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**Neutral Citation Number: [2023] EWCA Crim 1492**

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2023/02443/A4



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 14<sup>th</sup> September 2023

**B e f o r e:**

**LORD JUSTICE SINGH**

**MR JUSTICE LAVENDER**

**MR JUSTICE JOHNSON**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v -**

**LEVI GEORGE**

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**Mr N Hearn** appeared on behalf of the Attorney General

**Mr B Aina KC and Mr S Espirit** appeared on behalf of the Offender

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**J U D G M E N T**  
**(Approved)**

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Thursday 14<sup>th</sup> September 2023

**LORD JUSTICE SINGH:**

**Introduction**

1. This is an application on behalf of His Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), for leave to refer to this court sentences on the ground that they were unduly lenient.

2. On 23<sup>rd</sup> June 2023, in the Crown Court at Norwich, the respondent offender was sentenced by Her Honour Judge Robinson to a total of nine years' imprisonment. The main charge of which he had been convicted by the jury on 3<sup>rd</sup> May 2023 was an offence of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861 (count 3). He was also convicted of cruelty to a person under 16, contrary to section 1(1) of the Children and Young Persons Act 1933 (count 1). On count 3, the judge passed a sentence of nine years' imprisonment, and on count 1 she passed a concurrent term of two years' imprisonment.

3. The principles to be applied on an application under section 36 of the 1988 Act are well established. We are grateful to Mr Aina KC, who appears with Mr Esprit and has reminded us of a number of classic decisions of this court which set out those principles. They have been summarised more recently in particular in *Attorney General's Reference (R v Azad)* [2021] EWCA Crim 1846, [2022] 2 Cr App R(S) 10 at [72] by the Chancellor of the High Court as follows:

"1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.

2. A sentence is only unduly lenient where it falls outside the

range of sentences which the judge at first instance might reasonably consider appropriate.

3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.

4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'."

4. Mr Aina has also reminded this court of what was said by Lord Lane CJ in a very early decision on section 36 in *Attorney General's Reference (No 4 of 1989)* (1990) 90 Cr App R 366 at 371, where he emphasised, as this court has done ever since, that its role is not simply to re-take the sentencing decision as if it were the sentencing court. He emphasised that mercy is not a vice and does not necessarily mean that a sentence was unduly lenient, and he emphasised that even where this court considers that a sentence was unduly lenient, it still retains a discretion as to whether to exercise its power to increase a sentence.

### **The Facts**

5. The facts are agreed and are helpfully set out in the Final Reference. The offender's daughter, to whom we will give the initials "XY", was born in March 2019 at a time when the offender was serving a prison sentence for an offence relating to the supply of Class A drugs. XY's mother had become pregnant following a brief liaison with the offender. She made efforts to provide XY with access to the offender. She took XY to visit him in prison. She made contact with his family and she and XY stayed with them several times. XY and her mother visited the offender on the day he was released from prison in May 2020.

6. In October 2020, arrangements were made for XY to visit the offender on his own. After that visit, her mother noticed that XY was covered in bruises. The offender's mother told XY's mother that XY had fallen down the stairs and that was how the injuries had been caused. Although XY's mother accepted this explanation at the time, later expert medical

assessment by a paediatrician indicated that the injuries were unlikely to be accidental. The injuries caused in this October incident formed the basis for count 1 on the indictment (child cruelty).

7. In November 2020, XY's mother (who believed the injuries caused in October 2020 had been accidental) allowed XY to have another visit with the offender. At the conclusion of that visit XY was collected by a cousin of XY's mother. She noticed that XY had a mark on her cheek. The offender said that XY had fallen from a step ladder leading into the offender's bedroom. XY was then taken to the train station to be collected by her mother. XY's mother travelled home on the train with XY. However, during the journey XY's mother discovered a large burn on the sole of her child's left foot. She took XY to hospital where it was discovered that XY had suffered the following additional injuries: each leg was broken just below the knee; the right forearm was broken; there were what looked like cigarette burns behind her right knee; soft tissue swelling and subdural haemorrhages of the scalp in multiple locations; a small skull fracture; soft tissue swelling at the back of the neck; and a spinal subdural haemorrhage in her lower back. The November injuries were the subject of count 3 (causing grievous bodily harm with intent).

8. As result of the injuries with which XY presented with at hospital, a police investigation ensued. Witness statements were taken from XY's mother and the offender's family. It was established that XY suffered the injuries when she was alone with the offender on the evening of 20<sup>th</sup> November 2020.

9. The offender was arrested on 22<sup>nd</sup> November 2020 and taken to Luton Police Station. He was interviewed. At the outset of the interview he gave the following prepared statement: "I did not cause any injuries to [XY]. I would never hurt a child". He then answered "No comment" in relation to questions regarding his movements or how the injuries to XY were

caused.

