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Case No: 202602197 B2

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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRISTOL
His Honour Judge Blair KC
ON APPEAL FROM THE CROWN COURT AT SHREWSBURY

HHJ Meegan

202602402 A4

52SB0573624

ON APPEAL FROM THE CROWN COURT AT ST ALBANS

Mr Recorder Claxton

202602147 A5

A REFERENCE UNDER S36 CRIMINAL JUSTICE ACT 1988 FROM THE CROWN
COURT AT BRISTOL

HHJ Burgess KC

202602585 A4

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 16th September 2026

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION

Lord Justice Edis

MR JUSTICE SOOLE

and

HER HONOUR JUDGE KARU

Sitting as a judge of the Court of Appeal Criminal Division

Between:

FIONA HODGE

Appellant

- and -

THE KING

JASON CARTER

Appellant

-and-

THE KING

**MORNE POTGIETER
- and -
THE KING**

Appellant

**JAMES McCLEMENTS
- and -
THE KING**

Appellant

Ian Bridge (instructed by HF Limited solicitors) for **Fiona Hodge**
Alexandra Khan (instructed by McKenzies solicitors) for **Morne Potgieter**
Ian Bridge (assigned by the Registrar) for **Jason Carter**
Adam Vaitilingam KC (instructed by **the CPS Appeal Unit**) for the **Prosecution in the three appeals**

Frederick Hookway for **HM Attorney General in the Reference under s36 CJA 1988**
Matthew Butt KC (assigned by the Registrar) for **James McClements**

Hearing dates: 29 July 2026

**Judgment Approved by the court
for handing down**

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The case of Potgieter involves a child victim. The Crown Court made an order in these terms which continues in force and applies to these proceedings: -

“Direction made under section 45 of the Youth Justice and Criminal Evidence Act 1999 restricting publicity in respect of the 5-year-old victim of charge 6. No matter relating to the youth may be published that would identify them, including their name, address, any educational establishment or any workplace they attend, and any picture of them. This order lasts until the youth reaches the age of 18.”

The names of both victims (mother and son) have been omitted from this judgment to enable its publication.

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The Vice-President of the Court of Appeal Criminal Division:

Introduction

1. In these four cases, the court is required to consider the impact of s277A of the Sentencing Act 2020 on sentencing practice. We have three applications for leave to appeal against sentence, for which we give leave. In these three appeals the grounds include the proposition that the law required that the sentences should have been suspended but immediate sentences of imprisonment were imposed. These are the cases of Fiona Hodge, Jason Carter, and Morne Potgieter. We also have an application under s36 of the Criminal Justice Act 1988, for which we also give leave, by HM Attorney General who asks the court to review a suspended sentence imposed on James McClements on grounds which include the proposition that it was unduly lenient and should have been imposed as an immediate prison sentence. This is either because it should have been longer than 12 months so the s277A presumption in favour of suspending sentences does not apply, or that there were exceptional circumstances justifying an immediate sentence if the presumption did apply. We have received expert assistance from all counsel in these cases and we are extremely grateful to all of them.

The s277A Presumption

2. The material parts of s277A are as follows:-

277A Presumption of suspended sentence order: adults

(1) This section applies where the court imposes a sentence of imprisonment for an offence where—

- (a) the offender is aged 18 or over when convicted of the offence,
- (b) the offender is convicted of the offence on or after the day on which section 1 of the Sentencing Act 2026 came into force,
- (c) the term of the sentence is not more than 12 months, and
- (d) a suspended sentence order is available in relation to that sentence (see section 277).

(2) The court must make a suspended sentence order in relation to the sentence where this section applies unless the court is of the opinion that there are exceptional circumstances which—

- (a) relate to the offence (or the combination of the offence and one or more offences associated with it) or the offender, and
- (b) justify not making the order.

(3) But this section does not apply if—

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- (a) when the sentence is imposed the offender is in custody—
 - (i) pursuant to a custodial sentence or a pre-Code custodial sentence,
 - (ii) having been remanded in custody in connection with another offence which is not an associated offence, or
 - (iii) having been committed to custody by an order of a court,
- (b) when the sentence is imposed the offender is in custody—
 - (i) pursuant to a sentence of service detention, or a custodial sentence, within the meaning of the Armed Forces Act 2006 (see section 374 of that Act),
 - (ii) having been kept in service custody in connection with another offence which is not an associated offence,
 - (iii) having been remanded or admitted to hospital under section 35, 36 or 38 of the Mental Health Act 1983 as the section in question has effect by virtue of Schedule 4 to the Armed Forces Act 2006,
 - (iv) having been committed to custody by an order of a service court, or
 - (v) pursuant to a pre-Armed Forces Act 2006 custodial sentence,
- (c) when the sentence is imposed the offender is detained in a hospital pursuant to—
 - (i) a hospital order within the meaning of section 37 of the Mental Health Act 1983,
 - (ii) an order under section 37 of that Act as it has effect by virtue of Schedule 4 to the Armed Forces Act 2006, or
 - (iii) a direction under section 45A or 47 of the Mental Health Act 1983,
- (d) the sentence of imprisonment is one of two or more sentences imposed on the same occasion where—
 - (i) the term of any of those sentences is more than 12 months, or

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- (ii) those sentences are to be served consecutively and the terms of those sentences are in aggregate more than 12 months,
 - (e) the offence, or an associated offence, is an offence—
 - (i) in respect of which the offender is, or has been, subject to a supervision order, and
 - (ii) for which the court is re-sentencing the offender,
 - (f) the offence, or an associated offence, was committed while the offender was subject to a supervision order,
 - (g) the commission of the offence, or an associated offence, constituted, or occurred in circumstances closely connected with, a breach by the offender of—
 - (i) an order of a court, or
 - (ii) an order or award (whether or not of a court) made (anywhere) in proceedings in respect of a service offence within the meaning of the Armed Forces Act 2006, or
 - (h) the court is of the opinion that making the order would put a particular individual at significant risk of physical or psychological harm.
3. The provisions of s277A were in force at the time when these sentences were passed, because all the convictions occurred after 22 March 2026. All those sentenced were adults. None of the sub-sections of s277A(3) applied. The courts were therefore required to apply s277A(2) which is the provision which we must first construe.

The results

4. We announced the outcomes of the appeals and the reference at the conclusion of the hearing and said that we would give our reasons at a later date, which we now do. These were as follows:-
- i) Hodge was convicted of causing death by careless driving, contrary to s2B Road Traffic Act 1988, and sentenced to 12 months imprisonment. She was disqualified from driving and order to pay £3,000 in costs. She is now 70 years old. The judge's sentence was quashed and we substituted in its place a suspended sentence order with a term of 12 months suspended for 2 years. The disqualification remained but the extension under s34A of the Road Traffic Offenders Act 1988 was removed.
 - ii) Carter pleaded guilty to causing death by careless driving, contrary to s2B Road Traffic Act 1988, and was sentenced to 13 months imprisonment. He is now 55 years old. In his case it is submitted that the judge erred in imposing a sentence in excess of 12 months, and that we should correct that error and then apply

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s277A to suspend whatever term we substitute. The sentence of 13 months imposed by the judge is quashed and in its place we made a suspended sentence order of 9 months suspended for 2 years without any requirements, having regard to the time spent between the sentence and appeal in prison. But for that punitive requirements would have been appropriate. The disqualification was reduced to 2 years, and until he passes an extended driving test.

- iii) Potgieter pleaded guilty to four offences, Driving motor vehicle when alcohol level above limit, contrary to s5(1)(a) Road Traffic Act 1988, driving motor vehicle with a proportion of a specified controlled drug above the specified limit contrary to s5A(1) (a) and (2) Road Traffic Act 1988, causing serious injury by careless / inconsiderate driving contrary to s2C Road Traffic Act 1988 and causing serious injury by careless / inconsiderate driving contrary to s2C Road Traffic Act 1988. A sentence of 12 months imprisonment was imposed on the last of these charges, with shorter concurrent terms on the others. He is 42 years old. We dismissed his appeal, finding that there were exceptional circumstances justifying an immediate sentence.
 - iv) McClements pleaded guilty to one offence of misconduct in a public office and was sentenced to 8 months' imprisonment suspended for 12 months with 200 hours of unpaid work. He is 36 years old. We allowed the reference and quashed the judge's sentence. We replaced it with an immediate sentence of 15 months and quashed the costs order which the judge made.
5. S277A arises in all four cases. It is submitted that the judges in the cases of Hodge Potgieter and McClements failed to apply it properly. In the case of McClements that submission is made in the alternative to the submission that the sentence should have been in excess of 12 months. It is submitted that the judge in the case of Carter avoided having to apply it by passing a sentence in excess of 12 months which was manifestly excessive or wrong in principle, and that if he had passed an appropriate sentence he would have been bound to apply s277A and suspend the sentence.
6. The nature of all four cases is such that they fall within the category where sentencing judges have frequently decided that immediate custody was required because, in the words of the Imposition Guideline, "the seriousness of the offence means that appropriate punishment can only be achieved by immediate custody". In driving cases where death or very serious personal injury is caused by serious offences of careless driving, this course has frequently been taken. In such cases there may be substantial personal mitigation in which an offender has lived a blameless and constructive life, and only ever committed one offence of carelessness with fatal or other very serious consequences. Hodge, Carter and Potgieter raise these issues. In cases where police officers have abused their public office to form sexual relationships with vulnerable victims of crime, again, this has usually been done. Cases of doing acts tending and intended to pervert the course of justice have usually also been treated in this way. The necessity for deterrence in both of these classes of case involving a public interest which goes beyond those directly involved in the crimes themselves has been held to require this. The question is whether that approach is no longer open to the courts. The case of McClements raises this issue, although we are not, in the result, required to decide it. That is because we decided that we were required to impose a sentence in excess of 12 months in his case, so that the presumption did not apply and the previous and long-standing approach of the courts to cases of this kind continued to govern his case.

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The general approach to sentencing and the statutory purpose of s277A

7. The Sentencing Act 2020 contains a scheme which closely regulates the circumstances in which custodial sentences may be imposed. The relevant provisions are:-

63 Assessing seriousness

Where a court is considering the seriousness of any offence, it must consider—

- (a) the offender's culpability in committing the offence, and
- (b) any harm which the offence—
 - (i) caused,
 - (ii) was intended to cause, or
 - (iii) might foreseeably have caused.

230 Threshold for imposing discretionary custodial sentence

(1) Subsection (2) applies where a person is convicted of an offence which is punishable with a custodial sentence. This is subject to subsection (3).

(2) The court must not pass a custodial sentence unless it is of the opinion that—

- (a) the offence, or
- (b) the combination of the offence and one or more offences associated with it,

was so serious that neither a fine alone nor a community sentence can be justified for the offence.

.....

Procedure for forming opinion

(6) In forming its opinion for the purposes of subsection (2), the court must take into account all the information that is available to it about the circumstances of the offence, or of it and the associated or offence or offences, including any aggravating or mitigating factors.

(7) The pre-sentence report requirements (see section 30) apply to the court in relation to forming that opinion.

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231 Length of discretionary custodial sentences: general provision

(1) Subsection (2) applies where a court passes a custodial sentence in respect of an offence. This is subject to subsections (3) to (6).

(2) The custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of—

(a) the offence, or

(b) the combination of the offence and one or more offences associated with it.

8. Custodial sentences are, therefore, never to be imposed unless they are unavoidable and must be no longer than is necessary. The Imposition Guideline says this about the imposition of custodial sentences, and the custody threshold:-

“1. Is it unavoidable that a custodial sentence be imposed?

