Neutral Citation Number: [2021] EWCA Crim 1064

Case No: 202100933 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SHEFFIELD CROWN COURT
Mr Recorder Hill-Baker
T20207297

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2021

Before :

LORD JUSTICE EDIS
MR JUSTICE DOVE
and
HER HONOUR JUDGE MOLYNEUX
Sitting as a judge of the Court of Appeal Criminal Division

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Between :

REGINA	**Appellant**
- and -	
CONNOR JAY O'ROURKE	**Respondent**

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- -

Mr Ben Lloyd (instructed by **Attorney General Office**) for the **Appellant**
Mr Dale Harris (instructed by **GWB Harthills Solicitors**) for the **Respondent**

Hearing dates : 11th June 2021

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JUDGMENT

The Court imposes a reporting restriction under s.45 of the Youth Justice and Criminal Evidence Act 1999. An order was made in Crown Court in the following terms:

No matter relating to a person concerned in the proceedings, shall, while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings, and in particular:

a) his name;

b) his address;

c) his family address;

d) the identity of any school or other educational establishment attended by him;

e) any still or moving picture of him.

That order also applies to this hearing and judgment, which should be reported with the words "the child aged 12 referred to below" in place of the name of the where it appears.

Lord Justice Edis:

This Reference

1. This is an application for leave to refer a sentence under Section 36 of the Criminal Justice Act 1988. We give leave. On 11 June 2021 we heard the case, and made the order set out in the final paragraph of this judgment. We reserved our reasons, which we now give.

2. The offender, Connor Jay O'Rourke, is 23 years of age having been born on 28 December 1997. He was indicted with two counts arising out of an incident on 26 June 2020. Each count alleged that without lawful excuse, he damaged by fire an occupied dwelling house. The fire caused very serious injury. Count 1 alleged that he did this intentionally and that when he did it, he intended to endanger the life of another. Count 2 alleged that he intended to destroy or damage the property, or was reckless as to whether the property would be destroyed or damaged and was reckless as to whether the life of another would thereby be endangered.

3. On 27 July 2020, the offender pleaded guilty to count 2 at a plea and trial preparation hearing. He pleaded not guilty to count 1. On 5 February 2021, following a trial, the offender was found not guilty upon count 1. On 5 March 2021, the offender was sentenced to 4 years' imprisonment upon count 2. A victim surcharge of £190 was payable.

Facts

4. At the material time, the offender was living with his grandfather in a terraced house in Doncaster. The fire which he lit occurred at the home of the next door neighbours. After a long day's drinking, and while very drunk, he had helped one of the neighbours back to her home, because she was intoxicated.

5. At around the time this was happening, there was evidence that he had become angry with his mother, Celia, who was also there. He was at one point looking for his mobile telephone, and he was heard to say to his mother "if I don't find my fucking phone, I want it now or else I'll burn the house down." Celia said she would find it. He appeared angry and he then left.

6. The prosecution case at trial was that while he was next door, he made sexual advances to the neighbour's daughter, "Anna" which she rejected. He then called her 'frigid' and a 'faggot', and he left the address to fetch petrol. He returned to the address with a 5 litre container of petrol and poured it along the perimeter of a wire chain- link fence which ran along 2 sides of the small yard in front of the house, and on to some wheelie bins near the fence. The yard is about 2 or 3 square metres. He then set it alight. The vapour from the petrol ignited instantly. The heated air in the yard created a pressure differential between the hot air (of higher pressure) in the yard and the cooler air (of lower pressure) in the house. When the front door was opened, the flames were sucked into the doorway of the property. No damage was caused to the inside of the property.

7. However, two people were seriously injured, one of whom was his mother Celia, who had been inside the address. She suffered life threatening injuries and sustained 69% burns to her body. She was transferred to a specialist burns unit where she was placed

on a ventilator. Her extensive injuries were life changing and require long term treatment. The other person to suffer injury was Anna. She was also taken to hospital, her legs were badly burnt and required a cooling gel and bandages, which required frequent changing. Others were also put at risk by the fire, including occupants of the house which was attacked, one of whom was a 12 year old child.

8. The initial call had been made by Anna. She told the emergency services that, 'He poured a jerry can of fuel all over the front garden and I watched him light it 'and 'It's all the bins in the front garden, I watched him do it, honestly I will write a statement, I don't care who my neighbours are, I don't know his second name, but I know he's called Connor and I watched him pour petrol all over my front garden and just set it alight, it burnt my socks'.

9. At trial the offender had denied losing his phone and making threats to burn down the house. He also denied making advances and comments towards Anna. When sentencing, the judge made no findings of fact about this evidence.

10. Anna's evidence was that she saw the offender start the fire when she opened the front door. She saw him leaning over some wheelie bins with a clear 5 litre container in his hands, shaking the contents of the container over the front garden of her home address. He flicked his thumb on a lighter and as soon as he did so, flames appeared that were taller than him and she could no longer see him. He then left. Before Anna could shut the front door, she felt heat travelling up her legs. She closed the door and ran towards the living room to alert the other people in the house, shouting and crying as she ran. At this point her grandfather was coming out of the living room to see what had happened and she told him there was a fire. She then heard the front door open and a loud scream. Celia O'Rourke ran past her in the hallway and out into the back garden through the living room. She ran to a paddling pool in the rear garden. The 12 year old boy saw this too. Her arms, legs and hands were bleeding and he said that her dress had melted. The child said she was screaming as she ran towards the pool. He then used a hose to spray her with water. He described her arm looking like a candle. The scene he saw was truly horrifying.

