IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002402/B2-202002403/B2

[2021] EWCA Crim 1372

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 7 July 2021

LADY JUSTICE SIMLER DBE

MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

REGINA

V

MARK STEPHEN LALLY

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MR J COODE appeared on behalf of the Appellant.

MR M WALSH appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. At some time between 20.59 and 21.02 in the evening of 27 November 2019 the appellant, Mark Stephen Lally, stabbed his wife, Laura Soogreen, using a large kitchen knife. He admitted doing so and on 18 August 2020 he pleaded guilty to unlawful wounding contrary to section 20 of the Offences Against the Person Act 1861. He was then tried in the Crown Court at Oxford by HHJ Ross and a jury, on two more serious counts, including a count of attempted murder, and ultimately unanimously convicted of attempted murder on 26 August 2020. On the same date he was sentenced by the judge to life imprisonment with a minimum term of 11 years and 3 months.
2. He appeals against both conviction and sentence with leave of the single judge.
3. On the conviction appeal, leave was limited to two of the many original grounds advanced on his behalf and counsel (who was his trial counsel), Mr Jonathan Coode, has confirmed that he does not seek to renew any of the refused conviction grounds.
4. The appeal is resisted on behalf of the Crown and we have received written and oral submissions from Mr Walsh. We are grateful to both counsel for their helpful submissions.
5. The conviction appeal raises two issues. First, whether the conviction for attempted murder is unsafe because the judge wrongly limited the time given to Mr Coode to cross-examine Ms Soogreen, and secondly, whether the conviction is unsafe by virtue of the fact that the judge failed to discharge a juror with autism who remained on the jury accordingly.

The facts

6. On 27 November 2019, at 21.02, the police received a 999 call from Ms Soogreen's son, Alex Soogreen (then aged 14). He told the operator that the appellant (his stepfather) had stabbed his mother with a kitchen knife. Ms Soogreen suffered between nine and 11 wounds, seven of them penetrating wounds. The force used to deliver those blows was considerable. Some of the stab wounds went so deep that they damaged her lungs, both of which collapsed. She required a blood transfusion but mercifully survived her injuries.
7. There was no dispute about some of the aspects to the background to the stabbing on 22 November, including that the parties' marriage had broken down and that, in January 2019, Ms Soogreen told the appellant that she wanted a divorce. The period that followed was, it was common ground and as the judge described in his summing-up, punctuated by bitter disputes over finances, property and had the added complexity that the two remained living together with Alex at the matrimonial property, which was also the base for the appellant's business. A settlement involving a payment of an agreed sum of £87,000 by the appellant to Ms Soogreen was agreed at some point although there were issues around how that money would be raised. In the weeks leading to 27 November, it was agreed that there was a series of unsuccessful applications for mortgages and further attempts to raise the money being made.
8. The Crown also alleged that there were earlier episodes of violence by the appellant towards Ms Soogreen and relied on three particular incidents: first, an incident where he placed a pillow over her face; secondly, but in fact the first in time and two years earlier, him pushing her against a wall and lifting her feet off the ground; and thirdly, an incident involving water throwing. The appellant accepted that in anger he had smashed items in the house on occasion and that he had pushed Ms Soogreen. He also accepted the

water-throwing incident. However, no other violence was accepted by him. His case was that she would get hysterical and make things up and then admit that she had done so.

9. The Crown also relied on threats to kill her made by him, including an occasion where Ms Soogreen said that the appellant threatened to stab her and said that neither of them would make it to the end of the divorce. He also threatened, she said, that he would kill her without the use of any guns. These threats were all denied.

10. So far as the events of 27 November 2019 themselves are concerned, the appellant returned home that evening having been drinking. He accepted that he drank about three pints and a couple of glasses of wine in two different pubs and that he would have been over the drink-drive limit. They had a conversation ending in an argument. According to her and supported by Alex, who was then present, the appellant said he had "taught someone a lesson" at the pub. The appellant disputed saying this. There was mention of selling the matrimonial property and a discussion about him obtaining a mortgage.

