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No: 201705290/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 27 July 2018

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE PICKEN

MR JUSTICE JULIAN KNOWLES

R E G I N A
v
NIKE ONYEAGUCHA

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Mr G Unwin appeared on behalf of the **Appellant**

Ms G Ong appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MR JUSTICE PICKEN: The appellant, Nike Onyeagucha, appeals with leave of the single judge against the sentence of detention for life, with a minimum term of 4 years and 99 days, which he received at Woolwich Crown Court before Mr Recorder Baumgartner on 11 November 2017, in respect of an offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. The appellant was convicted of that offence at a trial which ended on 4 October 2017 and which took place before the same court. He was convicted at the same time of a further offence of having an article with a blade, namely a knife and received a concurrent 4-year term of detention in respect of that offence. As will appear, at the heart of the appeal is a complaint that the Recorder ought not to have assessed the appellant as "dangerous" for the purposes of the Criminal Justice Act 2003 and ought not, in any event, to have imposed a life sentence as opposed to a determinate sentence or an extended sentence of imprisonment. It is also suggested that the Recorder approached the matter of sentence by taking into account aggravating features which were not present and by failing to afford a sufficient reduction to take account of the appellant's age, both at the time that the offences were committed and at the time he came to be sentenced. This is the second occasion that the matter has come before the Court of Appeal since the present hearing follows an earlier hearing before Sharp LJ, Andrews J and the Recorder of Leeds (His Honour Judge Peter Collier QC) which took place on 1 May 2018. On that occasion the appeal was adjourned so as to enable the probation service to prepare a report dealing specifically with the issue of dangerousness. We now have the benefit of such a report and will refer to its contents later.

2. The circumstances in which the offences were committed can be relatively briefly described. In the early evening of 18 December 2016 the complainant, Mr Zambellis, visited the home of his friend, Mr Isaacs, who lived in a third floor flat in South London. There was a knock on the door. Mr Zambellis opened the door and saw two boys, the co-defendants, Nathan Boyce and Tony Nguyen. Boyce and Nguyen asked if Mr Isaacs was in. They came in but Mr Isaacs asked them to leave. Boyce said he wanted to go into Mr Isaacs' bedroom. Mr Isaacs had let the boys into his flat before but they had become something of a nuisance. Taking their time the two co-defendants left. About 10 minutes later they returned and knocked on the door again. This time the appellant was with them. Mr Isaacs opened the door and made it clear that they were not welcome. He called Mr Zambellis to the door. Mr Zambellis told the three of them to leave. The appellant and Boyce were smoking cannabis. As they left the flat, just outside the front door Boyce punched Mr Zambellis twice in the face. Mr Zambellis hit him back, punching him twice. Nguyen then punched Mr Zambellis from behind. Mr Zambellis held onto Boyce by the collar and tried to fend off Nguyen. Whilst he was grappling with Nguyen Mr Zambellis felt a sharp stab of pain on the top of his right shoulder. He did not realise that the appellant had stabbed him. The appellant stabbed him at least five times. Mr Zambellis was still grappling with Boyce and tried to turn around to bring Boyce between him and the appellant who was wielding the knife. The three defendants were all on top of Mr Zambellis and he was still being punched and kicked. Eventually he let go of Boyce and Boyce and Nguyen fled. At that point Mr Zambellis saw the appellant holding a kitchen knife with a 10 to 12-inch blade. The appellant turned round and fled.

3. Mr Zambellis was on his hands and knees bleeding. He managed to get inside the flat and call the emergency services. Paramedics noticed that he had five stab wounds to his back and one to his left flank. He also had scratches to his face. The injuries were so serious that an air ambulance was called.

4. Mr Zambellis was treated for his injuries. A chest X-ray and CT scan showed a collapsed lung with bleeding around the lung, suggesting at least one stab wound had punctured the chest cavity. None of the wounds proved immediately life threatening. Mr Zambellis was admitted to the trauma ward and was discharged on 21 December 2016.

5. Boyce and Nguyen were later apprehended but the appellant remained at large. Boyce and Nguyen were each convicted after trial and sentenced on 7 June 2017. Boyce received a sentence of 12 months' imprisonment suspended for 12 months in respect of an offence of affray, after being acquitted by the jury, on the judge's directions, of wounding with intent and wounding. Whilst Nguyen was sentenced to a youth rehabilitation order, having been convicted of an offence of wounding but acquitted of wounding with intent.

6. The appellant was arrested on 30 May 2017, having been arrested for an unrelated allegation of affray.

7. At trial, he denied the offences. He admitted being present at the repeated stabbing of Mr Zambellis but lied to the police and denied having or using a knife. He claimed that Mr Zambellis was stabbed by a fourth person. He claimed Mr Zambellis attacked Boyce by punching him and trying to flip him over the balcony. He said the fourth person appeared, produced a knife and repeated stabbed Mr Zambellis. That account was rejected by the jury hence the appellant having to be sentenced for the section 18 offence.

