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**Neutral Citation Number: [2018] EWCA Crim 834**

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

**Royal Courts of Justice**

**Strand**

**London, WC2A 2LL**

Thursday, 8 March 2018

**B e f o r e :**

**LORD JUSTICE HOLROYDE**

**MRS JUSTICE MCGOWAN DBE**

**THE RECORDER OF GREENWICH**

**HIS HONOUR JUDGE KINCH QC**

**(Sitting as a Judge of the CACD)**

**REFERENCE BY THE ATTORNEY GENERAL UNDER**

**S.36 OF THE CRIMINAL JUSTICE ACT 1988**

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**R E G I N A**

v

**THEODORE JOHNSON**  
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**Mr R Buckland QC MP and Mr M Heywood QC** appeared on behalf of  
the **Attorney General**

**Miss A Henry QC and Miss V Halia** appeared on behalf of the **Offender**  
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## J U D G M E N T

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1. LORD JUSTICE HOLROYDE: On 2nd January 2018 at the Central Criminal Court, Theodore Johnson pleaded guilty to the murder of his former partner, Miss Angela Best. On 5th January 2018 he was sentenced by the Common Serjeant, His Honour Judge Marks QC to life imprisonment. The learned judge specified the minimum term to be served as one of 26 years, less the 350 days which Mr Johnson had spent on remand in custody.

2. Pursuant to [section 36 of the Criminal Justice Act 1988](#), Her Majesty's Solicitor General now seeks leave to refer the case to this court so that it may review the sentencing and determine whether it was unduly lenient. We grant leave.

3. Miss Best was murdered on 15th December 2016. Before summarising the circumstances of her murder, it is necessary to consider events which occurred many years ago, for it is a striking and unusual feature of the case that the murder of Miss Best was the third occasion on which Mr Johnson has committed a crime of homicide.

4. In May 1981, Mr Johnson killed his then wife, Yvonne. They were living, together with their two young children, in a ninth floor flat. The relationship had become unhappy. On the day of Mrs Johnson's death they argued and began to fight. It was Mr Johnson's case, which must have been accepted by the jury as at least possibly true, that the fight broke out because Mrs Johnson struck him with a broom. He struck her with an ashtray and a vase. The fight moved out onto a balcony, from which he pushed her to her death. He was tried for murder. The jury returned a verdict that he was not guilty

of murder but guilty of manslaughter on the ground of provocation. Mr Johnson was sentenced, in accordance with the level of sentence which at that time was regarded as appropriate, to three years' imprisonment.

5. Following his release from that sentence Mr Johnson began a relationship with a Miss Bennett. A child was born to them. By 1992 however the relationship had broken down and Miss Bennett wished to separate. Following police intervention, Mr Johnson left for a time but then returned to the home. There on 20th September 1992 the couple argued, and eventually a fight began. Mr Johnson strangled Miss Bennett using a belt as a ligature. Having killed her, he made an unsuccessful attempt at suicide.

6. Mr Johnson was again prosecuted for murder. Psychiatric reports commissioned by both prosecution and defence concluded that at the material time he was suffering from a severe depressive illness, coupled with a personality disorder, and that his responsibility for the killing was substantially impaired. The prosecution accepted Mr Johnson's plea that he was not guilty of murder but guilty of manslaughter on the ground of diminished responsibility. In 1993 a Hospital Order combined with a restriction order without limitation of time was made.

7. Mr Johnson remained in hospital for many years. In the mid-1990s he was granted temporary leave from hospital for rehabilitation purposes and permitted to attend a training course. There he met Miss Best. He was then in his early forties and she was some 12 years younger.

