36 CRIME

36 CRIME NEWSLETTER

- Winter 2024

Contents

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36 CRIME

36 Crime Updates - Winter 2024

A welcome from our Head of 36 Crime - Mary Prior KC

The 36 Crime Newsletter is designed to help our busy Solicitors and in house Counsel colleagues to have a practitioner's update on developments in criminal law over the last 12 months.

It is my privilege to be Head of 36 Crime, a group of excellent KC's and juniors who undertake serious and complex criminal cases across England, Wales and around the world. We provide high focussed and timely written advice and bespoke advocacy.

The 36 Crime team is well known for being friendly, approachable, flexible and for working collaboratively with those who are kind enough to instruct us. We hope that our relationships with our Instructing Solicitors last a lifetime of practice and that, as a team, we can create the best outcome for our clients.

Our clerking team is highly professional and dedicated to finding solutions to listing difficulties from start to finish. We always try to ensure that you have the Counsel of choice but if that is not possible we can provide you with a Counsel of similar ability. That is the benefit of our ethos and culture.

Chambers is ranked in all the directories as a Leading Set in the Legal 500 and other directories. Many of the members of our criminal team have individual rankings. We aim always to provide an inclusive, warm and welcoming environment to all who wish to practice here or who use our services.

We are proud to prosecute and defend the most serious and difficult cases across the county and overseas in the best traditions of the criminal bar.

We have a dynamic and hugely talented group of junior barristers who excel. Our most junior tenant, Kate Jenkin, has joined us having recently successfully completed pupillage with us. Emma Fielding is making a great success of her career, finding time at these early stages of practice to make time for the Criminal Bar Association, the Young Bar Association and the Kalisher Trust. Many of the ten junior practitioners we have have been recognised in the directories as stars in the making and we could not agree more. They all are.

A welcome from our Head of 36 Crime - continued

- Mary Prior KC

We are very privileged to have them. Of our practitioners of 10 years call to 20 years call we have a large number of practitioners who are ranked as outstanding in legal directories.

Sebastian Walker, before coming to the Bar, enjoyed a career in academia. He has recently co-authored Sentencing Principles, Procedure and Practice 2024 which I would commend to you as an excellent and easy to use practitioner's guide.

Our senior juniors are equally stellar in the directories. Most have been with 36 Crime since pupillage but we have been delighted to welcome like minded practitioners with exceptional ability to join us in the last 12 months including Diane Mundill, Emma Rance, Peter De Feu and Elizabeth Muir. Please do look at the individual profiles of all our juniors to see the depth and breadth of work that they undertake.

Our Silks are highly sought after and undertake high profile work which attracts national and international publicity.

The inclusivity of our clerking and barrister team is best demonstrated by the fact that we have as many women practitioners and clerks as we do men, that our Practice Manager and Head of Team are both women and that, in our set, this is simply a reflection of fair division of work and a culture of encouragement and inspiration for everyone, regardless of gender, race, disability or other protected or non-protected characteristic.

We appreciate that the levels of stress and exhaustion amongst our instructing Solicitors has never been higher and that we are all being asked to do more and more to ensure that the system continues and that everyone is properly represented. We aim to ease that process as much as we are able. If, for any reason, we have not reached our own high standards, please do let Michelle and I know.

All of us in the 36 Crime Group wish you and your loved ones a happy, healthy and prosperous 2024.

Mary

Crossing the Rubicon: Implications of s.75A of the Serious Crime Act 2015 for consent and reasonable belief in consent in Sexual Offences Act 2003 offences

- John Simmons

Since the creation of stand-alone offences of strangulation and suffocation 16 months ago we are now well-educated in the prevalence, unique harms and high risk factors of such offending (see Joanna Evans and Nogah Ofer's excellent analysis in the June edition). Police, prosecutors and courts are well-versed in the evidential issues. The Court of Appeal in Cook [2023] EWCA Crim 452 established that strangulation offences are for the Crown Court, and that due to the real harm inherent in strangulation "which inevitably creates real and justified fear of death," custody is inevitable save in exceptional circumstances. The starting point after trial is 18 months' imprisonment, 'ordinarily' immediate, although in Borsodi [2023] EWCA Crim 899 the Court since stated that this does not mean that suspension will be appropriate only in exceptional circumstances (although presumably suspension will only be apt 'extraordinarily.')

However, there has been little analysis to date of the implications of the way in which the Act is drafted: s.75A SCA 2015 both places an evidential burden on a defendant running consent to a charge of intentional strangulation, and appears to rule out any belief in consent defence unless that belief in consent is firmly allied to evidence of actual consent. The Act arguably provides grist to the mill of the victims' and women's groups calling for the Sexual Offences Act 2003 to be amended via the Victims and Prisoners Bill to require 'affirmative consent'.

Consent

For the first time, a defendant must not only raise consent but must also provide evidence of consent. This represents a sea change in criminal law that has largely gone unremarked. It sets precedent.

Belief in Consent

Here the Act brings equally seismic change, through silence regarding the perpetrator's state of mind. Previous commentators have suggested that a common law mens rea must attach to the consent defence in s.75A(2), consistent with the basic position at common law per Beckford [1988] A.C. 130. Stranglation is regularly indicted as part of wider sexual abuse, often domestic. Yet the common law approach to a

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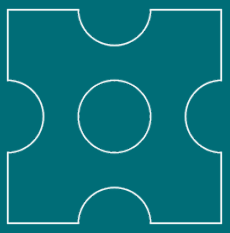

defendant's belief in consent is that it must be genuine; under the Sexual Offences Act 2003 the belief must also be reasonable. It has been queried whether this difference is significant, citing the Privy Council in Beckford (in the context of self-defence):

> "Whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held." [1]

Nonetheless, if it is correct to presume a common law mens rea such that the Crown must disprove a belief in consent, the difference in the quality of the belief—reasonable for rape, genuine for strangulation—is problematic for two reasons. First, the necessarily different directions for each offence may confuse the jury and are certainly unhelpful. For example, a complainant may assert a pattern of coercive control throughout a relationship including specific allegations of rape and of strangulation. The indictment may be framed to reflect her account, alleging an over-arching count of controlling or coercive behaviour with substantive counts of rape and strangulation. The defendant may deny the rape allegations on the basis of consent, or at least his reasonable belief in consent; he may accept the incidents of strangulation but say that they were always part of consensual sexual activity for the complainant's gratification and that they were not part of any pattern of coercive control. If a common law mens rea applies to s.75A, the jury will receive different directions on the rape and strangulation counts both in respect of consent ('free' for rape, 'free and informed' for strangulation) and belief in consent ('reasonable' for rape, 'genuine' for strangulation). There is the potential for verdicts on rape and strangulation that differ solely due to a jury's determination that the defendant held an unreasonable but genuine belief in consent.

Further, the behaviour with objectively the highest risk of fatality requires the disproof of a subjective, and therefore possibly unreasonable, mens rea rather than an objective one. Given the unique harms and high-risk factors[2] that concerned Parliament sufficiently to make strangulation a standalone offence, it is unlikely to have intended a lesser mens rea than for rape or other sexual offences.

