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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Chelmsford
Her Honour Judge Lynch QC
T201707030 & T201707035

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2018

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HON MRS JUSTICE NICOLA DAVIES DBE
and
THE HON MR JUSTICE HADDON CAVE

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Between:

HOBBS and DM	**Appellants**
- and -	
R	**Respondent**

- -
- -

Mr Tony Badenoch QC (instructed by **Alexander Johnson Solicitors**) for the **First Appellant**
Mr Charles Sherrard QC (instructed by **Criminal Defence Solicitors**) for the **Second Appellant**
Mr David Matthew (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 11th April 2018

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Approved Judgment

Lord Burnett of Maldon CJ:

1. This case concerns the death of Vilson Meshi in the early hours of the morning of Saturday 27 February 2016. On 24 August 2017, in the Crown Court at Chelmsford before HHJ Lynch QC, the appellants, Keani Hobbs and DM, were each convicted of the manslaughter of Vilson Meshi and theft.

2. On the day following their conviction, the Judge sentenced Hobbs to nine years' detention in a young offenders' institution for manslaughter and 12 months' detention concurrent for the theft. The judge sentenced DM to six years' detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 for manslaughter and 12 months' detention concurrent for the theft. Both appeal against sentence with leave of the single judge. Hobbs also renews her application for leave to appeal against conviction on one of eight grounds of appeal originally advanced in writing. At the end of oral argument on that renewed application, we refused leave to appeal against conviction. Our reasons are set out below.

3. The nature of the sentences imposed reflected the ages of these two appellants at the time of their conviction. Hobbs was born on 14 October 1998 and so was 18 when she was sentenced. At the time of the offending, she was 17 years and four months old. DM was born on 14 February 2001. He was 16 when sentenced but only two weeks past his fifteenth birthday at the time of the offending.

4. We note immediately a technical error in the sentence imposed upon DM. In respect of the theft count, the only sentence available was a detention and training order. In *R v Mills* [1998] 2 Cr App R(S) 128, this court, dealing with previous applicable legislation, held that where an offender is sentenced to detention under what is now section 91 of the 2000 Act no separate penalty should be imposed on an offence to which that provision does not apply.

5. We shall continue to refer to the second appellant as DM. An order was made in the Crown Court pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999 in relation to the proceedings before that court. We made a similar order here, with the effect that no matter relating to him shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in these proceedings and, in particular, his name, his address, the identity of any school or other educational establishment attended by him and any still or moving picture of him.

The facts

6. The underlying facts were these. Mr Meshi had two small children, then aged four and two, who lived with their mother in Basildon. They had split up amicably and Mr Meshi was still involved in the upbringing of his children, although he lived in Derbyshire and worked in the North of England. He had a third child, then 8 months old, with his wife. He had agreed to look after the two children on Saturday 27 February 2016. He drove down to Basildon leaving in the late afternoon and arrived outside his former partner's home at some time before midnight. He had done so to be able to look after them from early the next morning. It was in those circumstances

that he came to be sleeping in his car. He put the back seats down and created a makeshift bed in the space. At about 02:00 in the early hours, a lit marine distress flare was thrown into his car. The toxic fumes from the flare killed him.

7. The flare was one of six which had recently been stolen from a boat moored at Pitsea Marina, relatively nearby. The prosecution case in relation to both the counts of theft of the flares and the manslaughter was one of joint enterprise. CCTV footage showed a hooded figure on a bicycle trying car doors in the area. That was DM, who came across Mr Meshi's car with one door unlocked. He saw an iPhone and the car keys and took them. He and Hobbs had been together at the marina. He went back to where Hobbs was waiting. A third young person was present. Hobbs had the flares and was eager to lob one into a car to see what the result would be. She tried to persuade both DM and the other person to do so, but they refused. Nonetheless, DM returned with her to the car. The door was opened and the flare thrown in by Hobbs. As the Judge observed in her sentencing remarks, "the whole reckless enterprise was on the basis that it would be fun to throw a lighted flare into a vehicle where a man was asleep in the back". She continued,

> "neither of you realised that the man was going to die but you must have realised that it would cause him some harm. A confined space, he was asleep, he would be wakened by it, what did you think he was going to do? Your actions were reckless they were stupid and they were dangerous."