11. In evidence at trial, Ms Soogreen said she did not want to talk to the appellant; she wanted to have a shower and then relax. She said he was in an excited and anxious state and that he asked for a hug. She did not want to give him a hug and asked him to leave her alone. They went upstairs. She told him that her mother was going to move in, and that she wanted to get on with her life. In evidence he accepted that he made some comment about not wanting other "freeloaders" to come and live in the house. There were about four occasions when he went into Alex's room to seek Alex's agreement that he was not behaving as badly as Ms Soogreen was suggesting he was. At some point Ms Soogreen went into the bathroom to have a shower. She was putting her towel by the bath when he entered and proceeded to attack her with a knife. She screamed out to Alex to call the police. He did so. The police arrived shortly after 21.00 to find Ms Soogreen sitting in the bathroom covered in blood. The appellant repeatedly said words to the effect, "What have I done?" He was arrested. He responded with a series of phrases including, "What the fuck have I done", "What drove me to that", "Why didn't I walk away" and "How the fuck can I let someone push me to fucking do that". He went on to ask officers whether Ms Soogreen was all right, commenting, "Obviously, she's not fucking all right because I fucking stabbed her".

12. In interview the appellant, who was of previous good character, answered "no comment" to all questions asked of him, on legal advice. He gave evidence at his trial. In evidence, he denied forming an intent to kill or to cause really serious injury and described the situation as "something went massively wrong in my brain". He admitted retrieving a knife from the kitchen, which he accepted in cross-examination was the biggest and sharpest he could find. He said his intention was simply to shock Ms Soogreen. He went upstairs having picked up the knife and went into the bathroom saying, "Are you going to have me arrested for threatening you with knives. Is this what you're talking about?" He said initially she had her back to him and that he was trying to "appeal to her better side". He said he flipped and proceeded to stab down on her. He had no idea that he had stabbed her many times. She screamed for Alex and he came running in and the appellant said he left the room and said he was panicking and scared. He opened the front door to allow the emergency services access and put the knife in the kitchen.

13. The issue for the jury was his intention: whether the appellant intended to kill Ms Soogreen or to cause her really serious harm.

14. Before the trial started the judge asked counsel to provide a witness timetable and time

estimates for the evidence in-chief and cross-examination. Mr Coode gave an indication that he thought three to four hours would be required for cross-examining Ms Soogreen. That estimate was revisited at trial shortly before the jury was sworn. There were discussions about the timetabling and the length of time needed for cross-examining Ms Soogreen.

15. Mr Coode explained to the judge that it would be very difficult for him to operate under the pressure of a time limit and that there was a considerable amount of material that would have to be covered in cross-examination. He explained that in addition to questioning on the ABE interviews, there were text messages and videos and, in circumstances where the judge had admitted bad character evidence in relation to the episodes of domestic violence described by Ms Soogreen (but disputed) and the threats alleged to have been made, he would have to challenge those as well. The judge rejected those submissions and concluded that it was necessary as a matter of case management to restrict the cross-examination. He identified a limit of 90 minutes as amply sufficient to cover the issues in the case.
16. There were other case management issues dealt with but that need not trouble us at this stage. A jury was sworn and the trial started.
17. At the close of the prosecution's opening, one of the jurors sent a note to the judge indicating that she had autism and expressing a concern that she would have difficulty dealing with concepts such as intention and emotion relating to other people. The judge invited her into court with both counsel and the appellant present, but in the absence of the other members of the jury. He asked her a series of questions directed at whether she felt she could be true to her oath. She responded equivocally that she did not know. She was asked about her abilities to deal with matters in day-to-day life and she made clear that she could deal with drawing inferences on a day-to-day basis but that the experience of being in court was new to her and that in the context of the courtroom she was unsure. Again, asked if she could be true to her oath, she told the judge frankly that she was concerned she could be a hindrance and that when "other people will interpret something they'd have to explain to me why they've done that and that will then backfire". The judge said that his preliminary view was that jurors frequently relied on others, for example, to explain evidence and he gave an example of a situation where a juror might have to ask questions of other jurors; or a juror with particular qualifications might be in a position to explain to other jurors with less understanding of those matters, the position on a particular topic.
18. Counsel for the prosecution, Mr Walsh, submitted that through her answers the juror had shown that she had sufficient learned behaviour to apply an analysis to the evidence and that with the help of judicial guidance, she was able to draw inferences sufficient to determine intent in the case. Mr Coode objected. He said his concern was that she might be swayed or influenced by other jurors and suggested that as it was very early on in the trial, that particular juror should be discharged. The judge ruled that, having listened with care to the responses she gave and to her thoughtfulness, she was a juror who could be true to her oath and she should not be discharged.