8. In May 1996 a Mental Health Review Tribunal concluded that at that stage it was not safe for Mr Johnson to be discharged from hospital. The Tribunal found that if he did not comply with a condition requiring him to disclose any relationship, there would be a serious risk to any woman who became involved in a relationship with him should Mr Johnson suffer further episodes of depression, as he was expected to do. The Tribunal concluded that at that stage the assessment of the outcome of imposing a condition of that nature was fraught with difficulty and that, having regard to the serious danger which Mr Johnson potentially represented to women in the future, it would at that stage be taking an unjustified risk to release him from hospital.

9. By 1997, however, it was felt that Mr Johnson could be discharged from hospital provided he could be trusted to be frank and open with his care team about developing relationships. A conclusion must have been reached that he could so be trusted, for in October of that year he was granted a conditional discharge from the Hospital Order. One of the conditions of his discharge required him "to disclose to both his medical and social work supervisor any relationships with women and accept that such disclosure will involve his past history being communicated to such a person."

10. Within a few years of his being released from hospital, Mr Johnson began a relationship with Miss Best although they never cohabited. In plain breach of the important condition to which we have referred, he failed to disclose the fact of that relationship to any of the persons involved in his care and supervision. On the contrary, he positively denied to them that he had or contemplated having any relationship with a woman. This situation persisted over many years.

11. Mr Johnson's relationship with Miss Best ended in the autumn of 2016, when she met someone else. Mr Johnson could not or would not accept that his relationship with Miss Best was at an end and repeatedly begged her to take him back. She did not wish any resumption of the relationship.

12. Pausing there, the medical evidence indicates that in the years since his conditional discharge from the hospital order, Mr Johnson had remained vulnerable to episodes of depressive illness. The annual care plans prepared in relation to him noted that the early warning signs of a relapse into depression included weight loss, poor self-care and poor appetite. In the weeks leading up to the killing of Miss Best, those familiar with Mr Johnson noted that he was not eating and was losing weight. On 8th December 2016, he told a doctor that he was feeling lonely and that he had been thinking a lot about how things had never gone right in his life. A further appointment was arranged for him to be seen a few days later. Mr Johnson attended that appointment, but unfortunately the doctor was unwell and so the appointment was re-arranged.

13. On 15th December 2016, Miss Best kindly agreed to go to Mr Johnson's house to help him complete an application form, that being something which

he found difficult to do without assistance. As the learned judge was to observe in passing sentence, it was a measure of Miss Best that she was still willing to spend time offering her assistance to Mr Johnson.

14. An argument began between them. In his sentencing remarks the learned judge noted that it was unclear how or why that argument began, but felt it highly likely that Mr Johnson became angry about her unwillingness to go back to him and jealous of her new relationship. He then attacked her in a brutal fashion. He struck at least six forceful blows to her head with a claw hammer. He fractured a bone in her hand as she tried to protect herself against that attack. He then strangled her to death with a dressing gown cord, using sufficient force to fracture her hyoid bone. He must have caused her terrible pain and suffering in the last moments of her life.

15. By that dreadful murder he not only ended the life of Miss Best, but he also caused continuing anguish to her family and friends. Victim personal statements provided to the judge, which we too have read, make it clear that Miss Best was an exceptional woman, that her family have been destroyed and devastated by the murder and that the family will never be the same again. We have the contents of those statements well in mind and we offer our sympathy to the bereaved. They will understand, we are sure, that in determining the outcome of this application we cannot and do not in any sense seek to value either the life of Miss Best or the suffering of the bereaved.

16. Following the murder, Mr Johnson left the house without alerting the emergency services. Later that day at a railway station he threw himself in front of a train in an attempt to end his own life. He survived, but as a result of the injuries which he sustained his right arm has been amputated below the shoulder and his left arm has been amputated at the wrist.

17. At a hearing on 22nd May 2017 he plead not guilty to the charge of murder, but guilty to manslaughter on the ground of diminished responsibility. That plea was not accepted by the prosecution.

