son was discharged, however he started to feel depressed during the second week.

(v) In relation to alcohol, his intake had always been a problem and after 2018/2019 he was drinking every day. He told Dr Kennedy that by the time of the fire he was drinking every other day between 3.00pm and 5.00pm.

(vi) In relation to his mental health, he has been prescribed citalopram, an antidepressant, and quetiapine, an antipsychotic. However, he had stopped taking quetiapine six to eight months before the fire due to side-effects. The quetiapine had helped reduce his negative thoughts and urges to self-harm. He had been diagnosed with antisocial personality disorder and borderline or emotionally unstable personality disorder. He had always been impulsive and experienced frequent mood changes.

(vii) As to self-harm, he used it to relieve stress. It initially started with hitting walls, then he began to get into fights and would threaten others.

(viii) He had always held an interest in fires and liked to sit and watch the fires burn. He set bonfires regularly and found it soothing. When he was 14 or 15 he threatened to set a person on fire using a deodorant can and set fire to the back of the children's home and watched the fire for hours. He told Dr Kennedy that fire had always helped with stress and was "cathartic". He enjoyed watching fires.

(ix) He also used to harm animals when younger.

(x) He had ongoing thoughts of harming others, had anger management issues and needed to "vent".

(xi) He had not had any real dispute with the deceased. Whilst he had an issue with household waste attracting rats, he had not spoken to the deceased about it, only the council, and was not thinking about rubbish at the time of the fire. He did not know why he set the fire.

(xii) At the time of the fire he was getting more depressed. He had some beers and self-harmed. He felt as though an elastic band went off in his head and from that moment until the fire, he felt as though he was watching himself through a camera and felt like he did not have any control. He got a spray bottle, took the lid off it and got petrol from his motorbike. He then poured the fuel through the letterbox and lit it with a tissue.

(xiii) He said he thought the house was empty because he had not heard anyone, whereas usually he heard the children crying. He did not think they were in.

(xiv) Once the fire was lit, the blowback was huge and he thought "shit, what have I done? I need to go" and he took his dog and went for a walk.

(xv) He had provided an initial statement about the incident which was provided to both doctors. In it he said he saw C1 once or twice a fortnight, there had been rubbish dumped in the alleyway, he believed it was C1's and had reported the rubbish dumping twice. His moods were up and down and he had low mood and self-harmed and, if he did not do that, he had violent tendencies. He was acutely unwell at the time of the incident and snapped at around 7.00pm the night before the incident. He began to drink and listen to depressing music. If he drank between six and eight cans he would get in a good mood, however anything else was excessive and changed his mood. On the night, he had 10 cans of San Miguel. He had flashbacks to when he was child of the sexual and physical trauma he experienced from his mother's partner. He began to self-harm and then he went into "auto-pilot", got the spray, siphoned off the petrol from his motorbike and wore blue medical gloves as he poured the petrol through the letter box. When he returned he heard a neighbour say that the

children had been carried out of the flat and taken to hospital, so he knew there were injuries.

20. Dr Furtado's opinion was as follows:

(i) The appellant did not present with post-traumatic stress disorder and did not present with psychotic symptomology.

(ii) His medical reports were considered, as they were by Dr Kennedy, and they also contained references to him enjoying violence, reporting anger management issues, thoughts of harming others and fantasies about torturing people who had done wrong.

(iii) He had been diagnosed with antisocial personality disorder and emotionally unstable personality disorder.

(iv) There was no documented history in his medical records of him experiencing disassociation and he was not experiencing disassociation on the night of the fire.

(v) There was no evidence of cognitive difficulties.

(vi) Alcohol had a negative impact on his mental state and affected his ability to think through his actions. On the night of the fire the alcohol disinhibited him, which would have resulted in him not being able to think straight or rationally about his actions and would have made him more impulsive. His consumption of alcohol was voluntary.