11. Anna then called the fire service and got instructions from them as to how to contain the fire until they arrived and encouraged the occupants of the property to remain in the back garden and to keep away from the fire. Anna began treating her legs which were both burnt by pouring cold water on them for 15 minutes before being taken to hospital for treatment. She described on the journey to hospital as feeling like her legs were sticking to the seat. She was given morphine for the pain at hospital.

12. By the time the fire service attended, the fire was almost extinguished by neighbours using a hose pipe. Fire crew were alerted to Celia in the rear garden. She was lying in a paddling pool in her underwear. Officers noted injuries to Celia as peeling skin on the majority of her body, including feet, legs arms, hands and lips. She was conscious and breathing but unable to give an account. She was taken by ambulance to the Northern General Hospital.

13. At 11.07pm, whilst on guard at the scene of the fire, an officer heard rustling coming from the nearby trees. The offender was found carrying a string bag and a bottle of Budweiser. He was drunk. He was arrested and made no reply.

14. The fire officer confirmed in evidence that there was no evidence of accelerant placed immediately beside the front door. It was confined to the base of the wire chain link perimeter fence and wheelie bins. These were quite close to the door, as we have described, in the small area at the front of the house. The fire officer also confirmed that the liquid visible on the floor by the front door was in fact water and not petrol. The conclusion reached by fire officer was that had the fire not been extinguished with a hosepipe, it was unlikely to have spread to the property.

15. The offender was interviewed and made no comment. His case at trial was that he did not envisage the fire would spread to the house; it had been set on a grassed area adjacent to the premises.

Previous convictions and the pre-appeal report

16. The offender had four previous convictions for six offences. On 5 February 2015, the offender received a referral order for a burglary committed on 1 December 2014 and for a shoplifting committed on 31 January 2015. On 31 March 2017, he received a community order for an offence of battery committed on 10 May 2016. On 28 May 2019, he was imprisoned for 18 weeks for an offence of disclosing private sexual photographs with intent to cause distress committed on 5 April 2019; and 8 weeks (consecutive) for an offence of harassment committed on 1 April 2019.

17. The judge decided that he did not need a pre-sentence report. Since he then made a finding that the offender was not dangerous for the purposes of sections 258 and 255 of the Sentencing Act 2020, this was a significant error. The circumstances required careful consideration of those provisions on the basis of full information. This court ordered a pre-appeal report which contains details of the previous convictions of the offender of which the judge was, because of his error, ignorant.

18. The pre-appeal report says:-

> "On 31/03/2017, he was convicted of two counts of battery. Previous assessments state that Mr O'Rourke went to the home of his ex-partner. He went to the back door and opened it. His ex-partner tried to pull the door shut but Mr O'Rourke managed to open it and walk into the kitchen. He pushed her, causing her to fall onto a chair. A witness was standing at the door leading into the living room and witnessed this. Standing next to her was her partner. Mr O'Rourke approached him and swung a punch at him connecting with the right side of his face. He pushed Mr O'Rourke away and Mr O'Rourke again swung another punch at the victim connecting with the right side of his face. The victim returned a punch to get Mr O'Rourke away. Mr O'Rourke grabbed his shirt and ripped it. He slipped on the laminate flooring but managed to get up and lent against the side. He then took the victim in a head lock. The witness tried to intervene by standing in front of the victim. Mr O'Rourke told her to get out of the way because she was pregnant - she was very upset. Mr O'Rourke left the address but was arrested on the street a short distance from the address. Mr O'Rourke was sentenced to a twelve-month Community Order.

On 28/05/2019, Mr O'Rourke was sentenced to twenty-six weeks custody for Disclose information in contravention of S.34 (LASPO Act) between 05/04/2019 and 21/04/2019 and Harassment between 01/04/2019 and 21/04/2019. The CPS documents state that Mr O'Rourke was in a relationship with the victim, a different partner to the above offence. On 09/03/2019 they were having consensual sex at his property and during intercourse, he has allegedly assaulted her by slapping her and biting her causing bruising to her chest area. She states that she has told him to stop numerous times, but they continued having sex. She stopped talking to him at the start of April and on the 5/4/19, she has been contacted by a person that she only knows through her college stating that Mr O'Rourke had sent her an explicit image which depicted the victim standing naked in front of a mirror. This image had been sent to Mr O'Rourke by the victim but for him only. They have continued to talk via text message, and he threatened to assault her and commit criminal damage to both her house and her dog. He has stated "I WANT MY JUMPER BACK OR I'LL BURN YOUR HOUSE DOWN AND YOUR SPACKER DOG. I'LL FUCK YOU UP and I'LL START BANGING THESE VIDEOS AND THAT EVERYWHERE" He has then stated that he would begin posting videos on all social media platforms. On 18/04/2019 he has sent four images to the victim's mother from his Facebook account.