- A custodial sentence (whether immediate or suspended) must not be imposed unless the offence (or the combination of the offence and one or more offences associated with it) was so serious that neither a fine alone nor a community sentence can be justified (Section 230(2) of the Sentencing Code).
- Passing the custody threshold does not mean that a custodial sentence (whether immediate or suspended) is inevitable. Custody should not be imposed where the purposes of sentencing could be achieved by a community order or where circumstances exist which may make a custodial sentence disproportionate to achieving the purposes of sentencing (for example, where there would be an impact on dependants, including on unborn children where the offender is pregnant.)
- Community orders are often punitive and last longer than shorter custodial sentences. Community orders can restrict an offender's day to day liberties, especially when imposed on an offender who may find regular attendance at a specific place or time challenging. Breach can result in custody.
- If the purposes of sentencing can be achieved by a community order, or any personal mitigation means that a community order may be a more suitable sentence, see the Imposition of Community orders section (section 5) above.”

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9. It is important to spell out something which is obvious to those who understand how sentencing works: the court decides whether or not to suspend sentences after it has decided that a custodial sentence is required and decided its length. It therefore takes that decision after the seriousness of the offence has been assessed by reference to culpability and harm, applying the stepped process in the sentencing guidelines. The factors which determined the nature and length of the sentence are also likely to be relevant to the later decision about whether or not the sentence is to be suspended.
10. Therefore, the context in which s277A was enacted was one where the use of custodial sentences, and in particular immediate custodial sentences, was already subject to constraints designed to ensure that they should be used only when necessary and only to the extent necessary.
11. It appears to be clear from the words used by Parliament in s277A in this context that its purpose was to introduce a new requirement which was intended to reduce the use by the courts of short immediate custodial sentences. This is clear from various materials which have been drawn to our attention, such as the Independent Sentencing Review chaired by David Gauke, the Explanatory Notes to the Sentencing Bill, and the accompanying Ministry of Justice factsheets. Not all of this material can operate as a legitimate aid to construction of the new provision, but the purpose is clear from the words of the provision itself. As this court said in *R v Morgan* [2026] EWCA Crim 886 ("*Morgan*") at [55]:-

"It may be of interest to record that prior to the passing of that Act, we would not have interfered with the Recorder's immediate sentence of imprisonment. It is the will of Parliament, as expressed in section 277A, that short prison sentences should almost always be suspended. It is the function of the courts to apply the law as enacted by Parliament, and that is what we will do."

The scope of s277A

12. S277A(1) defines the cases in which the presumption in s277A(2) applies. In s277A(3) Parliament identified an additional series of situations where the presumption does not apply, even if the case is within s277A(1). This is important in the present context because by s277A(3), Parliament itself made some decisions about the proper scope of any restriction to the operation of the presumption. These restrictions exclude cases where the offender is (a) in custody because of other civilian court orders; (b) in custody because of certain orders made in the service courts; (c) detained under orders made under the Mental Health Act 1983; (d) sentenced on the same occasion to other terms which together exceed 12 months; (e) being re-sentenced following breach of a supervision order; (f) sentenced for an offence committed in breach of a supervision order; (g) sentenced for an offence committed in connection with a breach of a court order or order in relation to a service offence and (h) where a particular individual would be placed at significant risk of physical or psychological harm if the sentence is suspended. Of those restrictions, that in sub-paragraph (g) is the most widely defined. It covers offences committed "in connection with a breach of a court order". If one or more of those applies, there is no requirement for there to be any exceptional circumstances before an immediate sentence may be imposed. It follows that none of these situations is capable of amounting "exceptional circumstances". None of the

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judges in the present appeals imposed an immediate sentence having found that s277A(3) applied and the judge in the Reference did not impose a suspended sentence in reliance on that provision either. We, therefore, are not required to consider s277A(3) further.

“Exceptional Circumstances”

13. *Morgan* was a case where the sentencing judge had failed to make any finding that the circumstances of the case were exceptional, and the court therefore held that he was required to suspend the sentence. It did, however, also make observations about the nature of “exceptional circumstances”. It said at [52]:-

“We do not intend to try to define or list what might amount to exceptional circumstances in this context. We do, however, underline the strong word chosen by Parliament: “exceptional”. Whatever such circumstances might be in any given case, they are obviously not circumstances (related to the offence, or the combination of the offence and one or more offences associated with it) which are commonly encountered.”

14. We do not resile from what this court said in *Morgan*, where the court also said, at [48]:-

“It seems to us, applying the new statutory provision as best we can, that it is unlikely that the seriousness of the offence, on its own, could amount to an exceptional circumstance such that an immediate custodial sentence could properly be imposed. After all, in all cases where this section applies, the sentence will be not more than 12 months' imprisonment, which is a measure of the seriousness of the offending with which the court is dealing. It means that it cannot be at the upper end of seriousness of criminal offending. The term of 12 months' imprisonment is, as custodial sentences go for adults, not a long sentence, and is generally not to be imposed for offences which are to be regarded as exceptionally serious.

15. The court in *Morgan* found that there were no exceptional circumstances and concluded that the sentence imposed was probably shorter than it should have been. That was a case where the principal physical harm caused by the offending was suffered by the offender. The culpability was very high, but the harm actually caused to others not so. It was not a case of causing death or serious injury.

The minimum sentence cases

16. We have received submissions, as the court did not in *Morgan*, based on a series of cases about statutory minimum sentences. These are now found in respect of offences involving bladed articles or offensive weapons, ss312 and 315 of the Sentencing Act 2020; prohibited weapons, s311 and schedule 20 (including offences contrary to s51A of the Firearms Act 1968); drug trafficking, s313; and “third strike” domestic burglaries, s314. In each case, the court must impose at least the prescribed minimum sentence unless it is of the opinion that there are exceptional circumstances which relate

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to any of the offences or the offender which justify not doing so. In those cases, Parliament decided that people should be imprisoned for at least a minimum term, no doubt fearing that otherwise the courts may not do so. In s277A Parliament did the opposite, by providing that people should not be sent immediately to prison in the absence of exceptional circumstances and thus limiting the power of the judges who may have otherwise have imposed immediate sentences. Indeed it is only relevant where the court *would* have passed an immediate sentence before the presumption came into effect. Parliament has decided that people whom the courts, left to their own devices, may believe deserve immediate custody should, almost always, receive a suspended sentence order instead.

17. We were invited to consider these cases, among others:-

- i) In *R v Kelly, AG's Reference No 58 of 1998 (Sandford)* [1999] 2 Cr App R 36 Lord Bingham CJ, considered the then new statutory obligation on a court to pass a life sentence under section 2 of the Crime (Sentences) Act 1997 on a person convicted of a second "serious offence" as defined. That section contained an "exceptional circumstances" provision which is materially identical to section 277A(2) of the 2020 Act. Lord Bingham said this:

"But even under section 2 the mandatory duty imposed on the court is not absolute. It is relieved of the duty to impose a life sentence where two conditions are met: first, that the court is of the opinion that there are exceptional circumstances relating to either of the relevant offences or to the offender: and secondly, that the court is of the opinion that those exceptional circumstances justify the court in not imposing a life sentence. We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered. To relieve the court of its duty to impose a life sentence under section 2(2)' however, circumstances must not only be exceptional but such as, in the opinion of the court, justify it in not imposing a life sentence, and in forming that opinion the court must have regard to the purpose of Parliament in enacting the section as derived from the Act itself and the White Paper "Protecting the Public" (Cm. 3190) which preceded it."

- ii) In *Rehman* [2005] EWCA Crim 2056; [2006] 1 Cr.App.R.(S.) 77 Lord Woolf CJ, considering cases under s.51(A) of the Firearms Act 1968 said:

"There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor

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by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional”.

Lord Woolf added at paragraph 14:

“The section makes clear that it is the opinion of the court that is critical as to what exceptional circumstances are. Unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, this court will not readily interfere”.

- iii) In *R v Nancarrow* [2019] EWCA Crim 470; [2019] 2 Cr. App. R. (S.) 4, again considering section 51A(2) of the Firearms Act 1968 Popplewell J (as he then was) giving the judgment of the court, said at [19]:

“(1) the purpose of the mandatory minimum term is to act as a deterrent (*R. v Rehman (Zakir) and Wood* [2005] EWCA Crim 2056; [2006] 1 Cr. App. R. 77 (p.404) at [12];

(2) circumstances are *exceptional* for the purposes of subs.(2) if to impose five years’ imprisonment would amount to an arbitrary and disproportionate sentence (*Rehman* at [16]);

(3) it is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional. In order to justify the disapplication of the five-year minimum, the circumstances of the case must be truly exceptional (*R. v Dawson (Robert)* [2017] EWCA Crim 2244 at [12] and [19]);

(4) it is necessary to look at all the circumstances of the case together, taking a holistic approach. It is not appropriate to look at each circumstance separately and conclude that, taken alone, it does not constitute an exceptional circumstances. There can be cases where no single factor by itself will amount to *exceptional circumstances*, but the collective impact of all the relevant circumstances makes the case exceptional (*Rehman* at [11]);

(5) the court should always have regard, amongst other things, to the four questions set out in *R. v Avis* [1998] 2 Cr. App. R. (S.) 178, namely: (a) what sort of weapon was involved? (b) what use, if any, was made of it? (c) with what intention did the defendant possess it? (d) what is the defendant’s record? (see, for example, *R. v McCleary* [2014] EWCA Crim 302 at [11]);

(6) the reference in the section to the *circumstances of the offender* is important. It is relevant that an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on his health (*Rehman* at [15]; *R. v*

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Shaw [2011] EWCA Crim 167; [2011] 2 Cr. App. R. (S.) 65 (p.376) at [6]–[7]);

(7) each case is fact-specific and the application of the principles dependent upon the particular circumstances of each individual case. Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical (see, for example, *R. v Stoker* [2013] EWCA Crim 1431; [2014] 1 Cr. App. R. (S.) 47 (p.286) at [22]); and

(8) unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this court will not readily interfere (*Rehman* at [14]).”

18. The considerations which govern the approach to exceptional circumstances in these cases of mandatory minimum sentences may sometimes be similar to those which will be relevant in approaching the same words in s277A, but there is an important difference. In the former class of case, the existence of exceptional circumstances will render the “usual sentence” arbitrary or disproportionate. In the present context that cannot be the test. The “usual sentence” is a suspended sentence order and the exceptional circumstances, if found, will result in an immediate custodial sentence. It will, however, be of a length which is proportionate otherwise it will be reduced on appeal. Very frequently it will have been assessed by reference to a guideline, which is the opposite of a process which could be described as “arbitrary”. It is not the length of the sentence which is the difference which exceptional circumstances may affect, but the fact that it will be served rather than suspended. It is not likely that such sentences could be described as “disproportionate”. If any are, then they will be reduced on appeal without the need for s277A and its presumption. The reasons for passing s277A of the 2020 Act included a concern that short immediate terms of imprisonment are counter-productive and do not promote rehabilitation, as well as concern about the shortage of prison places.
19. Therefore, the exceptional circumstances, if found, will affect the decision on the form and length of the sentence in the mandatory minimum sentence cases. In the s277A situation, those decisions have already been taken and the relevant exceptional circumstances can only be ones which militate against the suspension of the prison sentence which is the default position. This must limit narrowly the type of factors which might properly be found to be both exceptional and relevant to that decision.

The test: our approach

20. For these reasons, the assistance to be derived from the authorities about “exceptional circumstances” in minimum sentence cases is limited. In place of the test found in those cases, it seems to us that exceptional circumstances in this context may properly be found where the culpability of the offender or the harm caused, intended or foreseen (s63 of the Sentencing Act), or both, were exceptionally high. An exceptional circumstance may also arise where the particular nature of the offence requires sentencing to be deterrent to a degree which is exceptional. This will be quite a limited class of case. There may be other factors which apply in other cases. The exercise of weighing those has been described in *Nancarrow* at [19(4)] at [17] above as requiring

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a “holistic” approach, which only means, we think, that all relevant factors must be taken into account to determine whether the case involves “exceptional circumstances”.

