Neutral Citation Number: [2020] EWCA Crim 1729

Case No: 202002171/2172/2174 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
MR JUSTICE EDIS
T20197317

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE HOLROYDE
and
MR JUSTICE WILLIAM DAVIS

- -

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL
pursuant to section 36 of Criminal Justice Act 1988

Between :

HENRY LONG, ALBERT BOWERS and JESSIE COLE	**Applicants**
- and -	
THE QUEEN	**Respondent**

- -
- -

Mr. R Scamardella QC & Mr. T Godfrey (instructed by **Hennessy and Hammudi Solicitors**) for **Henry LONG**
Mr. T Raggatt QC & Mr. R Moss (instructed by **Andrew Storch Solicitors**) for **Albert BOWERS**
Mr. P Upward QC (instructed by **Andrew Storch Solicitors**) for **Jessie COLE**
Mr. J Laidlaw QC & Mr. J Polnay (instructed by **Crown Prosecution Service**) for the **Respondent**
The Attorney General in person (Mrs. S Braverman QC MP) & Mr. T Little QC on behalf of the Attorney General

Hearing date : 30 November 2020

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Approved Judgment

Dame Victoria Sharp P:

1. This is the judgment of the court.

Introduction

2. We have before us three applications. Bowers and Cole apply for leave to appeal against their convictions of the offence of manslaughter, their applications for leave having been referred by the Registrar to the full Court. Her Majesty's Attorney-General applies for leave to refer the sentences on all three offenders as being unduly lenient. Long, Bowers and Cole apply for leave to appeal against their respective sentences. The Registrar has referred those applications to the full Court.

3. Henry Long, Albert Bowers and Jessie Cole were charged on an indictment containing three counts: conspiracy to steal; murder; manslaughter. The counts arose from a single series of events. Each of them pleaded guilty at different stages of the proceedings to the offence of conspiracy to steal. On 6 January 2020 at an adjourned Plea and Trial Preparation Hearing Henry Long pleaded guilty to the offence of manslaughter.

4. A fourth man named Thomas King was also charged with conspiracy to steal. He pleaded guilty in March 2020. Save that he had a part to play in the early stages of the conspiracy to which we shall refer when recounting the facts, his case does not need to concern us further.

5. Long, Bowers and Cole were tried at the Central Criminal Court on an indictment now containing two counts: murder and manslaughter. Having pleaded guilty to manslaughter Long fell to be tried only in respect of the offence of murder. The trial commenced on 9 March 2020 before Edis J and a jury. It came to a premature end later that month as a result of the Covid-19 pandemic. The jury were discharged prior to the close of the prosecution case. A further trial commenced on 15 June 2020 before a fresh jury. Edis J again was the trial judge. On 24 July 2020 all three men were acquitted of the offence of murder. Bowers and Cole were convicted of the offence of manslaughter.

6. On 31 July 2020 Edis J imposed sentence as follows:

Long

Manslaughter: an extended determinate sentence pursuant to Section 226A of the Criminal Justice Act 2003 comprising a period of detention of 16 years and an extended licence period of 3 years.

Conspiracy to steal: 32 months' detention in a Young Offender Institution to be served concurrently.

Bowers and Cole

Manslaughter: 13 years' detention in a Young Offender Institution.

Conspiracy to steal: 38 months' in a Young Offender Institution to be served concurrently.

7. Ancillary orders were made including the imposition of periods of disqualification for holding or obtaining a driving licence, the details of which we shall consider later.

The facts

8. In August 2019 Long was aged 18. Bowers and Cole were aged 17. They lived with their respective parents in villages in Berkshire south west of Reading. They were often together at a travellers' caravan site in Ufton Nervet, the site also being in the Berkshire countryside south west of Reading. Long, Bowers and Cole had been friends since early childhood. They spent a lot of time in each other's company.

9. One thing Long, Bowers and Cole had done together prior to August 2019 was to go out thieving (to use their expression). Long and Bowers frequently went out together for this purpose. Cole did not always go out with them. King also had participated in these expeditions on occasion. They would use a car to get to and from the places at which they committed the thefts. They would steal items such as quad bikes and tools from sheds or compounds. There were occasions when they were seen by the police and had to escape. They agreed that, on such occasions, they would get away by driving off as fast as possible. Bowers had been in this position on four or five occasions when whoever was at the wheel of the car drove fast. Bowers knew that to drive at speed was dangerous. In his evidence at trial he accepted that, if you thought about it, someone might be killed in this situation though he said that it was not something he thought about at the time. Cole in his evidence said that there could be a police chase when he went thieving in which event the driver would have to drive fast and somebody might get hurt.

10. At some point shortly before the events with which we are directly concerned Long, Bowers and King clubbed together to buy a Seat Toledo car. It was a cheap vehicle costing around £150. Its sole purpose was for use on thieving expeditions. It was a car with no apparent association to any of those who planned to use it. Carried in the Seat car were various tools to be used to break into sheds or to remove padlocks and chains from gates to compounds. There was also masking tape for placing over the number plates of the car when the car was used in daylight. At some point the rear lights and the brake lights of the car were disconnected so that the car would be less visible at night in the event of the car being pursued by the police.

11. On 14 August 2019 Long, Bowers, Cole and King went out in the Seat intending to steal any suitable property they could. They came across a builder's van. As well as stealing tools from the van, they took a long strap. They thought that it might be of use as a tow rope to attach a quad bike to the Seat when stealing such an item. From this chance finding appalling consequences flowed.

12. On the afternoon of 15 August 2019 the four young men set out again in the Seat. They lived south of the main A4 trunk road. The site at Ufton Nervet was also south of that road. They drove to the village of Bradfield Southend to the north of the A4. Privett House is just outside that village. In August 2019 it was the home of a Mr Wallis. At around 4.50 p.m. the Seat containing Long, Bowers, Cole and King drove up the drive to Privett House. By this time the number plates of the car were taped over with masking tape. Mr Wallis was working in his front garden. He saw and

heard the Seat approach. The car stopped and two of those in the car got out. Both were wearing masks as were the two left in the car. Mr Wallis owned a quad bike which was outside his home. The two who had got out of the car walked towards the quad bike. Mr Wallis spoke to them asking if he could help them. The men turned and got back into the Seat at which the car drove away. Had Mr Wallis not been in his garden, his quad bike would have been stolen there and then.

13. At some point during the early evening of 15 August King decided that he would not go out in the Seat that evening. He played no further part in the agreement to steal, in particular the agreement to steal Mr Wallis's quad bike. Shortly after 11.00 p.m. on that evening Long, Bowers and Cole returned in the Seat to Privett House. Long was the driver. By this time Mr Wallis was inside his house. His car, which had been parked near to the house at the time of the earlier visit by the Seat, was still in situ. He had gone to bed but was disturbed by headlights on his drive. He got up and looked out of the window. By now the Seat had come to a stop and Long, Bowers and Cole were out of the car. Once again they were masked. They went over to the quad bike. Mr Wallis called 999. He also switched on the outside lights by his front door in the hope that this would disturb or deter the three young men. It did not do so. Rather, the quad bike was attached to the Seat by the strap taken the day before from the builder's van. Cole sat on the quad bike in order to steer it. Long drove the Seat away with the quad bike being towed behind it. Bowers was the front seat passenger.