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[1] Beckford [1988] A.C. 130; [1988] Crim. L.R. 116; Kelly and Ormerod, "Non-fatal strangulation and suffocation" [2021] Crim. L.R. 549

[2] For detailed descriptions of these harms and risk factors see: Kelly and Ormerod, "Non-fatal Strangulation and Suffocation" [2021] Crim. L.R. 532; White et al, "'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period" (2021) 79 J. Forensic Leg. Med. 102; S. Edwards, "The strangulation of female partners" [2015] Crim. L.R. 949; Bichard et al, "The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review" [2021] Neuropsychological Rehabilitation 4, 18–20.

Crossing the Rubicon: Implications of s.75A of the Serious Crime Act 2015 for consent and reasonable belief in consent in Sexual Offences Act 2003 offences

- *John Simmons*

Lack of consent and lack of belief in consent were first statutorily defined when s.1 SOA 1956 was amended by the Sexual Offences (Amendment) Act 1976. It required a jury considering belief in consent to have regard to "the presence or absence of reasonable grounds for such a belief"[3]—providing statutory precedent for the Privy Council's later observations in Beckford.

The SOA 2003 was the first statute to define consent;[4] Parliament chose to replace the subjective mens rea with an objective one, making lack of consent and lack of reasonable belief in consent discrete elements of the offence. By contrast s.75A DAA creates a statutory offence,[5] incorporating a statutory consent defence at s.75A(2) SCA, which surely ipso facto circumscribes that defence to that described within the statute. Lack of consent is not an element of the offence to be proved; rather consent is a defence to be raised and sufficiently evidenced to require the prosecution to disprove it. Once this evidence is given, it brings into play a new element of the offence to be proved by the Crown, i.e. serious harm (ss.(3)(a)), with a reckless mens rea attached at ss.(3)(b).

Mens rea in consent has evolved from the common law subjective (1956), through the statutory subjective with objective elements (1976), to the statutory objective (2003). Had Parliament in 2021 intended that belief in consent should be a standalone defence to strangulation, then surely it would have been an objective belief, consistent with 21st-century statute, explicitly set out within s.75A(2) SCA. The absence of a statutory mens rea attaching to consent is more likely to represent the height of its evolution from subjective, through subjective with objective elements, to objective, and now finally to a belief in consent that is indivisible from the fact of consent.

It is antithetic to the wording of the statute to infer a mens rea concerning A's belief in B's consent that is anything other than concomitant with B's actual consent. If it is enough for A to show that he genuinely believed B consented, even though she did not, then how can A "show that B consented" as required by ss. (2)? Tthere would have to be implied into s.75A(2) after "It is a defence to an offence under this section for A to show that B consented to the strangulation or other act" the words "or for A to show that A genuinely believed that B consented to the strangulation or other act.

Konzani [2005] EWCA 706 provides common law precedent; A appealed his convictions for inflicting GBH

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[3] Sexual Offences (Amendment) Act 1976 s.1(2).
[4] Sexual Offences Act 2003 s.74.
[5] Section 75A(1) of the SCA 2015.

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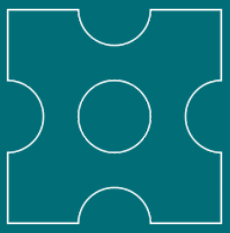

contrary to s.20 OAPA 1861. He had had unprotected consensual sexual intercourse with three womenwithout having disclosed that he was HIV+. Each contracted HIV. The jury had been directed that if the consent of the women were to provide A with a defence, it had to be an informed and willing consent to the risk of contracting HIV.A submitted that the judge had wrongly declined to leave to the jury the issue whether he may have had an honest, even if unreasonable, belief that because each of the complainants had consented to unprotected sex, it might be inferred that they had also consented to all possible consequent risks, including the risk of contracting HIV. He submitted that the judge had deprived him of the jury's consideration of whether he had a guilty mind. The Court of Appeal dismissed the appeal, emphasising a critical distinction between taking a risk as to the various potentially adverse and possibly problematic consequences of unprotected consensual sexual intercourse, and the giving of informed consent to the risk of infection with a fatal disease. Where consent provided a defence to an offence against the person, it was generally the case that an honest belief in consent would also provide a defence. However, in the circumstances, A's honest belief had to be concomitant with the consent that provided a defence. Unless consent provided a defence, an honest belief in it would not assist a defendant.

It is arguable that there is a similar critical distinction between consensual sexual intercourse and the giving of informed consent to the risk of serious—possibly fatal—harm through strangulation, which distinction justifies the refusal to leave to a jury consideration of whether the defendant has a "guilty mind." This approach would be consistent with the evidential burden placed on the defendant by ss.(2) "to show that B consented." It would also be consistent with Parliament's stated intention to protect the public—young women and girls in particular—from coercion into risk-laden sexual activity. Once the act of oxygen-deprivation begins, the window for the subject maintaining capacity to withdraw consent may be as little as four seconds. As a matter of public protection, the importance of obtaining informed, unambiguous and freely given consent prior to the act of strangulation should override the protection traditionally afforded to a defendant who erroneously believes his partner has consented.

Implications for sexual offences

If our interpretation of s.75A SCA is correct—that belief in consent to strangulation is indivisible from the fact of consent—then the Rubicon has been crossed: the burden of evidencing consent in strangulation falls on the defendant, and he must ensure that consent is clear and unambiguous since he can no longer rely on a genuine but mistaken belief in consent. Putting the onus on the strangler to obtain consent and to take care that no serious harm occurs may reflect a fundamental change in the application of criminal law principles. However, this seems timely rather than unreasonable given the unique harms and high risk of instant or

future fatality or morbidity associated with non-fatal strangulation offences, and the general disparity in physical strength between the sexes. Like rape, strangulation is a gendered crime, with current research indicating that around 96% of victims are female, and 98% of perpetrators are male.[6]

In debating whether or not consent should be a defence to strangulation, Parliament was concerned with the modern pressures that today's children and teenagers must navigate to reach adulthood, including the "widespread availability and use of extreme pornography."[7] However, anti-VAWG associations and victims' rights groups may well point to the implications of those same pressures surrounding sexual activity as well as the serious trauma-based harm caused to victims of rape. If s.75A SCA recognises that the potential serious consequences of strangulation for sexual gratification require a high level of care to be taken by the perpetrator such that the onus is placed on him to obtain and ensure consent, then why in principle can that recognition not be extended to rape and assault by penetration cases?

Public concern at how rape allegations are investigated and misgivings surrounding the balance between fairness to a defendant and fairness to a complainant at trial, are higher than ever.The Editorial in this February's Criminal Law Review referred to "the repeated claim that rape has effectively been decriminalised as conviction rates are so low."[8]

Earlier this year France abolished juries for all crimes with maximum sentences between 15–20 years—in the three-year pilot 90% of these cases involved rape.[9] The Republic of Ireland is currently debating a Bill that will replace the subjective belief in consent to sex with an objective one, bringing the Republic into line with the UK.[10] Each jurisdiction in the UK is looking closely at how victims might be better served and these offences might be better investigated and presented while still ensuring a fair trial for the defendant.[11] On 23 May the Law Commission of England and Wales launched a 730-page consultation paper on Evidence in Sexual Offences Prosecutions, discussing various reforms including limitations on disclosure of complainants'

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[6] White et al, "'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period" (2021) 79 J. Forensic Leg. Med. 102.