21. Does this mean “exceptionally high for the offence charged” or does it just mean “exceptionally high”. If it is the former then the level of harm in a case of causing death by careless driving is not exceptionally high because it is an element of all such offences. If it is the latter, then the court may be tempted to say that all offences involving causing death result in exceptionally high harm and therefore involve “exceptional circumstances”. The words “relate to the offence (or the combination of the offence and one or more offences associated with it) or the offender” do not answer this question, because the harm caused by an offence certainly does “relate to” the offence. “Relate[s] to the offence” does not in terms mean that to be exceptional a circumstance cannot be an element of the offence, and therefore common to all such offences. It is notable that, as HHJ Burgess KC perceptively observed in McClements, Parliament did not include a list of offences to which the presumption does not apply, and it therefore applies to all offences. Does this mean that Parliament has decided that the fact that an offender caused death by careless driving is to be disregarded entirely when deciding whether to suspend a sentence, because it is not an exceptional circumstance? It would be surprising if the fact that death was caused was entirely irrelevant to any aspect of the sentencing process. In our judgment, the fact of death in a case of causing death by careless driving is not irrelevant when considering whether the case involves exceptional circumstances, but it will not be decisive if it is the only factor which could be so described. When looking at the case “holistically” it is a factor to which the court will have regard in conjunction with other relevant circumstances. This is the approach we have taken in the three appeals. In Hodge and Carter, where death was caused, there were no such other circumstances and we have quashed the judges’ findings that there were exceptional circumstances. In Potgieter we have considered the very serious harm caused to the two victims who were physically injured, together with other relevant circumstances and upheld the judge’s finding on that subject.
22. In all cases the court will consider not only harm but also culpability. Is this offender “exceptionally” deserving of punishment? Culpability and harm will frequently have been addressed when applying an offence specific guideline, when deciding that a custodial sentence was required and in determining its length. They must be further considered at the stage when the decision about exceptional circumstances is made under s277A of the SA 2020. To continue the analysis by reference to an offence involving the highest level of harm, an offence of causing death, the culpability of the offender will be part of a “holistic” analysis of the exceptional circumstances test.
23. As part of the same holistic analysis the court must consider the purposes of sentencing and whether any of those purposes, are exceptionally served by an immediate rather than a suspended sentence. These are identified in s57 of the Sentencing Act 2020:-

57 Purposes of sentencing: adults

(1) This section applies where—

- (a) a court is dealing with an offender for an offence, and
- (b) the offender is aged 18 or over when convicted.

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(2)The court must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public (including victims of crime),
and
- (e) the making of reparation by offenders to persons affected by their offences.

- 24. The purpose which is most likely to be relevant under s277A is that in s57(2)(b), the reduction of crime by deterrence. The question here is whether the conduct of the offender which constituted the offence is of a kind in which there is an exceptional public interest in deterring.
- 25. We do not rule out the possibility that apart from culpability, harm and deterrence there may be other relevant considerations, but we would suggest that these are likely to be the most commonly occurring ones.
- 26. The court is then required to consider whether the exceptional circumstances it has identified “justify not making the order”. If the exceptional circumstances question is approached in the way we have described, it is likely that any irrelevant but exceptional circumstances will have been ignored and this question will be answered by reference to the same material.
- 27. We emphasise that in all decisions of this kind the court must be scrupulous to identify factors which truly render the case “exceptional” for the purposes of s277A, and must explain what they are. [19(3)] of *Nancarrow* can be transposed to the present context: “it is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional”. As the court said in *Morgan* at [52] and [55], quoted at [11], [13] and [14] above, Parliament has chosen a strong phrase in “exceptional circumstances” with the result that “short prison sentences should almost always be suspended”.
- 28. The Imposition Guideline originally suggested that having decided that the presumption in s277A does not apply because there are exceptional circumstances which justify imposing an immediate custodial sentence, the sentencer should then go on to decide whether to suspend the sentence anyway, by reference to the Guideline Table at [29] below, “the Guideline Table”. In *Morgan* at [40] the court doubted this:

“40.if a finding is made of exceptional circumstances under section 277A(2), the court will almost invariably impose an immediate sentence, and it is not obvious that the statute requires a further step, where the court, having decided that there were exceptional circumstances which justify an immediate custodial sentence, would go on to consider separately and by reference to

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the table in the guideline whether an immediate sentence was "appropriate". The table and a consideration of appropriateness remains highly relevant in circumstances where suspension is a matter of unfettered discretion. It is hard to see why it is relevant in circumstances where that discretion is fettered in the way Parliament has provided in section 277A(1) and (2)."

29. Since the decision in *Morgan* and the sentencing in these cases, the Sentencing Council has revised the Imposition Guideline, which now reads as follows:-

If the shortest term commensurate with the seriousness of the offending is 12 months or less, the court must suspend the sentence under the statutory presumption of suspension, unless any of the following apply:

- The offender is in custody (whether serving a sentence, on remand for another offence, or detained under a hospital order)
- The offender is being resentenced for breaching a community or suspended sentence order
- The offence was committed while the offender was subject to a community or suspended sentence order
- Committing the offence, or an associated offence, was a breach of a court order or was closely connected with a breach of a court order (whether or not that breach was a criminal offence)
- There is significant risk of physical or psychological harm to an individual

If none of the of the exemptions to the presumption to suspend apply but the court finds exceptional circumstances that relate to the offence or the offender which justify not suspending the sentence, the court should impose an immediate custodial sentence.

If any of the exemptions to the presumption to suspend apply OR if the shortest term commensurate with the seriousness of the offending is more than 12 months and no more than 3 years, the court should consider whether it is appropriate to suspend that sentence using the table below:

Factors indicating that it <u>may</u> be appropriate to	Factors indicating that it <u>may not</u> be appropriate to
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suspend a custodial sentence	suspend a custodial sentence
• Realistic prospect of rehabilitation in the community • Offender does not present high risk of reoffending or harm • Strong personal mitigation • Immediate custody will result in significant harmful impact upon others, including any dependent children or where the offender is pregnant or postnatal (has given birth in the previous 12 months)	• Offender presents a risk to any person • The seriousness of the offence means that appropriate punishment can only be achieved by immediate custody • History of poor compliance with court orders AND unlikely to comply in the future

30. Having stated these principles, we now turn to apply them to the present cases.

FIONA HODGE

31. On 9 June 2024 at about 5.30pm, the appellant, accompanied by two passengers, was driving her car, a red Citroen C1, north on Brunel Way, Bristol towards a flyover which took the road over the River Avon. At the same time Donna Crossman, the deceased, and two of her friends were walking south on the west footway of the flyover, towards the direction from which the appellant's car was approaching.
32. The occupants of a car following the appellant as she drove towards the flyover saw her car weave in and out of a bus lane and put on its left indicator lights although there was

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no imminent road coming up on the left. Just over a minute, or some 0.7 miles later, as the road began to curve gently to the right, the appellant's car carried straight on, mounted the pavement and, narrowly missing her two friends, struck the deceased before coming to a halt after hitting railings at the side of the flyover. The deceased was thrown into the air over the railings, falling many yards below on to the concrete surface of a skate park. The deceased died from the injuries she suffered from the impact.

33. The appellant's car was examined and no faults or defects were found that would have caused or contributed to the collision, prior to which it had been in good order and well-maintained. Analysis of the appellant's blood showed she had no alcohol or drugs in her system.
34. At trial, the appellant pleaded not guilty and called expert neurological evidence. Her defence, rejected by the jury, was that she had suffered a complex partial seizure from a previously undiagnosed form of epilepsy.
35. There were harrowing victim personal statements before the Crown Court from Annette Price, Steve Price, Darren Crossman, Helen James, Alison David, Angela Gasson and Clare Smith. These set out in clear terms the irreparable loss which the death of Donna Crossman has caused to those who loved her.
36. The judge rejected the suggestion made on behalf of the appellant that it was a mitigating feature that she would have pleaded guilty but for the neurological evidence called in support of her defence of insanity. He said that, the jury having concluded that the cause of death was her carelessness, the appellant had forfeited any credit she would otherwise have had for entering a plea of guilty. The judge said that he had a very clear picture of the appellant and her personality and that he had concluded, under s30(2) of the Sentencing Code that it was unnecessary to obtain a pre-sentence report. The judge said that he was satisfied to the criminal standard of proof that the appellant was driving when she was tired and that in his view, the jury's decision was "what in ordinary language would be called nodding off at the wheel". The appellant had driven when she had had inadequate rest. She had been seen weaving into the bus lane and should have pulled over earlier or taken precautions to ensure she was alert enough to drive. In the judge's view this was not a momentary loss of concentration. Culpability was at level B on the Sentencing Council guideline with a starting point to 12 months' imprisonment. The aggravating feature was that the deceased was a vulnerable pedestrian who had no protection from a vehicle coming over the kerb onto the pavement.
37. The judge said that the appellant's mitigation consisted of her long and impressive good character, her lack of previous convictions and clean driving record. A significant feature was the sorrow she had expressed. He had taken account of character references and her age, health, the impact of the arrival of her grandchildren and of having this offence on her conscience. He added that he did not consider that the delays in the case provided any reason to mitigate sentence.
38. The judge said that the aggravating and mitigating features balanced each other out and that sentence was 12 months' imprisonment. He accepted that there was not a high risk of reoffending but said appropriate punishment could not be achieved otherwise than

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by a prison sentence which was inevitable for causing a fatality in circumstances such as these and was undoubtedly proportionate.

39. With regard to whether the sentence might be suspended, the judge said that,
- “The circumstances of this offence are sufficiently exceptional to justify not suspending the sentence, despite the new statutory presumption in favour of suspending sentences of 12 months or less in s277A(2) of the Sentencing Act.”
40. The appellant’s driving licence was endorsed and she was disqualified for driving for 2 years which period was extended by 6 months pursuant to s35A RTOA 1988. The judge further ordered that she be disqualified until passing a test of competence to drive pursuant to s36(4) RTOA 1988. The judge stated that such test “is not an extended retest, it is simply a test of competence to drive”. The appellant was ordered to pay £3,600 towards the prosecution costs.

Discussion

41. With great respect to the very experienced judge who passed this sentence, we are unable to agree that there are exceptional circumstances here which justify the imposition of an immediate custodial sentence. We do, however, agree with the way in which he arrived at a sentence of 12 months’ imprisonment. We reject the suggestion that a person convicted after a trial should receive some form of credit for a plea they never entered.
42. As we have said above, and as we shall repeat when dealing with the case of Jason Carter below, the fact that a single offence caused a death is not irrelevant but cannot, on its own, be decisive. Death is an element of the offence and yet the seriousness of the offence is at a level where a sentence of 12 months was imposed.
43. Here there are no exceptional circumstances militating in favour of an immediate custodial sentence. The judge did not actually identify any, although he clearly had the new provision well in mind and sought to apply it faithfully. We explain the difference in outcome between this case, and that of Jason Carter, on the one hand and that of Morne Potgieter on the other below at [72] when dealing with the case of Carter.
44. For these reasons, we allow this appeal and the 12 months sentence imposed by the judge will be suspended for 2 years without any requirements, having regard to the time spent between the sentence and appeal in prison. Had that not happened, we would have considered the imposition of significant punitive requirements in the suspended sentence order. The disqualification is reduced by the removal of the 6 months uplift to 2 years, and until she passes an extended driving test. The costs order made the judge shall stand.

JASON CARTER

45. On 25 March 2026, in the Crown Court at Shrewsbury, before His Honour Judge Trevor Meegan, the appellant pleaded guilty to causing death by careless driving (contrary to s2B Road Traffic Act 1988). Count 1 (causing death by dangerous driving) was dismissed following a successful application by the defence. The provisions of s277A of the Sentencing Act 2020 were in force and applied to this case.

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46. On 12 June 2026, before the same Court and Judge, the appellant was sentenced to 13 months imprisonment and disqualified from driving for a period of 5 years 6 ½ months, comprised of a disqualification period of 5 years and an extension period of 6 ½ months. An extended retest was ordered.
47. It is necessary to set out the history of the proceedings in a little detail because it is submitted on behalf of the appellant that the judge's ruling on the application to dismiss count 1 involved findings about the evidence which were inconsistent in some respects with the factual basis on which he later sentenced for count 2. There is some force in this submission, and we must explain why.