8. At the time that the offence was committed the appellant was aged 17. He was 18 when he was sentenced and is now 19. He had two previous convictions: in March 2015 he received a 12-month referral order for two offences of possession of a Class A drug with intent to supply and in December of the same year he received a conditional discharge for simple possession of a Class B drug.

9. In the pre-sentence report which was prepared for the purposes of the sentencing hearing, it was noted that the appellant continued to deny the offences but that he showed some victim empathy having himself been the victim of a stabbing in the past. He regretted being in the wrong place at the wrong time but denied responsibility for wounding the victim.

10. It was difficult, the report writer explained, to make an accurate assessment of his motivation due to his denial of the offences. His life-style and associations were related to his risks of re-offending and risks of harm. He had developed a pattern of previous offending similar to those who had entrenched anti-social behaviours. The report writer described the appellant denying being part of a gang, but the writer observed that this was his third conviction and his first involving violence and weapons. He was assessed as posing a medium risk of re-conviction and a high risk of serious harm to members of the

public. The risk was not imminent, the report's writer considered, but remained because of his peer associates and life-style choices including drug misuse. The report went on to state that given his gang associations the appellant was assessed as posing a medium risk of harm to known associates.

11. In his lengthy sentencing remarks the Recorder described the impact of the offence on Mr Zambellis. He explained in particular, that he no longer felt safe being out late or travelling home late from work. That he and his family had moved away from the area. As of October 2017 Mr Zambellis had not been able to return to paid work and he was suffering from depression, the Recorder stated. He went on to identify the factual basis on which he was approaching the matter of sentence. We will return to this shortly when dealing with the submission made by Mr Unwin, on the appellant's behalf, that the evidence did not, in certain respects, justify the Recorder's approach in that respect.

12. The Recorder then explained that it was common ground before him that the section 18 offence came within category 1 under the Assault Definitive Guideline on the basis it involved both greater harm and higher culpability. Again, as will appear, although there is indeed no issue about category 1 being the appropriate categorisation Mr Unwin nonetheless criticises certain of the reasons given by the Recorder for treating the case as a category 1 case. We will therefore come back to this topic. However, the Recorder summarised the position as follows:

> "... for the reasons I now set out, this is a crime in which high culpability is present. So far as culpability according to the guidelines is concerned:
>
> a) There was here a degree of premeditation, in that you were plainly summoned, during the 10-minute gap between the first and second visits.
>
> b) A weapon was used.
>
> c) There was intent to commit as much harm as possible.
>
> d) There was, it seems, no reason for the offence in the first place, such that more harm was quite deliberately caused [than] was necessary to settle a dispute over whether you and your co-defendants should be in Mr Isaacs' flat.
>
> e) Mr [Zambellis] was vulnerable in the manner I have described above, namely that this was a three-on-one attack, with Mr [Zambellis] being attacked from behind.
>
> f) You played a leading role in the group, delivering the debilitating serious injuries that affected the intention of the group, and serious harm to Mr [Zambellis]."

13. The Recorder then identified aggravating features as being:

(i) the appellant's previous convictions which he took as demonstrating that he had been concerned or mixed up with the supply of drugs from an early age;

(ii) the fact that the offence was committed whilst the appellant was on bail;

(iii) the fact that the offence was committed in a residential location and in the evening and

(iv) the ongoing effects on Mr Zambellis, which the Recorder described as "pronounced and life changing".

14. The Recorder next went on to address the dangerousness issue which he did by reference to a number of authorities including Attorney-General Reference No 27 of 2013 (R v Burinskas) [2014] EWCA Crim 334. Again, this is a matter to which we shall return when addressing Mr Unwin's submissions but, suffice it to say, that the Recorder's conclusion was that the appropriate sentence in this case was one of life imprisonment. The Recorder considered in particular that a determinate sentence would not adequately protect the public, because the appellant would be released without a finding that he was no longer dangerous. He went on to explain that, whilst there had to be a reduction for the appellant's youth, it would not be just for the reduction to be as much as half or a third since, as the Recorder put it: "There can be no sensible submission" that the appellant "effected the offences because of his youth of immaturity". Rather in the Recorder's view the appellant "chose to be a member of this group", "chose to attend the address", "chose to arrive armed", "chose to embark on a course of serious violence" and "chose to flee the scene". This was not a case, the Recorder explained, where the appellant's age or immaturity forced him "into a course of conduct such that a young person, cornered or provoked might feel they had no option other than to lash out". Instead the Recorder observed that the appellant "specifically sought out this confrontation". The Recorder concluded by saying that had a life sentence not been appropriate a sentence of 10 years' detention in a young offender institution would have been imposed. Taking into account the seriousness of the offence and the mitigating factors and making an allowance of 10% for his youth he would have spent one-half of that time in custody after deducting 167 days, regarded by the Recorder as the time that the appellant had spent in custody, and so on that basis the Recorder arrived at a minimum term of 4 years and 99 days.