The Conviction Appeal

19. In written grounds of appeal developed orally, Mr Coode submitted in relation to the first ground that the judge was in error in restricting his cross-examination of Ms Soogreen. Although judges have case management powers, those must be balanced against fairness.

The decision to limit cross-examination to 90 minutes was wrong in light of the considerable volume of material on which he had to cross-examine. In particular, there were the ABE interviews of Ms Soogreen, the 14 video films of arguments between the couple, the very many closely typed text messages and the other materials relevant to the background to their relationship and the previous incidents during their marriage. Moreover, because of interruptions by the judge, he in fact only had 80 minutes and felt under considerable pressure during those 80 minutes. Having reached the time limit and asked for more time, he submitted that he was wrongly refused it. The result was it was not possible for him to do his duty to the appellant and the pressure and the limitation upon him made his task impossible.

20. Mr Coode did not, during the course of the submissions to the judge, identify any particular matters that he wished to put to Ms Soogreen but had not been able to do so. In response to this court's questioning, he identified a number of specific matters that he says he was prevented from canvassing with the witness. They were the following. First, the relationship between the appellant and Alex. Secondly, the fact that Ms Soogreen had a romantic involvement with at least one other, and possibly two, men and the appellant was aware of that. He wished to explore the effect that would have had on the appellant. Thirdly, the fact that Ms Soogreen said she was going to bring her mother to live with her and that she knew this would wind the appellant up. Fourthly, the fact that there were financial matters in dispute between the couple and a settlement had been agreed in which he would pay £87,000, all of which added to the pressure-cooker effect on the environment in which this couple were living. Finally, he wished to cross-examine but was prevented from doing so, on the behaviour of the appellant that evening and the descriptions given by Ms Soogreen in her statements and interviews, that he was tired, descriptions about the altercation earlier at the pub and how that may have affected his mood, and the look in his eye during the incident itself.

21. Mr Coode said that he would have put questions on those topics based not only on the text messages and the statements Ms Soogreen herself made, but also by reference to the video clips from the telephones.

22. In opposition to those submissions, Mr Walsh submitted that the judge was correct to actively case manage and that the time limit imposed was reasonable. He relied on R v Simon [2018] EWCA Crim 3086 as supporting the judge's approach. The Criminal Procedure Rules, rule 3.11 D.1 in particular, specifically allow a judge to limit cross-examination of a witness, and he relied on the fact that prosecution counsel was similarly limited in the supplementary questions he was entitled to ask of Ms Soogreen and in cross-examining the appellant. Critically, the issue at trial was a limited one, albeit he accepted that the domestic violence and threats were properly the subject matter of cross-examination. But the other matters were either irrelevant or of peripheral relevance and the cross-examination adequately covered the material. Additional questions would either have simply been repetitive of what had gone before or irrelevant, and certainly would have added nothing.

23. We have examined the transcript of the cross-examination in this case with considerable care and have concluded that there was no failure or unfairness by the judge in limiting the cross-examination in the way that he did. The Criminal Procedure Rules 2020 require trial judges to manage their cases actively by establishing the extent and nature of the disputed issues and by setting a timetable for receiving evidence that enables the issue to

be resolved in a just and proportionate way. The rules expressly allow judges to limit the duration of any stage of the hearing and in particular to limit the cross-examination of any witness.