8. Hobbs and DM had also traded the iPhone and car keys for some cannabis.

The conviction renewal

9. The sole conviction ground of appeal now pursued by Hobbs relates to rulings made by the Judge in connection with the bad character of DM. The context was that Hobbs' defence was that she was not present at either the marina or at the car. She was at home. DM, by contrast, accepted that he was at the marina but denied any involvement in the theft or in the subsequent use of a flare. The judge allowed some evidence of bad character relating to DM to go before the jury. That comprised cautions for burglary and theft and also a conviction for theft after breaking into a car. Mr Badenoch QC, on behalf of Hobbs, sought to persuade the judge to introduce further bad character evidence relating to DM, including the fact that he had been arrested for, and was awaiting trial on, a count of conspiracy relating to robberies committed violently using motorbikes in the London Metropolitan area, possession of Class A drugs and also photographs recovered from his phone which showed him dressed in black and equipped for moped robberies with a "Rambo-knife" in hand, said to evidence a criminal lifestyle. The bad character was said to evidence a propensity to use the flare, and also to undermine DM's credibility.

10. The allegation of the alleged conspiracy to rob was awaiting trial at a later date. DM was linked with one particular robbery because a stolen Oyster card was found in his possession. DM was later convicted and sentenced to three and a half years' detention consecutive to that imposed for the manslaughter. So far as this and the other matters were concerned, the judge considered that they did not satisfy the statutory test under section 101(1)(e) of the Criminal Justice Act 2003 for admitting bad character evidence on the application of a co-accused, namely that the evidence

has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant.

11. We have noted that there were originally eight grounds of appeal against conviction. They were set out in an exceptionally long, prolix document which was difficult to follow. In respect of them the single judge said:

> "The very long grounds of appeal have been reduced to a shorter document containing eight grounds. I have examined each of those grounds and found no merit in any of them… There is no reason to doubt the safety of the conviction."

On the only ground now pursued, the single judge observed:

> "This was a decision which fell well within the trial Judge's area of discretion and there is no basis for this court to interfere. The point made by the Judge, correctly, was that the allegations were unproven and the evidence about them untested. As such, they could not have any 'substantial' probative value."

We agree with the single judge and, despite the detailed argument we have received in writing and orally, we consider that there is no merit in this ground of appeal and also that the conviction is plainly safe. The introduction of the allegations relating to conspiracy to rob, the evidence of the photographs and possession of the Oyster card were of limited probative value given the wholly different nature of the respective offences. The allegations relating to the conspiracy were no more than that, allegations. They were not convictions. To have even theoretical value, the jury would need to have been sure of DM's guilt in connection with the allegations, something which would have required a satellite trial.

12. We also agree with the judge that, irrespective of any question relating to this evidence of bad character, this was a very strong case against Hobbs and there is no possible basis for suggesting that the conviction is unsafe. There was direct evidence that Hobbs had offered to sell the iPhone and car keys. There was direct evidence from the third person that Hobbs was not only present at the scene but had asked him to throw something in a car. There were extensive covert recordings of Hobbs' mother and DM's parents (who were closely related) giving detailed descriptions of what both Hobbs and DM had done that night, recounting (amongst much else) her incriminating description of what took place to them. DM gave evidence explaining Hobbs's role. Hobbs had disposed of a SIM card the next day. Moreover, Hobbs chose not to give evidence in her own defence, in respect of which the Jury received an appropriate adverse inference direction.

Sentence

13. The judge considered that the appellants were equally culpable for what occurred. In other words, she did not think that either had played a substantially more prominent part in what occurred than the other or that one was the obvious leader and the other the obvious follower. She observed:

> "The offence was committed as part of a group, it was planned to the extent that you [DM] took them back to the car where Mr Meshi was sleeping, knowing that they were going to throw or [Hobbs] was going to throw the flare inside. Without you [DM], she could not have committed the offence. There was in my view no peer pressure from her, no force or intimidation and so therefore I deal with you on the same basis."

14. In sentencing the appellants the judge noted their ages at sentence. Hobbs was 18 and DM 16. As to Hobbs, the judge stated:

> "You are an adult. I take on board Mr Badenoch's submissions that you are only just 18 and I take on board everything he said about what you might or might not have realised when you were igniting that flare and throwing it into the car where the sleeping man lay…"

She took account of Hobbs' academic results and the fact that she attended college.

15. In sentencing DM the judge said:

> "I am bound to take into account the overarching principles dealing with children and young people. You are just 16 years of age but you are a young person. I am bound by those principles to take into account and have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. I am also bound and must take into account the welfare of you and that takes into account securing proper provision for education and training, removal from undesirable surroundings wherever appropriate and choosing the best option for you."

The judge added that she had taken account of DM's background, the detailed psychological report, his emotional and developmental age and maturity as well as his chronological age.