Mr O'Rourke stated during a previous interview that he did cause the bruises but with her full consent because that is how she likes sex. He states that he had to go to hospital for an operation and he was upset that she had not contacted him and that she had blocked him from certain social media apps so that he could not see that she was at parties with other males. This has made him angry and he admits that he has sent the messages to her mother. However, he admits that he should not have done it. He realises he has made a mistake. He admits to sending the messages but also states that he was on heavy painkillers and he probably wouldn't have done had he not been. He admits sending the message to one of his friends asking them to damage her house but again states he never meant to cause her any distress but states that his friends would not have carried it out and if they had tried he would have stopped them. Previous assessments state that "his hurt led to jealousy and jealousy to these offences. It is clear from some of the language used in his threats that he was ruminating on her being with other men and, owing to him being physically unable to control the situation he sought to do so through social media. In my view, the threats coupled with the behaviour, were designed to shame and embarrass and not the actions of someone oblivious to consequence. His motivation was to use his power to control Ellie in a situation where he felt that he had lost this.

> Mr O'Rourke was initially released from custody on 15/07/2019, he returned to custody again 04/11/2019 for failing to comply and he was re-released on 18/11/2019. He was subject to license until 25/11/2019 and Post Sentence Supervision until 26/08/2020."

The Psychiatric Evidence

19. The judge appears to have decided that he did not need a pre-sentence report because there was a psychiatric report by Dr P.N. Egleston (dated 29 November 2020, together with an addendum report dated 3 March 2021). Given that he appears to have relied upon it in finding that the offender is not dangerous, it is necessary to summarise it in some detail.

20. The first report had been commissioned largely to deal with the issue of intent. The doctor took a full history. The offender told the doctor that his behaviour had been difficult to manage from a young age. He said that he 'had problems with behaviour and this caused misery for everyone'. 'I didn't listen at school and I caused trouble at home. I always had a bad temperand became angry easily'. He told the doctor that he became more violent and aggressive as he got older. He explained that he experienced similar problems at home. He indicated that he would smash up his bedroom, be violent and aggressive and regularly ran away. He stood trial aged 16 on an allegation of rape (and been acquitted). The case had 'destroyed' him when he saw what it did to his mother. He said that he became addicted to Spice at that time and took an overdose of medication which led to a hospital admission. He did not use alcohol regularly; however, in the summer he would sometimes drink heavily but that was rare. He said that when he did drink heavily (he gave the doctor the example of the index offence) he tended to be more impulsive and to do things that he regretted. He said that cannabis had been his main drug of misuse during his life. In relation to the index offending, he told the doctor that he never meant to hurt anyone. He had been greatly upset, as his mother had been in rehabilitation for her drinking, 'but she just walked out and carried on drinking – I was upset by this but I was trying to support her'. He said that he had been using cannabis worth up to £40 a day. He felt he had been generally fortunate in his life, but that he had also been brought up around violence and that when he drinks alcohol he can 'feel it (violence) coming out of me. I am a good person with a good heart but I have abad side in me'. He said that he rememberedthat during the course of the evening he had helped a female neighbour back into her home as she was drunk. He said that he had no memory of events around the fire. He added that he could not remember any arguments or unhappiness. He said he had no plan to set a fire and had no idea why he did it and that he must have been 'messing about' as he had been so drunk. He said that he had no idea why he would do what he did, but that he sometimes did things without thinking. He said that his understanding was that his mother had opened the door, that another door in the house was open and that this sucked the fire from the patio into the house. He had no intention of setting the house alight.

21. He said that he planned to continue to take cannabis in the community in the future. His main difficulty throughout his life had been problems managing anger and sometimes he 'might have to do something to get rid of it'. He said that he also sometimes enjoyed hurting the feelings of other people although he was not sure why he did this, saying that he regretted it afterwards. His changes of mood were something that had happened

throughout his life, and related to his anger problems. He said that he had also experienced regular impulsivity over the years. He described these as his core difficulties and said he hoped to get help in prison as he worried that if he could not address these he might offend more seriously in the future.

22. The doctor found no evidence of any psychiatric condition or of any intellectual disability, autistic spectrum disorder or hyperkinetic disorder. He said that whilst it was not possible for him to make a formal diagnosis of personality disorder aftera single interview, and without background corroborating information, it seemed to him that the long-term symptoms described were most likely personality related and were indicative of dissocial and emotionally unstable personality traits.

23. The doctor observed that the issue of intent was difficult fully to understand as the offender had consistently said that he had no memory of the events in question and that he did not know why he did what he did. It was reasonably clear that he was heavily intoxicated with alcohol at the material time. It seemed likely that this factor (in addition to his lifelong difficulties managing anger and impulsivity) was a precipitant to his actions at the time.

24. In his addendum report, the doctor was asked to consider whether, from a psychiatric perspective, there was a significant risk to members of the public of serious harm. Overall, the doctor could not state that there was anything to indicate that there was such a risk from a medical perspective. The doctor observed that the court would form its own judgment on those issues.

The sentencing hearing

25. At the sentencing hearing, it was agreed that the offence was within Culpability B and Category 1 Harm (on the basis that very serious physical and/or psychological harm was caused). That provided a starting point after trial of 6 years with a category range of 4 – 10 years' custody.