24. We agree with Mr Walsh that the issues in this case were limited. The appellant accepted stabbing Ms Soogreen. The sole issue for the jury was his intention when he did that and whether he intended to kill her or cause her really serious harm or, on the other hand, simply to frighten her with the knife.

25. Nor was there any dispute that the marriage between the appellant and Ms Soogreen had broken down, there were discussions about a financial settlement but achieving this was difficult and they continued to live together in difficult circumstances. Her suggestion that she would bring her mother to live with her was also not disputed. Moreover, the case was opened to the jury on the basis that they had heated arguments and filmed each other during their rows. There was a relatively limited factual dispute about previous incidents involving alleged violence by the appellant towards Ms Soogreen and a dispute as to whether he made threats.

26. In the case of R v Simon, to which Mr Walsh referred us, this court considered the effect of curtailing cross-examination on the fairness of the trial, in a case where the witness who was being cross-examined was described as "a difficult witness", in the sense that the pace of questions and answers may not have been as straightforward as when scripted. This court held that the judge was entitled and indeed correct, to curtail the questioning. This court held that the decision to limit cross-examination will not be unfair where the defence have had ample opportunity to put their case, not only through cross-examination but also through the examination of other witnesses, and when permitting further cross-examination would not have advanced the defence case.

27. Looking at the transcript of the cross-examination in this case, Mr Coode was amply able to put forward the positive case he had to put in cross-examination of Ms Soogreen. She was cross-examined to the effect that her allegations of previous domestic violence and the suggested threats to kill were lies or were exaggerated, and that she could be hysterical and jealous in the relationship. She was cross-examined to the effect that she had provoked the appellant by threatening to call the police about him immediately before the offence took place, and about the behaviours she engaged in that wound him up. She was cross-examined about the evening of 27 November and the defence case was substantially put in so far as it could and should have been. It was suggested that the appellant was in a good mood that evening on his return from the pub but that she tried to bring him down (see page 30F). It was suggested he was showing affection. There was a row about her moving her mother in and he said, "that's not going to happen" (see page 31B). It was suggested that she said "if you try to stop me I'll tell the police you threatened me with a knife"; that she was willing to lie to the police; that she was cocky and arrogant towards him. It was put to her that he showed her the knife he had picked up from downstairs and said, "This is what I'm doing then is it?"; and she said, "I'm going to call the police and you're going to get arrested and taken away from this house". It was suggested that was the conversation in the bathroom and that she had provoked him and a red mist came down and the appellant attacked her. She was cross-examined about what he said immediately afterwards, and challenged that he never said, "I killed my wife" or words to that effect.

28. In short, the appellant's case was squarely put to Laura Soogreen. She consistently and resolutely disagreed with what was being put to her and maintained her account. It is

highly unlikely that further cross-examination repeating these matters would have yielded a different response from her.

29. What is clear to us is that defence counsel had ample opportunity to test her willingness to abandon her account of events in the relationship, both leading up to the stabbing and in relation to the stabbing itself. It was not necessary for every aspect of the appellant's narrative to form part of the challenge to her in this case and it was not necessary for every text message or video clip to be put to her. To do so would have been repetition and would have added nothing. Moreover, the appellant himself gave evidence. He gave a full account of events in the marriage and his denial of violence and threats. He gave an account of what happened in the pub earlier on 27 November, and when he returned home that evening; and he gave an account more generally of his side of the story. The summing-up fairly reflected his evidence and the account he gave of all disputed matters.

30. We are quite satisfied that no other relevant or pertinent issues could or should have been addressed that had not already been addressed, either in the cross-examination of Ms Soogreen by reference to the material relied on by Mr Coode, or through the appellant's own evidence. In the circumstances, we are not satisfied that any unfairness resulted in this case from the limitation on cross-examination and this ground accordingly fails.

31. So far as ground 2 is concerned, Mr Coode submitted that the appellant was entitled to be tried by 12 independent jurors and that in light of the responses given by the particular juror and the emotional nature of this trial, the judge was wrong not to discharge her and to proceed with only 11, as he described it, independent jurors in the circumstances.