18. The trial date was fixed for 2nd January 2018. Both defence and prosecution commissioned medical reports. The former provided support for the partial defence of diminished responsibility. The latter did not. On the day of the trial, and as the jury was about to be sworn, Mr Johnson volunteered from the dock that he wished to plead guilty to murder. We are told, and have no reason to doubt, that his decision to do so was in large part prompted by a desire to spare the bereaved family the ordeal of a trial. After an appropriate adjournment so that he could be advised, Mr Johnson duly entered that plea and sentence was adjourned to 5th January 2018.

19. Mr Johnson was born on 25th December 1953 and so is now 64 years old. In addition to the history of depressive illness, to which we have referred, he suffers from diabetes and glaucoma. As a result of the injuries sustained in his attempted suicide he is now largely dependent upon others for many of the activities of daily living.

20. It is clear from the learned judge's detailed sentencing remarks that he gave careful consideration to the determination of the appropriate minimum term. He considered, as he was bound to do, the provisions of [schedule 21 to the Criminal Justice Act 2003](#). He rejected a defence submission that under that schedule the appropriate starting point was one of 15 years. He concluded that the seriousness of the offence was particularly high, such that the appropriate starting point was one of 30 years. In reaching that conclusion he said he took account of three factors, which he explained as follows:

"The attack perpetrated by you upon Angela Best was sustained, vicious and utterly brutal. She suffered an unimaginably terrible death, and as I have already observed, there can be no doubt whatsoever that you intended to kill her.

This is the third occasion when you have killed a female partner, albeit I note and take into account the fact that the two previous occasions were many years ago, and as I have already observed, resulted in convictions for manslaughter and not murder. Such repeated offending resulting in three separate court cases must be almost unprecedented.

As I have already observed, the lies that you repeatedly told those who were supervising your conditional discharge, concealing from them that you were in a new relationship and thus depriving them of the opportunity of telling your partner about your past, is an extremely serious aggravating feature. If I am wrong about regarding this as being a case where the appropriate starting point is 30 years and the correct starting point is in fact 15 years, so serious are the factors to which I have just made reference that it would necessitate a very substantial increase from that 15 year figure such that the end figure would not in my judgment be any different."

21. The learned judge then went on to deal with matters of mitigation. He identified four: Mr Johnson's age, coupled with his serious ill-health and disability, which collectively made it almost unthinkable that he would be in a position to commit a further offence in the future; the absence of any premeditation; the history of mental ill-health and the evidence that at the time of the murder Mr Johnson had been in a low mood for some time and may very well have been in the early stages of a relapse into a depressive illness; and the guilty plea.

22. As to the guilty plea, the learned judge noted that in the ordinary way no more than a five per cent reduction could be made for such a late guilty plea to murder. He indicated however that he was willing to allow a marginally greater discount than that, because Mr Johnson had chosen, albeit extremely late in the day, not to put before the jury a defence for which there was some expert support.

23. We are grateful to counsel for their written and oral submissions which we can encapsulate in this way. Her Majesty's Solicitor General submits that the sentence was unduly lenient because it failed to mark the gravity of the offending, the need to protect the public from harm and public concern about cases of this kind. In his primary submission he particularly argues that the learned judge should have regarded the case as being one of exceptionally high seriousness and should therefore have ordered that the early release provision ought not to apply in this case. In the alternative, he submits, having regard to the previous convictions for manslaughter, the learned judge should have concluded that the starting point must be

increased well above 30 years and should further have concluded that even after making appropriate allowance for the mitigation, the minimum term should have been significantly in excess of 30 years.

24. On behalf of Mr Johnson, Miss Henry QC submits that the learned judge took a perfectly proper approach to the application of [schedule 21](#) to the complex circumstances of this case and that the minimum term of 26 years cannot be said to be unduly lenient or "much too low". She submits that the suggestion that the experienced judge, after a careful assessment, passed a sentence which was "much too low" is difficult to reconcile with the blunt fact of a 26 year minimum term. She emphasises the history of depressive illness and the indications that Mr Johnson was relapsing into a further episode of depressive illness in the days leading up to the murder of Miss Best. She urges the court not inappropriately to undervalue that mitigation.