15. A number of points are raised in support of the appeal but, in summary, Mr Unwin submits that the sentence was wrong in principle and manifestly excessive in that the Recorder: (i) found aggravating factors which were not justified in the available evidence;

16. (ii) made an inappropriate finding of dangerousness;

17. (iii) was wrong to conclude that the seriousness of the offence justified a life sentence;

18. (iv) should, in the alternative, have exercised his discretion to impose a determinate sentence or, if not, an extended sentenced;

19. (v) made insufficient reduction in relation to the custodial term to take account of the appellant's age.

20. We propose to deal with these matters in turn. As to the first, although Mr Unwin accepts on the appellant's behalf that the section 18 offence was a higher culpability offence for the purposes of the Assault Definitive Guideline given the use of the kitchen knife, he submits that the Recorder ought not to have approached the matter of sentence on the basis that they were the aggravating factors which he identified. Mr Unwin highlights in this connection the Recorder's reference to the appellant's attendance at Mr Isaacs' flat with his co-defendants as amounting to "unlawful gang-like behaviour involving as it did the smoking of drugs".

21. We agree with Mr Unwin that the Recorder's reference to "gang-like behaviour" does not sit particularly well with the Recorder's repeated references including, as it happens immediately after the reference to "gang-like behaviour" to his making no finding as to whether the appellant, Boyce and Nguyen were members of a gang. It would in the circumstances have been better had the Recorder not referred to "gang-like behaviour", but it needs to be borne in mind that the specific context in which the reference was made was the Recorder making the point that there was "a connection of some sorts" between the appellant and the co-defendants and that it was not clear to him what the purpose of the visit to Mr Isaacs' flat was.

22. We are not satisfied, in short, that the Recorder relied upon any gang-like behaviour as an aggravating factor. Indeed, later on in his sentencing remarks, when identifying the identifying factors which he did rely upon, it is significant that the Recorder did not identify this as one of those factors.

23. Mr Unwin also criticises the Recorder for approaching the matter of sentence on the basis there was pre-planning. Specifically the Recorder said this:

> "c) It is plain that whatever the purpose of the first visit, it did not meet with whatever purpose your co-defendants had in mind. It is plain from the facts of this case, that you are connected with Boyce and [Nguyen]. It is also plain that, given the 10-minute interval, you were summoned to attend the address, whether from the immediate vicinity or close by. In so doing I infer that there was plainly an element of preplanning, whether that be to offer necessary assistance or to instigate violence. Whatever the position was, you plainly attended at the behest of Boyce and [Nguyen], such that concerted action as a group was, at the very least, contemplated, if not outright planned."

24. The Recorder then said this when dealing with why, in his assessment, the case involved higher culpability:

> "a) There was here a degree of premeditation, in that you were plainly summoned, during the 10-minute gap between the first and second visits."

25. Mr Unwin submits that there was no proper basis on which to infer that the appellant was summoned to the scene as some type of enforcer. He adds that such a finding is not consistent indeed with how the case was put by the prosecution at trial.

26. It seems to us however that the Recorder was well placed to form an assessment as to whether there was premeditation for the purposes of the Assault Definitive Guideline. He had, after all, presided over the appellant's trial. Whether or not Boyce and Nguyen knew the appellant had a knife, the Recorder was entitled to take the view that there was some element of summoning and so premeditation between the first and second visits to Mr Isaacs' flat that night.

27. Mr Unwin then submits that the Recorder impermissibly regarded the appellant as an habitual carrier of a knife. There is nothing in this submission however because the Recorder actually did no such thing. On the contrary, in dealing with culpability the Recorder in fact stated as follows:

> "e) You arrived at the address in question armed with a lethal weapon, the kitchen knife. Given the circumstances of the first visit, it beggars belief that that could be a coincidence. You either attended with such a weapon, on the basis of habitual carriage of such weapons, such that you could be reasonable relied upon to have such, or you specifically sourced it. I do not need to make a finding as to that fact. The plain fact is that you knew very well, on attendance, you were so armed, and that you attended following the unsatisfactory first visit between Mr Isaacs and your co-defendants, Boyce and [Nguyen]."

28. The Recorder later said this:

> "a) The presence of a knife on your person [militates] against the suggestion of a lack of premeditation. Whether the weapon was

> habitually carried or carried on the night, you knew that you attended outside Mr Isaacs' flat with the knife, and I find that you did."

29. The Recorder therefore made it clear that he was not saying that the appellant habitually carried a knife but that that night the appellant was carrying a knife when he attended the flat. The Recorder, in our assessment, was entitled to treat this as being indicative of premeditation.