32. We disagree and have concluded that neither the procedure adopted by the judge in this case nor the ruling he made, can be criticised.

33. First, we consider the judge was quite right to speak to the juror away from the rest of the jury, in open court, as he did and to ask her questions about her ability to be faithful to her oath. The judge had the benefit of hearing and seeing the juror give answers to the questions asked and it is particularly relevant, in our view, that the judge made an assessment of the juror as a high functioning individual who in everyday life accepted that she made assessments of the facts and drew the sorts of inferences from facts that she might have to draw in this particular case. Her concern, understandably, was the new environment in which she found herself and that she had not had to make those sorts of assessments or draw inferences in this particular context. But it seems to us that the judge was entitled to conclude in light of the responses she gave that she would be able to reach common sense conclusions based on the facts, and to properly analyse the evidence and where necessary ask her fellow jurors about matters of emotional behaviour that she found more difficulty to understand. That was not the same as saying that she would simply adopt the other jurors' conclusions as hers, or not be an independent member of the jury. Rather she might seek clarification from others where necessary in order to come to her own view.

34. The advantage of a jury of 12 people made up of citizens randomly selected in this country is that they are inevitably people who come to a trial with different lived experiences and different abilities. This particular juror's autism is but one aspect of that variety. People with different mental and physical abilities and disabilities make up the society from which jurors are selected and those differences are not a basis for excluding anyone, provided that a juror can be faithful to his or her oath in trying a defendant on the evidence. We do not see any difficulty whatever with the conclusion reached in this case, that the juror in

question was a juror who properly continued to remain part of the jury and continued to serve.

35. We are fortified in reaching that conclusion by the fact that neither the juror in question nor any other member of this jury, raised any concern whatever about her ability to understand the evidence during the course of the trial, or to participate in the verdicts that were reached on a unanimous basis.

36. The reality of this case is that the evidence of the appellant's guilt was strong. His trial was fairly and properly conducted by the judge and his defence was not in any sense undermined or affected either by the case management decisions made by the judge or by the participation of the juror with autism on the jury. The appellant's conviction is not, in our judgment, arguably unsafe and the conviction appeal fails and is accordingly dismissed.

The Sentence

37. In light of that conclusion, we turn to address sentence and the challenge advanced on the appellant's behalf to the sentence passed by the judge in his case.

38. In sentencing the appellant the judge made the following findings about the history of the relationship between these two individuals. He found that the appellant did make previous threats towards Laura Soogreen, including that perhaps one or both of them would not live to see the end of the divorce proceedings and that he was capable of killing her by means other than using guns. Such threats reflected thinking on the appellant's part that contemplated Ms Soogreen's death as a means of dealing with the fallout from their marriage. The judge accepted as true the account she gave of his use of domestic violence towards her, accepting her explanation for why she had retracted her allegation of domestic violence on one particular occasion.

39. So far as 27 November is concerned, the judge found that the appellant had been drinking on the evening of the offence and that played a particular and relevant part in the evening's events because it played a part in his refusal to comply with her requests not to go into her son's room. He found that just before stabbing Ms Soogreen, the appellant had a moment of calm. That was the moment he determined that he would kill her, as he went through the house to the kitchen and deliberately selected the biggest and sharpest knife. That meant there was no instantaneous anger, but a calm and deliberate act demonstrating an element of premeditation or planning. The judge observed that it was a minor miracle that she was not left paralysed from the concentration of stab wounds on either side of her spine. It was, he said, significant that both her lungs were punctured as a result of these stabbings. The judge found that the psychological impact of witnessing the scene of the offence on Alex was significant for him. The judge found that when leaving the bathroom to go downstairs, the appellant said he believed he had killed Ms Soogreen.