[7] Laura Farris MP, Hansard Commons Consideration of Lords Amendments to Domestic Abuse Bill, col.548 (15 April 2021).

[8] H. Quirk, "(Perceptions of) fairness" [2023] Crim. L.R. 101.

[9] "France: Juries abolished for most rape trials as lawyers decry attack on legacy of 1789" (4 Jan 2023), Irish Legal News, https://www.irishlegal.com/articles/france-juries-abolished-for-most-rape-trials-as-lawyers-decry-attack-on-legacy-of-1789.

[10] Criminal Justice (Sexual Offences and Human Trafficking) Bill 2023;

[11] Ministry of Justice, "End to End Rape Review, England and Wales 2021" (20 August 2021), gov.uk, https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions; "Gillen Review Report into the law and procedures in serious sexual offences in NI 2019" (9 May 2019), gov.uk, https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni;

personal records, stricter controls on their cross-examination and offering them independent legal representation.[12] Trial by judge rather than jury is proposed in Scotland through the Victims, Witnesses and Justice Reform (Scotland) Bill 2023. It is our experience that in the jurisdiction of England and Wales, with its binary verdicts, jurors are well able to discuss and dissect the issues; they are generally assiduous in following directions and in the application of the burden and standard of proof. They remain the barometer and the guarantor of democracy.

Our anecdotal observations are supported by recent research published by Professor Cheryl Thomas KC. Her empirical analysis of rape trials from 2007–2022 indicates that in the last five years—during which period written directions including on rape myths and stereotypes have routinely been given to juries—the conviction rates after trial by jury for rape have increased from between 50–55% in 2007–17 to between 65 and 78% in 2018–21.[1] It may be that the lack of justice afforded to victims of sexual crime complained of by victims' rights' groups is rooted in the way the jury has historically been directed to perform its task rather than in want of juror diligence or fairness. Nonetheless, currently a jury must be directed that they must acquit a defendant of rape if they are sure that the complainant did not consent but think that the defendant may not have realised that.

Conclusion

S.75A places a burden on a defendant to provide evidence of consent and denies him the separate defence of mistaken but honest belief in consent. It is groundbreaking. The – possibly unintended – consequence is to create statutory precedent for those advocating for like amendment of the SOA 2003 to conform to the principle of 'affirmative consent'. If the defendant says that the complainant consented, then why should he not have to demonstrate the fact of that consent when tried for rape, as he does when tried for strangulation for sexual gratification? If he accepts with hindsight that the complainant was not in fact consenting, then why should his possible contemporaneous belief that she was entitle him to be acquitted of rape but not of strangulation?

While the Court of Appeal is likely soon to be called upon to determine whether and to what extent belief in consent is relevant in strangulation, it will be for Parliament alone to determine whether and to what extent

[12] Law Commission, Evidence in Sexual Offences Prosecutions (London: The Stationery Office, 2023), CP No.259.

[13] C. Thomas, "Juries, Rape and Sexual offences in the Crown Court 2007/21" [2023] Crim. L.R. 200.

the evidential burden in establishing consent in rape should shift, and whether there is in the modern age any longer any justification for the reasonable belief in consent defence at all.

John Simmons
The 36 Group

This article has also been submitted to Counsel Magazine and is a distillation of the full text found in [Crim.L.R. 2023, 8, 512-529], by kind permission of the co-author, HHJ Emma Nott.

The State of Encrochat: what arguments are left?

- Sebastian Walker

Encrochat

From at least some point in 2016 and the 13th of June 2020, Encrochat devices offered an encrypted communication platform which whilst not illegal to use per se had obvious attractions for organised criminals. Running a criminal enterprise by Encrochat (which was installed on a small range of Android devices) offered many unique advantages. Amongst other things, the phones were end to end encrypted, preventing law enforcement from accessing your communications; there was a dual boot mode meaning that even if the device was seized it was not always obvious it was an Encrochat device; and even where it was seized, the ability to set up automatic burn times and to remotely wipe the device meant you could limit the evidence that got into officers hands.

Like all good (?) things, it of course came to an end, with the network being shut down remotely by those managing it on 13 June 2020, once it had become apparent that the "domain [was] seized illegally by government entities" and that they could no longer guarantee the security of the devices.
Much has been written about what happened (although due to French secrecy laws the exact methods employed are still somewhat hazy) but in short, the position of the National Crime Agency is that a digital "implant"[1] was placed onto Encrochat handsets remotely and that that implant copied the data stored on that handset and provided it to the French Gendarmerie. In due course it was provided to the National Crime Agency and prosecutions have followed.

Admissibility and adjournment

Inevitably significant arguments followed about the admissibility of this evidence and how it was obtained. They were roundly rejected in A, B, D and C [2021] EWCA Crim 128; [2021] 2 W.L.R. 1301. It is, frankly, difficult to imagine that the position in respect of that will change, although given the sentences that often follow for Encrochat cases it is not surprising that some defendants would rather take that risk and run a trial to preserve their ability to appeal in due course.

[1] For the lay person equivalent to a "bug" or computer programme.

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The State of Encrochat: what arguments are left?

- Sebastian Walker

Despite Encrochat concluding in June 2020, many Encrochat cases continue to rumble on.[2] This is in large part because of delays for "the resolution of points of principle in lengthy preparatory hearings"[3] – often relating to either the need for further expert evidence (used to challenge the admissibility or reliability of Encrochat), or because of pending judgments and decisions in other cases (notably those ongoing in the Investigatory Powers Tribunal).

In the recent decision of Murray [2023] EWCA Crim 282, the Lord Chief Justice sought to put his foot down in relation to this, holding at [8] that "… there is a strong public interest in the swift resolution of criminal proceedings, compatibly with fairness and the interests of justice which include the interests of the prosecution. The defendants in this case, and others, have had years to get their cases in order. Applications for adjournments on the basis that something may turn up will not prosper."

Moreover, the initial judgment in the Investigatory Powers Tribunal has now been handed down in SF and others v NCA [2023] UKIPTrib 3 and does not provide material assistance to those seeking to challenge the admissibility of Encrochat.

Those involved in these cases may then find themselves asking what the remaining grounds of challenge are in such cases.

Challenging Encrochat

It is suggested that there remain three principal grounds of challenge in Encrochat cases:

(1) challenges to the reliability of Encrochat data;

(2) challenges to attribution; and

(3) challenges to the inferences that can be drawn from the Encrochat data.

The reliability of Encrochat data

Challenges to the reliability of Encrochat data are in fact challenges to the reliability of the method whereby the data was obtained. Due to French secrecy laws this is still in part shrouded in mystery. The working theory employed by the National Crime Agency is that the implant gathered data in two phases. Phase 1 occurs when the implant is first installed on a device (but can be run again subsequently), with the implant

[2] In Murray [2023] EWCA Crim 282 on 16 March 2023 it was estimated there were about 1800 defendants awaiting trials founded principally on Encrochat evidence.