The facts of the offence

48. Just before 2pm on 31 October 2023, Barry Russell, who was aged 77, was driving his Nissan Micra from Shrewsbury. The appellant was driving north on the other side of the road from the Kidderminster area in a Seat Ibiza, which was a courtesy car. The road was a single carriageway, with a national speed limit at the location. What occurred was not recorded on CCTV or dashcam, but there were two witnesses who saw the precise mechanics of the collision. One of those motorists was Adrian Sumner. He was following Mr Russell's Nissan, heading south. He said that this vehicle had been keeping within the various speed limits. Mr Sumner followed it for about 5 minutes, and he was about 30 metres away. He said that Mr Russell was driving in a normal and safe manner. As they approached a corner Mr Sumner said that Mr Russell was on the correct side of the road, and then the next thing he knew was two cars lifting up a couple of feet, followed an explosion of metal and plastic.
49. Paul Beeman was the other eyewitness. He was following the appellant's Seat, driving northwards. He noted that the appellant's car was being driven at about 40 miles an hour. He was not surprised at this because it was a dangerous section of the road because deer often enter the road at this point. He said he had thought that the appellant was being a little bit hesitant at that point. He noted that the Seat then began to increase in speed, reaching about 55 miles an hour. Mr Beeman then saw the Seat twice swerve across into the other carriageway. He described the manoeuvres as quite sharp, rather than a gradual drift. On both occasions, the appellant had corrected himself and driven back into his carriageway. Mr Beeman said that he thought the driver had gone to sleep. Having seen the appellant veer twice into the wrong side of the road, Mr Beeman thought that something was wrong and he slowed down, dropping back and away from the appellant's vehicle. As he approached the bend, Mr Beeman saw the appellant's car cross the road and enter the opposing lane right into the path of the deceased's vehicle.
50. After seeing the collision, both Mr Sumner and Mr Beeman approached the scene and went to help. The emergency services did not arrive for about 15 minutes or so. Other motorists stopped and did what they could. They noted that both the deceased and the appellant were unconscious. After the paramedics arrived, paramedics noted that Mr Russell had sustained very significant injuries and he was airlifted to hospital. The appellant was airlifted to hospital a little later. When the deceased was admitted to the hospital, it was recognised that he had suffered a constellation of serious and complex issues. He underwent surgery. He was admitted to the Intensive Care Unit, but on 19th November 2023, treatment was withdrawn, and he died.

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51. A forensic collision investigator examined the scene of the collision. He identified features of damage in the road, particularly a gouge mark about two metres away from the road centre, which he identified as the point of collision. Very significant damage had been caused to both vehicles. He concluded that the appellant's Seat had been entirely in the incorrect traffic lane. Mr Russell had been driving within the speed limit in his own lane. The investigator concluded that the appellant's car could only have been in the deceased's lane for a very short period of time, and therefore Mr Russell had been left with little or no time to react to the oncoming vehicle.
52. The investigator was of the view that there must have been some steering input from the appellant to complete the manoeuvre, as a lack of driver input would have resulted in the Seat proceeding straight. In his first report, he said, "It is not possible to establish what caused the driver of the Seat to enter the opposing lane and into the path of the Nissan. Conceivably, the manoeuvre could be as a result of a distraction within the vehicle, that the driver was afflicted in some way through impairment, or that it was a deliberate act". Blood samples taken from the appellant showed that he had no alcohol or illicit drugs in his system. It was not possible to download the appellant's phone because it had been damaged in the collision. In a further report, the investigator said that the appellant could have fallen asleep at the wheel. A joint expert report ruled out mechanical defect, environmental or road conditions.
53. The appellant was interviewed by the police 6 months after the incident, in April 2024. He provided a prepared statement in which he said he did not know how the collision occurred. He worked as a nurse, and as part of that role, he drove in his employment. His usual vehicle was being repaired, and he had been given the courtesy vehicle, which he had some experience of earlier in the month. He set out the very serious injuries that he had suffered as a result of the collision. He said he had not been tired that afternoon. He had been on his way from Kidderminster to Shrewsbury. He said he had not been distracted. His phone had been plugged into the car system. He said he ultimately could not remember the incident and could not account for the description of his driving. He did say that he was devastated to learn that the deceased had died.

The judge's ruling on the dismissal application in relation to causing death by dangerous driving

54. The audio recording of this ruling cannot be traced and we have no transcript of it. Counsel have provided us with a Note. This was prepared by Ms Henney a solicitor from Messrs. Keoghs who attended upon Mr Bridge at the dismissal hearing. It is agreed as a reasonably accurate document from which to work. Our aim is to identify the substance of the findings which the judge made about what the prosecution case, taken at its highest, was capable of proving. The evidence on which sentence was passed was the same, because there was no trial or trial of issue in relation to count 2.

JUDGE'S RULING

This is the defendant's application – on Count 1 on the indictment – death by dangerous driving – para. 2(2).

The application addresses the question of: -

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If it appears that the evidence is not sufficient for the D to be convicted by a jury so they are sure, then the case should be dismissed on the basis of Count 1.

I have received arguments in writing and orally from both Counsel.

No Case To Answer – Taking the P evidence at its highest – could a jury convict safely?

General matters for the jury.

Dangerous driving – s2(a) – the driving falls far below the standard of driving of a careful and competent driver, and it is obvious to that driver that his driving would be dangerous.

This is a high threshold to meet – the phrase far below – we must not dilute it.

Focus of this dismissal is whether the P have met that standard.

Key issue - Is there sufficient evidence to put in front of a jury on a combination of the facts.

Question is not whether the D will be convicted.

Defence submit – D accepts crossed into the opposing lane.

No identified medical cause – cardio and neuro investigations have taken place.

The agreement between the experts – they cannot exclude a medical episode or momentary attention lapse.

There is a short crossing into the opposing lane.

No basis that jury could conclude that driving falls well below the standard.

Defence cite the cases of Dunne and Sacoolas – charging standards – prolonged wrong side driving does not constitute dangerous driving.

P say – D was wholly on the wrong side of the road. BEAMAN states there were two earlier swerves into the opposing lane. Must be due to sleep – dangerous distraction – deliberate action. Therefore, the driving falls far below the standard.

I must ask myself whether the evidence is such that a jury can safely convict D.

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Threshold is deliberately stringent. Even though there are tragic outcomes, the Court must not lower the standard for dangerous driving.

Undisputed features – no speeding, no intoxication, no defects on the vehicle, no evidence of distraction, long clean driving record, experts – several explanations as to a cause.

Momentary inattention – this is a classic feature of careless driving.

Obviousness – it would have been obvious for a careful and competent driver that the driving was dangerous.

There is no evidence of a conscious or reckless act.

There is a lawful driving speed throughout by D.

Defence analysis – lane incursions – cannot let the jury draw an inference on the circumstances of the driving.

The Court cannot simply infer from mere facts – that the driving was dangerous.

P rely heavily on Beaman's evidence and his account of the swerves.

These swerves are not prolonged – they are consistent with momentary distraction – not deliberate manoeuvres.

The evidence does not exclude a non-dangerous.....

Automatism has clearly been investigated. There is no evidence of illness at the time of the collision.

In the absence of evidence of dangerousness.

A death has occurred and it is always difficult for the Court. It is a human reaction with the death of a loved one that those affected look for culpability.

I have to apply the law, however.

There is no evidence of prolonged or deliberate swerving.

Witness evidence provides there are brief moments of deviation.

There is no evidence of risk taking.

My ruling is that the evidence is such that it is not capable of proving an offence of dangerous driving where a jury could properly convict the D.

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The basis of sentencing

55. The judge began by recording the immense loss suffered by those who loved Mr Russell and, in particular, his wife. There was powerful evidence about this put before him.
56. The judge then made his finding about culpability and harm for the purposes of the guideline for offences of causing death by careless driving. He said:-

“I assess the culpability as category A. Although the case does not cross the threshold into dangerous driving, as I found at an earlier hearing, the standard of driving, in my judgment, fell just below that threshold. Before the fatal collision, your vehicle had already twice swerved into the opposing carriageway. Mr Ewell, PC Ewell, was of the view that there was some deliberate manoeuvre, i.e. some steering input from you. And despite those earlier incursions into the wrong side of the road, your driving continued until just before the fatal head-on collision, you crossed fully into the path of Mr Russell's vehicle. I am satisfied that there is no suggestion and there is no evidence of impairment through alcohol or drugs, and I am satisfied on the evidence before me that there is no evidence of mechanical failure on the part of the courtesy car. It is those features which place the offending in the highest level of culpability for this offence. The harm could not be more serious. A wholly innocent man lost his life, and the effects upon his family, as I have gone through, have been devastating and irreversible.

The applicable guideline starting points, therefore, is two years imprisonment, with a category range of one to four years. I do not find any aggravating factors.”

57. The judge then addressed the mitigation, which was substantial. There were no convictions of any kind recorded against the appellant who was 55 years old. The judge said:-

“You have led a hard-working and constructive life. The references provided from those who know you best speak consistently of a kind, a caring, and a dependable man. I note in particular your long service within the National Health Service caring for others, and also your supportive role within your family, and the high regard in which you are held by friends, former colleagues, and indeed relatives. I also take into account the profound impact this offence has had on you personally, and the material before me demonstrates that you have experienced significant emotional and psychological consequences since the collision, and that you continue to suffer ongoing mental and physical health difficulties. You have been described by those referees, as deeply distressed, remorseful, and burdened by the tragic loss caused, burdened by guilt, and that is also a theme in the pre-sentence report. And I do accept that not only is there remorse, but the remorse from you is genuine, and it is something that you

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will carry with you, Mr Carter, for the rest of your life. You suffered significant injuries in this collision, including injuries to your chest, your pelvis, and internal organs. You have had symptoms consistent with post-traumatic stress disorder, nightmares, flashbacks, and even periods of suicidal ideation following the incident. Your guilty plea, although delayed, has ultimately spared the Russell family the ordeal of a trial, and not knowing what the outcome and what the verdict of that trial will be. You have surrendered your driving licence on health grounds, and there is no indication you intend to drive in the future. And the pre-sentence report assesses you as posing a low risk of reoffending, and I endorse that, and I agree with that. So there is significant mitigation, as I have taken care to outline, and standing back, as any sentencing judge must do, and taking all matters into account in the round, that reduces the sentence to twenty months imprisonment.

Credit. I am satisfied that your plea, although not entered right at the start at the first opportunity, did follow extensive medical investigation and expert consideration in this case, and that was directed to whether there was an underlying medical explanation for your driving, and directed to your asserted lack of recollection of events. Applying the credit guidelines as I do, I am satisfied that you should be given full credit of one-third for your guilty plea, and that reduces the sentence to thirteen months' imprisonment."

58. In reaching his finding about credit for the plea, the judge had in mind the guideline which says:-

F. Exceptions

F1. Further information, assistance or advice necessary before indicating plea

Where the sentencing 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, a reduction of one-third should still be made.

In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.

59. The appellant's case was that he delayed his plea to count 2 while medical investigations were undertaken to determine whether he had suffered any medical event, such as vasovagal syncope, which might explain how this collision had occurred without carelessness on his part. When those enquiries failed to reveal any medical

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explanation, he accepted it must have been the result of carelessness on his part. He himself says that he has no recollection of what caused the accident.

The Grounds of Appeal

60. In his Grounds, Mr Bridge relies on the judge's findings in the dismissal ruling that this was a case where momentary inattention could not be excluded as the cause of the collision. He therefore says that the case should not have been placed within culpability category A and that, if it was within that category, the level of culpability proved was such that the starting point should have been reduced within the range. Further, he says that the impact of delay in this case on the appellant was substantial and should have led to a reduction. As it was, the judge did not address this factor. The period of time on which reliance is particularly placed is between 19 September 2024 (when the notice of charge was sent to him alleging causing death by dangerous driving) and March 2026 (when that charge was dismissed because of a lack of evidence). Throughout most of that time the appellant was at risk of conviction for a much more serious offence which would result in a very substantial prison sentence. The effect of that burden on the appellant was a matter to which some regard should have been given.