26. It was suggested by the evidence the offending was a revenge attack and that there was a malicious intent, in that it was a response to perceived rejection by Anna. Such a finding would not be inconsistent with the jury's conclusion that they were not sure that there was an intention to endanger life, as opposed to taking revenge by terrifying people. The Recorder said that they would never know for sure why he had committed the offence, but otherwise, having heard the evidence during the trial, made no finding of fact as to the basis of sentencing on this issue.

27. Defence counsel submitted there was no obvious motive, perhaps due to the offender's intoxication. Harm was not intended, and the seriousness of the harm caused not reasonably have been foreseen. Defence counsel however accepted that intoxication was a statutory aggravating feature.

28. There was a letter from the offender to judge, in which remorse was expressed. Reliance was placed in mitigation upon a lack of recent or relevant previous convictions; a lack of premeditation; remorse; and a determination or demonstration of steps having been taken to address addition or offending behaviour.

29. With respect to dangerousness, defence counsel submitted that the criteria as to risk were not met. There was nothing about the background to the offence to suggest the offender had any fascination with fire or was likely, in the future, to cause a significant risk of serious harm to the public.

The Sentencing Remarks

30. In his sentencing remarks, the Recorder observed that two people had been injured: Anna had injuries to her legs, which required morphine for the pain, and she was significantly disturbed by what had happened both physically and mentally. Celia O'Rourke suffered substantial burns. Her injuries were life threatening.

31. The Recorder said "Only you know, or could know, what it was that motivated you to leave the premises and act in the way that you did." We understand this to mean that the evidence at trial did not enable the sentencing judge to make any findings at all about why this attack had been committed. This is rather surprising, but not at all reassuring so far as future risk from the offender is concerned. He did not explain why he was unable to make a finding, in particular given the evidence of Anna. There was no proper basis for rejecting that evidence, given that the offender said he could not really remember what had happened. The offender had been acquitted by the jury of intending to endanger life by what he did, but pleaded guilty to being reckless on that issue. This means that he appreciated that there was a risk to life as a result of his actions, but went on and took that risk anyway, intentionally. There is no doubt at all that he deliberately created a significant fire in the near vicinity of living people, although the jury's finding means that he did not intend that the petrol would create a fireball at the front door.

32. In relation to dangerousness, the Recorder said only this:-

> "Because of the nature of the offence, I have seen and read psychiatric reports about you and have had to consider the question of whether you are a dangerous offender. I've already indicated to your counsel that I am not driven to the conclusion that you are dangerous within the meaning of the Act, and so the sentence I intend to pass will be a determinate sentence of custody."

33. The Recorder held the offence fell within category 1B of the Guidelines and he identified the following aggravating factors: (i) use of an accelerant; (ii) under the influence of alcohol or drugs; (iii) if not a significant degree of planning or premeditation, nevertheless planning and premeditation were involved (he left the scene to obtain the petrol used); (iv) multiple people endangered; and (v) the impact on emergency services or resources, In terms of mitigation, the Recorder identified remorse; and the absence of any similar previous offending. The Recorder found that having regard to the aggravating and mitigating features, the starting point would be elevated to 8 years'imprisonment.

34. The Recorder then held it was appropriate to give the Offender full credit for his plea of guilty. He did not say why. The plea was entered at the PTPH and the appropriate credit was 25%. It had been suggested the court should be satisfied that there were particular circumstances which significantly reduced the offender's ability to

understand what was alleged or otherwise made it unreasonable to expect the offender to indicate a guilty plea sooner than it was done. It seems likely that the judge accepted this submission. It was an obviously ill-founded submission which should have been rejected. The reduction for the plea, he said, reduced the sentence from 8 years by a third to 5 years 4 months.

35. The judge did not explain why he departed from the guideline by applying the credit for the plea before applying a second reduction for mitigating factors. He then made a further reduction of 16 months for the offender's personal mitigation and the fact that the sentence would have to be served under Covid-19 conditions (*R v Manning* [2020] EWCA Crim 592 [41]). Because of the stage at which he applied this discount, this has the same effect as a discount of 2 years would have had if applied before the plea discount. The order in which such discounts are given does not matter, as long as the sentencing judge appreciates that if it is done the wrong way round, the reduction for personal mitigation needs to reflect the fact to avoid it becoming excessive. He gave his reasons as follows:-

> "I then have regard to your personal mitigation and to the factors set out by the Lord Chief Justice in the case of *R v Manning [2020] EWCA Crim 592* concerning sentences imposed during the pandemic. I am impressed by what you say in your letter and as a consequence of all of the matters I have referred to, I reduce the sentence which I feel I must impose to one of four years' custody."

The Solicitor-General's aggravating and mitigating factors

36. The aggravating features were:

a) Multiple people endangered beyond those injured;

b) Use of an accelerant;

c) Under the influence of alcohol;

d) Planning and premeditation, in that the offender left the scene to obtain the petrol;

e) Significant impact on emergency services. As it was a dwelling house fire with multiple people potentially at risk, three fire engines were dispatched to the scene.

37. The mitigating features were:

a) Remorse.

b) Lack of recent/relevant previous convictions.

c) Determination and/or demonstration of steps having been taken to address addiction or offending behaviour.