30. Mr Unwin submits nonetheless, before us today, that the Recorder was unjustified in deciding that the knife had been brought to the scene by the appellant, and relies for these purposes on handwritten notes prepared by Mr Zambellis in the aftermath of that night's events in which Mr Zambellis describes seeing the appellant with a kitchen knife, which he considered was obtained by the appellant probably, as Mr Zambellis puts it, as the appellant pushed past Mr Isaacs to enter the kitchen in Mr Isaacs' flat. Mr Unwin therefore submits that the Recorder ought not to have reached the conclusion which he did concerning the appellant bringing the knife to the scene but should instead have approached the matter of sentence on the basis that the appellant did not attend the scene with a knife but instead obtained the knife from Mr Isaacs' kitchen.

31. As we have indicated, we are reluctant to interfere with the Recorder's assessment of the facts, the Recorder having, unlike us, presided over the trial where the evidence was heard. But even if Mr Unwin is right in what he submits before us today, we consider that there was anyway premeditation involved in the appellant going into the kitchen, arming himself and coming back out to stab Mr Zambellis. It follows that the point today raised by Mr Unwin is not, in our view, a good one.

32. Mr Unwin goes on to criticise the Recorder for describing the appellant as having played a "leading role delivering serious injuries reflecting the intention of the group". Mr Unwin submits that this is inconsistent with the jury's verdicts in relation to Boyce and Nguyen - we should say the jury's verdict in the other trial that took place prior to the trial of the appellant.

33. The Recorder did this again, when setting out the factors which caused him to conclude that this was a higher culpability case. Earlier he had made the point that as he was "the only person with the knife" the Recorder could not accept the submission that the appellant did not play a leading role. We are clear that, whatever the position in relation to Boyce and Nguyen, the appellant did obviously play a leading role for the reason given by the Recorder.

34. It is next said that the Recorder ought not to have treated Mr Zambellis as being vulnerable for the purposes of the assessment of the harm under the Assault Definitive Guideline. The Recorder explained that by this he had in mind the fact that Mr Zambellis was facing away from the appellant when he was stabbed. As he put it:

> "l) Apart from the slash to the face, at all times Mr [Zambellis], your victim, as the stab wounds to his back suggest, was facing away from you. He simply had no opportunity to defend himself and was, therefore, obviously extremely vulnerable to your cowardly knife-wielding attack, delivered as it was, in the main, from behind him."

35. We agree with Mr Unwin that this does not mean that Mr Zambellis should be regarded as being a "particularly vulnerable because of personal circumstances", which is how it is put in the Assault Definitive Guideline. Nonetheless, since it was accepted and is still accepted by Mr Unwin on the appellant's behalf that this is a category 1 case, we do not consider that the Recorder's mischaracterisation is material. In any event, we are satisfied that the Recorder was entitled to regard the fact that Mr Zambellis was not facing the appellant when he was stabbed as an aggravating feature of the offence.

36. Mr Unwin goes on to submit that the Recorder was wrong to have described the attack as entailing "wounds ... delivered with rapidity and without mercy" on the basis that the finding, as Mr Unwin puts it, goes too far, since the Recorder failed to take into account the fact that Mr Isaacs had not each appreciated, when Mr Zambellis came back into the flat after being stabbed, that he had been stabbed. The suggestion made is that the extent of the injuries might not have been obvious to the appellant either. We reject this submission: the appellant would obviously have known what he was doing.

37. Lastly, Mr Unwin submits that the Recorder ought not to have relied upon the community impact of the offence as an aggravating factor having already identified the location and timing of the offence as aggravating factors. Specifically the Recorder said this:

> "c) This offence took place in a residential location, a landing outside Mr Isaacs' flat, accessible by the public, any of whom might have seen or walked in on serious violence. To that extent I hold the location and timing of the offence - it was a Sunday evening - aggravates seriousness."

38. He went on in the next paragraph to say this:

> "d) The ongoing effects of Mr [Zambellis] are pronounced and life-changing... I find that group violence of this kind has an ongoing effect on any community, to the extent that the Assault guideline requires established evidence of a community impact. I simply observe that this was a serious assault outside a residential building, during hours when people can reasonably be expected to be at home. No court, frankly, would want any member of the public to have to

put up with that."

39. In the circumstances, we reject the suggestion that there was any element of double counting here, since it does not appear on analysis that the Recorder was really saying anything more than that location and timing were aggravating factors which, of course, they were.

40. In summary therefore, as to the first of the grounds put forward by Mr Unwin, for the reasons which we have given, we do not consider it has been established certainly in any substantial way, that the Recorder's approach was inappropriate or impermissible.