[3] Murray [2023] EWCA Crim 282 at [4].

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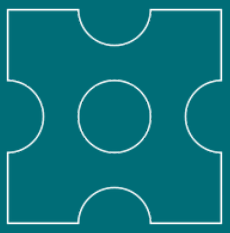


attempting to scrape the device, downloading the handle used, the messages, media files and decryption keys. Phase 2 occurs subsequently and periodically, where the implant in essence routinely attempts to collect messages and cell data.

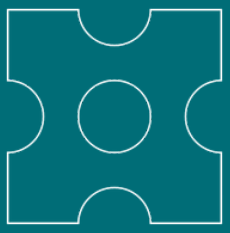
The position of the National Crime Agency is that it is accepted that the implant itself did not work all the time and did not collect all the messages and data from a phone (and the implant itself was not therefore reliable); but that where it did run, the data it obtained is reliable (in that the data is an accurate reproduction of the messages, correctly attributed to the handset used). In essence, that the data is incomplete, but it is not inconsistent (when compared against messages downloaded from other handsets). It is impossible to say at a technical level where data is missing – albeit it is sometimes obvious from conversations or external evidence that the conversation is incomplete – or indeed how much data is missing.

When defending this provides a clear ground of challenge before a jury; that the jury cannot be sure that there is not important missing context – ie evidence suggesting that someone else was using the handset, or that an agreement was not in fact reached, or that the user objected to a proposed plan. This missing context is arguably exacerbated by the potential for messages to have been automatically burned and therefore never even been able to be captured. A reliability argument may in an appropriate case form the basis of an application under s.78 of the Police and Criminal Evidence Act 1984 to exclude the chat data, or for an application of no case to answer.

When prosecuting, counsel will often point in rebuttal to the volume of material that is indicative of involvement in the crimes alleged; the unlikelihood that any further messages could try change the context given what has been recovered; and – potentially the ultimate proof of reliability – evidence external to the Encrochat device that shows the criminality was in fact carried out by the defendant.

Challenges to attribution

There are a number of features that make Encrochat data evidentially unique. First, Encrochat operated only over the internet, and so call data records are limited to GPRS sessions (which have more limited use in cell-siting a phone because GPRS data only provides an "at or before" time at which a particular cell is used). Secondly, that Encrochat handles are unique and unregistered (albeit can be transferred onto different handsets for a fee). Thirdly, the cost of procuring an Encrochat device (which is estimated at between £1,200 to £1,400 for a six monthly contract in the UK). Fourthly, the anonymity of the device means that anyone in possession of the handset is for all intents and purposes the owner of the handle.



For defendants, the limits of GPRS data, and the lack of accompanying Encrochat registration data can provide a way to attack the sufficiency of the Crown's attribution of a handset. There also remain the traditional arguments about attribution that are common in ordinary telephone cases; whether the evidence in fact shows they are the user, and whether it arguably suggests someone else is.

An unfortunate difficulty of the third and fourth points, however, is that whereas in ordinary telephone cases it might be possible to accept partial attribution without accepting involvement in the criminality this is less likely in an Encrochat case. The fact that these handsets are anonymous, expensive and require a 15 digit password provides a strong inference that only trusted members of an organised criminal group would be given access or use of the handset.

That being said, partial attribution may of course limit the extent to which it can be said that a defendant was a part of any particular conspiracy (i.e. it may be possible to accept involvement in the supply of drugs, but not in any of the messages to do with firearms).

Challenges to the inferences that can be drawn from the messaging

This perhaps brings us neatly to the last point of defence, challenge to whether the handset is in fact involved in the specific criminality alleged on the indictment. It is not uncommon for there to be no direct evidence of the criminal agreement alleged: as judges often observe "This is not unusual, you would not expect people who are planning a crime to put their agreement into writing or to tell other people about it." [4]

Even making allowances for the freedoms with which users of Encrochat devices often communicated, there is often some scope for argument as to the intent with which certain activities were being conducted, or the knowledge that any particular defendant had of the discussions. In this respect Encrochat evidence is similar to any phone evidence; it does not capture any communications had in person or by phone for example. It is, however, worth bearing in mind when considering the inferences that can be drawn from Encrochat devices: (a) the apparent hierarchy of any organization (including if there is any evidence how the Encrochat devices are sourced, funded and given out); and (b) that only two people could ever be in an Encrochat communication – there was no group chat functionality.

[4] See the Crown Court Compendium Part 1 (June 2023), 7-31.

The future

The remaining Encrochat cases will continue to trouble the courts and practitioners for some years to come, and in due course so will cases involving its replacement (in whatever form that takes). No doubt litigation will similarly continue challenging the core admissibility of the Encrochat data. In the meantime, however, it is suggested that the core issue in such cases will come down to the three heads of challenged identified herein: (1) reliability; (2) attribution; and (3) evidential inferences.

Sebastian Walker

The 36 Group

R v ZA [2023] EWCA Crim 596: Sentencing children and young people

- Simren Singh

Introduction

1. The sentencing of children and young people ("youths") inevitably involves practitioners and judges having to grapple with complex and disparate sentencing regimes, often those of which they have little experience Whilst the Sentencing Council's guideline on sentencing children and young people (issued in 2017) has provided invaluable assistance to practitioners, the sentencing of such cases is a complex exercise.

2. In the recent decision of R v ZA [2023] EWCA Crim 596, the Court of Appeal set out the correct approach and lessons to be learned for both judges and counsel in sentencing children and young people, especially when they have been tried with older co-accused.

Facts

3. ZA, who was 15 years' old, conspired with his co-defendants (all under 18) to steal mobile telephones and rob taxi drivers of their vehicles. There was a long sequence of robberies involving the co-defendants, however ZA was only involved in one.

4. On 17th February 2021, Mr Bringye, a taxi driver, was subject to a robbery. During the course of this robbery, Mr Bringye was fatally stabbed. Earlier that day, ZA was witnessed in possession of a machete. ZA was subsequently charged with five offences: conspiracy to steal; conspiracy to rob; possession of a bladed article; murder; and manslaughter.

5. Prior to his trial, ZA entered a Guilty plea to possession of a bladed article prior to trial, and during trial, a Guilty plea to conspiracy to steal.

6. Following a trial with four co-defendants, ZA was found convicted of conspiracy to rob, however was acquitted of both murder and manslaughter. He was sentenced to a total term of five years' detention.

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Judgment

7. Although sentencing notes had been prepared by the advocates in the court below, they did not meet the approval of the Court of Appeal.

8. There was much criticism levelled at the sentencing note prepared by the prosecution. Firstly, that there was no "hard-line distinction" drawn between older and younger defendants, by virtue of their respective ages and roles within the events leading to Mr Bringye's death. Secondly, there was a suggestion that the adult robbery guidelines applied to all defendants, when it only applied only to the older two defendants (who were not even present for the sentencing exercise). A similar error was repeated in relation to the theft and bladed article guidelines. Finally, there was only one mention of the overarching youth guidelines, and that reference was to paragraph 6.46 – that when considering custody for youths (aged 15-17), the court may feel it appropriate to sentence broadly within the region of a half to two-thirds of the adult sentence.