40. Based on Ms Soogreen's victim personal statement the judge found that she would suffer long-term psychological harm and extensive and permanent physical harm. He found that there would be long-term serious psychological harm for Alex. The judge held that the appellant was a dangerous offender satisfying the criteria set out in the Criminal Justice Act 2003, because he was satisfied that the appellant represented a significant risk of serious harm to the public occasioned by the commission of further specified offences. He had in mind, he said in particular, future partners and the appellant's reaction to relationship breakdown and the consequences flowing from that. He was satisfied that the seriousness of this offence was such that a life sentence was appropriate. Indeed, he said

even absent the dangerousness provisions, he was satisfied that he would have been justified in passing a life sentence in the circumstances of this case. The judge had regard to the Sentencing Council's Attempted Murder Definitive Guideline. He was satisfied that this was a level 2 case. He found that it was not a spontaneous attempt to kill, nor was it the most serious attempt, but he categorised it as an attempt in level 2, with serious long-term physical and psychological harm to Ms Soogreen and long-term psychological harm to her son. That meant a range of 17 to 25 years with a starting point of 20 years' imprisonment.

41. In terms of aggravating features, he identified the presence of the 14 year old boy in the house and the impact of the attack upon him. There was previous domestic violence of an escalating degree, the most recent being when the appellant held Ms Soogreen against the wall having lifted her from the floor and pushed her head against the wall. That was incorrect and this incident was in fact the earliest incident of the three (as Mr Coode reminded us). Thirdly, there was the fact that the assault took place in their home, where she and her son should have felt safe and this was violence perpetrated on a partner in a domestic environment.

42. Against that the appellant was a man of good character until violent towards Ms Soogreen. There were numerous character witnesses and we have read that material, including the statement from the Samaritans. The judge concluded that this evidence carried little weight because, as he explained,

> "You may have been one man in the pub, and in social circumstances, and at work, but, on occasions, a very different man, as we saw from the footage, in your own home."

The judge did not accept that this was an attack engendered by significant provocation.

43. Having regard to his findings about the offence, its consequences and the background, together with the aggravating and mitigating features he identified, the judge concluded that had this been a determinate sentence, it would have been a sentence of 24 years' imprisonment and he used that as the basis for calculating the minimum term for a life sentence, producing a minimum term of half the determinate sentence, less time spent on remand and resulting in the minimum term of 11 years 3 months to which we have referred.

The appeal against sentence

44. Mr Coode challenges several aspects of the judge's approach, contending that the sentence passed was both wrong in principle and manifestly excessive. We take the three criticisms together. They are, first, the contention that although the case was a serious one, the sentence of life imprisonment, as opposed to a determinate sentence, was wrong in principle and not justified. The judge was wrong not to obtain a pre-sentence report, which would have assisted him in understanding the position and the result was that the judge's conclusion that the appellant was dangerous was wrong: He is a 51 year old man, of good character, a model prisoner, a valued listener under the Samaritan's Scheme in prison, and the case cried out for an independent assessment of the risk he posed. But for his relationship with Ms Soogreen, he was of positive good character, hard-working and a positive member of society. Secondly, the judge adopted too high a starting point in any event. Thirdly, he made a series of factual findings that were unsupported by the evidence and could not be justified.

45. Those submissions are resisted by Mr Walsh. He submitted that the judge made a series of findings of fact that in combination justified a finding of dangerousness and although the judge's reasoning was not as fully and clearly set out as it could and should have been, the judge was entitled to conclude that this was so serious a case as to justify a life sentence. The nature and the brutality of the attack was such as to elevate it into the life sentence category. He submitted that this was not a level 3 case, as Mr Coode contended, but a level 2 planned attempted murder. He accepted that there are degrees of planning but even so, there was long-term serious physical and psychological harm and the judge was amply entitled to pass the life sentence with the minimum term identified.

Discussion

46. Section 225 of the Criminal Justice Act 2003 (as amended) has been considered in a number of authorities. For presents purpose we limit our consideration to two of those cases. In R v Wilkinson & Ors [2009] EWCA Crim 1925, the then Lord Chief Justice said the following at [19]:

> "... it is clear that as a matter of principle the discretionary life sentence under section 225 [of the Criminal Justice Act 2003] should continue to be reserved for offences of the utmost gravity. Without being prescriptive, we suggest that the sentence should come into contemplation when the judgment of the court is that the seriousness is such that the life sentence would have what Lord Bingham observed in *Lichniak* [2003] 1 AC 903, would be a 'denunciatory' value, reflective of public abhorrence of the offence, and where, because of its seriousness, the notional determinate sentence would be very long, measured in very many years."