The S-G's submissions

38. It is submitted that the judge appears to have double counted the mitigation: he took it into account in arriving at a starting point of 8 years, and later a second time when applying a further discount of 16 months, or, actually, 2 years.

39. Furthermore, where a sentence of some length is imposed, any reduction to reflect Covid-19 ought to be minimal. (See *R v Whittington* [2020] EWCA Crim 1560, at §30).

40. No issue is taken with the reduction of one third to reflect the offender's plea of guilty. We assume that this stance is taken because the court generally will not interfere with a sentence as unduly lenient simply on the ground that the credit for the plea was too generous. Where, as here, there are other substantial reasons for quashing the original sentence as unduly lenient, we consider that we should act in accordance with the relevant guideline when deciding what sentence to pass in its place.

41. Furthermore, the judge failed properly to consider the question of dangerousness. He ought to have ordered a pre-sentence report, which would have considered other issues relevant to dangerousness which were outside the scope of the psychiatrist's reports.

42. The Solicitor-General submits that there were in any event matters raised on the face of the psychiatrist's reports that indicate that there was a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. We have summarised extensively above the passages relied upon.

43. Finally, it is submitted that the judge had received no proper explanation as to why the offender committed this offence. He proceeded on the basis that it was unexplained. The Solicitor-General refers the court to *Attorney General's Reference (R v Smith (Terry))* [2017] EWCA Crim252; [2017] 2 Cr App R (S) 2, per Treacy LJ at paras [25]-[26] in which the court accepted that the absence of any explanation for serious offending may support a finding that the offender was dangerous. The court said this:-

> "26. In circumstances where the court has no idea as to why these very serious offences were committed or what triggered them there cannot be confidence that another serious event might not occur in the future. We do not consider that a substantial determinate sentence would enable the court to say that the risk of future repetition would be at an acceptable level by the time of release from such a sentence. In so concluding we have borne in mind the test under s.229(1)(b) ."

44. It is worth noting also that the court in *Smith* at [19] cited *Attorney General's References Nos 73 and 75 of 2010 and No.3 of 2011 (R. v Anigbugu) [2011] 2 Cr. App. R. (S.) 100* (p.555) at [7] in relation to the importance of pre-sentence reports in cases of serious sexual offending.

Decision

The Length of the Sentence

45. We agree with the judge that a sentence of 8 years after adjustment for aggravating and mitigating factors was appropriate.

46. The next step was to consider whether any further adjustment was required to take account of the effect of Covid 19 on prisoners, and any other matters of mitigation not already taken into account.

47. The judge dealt with plea discount before that next step, but we will approach this in the correct order.

48. There were no other matters of personal mitigation not already taken into account in the adjustment to the starting point. The judge referred to the respondent's letter at both stages for reasons which he did not explain. This was an error. The judge accepted that the offender's letter demonstrated remorse which was genuine. If he had done as he should have done, and ordered a pre-sentence report, he would have discovered, as the pre-appeal report shows, that this is not so. The offender minimises his guilt and refuses to say why he did what he did. He describes it as a "mistake". This is a further extract:-

> "I again attempted to discuss the offence and asked if he agreed with the details in the CPS documents, he told me that he did not. I asked if he had made advances to the victim, as detailed in the CPS documents and he told me he did not. He refused to explain why he had the fuel or where he had got it from and his only explanation for his behaviour was "it's sweet and simple. I was pissed and it was a mistake". I attempted to discuss with him his alcohol use at that time and he told me that drinking on the day of the offence was "a one off. It was good weather", and he believes that his alcohol use impacted his behaviour "150 million percent. I drank over eighteen cans". I again attempted to discuss the circumstances of why he committed the offence and he told me "I don't feel comfortable answering these things until I've discussed this with my solicitor".

49. So far as the COVID 19 reduction is concerned, the judge does not appear to have been taken to *R v. Whittington* [2020] EWCA Crim 1560 which was decided on 23rd November 2020, some months before the present sentence was passed. That decision concerned sentences imposed before the pandemic which for obvious reasons constitute most of the decisions of this court on this issue to date. Sentences, such as the present, which were imposed for offences committed after the start of lockdown and during restrictions are only now coming for review.

50. *Whittington* explains how the principle in *R v. Manning* [2020] EWCA Crim 592, [2020] 2 Cr. App. R. (S.) 46 applies in cases where long sentences must be imposed for serious offences. What the Lord Chief Justice, giving the judgment of the court actually said in *Manning* was:-

> "41. We would mention one other factor of relevance. We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the

> Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgement should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case—currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of COVID-19.
>
> "42. Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a magistrates' court to retain jurisdiction, rather than committing for sentence."

51. The words "established principles" and "ordinary principles" are, we think, key to understanding this passage. The court was not considering a case where a substantial custodial sentence was inevitable, much of which, almost certainly, will be served when the pandemic has receded.