### **The Sentencing Process**

10. The offender was born on 30<sup>th</sup> June 1995 and is aged 28. He has seven convictions for 16 offences. On 21<sup>st</sup> November 2019 he was sentenced to 30 months' imprisonment in relation to eight counts of being concerned in the supply of Class A drugs (heroin). He had no previous convictions for violence.

11. No pre-sentence report was ordered in the Crown Court. However, the sentencing judge was provided with a large number of character references from the offender's family who spoke of him being a kind and compassionate man and who expressed shock that he had been convicted of such a serious offence.

12. The judge was also provided with a letter from the offender in which he maintained that he had not harmed XY in any way and that he was not guilty of the offences for which he had been convicted.

13. At the hearing before this court, having been given time to consider the factual history in more detail, counsel for both sides helpfully provided the court with a brief chronology in relation to another drugs offence for which the offender was sentenced. Having been released on licence in May 2020, and having committed these index offences in October and November 2020, the offender was recalled to prison. Subsequently, on 11<sup>th</sup> November 2022 he received a sentence for a drugs offence of 54 months' imprisonment. We were informed today that the earliest release date pursuant to that sentence will be August 2024. Furthermore, it was clarified today that on the date of sentence for the index offences (23<sup>rd</sup> June 2023) the offender was in custody, serving that unrelated sentence.

14. The maximum sentence for an offence under section 18 of the Offences against the Person Act 1861 is life imprisonment. The maximum sentence for child cruelty was ten years' imprisonment at the time of the index offence. It has been increased to 14 years' imprisonment for offences committed after 28<sup>th</sup> June 2022. The Sentencing Council has issued definitive guidelines in respect of each of the two offences with which this court is concerned.

15. In her sentencing remarks the judge referred to the guideline on causing grievous bodily harm with intent. She noted that there was no dispute that the offending fell into culpability A, since XY was obviously vulnerable due to her age. Indeed, she was a defenceless infant. Further, the judge was satisfied that these were prolonged and/or persistent assaults. As to harm, the judge concluded that the totality of the injuries were properly described as grave, and so the case falls within category 2. A category A2 case attracts a starting point of seven years' custody, with a range of six to ten years.

16. The judge noted that there were the following aggravating factors:

(a) The offender was on licence at the time.

(b) He abused his position of power as the child's father; this was not double counting, because this was not simply accounted for by the fact that the child was obviously vulnerable; and he had a history of violence against her.

(c) He had taken no active steps to prevent his child from obtaining medical assistance, but had failed to do so; and he had handed over the child when she was fully clothed so that the injuries were concealed.

(d) The offender had sought wrongly to place blame on XY's mother.

Accordingly, the judge was satisfied that the offence fell at the top end of the category range, if not beyond it. As we shall note, however, this finding was not reflected in the sentence that in due course the judge imposed.

17. In relation to the sentencing guideline on child cruelty, it was agreed that the offending fell into category 2 harm. As to culpability, the judge was of the view that there was the use of significant force and multiple incidents of cruelty, rather than serious cruelty, and it was therefore category C medium culpability. For a category C2 case, the starting point recommended in the guideline is one year's custody, with a range between a high level community order up to two and a half years' custody. The judge said that similar aggravating factors applied to this offence as to the earlier one. Further, the chronology of events was such that the fact that the offender took the steps which he did to conceal the earlier offence gave him the opportunity further to assault XY on the second occasion very seriously. The judge noted the offender's age and that he had a number of previous convictions, although none was for violence.

18. Turning to the character references filed on behalf of the offender, the judge considered that she could give them only modest weight because they were tainted by the authors' disbelief that the offender would do anything like committing these offences. The judge accepted that the offender had been doing well in custody while serving the sentence for the drugs offence. The judge considered the question of dangerousness, but concluded that there was not a significant risk of serious harm caused by further offending on the offender's part. The judge went on to impose the sentence of nine years' imprisonment to which we have made reference.



### **The Solicitor General's Submissions**

19. On behalf of the Solicitor General, Mr Hearn submits that the overall sentence was unduly lenient because it did not reflect the true gravamen of the offences. He accepts that the judge was correct to impose a lead sentence in respect of the count of causing grievous bodily harm with intent. However, he submits that the presence of multiple culpability category A factors and the serious nature of XY's injuries required a starting point, before consideration of aggravating and mitigating features, at the top of the category range. He submits that a starting point of ten years' imprisonment would have been appropriate. Further, he submits that a significant uplift from that starting point was then required to reflect the large number of serious aggravating features. He submits that an appropriate uplift would have been three years. Further, he submits that there was no compelling mitigation. The fact that the offender was serving a sentence for separate criminal conduct did not mean that a reduction was required for totality. Any reduction, he submits, because of personal mitigation and totality should have been very modest.