41. We turn then to the second ground, the issue of dangerousness. As we explained, the Recorder dealt with this matter and relevant provisions of the Criminal Justice Act 2003 by taking into account the guidance given by the Court of Appeal in Burinskas. Specifically in that case, at paragraph 43 Lord Thomas stated as follows:

> "43. The order in which a judge should approach sentencing in a case of this type is this:-
>
> i) Consider the question of dangerousness. If the offender is not dangerous and section 224A does not apply, a determinate sentence should be passed. If the offender is not dangerous and the conditions in section 224A are satisfied then (subject to ss.2(a) and (b)), a life sentence must be imposed.
>
> ii) If the offender is dangerous, consider whether the seriousness of the offence and offences associated with it justify a life sentence. Seriousness is to be considered as we have set out at paragraph 22.
>
> i. iii) If a life sentence is justified then the judge must pass a life sentence in accordance with s.225. If s.224A also applies, the judge should record that fact in open court.
>
> ii. iv) If a life sentence is not justified, then the sentencing judge should consider whether s.224A applies. If it does then (subject to the terms of s.224A) a life sentence must be imposed.
>
> iii. v) If section 224A does not apply the judge should then consider the provisions of section 226A. Before passing an extended sentence the judge should consider a determinate sentence."

42. For the present it is obviously the first step which matters. Mr Unwin suggests that in his reasoning the Recorder proceeded straight to the second step. We agree with Mr Unwin that there was some confusion on the Recorder's part in his sentencing remarks. Since in referring to Burinskas he cited what Lord Thomas had to say at paragraph 22 rather than at paragraph 43. At paragraph 22 this was stated:

> "In our judgment, taking into account the law prior to the coming into force of the CJA 2003 and the whole of the new statutory provisions, the question in s.225(2)(b) as to whether the seriousness of the offence (or of the offence and one or more offences associated with it) is such as to justify a life sentence requires 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."

43. It can be seen that is concerned not with the assessment of dangerousness but the question of whether a life sentence should be imposed which presupposes that the sentencing judge has already determined that the offender is dangerous for the purposes of the 2003 Act.

44. In the present case, the Recorder was quite obviously wrong to do what he did, which was to consider that four-stage test without first considering dangerousness. Specifically what the Recorder did was to refer to the first stage of what he described as the "four-stage" test, by stating that this was met since in his assessment, in view of the features he had earlier identified, including those which we have addressed when dealing with the first ground:

> "... this was a premeditated, unnecessary, excessive and sustained assault with a deadly weapon effected in a manner designed to cause maximum damage."

45. He observed that: "... it is something of a miracle that this was not a murder case."

46. The Recorder then went on to consider the second step before only then dealing with the third step, concerning the level of danger to the public and explaining that he considered the appellant posed "a high level of danger to the public" for three reasons namely:

> "a) On the day in question you were summoned at the behest of your co-defendants. I infer that you were prepared to do so to enforce the objectives of your so-called friends.
>
> a) You were armed with a lethal weapon. I infer that you were either specifically armed for that purpose, or that you routinely carry lethal weaponry, and
>
> b) You were prepared to engage in group violence with a victim at your mercy, delivering potentially fatal violence."

47. The Recorder elaborated on this in the sentencing remarks which he then went on to give.

48. Later he stated as follows, again in the context of stating that a life sentence was appropriate in the appellant's case:

> "For the reasons I have set out, in my opinion there is a significant risk to the public of serious injury caused by your committing further offences, as specified in Schedule 15. Your offence in count one is punishable by a life sentence that, in my opinion, is sufficiently serious to justify such a sentence. In reaching these conclusions I have considered the nature and the circumstances of your current offences, and what I know about you as I have set out above. In these circumstances I am required, by law, to impose a sentence of imprisonment for life..."

49. What the Recorder did not do was to refer, in terms, to section 229 of the 2003 Act. As Mr Unwin reminds us in his grounds, section 229 provides where material as follows:

> "(1) This section applies where—

(a) a person has been convicted of a specified offence, and

(b) it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.

ii. (2) . . . , the court in making the assessment referred to in subsection (1)(b)—

(a) must take into account all such information as is available to it about the nature and circumstances of the offence

iii. (aa) may take into account all such information as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,]

iv. (b) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (aa)] forms part, and

v. (c) may take into account any information about the offender which is before it."

50. Nor did the Recorder refer to what Lord Thomas had to say in Burinskas at paragraph 43, specifically concerning the need to decide whether an offender is dangerous before coming on to decide what sentence is in the circumstances appropriate. Although the Recorder was wrong to approach matters in the way that he did, it is nonetheless tolerably clear that he did have regard to that dangerousness issue, if only because in his sentencing remarks he expressly referred to his having to consider dangerousness in accordance with step 5 of the Assault Definitive Guideline and that he concluded that the appellant was dangerous for essentially the reasons which he gave when considering the third stage of the so-called four-stage test identified at paragraph 22 in Burinskas.