(vi) He was not experiencing disassociation, it was not a common clinical phenomenon and was often seen in the context of other mental health disorders. Those with a history of trauma with a personality disorder could experience disassociation; however, in most cases, the episodes of disassociation start from their late teens and early twenties. There was no clear history of previous episodes of disassociation in his medical records. Further, those with disassociation experienced either partial or complete memory loss of the events that take place. He was able to recollect in detail the events that took place. In addition, he had consumed alcohol and it was not uncommon for those who had consumed large amounts of alcohol to work on "auto-pilot", as he described.

(viii) He was not experiencing a severe psychotic or depressive episode at the time of the fire. In relation to severe depressive episodes, the duration of the symptoms needed to be at least two weeks of duration with significant functional decline. He was able to function in the days leading up to the fire, for example looking after his son. The fluctuations in mood he described were more in keeping with his emotionally unstable personality disorder.

(ix) He was assessed as meeting the criteria for an emotionally unstable personality disorder of both borderline and impulsive sub-types. In addition, he presented with dissocial personality traits and met the criteria for a mental and behavioural disorder due to use of alcohol, which would have been harmful use of alcohol, rather than dependence.

(x) There was clear evidence of maladapted personality traits across decades and there was a clear history of experiencing significant trauma and abuse, which would have impacted negatively on the development of his adult personality. He used self-harming behaviours or violence to cope with his stresses and mood changes. His impulsivity, not thinking through the consequences,

applied to his self-harming and use of violence. There was ample evidence from his medical records of him having difficulties managing his anger.

(xi) He did not meet the threshold for a dissocial personality disorder, he presented with traits but he did not meet the required number of criteria for a diagnosis.

The sentencing process

21. The appellant was born on 14 September 1991 and was aged 31 at the date of sentence. He had three convictions for four offences, including using threatening words and behaviour, contrary to section 4 of the Public Order Act 1986, for which he was fined; battery, for which he received a suspended sentence; and possession of a knife or bladed article, for which he received a suspended sentence.

22. The Crown Court sentenced the appellant without a pre-sentence report. We confirm, in accordance with section 33 of the Sentencing Act 2020 ("the Sentencing Code") that, in the circumstances, such a report is not necessary.

23. The judge had Victim Personal Statements from C1's husband and mother.

24. In her sentencing remarks, the judge recited the facts and found that the appellant knew the deceased were all at home asleep and, having heard the fire alarm and the screaming from within the flat, stayed and watched the fire develop for five minutes. It was an enormous length of time in the circumstances; in that time the smell of fire spread to nearby houses and smoke billowed from the property. Others were alerted and contacted 999; and, on hearing the noise and commotion, people rushed to the scene to help. When he returned over 10 minutes later, the appellant pretended he had no idea about what had happened.

25. The appellant had had problems with his mental health for years. In 2013 he was diagnosed with emotionally unstable personality disorder of both subtypes, borderline personality disorder and impulsive personality disorder. His disorder was moderate to severe. He had difficulty managing his anger and in the past had engaged in violence with others and self-harm. He had dissocial personality traits, which were difficulties in maintaining relationships with others and a low tolerance to anger. He also met the criteria for mental and behavioural disorders due to alcohol use which was harmful, but not dependent. Those disorders did not affect his cognitive ability. He took antidepressants and antipsychotic medication. The Quetiapine was prescribed to reduce his anger and urges to harm himself and others. He had decided to stop taking it in the summer of 2022, which had an adverse effect on his mood and sleep.

26. He had an interest in and considerable experience of fires. He often sat and watched fires burn and develop. He set his first fire when he was 14 or 15. The court was sure that, shortly after 4.30pm on the day in question, he realised that the deceased had come back home; the children were lively and excitable. At 5.00pm he began to drink. Shortly after 6.30pm he purchased six cans of beer and drank them. He purchased another four cans shortly before 11.00pm. He knew that if he drank between six and eight cans of beer he would be in a good mood, but any more was excessive and would change his mood.

27. When he spoke to a friend shortly after 11.00pm, he was slurring his words and she could tell he had been drinking. He tried to flirt with her but she spurned his advances, which made him upset. He then spoke to another friend and said that his head was going. He continued to message friends, self-harmed and was in a dark and depressed mood. He had urges to harm others and continued drinking. By the early hours he had drunk 10 or 11 cans of beer; it made him disinhibited and more impulsive. The court was sure, based on the evidence of Dr Furtado, that his voluntary consumption of alcohol was the main reason for what he did.