47. In R v Burinskas [2014] EWCA Crim 334, this court dealt with the approach that judges should take to the statutory provisions and the question posed by section 225(2)(b) as to whether the seriousness of the offence or one or more offences associated with it is such as to justify a life sentence. A staged approach was identified at [22], requiring consideration of:

> "i) The seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of s.143(1). This is always a matter for the judgment of the court.
>
> ii) The defendant's previous convictions (in accordance with s.143(2)).
>
> iii) The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.
>
> iv) The available alternative sentences."

48. There is no doubt in our minds that the facts of this case were extremely serious. On the judge's finding this was not a spontaneous attempt to kill. Rather, albeit short, the appellant had a moment of calm during which he went from an upstairs room, downstairs and determined upon murdering his wife. There had been previous threats to kill her and he attacked her in a frenzied way with the most savage of blows. The wounds were concentrated around a small area close to her spine. The injuries included fractured ribs,

chipped vertebrae and a wound passing within millimetres of her spinal column. It was a brutal attack and it was a minor miracle that she was not killed or maimed.

49. We have had regard to R v Allen [2019] EWCA Crim 1772, where the sentencing judge made a finding of dangerousness without obtaining a pre-sentence report and that decision was challenged on appeal. This court noted that the decision to make a finding on the question of dangerousness without the benefit of a pre-sentence report is one that requires "careful justification". In that case, this court concluded that the judge was entitled to proceed without such a report, having been the trial judge and in a position to form a clear impression of the appellant during his trial which, together with the facts of the case, gave him a proper basis for his finding of dangerousness.

50. We have concluded that the same is true here. Although it might have been prudent for the judge to have obtained a pre-sentence report to afford him a better understanding of the appellant's situation, particularly given the factors identified by Mr Coode, we have concluded that the judge was entitled to proceed on the basis that such a report was not necessary for determining dangerousness on these facts. We are satisfied that the question as to the risk posed by the appellant to members of the public of serious harm occasioned by the commission of further specified offences, particularly in relationships with women that break down and lead to considerable pressure, was one that the judge was able to answer by reference to the evidence available at trial. That evidence dealt with the history of this relationship and the events leading to the stabbing. The evidence at trial, meant that the judge was as well placed as any probation officer to make an assessment of dangerousness in this case. That however does not necessarily lead to the conclusion that a life sentence inevitably followed.

51. Mr Coode submits that there was insufficient material to conclude that a life sentence was justified in this case. The judge did not explain clearly what led him to the conclusion that it was justified. Nor did he adopt the staged approach identified by this court in R v Burinskas, starting with the seriousness of the offence itself. This was, as we have indicated, a very serious stabbing and Ms Soogreen's ordeal was terrifying, with lasting consequences for both her and her son. But life sentences are not always called for in stabbings - even stabbings of this kind. The circumstances here were very particular to the fraught situation that existed between this couple and the domestic violence, whilst totally unacceptable, was not at the level often seen. There was limited escalation. Further, the appellant was, as Mr Coode emphasised, of previous positive good character. He reacted with immediate remorse and his conduct in prison has been exemplary.

52. The judge did not record any consideration as to whether there were alternative sentences to a life sentence, for example an extended sentence that would have been available in this case. Serious as this offence was, we have concluded that its seriousness did not justify a life sentence. On the other hand, we are satisfied that this is not a case that would have merited a determinate sentence. Public protection was needed and an extended sentence was available.