52. In this case the following factors are relevant:-

    i) The offence was committed at a time of lockdown. At this time in the pandemic everyone knew that responsible behaviour was required, and anyone who was interested would know that the impact of lockdown on prison conditions was severe. The offender's response was to drink 18 cans of lager, attend a party and then torch his neighbour's house. If he had thought about the situation at all, he could have avoided prison altogether simply by behaving in the way that the whole population was expected to behave. To place this offence in chronological sequence, the Prime Minister had announced on 23rd June that there would be some relaxation of the very significant restrictions with effect from 4th July 2020. We consider that the mitigating effect of the consequences of the pandemic is very limited in this case. We accept that there may be mitigation to be derived from a psychiatric condition which may have been exacerbated by the lockdown, if there is evidence of that, but there was no such evidence here.

    ii) The sentence must on any view be so long that it appears likely that almost all of it will not be served in Covid 19 conditions. There is of course no certainty about this, but the courts must proceed on the basis of official statements. It is the responsibility of the government, not the sentencing courts, to ensure that

the benefits of the relaxation of restrictions are passed to those in prison, when they eventually transpire.

iii) One of the purposes of sentencing is the protection of the public, see section 57(2)(d) of the Sentencing Act 2020. That was a purpose which the sentence in this case was required to serve. We suggest that *Manning* does not require a discount in all such cases.

53. For these reasons we conclude that there was no further scope for any reduction in the sentence arrived at by the judge after balancing aggravating and mitigating factors. That sentence was 8 years. The judge's reduction by the equivalent of 2 years was unwarranted and the resulting sentence was unduly lenient. We quash it.

54. The judge did not explain why full credit should be afforded for a plea entered at PTPH. We have been unable to think of any reason why that would be proper. The right reduction was 25% leading to a sentence of 6 years. As we have explained, it is appropriate to apply to proper reduction for the guilty plea when deciding what sentence to impose, having decided that the judge's sentence must be quashed.

Dangerousness

55. We now turn to the question of dangerousness and whether the sentence should have been a determinate sentence or an extended determinate sentence.

The Proper Approach on Review of a Finding that an Offender is Not Dangerous

56. The proper approach of this court to reasoned decisions by sentencing judges is explained in *R v. Johnson (AGs Ref No 64 of 2006) and other cases* [2006] EWCA Crim 2486, [2007] 1 Cr. App. R. (S.) 112, summarised in paragraphs 7 and 8 of the headnote:-

> "(7) The Court of Appeal would not normally interfere with the conclusions reached by a sentencing judge who had accurately identified the relevant principles and applied his mind to the relevant facts.
>
> (8) Those essential principles applied with equal force to references by the Attorney-General. In such cases the question was whether the decision not to impose the sentence, in the circumstances, was unduly lenient. In particular, in cases to which s.229(3) applied, where the sentencing judge had applied the statutory assumption, to succeed the appellant should demonstrate that it was unreasonable not to disapply it. Equally, where the Attorney-General had referred such a case because the sentencing judge had decided to disapply the assumption, the reference would not succeed unless it was shown that the decision was one that the sentencing judge could not properly have reached."

57. We accept the submission of the Solicitor-General, based on *Smith*, cited above, that the absence of an explanation as to why serious offending had occurred can give rise to

finding that an offender is dangerous and unpredictable. We do not think that this line of reasoning is limited to serious sexual cases, and are satisfied that it can also extend to arson. We also observe that in that case the court proceeded by reviewing the judge's reasoning and deciding whether the conclusion was properly open.

58. In this case, the judge decided that the reason why the offender committed this offence was not known, and apparently attached no significance to that decision. He did not say whether he accepted that it was committed in response to the rejection of the offender's advances to Anna or not. It was not a necessary consequence of the verdict that the jury had rejected this evidence, and it was therefore a matter for the judge to decide. The jury simply decided that they were not sure that when he lit the fire he intended to endanger life. This was no doubt because they were not sure that he intended the fireball, although he had accepted that in lighting the fire he did not care whether life was endangered or not. The jury was not required to decide why he lit the fire. It was therefore, for the judge to say what the factual basis of sentence was. He said he did not know why it had happened without addressing the evidence called by the prosecution which sought to explain it.

The sentencing court's statutory duty to give reasons

59. Section 52 of the Sentencing Act 2020 imposes obligations on the court

> "**Duty to give reasons for and to explain effect of sentence**
>
> (1) A court passing sentence on an offender has the duties in subsections (2) and (3).
>
> (2) The court must state in open court, in ordinary language and in general terms, the court's reasons for deciding on the sentence.
>
> (3) The court must explain to the offender in ordinary language—
>
> > (a) the effect of the sentence,
> >
> > (b) the effects of non-compliance with any order that the offender is required to comply with and that forms part of the sentence,
> >
> > (c) any power of the court to vary or review any order that forms part of the sentence, and
> >
> > (d) the effects of failure to pay a fine, if the sentence consists of or includes a fine."

60. *R v. Chinn-Charles* [2019] EWCA Crim 1140, [6], [11] and [12] gives helpful guidance to sentencing judges about how these reasons should be structured:-

> "6. Subsections (2) and (3), and the rule, are directed to ensuring that the offender understands the nature and effect of the sentence. The key to the nature of sentencing remarks is the use of the terms "in ordinary language" and "in general terms". The offender is the first audience because he or she must understand what sentence has been passed, why it has been passed, what it means and what might happen in the event of non-compliance. If the offender understands, so too will those with an interest in the case, especially the victim of any offence and witnesses, the public and press."
>
> And:-
>
> "11. Findings of fact should be announced without, in most cases, supporting narrative.
>
> 12. If in play, a finding of dangerousness contrary to statute must be recorded. Supporting facts should be set out only when essential to an understanding of the finding, not as a matter of course."