The guideline culpability factors

61. The guideline has three levels of culpability. Harm is always, at least where there is a single offence involving one victim, at the highest level.

A

Standard of driving was just below threshold for dangerous driving and/or includes extreme example of a culpability B factor

Starting point 2 years, range 1-4 years**B**

- Unsafe manoeuvre or positioning
- Engaging in a brief but avoidable distraction
- Driving at a speed that is inappropriate for the prevailing road or weather conditions
- Driving impaired by consumption of alcohol and/or drugs (see step 5 on totality where this is the subject of a separate charge)
- Driving vehicle which is unsafe or where driver's visibility or controls are obstructed
- Driving impaired as a result of a known medical condition and/or in disregard of advice relating to the effects of medical condition or medication
- Driving when deprived of adequate sleep or rest
- The offender's culpability falls between the factors as described in culpability A and C

Starting point 1 year, range 26 weeks-3 years**C**

- Standard of driving was just over threshold for careless driving
- Momentary lapse of concentration

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Starting point 26 weeks, range Medium level community order – 1 year's custody**Discussion**

62. In general, it seems to us that cases where the “standard of driving was just below threshold for dangerous driving” will be cases where it is a matter for the jury to decide whether the standard of driving is below or above that threshold. We do not set out this proposition as a matter of law. We are not here considering an appeal against the ruling the judge made on the dismissal application.
63. This factor has caused us to look with care at the evidence and the judge’s approach to it. The Note of the Ruling suggests that the judge used the phrases “momentary attention lapse” “momentary inattention” and “momentary distraction”. On each occasion he was drawing attention to the inability of the prosecution to disprove these things as causes of the collision and the two earlier incursions into the opposite lane observed by Mr Beaman. These events appear to have occurred over a fairly short period of time. It does not seem to us that the judge’s view of the seriousness of the driving was consistent as between the ruling on dismissal and the sentencing remarks. The sentencing remarks do not say why he dismissed the case on count 1 if the driving was “just below” the threshold for dangerous driving. He seems to have made no such finding on that earlier occasion. It also seems to us that it was necessary to engage with the category B factors, which are intended as indicators of the level of culpability of an incident of careless driving. The judge did not find, either in June or March 2026, that there was evidence that the appellant had driven while tired so that he was falling asleep. If he had, this would have been a category B factor. Obviously, the driving did involve an “unsafe manoeuvre or positioning”, which is another category B factor, because he was driving on the wrong side of the road. However, by that standard all such cases would involve that factor since all cases of causing death by careless driving must have involved doing something which was unsafe. In our judgment this factor is intended to describe conduct where the offender deliberately decided to undertake an unsafe manoeuvre or positioning, as a result of which death occurred.
64. A “momentary lapse of concentration” is a category C factor. The judge did not explain the apparent shift in his view between March and June on this question.
65. We consider that the judge was wrong in March to accept, to the extent that he did, that the jury would have been bound to find that this was, or may have been, a case of “momentary lapse of concentration”. We acknowledge the limits of the Note of that Ruling but it does seem fairly clear that the judge did feel that this could not be excluded to the criminal standard as the cause of the driving. The fact that the vehicle adopted an unsafe course onto the wrong side of the road on three occasions means that this is not an apt description of it.
66. In our judgment, the course of driving was not “just over threshold for careless driving”. Driving along the wrong side of the road at a substantial, although not illegal, speed is not mere inattention. That does not mean that the decision to dismiss count 1 was wrong, but it does mean that it would have been wrong to place the case in Category C for culpability at sentence. We are not bound by the judge’s findings in that first ruling when it comes to determining the basis for sentence.

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67. Sleep or brief but avoidable distraction seem much more likely causes of a catastrophic outcome such as this. Something significant clearly affected the appellant's concentration for more than a "moment". Those are category B factors, and on the facts of this case, they are not "extreme examples" of them. A proper classification of this case would be in category B. We infer from the circumstances, so that we are sure, that this calamity must have been caused by a category B factor, even if it is not possible to say precisely what it was. It is not, however, right to say that this driving fell just short of the threshold for dangerous driving.
68. A category B sentence involves a starting point of 12 months, but might rise as high as 3 years. In our judgment, an increase in the starting point was warranted because this driving involved a failure to achieve a crucial and principal aim of all drivers, namely to keep on the right side of the road and avoid head on collisions with traffic travelling lawfully in the opposite direction. For such a thing to happen, something serious has gone wrong. It speaks for itself.
69. We would therefore increase the sentence within the range to 15 months before balancing the aggravating and mitigating factors. The judge was right to say that there were no additional aggravating factors and that there was substantial mitigation. This brings the sentence to 12 months from which 3 months is deducted giving appropriate credit for the plea of guilty. If we were making no other adjustment to the sentence, we would not interfere with the judge's decision to allow full credit for the plea. However, we have noted above that the charge was communicated to the appellant in September 2024, and he did not plead guilty until March 2026. A discount of 25% was quite generous enough in those circumstances. No doubt there was much to do, but that was a very long time in which to do it. The judge's sentence of 13 months is therefore quashed and we substitute a sentence of 9 months for it.
70. Such a reduction might be regarded as "tinkering", but we reject that charge. Parliament has decided that the decision on length of sentence where the outcome will be in the region of 12 months is a critical watershed in the final outcome. It is vital that decisions to impose sentences just above 12 months are subjected to careful scrutiny both by the sentencing judge and on appeal thereafter. This is not because the result involves a sentence of a few weeks longer than it should have been, but because it deprives the person being sentenced of the statutory protection of s277A of the Sentencing Act 2020. This court would be failing in its duty to ensure that the law passed by Parliament is applied if it dismissed appeals in circumstances such as this because the reduction to the length of the sentence is modest.
71. As we have explained above, the fact that a case involved a death cannot amount to "exceptional circumstance" on its own for the purposes of s277A. We refer again to the passages from *Morgan* from paragraphs [48] and [52] cited above at [13]-[14].
72. In this case, there are no circumstances which are exceptional. It is a more than usually serious Category B case of causing death by careless driving for the reasons we have given. The death of Mr Russell was its tragic consequence. He was entirely blameless in the collision which caused his death. However, in contrast to the case of Mr Potgieter, there was only one offence because there was a single victim and there were no additional offences significantly aggravating the position. This appellant had an entirely clean driving record. This appellant's blameworthiness was at a wholly different level from that of Mr Potgieter. The fact that no-one died in that case does

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not lessen his blameworthiness because it was only by fortune that it happened. He did everything necessary to cause multiple deaths if things had turned out differently.

73. We are therefore required to suspend the sentence following s277A of the 2020 Act.
74. The 5 year disqualification period therefore no longer requires an extension period under s35A of the Road Traffic Offenders Act 1988 and that 6½ month extension is also quashed.
75. Finally, the appellant also appeals against the five year discretionary disqualification. This offence carries a mandatory disqualification of at least 12 months. There is a guideline about disqualification, to which the judge did not refer, which sets out these principles:-

Principles

15. When setting the length of a disqualification the court must have regard to the purposes of sentencing in section 57 of the Sentencing Code, which include: the punishment of offenders, the protection of the public, the reduction of crime, and the reform and rehabilitation of offenders.

16. Sentencers should consider the following questions, when considering the length of a disqualification over and above any applicable minimum and any period spent in custody:

- How bad was any driving concerned in the present offence?
- Does the offender have a history of poor driving, driving unlicensed, or breaching disqualifications?
- Will the public be at risk of harm from the offender's driving in future?
- Will the disqualification period provide a sufficient deterrent to the offender, helping to ensure their future driving is of an acceptable standard?
- How will the disqualification affect the offender's prospects for rehabilitation (with particular regard to employment, training, and family responsibilities)?
- What will the impact be on third parties (including children and dependent family members) for the duration of the disqualification?
- What is the aggregate period that the offender will be prevented from driving, bearing in mind any period spent in custody?

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- Standing back, is the disqualification fair and proportionate, considering the culpability of the offender and the harm done?

17. Sentencers should consider how a disqualification interacts with other parts of an offender's sentence. For example, where an offender is serving a community sentence or paying a fine, a longer disqualification may form a greater element of the punitive element of the sentence. Where an offender will spend a long time in custody the disqualification period after release may represent a continued means of public protection, potentially even after the custodial sentence (including the licence period) has been served. However, the court will need to consider all the circumstances of the offender and the offence before it.

18. Sentencers must explain the reasons for the duration of the disqualification period.

76. The appellant had voluntarily surrendered his driving licence while medical examinations were ongoing, and has now retired from the NHS. However, he may wish or need to drive again in the future. He submits that there was no need for a long disqualification period either for punitive reasons or for public protection reasons. He has been genuinely remorseful and has behaved responsibly throughout the proceedings.
77. We agree. The judge did not explain his reasons for imposing a five year disqualification and it was not justified. We quash it and substitute in its place a disqualification for 2 years. This is longer than the minimum required because the unexplained but very serious error of judgment while driving remains concerning and in our judgment a longer period than 12 months is required for public protection. No medical reason rendering the appellant unfit to drive has yet been found and he was sentenced on the basis that no such reason exists, but we remain concerned about that. A period of 2 years should allow any underlying medical condition to manifest itself more clearly, and, if it does not, this should reduce any fears about the appellant's fitness. This is not a judgment about punishment but about risk to the public.

MORNE POTGIETER

78. On 24th April 2026 the appellant, then aged 41, pleaded guilty to 4 charges before the St. Albans Magistrates' Court and was committed for sentence pursuant to s.14 Sentencing Act 2020 in respect of charges 5 and 6 and pursuant to s.20 Sentencing Act 2020 in respect of charges 1 and 4.
79. On 11th June 2026, in the Crown Court at St Albans (Mr Recorder Claxton), the appellant (then aged 42) was sentenced as follows:

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	Offence	Sentence	Consecutive or Concurrent	Maximum
1	Driving motor vehicle when alcohol level above limit, contrary to s 5 (1) (a) Road Traffic Act 1988	2 months	Concurrent	6 months
4	Drive motor vehicle with a proportion of a specified controlled drug above the specified limit contrary to s5A (1) (a) and (2) Road Traffic Act 1988	2 months	Concurrent	6 months
5	Cause serious injury by careless / inconsiderate driving contrary to s2C Road Traffic Act 1988	6 months	Concurrent	2 years
6	Cause serious injury by careless / inconsiderate driving contrary to s2C Road Traffic Act 1988	12 months		2 years
Total Sentence: 12 months				
Statutory Victim Surcharge £228. This should have been £187 and we direct that the Crown Court record be corrected accordingly.				
Disqualified from driving for 35 months and until extended test passed.				