51. We propose therefore to focus on the submissions which Mr Unwin makes regarding the substance of the dangerousness issue rather than to concentrate on the manner in which the Recorder went about his analysis. Mr Unwin submits as regards section 229(2)(a) that although disproportionate the offence was not wholly unprovoked in the sense that it had no comprehensible trigger. Mr Unwin suggests also that the attack was not premeditated nor was it a random or indiscriminate attack on a member of the public with whom there was no prior connection. He also draws attention to the fact that the attack ended once Mr Zambellis fell to his knees.

52. We are not persuaded by these points. It seems to us that the Recorder was justified in forming the assessment which he did. We have, of course, in this regard already rejected Mr Unwin's submissions on the premeditation issue.

53. Mr Unwin goes on to submit, by reference to section 229(2)(aa) to (c), that the appellant's convictions do not indicate any propensity to violence or a tendency to carry a weapon. Although it is the case that the appellant has no previous convictions for violence (a point expressly noted by the Recorder), we nonetheless consider that it was appropriate that the Recorder should take the convictions into account in the way that he did and so without placing undue weight on them. The fact that the appellant was previously himself the victim (twice as it happens) of a stabbing does not change matters.

54. As to the pre-sentence report which was before the Recorder at the time of sentence, Mr Unwin makes the point that the Recorder placed too much reliance on the report writer's reference to the appellant posing a high risk of serious harm to members of the public and highlights how the report also proceeded on the basis of gang association when the Recorder himself made no finding on that topic. He furthermore highlights how the report discussed the possibility of a suspended sentence, which was, Mr Unwin observes, hardly consistent with an assessment that the appellant was regarded by the report author as being dangerous.

55. We consider that there is merit in these points. It is unfortunate indeed that the report writer had not been asked to consider the dangerousness issue and so did not do so in terms. It is for this reason that on the last occasion that the matter was before this court a further report was ordered. That new report deals with the dangerousness issue inter alia in the following terms:

> "The issue of dangerousness was not included within the pre-sentence report prepared for the Court. This has been requested and will be included within this pre-appeal report... In such an assessment consideration is given to three elements, the nature of the offence and whether it represents an escalation in offending behaviour, the level of remorse and the degree of motivation to change; and the context of the offence and whether there are continuing risk factors."

56. The report continues in the next paragraph as follows:

> "In respect of the first of these elements, it must be concluded that the offence of wounding with intent was serious in nature. Mr Onyeagucha has two previous convictions, both drug related which resulted in no violence to another. The current offence represents a significant escalation of offending behaviour. However, the Court may wish to consider other matters raised in description of concerning behaviour. This includes 'gang like' behaviour which has resulted in Mr Onyeagucha being near fatally stabbed on two previous occasions. His involvement with criminal peers and his repeated return to associate with such peers, regardless of him being subject to violent assaults and his family having relocated to protect him. These incidents suggest that some of the behaviour demonstrated during the offence is not entirely out of character."

57. Though again, there is reference her to "gang like" behaviour, it should be observed that the reference is made in the context of a description of the two previous incidents when the appellant himself was stabbed rather than the incident involving Mr Zambellis for which the appellant was being sentenced by the Recorder.

58. Although Mr Unwin urged caution in relation to the report in view of the reference to "gang like" behaviour, we consider that the report writer was nonetheless justified in having regard to those two previous incidents and to make some connection to the likely context in which those incidents took place.

59. The report then deals with the appellant's motivation to change and the remorse, matters to which Mr Unwin drew our attention during the course of today's hearing before going on over the page to say this:

> "Finally, I have assessed the context of the offence and whether or not there are continuing risk factors. It is my assessment that Mr Onyeagucha poses a high risk of causing serious harm to a member of the public. The nature of this harm would be physical and could result in serious injury. Such an injury has the potential to result in death, either due to recklessness on Mr Onyeagucha's part or with intent. He is likely to cause such harm by way of physical violence with a weapon. The victim of such violence is likely to be within a group setting and outnumbered."

60. The conclusion in the next paragraph reads as follows:

> "Mr Onyeagucha has been assessed as posing a High risk of serious harm to members of the public. This is due to the seriousness of the index offence. The risk is not assessed as being imminent however it remains due to his peer association and lifestyle choices including drug misuse. In relation to his associates and lifestyle, he is assessed as posing a medium risk of harm to known associates."

61. The report states at the foot of the same page under the heading "**Conclusion**":

> "In the event that dangerousness is upheld at the Appeal Court and should the Court wish to change the sentence, the Court might wish to consider the imposition of an Extended Sentenced as an alternative to the current Life Sentence Mr Onyeagucha is serving. Such a sentence would allow for a longer period, than that of a Standard Determinate Sentence, of time for controls and interventions in place, in order to reduce his risk and protect the public. Mr Onyeagucha has recently been sentenced therefore such change would not impact his ability to undertake work to address his behaviour."

62. We are satisfied, having considered this new report with its specific focus on the question of dangerousness and taking account of the circumstances of the offence for which he was being sentenced, that the appellant is indeed appropriately to be regarded as "dangerous".