### **The Offender's Submissions**

20. On behalf of the offender, Mr Aina submits that the sentence could be regarded as lenient or compassionate, but was not unduly lenient. He submits that the Solicitor General's submissions do not give sufficient weight to the mitigating features which were indeed present in this case. Further, he submits that, having presided over a four week trial, the judge had the opportunity to assess the evidence as a whole and was well placed to make the assessments which she did.

21. Mr Aina submits that the serious nature of the injuries caused in the offence of grievous bodily harm with intent had already been taken into account by the judge in assigning the case to category 2 harm, on the basis that they amounted to grave injury. He submits that the judge was correct not to accede to the Crown's contention that the aggravating feature of

gratuitous degradation was applicable. He submits that there was divergent evidence given at the trial as to the cause of the burns. He has taken this court in some detail through the different types of burn and the evidence which the jury heard about them. Mr Aina pointed out that in her sentencing remarks the judge said that the burns "appeared" to be caused by cigarette burns and did not make a finding to the criminal standard of proof that she was sure of that fact.

22. In his written submissions, Mr Aina has set out extracts from the evidence at the trial given by family members who were called as prosecution witnesses. They gave evidence that the offender was a loving father to XY and that he took his responsibilities towards her, including feeding and bathing her, seriously. Mr Aina submits that this evidence was mirrored in the character references placed before the judge, and that the judge was entitled to conclude that the offender had tried to be a good father to his daughter on the occasions he had seen her.

23. Finally, Mr Aina has drawn our attention to the fact that the offender gained enhanced prisoner status by the date of sentencing for the index offences. He submits that this court should encourage the rehabilitation of an offender.

### **Our Assessment**

24. We do not accept all of the submissions which have been advanced by Mr Hearn on behalf of the Solicitor General. In particular, we make it clear that we do not proceed on this application on the basis that there was proved to have been gratuitous degradation. We accept Mr Aina's submissions in that regard. In our judgment, the judge was entitled to make the findings of fact which she did. She did not make that finding to the criminal standard of proof.

25. Nevertheless, with great respect to the very experienced sentencing judge, we have come to the conclusion that the total sentence passed was unduly lenient for the following reasons. First, the section 18 offence was by itself so serious, as the judge herself recognised in her sentencing remarks, that it fell towards the top of the suggested range, if not beyond. A custodial sentence of more than nine years was therefore required for that offence alone.

26. Secondly, although it was appropriate to make the sentence for the offence of child cruelty offence concurrent, it was then necessary to increase the main sentence in a way that would reflect the overall gravity of the offender's offending, while respecting the principle of totality. It is not simply an arithmetical exercise.

27. Thirdly, as has become clear in the oral submissions at the hearing before this court, there is reason to be concerned as to the way in which the judge treated the sentence that the offender was already serving for a completely unrelated drugs offence. The judge directed that the sentences she passed for the index offences were to commence on the date of sentence, and not at the end of the sentence that the offender was then serving.

28. We entirely accept Mr Aina's submission that the principle of totality still needs to be taken into account, even in this context. Ultimately, as the definitive guideline on totality advises, a sentencing court must consider the length of sentence that would have been appropriate if the various matters had been dealt with at the same time and ensure that the total sentence is just and proportionate to reflect the overall offending of an offender.

29. Nevertheless, the reality is that the sentence the offender was serving at the date of sentence on 23<sup>rd</sup> June 2023 was for a completely unrelated offence. As we have been told at this hearing, the earliest release date for that offence would have been August 2024. There is, therefore, inevitably some overlap in the time which will be served in custody as between

those various sentences.

30. We do not consider that the sentence of two years' imprisonment for the offence of child cruelty can itself be regarded as unduly lenient, but we have concluded that the overall sentence needs to be increased to reflect the full gravity of the offender's offending. This can properly be done by increasing the sentence for the section 18 offence to 12 years' imprisonment. We make it clear that that sentence will be deemed to have taken effect from 23<sup>rd</sup> June 2023.

### **Conclusion**

31. For the reasons we have given, we grant the Solicitor General's application for leave to refer these sentences to this court under section 36 of the 1988 Act. We quash the sentence of nine years' imprisonment on the section 18 count and we substitute for it a sentence of 12 years' imprisonment. We do not alter the sentence of two years' imprisonment on the count of child cruelty. That sentence remains concurrent. Accordingly, the total sentence is one of 12 years' imprisonment. We emphasise again that that sentence took effect from 23<sup>rd</sup> June 2023.

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