80. At approximately 3.24 pm on 26 September 2025 the victim of charge 5 was driving her Kia Sportage motor vehicle along Hare Street Road in Buntingford. She will be called V5 in this judgment. Her two sons, aged 5 and 2, were both in the vehicle. The elder son is the victim of charge 6, he will be called V6 in this judgment. There is an order preventing the child victim being named and neither of the children will be named in this judgment.
81. The appellant lost control of his Porsche SUV and was seen to weave from left to right across the entire width of Hare Street Road and collide both with the Kia carrying the victims and a Vauxhall Movano belonging to Gary Burt, which was behind the Kia. V5 saw the appellant's vehicle travelling at speed towards her moments before the collision. The impact caused the Kia to leave the roadway and to come to a rest in a field. The speed limit on that road was 60 miles per hour. At the time of the collision the weather was slightly overcast, there was daylight and the road surface was dry. The appellant had a passenger in his vehicle at the time. Members of the public stopped to help before the emergency services arrived. Ms Cockerton, a paediatric nurse, described observing a puncture wound to V6's chest, but did not tell his mother how critical that injury could be and how quickly it could have become life-threatening. Both V5 and V6 were treated at the scene and conveyed to Addenbrooke's Hospital. Mr Burt was not seriously injured and therefore did not require hospital treatment. At 4.34 pm the appellant was breath tested at the roadside. He was described as visibly intoxicated and he was then conveyed to Lister Hospital where at 6.58 pm a blood

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sample was taken for analysis. The results were received on 17th November 2025. The toxicology report showed that his blood alcohol concentration was 133 milligrams per 100 millilitres; the legal limit is 80 milligrams of alcohol per 100 millilitres of blood. The report also showed that the appellant had 59 micrograms of Benzoylcegonine (a by-product of cocaine) in his blood; the legal limit is 50 micrograms per litre of blood. On 28th November 2025 the appellant attended a voluntary interview at Stevenage Police Station; he gave a detailed account and admitted to having had a significant amount to drink. All three vehicles involved in the collision were examined. The appellant's vehicle was found to have a nearside rear tyre tread worn below 1.6 millimetres on the inner section, a 1.6 millimetre tread depth is the minimum legal requirement for tyres in the UK. The other two vehicles had no defects.

82. As a result of the collision V6 suffered a puncture wound to his chest, four fractured ribs, internal stomach bleeding, concussion and severe headaches, and a blood clot which damaged a nerve in his right eye causing a squint and double vision. He was in extreme pain and fear. At Addenbrooke's Hospital he projectile vomited fresh red blood which was very distressing. Since the collision he has continued to struggle emotionally. He has a fear of loud noises, a fear of the dark and travelling long distances in the car and was also frightened of seeing other vehicles on the road. As a result of the collision V5 suffered three broken ribs, fractures to both her feet, a broken left ankle, kidney trauma, internal bruising and severe headaches. She was also treated at Addenbrooke's Hospital for over a fortnight. During this time she was separated from her young children whilst they were also scared, injured and vulnerable. She was then confined to a wheelchair for several weeks thereafter.
83. The appellant also suffered significant injury. Following the collision, Mr Potgieter was at Lister Hospital from 26 September 2025 to 30 September 2025. He sustained a fracture to his sternum, collapsed right lung, a fracture to a bone in the spine at the level of the lower back and a fracture to his right thigh bone resulting in multiple bony fragments. He had surgery on his thigh bone to align the bone and held in place with nail and three screws on the 27 September 2025. Following this he was discharged to his home address.
84. The appellant had convictions for motoring offences, but no other convictions. He had 3 points on his licence from 1 October 2022 for driving with excess speed. He also had 5 points on his licence from 4 December 2025 for driving without due care and attention on 6 May 2025, when he was also fined. He was also issued with a warning under s59 of the Police Reform Act on the 6 May 2025, which is valid until 6 May 2026. This is issued when a vehicle is used antisocially, giving the driver notice that repeated misuse would lead to vehicle seizure.
85. According to the Pre-Sentence Report the appellant took a decision to drive when he felt intoxicated although he believed he was under the limit for driving. He said he had taken cocaine 2 days before the incident, but not on the day when it happened. He had taken, as far as he recalled, 4 drinks of whisky and soda which were poured freely from a bottle and not limited by any measure as would be the case in a pub. He took this decision a few months after the 6 May when he had been issued with the warning notice and was awaiting the hearing for the careless driving charge which arose on that day.
86. There were victim personal statements from V5 which described the very significant physical injuries sustained by her and her older son, V6, and the serious distress and

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psychological harm she and both of her sons have suffered. All three of them could easily have been killed and the consequences of this terrible accident have been profound and will endure.

87. Following education the appellant worked with his father and described a good work ethic, indicating he currently has his own plumbing and heating business. He did, however, state he has now not worked for the business since the incident in September 2025, due to the injuries he suffered, which has reduced his mobility. Mr Potgieter indicated that he continues to work from home completing mechanics on dirt bikes. He also disclosed that he hopes to secure office-based employment in the near future. His wife is employed and they live in a house which they own subject to a mortgage. They have two sons.
88. The mitigation advanced by Ms Khan on his behalf was comprised of his genuine remorse which was confirmed by his wife. He also had caring responsibilities for his two children, and a good work record. He had himself suffered severe physical injuries and financial loss as a result of the accident and had taken significant steps towards his own reform, including abstaining from alcohol and drugs.
89. The judge identified the facts and the very serious harm caused to V6 and the somewhat less serious harm to V5, and then said this:-

“I come to deal now with the sentencing guidelines which have been agreed in this case in relation to the offences of causing injury by careless driving and as you heard the starting point is one year with a range of 26 weeks to two years for the two matters which are going to be the lead offences. There is the seriousness of the matter in your previous offence of speeding, driving when you were clearly impaired and with a passenger in your vehicle and it turns out that your vehicle was poorly maintained. The offences have clearly passed the custody threshold and I have been asked to deal the matter in the way set out in the pre-sentencing report. Had there been no credit, I would have considered a sentence of 18 months’ imprisonment in the first matter, that’s in relation to Luca. I have considered all matters and I now have to pass a sentence, can you stand up.

In relation to the first matter, as I said, I would have started at a sentence of 18 months’ imprisonment, that’s the offence involving Luca but I’m going to reduce that to 12 months’ imprisonment, taking into account what I’ve heard about you and given you credit. As far as his mother is concerned, had I not had to consider credit, the sentence I would have had in mind is one of 10 months’ imprisonment. I reduce that to six months’ imprisonment.

For the driving matters, and that’s the drug matter, the sentence will be two months’ imprisonment and as far the excess alcohol is concerned, the sentence will be two months’ imprisonment. On those matters there will be no separate disqualification but for the sentence of – on the first matters, the two lead offences,

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I'm informed that the minimum sentence is one of 29 months. I pass - I say that your disqualification period will, in fact, be 35 months. You will have to do an extended test, that's to be taken. And as far as your sentence is concerned, those sentences, in my view, have passed the custody threshold and the sentence must be immediate, so, all the sentences will be concurrent, which means that there's a sentence of 12 months' imprisonment that you will serve immediately. There will be no cost as far as the matters are concerned and the reason why you're disqualified for 35 months is to take into account the period that you must spend in custody. Have I understood right when you said that the sentence – minimum sentence is 29 months?"

90. At that stage, the Recorder made no reference to the possibility that the sentence might be suspended. This was a significant error even before the coming into force of s277A of the Sentencing Code, but a matter of concern afterwards. Although the Imposition guideline has been amended since the sentencing hearing in this case, it did, at the time, clearly point sentencers to the new provision and required them to consider whether the case was before or after the coming into force of the new provision and to deal with the case accordingly. The Recorder does not appear to have looked at that.
91. After the sentence was passed, Ms Khan very properly asked the court to reconvene. This exchange then took place:-

“RECORDER CLAXTON: Thank you. Yes, this matter's been called back on because you would like me to clarify certain matters, is that right?

MS KHAN: Yes your Honour.

RECORDER CLAXTON: Right, can I just make it clear that in passing the sentence I did I considered carefully whether the sentence should be suspended and I took into account the previous good character and the mitigation and I also took into account the fact that the defendant had a previous matter for exceed – excess – speeding. However, when I looked at the offence, and it was extremely serious because the defendant chose to drive having consumed alcohol and was above the prescribed limit as far as the drug that was mentioned was concerned and drove a car with a passenger in and the consideration of those aggravating features displayed a significant disregard for others using the road and I accordingly declined to suspend the sentence that I passed.

MS KHAN: Your Honour is that with consideration to the new -
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RECORDER CLAXTON: And I considered all the mitigation matters, just let me finish, all the mitigation that was put before me and I declined to suspend the sentence. I am fully aware of the matter that you refer to but in this case I decline to suspend

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to sentence. Can I just have you make it clear to me. Under the new regulation matters it is still discretionary on me as to whether I should suspend a sentence, is that right?

MS KHAN: The guidelines say, "The shortest term commensurate with the seriousness of the offending is 12 months or less the court must suspend the sentence under the statutory presumption suspension unless any of the following apply: The offender is in custody; the offender is being resentenced for breaching a community or suspended sentence; the offence was committed while the offender was subject to a community or suspended sentence order; committing the offence or associated offence was a breach of a court order or was closely connected with a breach of a court order; there is significant risk of physical or psychological harm to an individual and exceptional circumstance relate to the offence or the offender which justify not suspending the sentence." So, the new guidelines have a presumption of a sentence of 12 months or less must be suspended unless any of those factors apply.

RECORDER CLAXTON: And you're submitting to me that I must suspend that sentence?

MS KHAN: My submission is that no - none of those factors apply and so I'd ask your Honour to put on record why your Honour is departing from the presumption, if that is the case.

RECORDER CLAXTON: Well, I am not suspending the sentence because of the exceptional seriousness of the offence and the significant injuries that was caused and I thought I'd made that clear earlier and I thought I'd made that clear earlier in the circumstances."

92. By this means the Recorder did eventually explain that he was not suspending the sentence because of the exceptional seriousness of the offence and the level of harm caused. The issue for us is whether it was properly open to him to find exceptional circumstances on that basis.
93. In our judgment it was. The case did have exceptional features which meant that the presumption in favour of suspending the sentences did not apply. The exceptional features arose from all the offences taken together. It would be wrong, when considering whether there were exceptional circumstances, to consider each offence in isolation. The court must look at the whole of the criminal conduct. The two most serious offences were charges 5 and 6, the two cases of causing serious injury by careless or inconsiderate driving. Both of these involved very serious injury. The fact that there were two victims is highly material. The other potential victims included the appellant's passenger, Mr Burt and V5's younger son who also sustained harm. All of these people were put at risk of serious harm or death. It is not necessary to decide whether that in itself would suffice to amount to exceptional circumstances because other factors also have to be considered. The fact that these offences were committed while the appellant was driving over the limit for alcohol and a by-product of cocaine

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is a critical factor. Finally, there is the appellant's driving record which shows that in the summer of 2025, while having three points already on his licence, he committed two separate pieces of careless driving and this one, by far the most serious, occurred while he was awaiting a hearing for the charge relating to the first.

94. The Recorder certainly expressed himself poorly when describing how his sentence of 18 months for the offence in relation to the child victim of Charge 6 resulted in a sentence of 12 months. He said "I'm going to reduce that to 12 months' imprisonment [from 18 months], taking into account what I've heard about you and given you credit." This would suggest that no credit for personal mitigation was in fact given, because the reduction of one third was required simply because of the early pleas. However, the sentencing range for a single offence of this kind extends upwards to 2 years and whatever sentence was required for Charge 6 alone required a substantial uplift to take into account the other offences. Further, the factors which constitute exceptional circumstances at the later stage when deciding whether the sentence must be suspended are also relevant at this prior stage when determining the length of the sentence. Once that approach is taken it would have been proper to arrive at a sentence before plea discount in excess of 18 months, and therefore the final term for all offences taken together did give effective credit for both the significant mitigation available to the appellant and the full credit for the early pleas to which he was entitled.
95. Because of the flaws in the approach of the Recorder we have considered this case afresh ourselves and have concluded that a sentence of imprisonment of 12 months for all offences taken together was not manifestly excessive. The decision that there were exceptional circumstances which justified the imposition of that term as an immediate sentence was, in our judgment, appropriate on the facts of this serious case.

JAMES MCCLEMENTS

96. This is an application by His Majesty's Attorney General for leave to refer a sentence which she regards as unduly lenient. It concerns the sentence passed on 16 June 2026, when the offender was sentenced to 8 months' imprisonment suspended for 12 months with 200 hours of unpaid work for an offence of misconduct in a public office. He had pleaded guilty at the first opportunity. He was also ordered to pay £1,000 in costs and a victim surcharge order was made. The sentencing judge was HHJ Burgess KC sitting at Bristol Crown Court. We give leave.