14. Long, Bowers and Cole intended to return south of the A4 to the traveller's site. They drove back through Bradfield Southend and set out down a narrow lane leading to the A4. Mr Wallis in the 999 call, as well as reporting that his quad bike was being taken, had been able to give limited details of the Seat so the police operator was able to give police control those details. P. C. Andrew Harper and P.C. Andrew Shaw, both in full uniform, were on duty in an unmarked police car relatively close by and they responded to the report of the theft. As the Seat drove along the narrow lane from the direction of Bradfield Southend, the police car approached from the opposite direction. When the two cars came close together, they stopped. Cole was still on the quad bike. Bowers shouted to him to get off the bike and to get into the Seat. Cole got off the quad bike and detached the bike from the strap. The common intention of Long, Bowers and Cole was to drive away as quickly as possible. The quad bike was to be abandoned.

15. Once Cole had freed the strap, Long began to drive the Seat slowly past the police car. This was not easy. The lane was very narrow. The Seat was partly on the verge as it passed the police car. P.C. Harper, who was the front seat passenger, jumped out of the police car. As he did so, P.C. Shaw, the driver of the police car, saw Cole run towards the Seat. Although the police car was unmarked, it did have blue flashing lights fitted to it. P.C. Shaw turned on those lights as Cole ran towards the Seat pursued by P.C. Harper. When the Seat had passed the police car, Long drove so that he was back in the centre of the roadway. Cole ran up to the passenger side of the car and launched himself into the car through the open passenger window and onto Bowers. He shouted at Long "drive, drive". Long then drove away accelerating fast. The strap was still hanging loose from the back of the Seat and lying on the road surface. It was in a loop at one end where it had been attached to the quad bike. P.C. Harper had got close to the Seat as Cole was diving into the car. As the Seat

accelerated away, P.C. Harper's feet were caught in the loop. The officer fell back onto the road and was dragged along by the Seat.

16. Long and the others knew that the car they had encountered was a police car. Long drove away down the narrow lane towards the A4 at an average speed of 45 mph. This calculation includes the period during which the Seat had to brake as it approached the A4. It follows that, for much of the journey down the narrow lane, Long was driving significantly faster than this average speed. Throughout this journey P.C. Harper was caught in the loop and was being dragged feet first along the road. Long and the others realised that something was caught in the loop albeit that they did not appreciate it was a person. Long, by driving from side to side as he went along the lane, tried to detach whatever it was.

17. When the Seat reached the A4, it drove straight across the main road into the lane (Ufton Lane) diagonally opposite. Ufton Lane led to the travellers' site in Ufton Nervet. A Mr Whittenham driving a car approaching on the main road had to slam on his brakes to avoid a collision. He saw a body attached to rope at the back of the Seat. Two other police vehicles were in a lay by close to the junction. As the Seat crossed the A4, the officers in those vehicles also could see a body. The blue lights on both vehicles were illuminated. They followed the Seat into Ufton Lane. The Seat had slowed almost to a halt just after it entered Ufton Lane. It was at this point that P.C. Harper came free of the loop. By now he had suffered catastrophic injuries from which he died within minutes. It is believed that he must have been knocked unconscious by the blow to the back of his head as he fell back onto the road. Mercifully, he was unconscious throughout the time he was being dragged along by the Seat.

18. Long accelerated away down Ufton Lane pursued by one of the police vehicles. Ufton Lane is also a narrow country lane. From the A4 to the travellers' site where the Seat was abandoned Long drove at average speeds in excess of 50 mph. A police driver who later attempted to recreate the journey was not able to replicate these speeds. Other cars coming in the opposite direction were forced onto the verge. The pursuing police vehicle was not able safely to keep pace with the Seat. However, the officer driving the car thought that the car might be heading for the travellers' site. A police helicopter was deployed. The Seat was seen parked at the site.

19. The police arrived at the site within a few minutes. Officers found the Seat. The loop was still attached to the boot hinge. Long and Bowers were arrested together in one caravan. Cole was arrested on his own in another caravan.

20. When interviewed, Long provided a prepared statement in which he said that he had been at the site for the whole evening and that he knew nothing about the Seat or taking a quad bike. Bowers and Cole made no comment at all when they were interviewed. The involvement of all three in the theft of the quad bike and the escape in the Seat was proved by close analysis of telephone traffic and usage and CCTV material together with the results of scientific examination of clothing and the Seat.

Conviction: Bowers and Cole

21. It is convenient to deal first in this judgment with the conviction applications though we have in mind that where an application is made for leave to appeal against

conviction at the same time as an application for leave to refer a sentence as unduly lenient, it may become necessary to rule upon the latter application first: see *AG's Ref No 82a of 2000* [2002] EWCA Crim 215 at [33].

22. At the trial it was never in issue that Long, Bowers and Cole had been to Privett House intending to steal Mr Wallis's quad bike and that they had all been in the Seat driven by Long away from the scene as it was pursued by the police. Long pleaded guilty to manslaughter on the basis that it was part of the criminal agreement to steal that, in the event of being interrupted by the police, he would behave dangerously by driving in a dangerous manner. The issue in his case was whether he was guilty of murder. It was distilled into two questions. At some point whilst P.C. Harper was being dragged along the lane by the Seat did Long know there was a person being dragged along? If so, did he intend to cause that person really serious harm? It is clear that Long's acquittal on the count of murder was because the jury were not sure that he knew that a person was being dragged by the Seat.

23. It was common ground that Bowers and Cole could not be convicted of murder unless and until Long was convicted of that offence. Thus, once the jury had determined that they could not be sure that Long had the requisite knowledge, Bowers and Cole were bound to be acquitted of murder. The written directions provided to the jury on the approach they were to take to the cases of Bowers and Cole in relation to manslaughter included four questions which were repeated in a separate route to verdict document. Those questions were:

> "Are we sure that
>
> 1. D participated in the unlawful act, by agreeing that dangerous driving would occur if necessary in order to escape; If No, Not Guilty. If Yes, go to question 2.
>
> 2. D was aware of the circumstances in which the unlawful act would be committed, that is fast driving along a narrow country road, when the brake lights of the SEAT were disabled and at a time, before midnight, when other vehicles and perhaps pedestrians might be using the road; If No, Not Guilty. If Yes, go to question 3.
>
> 3. A reasonable person sharing D's knowledge of the circumstances would have realized that the unlawful act might cause a risk of some physical harm to any person on the road at that time, that is to say the unlawful act was a dangerous one which carried an obvious risk of injury. If No, Not Guilty. If Yes, go to question 4.
>
> 4. The unlawful act caused the death of PC Harper. If No, Not Guilty; if Yes Guilty of Manslaughter."

24. The directions were the subject of lengthy discussion with counsel. The principal point of dispute related to the third question. The same issue is now raised in the applications by Bowers and Cole for leave to appeal against conviction.

25. The prosecution put the case on the basis of unlawful act manslaughter. The modern foundation of the offence is the decision of the Court of Criminal Appeal in *Church* [1966] 1 QB 59. *Church* established that the prosecution cannot succeed simply by proving that the accused committed an unlawful act and that death resulted from that act. The formulation provided by the Court of Criminal Appeal was that:

> "…an unlawful act causing the death of another cannot simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

26. This formulation holds good today. It was approved by the Supreme Court in *Jogee [2017] AC 287*. In the context of considering joint liability in cases of homicide Lord Hughes said:

> "…if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: R v Church [1965] 1 QB 59, approved in Director of Public Prosecutions v Newbury [1977] AC 500 and very recently re-affirmed in R v F (J) & E (N)[2015] EWCA Crim 351; [2015] 2 Cr App R 5."