25. In reflecting upon those submissions we start by considering the statutory framework applicable to this case. The determination as to what punishment is just and proportionate in the circumstances of a particular offence necessarily involves a determination of the seriousness of that offence. So far as material for present purposes, [section 143 of the Criminal Justice Act 2003](#) provides as follows:

26.

"143

Determining the seriousness of an offence

(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

(2) In considering the seriousness of an offence ('the current offence') committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—



(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and

(b) the time that has elapsed since the conviction."

27. The sentence for murder is fixed by law. It is one of life imprisonment. The effect of [section 269 of the Criminal Justice Act 2003](#) is that a court when imposing a mandatory life sentence for murder must specify the minimum term which must elapse before the early release provisions (in other words the provisions relating to release on licence) can apply. The minimum term is the period which the court considers appropriate, taking into account the seriousness of the offence. If the court is of the opinion that because of the seriousness of the offence the early release provisions should not apply to the offender, [section 269\(4\)](#) requires the court so to order. That is commonly referred to as a whole life order.

28. [Section 269\(5\)](#) requires the court in considering the seriousness of the offence to have regard to the general principles set out in [schedule 21](#). Paragraph 4 of [schedule 21](#) provides:

29.

"(1) If—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when he committed the offence,

The appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

(a) the murder of two or more persons, where each murder involves any of the following—

(i) a substantial degree of premeditation or planning,

(ii) the abduction of the victim, or

(iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) a murder done for the purpose of advancing a political, religious or ideological cause, or

(d) a murder by an offender previously convicted of murder."

Paragraph 5 provides:

"(1) If—

(a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and

(b) the offender was aged 18 or over when he committed the offence,

The appropriate starting point, in determining the minimum term, is 30 years.

(2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph (1)(a) include—

(a) the murder of a police officer or prison officer in the course of his duty,

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or

(h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence."

Paragraph 8 of [schedule 21](#) provides:

"8 Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point."

30. Consideration of those features may lead the court to adjust the starting point either upwards or downwards. Paragraphs 10 and 11 set out non-exhaustive lists of potential aggravating and mitigating factors. It should be noted that one of the potential mitigating factors is a lack of premeditation.

31. When a court does not make a whole life order, but specifies a minimum term, that means precisely what it says. It is the minimum number of years which must pass before the murderer can even be considered for release on licence. Even when the minimum term expires, release on licence does not follow immediately or as a matter of course. The Parole Board must decide whether the protection of the public requires the continued detention of the murderer and will only release him when it is satisfied that it is safe to do so. Those features of a life sentence for murder provide the public with the necessary protection for the future. Thus the minimum term is intended to be the term which is appropriate by way of punishment and retribution. It is neither necessary nor appropriate for a court to increase that term in order to protect the public.

32. We must next mention some features of relevant case law. So far as a whole life order is concerned, in Jones and others [2006] 2 Cr.App.R (S) 19, at paragraph 10, the Lord Chief Justice said of a whole life order:

33.

" Often, perhaps usually, where such an order is called for the case will not be on the borderline. The facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life."

34. In Oakes and others [2013] QB 679, Lord Judge, LCJ, said at paragraph 12, that the decision as to whether a whole life order is necessary is therefore a discretionary aspect of the judge's sentencing decision. At paragraph 29 he said that such an order

35. "is reserved for the few exceptionally serious offences in which, after reflecting on all the features of aggravation and mitigation, the judge is satisfied that the element of just punishment and retribution requires the imposition of a whole life order. If that conclusion is justified, the whole life order is appropriate: but only then. It is not a mandatory or automatic or minimum sentence."