Grounds of Appeal

16. The grounds of appeal against sentence for Hobbs are:

i) The judge stated that she had to consider "the relevant adult Guidelines". The Sentencing Council has not published definitive Guidelines in respect of the offence of manslaughter.

ii) At the time of the offences Hobbs was aged 17. The Judge erred in sentencing Hobbs as an adult and failed to have regard to her personal background and limited contact with the authorities.

iii) The judge failed properly to adjust sentences as between the appellants to reflect their closeness of age and differences in criminal history.

17. The essence of the submission of Mr Badenoch QC is that, in sentencing Hobbs as an adult, the judge failed to take account of her age at the time of the offence and the continuing applicability of the Sentencing Council Guidelines for Children and Young People, despite her having achieved her eighteenth birthday. The single judge directed that a pre-appeal report should be prepared. It is dated 20 February 2018 and has been prepared by the Prison Service. It details Hobbs' history since 2 October 2017. Her conduct is described as mixed, with positive and negative comments. The report notes that there is no established pattern of violence and no evidence to indicate an immediate risk of reoffending on release. The risk of serious harm to others is assessed as medium. Mr Badenoch QC relies upon the report as illustrating Hobbs' immaturity. He describes her act of throwing the flare into the car as immature and stupid, the single act of a 17-year-old. The three year difference in sentence between Hobbs and DM does not properly reflect their close ages at the time of the offending.

18. The grounds of appeal against sentence for DM are:

    i) The starting point of nine years for Hobbs may have been manifestly excessive given her age of 17 at the time of the offence. If that is correct, DM's sentence must be manifestly excessive.

    ii) The reduction in sentence of one-third as between her and DM is insufficient. No account appears to have been taken of DM's learning, educational and emotional difficulties, his reasoning skills and parental background.

19. Mr Sherrard QC submits that, notwithstanding the sentencing comments of the judge which refer to the relevant Guidelines, the Judge failed to have adequate regard to paragraph 6.46 of the Guidelines which states:

> "In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age."

20. The psychological report identified DM's IQ as 74, meaning that 96% of the population would be expected to score higher. The report assessed DM as a mentally vulnerable young male, with significant deficits in cognitive functioning and deficits in verbal comprehension and reasoning. DM's IQ was similar to that of the appellant JF in *R v JF and NE* [2015] EWCA Crim 35 (see paragraph 27 below). The psychologist referred to DM's "significant developmental problems and delay" and "significant deficits in his cognitive functioning" and described DM's reasoning skills as poor. Relying upon the assessment, it is said that the culpability and underlying criminality of DM must be significantly less than that of an adult without such problems, particularly so in a case where the judge sentenced the appellants on the basis that it would be "fun" to throw a lighted flare into a vehicle where a man was asleep. This, submits Mr Sherrard QC, is different from pure recklessness. This was a case of a prank which went horribly wrong, albeit in the context of other offending (theft). Furthermore, any anticipation of harm would depend upon the maturity and reasoning ability of the individual.

21. A report was prepared by Lambeth Youth Offending Service for this hearing. DM has been serving his custodial sentence at a secure training centre suitable to his

learning needs and requirement for additional support. He has attained the highest level of behaviour, re-engaged with learning, positively responded to the support provided and is demonstrating a level of understanding of the impact of his offending. DM is presently motivated to pursue achievements in English and Maths, not previously seen. The report is said to show what can be achieved by DM with appropriate support, which has hitherto been absent.

Discussion

22. The Sentencing Council Guidelines in respect of Children and Young People identify the following principles:

> "When sentencing children or young people the court must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people and the welfare of the child or young person" [1.1];
>
> "The approach to sentencing should be individualistic and focused on the child or young person as opposed to the offence. The sentence should focus on rehabilitation where possible. A court should consider the effect the sentence is likely to have on the child or young person as well as any underlying factors contributing to the offending behaviour" [1.2];
>
> "The primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote reintegration into society rather than to punish" [1.4];
>
> "It is important to bear in mind any factors that may diminish the culpability of a child or young person. The children and young people are not full developed and they have not obtained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. …When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater)" [1.5].
>
> "For these reasons, children and young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their mistakes without undue penalisation or stigma…" [1.6].

The Guidelines conclude:

> "If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15–17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range."