27. This applies to the cases of Bowers and Cole. Their participation was by way of encouragement and assistance.

28. The argument before Edis J at the trial (which has been repeated before us) was as follows. Theft is not an offence of violence. It cannot give rise to any risk of harm. It is unlawful but not dangerous. Theft could not provide the foundation for an offence of unlawful act manslaughter. In any event, by the time that P.C. Harper's death was caused, the theft of the quad bike was complete. Any continuing appropriation must have come to an end at the point of the detaching of the quad bike from the strap. The act of escape of itself was not unlawful. Neither Bowers nor Cole were in lawful custody. The unlawful act relied on by the prosecution had to be the dangerous nature of the driving. Driving of itself is a lawful act. It is only rendered unlawful if criminal liability arises in the manner of its commission.

29. It is submitted that where manslaughter is alleged arising from an act of driving, the jury must be directed in accordance with *Andrews* [1937] A.C. 576. The defendant in that case overtook a car and struck a pedestrian as he was still on the wrong side of

the road. He was convicted of manslaughter. The trial judge directed the jury that, if they concluded that the defendant was driving recklessly and in a dangerous manner (as defined in Section 11 of the Road Traffic Act 1930, the statutory provision then applicable) and the deceased was killed as a result of that manner of driving, the defendant was to be convicted of manslaughter. The House of Lords, in dismissing the appeal against conviction, criticised that direction. Lord Atkin delivered the sole opinion in the course of which he said at [581 – 583]:

> "My Lords, of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days when any homicide involved penalty the law has gradually evolved "through successive differentiations and integrations" until it recognise murder on the one hand, based mainly though not exclusively on an intention to kill, and manslaughter on the other hand, based mainly though not exclusively, on the absence of intention to kill but with the presence of an element of " unlawfulness " which is the elusive factor. In the present case it is only necessary to consider manslaughter from the point of view of an unintentional killing caused by negligence, i.e., the omission of a duty to take care…..
>
> The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied " reckless " most nearly covers the case. It is difficult to visualise a case of death caused by " reckless " driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all embracing for " reckless " suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction. If the principle of Bateman's case is observed it will appear that the law of man-slaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, though un-happily much more frequent, is to be treated in law as death caused by any other form of negligence: and juries should be directed accordingly."

30. Had the trial judge done no more than direct the jury that driving in a reckless and dangerous manner would be sufficient to warrant a conviction for manslaughter if the driving caused the death, Lord Atkin said that would have been a misdirection. In fact, the trial judge repeatedly referred the jury to the high degree of negligence which

was said to have been proved and which, if so proved, would justify the jury in convicting the defendant. In the light of those references the true question was left to the jury.

31. The submission made on behalf of Bowers and Cole is that, because the rationale in *Andrews* applied to their case, the third limb of the direction to the jury should have gone beyond "a risk of some physical harm". Rather, the jury should have been directed that "a serious risk of death" was required in line with *Andrews* and the subsequent development of the law of gross negligence manslaughter in *Adomako* [1995] 1 A.C. 171 and succeeding cases.

32. Edis J rejected this analysis of the case against Bowers and Cole. He provided a note to counsel explaining his approach as follows:

> "I have left unlawful act manslaughter in the cases of Bowers and Cole in the way mandated by R. v JF, [2015] 2 Cr. App. R. 5.
>
> I have included the agreement to escape if necessary by dangerous driving as an element of the unlawful act. I do not believe that Andrews, which concerns the degree of negligence required to establish manslaughter by gross negligence in a driving case, is relevant to unlawful act manslaughter. The law in relation to the two forms of involuntary manslaughter and in relation to fatal driving offences has changed materially since Andrews and I consider that it is a case about gross negligence manslaughter not unlawful act manslaughter. An agreement to behave in a dangerous way in furtherance of a crime of theft is a dangerous and unlawful act for the purposes of unlawful act manslaughter."

33. The prosecution supported that approach at trial. They continue that support before us.

34. We reject the proposition that *Andrews* was applicable to this case. As the opinion of Lord Atkin makes clear, *Andrews* concerned manslaughter by negligence. The requirement for a very high level of negligence leading to a serious risk of death in such cases is well-established. It is not necessary for us to rehearse the line of authority following *Adomako* because, as Edis J explained, this was not a case of gross negligence manslaughter.

35. The real issue is whether the nature of the conspiracy to steal to which Bowers and Cole on their own admission were parties rendered it a dangerous act in addition to it being an unlawful act. Edis J referred to *JF* [2015] 2 Cr.App.R. 5 as mandating his approach. In *JF* a boy of 14 and a girl of 16 had set fire to a duvet on top of some old tyres in the basement of a derelict building. They left the building at which point the duvet was smoking but was not obviously on fire. Once they had left the tyres caught light and thick acrid smoke filled the basement rooms. A homeless man was sleeping in one of the rooms. He died from the effects of smoke inhalation. The boy and the

girl said that they did not know that anyone was in the building though there were some indications that someone had been using the basement area. Both were convicted of unlawful act manslaughter and simple arson. Their appeals were dismissed. The trial judge in fact had been over-generous to them in relation to part of the direction he gave in relation to their state of mind. For that reason it is unnecessary to set out the directions given by the trial judge in *JF*. This court held that the prosecution had to prove two matters: the defendant had intended to damage the building by fire or had been reckless as to whether it would be damaged; a sober and reasonable person with the defendant's knowledge of the circumstances would realise that the act of arson might cause a risk of some physical harm to someone in the building. The relevance of *JF* to the circumstances of this case is that the unlawful act in that case – criminal damage by fire – of itself is not a crime of violence and/or dangerous. The circumstances in which the offence was committed made it dangerous because of the risk of others being in the building, a risk which would have been recognised by a reasonable and sober person.

36. We agree that the same approach can be taken to the offence of conspiracy to steal. This court had to consider a not dissimilar factual position in *Bristow and others* [2103] EWCA Crim 1540. A group of men conspired to burgle workshops in a relatively remote area of the Sussex countryside. The group went to the workshops late at night in more than one vehicle. The owner of the workshops lived nearby. He heard the noise of the burglars breaking in and went to investigate. The burglars realised that they had been interrupted and made off in their vehicles. In the course of their escape the owner of the workshops was struck by one of the vehicles and suffered fatal injuries. There was evidence entitling the jury to conclude that it was part of the agreement to burgle that, in the event of someone interrupting or confronting the burglars, there would be an escape carried out with speed and determination irrespective of any obstacle. Thus, there was a risk of harm to whoever was in the way. The defendants were convicted of unlawful act manslaughter and conspiracy to burgle.

37. The court in *Bristow* was concerned principally with issues of participation and joint enterprise. However, the concept of a conspiracy to burgle being a dangerous and unlawful act was considered at [34]:

> "Whilst burglary of itself is not a dangerous crime, a particular burglary may be dangerous because of the circumstances surrounding its commission. We consider that the features identified by the Crown….[as summarised above]…..were capable of making this burglary dangerous when coupled with foresight of the risk of intervention to prevent escape."