63. We ask ourselves whether this assessment should be different in view of the appellant's age. Mr Unwin refers, in this context, to the general guidance given in the Sentencing Children and Young People Overarching Principles Definitive Guideline (we would describe this as "the Children Guideline") at paragraph 1.5 as follows:

> "It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking

behaviour.

It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause

to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young

person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater)."

64. Mr Unwin criticises the Recorder for commenting that the appellant's age did not force him to do what he did what might be described as "a culpability issue" and suggests also that the Recorder failed to take age into account when assessing the risk of how he would conduct himself in the future. He highlights in this regard certain observations made by Rose LJ, in R v Lang [2005] EWCA Crim 2864 at paragraph 17(vi) as follows:

> "It is still necessary, when sentencing young offenders, to bear in mind that, within a shorter time than adults, they may change and develop. This and their level of maturity may be highly pertinent when assessing what their future conduct may be and whether it may give rise to significant risk of serious harm."

65. We however are unpersuaded by these submissions. We consider that the Recorder did adequately take the appellant's age into account in making the dangerousness assessment, although, as we shall explain, we nonetheless do consider that the Recorder did not reduce the length of the notional determinate sentence sufficiently to reflect the appellant's age. We bear mind also in this respect that the appellant was not that young at the time of the offence but was in fact aged 17. This is an offender therefore who was, at the time of the offence, not far from becoming an adult.

66. Mr Unwin cites Attorney-General's Reference No 21 of 2016 (Britton-paull) [2016] EWCA Crim 600, in support of the proposition that the court should be slow to find that a youth is dangerous for the purposes of the 2003 Act. He suggests that in that case it was accepted that it was appropriate not to make a finding of dangerousness. This is not authority for so wide ranging a proposition however, since not only is this nowhere stated in the judgment of Davis LJ but the pre-sentence report in that case stated that the

offender could be dealt with "outside the realms of the public protection provisions" (see paragraph 16 of the judgment) and so implicitly that he was not dangerous for the purposes of the 2003 Act. Each case will depend on it owns facts and in the case of the appellant in the present case we are satisfied that he is appropriately regarded as being dangerous.

67. We therefore, for all these reasons, are not persuaded by the second ground of appeal and turn to the third of the grounds raised by Mr Unwin on the appellant's behalf, namely the question of whether the Recorder was wrong to have decided that a life sentence was appropriate in this case.

68. We propose to deal with this ground in conjunction with the fourth ground, which is to say the submission that the appellant ought to have received a determinate sentence.

69. We can state our views on this in short order. We consider that the Recorder was wrong to have decided that the appropriate sentence was a life sentence. We consider equally that this is not a case in which an ordinary determinate term of imprisonment would be appropriate. We are not persuaded by Mr Unwin's submissions today that there would be sufficient protection for the public by the passing of a determinate sentence to mean that a determinate sentence as opposed to an extended sentence would be sufficient, given in particular, Mr Unwin submits, the fact that the appellant will apply a greater maturity during the course of the next few years. We consider instead that, as recommended indeed in the report prepared for the purposes of this hearing, the right sentence in the appellant's case is an extended sentence.

70. We have already described how the Recorder focused in his sentencing remarks on the guidance which was given by Lord Thomas in Burinskas at paragraph 22, concerning the circumstances in which a life sentence would be appropriate. It will be recalled that at (iv) in paragraph 22 it is made clear by Lord Thomas that available alternative sentences need to be considered assuming, that is the first to third stages have been satisfied.

71. The Recorder dealt with this by simply stating as follows:

> "In the end, I must consider alternative available sentences. In a case of this seriousness, that amounts to a consideration of a determinate sentence. In this case, because of my findings as to the dangerousness, in my judgement a determinate sentence would not adequately protect the public because you would be released without a finding that you were no longer dangerous."

72. It can be seen that the Recorder therefore made no reference to the possibility of imposing an extended sentence on the appellant. We are quite clear that this was an error. Moreover, that an extended sentence would indeed be appropriate in the present case precisely for the reasons stated in the report which has now been prepared, namely

to allow for a longer period than in the case of a determinate sentence for controls and interventions to be put in place so protecting the public and reducing the risk posed by the appellant. There was, in short, no need in this case for a life sentence which, as Lord Thomas observed in Burkinsas at paragraph 18, is a sentence of last resort.

73. The final ground concerns the appellant's age and the argument that the Recorder failed to make a sufficient reduction to take account of that when arriving at the notional 10-year term of imprisonment, which he then halved, to arrive at the 5 year minimum term which was then reduced to take account of time already spent in custody. The Recorder rejected the suggestion that the appellant should have received a reduction in the order of one-third, deciding instead that the reduction ought to be just 10%, on the basis that the appellant's youth or immaturity did not mean he had no option but to do what he did in committing the offences.