36. Those well-established principles have been reiterated in more recent cases. In Reynolds [2015] 1 Cr.App.R (S) 24, at paragraph 5, Lord Thomas, LCJ emphasised that the guidance in schedule 21 is provided to assist the judge to determine the appropriate sentence, that each case will depend critically on its particular facts and that the court should take into account consideration the fact of a guilty plea to murder when deciding whether it is appropriate to order a whole life term.

37. Turning now to the provisions of paragraph 5 of schedule 21, this court in Khaleel [2013] 1 Cr.App.R (S) 122, rejected a submission that the court was bound to adopt a 15-year starting point in any case which fell outside the specific identified criteria in paragraphs 4 and 5 of the schedule. The court held that the sentencer must make a judgment as to the seriousness of the offence, and may properly find the case to be of exceptionally high or particularly high seriousness even though it cannot be brought within the specific circumstances listed in paragraphs 4 and 5. A previous conviction for manslaughter may lead a judge to treat a subsequent offence of murder as an offence of particularly high seriousness. In the circumstances of that case, the sentencing judge had been entitled to conclude that an offence of murder committed while the offender was on licence from a sentence of eight years' imprisonment imposed for manslaughter, was an offence of particularly high seriousness and that the 30-year starting point should apply. However, in all the circumstances of that case, "that conclusion would have reflected all the relevant aggravating features."

38. As to the age/or ill-health of an offender, this court in Clarke [2017] 2 Cr.App.R (S) 18 made clear that these are factors which should be taken into account in a limited way. The focus of the court should be on the extent to which a custodial sentence will be more onerous than in the case of a younger, fitter offender. At paragraph 25 the Vice President, Hallett LJ said:

"Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes."

39. We have applied those principles in reaching our decision in these this case. Of the three points specifically relied upon by the Solicitor General, it seems to us that our focus must be on the gravity of Mr Johnson's crime. The need to protect the public from harm is, as we have indicated, catered for by the nature and the effect of the mandatory life sentence. The reference to public concern about cases of this kind is, as we see it, an aspect of the gravity of the offending.

40. The learned judge did not regard this as a case in which a whole life order was necessary. That was not of course a conclusion that this is anything other than a very serious case, but rather a conclusion that it is not one of the rare and exceptional cases in which such an order is necessary. As the authorities to which we have referred make clear, that is a discretionary decision. We must therefore consider whether it can be said that the sentence was unduly lenient because in all the circumstances it was not properly open to the judge reasonably to conclude that a whole life order was unnecessary.

41. In our judgment, it plainly was open to him reasonably to reach that conclusion as he did. Having regard to Mr Johnson's age and disability, to his guilty plea and to all the circumstances of the case, the learned judge was entitled to conclude that a long minimum term constituted just punishment and retribution for this dreadful crime. We are therefore unable to accept the submission of the Solicitor General that the judge was bound to impose a whole life order.

42. As to the determination of the minimum term, it is in our view clear from the passage in the sentencing remarks which we have quoted that the learned judge regarded the aggravating factors which he identified as collectively making this a case of particularly high seriousness, so that the 30 year minimum term was the appropriate starting point. Having taken all of the aggravating features of the case into account in reaching that decision, he did not then find any further aggravating feature which required him to add to that minimum term. It followed that the effect of the mitigating factors and of the guilty plea was to reduce the sentence below the 30-year starting point. It was in that way that he reached his decision that the appropriate minimum term was one of 26 years.

43. The key question, as it seems to us, is whether that approach was unduly lenient. We naturally hesitate to differ from the assessment made by a highly experienced judge and we acknowledge the force of many of the points made to him and to us by Miss Henry. Nonetheless, and with all respect to the learned judge, we conclude that he did fall into error.