9. Whilst it was accepted that the defence note was more helpful, referring to the overarching youth guidelines, unfortunately that note too had failed to refer to the specific youth robbery guidelines.

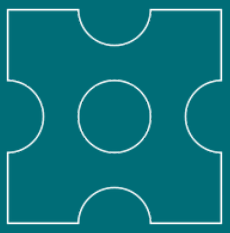
10. Reflecting on the "collective failure of counsel and court" to have regard to the relevant guidelines, the Court devised a seven-point checklist [at 82] for both counsel and courts to follow in advance of, and during, what are "invariably complex and difficult sentencing exercises" for youths:

"*(1)* ***Court listing should ensure that there is sufficient time for the judge,*** *even if that judge heard the trial and knows the case well, to read and consider all reports and to prepare sentencing remarks in age-appropriate language.*

(2) ***Consideration should be given to listing separately, and as a priority, the sentence of any child(ren) or young person(s)*** *jointly convicted with adult co-defendants.*

(3) ***The courtroom should be set up and arranged to ensure that the child or young person to be sentenced is treated appropriately, namely as a vulnerable defendant entitled to proper support.*** *So far as possible the judge should be seated on a level with the child or young person, and the latter should be able to sit near to counsel, with parental or other support seated next to them (see further below).*

(4) ***Counsel must expect to submit full sentencing notes identifying all relevant Sentencing Council Guidelines, in particular any youth-specific guideline(s),addressing material considerations in an individualistic way for each defendant separately*** *(if more than one young defendant is to be sentenced).*



Where an individualistic approach is mandated, as it is for a child or young person, a note which addresses all defendants compendiously risks missing important distinctions. ***These notes should be uploaded well in advance of the sentencing hearing.***

(5) ***The contents of the Youth Justice Service pre-sentence report and any medical, psychiatric, or psychological reports will be key.*** *Courts should consider these reports bearing in mind the general principles at section 1 of the overarching youth guideline, together with any youth-specific offence guideline, carefully working through each.*

(6) ***In general, it will not be helpful to go straight to paragraph 6.46 of the overarching youth guideline without having first directed the court to general principles canvassed earlier in that guideline, as well as to any youth-specific guideline.*** *The stepped approach in the overarching youth guideline and any youth-specific offence guideline should be followed. Working through the guideline(s) in this way will enable the court to arrive at the most appropriate sentence for the particular child or young person, bearing in mind their individual circumstances together with the dual aims of youth sentencing.*

(7) ***If the court considers that the offence(s) is(are) so serious as to pass the custody threshold, the court must consider whether a YRO with ISS can be imposed instead. If it cannot, then the court must explain why."***

11. In relation to the overarching youth guidelines, the court drew specific attention (at [55] to the need to take an individualistic approach that the guidelines promote; and that the court must have regard to the principal aim of youth justice (preventing reoffending by children and young people) as well as the welfare of the child/young person.

12. The court held [at 68] that as there was a specific youth robbery guideline, this was to be read alongside the overarching youth guidelines. The youth robbery guidelines provide a stepped approach for the court to work through in determining sentence. Importantly, under Step 5 (Custodial Sentence), should the court wish to resort to imposing a custodial sentence, there is a need for the court to explain why a YRO with ISS could not be justified.

13. In applying the above guidelines, the Court considered that the judge at first instance was unable to take a stepped approach before referring to the equivalent adult guideline, as she had not been referred to the youth robbery guidelines. It was emphasised as "critical" that resort to adult guidelines comes "at the end of the process, not the beginning" [at 70].

14. The Court also considered the judge to have wrongly allowed the string of robberies (unrelated to ZA), as well as the death of Mr Bringye to influence her decision on sentence, not properly considering the jury's verdict (on murder and manslaughter), and therefore failing to "discriminate between the roles" between ZA and his older co-accused [at 73].

15. In assessing what would have been an appropriate sentence, the Court remarked that ZA would have been highly suitable for a YRO with ISS, and that it was regrettable that he was not allowed an opportunity to have the supervision and educational provisionwhich a YRO with ISS would have afforded him.

16. Turning to more practical matters, the court observed at [83] and [84] that "it may be helpful to remind courts of certain practical matters which are required to be addressed when sentencing children or young people in the Crown Court", these included whether there should be attendance in person or over the link; if having a parent or key worker present with the appellant in the link room will assist; court dress; use of first names; familiarisation; positioning in court; adequate breaks during the hearing and use of age-appropriate language.

17. Finally, at [87] and [88] the court observed that all courts called upon to try and/or sentence a child or young person should be thoroughly well-acquainted with the contents of the "Children and Young People in the Crown Court Bench Book" ("Youth Bench Book"), published by the Judicial College. There is, a need to ensure that sentencing remarks take care to explain the sentence, and the reasons for it to the child or young person being sentenced, in a way and using words that they can easily grasp.

Discussion

18. This judgment provides an important starting point, not only for counsel, but also courts, dealing with such sentences, and is a stark warning against taking a swift broad-brush approach to sentencing youths.

19. Furthermore, there is a repeated clear principle - that the sentencing exercise must be "individualistic". This holds true even in cases of youths involved in conspiracy offences, and it is in the words of the court "categorically wrong" to treat youths as "mini-adults".

20. In a positive move, the Court of Appeal has made clear the expectations of counsel and judges in anticipation of sentencing youths in that:

    a. There will always need to be sentencing notes, both from Prosecution and Defence;
    b. There will need to be an adjournment to sentence for reports;
    c. The court should be looking to allow adequate time for the sentencing exercise, and allow for a young person or youth to be sentenced earlier in a multi-hander; and
    d. The court should be mindful of practical steps which must be taken by the court and counsel, such as using age-appropriate language, and referring to youths by their first name.

21. There are various factors outlined in the overarching youth guidelines, guiding the the courts and counsel through all relevant and competing considerations, before arriving at sentence. These are difficult sentences, and careful consideration needs to be given to preparation for these exercises by all involved, in order to avoid excessive or unlawful sentences.

Simren Singh

The 36 Group

Legal Aid Transfer Applications – A practitioner's guide

- Emma Fielding

It is something that every defence solicitor dreads - an email or letter with the subject 'legal aid transfer'. Whether you are the firm applying for the transfer, or the one who currently holds legal aid, it can be a contentious application.

Legal aid transfers can sometimes involve serious allegations levelled at the firms in question and some judges take a dim view of applications and the motivations behind them. In the case of R v Angela Thornton (T20217094) at Bradford Crown Court, The Recorder of Bradford HHJ Richard Mansell KC in his written ruling dated 26 August 2021 made some robust remarks about legal aid transfer applications that he had come across recently.