38. Precisely the same rationale can be applied to the facts of this case. The terms of the agreement as conceded by Bowers and Cole made the theft dangerous.

39. We were referred by Mr Raggatt QC who presented the argument in respect of this application to two sequential decisions of this court in relation a man named Willett. He was convicted of murder as a secondary party. The victim died as he was run over by a car being driven by Willett's co-accused. Willett and his co-accused had been in

the process of trying to steal the victim's van. He was run over as the two men escaped. In *Willett* [2010] EWCA Crim 1540 Willett's conviction for murder was quashed, the judge having left the issue of his participation in the murder to the jury on an impermissible basis. Mr Raggatt invited our attention to the judgment of Moses LJ at [33] – [35]:

> "33. We have considered whether it would be open to us to substitute a verdict of manslaughter by an unlawful and dangerous act. A case could be made against the appellant that the escape, being part of the theft, was an unlawful act, intentionally performed, in circumstances rendering it dangerous in the sense that a reasonable and sober person would have been aware of the circumstances which made the escape dangerous. It is arguable that a verdict of manslaughter on that basis would be almost inevitable.
>
> 34. But we are not entitled to substitute a verdict of manslaughter on that basis unless the jury could, on the indictment, have found him guilty of that offence and:—
>
> "On the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which prove him guilty of the other offence." (See s.3(1) Criminal Appeal Act 1968 .)
>
> 35. We are unable to say that on its verdict of murder the jury must have been satisfied of "unlawful act" manslaughter, particularly in light of difficulties and controversy in identifying the ingredients of that offence."

40. We cannot see that this passage assists Mr Raggatt's argument. Moses LJ did not reject the proposition that the escape could be part of the theft (which was abandoned) so as to make the theft both unlawful and dangerous. Rather, he concluded that it would not be safe for this court to substitute a verdict of guilty of manslaughter.

41. Willett was re-tried. He was convicted of manslaughter. He appealed on grounds relating to the evidence called at the re-trial. They are of no relevance to this case. This court dismissed the appeal: *Willett* [2011] EWCA Crim 2710. Mr Raggatt directed our attention to the judgment of Richards LJ at [16] where the trial judge's direction on manslaughter is set out:

> "To steal is an unlawful act. If a person escapes or attempts to escape from stealing that is also an unlawful act. If a person, in attempting to escape, embarks upon an unlawful and dangerous act, which is likely to injure, if only slightly, another person, and that causes the death of that other person, then he would be guilty of manslaughter.

> To be guilty of manslaughter Tommy Willett must have agreed that they should escape, and he must also have been aware that Albert Willett would drive dangerously and agreed that his brother should do so to make their escape. If Albert Willett did then do just that, and as result Mr Matharu was killed, then Tommy Willett would be guilty of manslaughter, provided you are sure of it …."

42. Once again we cannot follow how this can assist the conviction application. The court did not comment adversely on this direction. Indeed, they upheld the conviction based on this direction. True it is that no argument was mounted by those representing Willett to the effect that the direction was defective. But, if it had been thought by the court that the direction was wrong in law, we are sure that the court would have drawn this to the attention of both sides of the appeal. In fact, the direction was cited without comment.

43. Mr Raggatt's final submission was that the proper view to be taken of the facts was that the quad bike had been abandoned and the conspiracy to steal had come to an end before the escape began. On that basis the driving of the Seat as it raced away from the police car with P.C. Harper being dragged along behind it was a separate and distinct act. We are satisfied that this is an unrealistic analysis of the events. The escape and the dangerous manner in which it was carried out were part and parcel of the conspiracy to steal just as was the position in *Bristow* and *Willett*. The evidence of Bowers and Cole as given to the jury established that beyond any doubt.

44. It follows that we refuse the applications for leave to appeal against conviction. The basis of the applications is wholly unarguable.

Sentence

45. We turn to the applications in relation to sentence. Her Majesty's Attorney General submits that the sentencing of each of the applicants was unduly lenient. She accordingly applies pursuant to section 36 of the Criminal Justice Act 1988 for leave to refer the cases to this court so that the sentencing may be reviewed. Each of the applicants submits that his sentence was manifestly excessive. Their applications for leave to appeal against sentence are resisted by the Crown Prosecution Service.

46. At the time of the offences, Long was aged 18 years 3 months, Bowers 17 years 4 months, and Cole 17 years 2 months. Long was aged 18 when he entered his guilty pleas and was thus convicted of manslaughter and conspiracy to steal, and 19 when sentenced. Bowers and Cole were 17 when they pleaded guilty to conspiracy to steal, and were convicted of that offence, and 18 when they were convicted of manslaughter and sentenced. Cole had no previous convictions. Long and Bowers did have convictions, but none of their previous offences approached the gravity of the present offences, and neither had previously received a custodial sentence. As we have noted, they had all given evidence about their frequent involvement in crime.

47. The judge began his sentencing remarks by identifying his task as being to impose sentences for manslaughter which reflected the seriousness of the case and protected

the public. He referred to the dates when the various guilty pleas were entered and stated that Long was entitled to a reduction of 25 per cent for his guilty pleas to manslaughter and conspiracy to steal, and Bowers and Cole were entitled to a reduction of 10 per cent for their guilty pleas to the conspiracy to steal. He continued:

> "Nothing which I can do, or could have done if there had been a conviction for murder, can restore Andrew Harper to his loving wife and family, or to the public he served so well. His devastating loss, in these terrible circumstances, will follow his family forever and they have the profound sympathy of the court and the whole nation in their loss. The victim personal statements are deeply moving and I have read them with care and listened intently to what was said in this courtroom. I heard the trial, and the facts I set out below are those of which I am sure, having heard the evidence. The jury were not sure that Henry Long knew that, as he was driving from Admoor Lane to Ufton Lane, the car he was driving was dragging a human body. That is what the prosecution had to prove before anyone could be convicted of murder, and they did not succeed in doing so. These young men therefore fall to be sentenced for manslaughter. Cases of manslaughter range greatly in seriousness. Sometimes death may be caused by an act of gross carelessness. Sometimes a case of manslaughter may be very close to a case of murder in its seriousness. That is so here. This is a very serious case of manslaughter."

48. We too have read the statements of PC Harper's family and have been moved by them. We too offer them our condolences and sympathy. We have well in mind the dreadful circumstances of PC Harper's death.

49. The judge then set out the circumstances of the offences, making a number of findings of fact. It is not necessary to mention all of those findings, but it is important to note that he rejected as "plainly false" the denials of all three applicant that they did not know that there was anything being dragged behind the car: he found that Long had been trying to dislodge whatever was being dragged, and that the applicants "drove on, not knowing or caring what it was they were dragging". He described the journey as involving "terrifying speeds", which the applicants knew gave rise to an imminent and real risk of death to the police, other road users and themselves. He referred to the ages of the applicants, and found that Long – whom he described as being brighter than the other two – had been in charge, and giving the orders, at the relevant time. He continued:

> "I will not take any previous convictions, of those who have them, into account as an aggravating feature, but the evidence given by Long, Bowers and Cole about their way of life is plainly very important. The mitigation is the ages of the offenders; the pleas entered by all defendants, to conspiracy to steal and by Long, to manslaughter; the learning

> difficulties of Bowers and Cole. I am sure they were able to understand what they were doing that night. I do not think that their learning difficulties made them more likely than other people to commit crimes involving serious risk of death. These problems do cause sympathy and also limit their abilities to pursue an honest career. However, they were not linked to the offence and did not in any way reduce their ability to understand that driving of the kind they took part in is likely to cause death."