The facts

97. In 2023 the offender was a serving police officer with Dorset Police. On 30 November 2023 he responded to a call from the victim who reported being assaulted by her ex-partner whilst she held her baby. The offender attended with a colleague. He provided the victim with his personal telephone number and instructed her to contact him when she reached the police station to make a statement. The victim followed this instruction, and later that day provided a witness statement to the offender having called him when she arrived at the police station. He then helped return some items to the victim's ex-partner. Later that day, he messaged the victim saying he would like to spend more time with her. A few weeks later he visited her at home. He complimented her, telling her she was pretty. On the 20 December 2023 he visited again, and this was the first occasion when they had sexual intercourse together. On the 29 December 2023 the offender visited for a third time, and again they engaged in sexual intercourse. Whilst

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the offender was outside on the phone, the victim's ex-partner arrived. After an exchange with the offender, he left. The offender instructed the victim not to make any report to the police, saying he would lose his job because it would reveal he was there when he shouldn't have been. They met on other occasions and engaged in sexual intercourse. Sometime after July, the victim sensed she was being used for sex. In summer 2024 she broke things off with the offender; he said he was heartbroken and asked to stay in contact. In November 2024 he asked to see her. Around this time the victim made disclosures to her counsellor which were reported to the police. The offender was arrested on 15 November 2024. Subsequent analysis of police systems showed the offender had accessed the victim's personal records on several occasions.

98. Some additional factual detail is required as follows:-

- i) The offender used his access to police intelligence contained in the NICHE Police Records Management System as follows:-
 - a) 30 November 2023: at 18:31 hrs he searched the victim's name and then opened her personal account and occurrence enquiry log. The occurrence log related to the initial report of a domestic incident. Later that evening, he again accessed her personal records and linked occurrence enquiry log.
 - b) 1 December 2023: between 17:00 hrs and 00:10 hrs the offender made four separate searches for the victim and accessed associated profiles/records. At 01:24 hrs he accessed the personal record for the victim's ex-partner.
- ii) Four days later, so in the first week of December 2023, the offender visited the victim at home whilst off duty. He gave the victim compliments, telling her she had a pretty face, a lovely smile and a nice body. He added he wanted to see her again, preferably before Christmas.
- iii) Again, he accessed police information as follows:-
 - a) 6 December 2023: at 07:37 hrs the offender searched for the victim and then accessed her records.
 - b) 18 December 2023: at 07:16 hrs the offender searched for the victim and accessed her records.
- iv) The offender visited the victim at home during the afternoon on 20 December 2023. This was the first time they had sexual intercourse together. Having departed her address on 20 December 2023, the offender messaged the victim to say, 'well that was a very nice afternoon xxxx'. It appeared they had discussed her complaints against her ex-partner, because the offender sent another message which read, 'my honest advice is you need to tell Sam about that other stuff though, if you have the strength to do it. But that is all I will say on the matter (so long as you don't want to discuss it with me anymore!)'. For context, 'Sam' was the name of the OIC for the victim's ongoing case.

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- v) There was then a further access to police information by the offender. On 27 December 2023: at 12:55 hrs he searched for the victim's ex-partner. He opened the personal record, and the occurrence enquiry log. This log contained a report of the bail breaches.
- vi) On 29 December 2023 the offender once again visited the victim at home, and they engaged in sexual intercourse. He visited in the evening, apparently to avoid being seen attending her address. He planned to stay the night. During the evening, he received a call and went outside to his car. Whilst the offender was outside, someone knocked at the victim's front door. She thought it was the offender returning. When she opened the door, she found it was her ex-partner who was on bail with conditions not to contact her. He tried to push past her and enter the address. The offender then returned. There was an exchange between the two men. The victim's ex-partner said something along the lines of, "this is my partner you need to leave, I'm going to ring the police". To which the offender said, "go for it but I am right here". The victim's ex-partner then left. The victim assumed this was because her ex-partner recognised the offender as a police officer. The offender and the victim then discussed whether she should report her ex-partner's breach of bail. The offender told the victim she should not call the police, because if she did, he could lose his job as he should not be there. Consequently, the victim agreed not to make any report.
- vii) At 00:13 hrs (so the same night), the victim messaged the offender to say, 'I have never felt so unsafe or worried in my whole life. I wish you could have just moved your car and then come back I can't keep living like this where I can't even live safely without the risk of him turning up xxxxx'. She then messaged the offender asking him to ring her. They spoke at 00:17 hrs for 1 minute 8 seconds, and again at 00:35 hrs when the call lasted for 35 minutes 37 seconds. The victim said that during this call the offender told her not to report her ex-partner for breaching his bail because of the risk he might lose his job.
- viii) Then, at 01:20 hrs, the victim messaged the offender to say,

From	Time	Content
Victim	01:20 hrs	'I'm also so sorry about tonight. I can't believe he turned up. It's so hard because no one will ever really realise how scared I am of him. Everyone thinks I'm going to go back and it makes me feel like shit. I never want him in my life again he absolutely scares the shit out of me. He's so horrible and so scary and manipulative. Seeing him at the door made me completely curl up inside and I was instantly filled with fear. The last thing I want to do is get you in trouble. I won't saying anything this time, but if he comes again I will ring them. The thing is you and obvs [her son] are the only reason I am completely happy and keeping going at the moment. I am absolutely head over heels for

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		you and I want to see where this can go. I really don't want to lose you.'
Offender	01:26 hrs	'Oh [the victim] I'm so sorry it ended this way tonight. It was an amazing evening and I really had the best time. Nothing had changed in terms of my feelings and I don't want you to think that this has affected anything! I'm so sorry I had to leave like that, I feel sick at having to do that. Thank you for understanding about stuff with work. Just keep reminding yourself there will be an end to this and you can completely move on eventually. I hope you get some sleep and I will drop you a message tomorrow.'
Victim	01:30 hrs	'To be honest now I'm just really upset and crying. I'll be ok though. It's hard to have to stay strong all the time when I feel no one really understands the impact he has had on my life. I'm sorry it ended this way it isn't your fault. I feel It's my fault. I had a lovely evening with you I just really don't want you to change your feelings towards me because of this. No worries I'll always understand your work things and how you feel about that, I never ever want to get you in trouble.'
Offender	01:32 hrs	'I'm so sorry you feel that way [the victim] it breaks my heart.'

- ix) Over the following two weeks, the victim's ex-partner returned and stood outside her block of flats. The victim assumed he was emboldened because she had not called the police on 29 December 2023. She discussed her ex-partner's behaviour with the offender. He said it posed too great a risk if she made any report to police, because they could trace it back to him being at her address on 29 December 2023.
- x) Police systems confirm the only recorded complaints of breach of bail by the victim in December 2023 and January 2024 against her ex-partner are dated 4 December 2023, 18 December 2023 and 7 January 2024. In other words she did not complain about the incident on 29 December. She did report an incident on 7 January 2024 when the ex-partner left flowers and a card for her at her home. On this occasion the offender did encourage her to report the breach.
- xi) In January 2024 the offender was away in Bristol. Whilst there, he messaged the victim when drunk. He asked for pictures and videos of the victim in her underwear. The victim felt compelled to oblige, in part due to residual fear from her previous relationship. The offender never sent her any similar pictures or videos of himself.

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- xii) She saw the offender again in February and they engaged in sexual intercourse.
- xiii) When he visited, he never stayed the night (after 29 December 2023). He had always asked to meet at her property.
- xiv) The offender told her he was single and lived alone with a cat. He told the victim he loved her and her son.
- xv) On 29 May 2024 at 22:04 hrs the offender again searched for, and then accessed, the victims personal record and an occurrence log related to a report of her ex-partner approaching her on 23 May 2024.
- xvi) Moving forwards, she met with the offender again in June/ beginning of July 2024. By then the victim had formed the impression she was being used for sex; there would be periods she did not hear from the offender, followed by messaging and then meetings where they engaged in sexual intercourse. She explained this to the offender via messages, adding she felt used and did not want to live her life as a secret (as he repeatedly told her not tell anyone about their relationship). The offender said he was heartbroken.
- xvii) When they met in June/July 2024, the offender persuaded the victim to have a few drinks to relax. He bought more alcohol with him, and they ended up having sexual intercourse. The offender was also drinking, and this happened in the afternoon before he started a late shift.
- xviii) The victim decided to end the relationship. She told him she had met someone else, he replied, 'I hope the sex is shit'. Worried by his reaction, the victim agreed to stay friends. The offender replied that he wanted to stay in contact, 'forever'.
- xix) In September 2024 the victim moved house having obtained a restraining order against her ex-partner. She did not tell the offender where she was going.
- xx) In November 2024 the offender requested to visit the victim. He said he had Christmas presents for her, and her son. The victim brushed off the requested meeting.
- xxi) On 12 November 2024 Dorset Police counter corruption unit received a crime stopper's report from a counsellor. This followed the victim having explained her relationship with the offender to her counsellor.
- xxii) The offender was arrested on 15 November 2024 at his home address. He was interviewed under caution and answered no comment. His phone was interrogated. He had deleted all contact with the victim (whose number was saved under the name, 'David Rudenko'), aside from one message in November 2024.

99. The Pre-Sentence Report contained the following information and opinions:-

- i) In explaining the context for the offending, the offender described that his marriage was going through a troubled phase for reasons which it is not necessary to set out here, but which attract sympathy for both parties.

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- ii) The offender explained he completed his probationary period with the police in the summer of 2023 and then joined the response team from the autumn.
- iii) In reference to his first interaction with the victim, he claimed to have provided his personal mobile phone number because he had no signal on his work phone. His involvement in helping to return belongings to her ex-partner had been discussed with his supervisor. Thereafter, he said the victim contacted him explaining her anxiety about continuing to support police action against her ex-partner. He attempted to support her, and this escalated to them meeting for coffee.
- iv) He said they met 5-6 times in December 2023 to February 2024 and had sexual intercourse twice. After each occurrence, he claimed they agreed it was inappropriate and should not happen again. He said he acted with, “stupidity” and became emotionally attached. But he maintained his initial intention had been to support the victim. He accepted that he knew it was wrong, but he had convinced himself it was mediated by him being off shift.
- v) He acknowledged the victim’s vulnerability and how his behaviour could have impacted her. He hated himself for what he had done and hoped the victim would be able to move on.
- vi) The author opined the offender had shown remorse and victim empathy. Though they questioned his decision not to end the relationship, and assessed his motivation to have been, ‘sexual and emotional gratification’.
- vii) The offender reported stable accommodation in a mortgaged property owned with his wife. He had resigned from the police. He obtained other employment, but this was terminated after press reports of his offending (the employer already being aware of the proceedings). He was therefore currently living off savings.
- viii) He married his wife in July 2024. They have been in a relationship for 10 years. He said their relationship was now positive, and he also has a supportive family network.
- ix) Regarding his mental health, the offender reported some depression and anxiety when he was charged with this offence. He has check-ups with his GP and has been referred to a wellbeing course. He had experienced some suicidal thoughts after he was arrested but has no plans to act on these.
- x) The offender was deemed to pose a low risk of reoffending, and a low risk of causing serious harm.
- xi) Though concluding a sentence of immediate imprisonment seemed, ‘very likely’, the author deemed the offender suitable for unpaid work, and rehabilitation activity requirements.
- xii) It was noted the offender was anxious at the prospect of immediate custody, noting the potential for him to be targeted and financial concerns that it might precipitate the loss of his home.

