Twitter Thread by The Secret Barrister

The Secret Barrister
@BarristerSecret

Some initial observations about this case, and in particular what the Court of Appeal made of the Attorney General's application to refer these sentences as "unduly lenient".

Spoiler: it makes uncomfortable reading for the Attorney General.

> There will be no substantive change to the sentences passed on the killers of Pc Andrew Harper.
>
> The Attorney General\u2019s application to refer the sentences as unduly lenient and the defence applications for leave to appeal against sentence have been refused by the Court of Appeal. https://t.co/qxTzuj7jR3
>
> — The Secret Barrister (@BarristerSecret) December 16, 2020

First, by way of background. I was one of several commentators astonished that the Attorney General, who has no known experience of practising criminal law, decided to personally present this serious case at the Court of Appeal.

It appeared an overtly political decision. https://t.co/Q5idP3FyZp

> Grimly cynical.
>
> The Attorney General - who has absolutely no experience of criminal law - is so desperate to exploit this tragic case that she is inserting herself into proceedings that she is not competent to conduct.https://t.co/QWdINvUwwf
>
> — The Secret Barrister (@BarristerSecret) November 12, 2020

Comments leaked to the press confirmed this was a political decision, to capitalise on a tragic case in the headlines.

A "friend" of the Attorney General told the Express that she was pursuing the case *against* legal advice. She also took a preemptive pop at the judges. https://t.co/vwvJ5yHIj8

> Before the hearing, the Attorney General leaked to the Daily Express, via an alleged \u201cfriend\u201d, her views that, should the judges find against her, it will be because they are \u201cwet liberal judges\u201d who are \u201csoft on criminals\u201d. https://t.co/5uGggN8tTT
>
> — The Secret Barrister (@BarristerSecret) November 30, 2020

On the day of the hearing, it appeared from selected reports that the AG was out of her depth. She appeared to be making political submissions to the Court of Appeal that have no place in a case of this type. https://t.co/PJH1UCn0aQ

> The Attorney General had to be embarrassingly corrected during the hearing by an actual criminal silk after making irrelevant and politicised submissions to the Court of Appeal.
>
> What a farce. pic.twitter.com/wy81xoFIDI
>
> — The Secret Barrister (@BarristerSecret) November 30, 2020

The Court of Appeal judgment helps understand what happened.

The AG played a limited role. She “rehearsed some of the facts and said that the sentences had caused widespread public concern”

Her contribution was seemingly not considered by the Court to be legal submissions. Oof.

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,

Instead, legal submissions were advanced by the experienced criminal QC being “led” by the Attorney General. It was left to him to advance the argument that the AG was herself apparently unable or unwilling to.

An important paragraph. One detects that the intended audience is not just the public.

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.

The Court of Appeal turns to the Attorney General’s legal argument.

These are words that you don’t want to hear from a judge.

“Striking.” “Unusual.”

“Regrettable” that a key point - the structure and ambit of the relevant Sentencing Guideline - was “not addressed”.

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.

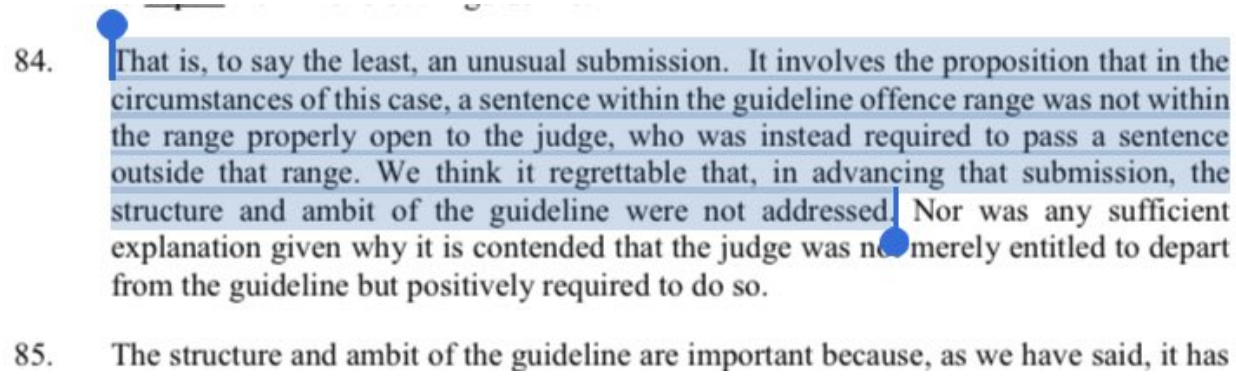
87. For those reasons, there is no basis on which it can be said that the judge could not reasonably conclude that a life sentence was not justified in Long's case, or that the custodial terms imposed on the offenders were unduly lenient.

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.

The AG could not complain that the sentencing judge had not followed the Guideline - because he clearly had. So instead, she argued he was under a duty *not* to follow it.

Striking and unusual indeed.

Court of Appeal: No “sufficient explanation [was] given” for this contention.



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The Attorney General also claimed that the judge made too great a reduction in sentence to reflect the defendants’ age and learning difficulties. The Court of Appeal said she had shown “no basis” for this argument.

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The conclusion? “There is no basis on which it can be said that...the custodial terms imposed on the offenders were unduly lenient.”

A resounding rejection of the Attorney General’s efforts.