28. The court was also sure, based on Dr Furtado's evidence, that he was aware that drinking alcohol was the last thing he should have done in his state of mind and that, whilst his disorders were all present in the early hours of 20 November, they did not impair his ability to understand the nature and consequences of his actions. They did not impair his ability to form a rational judgement and did not impair his ability to exercise self-control. He was well aware of what he was doing and wanted to kill all three deceased. He was very angry, but only he knew why he did it.

29. He deliberately chose a slim-necked bottle and put on plastic medical gloves. He took time to siphon off petrol and filled the bottle with as much petrol as he could. When he wedged the letter box open, he must have seen the pushchair by the front door, as had those that responded to the fire. He knew that, as he was starting the fire with petrol at the only entrance to the flat with the occupants asleep upstairs, they would be unable to escape. When he returned to the area, he was completely calm and composed and made out that he had no idea what had happened. He later voiced concern as to whether he could make an insurance claim for smoke damage, despite knowing by that time that C1 and her two children were either dead or in a very serious condition in hospital.

30. The judge said that the only sentence that could be imposed as a matter of law was life imprisonment. The case fell within para 3 of Schedule 21 to the Sentencing Code, with a starting point of 30 years. He was 31 and had three convictions for four offences; the most recent was for possession of a knife in 2018. He was sexually, emotionally and physically abused as a child and was neglected. He lived with his mother until he was 8, with his grandmother until 14 and in care homes thereafter.

31. The aggravating features were that he murdered three people, including two very young children; that he was under the influence of alcohol; from C1's screams in the moments after she woke up until she was rendered unconscious, the court was sure he inflicted mental suffering on her; that he stood and watched the fire and did not seek any help at all and, finally, that he was also convicted of arson being reckless as to whether the lives of neighbouring residents would be endangered.

32. It was said in mitigation that there was a lack of premeditation. The court disagreed: the offence clearly involved planning and thought. That was obvious from his decision to start the fire inside the deceased's home at the only point of exit, together with the way in which he used petrol decanted from his motorbike as an accelerant, the use of medical gloves and a slim bottle to fit through the letterbox.

33. It was further said that he suffered from a mental disorder which lowered his degree of culpability. He suffered from emotionally unstable personality disorder and one symptom of that was he acted impulsively and did not think through the consequences

of his actions. The court had been referred to the sentencing guidelines on offenders with mental disorders. Culpability would only be reduced if there was a sufficient connection between his disorder and his actions. That sufficient connection did not exist in the present case.

34. The court was sure that he did what he did because he had drunk 10 or 11 cans of beer; it was not because of his personality disorder. The court was sure of that based on the expert evidence of Dr Furtado. The fact he had a personality disorder would, however, be borne in mind in his personal mitigation.

35. It was not accepted that he had shown genuine remorse. Whilst he had accepted some time ago that he had started the fire, he had sought to minimise responsibility and maintained throughout the trial that he did not know his neighbours had returned home on 19 November and thought the flat was empty. That was a lie.

36. The sentence on Count 7 would be concurrent and regard was had to totality. That offence was aggravated by the use of an accelerant, that the offence was committed whilst under the influence of alcohol, that multiple people were endangered and the significant impact on emergency services.

The appellant's submissions

37. On behalf of the appellant Mr Chris Henley KC makes the overarching submission that the minimum term of 44 years was manifestly excessive. He submits that it is out of kilter with other cases of murder involving arson which have been considered by this Court. He accepts that a starting point of 30 years was inevitable in this case, having regard to the provisions of Schedule 21 to the Sentencing Code, but submits that the increase to 44 years was so high that it is manifestly excessive. He submits that, for a 31 year old man, it is close to being tantamount to a whole life order.

38. In developing that overarching submission, Mr Henley makes four specific criticisms of the judge's sentencing remarks.