44. Paragraph 8 of [schedule 21](#) requires the court to take account of aggravating factors to the extent that it has not allowed for them in deciding the appropriate minimum term. The judge here correctly identified the aggravating factors and rightly observed that it must be well-nigh unprecedented for an offender to plead guilty to murder having twice previously been charged with murder and convicted of manslaughter. In our judgment, however, he fell into error in his assessment of the weight to be given to those factors, individually and collectively, in determining the seriousness of the offence of murder. It must be remembered that the two previous convictions were for voluntary manslaughter in circumstances where all the ingredients of the offence of murder were proved or admitted but one of the partial defences was successfully invoked. Moreover, the first offence of manslaughter was a case of provocation, not a case in which Mr Johnson's mental health was relevant to the verdict. In our view, the passage of many years since those convictions does not significantly reduce the extent to which they aggravate the seriousness of the present crime.

45. In addition, we agree with the learned judge that Mr Johnson's breach of the condition of his discharge from hospital was a gravely aggravating feature. The obvious purpose of that condition was to safeguard any women with whom Mr Johnson formed or tried to form a relationship. We find nothing in the evidence about Mr Johnson's mental health problems to suggest that he was not fully aware of the importance of the condition. We are unable to accept Miss Henry's submission that it was in some way inappropriate to leave a person with a history of mental health problems to self-report, as this condition required him to do. We have referred to the two assessments which preceded his discharge and to the assessment made at that time that he could be trusted to self-report about this matter.

46. Against that background, Mr Johnson deliberately breached the requirement, not only by failing to disclose relationships to those whom he should have told, but by actively concealing the fact of his relationship with Miss Best when they asked him questions in general terms about any relationship. The awful reality, as it seems to us, is that Miss Best may well have been alive today if Mr Johnson had complied with that important requirement of his conditional discharge from hospital. It is not for us to speculate as to whether she would ever have begun a relationship with Mr Johnson in the first place if she had then known of his true history, but if appropriately advised and warned she would surely at the very least have been on her guard for signs indicative of a decline on his part towards depression, with the associated increase in the risk to her safety.

47. In our view, the combination of the first manslaughter conviction and the brutal circumstances of this murder of a woman who had gone to Mr Johnson's home trusting that he would behave properly towards her, should, without more, have caused the judge to regard this as a case of particularly high seriousness. So too should the combination of two previous convictions for manslaughter followed by the murder of a third woman with whom he had been in a relationship. It follows that in our view the judge should have concluded that the appropriate starting point was 30 years, even without taking into account all three of the factors which he identified. He should then have regarded those features which he had not already taken into account as necessitating an increase from the starting point. We agree with

Miss Henry that the judge in such a situation must not count the same factor twice; but that does not mean that the judge must simply look to all the factors collectively in reaching the 30-year starting point, without also considering whether that starting point is reached even before they are all taken into account.

48. Thus in our judgment, with respect to the learned judge, he failed to give sufficient weight individually and collectively to all three factors. In our judgment, notwithstanding Mr Johnson's age and disability, those factors necessitated not only a starting point of 30 years but also a significant increase in that starting point. We conclude that after a trial, but before consideration of personal mitigation, the appropriate minimum term would have been one of 35 years.

49. We give rather greater weight to the personal mitigation than did the learned judge. We do so principally because imprisonment will undoubtedly be very much harder for Mr Johnson as an aging man, largely dependent upon the assistance of others, than for a younger prisoner in better health. We accept Miss Henry's submission that the marginal adjustment to the conventional reduction for a guilty plea was one which the judge was entitled to make. In all the circumstances of the case, it seems to us that the combined effect of the personal mitigation, followed by appropriate credit for the late guilty plea, is to reduce the minimum term of 35 years which we have mentioned to one of 30 years.

50. For those reasons, we accept the submission of the Solicitor General that the sentencing of Mr Johnson was unduly lenient. By treating all of the aggravating features of the case as collectively necessitating a starting point of 30 years, but not as necessitating an increase above that starting point, the learned judge failed fully to reflect the true seriousness of this crime. We therefore quash the minimum term of 26 years imposed below and we substitute for it a minimum term of 30 years. As before, 358 days spent on remand in custody will count towards that minimum term.

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