He concluded that 'far too many meritless applications to transfer representation are being made' and he estimated that he deals with five to ten applications a week. He said that it was 'inconceivable' that so many criminal defence solicitors could be failing their clients or have conflicts of interest. He stated as follows:

> *There is widespread suspicion in the criminal defence legal community that many of these applications are being initiated and driven not by the defendants but by the solicitors who stand to benefit from the transfer of representation.*

It is alleged that solicitor firms are agreeing transfers between themselves in order to 'game' the LGFS scheme which means that the overall cost can be up to 160% of the usual litigators fee payable to one solicitor. HHJ Mansell KC also refers to cases where applications are made to revoke legal aid and instruct a solicitor privately, which exclusively involve Albanian illegal immigrants arrested for cannabis grow houses. On this topic he stated as follows:

> *When asked where the monies have come from, given that the defendants are often claiming that they are the victims of modern slavery and owe approximately £15,000 to the human traffickers who facilitated their entry into the UK, the answer given to me is "family money." Given that it is abject*

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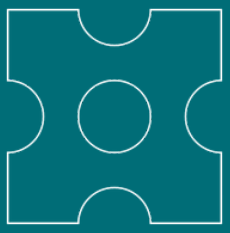


> *poverty in Albania which drives these defendants to enter the UK illegally, I find this implausible in the extreme.*

In the Thornton case the judge referred the allegations and counter allegations to the SRA along with his wider 'concerns' about legal aid transfer applications.

LASPO criteria

The criteria for transferring legal aid are found in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (SI 2013/614). There are two main grounds:

1. Your present solicitors are unable to provide effective representation because there has been a breakdown in the relationship between you and the present solicitors, or there is some other compelling reason why they cannot, [reg.14(3) of SI 2013/614] OR
2. Your present solicitors consider they have a duty to withdraw from the case in accordance with their professional rules of conduct, or your present solicitors are no longer able to represent you through circumstances outside their control [reg.14(4) of SI 2023/614]

Top tips for legal aid transfer applications

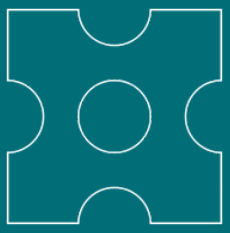
1. Beware the unopposed application

Sometimes the current and proposed solicitor firms do not oppose the application to transfer, however this does not mean that it will automatically go through. Regardless of whether there is agreement, the application still has to meet the criteria for transferring legal aid, and the court is required to give "vigorous scrutiny"[1] to all applications, even agreed ones.

2. Conduct

One of the main risks of a legal aid transfer application is the possibility of accusations that a solicitor firm has conducted themselves in a dishonest way or acted in bad faith. In the Thornton case the judge referred the solicitor firms involved to the SRA to investigate their actions. If you are the firm making the application

[1] Iqbal (Naseem) [2011] EWCA Crim 1294; [2011] 2 Cr. App. R. 19.



to transfer legal aid, you should be careful to not make any serious accusations without evidence and consider the consequences of making such an application.

3. Cross the T's and dot the I's

It is essential that you submit signed endorsements and that the transfer application itself is signed. If there are any language difficulties, then you must have an interpreter present for instructions and make sure that the client fully understands everything. The Court will expect to see evidence to support the LASPO criteria for a transfer. You are not limited to the form only and can provide further documents or submissions if required. Chronologies can be helpful to assist the Court with what happened when.

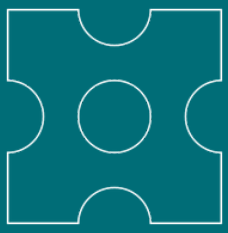
4. Consider your reasons carefully

There are certainly some cliches when it comes to transfer applications including 'my family have recommended a solicitor' and complaints about the current solicitor including that they have not visited the client, or they haven't sent key documents or papers. These may of course be legitimate reasons for a transfer, but they should be explored further with the client. Legal visits can be challenging to arrange and it may be that this is simply outside of the current firms control. Unfortunately, a defendant does not have the right to change solicitors simply based on a preference.

Judges will also be alive to applications being made simply because the client doesn't agree with the advice that they have received. Providing robust and realistic advice is part of any solicitor's role and while receiving such advice may not be well-received, it will rarely be a genuine basis for a breakdown in a relationship.

5. Is there another lawyer that can take conduct of the case?

Frequently the issues that the client is raising can be resolved by transferring the case to another solicitor inside the firm, including any possibly conflicts of interest. If you receive a legal aid transfer application on the basis of a breakdown in relationship with a particular solicitor at the firm, consider suggesting that you could transfer the case to a different solicitor which may resolve the issue.



6. Multiple legal aid transfers

Clients that have made more than one application to transfer legal aid should be a red flag. One application is understandable, but if there have been multiple breakdowns in relationship or multiple instances of professional embarrassment, this is going to be of concern to the Court. It can also be a sign of mental health disorders and is something that psychiatrists consider when deciding whether a defendant may be unfit to plead.

You've made an application to transfer and it has failed – what next?

One option if the client can afford it is to revoke legal aid and to instruct the new firm privately. However, bear in mind that if legal aid were later to be reinstated, it would return to the firm who held the legal aid order when it was revoked, so you would be back to square one.

Legal aid applications can be renewed, however unless there has been a material change, it is unlikely that there will be a different outcome. There is no appeal process for the decision.

Emma Fielding

The 36 Group

Legal Update

- Mary Prior KC

- Winter 2024

The Sale of Knives to under 18 years olds.

New sentencing guidelines for the offence of sale of knives etc to persons under 18 will come into effect on 1 April 2023. Two guidelines apply for the offence contrary to section 141A of the Criminal Justice Act 1988: one for individuals and one for organisations -carries a maximum of six months' imprisonment (or, in the case of an organisation, an unlimited fine) and can only be dealt with in Magistrates' Courts. The guidelines apply to sentencing retailers who fail to ensure that adequate safeguards are in place to prevent the sale of knives to under 18s either in store or online.

Section 28

Youth Justice and Criminal Evidence Act 1999 (Commencement no 30) order 2023 SI2023/10. Brought into force s28 in all remaining Crown Courts from 1 2 2023 in respect of all witnesses eligible under ss16 and 17(4).

Serious Violence Reduction Orders

PACE 1984 Revision of Code A SI2023/20 brings into force Annex G to Cide A dealing with powers in relation to individuals subject to a SVRO. Imposition of SVRO will be piloted in Merseyside, West Midlands, Thames Valley and Sussex Police force areas. SVROs can only be ordered in the pilot areas.

Breach of Non-Molestation Order

R v Cowell [2023] EWCA Crim 162

C, aged 33 admitted breach of NMO and battery. C moved back in with the complainant without her consent on two occasions. During one of these he tipped her out of bed in anger as she had not washed up. C was sentenced to 12 months imprisonment for breach of NMO with NSP on the battery. C appealed on the basis that he should have received a community order. The Court held that a Judge must go through the six factors in the Guideline Imposition of Community Orders and Custodial Sentences. It is not a tick box exercise. The sentence was upheld.

Causing death by dangerous driving

R v Soto [2023] EWCA Crim 55

Guidance as to approach where the court is sentencing for an offence where the maximum sentence has

increased but the Guideline has yet to be updated. Judges should use the starting point and adjust the sentence to take account of the increased maximum. It may be increased further to take account of aggravating factors. Advising a defendant that they will serve half a custodial sentence whereas it is 2/3 does not affect the sentence imposed but may affect the disqualification. Early release provisions are in the CJA 20023 and not the Sentencing Code.