39. First, he submits that the judge's finding that the appellant's personality disorder and mental health problems did not in any way reduce his culpability was unreasonable and at fundamental odds with the evidence. Alcohol certainly played an important part but it was the combination of the alcohol and the acute mental health crisis that explained what happened. Nothing else provided a realistic context for what happened. He also submits that, as the judge herself mentioned at page 7E of her sentencing remarks, those mental health issues had to be taken into account as part of the appellant's personal mitigation even if they did not reduce the appellant's culpability, but the judge cannot have given sufficient weight to this mitigation since, if she had done so, the minimum term would have been even higher than 44 years.

40. Secondly, Mr Henley submits that, as the prosecution itself had submitted, the incident had been relatively spontaneous and, while there may have been a degree of planning, it was not a significant degree. There was no real delay between forming the intention to set the fire and taking the few steps required to bring that about.

There was no evidence at the trial that the appellant had given forethought to what he did for more than a very few minutes.

41. Thirdly, Mr Henley criticises the judge's finding that the appellant had stood and watched the fire take hold for five minutes, only leaving the scene on hearing others coming to it. Mr Henley submits this was entirely speculative and not supported by clear evidence. He reminds us that the standard of proof is the usual criminal standard. He submits that the judge appears to have overlooked the fact that the appellant was wearing large headphones as he walked away from the scene and this can be seen on the CCTV footage. His account was that he was listening to loud music. Further, the appellant needed to return to his own flat before he could leave and he did, to collect his dog before he walked away.

42. Fourthly, Mr Henley submits that the judge's finding that the appellant had shown no remorse was contradicted by very clear evidence. Within not much more than 12 hours of the fire, at a time when no suspicion had yet fallen on him, he confessed to starting the fire to the police officers who were conducting routine house-to-house enquiries. Ultimately the only issue for the jury at the trial became whether the appellant had known that the flat was occupied on the night in question. The appellant also expressed sincere regret in his oral evidence. Mr Henley submits that there should have been some reduction, however modest, to differentiate the position of a defendant who makes an entirely voluntary and unprompted admission from a defendant who contests every aspect of the prosecution case.

Submissions on behalf of the Crown

43. On behalf of the Crown Mr Simon Ash KC responds to those four specific criticisms in the following way.

44. First, he submits that the judge was entitled to find that there was a degree of planning in this case. If there had been significant degree of planning, then the case would have been appropriate for a whole life order.

45. Secondly, Mr Ash submits that the judge did take into account (and there was no dispute about this) the background mental health issues but they do not automatically mean that there is mitigation. The finding that the appellant's personality disorder in no way reduced his culpability was not at odds with the medical evidence. In particular, Dr Furtado stated in evidence that the appellant's personality disorder did not substantially impair his ability to exercise self-control and his abnormality of mental functioning did not provide an explanation for the killing. Dr Furtado was of the firm view that the appellant was not experiencing dissociation on the night of the fire and was not psychotic.

46. Thirdly, Mr Ash submits that the judge was well placed to assess the evidence about what the appellant was doing in the five minutes after starting the fire. Although he can be seen wearing headphones on the CCTV footage there was no evidence that he had them on that the time he set the fire. Mr Ash submits that the judge was entitled to draw the inference that he had stood by and watched the fire in those crucial five minutes after it started. Mr Ash submits that there was a lot of evidence at the trial,

only some of which has been drawn to this Court's attention. For example, there was a combination of phone location data and CCTV which showed that the Defendant had remained in the area of the victim's flat for 5½ minutes after the start of the fire. Further, Dr Furtado gave evidence that the appellant had told him that he had used some tissue which he lit and it blew up really quickly. The appellant said that the flames came from both inside and outside the door, which provides clear evidence that he had stayed for a time to watch as the fire took hold. Dr Furtado also gave evidence that the appellant had told him that he did hear one of the neighbours return to the scene and that the emergency services carried one of the kids out of the flat, so he was aware of injuries at that stage.