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The Court of Appeal also had little time (4 paragraphs!) for the defence argument that the sentences were manifestly excessive or wrong in principle. They quickly approved the sentencing judge's approach and said that the defence grounds of appeal were "unarguable".

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.

One final thing. Neither the Attorney General, nor indeed the defence, spotted that the sentence was technically unlawful for other reasons. Court of Appeal in-house lawyers had to point it out.

Happens to us all, but still not great for the government's most senior law officer.

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.

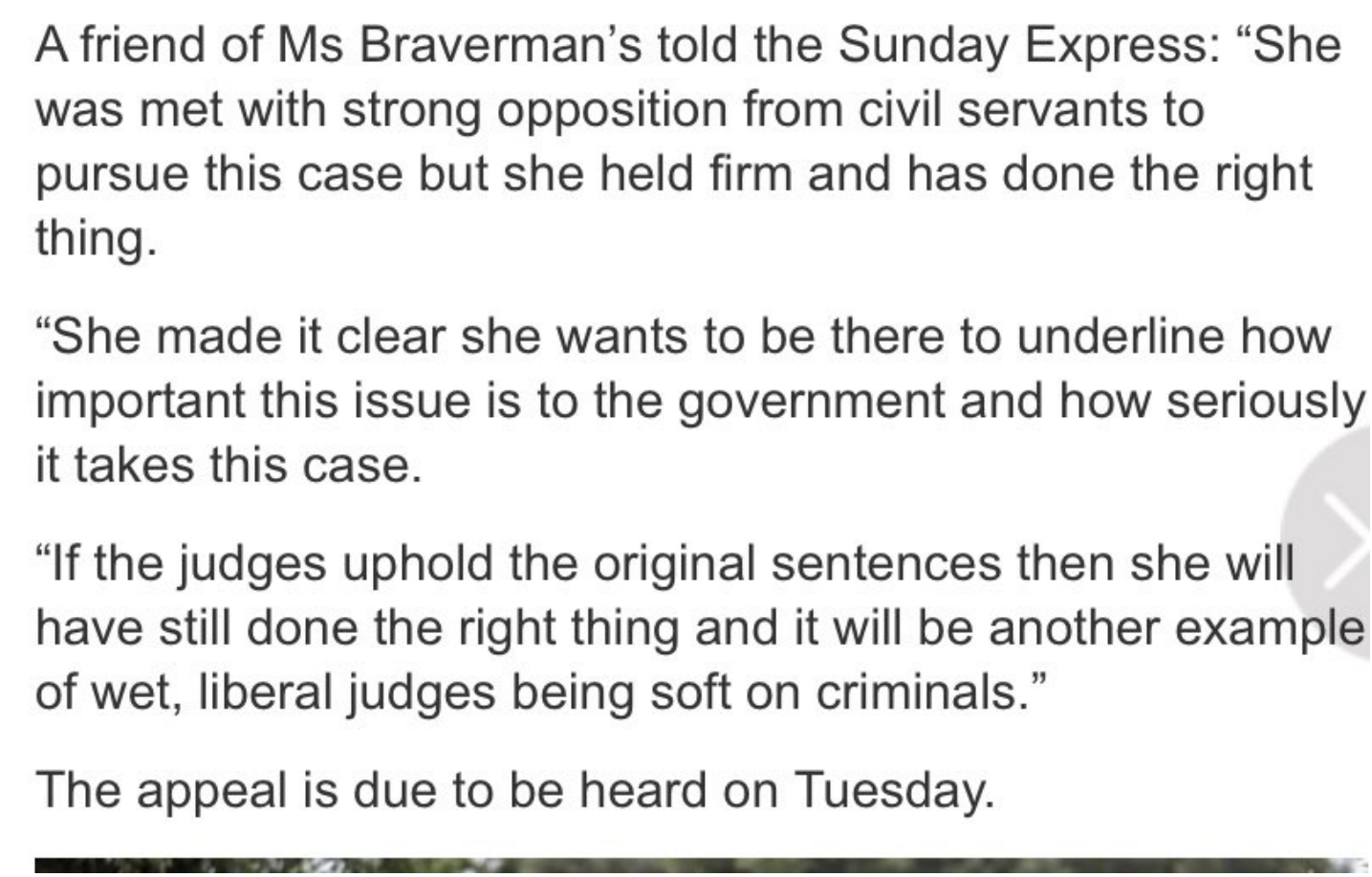
99. The prosecution subsequently alerted him to those errors in an email, and suggested that the correct periods of disqualification, with extension periods based on two-thirds of the custodial terms, were 13 years 8 months in the case of Long (ie, 3 years + 10 years 8 months) and 10 years 8 months in the cases of Bowers and Cole (ie, 2 years + 8 years 8 months). They invited the judge to make the corrections administratively in

So a resounding defeat all round.

Exactly as the AG was apparently advised by her own lawyers.

It is one thing to lose a case, even heavily, that you genuinely believe to be arguable.

But to pursue a case against legal advice at public expense for political gain? Not good.



So the headline:

The Attorney General was advised by experienced government lawyers that this application had no legal merit.

She pursued it anyway, briefed the tabloids that any judge who found against her was a "wet liberal", insisted on presenting it herself, and lost.

I'm aware that my criticism of the AG is not universally popular.

If she stops exonerating political advisors, approving government law-breaking, sitting silent as lawyers are attacked by her colleagues and intervening in criminal cases for political gain, I'll happily stop too.