For determinate sentences of imprisonment or Detention in a Young Offenders Institution (DYOI) an offender will be released at the half way point of the sentence (CJA 2003, s.244). Two exceptions, release will be at the two-thirds point:
(i) by the CJA 2003, s.244ZA(4), if D is serving a sentence of imprisonment or DYOI
of seven years or more which was imposed on or after 1 April 2020, for an offence specified in Part 1 or Part 2 of sch.15 (specified violent or sexual offences) and which carries life as its maximum penalty (this was the exception which was overlooked in Soto); and
(ii) by the CJA 2003, s.244ZA(5) and (7), if D is serving a sentence of imprisonment
or DYOI of at least four years but less than seven years which was imposed on or after 28 June 2022 for an offence of manslaughter, soliciting murder, OAPA 1861, s.18 (and ancillary offences in relation to these) or an offence specified in Part 2 of sch.15 (specified sexual offences) which carried life as its maximum penalty when the sentence was imposed.
Exception (ii) is a recent change, brought about by the Police, Crime, Sentencing and Courts Act 2022. Its lower threshold of four years means that it will have an impact in more cases than exception (i), and is therefore more likely to catch out practitioners. The appropriate extension period under the RTOA 1988, s.35A becomes two thirds of the determinate sentence of imprisonment or DYOI.

Referral Orders

S [2021] EWCA Crim 960
S was committed to the Crown Court for trial alongside adults. At PTPH S pleaded guilty. A trial was set for the adults. The Judge refused to remit S to the Youth Court for sentence and ordered a PSR. At sentence the Judge was again invited to remit. He refused. S was made subject to a YRO on the basis that a Referral Order was not available. The Judge could have sat asDJ under s66 of the Courts Act 2003 having remitted the matter and imposed a referral order. The cases of Dillon [2017] EWCA Crim 2671 and Koffi [2019] EWCA Crim 300 were incorrectly decided.

Legal Update

- Mary Prior KC

- Winter 2024

Modern Slavery Act 2015

R v AFU [2023] EWCA Crim 23

Guilty plea quashed.

D pleaded guilty. He appealed, relying on fresh evidence that he had been trafficked from Vietnam, including a Home Office determination and two psychiatric reports which demonstrated that his guilty plea was wrong in law. AFU had been properly advised at trial as to the possibility of relying on the defence and chose to plead guilty. The Appellant did succeed on the ground that the prosecution was an abuse of process in that the police failed to discharge their duties as first responders and the prosecution failed to comply with CPS guidance. There was no referral to the VRM or consideration as to whether the public interest lay in proceeding to prosecute.

CCTV evidence

R v Ulas [2023] EWCA Crim 82

The Court admitted evidence from a police officer who reviewed CCTV images and noted the appearance of DJ. He then arrested DJ and instantly recognised him as being the person on the CCTV. The officer subsequently identified DJ on an identification parade. A police officer can acquire a degree of special knowledge or skills by frequent playing of CCTV footage. Whether the officer is skilled is a matter of fact in each case.

R v Gold [2023] EWCA Crim 22

It was permissible for the Crown to show its witnesses the CCTV of an incident that they had given eye witness testimony of in the witness box before they were cross-examined. An exception to his might be if what the footage showed was contentious. The Court rejected the contention that there should be a CPR rule dealing with CCTV evidence.

Protests

DPP v Bailey and Others [2022] EWCH 3302

The prosecution do not have to prove that a D knew or was reckless as to whether they were trespassing under s68 of the Public Order Act 1994. Proof of the civil wrong of trespass required no mental element. Burglary and aggravated trespass were different offences. A presumption of mens rea only applies where the statute is silent as to mens rea. Section 68 is not silent.

Legal Update

- Mary Prior KC

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Attempting to abduct a child.

Andrews v Chief Constable of Suffolk [2022] EWHC 3162 (admin)

A was arrested for attempting to abduct a child. He had got out of his car and approached a child who appeared to be alone. He had danced towards her. The CPS offered no evidence at a hearing in the Crown Court. The case includes a detailed account of s1 Criminal Attempts Act 1981. Had the individual moved from the realm of intention preparation and planning into the area of execution or implementation. The Court held that it would have been open to a jury to conclude that the acts were more than merely preparatory.

Immigration offences

Khodamoradi [2022] EWCA Crim 37

K had his hand on the tiller of a boat for 1-2 minutes. He pleaded guilty (on advice that he had no defence) to facilitating the commission of a breach of immigration law. The Crown did not suggest he was a smuggler or organiser. Appeal allowed.

Stalking

R v Musharraf [2022] EWCA Crim 1482

At the end of a relationship, M sent text messages, turned up at V's house and workplace and made false allegations against V to colleagues, employer and the SRA. M's case was that V had taken advantage of her vulnerability and subjected her to sexual abuse so that the allegations were true. Sending complaints to others can amount to stalking.

Sexual allegations

R v Laek [2023] EWCA Crim 710

V woke to find someone in bed with her and her jogging bottoms removed. Her knickers were halfway down her legs. D said that V consented. At trial the Crown adduced three first complaint statements which indicated that V was hyperventilating, crying, petrified and adduced her upset on the 999 call. Appeal was allowed on the basis that the Recorder had failed to give clear directions on the evidential value of recent complaint, adverse inferences, inconsistencies. The Recorder descended into the arena by suggesting that it was unlikely that V would consent to sexual activity with a stranger. The Court could see no good reason why the Recorder failed to follow the Compendium.

Legal Update

- Mary Prior KC

- Winter 2024

R v Pipe [2023] EWCA Crim 328

P was 88 when convicted of sexual offences. He died after commencing the appeal. His widow was permitted to continue. The trial judge had determined that the abuse of process application should be heard at the close of the prosecution case rather than at the commencement. A stay of proceedings is the exception, not the rule.The decision as to when the matter is to be considered is a matter for the trial Judge.

R v KC [2022] EWCA Crim 1378

Historical sexual abuse. Judge provided jury with three written documents as to how to approach the evidence. Rule 25.14 permits the Judge to remind the jury of evidence in writing. A judge should exercise caution where the document includes an account of evidence that has been given. The facts in a trial are for the jury to decide.

Attempted robbery

R v Robinson [2022] EWCA Crim 1637

A sentence of 6 years 9 months was upheld for an attempted robbery where the defendant grabbed a woman and threw her to the floor. Little or no reduction was made for the fact that is was an attempt because the offence only stopped because a van driver intervened. The victim suffered significant psychological damage.

Terrorism

R v Musins [2022] EWCA Crim 1625

M pleaded guilty to membership of a proscribed organisation. By the end of 2017 M had resiled from his earlier beliefs and had held a respectable job for four years. The case provides guidance as to the degree of reduction of sentence if D has resiled from membership. A reduction of 50% should be reserved for cases where the D has given active assistance to the police in undermining it.

Jury bias

R v Skeete [2022] EWCA Crim 1511

Two members of the jury had close personal experience of sexual assault and rape. Other jury members were concerned that this had influenced their verdict and sent a note to the Court. The note did not provide evidence that jurors were not faithful to their oath. The note did not require a discharge of the whole jury.