47. Fourthly, Mr Ash submits that there was no evidence of genuine remorse in this case and the judge was entitled to draw that conclusion. Although the appellant had made an early admission of starting the fire, he had then given no comment at interview. Although the appellant pleaded guilty to manslaughter at a hearing on 21 April 2023, he continued to dispute the murder charges and the arson charge. This was not on any view full remorse. Furthermore, the judge was entitled to observe the demeanour of the appellant when he gave his oral evidence and assess for herself the sincerity of his expression of regret.

48. In response to the overarching submission that the minimum term of 44 years was manifestly excessive, Mr Ash submits that the judge was entitled in her discretion to impose that minimum term. He submits that the specific cases to which reference has been made in this Court are distinguishable on their very specific facts.

The legal framework

49. The sentence for murder is fixed by law and must be a life sentence. The court must then specify the minimum term which the offender must serve before he can be considered by the Parole Board for release on licence. The minimum term must be such part of the sentence as the court considers appropriate taking into account, among other things, the seriousness of the offence or the combination of the offence and any one or more offences associated with it: see section 322(2)(a)(i) and (ii) of the Sentencing Code. In considering the seriousness of the offence or offences, the Court must have regard to (i) the general principles set out in Schedule 21, and (ii) any sentencing guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21: see section 322(3) of the Sentencing Code.

50. In Schedule 21, para 2(1) provides that, if the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high and the offender was aged 21 or over when the offence was committed, the appropriate starting point is a whole life order. Subsection (2) provides that cases that would normally fall within sub-paragraph (1)(a) include (a) the murder of two or more persons, where each murder involves any of the following, including (i) a substantial degree of premeditation or planning.

51. Para 3(1) of Schedule 21 provides that, if the case does not fall within para 2(1) but the court considers that the seriousness of the offence (or the combination of the

offence and one or more offences associated with it) is particularly high, and the offender was aged 18 or over when the offence was committed, the appropriate starting point, in determining the minimum term, is 30 years. Para (2) provides that cases that would normally fall within that provision include (f) the murder of two or more persons.

52. Para 5 of Schedule 21 provides that, in other cases, the appropriate starting point is 15 years.

53. Para 8 makes it clear that detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

54. Para 9 of Schedule 21 provides that aggravating factors that may be relevant to the offence of murder include: (a) a significant of planning or premeditation, (b) the fact that the victim was particularly vulnerable because of age or disability, and (c) mental or physical suffering inflicted on the victim before death.

55. Para 10 of Schedule 21 provides that mitigating factors may be relevant include: (a) an intention to cause serious bodily harm rather than to kill, (b) lack of premeditation, (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered the offender's degree of culpability.

56. The relevant provisions before the Sentencing Code were contained in section 269 of the Criminal Justice Act 2003 ("the 2003 Act") and Schedule 21 to that Act. Although some of the numbering in Schedule 21 has changed in Schedule 21 to the Sentencing Code, the substantive provisions to which we have referred are not materially different.

57. The sentencing regime created for murder cases by the 2003 Act was considered by this Court in a number of decisions shortly after it came into force, in particular *R v Jones (Neil) and Others* [2005] EWCA Crim 3115; [2006] 2 Cr App R (S) 19, in which the judgment was given by Lord Phillips CJ. At paras 6-9, Lord Phillips CJ set out some general principles, the most pertinent of which we will summarise here:

(1) The guidance given by Schedule 21 is provided to assist the judge to determine the appropriate sentence. The judge must have regard to that guidance but each case will depend critically on its particular facts.

(2) There are huge gaps between the starting points. The difference between 15 and 30 years is enormous and the difference between 30 years and whole life may, depending on the age of the offender, be even greater.

(3) The starting points must not be used mechanistically so as to produce, in effect, three different categories of murder. Full regard must be had to the features of the individual case so that the sentence truly reflects the *seriousness* of the particular offence.

(4) Protection of the public is not a relevant factor in fixing the minimum term, because Parliament has decided that the sentence for murder is a mandatory

sentence of life imprisonment, so that it is the task of the Parole Board to ensure that the offender is not released after serving the minimum term unless this presents no danger to the public.

Other decisions of this Court

58. As we have mentioned, our attention has been drawn to a number of other decisions of this Court, some of which were mentioned by the single judge in giving leave to appeal.