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100. There was a substantial quantity of information contained in a number of letters from a number of people who know and respect the offender. These included letters from his wife, her two sisters and her aunt. This material spoke well of the offender, but also described the serious impact on her of his conduct, and the subsequent publicity and proceedings. His wife was concerned about the potential impact of his immediate imprisonment on her and the offender's mother as well as on him.
101. The victim provided a Victim Personal Statement which said that she was vulnerable at the time when she met the offender, having finally reported her ex-partner. She needed professional support and to be protected. She had trusted the offender because he was a police officer. But instead, she felt she was taken advantage of. She thought she was drawn into an inappropriate sexual relationship which she was required to keep secret. Overall, she expressed feelings of being, 'manipulated, hurt and betrayed'. In reference to the occasion when her ex-partner came to her home whilst the offender was there, she said she was, 'petrified'. She explained how thereafter her ex-partner came back and, determined not to report matters to the police to protect the offender, she hid with her son in the hope he would leave. She described it as, 'I was once again in a vulnerable position where I was trapped and scared'. She said it had a profound effect on her, and she has experienced anxiety, stress, and PTSD. Overall, she said it had, 'damaged my trust in the system that is supposed to protect people like me'. The offender was arrested on 15 November 2024 and a year went by before he was charged. He was sentenced on 16 June 2026. This is a long time for proceedings where the guilty plea was indicated unequivocally at the first appearance in the magistrates' court. The passage of time had adversely impacted him, but also his wife. No doubt the victim also found the protracted proceedings an additional cause of stress.

The approach of the courts to offences of this kind

102. There is no offence specific guideline for this offence, and the court should therefore follow the stepped approach in the three relevant overarching guidelines, the General guideline: overarching principles; the Imposition of community and custodial sentences; and Reduction in sentence for a guilty plea. The judge correctly followed these guidelines. The Imposition guideline was, at the time of sentence, in a somewhat different form from the present version.
103. The parties drew the attention of the judge, and have now drawn our attention to a large number cases where this court has considered sentences for this offence when committed by a police officer, most recently, to *R v Longmate* [2024] EWCA Crim 443. In that case, the Court considered a reference by the Attorney-General against a suspended sentence of 12 months. The offender had been a serving police officer who, together with another officer, engaged in sexual intercourse with a vulnerable female they had been called to assist. The sentence was quashed to be replaced with a sentence of immediate imprisonment (11 months) On the issue of suspension, Edis LJ said [at 22]:
- “These cases all involve police officers and the offence of misconduct in a public office. They establish that the nature of the office held by a police officer is such that the public reposes particular trust in them in all that they do while on duty. They have access, as a result of that trust, to opportunities to commit offences of all kinds. Sexual misconduct, as appears in this case,

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is not uncommon in the authorities, but it is not the only way in which police officers commit this kind of offence. The regularity with which these cases come before the courts is disheartening and emphasises the need for the court to maintain the important sentencing policy that they involve. This is that misconduct in a public office, when committed by a police officer, will almost always result in an immediate custodial sentence. We understand that line of authority as meaning that for the purposes of the imposition guideline offences of this kind are such that only a sentence of immediate custody will achieve sufficient punishment.”

And at [24]:

“So far as the length of the immediate custodial sentence which is required is concerned, we do not identify any tariff or sentencing range for particular kinds of misconduct from these cases. The nature of the misconduct will vary. The circumstances of the offender will vary. The harm will vary. It is the task of the court to take all of these matters into account and to arrive at a proportionate sentence reflecting the culpability and harm, giving such weight as it is possible to give for matters of personal mitigation.”

Summary of submissions

104. The submission of the prosecution in the present case is that the sentence should have been in excess of 12 months so that this principle would apply to prevent the sentence from being suspended because the law is unchanged by s277A of the Sentencing Act 2020 in that event. Alternatively the prosecution submits that exceptional circumstances apply which mean that the sentence should be an immediate one even if the presumption does apply because the first submission fails.
105. The prosecution submitted the offending was aggravated by:
- i) Exploitation of a vulnerable victim;
 - ii) The danger to the victim caused by the offender encouraging her not to report her ex-partner for breach of bail;
 - iii) The gross breach of trust in relation to the police;
 - iv) The prolonged period over which the offending occurred.
106. The defence submitted the case fell towards the lower end of the spectrum for cases of this type and cited *Hamza* [2017] EWCA Crim 1217, and *Longmate* as being of comparable seriousness. In respect of the improper access of police computer systems, it was submitted police operations were not undermined, no offenders were assisted to evade detection, and nor was information shared with any third party. Further, the initial access had been for a policing purpose.

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107. On the facts, it was not accepted the victim suffered from PTSD because of her relationship with the offender. It was also observed the offender had sometimes encouraged the victim to report her ex-partner.
108. The defence submitted the evidence of good character, the impact on his wife, the loss of his policing career, delay and an uncertain future were all sources of mitigation.
109. The defence submitted that by reference to some of the earlier decisions the sentence should not be longer than 12 months and that the presumption in favour of suspension applied because there were no exceptional circumstances to justify the imposition of an immediate sentence. They relied on *Morgan*.

The approach of the judge

110. The judge said this:-

“As you have acknowledged by your plea of guilty to this offence, your breach of the trust that the complainant placed in you, a persistent breach committed in order to satisfy your own sexual and emotional desires, was so egregious that it deserves to be met with punishment by a criminal court. The overriding feature of this case on its own facts is that gross abuse of the complainant’s personal trust in you at a time when she was particularly vulnerable, and in saying that I am very mindful of the contents of her victim personal statement. I accept that there is not a simple or exclusive cause and effect relationship between your misconduct on the one side and her post traumatic stress disorder and other related mental health issues on the other. That said, I am in no doubt that your selfishness has added, and added very significantly, to the complainant’s stress, fear and anxiety.

You put her and her child at greater risk of harm from her abusive and violent ex partner at least for a time because you actively dissuaded her from reporting his breach of bail conditions, at least initially, and you did so for reasons of pure self-interest, it seems to me, panicking at the prospect of the truth being discovered and losing your job. That is all the more ironic in light of subsequent events and the situation in which you sit quite literally now in the dock of the Crown Court. Your behaviour during the month covered by this indictment undoubtedly caused further and real damage to the Complainant’s already very fragile sense of self and that is probably an understatement on my part. With time she of course came to realise that you were simply using her and doing so to satisfy your own, as I will characterise them, puerile emotional needs and to indulge your own selfish, sexual desire.

The duration of your offending, as your learned counsel acknowledges, is an important aggravating feature of this case, as is your repeated misuse of the computer system operated by the police for what seemed to be personal reasons of your own

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connected to your relationship with the Complainant. I acknowledge that that was mostly at the outset of the indictment period and without any discernible impact on operational policing.”

111. In reference to mitigating factors, the Judge observed the offender being, “otherwise of excellent character”, and the impact upon his wife. The Judge also observed the evidence of remorse arising from the PSR, and the offender’s demeanour in court.
112. This led the Judge to conclude that the least sentence which could be imposed after a trial would have been 12 months custody which he reduced to 8 months to give full credit for the early plea.
113. It is apparent from the PSR and the account of the facts set out above that there was a difference between the victim and the offender as to the duration of the relationship and the frequency with which they had sexual intercourse during it. The offender’s case on this aspect was put to the judge by Mr Butt KC in this way:-

“And finally, the Defendant does not believe that sex took place in July 2024 but he accepts this is a prolonged relationship certainly within the context of all of the guideline cases. He also accepts that contact continued between himself and the victim although on a much more sporadic basis until around November 2024 as has been outlined.”

114. The judge dealt with the case on the basis that the misconduct lasted a month, as he said in his sentencing remarks. He did not make a finding about the frequency of sexual contact between the offender and the victim, but sentenced on the basis that this was a sexual relationship which lasted for a significant period of time. He is not criticised for taking that approach. In view of Mr Butt’s acceptance that the relationship continued, in some form, until November 2024 this was a very fair approach to the offender, but the duration of the misconduct, even on the judge’s finding, was a significant aggravating factor. It may be contrasted, to illustrate the point, with the facts in *Longmate* which involved a single occasion of sexual misconduct.
115. The defence relied on the presumption in s277A of the Sentencing Act 2020 and made detailed and careful submissions about that. The judge said:

“I have had to think very carefully, especially in the absence of any guidance from the appeal courts about whether it is in the very nature of the offence of misconduct in public office, particularly where committed by, in your case now, a former of police officer, a police officer at the time, that the offence necessarily falls within the exceptional circumstances exemption to the statutory presumption which favours suspension of short custodial sentences. The difficulty with that proposition, in my judgment, is that if Parliament had intended to exclude certain offences, or at least to exclude certain offences on particular factual bases, from the operation of that statutory presumption then they could, and I believe would, have done so expressly in the Sentencing Act itself of 2026. But they did not do so. It seems

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to me, therefore, that the effect of the new legislation is to reverse the position as it was previously under common law, whereas that previous position meant that a short custodial sentence for this offence should almost always be immediate, save in truly exceptional circumstances, none of which I am bound to say would have applied to your case. The new regime means that if it is a sentence of below 12 months, that sentence must be suspended unless there are exceptional circumstances about the individual example of the offence or the individual offender which would justify the Court in not suspending it.”

116. The judge therefore concluded he was bound to suspend the sentence of 8 months imprisonment. He expressly held that but for s277A he would have imposed it as an immediate sentence.

Discussion

117. We acknowledge the expert and careful approach the judge took to this case. He was in relatively uncharted waters in two ways. First, this court has not set any form of tariff for offences of this kind and all cases are different. He had to exercise his judgment and we have to exercise ours on this Reference. As we have explained in dealing with the case of Carter, we consider that sentences around the 12 month mark require particularly anxious consideration in this court so as to ensure that those who ought to have the protection of the presumption in s277A do in fact have it, and those who should not don't. The second respect in which the judge was dealing with a novel question was his approach to s277A of the 2020 Act. His approach to that task was perceptive and illuminating, but we respectfully part company with him on the first part of the exercise. We consider that this conduct required a sentence in excess of 12 months, and that s277A did not therefore apply.
118. We do not therefore have the ability to grapple with the question of whether this case involved exceptional circumstances which would enable the policy of the court identified in *Longmate* to continue in application where the sentence is 12 months or less. Anything we said about that would be *obiter*, or not necessary to our decision. We have made some observations which may be material when this issue arises for decision, but we do not decide it in this case.
119. The reason why this case required a longer sentence than 12 months was the presence of the serious aggravating factors identified by the Attorney General in the Reference. The duration of the offending and the rapidity with which the offender decided to take advantage of a vulnerable woman for his own sexual gratification is the starting point for this assessment. The use of the NICHE system to research her and her partner on repeated occasions shows a settled determination to exploit his position. The particularly serious aspect of this case is the use of that position to persuade her not to complain about a serious bail breach by her ex-partner. This exposed her to risk from that source and denied her the protection which the bail conditions were designed to provide. It also subverted entirely the public duty which he was being paid to perform. This man should have been arrested by the offender and taken before the court to consider a remand in custody. Instead of doing that duty, he exploited the victim's vulnerability with the result that no complaint about that breach was ever made.

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120. For these reasons we decided to quash the judge's sentence of 8 months suspended for 12 months. An immediate sentence of 15 months was imposed in its place. In these circumstances we quashed the costs order made by the judge. That was an entirely proper order if the sentence was to be suspended, but falls away on ordinary principles once an immediate sentence is imposed.
121. We considered that a sentence of 2 years was required to address the culpability of this offender and the harm caused both to the victim and to the public, after allowing a modest reduction for the mitigation was required. He was remorseful and resigned from the police and found other work, and there is substantial impact on others as a result both of the offending and this sentence. Most matters of this kind are factored into the sentence because it is designed to reflect to the fact that the offender was a serving police officer. They are always of good character and almost always have provided valuable service to the public before their fall from grace. Those factors gave them the opportunity to commit the offence and can only afford very limited mitigation. He was entitled to 1/3 reduction for the guilty plea, which reduced the sentence to 16 months. We then made a further reduction to 15 months to reflect the significant amount of unpaid work he has done pursuant to that requirement on the judge's suspended sentence order.
122. We are required to consider whether that sentence should be suspended, even though the offender does not have the benefit of the presumption in favour of suspension. Applying *Longmate* and a whole series of other decisions, but without repeating the matters there set out, we consider that this offence is so serious that appropriate punishment can only be achieved by an immediate custodial sentence. That factor in the Guideline Table predominates in this kind of case and leads to the conclusion that it would be wrong to suspend this sentence.