61. In *R. v John Paul Berry* [2021] EWCA Crim 715, the same submissions were made on a reference, by reference to the same authorities, as have been made to us. The facts, though in many ways different, were in other relevant ways similar: no pre-sentence report had been ordered and the court had proceeded with only a psychiatric report. Macur LJ, giving the judgment of the Court of Appeal, said:-

> "40. However, we also go on to consider the issue of dangerousness. The judge said:
>
> > "You have got a bad record, I accept. Violence features in it, but nothing of this gravity. I have had to think anxiously as to whether or not you are dangerous within the statutory meaning of that term. I have not got a pre-sentence report here. That would not have helped me. It would have been unnecessary. I have a wealth of material, not only from Mr Bird, to whom I am grateful throughout the case, but also from the three psychiatric reports I have mentioned. I have concluded that you are not dangerous within the statutory meaning of the term, such that I cannot punish you today by means of a deterrent sentence."
>
> 41. We have been unable to discern from those remarks why the judge reached the conclusion that the offender was not 'dangerous'. It is undoubtedly correct that the judge may have been assisted in this case by a pre-sentence report to deal specifically with the point of dangerousness, as he would have been assisted by updated psychiatric reports. However, we agree with him that there was sufficient evidence before him upon

> which he could make an assessment as to whether or not the offender posed a significant risk of causing serious harm to the public by reason of the commission of further offences. Unfortunately, however, we do not consider that the judge carried out a sufficient analysis of all of the information that was before him.
>
> 42. The offence itself speaks volumes. This was a specified offence of significant and severe harm. The facts show an unexplained and unprovoked attack. The offender's reaction to the consequences of his attack are bizarre. His presentation on psychiatric examination was extremely concerning. His complex character, as identified by the judge, added to the concerns of risk, rather than dissipated them."

62. We consider that the approach to a review of a judge's determination of the dangerousness issue in *Johnson, Smith* and *Berry* is correct. This court will consider the reasoning of the judge, and where it properly reflects the material before the sentencing court will be slow to reach a different conclusion. This means that there is an onus on the judge to explain what that reasoning is.

63. This does not conflict with *Chinn -Charles* and is consistent with section 52 of the Sentencing Act 2020.

64. It is clear that the purpose of the duty under section 52(2) is to inform the public and all parties to the case (including the victim and the victim's family) why the sentence is being imposed. The narrower duty under sub-section (3) is a duty to explain certain things to the offender, for the benefit of the offender and to ensure that enforcement of the conditions of the sentence may fairly occur because the offender has had those conditions properly explained by the court. It is quite true that in most cases, if the duty to the offender is performed, it will follow that the wider duty under sub-section (2) will also have been performed.

65. However, that is not true where a decision has been taken not to impose a type of sentence which obviously arose for consideration. Sub-section (3) requires the court to explain the sentence which has been imposed and not to explain why some different kind of sentence has not been chosen. That explanation is, though, required by subsection (2) in cases where dangerousness plainly arises, but is not found. The present case was such a case.

66. *Chinn-Charles* authoritatively says that lengthy, narrative, quasi-judgments are not required by the Act. However, there is no indication in that judgment that the court intended to go behind what was said in *Johnson*, and *Smith* which has been recently reaffirmed in *Berry*. A succinct explanation in general terms of why dangerousness has not been found is required in cases such as the present so that all parties and the public can understand why that conclusion was reached. This will tend to forestall references by the Attorney-General in cases where the decision was properly open to the judge, and will make it possible for the Court of Appeal to review the case if an application

for leave to refer it is made. With a degree of skill an explanation of this kind, in general terms, can be crafted in a couple of sentences. If it must be longer, then so be it.

67. It is also to be recalled that ultimately these decisions are tested by experience. If an offender does go on to commit a serious offence after having not been found dangerous, there should be a record of why that happened. There will inevitably be such cases and public confidence in the system requires that much. Equally, if an offender is found dangerous, the Parole Board will need to know why.

68. In the specimen sentencing remarks in Appendix B, drafted by the court in *Chinn-Charles* to show how it can be done, the court said this:-

> "A detailed pre-sentence report sets out the high risk you pose of further such offences. You easily resort to weapons and violence to resolve conflict. You are dangerous for the purposes of the statute."

69. This does identify the basis on which the determination was made, which was found in the pre-sentence report. This was said to be "detailed" and no doubt included reference to the previous convictions as well as the matters summarised at paragraph 25 of the judgment. When deciding the appeal against the judge's finding on the issue, the court set the matter out a little more fully and said this at [34]:-

> "The finding of dangerousness was open to the judge. That more serious injuries did not occur was chance not design. One wound was just above the victim's eye and one close to his lungs. This was not the first time the applicant had used a weapon to intimidate. A clear escalation in the seriousness of his offending and his potential for causing really serious harm sat within the criminal lifestyle he adopted, enforced by use of a potentially lethal weapon."