59. Among the individual cases which were considered by the Court in *Jones* were those of *Dosanjh* and *Multani*. They were convicted of murder and causing grievous bodily harm with intent. In both cases the specified minimum term was 23 years. The sentencing judge took a starting point of 30 years but reduced the minimum term to 24 years on account of the offenders' ages. He then reduced the minimum term by another year to reflect the time spent in custody, so arriving at the minimum term of 23 years. This Court ultimately reduced the minimum term to 21 years: see para 63.

60. At paras 60-61, the Court observed that pouring petrol into a person's home and setting fire to it when it is, or maybe, occupied is on any footing a horrifying crime. Setting fire to a person's home with the intention of causing death or really serious injury is peculiarly horrifying. The judge could not be criticised for having taken a starting point of 30 years. Mr Ash points out that that was a case in which there was one death, yet a starting point of 30 years was considered appropriate even then.

61. In *R v Mahmud (Farhad)* [2014] EWCA Crim 1008, the two offenders were convicted of three counts of murder and two counts of attempted murder. The appeal against sentence was brought by Mahmud. The other offender had been Danai Muhammadi. Muhammadi was imprisoned for life with a minimum term of 38 years. Mahmud was sentenced to life with a minimum term of 34 years.

62. The factual background was that a fire was set to a home. As a consequence a woman and her baby son (aged 16 months) died that night and the woman's father had died in hospital a week later. Her mother and her brother escaped death but suffered life-threatening injuries. The woman was the estranged wife of Muhammadi. Mahmud was his good friend. Muhammadi was the principal offender. Mahmud was accused of having engaged in a joint enterprise.

63. The sentencing judge observed that the murder of one person by arson is, without more, sufficient to trigger a 30-year starting point, referring to *Jones*. In this case there were three murders and two attempted murders with significant and ongoing injury to the survivors. There was significant premeditation. There was mental or physical suffering inflicted on at least two of the victims before death. Noah was particularly vulnerable, unable to save himself because he was 16 months old. The mitigating features for Muhammadi were his youth and good character. In Mahmud's case they were that he had no previous convictions and he had not been a prime mover in the sense of instigating the plan.

64. Before this Court no one suggested that the sentencing Judge's identification of the minimum term of 30 years was in error. He also had regard to the principle of totality and warned himself against double counting.

65. This Court (Rafferty LJ) was of the view that the offending was particularly grave, carried out with the intention to kill five people, one of whom was a child. The arson was in the dead of night and the victims were asleep and defenceless. The Court was entirely unpersuaded that the sentence passed on Mahmud (a minimum term of 34 years) was manifestly excessive.

66. *Attorney General's Reference (No 50 of 2013) (R v Mills)* [2013] EWCA Crim 2573 was an application to increase a sentence on the ground that it was unduly lenient.

67. At around 3.00am the offender set fire to a house where three people were asleep. They died as a result of the fire. The offender was convicted following a trial on three counts of murder and was sentenced to life imprisonment with a minimum term of 30 years.

68. This Court (Lord Thomas CJ) held that the sentence was unduly lenient. There were three particular factors showing that the culpability of the offender was extremely high: (i) the threats made, including those on the night in question; (ii) the fact that one of the victims was the offender's child and was extremely handicapped; and (iii) the fact that the offender had known that there was oxygen in the house and the effect that would have, as demonstrated by his text messages. The case had serious aggravating features, including the way in which the family had died. The harm had gone way beyond the mere fact that there were multiple deaths. Accordingly, a minimum term of 35 years was substituted.

69. *Attorney General's Reference (R v Mohammed (Shahid))* [2020] EWCA Crim 766; [2020] 4 WLR 114 was another application to increase a sentence on the ground that it was unduly lenient. The events, however had taken place in 2002, before the coming into force of the 2003 Act. The offender was convicted in 2019, having spent time in Pakistan in the meantime.

70. The facts were that eight persons, including five children, were killed and three others sustained very serious physical and psychological harm.