50. The judge then referred to the relevant sentencing guideline. He found the culpability of the offenders to be very high. He identified the aggravating features as being Long's leading role; the attempts to cover up or conceal evidence; and, most importantly, the fact that the offence was committed against a talented and brave young police officer who was going above and beyond his duty to provide a public service. He said:

> "You decided that your freedom to commit crime was more important than his life. This was not a spur of the moment decision: when confronted by him, you carried out a pre-agreed plan. That is a very wicked calculation. It is not as wicked as deliberately intending to cause really serious injury or death, but it represents a highly culpable state of mind. Although the guideline is structured in a different way from the rules which apply when a minimum term is to be fixed in a murder case, it is important to have regard to the sentence for murder in order to ensure that the gap between the sentence for murder and manslaughter is wide enough to mark the very significant difference between the two offences, but not wholly disproportionate."

51. The judge accordingly considered what the position would have been if the applicants had been convicted of murder, concluding that the minimum terms would all have been very long. In particular, he noted that in the statutory provisions governing sentencing for murder –

> "Parliament places the murder of police officers on duty in a particular category for sentencing purposes, and I see no reason why the manslaughter of police officers on duty, at least in cases where the unlawful act intentionally and deliberately created a risk to the police, should not also be in a particular category of seriousness. These factors require a significant upward adjustment of the starting point … ."

52. The judge then proceeded to sentence the individual applicants as we have indicated earlier in this judgment. He found Long to be a dangerous offender (as that term is defined for sentencing purposes) on the basis of Long's own evidence. He said:

> "As things stand, if you were to be free, I am confident that you would carry on as before, going out thieving all the time, using cars to escape by any means required. It is only a matter of time before someone else dies if you do that. I heard you give evidence over a long period of time and I do not believe that I require the assistance of a pre-sentence report to decide this question.
>
> I have decided that although this is an extremely serious offence I can deal with it by means of an extended determinate sentence of detention because of your age. A man only a few years older than you would have received a life sentence. It does mean that you are entitled to release at the end of the custodial term. At your age it seems to me to be an important benefit. That is the principal way in which I address the fact of your age, and the discount in relation to the custodial term will be modest. The custodial term will be based on a starting point of 24 years, discounted for your age, and then for your plea, to 16 years. You will serve 10 years and 8 months of that before you can be considered for release. You will be entitled to release after 16 years. The extended licence period will be 3 years."

53. In relation to Bowers and Cole, the judge noted that they were younger than Long and were not ringleaders. They also suffered from learning difficulties which made them more likely to follow the lead of someone more capable than themselves. He did not make a finding of dangerousness in either of their cases. He indicated that he would deal with them equally. He said:

> "The starting point in your cases is 20 years. This is reduced on account of your ages and immaturity to a term of 13 years in each case. You will serve two-thirds of that in custody and the balance on licence."

54. The judge imposed the concurrent sentences for conspiracy to steal, to which we have referred. He also sentenced the co-accused King for his part in the conspiracy to steal, noting that it was a serious offence because of the value of the quad bike, the planning of the theft and the taping up of the number plates so that the offenders could escape the police by dangerous driving if necessary:

> "That is a seriously aggravating feature of this conspiracy, for all the reasons I have given above. This kind of theft, using a car in this way, is not simply an offence against property. It involves a potentially very serious risk to public safety."

55. We need not quote any further from the sentencing remarks. It is entirely clear from them that the judge took into account all relevant factors as to the nature and seriousness of the offences and as to the aggravating and mitigating features of the individual cases, and gave particular weight to the fact that the offence of manslaughter was committed against a police officer acting in the execution of his duty.

56. We shall come, later in this judgment, to discrete points relating to the orders which the judge made in relation to disqualification from driving. We consider first the submissions of the parties in respect of the sentences for manslaughter and conspiracy to steal.

57. In her initial remarks, the Attorney General rehearsed some of the facts and said that the sentences have caused widespread public concern. She outlined four points, about which Mr Little QC then made submissions.

58. In relation to Long it is submitted that this was a very serious case of manslaughter, very close to murder, and that there is no reliable indication of when Long will cease to pose a risk to the public. The judge should therefore have imposed a life sentence, not an extended determinate sentence. Long's age was not, in the circumstances of this case, a reason not to impose a life sentence. Reliance is placed on section 225 of Criminal Justice Act 2003 and the decision in *Attorney General's Reference no 27 of 2013, R v Burinskas* [2014] EWCA Crim 334, [2014] 1 WLR 4209.

59. In relation to all three applicants, it is submitted that the custodial terms were too short. It is acknowledged that the judge took a provisional sentence in Long's case which was at the top of the guideline range, before making reductions in respect of his young age and his guilty plea which are not themselves challenged. It is nonetheless submitted, in particular emphasising that PC Harper met a dreadful death when acting in the execution of his duty and for the protection of the public, that the judge should have reached a provisional sentence outside that range. If Long's custodial term was too short, it is submitted, then so too are the custodial terms in the cases of the other two applicants. Although the judge was correct to consider the relevance to culpability of their young ages and their respective learning difficulties, he made excessive reductions on those grounds.

60. Finally it is submitted that in each case, the discretionary period of the disqualification from driving should have been much longer.

61. For Long, Mr Scamardella QC submits that the judge, having presided over the trial (and indeed the part-trial which preceded it), was in the best position to assess the appropriate sentences. Leave to refer should only be granted to the Attorney General where the sentence passed is outside the range which a judge could reasonably consider appropriate, or is based on an error of principle, such that public confidence in the administration of justice would be damaged if the sentencing was not corrected. References to "widespread public concern" do not meet that test. Long's sentence could not possibly be said to be unduly lenient: on the contrary, it was manifestly excessive. It is submitted that the judge should have obtained a pre-sentence report before making any decision as to whether Long was a dangerous offender, and that he

was wrong to make such a finding. Although Long was 18 years 3 months old at the time of the offending, cases such as *Clarke* [2018] 1 Cr App R (S) 52 and *Balogun* [2018] EWCA Crim 2933 make clear that his young age and level of maturity remained relevant and important considerations. If the finding of dangerousness was properly made, there was nothing to suggest that Long would remain a danger beyond the period of the appropriate determinate sentence, and the judge was therefore correct not to impose a life sentence. The prospect that Long will mature, and that his risk to the public will accordingly reduce as he serves his sentence, should have led the judge to conclude that a standard determinate sentence would suffice to protect the public, and that an extended sentence was therefore not necessary. It is further submitted that the custodial term was much too long, in particular because the judge, in applying the sentencing guideline, was wrong to find that PC Harper's death was caused in the course of an unlawful act which carried a high risk of death, and wrong to find that it was caused in the course of escaping from a serious offence. Some of the judge's findings of fact are challenged. Mr Scamardella also submits that Long should have received full credit for his guilty plea to manslaughter, on the ground that he needed legal advice before he could reasonably be expected to indicate his guilty plea, and that there was an unfair disparity between Long's sentence and those imposed on the other applicants.