53. The Definitive Guideline identifies three levels of offending in attempted murder cases. Level 1 is reserved for the most serious offences including those which (if the charge had been murder) would come within paragraphs 4 or 5 of Schedule 21 of the Criminal Justice Act 2003. Paragraph 4 identifies those cases justifying a whole life order and paragraph 5, those cases where the starting point for the minimum term is 30 years. Level 2 is reserved for other planned attempts to kill; and level 3 for other spontaneous attempts to

kill. Within each level there are three bands, each relating to the degree of physical or psychological harm suffered by the victim. The top band covers *serious and long-term physical or psychological harm*, the middle band *some physical or psychological harm* and the bottom covers *little or no physical or psychological harm*. That produces three different starting points and sentencing ranges for each of the three levels of the Guideline. The starting point for the top band in level 1 is 30 years with a sentencing range of 27 to 35 years and the starting point for the top band in level 2, 20 years with a range of 17 to 25 years.

54. The submission made by Mr Coode in this case is that the facts, and the appellant's background and character justified a determinate sentence based on this being a spontaneous attempt to kill falling within level 3.

55. For the reasons identified by the judge, we do not accept that the judge was wrong to categorise this as a level 2 case. The judge heard all the evidence and was well placed to make the factual findings he did. He rejected the appellant's version of events and was amply entitled to find, as he did in light of the evidence about the attack itself and the evidence of previous threats to kill Ms Soogreen, that these reflected some degree of thinking on the appellant's part which contemplated the death of Ms Soogreen as a means of dealing with the fallout of their marriage. He was entitled on the evidence to find that there was a degree of planning in the time taken to go downstairs and through the house, into the kitchen, where he chose the sharpest, largest knife and then returned upstairs. While this was, as Mr Coode emphasised, a short period measured in seconds, this was not a moment of instantaneous anger, but a short period that involved deliberate and calm actions associated, as the judge found, with some planning. The case was, we consider on the judge's findings, properly considered to fall within level 2.

56. However, as Mr Coode emphasised, there are inevitably different levels of planning and here the planning was limited, both in time, and in the actions that the appellant took. That ought to have been factored into the judge's assessment. These were also serious injuries with, we have no doubt, lasting psychological harm but again, that is a question of degree for assessment by the judge.

57. As we have said, the starting point for level 2 in the top band is 20 years, and that was the starting point taken by the judge. However, we have concluded that this assessment failed to reflect the two matters to which we have just referred. The judge should have come down from that starting point to reflect the limited planning and the actual level of psychological harm with the limited evidence available to support it. The aggravating features, and in particular, the domestic violence context and the presence of Alex in the home had also to be reflected; but these had to be balanced by the mitigation available to the appellant, particularly his good character. In our judgment, balancing all of those matters, an extended sentence of 24 years, made up of a custodial term of 20 years and an extended licence of 4 years was the appropriate sentence in this case.

58. The effect of that sentence is that the appellant will not be eligible to apply for parole until he has served at least two-thirds of the custodial term, and the question of his release at that stage will be a matter for the Parole Board. Even when released he will be subject to licence for the remainder of the sentence and liable to be recalled. We would expect those responsible for this appellant to be particularly alert to the risks inherent in him forming any future relationships. We direct that a copy of this judgment be placed on his prison record and we also make an indefinite restraining order prohibiting him from

contacting, either directly or indirectly, Ms Soogreen or Alex Soogreen.

59. The result is that we dismiss the conviction appeal but allow the appeal against sentence. We quash the life sentence and we substitute for it an extended sentence of 24 years made up of a custodial term of 20 years and an extended licence period of 4 years.

60. **Postscript**: Following the delivery of our judgment, representations were made to the effect that the result of our decision to substitute an extended sentence in this case, is that the appellant will have to serve longer in prison before he can apply for parole, and this meant that we had imposed a more severe sentence on him that is outwith our powers (see s.11(3) Criminal Appeals Act). That is obviously wrong. The substitution of an extended sentence for a life sentence cannot entail the imposition of a more severe sentence. A life sentence is the most severe sentence available to the court, being imposed for life. A life prisoner is not entitled to be released at the end of the minimum term but must wait until the Parole Board is satisfied that it is safe to release him or her whenever that might be. It follows that an extended sentence cannot conceivably constitute a more severe sentence than a life sentence.

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