74. Relevant in this context is what is stated in Sentencing Children Guideline at paragraph 6.1 and 6.2 under the heading "Crossing a significant age threshold between commission of offence and sentence":

> "6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the
>
> date on which the offence was committed (primarily turning 12, 15 or 18 years old).
>
> 6.2 In such situations the court should take as its starting point the sentence likely to have been
>
> imposed on the date at which the offence was committed. This includes young people who attain
>
> the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:
>
> - the punishment of offenders;
> - the reduction of crime (including its reduction by deterrence);
> - the reform and rehabilitation of offenders;
> - the protection of the public; and
> - the making of reparation by offenders to persons affected by their offences."

75. Also relevant is what is stated at paragraph 6.46 as follows:

> i. "When considering the relevant adult guideline, the court **may** feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.**"

76. We emphasise in this last page the use of the word "**may**" and also the reference to not adopting too mechanistic an approach.

77. We consider that the Recorder nonetheless did adopt too restricted an approach in this case and that a more appropriate reduction would have been in the order of 25%, which we note is the approach that has been adopted in other cases.

78. In these circumstances, taking as our starting point the 12-year starting point for a category 1 offence within the assault Definitive Guideline, recognising that the sentencing range for such an offence is between 9 and 16 years, we consider that the appropriate sentence in this case was one of 9 years' detention. This is the shortest term we consider is commensurate with the seriousness of the offence.

79. As for the extension period, that is the extended licence period, again, taking account of everything we have described, our conclusion that this should be 3 years. This is the length of time which we consider is necessary for the purpose of protecting members of the public from serious harm.

80. It follows that we allow the appeal and substitute for the sentence of detention for life in a young offender institution an extended sentenced as we have described.

81. Before we close we should mention one final matter, which is that Mr Unwin submits (for the first time today) that regard should be had to section 11(3) of the Criminal Appeals Act and to the question therefore of whether replacing a life sentence with an extended sentence amounts to the imposition of a more severe sentence and as such is impermissible. In this regard Mr Unwin has directed us to the recent decision (27 March 2018) in R v Thompson [2018] EWCA Crim 639. It seems to us, however, that there is nothing in this further point raised by Mr Unwin.

82. We have regard in particular to the fact that in Burinskas, Lord Thomas had this to say at paragraphs 35 and 36:

> "A number of advocates drew to our attention what they described as an anomaly caused by the provisions for early release in respect of the new extended sentences. The effect is that a life prisoner may serve less time in prison than an offender serving the custodial term of an extended sentence even though the appropriate custodial term is the same. Offender A, subject to a life sentence, is given a minimum term of five years on the basis that but for the life sentence he would have been sentenced to a 10 year determinate sentence. He serves five years before being considered for parole. He may be released at that stage. Offender B is made the subject of an extended sentence. The appropriate custodial term is 10 years. Offender B is not eligible for release until he has served two thirds of his sentence. Even if he is released at that point he will have spent longer in prison than the life prisoner who has been released at the first opportunity. Thus the first opportunity for release occurs sooner for the life prisoner than for the prisoner serving an extended sentence."

83. Lord Thomas went on in the next paragraph, paragraph 36 to say as follows:

> "36. We understand the argument, but the position is more complex. A life prisoner is not entitled to release at the end of the minimum term. He must wait until the Parole Board consider that it is safe to release him. In some cases that date is years after the minimum term has expired. The prisoner serving an extended sentence is entitled to be released at the end of the custodial period without any further assessment of risk. Where the custodial term is less than 10 years the entitlement arises at the two thirds point."

84. It seems to us necessarily to follow from these observations by Lord Thomas in the Burinskas case that the substitution of an extended sentence for a life sentence cannot conceivably entail the imposition of a more severe sentence than that which was imposed by the Recorder in this case. We note indeed that in the Burinskas case, amongst the various individual cases which were under consideration, was included at least one instance of the replacement of a life sentence with an extended sentence. We would observe more generally that the proposition that an extended sentence can amount to a more severe sentence than a life sentence, a life sentence being the most severe sentence that the criminal courts can impose, it seems to us to be somewhat implausible.

85. It follows, as we have explained, that the appeal is allowed. We should observe that appropriate credit will have to be given in respect of time spent in custody pending the sentence, but that can be dealt with administrative. We note also that in relation to

the concurrent sentence in relation to the possession of a bladed article, we do not disturb the original sentence.

86. MS ONG: My Lords, forgive me if I am in error but I had understood that there was no separate penalty for the bladed article and that appears in the Criminal Appeal Office summary.

87. MR JUSTICE PICKEN: No, you are right.

88. LORD JUSTICE SIMON: I think we have got the record "no separate penalty", so my Lord will change that in the final form of his judgment.

89. MR JUSTICE PICKEN: I will change it in the introductory paragraph where I also got it wrong.

90. LORD JUSTICE SIMON: Thank you both for your submissions.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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