62. Mr Raggatt QC, on behalf of Bowers and Cole, submits that the assertion that their sentences were unduly lenient is "far-fetched". He submits that the sentences were manifestly excessive for offenders who were only 17 at the time and who were secondary parties, playing a limited role, in the manslaughter. He too submits that the judge erred in his application of the sentencing guideline. He too challenges the length of the sentences for conspiracy to steal. He points out that the judge had the assistance of psychological reports about these two applicants, which he must have had in mind when concluding that they were not dangerous offenders. His submissions are supported by those of Mr Upward QC, who suggested that Cole was both less involved, and more open to persuasion, than was Bowers.

63. We preface our consideration of these submissions by making a basic but very important point. No one doubts the seriousness of the offending in this case. No one doubts the importance of the fact that the victim was a police officer engaged in performing his duty in the service of the public. No one doubts the gravity of the harm caused, involving as it did not only the death of PC Harper in dreadful circumstances, but also the anguish suffered by his bereaved family. As the judge rightly said, PC Harper's family have the profound sympathy of the nation. The issues before this court must however be resolved in accordance with the law.

64. The judge had to sentence three young offenders for manslaughter, not for murder. Mere disagreement with his decisions as to the nature and length of the appropriate sentences provides neither a ground for finding the sentencing to have been unduly lenient nor a ground for finding a sentence to have been wrong in principle or manifestly excessive. The essential issue in each of the applications is whether the judge passed a sentence which was outside the range properly open to him in all the circumstances. In *Attorney-General's Reference (no 4 of 1989)* [1990] 1 WLR 41 at p46A. Lord Lane CJ stated that a sentence would only be unduly lenient "where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate". The Lord Chief Justice went

on to say that it must always be remembered that sentencing is an art rather than a science, and that the trial judge is particularly well placed to assess the weight to be given to various competing considerations.

65. In *Reynolds* [2007] 2 Cr App R (S) 87 Latham LJ, giving the judgment of the court, said at [17] that the function of section 36 of the 1988 Act is not to provide a general right of appeal to the prosecution:

> "It is a means of ensuring by judicious selection of cases, that issues of principle in relation to sentencing can be resolved, and sentences corrected, in cases where public confidence in sentencing could otherwise be undermined."

66. As Hughes LJ pointed out in *Attorney General's Reference (No 60 of 2012)* [2012] EWCA at [19]:

> "The procedure for referring cases under section 36 of the Criminal Justice Act 1988 is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result."

67. We consider first the sentences for the offence of manslaughter, the maximum sentence for which is life imprisonment. We preface that consideration by some general observations about the approach to sentencing in England and Wales.

68. The Sentencing Council for England and Wales was established by Parliament in April 2010 to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary. It is an independent, non-departmental public body accountable to Parliament for fulfilling its statutory duties. The primary role of the Sentencing Council is to issue guidelines on sentencing, which the courts must follow unless satisfied in a particular case that it would be contrary to the interests of justice to do so. The Council has a statutory responsibility amongst other things, to develop sentencing guidelines and monitor their use; to consider the impact on victims of sentencing decisions; to monitor the application of the guidelines; and when developing guidelines, to promote understanding of, and (it is to be noted) public confidence in, sentencing and the criminal justice system: see Part 1, Chapter 4 of the Coroners and Justice Act 2009, and in particular section 120(11)(b) to (d) of that Act.

69. When developing a new guideline the Sentencing Council carefully considers the principal factors by which the seriousness of a particular type of offence should be assessed. It publishes a draft in which it sets a range of sentences which appropriately reflect the range of seriousness of individual examples of that offence. It engages in widespread public consultation on that draft, and where appropriate makes amendments in the light of the responses to the consultation. The definitive guideline which is then brought into effect is published on the Council's website and so is

available to any interested member of the public who wishes to understand the approach which sentencers are required to follow. That is a transparent process. It provides members of the public with the information which enables them to understand the guidelines issued by the body which Parliament has created for that purpose, and to have confidence in sentencing. Public confidence about sentencing in accordance with such guidelines is to be distinguished from public concern about a particular sentence, which may sometimes be based on a misunderstanding of the circumstances of the case in question, or of the reasons for the sentence.

70. In accordance with the process just described, the Sentencing Council has published a definitive guideline for sentencing in cases of unlawful act manslaughter. It came into effect as recently as November 2018. The judge rightly referred to it. Section 125 of Coroners and Justice Act 2009 (now replicated in section 59 of the Sentencing Act 2020, which applies to convictions on or after the commencement date of 1 December 2020) imposes the duty on sentencers to which we have referred:

> "**125 Sentencing guidelines: duty of court**
>
> (1) Every court—
>
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
>
> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
>
> unless the court is satisfied that it would be contrary to the interests of justice to do so."

71. The circumstances of offences of manslaughter by an unlawful act can vary greatly, as can the level of culpability on the part of the offender. For that reason, the sentences indicated by the guideline have a very wide offence range, from 1 year to 24 years' custody. It identifies 4 levels of culpability: A, very high; B, high; C, medium; and D, lower. It lists characteristics which indicate each level. It directs judges to balance those characteristics, avoiding an overly mechanistic approach, so as to reach a fair assessment of the overall culpability of an offender. The guideline then gives a starting point for sentence, and a category range of sentences, for each category. The sentencing levels for each category take into account the fact that the offence has caused a death. Having identified the appropriate starting point, the sentencer may adjust it upwards or downwards to reflect aggravating and mitigating factors which have not already been taken into account in assessing culpability. Non-exhaustive lists are given of possible aggravating and mitigating factors.

72. The judge was satisfied that two of the factors indicating high culpability were present: "death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender" and "death was caused in the course of committing or escaping from a serious offence in which the offender played more than a minor role". The first of those, he said, was

present "to an extreme level", because of the premeditated intention of the offenders to drive, if accosted by the police, in a way which was designed to expose the police officers to risk of death. The second was present because the conspiracy to steal the quad bike was a serious offence. The guideline provides that very high culpability may be indicated by the extreme character of one or more culpability B factors, and/or a combination of culpability B factors. The judge was satisfied that this was a case of category A, very high culpability.

73. The guideline indicates, for category A, a starting point of 18 years' custody and a range from 11 to 24 years. It may be noted that for category B offences, the starting point is 12 years' custody and the range from 8 to 16 years.

74. We have already quoted the passages in the sentencing remarks in which the judge identified the aggravating and mitigating factors. It is apparent that in Long's case he regarded the overall circumstances of the offence, including the aggravating factors, as justifying an adjustment of the starting point upwards to the very top of the category A range before taking into account the mitigating factors, which brought the custodial term back down from 24 years to 16 years. Arithmetically, the judge reduced the 24-year sentence - which would be appropriate for a mature adult - by less than 3 years before making the 25% reduction in relation to Long's guilty plea. Given that Long had only attained adulthood about 3 months before he committed these offences, Mr Little realistically accepted that no criticism could be made of that reduction.

75. In the cases of Bowers and Cole, the judge increased the guideline starting point to 20 years before taking into account their ages and immaturity, which reduced their sentences to 13 years. They, of course, had been convicted after a trial and so no reduction was to be made for a guilty plea. The Sentencing Council's definitive guideline on sentencing children and young people did not directly apply in their cases, because they were over the age of 18 when convicted; but it was nonetheless relevant to consider what the sentence would have been at the time when the offence was committed, when they were only 17. Where a custodial sentence is unavoidable in the case of a 17-year old, paragraph 6.46 of that guideline suggests as a rough guide that the court "<u>may</u> 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". The reduction from 20 years to 13 years is consistent with that approach, and it can in our view be inferred that the judge did not make any reduction on the ground of learning difficulties.