71. The arson attack was carefully planned. The offender acted with others. They were armed with at least four petrol bombs and a cannister containing at least two litres of petrol. The fire was started by the use of the petrol bombs and, in addition, the petrol from the cannister was poured through the letterbox into the hallway at the foot of the stairs and ignited.

72. The judge concluded that, if the 2003 Act had been in force, the appropriate minimum term would have been 38 years: see para 29. This Court did not comment on whether that figure of 38 years would have been unduly lenient but it was submitted by Mr Ash to us that it would have been.

73. The trial judge imposed a sentence of life imprisonment with a minimum term of 23 years for each of the offences of murder, and a determinate sentence of 14 years

imprisonment for the offence of arson. Of particular significance was the fact that at the time of the offences the offender was aged only 19.

74. This Court (Holroyde LJ) granted the application on behalf of the Attorney General and increased the minimum term to 27 years less the 312 days which the offender had spent remanded in custody in the United Kingdom.

Assessment

75. We see some force in Mr Henley's submissions on behalf of the appellant but not in all the specific criticisms which he makes of the judge's sentencing remarks.

76. We agree with Mr Ash that the judge, having conducted the trial and seen the whole of the evidence, was much better placed that this Court can be to assess questions of fact. In particular, she was entitled to conclude that the appellant had stayed in the vicinity for approximately five minutes after starting the fire and that he would have been able to hear what was going on. Secondly, she was entitled to conclude, on the basis of the expert medical evidence before her, that the appellant's culpability was not reduced by reason of his mental health issues. Thirdly, the judge was entitled to conclude that there had been some degree of planning. If this had been a case of substantial premeditation or planning, it might well have been appropriate to impose a whole life order, having regard to the matters set out in Schedule 21 to the Sentencing Code.

77. The judge was also entitled to reach the conclusion that the appellant had not shown full remorse, although he had (as she accepted) made an early admission that he had started the fire. But this was more a question of a lack of mitigation rather than an aggravating factor. Furthermore, as the judge herself accepted, the appellant's mental health issues did have to be taken into account as part of his personal mitigation even if they did not reduce his culpability for the offending. If that is right, the minimum term would have been even higher than 44 years.

78. Of most significance, in our judgement, is Mr Henley's overarching submission, that the minimum term of 44 years was out of kilter with other comparable cases. Whilst we acknowledge that the judge had a difficult sentencing exercise to perform, we have (with respect) reached the conclusion that a minimum term of 44 years was manifestly excessive in the circumstances of this case.

79. We reiterate that each case depends on its own facts and this Court does not usually find it helpful to be taken to the specific facts of other cases. That said, this is sometimes unavoidable in cases of this kind. The guidance available for sentencing judges in Schedule 21 to the Sentencing Code differs from that which is provided by the Sentencing Council in its definitive guidelines, because those guidelines not only set out a recommended starting point for various categories of offending but usually give a sentencing range. Schedule 21 does not set out a recommended sentencing range for different types of offending, although it does set out a starting point. The consequence is that, for example, a case which is particularly serious and therefore justifies a starting point of 30 years, may, depending on the circumstances, require a significant adjustment either downwards from that figure or upwards. It is also

important that there should, so far as possible, be consistency as between different cases, while bearing in mind that no two cases are the same.

80. In the present case we have no doubt that the judge was entitled to go well above the starting point of 30 years. Nevertheless, bearing in mind what this Court has done in other cases to which we have referred above, including in references to this Court by the Attorney General, we have reached the conclusion that the appropriate minimum term should have been 38 years (less the time spent by the appellant on remand of 224 days).

Conclusion

81. For the reasons we have given this appeal is allowed to the extent that we substitute a minimum term of 38 years (less the 224 days spend on remand) for each of the three offences of murder. Those sentences remain concurrent. The concurrent sentence of 10 years' imprisonment for the offence of arson, being reckless as to whether life was endangered, remains unaltered.

82. We stress that the minimum term is not the term that the appellant will in fact serve in prison. He may serve longer. He will only be released if the Parole Board is satisfied that he is no longer a danger to society and, even if he is released, he will then be on licence for the rest of his life and may be recalled to prison if he breaches the conditions of any such licence.