70. For these reasons, we do not consider that the necessity for a sentencing judge to give reasons when determining an offender's dangerousness (whichever way that issue is resolved) is in conflict with *Chinn-Charles.* The reasons must be succinct, and clear, as required by *Chinn-Charles*, and in ordinary language and in general terms as required by section 52 of the Sentencing Act. This court can then review the finding when necessary, whether on appeal or on a Reference, in the way described in *Johnson* and *Berry.* As long ago as *R v. Lang* [2005] EWCA Crim 2864 at [17(ix)] this court emphasised that reasons for conclusions about dangerousness were necessary, but should be given briefly.

Application to this case

71. In this case the judge did not explain why this man is not dangerous. He did not have a pre-sentence report. He had a psychiatric report which was a carefully constructed document. This was concerned in the first place with whether the offender suffers from any psychiatric condition which was relevant to his ability to form an intent. The doctor's opinion was that he does not. An addendum dealing with dangerousness was prepared in which the doctor said, carefully, that there was no *psychiatric* reason why this offender was dangerous. The judge appears to have read this as meaning that there

was no reason why he is dangerous. This was a misreading, if that is what he thought. The report shows that this man's long history of angry violence is not the result of any transient or treatable psychiatric condition, but is simply the result of the kind of man he is, together with his long history of substance abuse. These are both properly regarded as factors increasing the risk he poses, and require such treatment as is possible and careful review of its progress.

72. The judge had therefore ample material to find the offender dangerous from the psychiatric report (properly understood) and from the facts of the offence itself. He ought to have given weight to the absence of any explanation of his conduct from the offender as a further worrying sign, as explained in *Smith.* There is no sign in this case from the sentencing remarks that the determination that the offender is not dangerous was made, in the words of *Johnson,* by a "judge who had accurately identified the relevant principles and applied his mind to the relevant facts". He must, we think, simply have failed to give proper weight to the psychiatric report, and to the extremely serious nature of the offence. His decision to deal with the case by a determinate sentence consequent upon a decision that the offender is not dangerous was unduly lenient.

The sentence now imposed in place of the 4 year determinate term

73. The judge made a significant error in failing to obtain a pre-sentence report. The pre-appeal report which we have seen illustrates exactly why a pre-sentence report was required. The author of a pre-sentence report, as a doctor instructed by the defence may not be able to do, can scrutinise the probation service records for the offender's past. They should also have access to detailed records of the offender's previous offending history, at least in most cases. If the judge had ordered a pre-sentence report it is likely that he would have avoided the principal errors he made when he was sentencing in this case.

74. It is clear that further information, which the court should have had about the offender in a pre-sentence report, can be taken into account by this court at the stage when the court is deciding what sentence to impose in place of a sentence which has been quashed as unduly lenient. The further information in the pre-appeal report includes a detailed account of the offender's previous convictions. The fact that he had threatened to burn down the house of a former sexual partner in April 2019 as part of a series of acts of harassment following her ending of the relationship is highly relevant. We accept that the offender's unwillingness to engage with the author of the pre-appeal report may have been because he perceived its purpose as being to increase his sentence. A pre-sentence report may have been more useful for this reason. However, what he did say substantially undermines his claim to be remorseful and shows he has no real insight into what he did. The effect of the pre-appeal report is to provide further information about the previous convictions of the offender and to support strongly the conclusion we would have reached in any event, namely that this offender is clearly dangerous.

75. It is worth re-stating the duty of a sentencing court in relation to pre-sentence reports, and the limits on the ability of this court to correct the position on a Reference. Both prosecutors and judges need to be aware of the need to "get it right first time", and to ensure that offenders are dealt with as dangerous offenders where appropriate and that, where this course clearly arises for consideration, it is not dismissed without proper examination in a pre-sentence report. Where dangerousness speaks for itself on the

material before the Crown Court, as in *Berry* and this case, the Court of Appeal can rectify an unduly lenient approach without taking into account any material not before the judge. In other cases, the position may be more problematic, and this court may expect the prosecution to have made appropriate submissions to the sentencing court if the matter is to be raised on a Reference.

76. Section 30 of the Sentencing Act 2020 says this:-

> **Pre-sentence report requirements**
>
> (1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion.
>
> (2) If the offender is aged 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report.

77. In this case, there was sufficient material before the judge on which the offender could and should have been found to be dangerous. If he was considering not making that finding, as it transpired was the case, then he was, in our judgment, obliged in the circumstances of this case to obtain a pre-sentence report. Any determination that this step was "unnecessary" on the facts of this case would be unsustainable, and this was therefore a statutory requirement.

78. We have explained that we consider that the sentencing judge erred in, among other things, failing to obtain a pre-sentence report, and failing to apply *R v. Whittington* [2020] EWCA Crim 1560. We consider that it was the duty of the prosecution to ensure the court was alerted to any important recent decisions of this court of which the judge might be unaware. *Whittington* was such a case, and one which should have been drawn to the court's attention. It would also have been appropriate for the prosecution to have drawn section 30 of the Sentencing Act to the attention of the judge and submitted that he should not make a determination that the offender was not dangerous without first obtaining a pre-sentence report dealing with that issue.

Conclusion

79. For these reasons, we quash the sentence of 4 years imposed by the judge. We find that the offender is a dangerous offender and we impose on him an extended determinate sentence of 9 years with a custodial term of 6 years and an extended licence period of 3 years.