76. Thus the judge followed the guideline, placed the case in the highest category of culpability and found aggravating factors which justified significant increases above the starting point for that highest category, before taking into account mitigating factors relating only to the ages and immaturity of the offenders.

77. As we have noted, the offence range for offences of manslaughter by an unlawful act goes up to 24 years' custody. It does not include a life sentence. The guideline does however make clear that at a later stage of the sentencing process the court must consider whether to impose a life sentence having regard to the statutory provisions relating to dangerous offenders. The judge found Long to be a dangerous offender. It is submitted for the Attorney General that on a proper application of the relevant statutory provisions, and in accordance with the decision of this court in *Burinskas*, a life sentence should have been imposed in his case.

78. By section 224 of Criminal Justice Act 2003, manslaughter is both a specified violent offence and a serious offence. Section 225, so far as material for present purposes, provides –

> "**Life Sentence for Serious Offence**
>
> (1) This section applies where –
>
> (a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and
>
> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.
>
> (2) If –
>
> (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and
>
> (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,
>
> the court must impose a sentence of imprisonment for life. …"

79. Section 226A of Criminal Justice Act 2003, so far as material for present purposes, provides:

> "**Extended sentence: persons 18 or over**
>
> (1) This section applies where –
>
> (a) a person aged 18 or over is convicted of a specified offence …,
>
> (b) the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences,
>
> (c) the court is not required by section … 225(2) to impose a sentence of imprisonment for life, and
>
> (d) condition … B is met. …
>
> (3) Condition B is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years.

> (4) The court may impose an extended sentence of imprisonment on the offender.
>
> (5) An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of -
>
> (a) the appropriate custodial term, and
>
> (b) a further period ("the extension period") for which the offender is to be subject to a licence. … "

80. In *Burinskas* Lord Thomas CJ, giving the judgment of the court, said at [22] that the question posed by section 225(2)(b), whether the seriousness of the offence (or of the offence and one or more other 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 section 143(1).
>
> (ii) The defendant's previous convictions (in accordance with section 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."

It is therefore clear that in considering the seriousness of an offence for the purposes of section 225, the sentencer cannot simply ask whether, compared to other examples of its kind, the particular offence is a very serious one.

81. The judge was plainly entitled, for the reasons which he gave, to find Long to be dangerous. We can see no merit in Mr Scamardella's submission that the finding was wrong. We agree with the judge that he was entitled to make that finding without adjourning to obtain a pre-sentence report, and we reject the suggestion that the defence were not given an adequate opportunity to address that issue. He also, and clearly correctly, found the offence to be a very serious example of manslaughter by an unlawful act and one which was close to murder in its seriousness. We reject the challenges made on behalf of the applicants to some of the findings of fact which led the judge to that conclusion. We reject the submission that there was unfair disparity of sentencing as between the offenders: the judge was plainly entitled to treat Long, the oldest of the three and the leader and the driver, differently from Bowers and Cole.

82. We cannot however accept the submissions for the Attorney General that the risk posed by Long could not be met by anything other than a life sentence, that an

extended determinate sentence was insufficient and that the judge wrongly relied on age alone as a reason for not imposing a life sentence. Those submissions overlook the important points that a judge, when considering the risk posed by a young offender who has been found dangerous, is entitled to take into account the prospect of maturation (with consequent reduction in risk), and must also have regard (as *Burinskas* makes clear) to the availability of alternative sentences, in particular in this case a lengthy extended determinate sentence. As Lord Burnett CJ said in *Clarke* at [5] –

> "Experience of life reflected in scientific research … is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."

The availability of an extended determinate sentence, and the judge's decision as to the appropriate custodial term, meant that Long would in any event be in custody for over a decade and would thereafter be subject to licence conditions for the remainder of the 16 year custodial term and for a further 3 years after that. The judge was, unarguably, entitled to conclude that an extended sentence of such length would provide sufficient protection for the public.

83. As to the length of the custodial terms, we note a striking feature of the submissions. When applications are made by the Attorney General for leave to refer to this court sentences which are said to be unduly lenient, it is frequently on the basis that the judge fell into error by failing to follow a relevant guideline. In this case, however, the argument advanced by the Attorney is that the sentence of Long, and therefore the sentences on Bowers and Cole, were unduly lenient because the judge erred in failing to depart from the relevant guideline.

84. That is, to say the least, an unusual submission. It involves the proposition that in the circumstances of this case, a sentence within the guideline offence range was not within the range properly open to the judge, who was instead required to pass a sentence outside that range. We think it regrettable that, in advancing that submission, the structure and ambit of the guideline were not addressed. Nor was any sufficient explanation given why it is contended that the judge was not merely entitled to depart from the guideline but positively required to do so.

85. The structure and ambit of the guideline are important because, as we have said, it has a wide sentencing range and, in category A, specifically caters for cases of very high culpability and for cases in which a police officer is killed whilst acting in the execution of his duty. This is not a case in which a departure from the guideline might be justified, for example, by the offenders having caused more than one death. In this case, the aggravating features relied on by the Attorney General were all taken into account by the judge either as part of his assessment of culpability or as an additional aggravating factor. In our judgment, the Attorney General's argument does not make good the submission that it was not properly open to the judge to impose custodial terms of a length within the guideline offence range.

86. We would add, in relation to Bowers and Cole, that it is not possible to argue that the judge made excessive reductions from his provisional sentence on grounds of their age and learning difficulties. As we have noted above, the judge seems to have made very little, if any, reduction by reason of their respective learning difficulties. The reductions made by reason of their ages were in accordance with the principles stated in the Children guideline, and again no basis has been shown for the implicit contention that the judge should not have followed that guideline.

87. For those reasons, there is no basis on which it can be said that the judge could not reasonably conclude that a life sentence was not justified in Long's case, or that the custodial terms imposed on the offenders were unduly lenient.

88. It is unnecessary, in the context of the Attorney General's applications, to say anything about the length of the sentences imposed for the conspiracy to steal.

89. The judge was required to, and did, order that each of the applicants be disqualified from driving. In Long's case, the discretionary period of disqualification was 3 years and until he takes and passes an extended driving test. In the cases of Bowers and Cole, the discretionary period for each was 2 years (the statutory minimum applicable in these cases) and until he takes and passes an extended driving test. It is submitted for the Attorney General that those periods should have been substantially longer. It is well established that orders for disqualification from driving serve a protective purpose and also impose a punishment on the offender. It is also well established that long periods of disqualification can sometimes be counter-productive. We accept that the applicants could have had no cause for complaint if rather longer periods of disqualification had been imposed. That is not however the test of undue leniency. We are satisfied that the periods of disqualification were not outside the range properly open to the judge.