23. At present, there is no definitive guideline for manslaughter. The Sentencing Council is working on a guideline for publication in the relatively near future. Manslaughter is a notoriously difficult crime to sentence because it covers a wide range of conduct. All sentencing has at its heart assessments of harm and culpability. In cases of manslaughter the harm, namely death, is always very high. But culpability can range from conduct only just shy of that needed for murder down to conduct which in colloquial terms might be described as accidental. Sentences for manslaughter properly range from long indeterminate or determinate sentences to, exceptionally, a non-custodial sentence. In the leading case of *Attorney General's Reference No. 60 of 2009, Appleby and Others* [2009] EWCA Crim 2693, [2010] 2 Cr App R (S) 46, p 311, Lord Judge CJ said at [22] that:

> "…crimes which result in death should be treated more seriously, not so as to equate the sentencing in unlawful act manslaughter with the sentence levels suggested in Schedule 21 of the 2003 Act, but so as to ensure that the increased focus on the fact that a victim has died in consequence of an unlawful act of violence, even where the conviction is for manslaughter, should, in accordance with the legislative intention, be given greater weight. It is with these considerations in mind that we have approached these individual cases, and they will, we anticipate, provide sentencing courts with some assistance about the way in which these difficult sentencing decisions should be approached in future."

24. In *Attorney General's Reference No. 16 of 2014* [2014] EWCA Crim 956 Treacy LJ made the following observations regarding *Appleby*:

> "19. …[*Appleby* was] signalling a significant change in the approach to be taken to cases involving manslaughter arising from a single punch with the bare fist. …
>
> 20. *Appleby* makes clear that whilst there must be a focus on the actions of an accused and his intentions, there should also be a focus on the catastrophic consequences of the offence, namely the death of the victim. …
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> 21. *Appleby* clearly signalled that crimes of violence of this sort resulting in death were to be dealt with more seriously than

> hitherto, albeit that the court, in dealing with the matter as an offence of manslaughter, must treat the fatal consequences as having been unintended. Were that not the case, the appropriate charge would have been one of murder."

25. Treacy LJ reviewed a number of decision in which the new guidance in *Appleby* was applied:

> "26. In *Rowell* [2011] 1 Cr App Rep (S) 116, p 682, the Appellant, who contested the case, had struck the deceased a very heavy blow, resulting in his hitting his head on the pavement and suffering a fatal injury. That event had been preceded by some earlier violence on the part of the Appellant. The Appellant had some convictions for violence or public order matters. The court described the case as falling at the upper level of sentencing for such a case of manslaughter and reduced the sentence of seven years to six years to reflect certain factual errors made by the judge which had wrongly aggravated his assessment of the case. It is to be emphasised that the figure of six years arrived at did not include credit for a guilty plea.
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> 27. In *Gray* [2012] 1 Cr App Rep (S) 73, the Appellant did plead guilty. He had delivered a forceful punch, described as a terrible blow, at night in a busy street to the victim, who was on the phone to the police after some trouble in a club. The Appellant was powerfully built. The judge found that the punch was delivered to an unsuspecting victim and was likely to cause harm. The Appellant had simply walked off after seeing the victim fall to the ground. That Appellant had a previous record for violence, including matters of assault occasioning actual bodily harm, affray and threatening behaviour. The sentence of four years and eight months was said to be at the top end of the bracket but not manifestly excessive.
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> 28. In *Lee*, to which we have already referred, the offender was convicted after a trial. He had punched a man with learning difficulties, which the judge found the Appellant must have been aware of, with a blow so hard that it ruptured the neck arteries. The Appellant had a bad criminal record but not for violence. The court dismissed a renewed application for leave to appeal against a sentence of seven years, holding that the sentence fell within the upper levels for such an offence but that it was not manifestly excessive.
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> 29. In *Duckworth* [2012] EWCA Crim 1712, [2013] 1 Cr App Rep (S) 83, p 454, a blow was struck which knocked the victim unconscious so that he landed heavily with his head hitting the road. It was described as gratuitous violence to an innocent victim who was backing away. The blow was said to be of

> considerable ferocity and the Appellant then kicked out at the victim as he lay on the ground, albeit that there was no evidence that he connected with him. He then aimed a blow at a friend of the deceased. That Appellant had 13 previous convictions, including some violent offences. After a trial an extended sentence was imposed which included a custodial term of eight years. This court reduced that custodial term to six years, describing the matter as 'a most serious offence of its kind'.
>
> 30. As this court has repeatedly said, decisions of the sort cited are fact specific, but it is clear that since *Appleby* there has been a relatively consistent approach to the levels of sentence in cases of the type this court is concerned with today."

26. The facts of *Appleby* and the cases referred to in *Attorney General's Reference No. 16 of 2014* primarily concerned death resulting from a single blow with a fist in which no weapon is used. The sentences imposed in those cases have tended to be within the six to eight years' imprisonment for an adult after trial. The facts are different from the nature of offending in this case but all concern conduct which is intended to do significant harm to the victim, albeit not cause serious injury.