90. For those reasons we refuse the Attorney General's applications for leave to refer.

91. We can deal comparatively briefly with the applications for leave to appeal against sentence. The judge was sentencing for manslaughter, and in the circumstances of this case the applicants are not assisted by submissions as to what the sentences might have been if they had instead been charged with and convicted of causing death by dangerous driving. They were prosecuted for manslaughter precisely because the case is so serious that charges of causing death by dangerous driving were not appropriate. The judge was as we have said in the best position to assess the seriousness of the offending and the culpability of the offenders. He was entitled, for the reasons which he gave, to regard this as a case of very high culpability: we reject the submissions to the contrary. He was also entitled, again for the reasons he gave, to move to the top of the offence range, and the reductions he made on grounds of age and immaturity were entirely appropriate. He was entitled, as we have explained, to find Long dangerous and to conclude that an extended sentence was necessary for the protection of the public. Nothing in the grounds of appeal provides any arguable basis for a successful challenge to any of the sentences imposed for manslaughter. They were severe sentences for such young offenders; but the applicants had committed a grave crime, and their punishments were deserved.

92. We can also deal shortly with Long's submission as to credit for his guilty plea to the offence of manslaughter. The Sentencing Council's definitive guideline on Reduction

in sentence for a guilty plea makes clear that the maximum available reduction, namely one-third, is appropriate where a guilty plea is indicated at the first stage of proceedings. After that first stage, the maximum reduction is one-quarter, decreasing to one-tenth for a guilty plea on the first day of a trial. The general rule is subject to certain limited exceptions, and exception F1 allows a reduction of one-third where -

> "… the court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done."

93. The judge considered this, and concluded that the exception did not apply in Long's case. He was entitled to reach that conclusion. We see no basis on which it could be said he was wrong to do so.

94. We are therefore satisfied that none of the grounds of appeal against the sentences for manslaughter is arguable.

95. So far as the sentences for conspiracy to steal are concerned, it was clearly a serious offence of its kind, for the reasons which the judge gave, and he was entitled to impose the sentence he did on Long. There is no arguable ground on which his sentence could be challenged. If Bowers and Cole had been aged 18 when convicted of this offence, we would have reached the same conclusion in their cases. Because of their ages, however, a point arises which is not the subject of any ground of appeal, but has been identified by the case lawyer in the Criminal Appeal Office.

96. Because Bowers and Cole were still 17 when they were convicted of the conspiracy to steal, a sentence of detention in a Young Offender Institution could not be imposed for that offence: such a sentence is only available for those aged 18-20 when convicted. Although no one noted the error at the time, the only custodial sentence available for that offence in their cases was a detention and training order. The maximum term of such an order is 24 months. However, there was no proper ground for withholding credit for their guilty pleas, which (because of the statutory provisions governing the length of such sentences) would reduce their sentences to 18 months. The sentences imposed by the judge were unlawful and must accordingly be corrected. This does not affect the sentences for manslaughter and, because the sentences were concurrent, it does not affect the overall length of the sentences.

97. A further point has been identified by the Criminal Appeal Office, to whom we are grateful. In the cases of Bowers and Cole, the judge was led into error in relation to the calculation of the appropriate lengths of the periods of disqualification from driving. In the circumstances of this case, the convictions of manslaughter meant that the judge was required to disqualify each of the applicants from driving for a minimum period of 2 years and until an extended driving test was taken and passed. Section 35A of the Road Traffic Offenders Act 1988 contains provisions which are designed to ensure that the disqualification from driving of an offender who receives a custodial sentence takes effect when he is released from custody. In summary, the judge in each case had to decide the appropriate length of disqualification ("the

discretionary period", to which we have referred earlier in this judgment) and was then required to add an "extension period" to cover the time when the offender would be in custody. Usually, the extension period would be one-half of the custodial term, because in most cases an offender is entitled to automatic release on licence after serving half his custodial sentence. In some cases, however, an offender has to serve two-thirds of his custodial term before being released or becoming eligible for release. That is the position with each of these applicants: in Long's case, because he received an extended sentence; and in the cases of Bowers and Cole, as a result of the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, SI 2020/158. The provisions of section 35A of the 1988 Act, as amended, require that in many cases in which a prisoner must serve two-thirds of the custodial term, the extension period must also be two-thirds of the custodial term. Specific provision to that effect is made in relation to an offender who receives an extended sentence, as was the case with Long. Crucially, however, it is now clear that no relevant statutory amendment has been made to cover the situation which arises in the cases of Bowers and Cole as a result of the 2020 Order. In the submission of the prosecution, that is an unintended statutory lacuna.

98. That point was not appreciated by anyone at the time of sentencing. The prosecution invited the judge to impose extension periods of two-thirds of each of the respective custodial terms, failing to recognise that he would thereby be led into making orders in respect of Bowers and Cole which were wrong in principle. It is apparent that judge intended to accept that invitation, but his sentences as pronounced were arithmetically incorrect. In Long's case, he stated that there would be a discretionary disqualification of 3 years and an extension period of 9 years. In the cases of Bowers and Cole, he stated that there would be discretionary disqualifications of 2 years and extension periods of 10 years.

99. The prosecution subsequently alerted him to those errors in an email, and suggested that the correct periods of disqualification, with extension periods based on two-thirds of the custodial terms, were 13 years 8 months in the case of Long (ie, 3 years + 10 years 8 months) and 10 years 8 months in the cases of Bowers and Cole (ie, 2 years + 8 years 8 months) . They invited the judge to make the corrections administratively in accordance with section 155 of Powers of Criminal Courts (Sentencing) Act 2000 and rule 28.4(2)(b) of the Criminal Procedure Rules. The judge accepted those suggestions and, by email from a court officer, varied his earlier order in these respects. The court record was amended accordingly. In Long's case it is conceded that the amendment was correctly and validly made.

100. Unfortunately, the prosecution were wrong to make the suggestions they did in relation to Bowers and Cole, because the statutory provisions applicable to their cases had the effect that the extension periods should only have been one-half of the custodial terms, not two-thirds. The prosecution concede that in relation to Bowers and Cole, the appropriate extension period is half of the custodial term. They apologise for the erroneous earlier submissions which led the judge into error.

101. It is unnecessary to go into further detail. The result of the errors which we have summarised is that the court record presently shows Bowers and Cole to be disqualified for periods which were based on an error of principle. No applicant has advanced any ground of appeal in relation to these points, but we are satisfied that the record relating to Bowers and Cole must be corrected. The correct periods of

disqualification are: in Long's case, 13 years 8 months (ie, 3 years + 10 years 8 months) and until he takes and passes an extended driving test; in each of the cases of Bowers and Cole, 8 years 6 months (ie 2 years + 6 years 6 months) and until he takes and passes an extended driving test.

102. We therefore make the following orders:

i) We refuse the Attorney General's applications for leave to refer. The sentences for manslaughter passed on Long, Bowers and Cole remain in place.

ii) We grant Bowers and Cole leave to appeal against sentence and allow their appeals only to the following very limited extents:

a) We quash the sentences of 38 months detention in a Young Offender Institution imposed for the offence of conspiracy to steal, and substitute for them a Detention and Training Order for 18 months in each case. Those sentences will run concurrently with the sentences of detention imposed for the offence of manslaughter, and so do not alter the overall sentence imposed by the judge.

b) We quash the orders for disqualification and substitute in each case an order that he be disqualified from driving for 8 years 6 months (comprising a discretionary period of 2 years and an extension period of 6 years 6 months) and until he takes and passes an extended driving test.

iii) Long's application for leave to appeal against sentence is refused.

iv) The applications for leave to appeal against conviction, which are made by Bowers and Cole only, are refused.