27. A number of recent authorities have specifically considered manslaughter sentences in respect of young people. In *R v JF and NE* (*supra*) the appellants, then aged 14½ and 16, entered a derelict building, set fire to a duvet which was on top of a pile of discarded tyres and left. Within minutes the tyres caught fire. The toxic fumes killed a homeless man who was in the building. They were unaware of his presence. The appellants were charged with arson and manslaughter. They were acquitted of arson but convicted of manslaughter. Lord Thomas LCJ observed at [34] that the sentences imposed of three years' custody were not, in principle, manifestly excessive. However, by reason of the particular circumstances of one of the appellants and the progress made in detention, the Court of Appeal allowed the appeals. The sentences of three years' detention were quashed, and sentences of 24 month detention and training orders were substituted in respect of each appellant.

28. In *R v Hayes* [2015] EWCA Crim 199 was a one punch case involving a 17 year old appellant. A sentence of 4½ years' custody in a young offenders' institution following trial was reduced by the Court of Appeal to three years and nine months.

29. In *R v E* [2011] EWCA Crim 2744, (Banks 13th Ed 283.61) the appellant had armed himself with a knife for the purpose of protecting himself from an attack by an older and larger boy using a heavy stick. The deceased, whilst attempting to intervene, was struck in the neck by the knife. He was convicted following a trial. The judge found that there was no intention to injure. The Court of Appeal took account of the fact that the appellant, who was aged 13 at the time of the killing, 14 at the time of sentence and 15 at the time of appeal, had progressed well in custody. A sentence of six years' detention was reduced to one of four years' detention.

30. These authorities are, of course, fact-specific but they all demonstrate the modern approach of the courts to sentencing those aged under 18 for manslaughter which is consistent with the Sentencing Council Guidelines, namely the need to look carefully

at the age, maturity and progress of the young offender in each case. That is also necessary in cases involving young people who offend before are 18, but are sentenced when technically adults, and also young people who offend in early adulthood but are far from the maturity of adults. In *R v Clarke* [2018] EWCA Crim 185 at [5], I emphasised this point:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R v Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R(S) 101 is an example of its application: see paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. 'The Age of Adolescence': thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."

31. In sentencing Hobbs we conclude, with due respect, that the judge appears to have had little, if any, regard to the fact that she was only 17 at the time of the offending. As we have noted, she found that the "whole reckless enterprise was on the basis that it would be for fun". This was an important finding which should have led the Judge to give careful consideration to the maturity of the 17 year old who committed the single act. The Guideline expressly refers to the need to take account of factors which could diminish culpability, including immaturity, the impact on decision making and lack of insight into the consequences of offending on victims. These were relevant matters in considering the culpability of Hobbs. To describe Hobbs simply as "an adult" gives the impression that the judge approached the sentence effectively as if there were a sentencing 'cliff-edge' at 18. In our judgment, the sentence passed does not reflect the age, immaturity and resultant culpability of Hobbs at the date of the offence.

32. Furthermore, in this very unusual case, we consider that it is necessary to look carefully at the nature of any harm that the appellants should be taken to have foreseen, in the context of what was prosecuted as, and accepted by the judge to be, a prank which gave rise to dreadful and tragic consequences. They expected to wake the sleeping occupant of the car and watch his reaction as he sought to get out of the vehicle as quickly as possible. They would not have known that marine flares burn at a much higher temperature than ordinary fireworks, with an exceptional intensity and that the chemicals are especially toxic. They must have appreciated that Mr Meshi would cough and splutter. A moment's thought would have led anyone to conclude that some injury might be suffered from inhaling smoke and fumes and also that in scrambling from the car its occupant might hurt himself. But in terms of culpability the circumstances fall at a relatively low level.

33. Hobbs, as we have noted, was only 17 when she committed these offences. A sentence of nine years on the facts of this case, even for an adult, would have been too high. Taking into account both the youth and immaturity of this appellant and the underlying culpability for the act in question, we consider that the appropriate

sentence for Hobbs for manslaughter should have been one of 5 years' detention in a young offenders' institution.

34. DM, as we have noted, was only just 15 when he committed these offences. We have averted to the psychological evidence and the post-sentence evidence. Having regard to the youth Guideline and the matters relating to culpability to which we have referred, we conclude that the appropriate sentence in respect of manslaughter for DM is one of 3½ years' detention.

35. We have noted the error in respect of the concurrent sentence imposed upon DM for the theft. We quash that concurrent sentence. In the Crown Court, all concerned overlooked the mandatory requirement to make Victim Surcharge Orders. Since we have reduced the custodial terms, we are obliged by statute to impose the appropriate surcharges.

36. We quash the sentences imposed, substitute those we have indicated and make the appropriate Victim Surcharge Orders (namely Hobbs, £120 and DM, £20).