Community Orders

R v Coates [2022] EWCA Crim 1603

D pleaded guilty to putting a person in fear of violence by harrasment. He had spent a period of 13 weeks on remand in prison awaiting sentence. He was entitled to 25% credit. The starting point was 12 weeks imprisonment. His appeal against a sentence of a community order for 2 years with requirements of 150 hours unpaid work and RAR for 40 days succeeded. He had served longer than warranted for the offence. There were good reasons to impose a community order but the unpaid work element was quashed.

Youth Court

BH v Norwich Youth Court [2023] EWHC 25

D aged 17 appeared before the Youth Court charged with rape. He was 17 at his first appearance. He was 18 by the time the trial date was fixed. The Judge declined to reconsider jurisdiction. There was no right to elect trial and save where the court declined jurisdiction a youth would be tried in the youth court. The date that mattered was the allocation date. Nottingham Justices ex parte Taylor [1992] 1 Q.B. 557; [1991] 3 W.L.R. 694); an accused who is under 18 at that date has no right to elect Crown Court trial.Note that when s.12 Judicial Review and Courts Act 2022 comes into effect, s.47 Crime and Disorder Act 1998 (which applies where a person who appearing before a youth court attains the age of 18 before the start of the trial) will be amended to include a new subs. (1A): "In the case of an indictable offence, the youth court may, at any time before the start of the trial, send the person for trial to the Crown Court".

Delay

R v MT [2023] EWCA Crim 558

The Court gave a sample direction.

"The defence say the defendant has been particularly prejudiced by the delay in the complainant going to the police and the case coming to court. They say because of the passage of time he may now not be able to remember details which could have helped his case. Had any complaint been made at the time a sexual assault is said to have happened he might have been able to show he was elsewhere or call a witness who would have assisted his case. He may not have even appreciated what evidence has been lost after such a period of time. As there are no specific dates for when things are said to have happened, as there might have been if a prompt complaint had been made, a defendant cannot say he was elsewhere or say that there

was someone else in his company or call a witness to confirm that. You should take the delay into account in the defendant's favour when you are deciding whether or not the prosecution have made you sure of guilt."

Hearsay

Dirie and Omar [2023] EWCA Crim 341

During a murder trial D handed O a signed dated defence statement in which D admitted matters and excluded O from involvement. The judge ruled that this amounted to a confession by D which was admissible under s76 PACE 1984. Section 133 required O to produce the document in evidence. If he was wrong he would not have admitted the document under s76 as it lacked sufficient probative value.

Held _ where a document is ruled admissible on a voir dire it must still be produced before the jury. Admissible does not mean admitted.

R v Beqa [2023] EWCA Crim 1661

The defendants had separate trials due to covid. A admitted in interview he went with B to the petrol station but A bought the fuel and provided it to the other defendants. A added that N knew noting of any plan and just came along for the ride. B submitted that he should be able to adduce A's interview as A's confession. The Court held that A's admissions was not a confession within s82. An argument that the interview should be admitted under s114(d) of the CJA 2003 was not made.

Court of Appeal – re-opening appeals

Useful guidance as to the principals is set out in

R v Zuman [2023] EWCA Crim 79

Judicial Intervention

R V Ramzan [2022] EWCA Crim 1718

The Judge intervened in a cross-examination of the defendant frequently. D sought leave to appeal on the basis that the level of intervention denied him a fair trial. Dismissing the appeal, the Court said that some of the interventions were unnecessary and unfortunate. The case of R v Mustafa [2020] EWCA Crim 1723 is a good example of guidance for the judiciary to remain neutral.

Legal Update

- Mary Prior KC

- Winter 2024

Unduly lenient sentences

R v Egan [2022] EWCA Crim 1751

A sentence of 2 years suspended for 2 years for child cruelty was increased to 4 years. The Court set out general principles relevant to applications for unduly lenient sentences.

Goodyear Indications

R v Solomon [2022] EWCA Crim 1333

S pleaded guilty to blackmail and assault abh on the third day of trial after receiving a Goodyear indication. He was sentenced to 18 months imprisonment (6 months concurrent on the abh. The sentence was increased to three years imprisonment on appeal as it was unduly lenient. A Goodyear indication is not appropriate in complicated and difficult cases unless issues between the prosecution and defence have been addressed and resolved. Judges should have all the information including VPS before agreeing to give any such indication. Prosecuting Counsel should guard against the giving of any appearance of approval or concession in respect of any indication given.

Appeal against conviction to the Crown Court

R v Lawal [2023] EWHC 466

L arrived at Court late on the day of his appeal and his case was disposed of in his absence. It was unreasonable and not in the interests of justice to strike out an appeal rather than adjourn it on the first listing for appeal and where L had said he was on his way. Cutts J referred (at para. 23) to Guildford Crown Court Ex p. Brewer (1988) 87 Cr. App. R.265; [1988] Crim. L.R. 439, which demonstrates that the power to strike the case from the list where a party does not appear and is unrepresented "is a power rather than a requirement", in other words a court "may" (not "must") strike the case out.

Sentencing children

R v ZA [2023] EWCA Crim 596

The court stressed the importance of having regard to the overarching guideline on Sentencing Children and Young People, to any applicable specific children and young person guidelines, and to the CPD. There should be an individualistic approach. It is important for Counsel to assist by the preparation of sentencing notes. This was a series of thefts and robberies of taxi drivers. One had died as a result. The prosecution

sentencing note did not distinguish between age and roles in the events nor point out that most of the guidelines referred to adult offenders. The youth robbery guideline was to be read alongside the overarching youth guideline and adopted a stepped approach which should be followed when sentencing a child or young person. The CACD noted that the judge had not been referred to the youth robbery guideline, and so did not follow the correct stepped approach. The collective failure of counsel and the court to have regard to the youth robbery guideline in addition to the overarching youth guideline, together with the errors in the judge's approach, had resulted in a sentence that was wrong in principle and manifestly excessive. The proper sentence would have been three years' detention. The concurrent sentences were unlawful, theft and bladed article offences are not grave crimes.

The Court gave a checklist:
When sentencing children and young people, counsel and courts should have regard to the following matters:

- Listing should ensure sufficient time for the judge to read and consider all reports and to prepare sentencing remarks in age-appropriate language.
- Consideration should be given to listing separately, and as a priority, the sentencing of any children or young people jointly convicted with adult co-defendants.
- The courtroom should be set up and arranged to ensure that the child or young person is treated as a vulnerable defendant entitled to proper support. They should be able to sit near to counsel and to parents or key workers, and the judge should be seated on the same level so far as possible.
- Counsel should submit full sentencing notes identifying all relevant guidelines, in particular any youth-specific ones, and address material considerations in an individualistic way for each defendant separately.
- The contents of the Youth Justice Service pre-sentence report and any other medical, psychiatric or psychological reports would be key.
- It would not generally be helpful to go straight to para. 6.46 of the overarching youth guideline without having first directed the court to general principles canvassed earlier in that guideline and to any youth-specific guideline. The stepped approach in the overarching youth guideline should be followed.
- If the court considered that the offences were so serious as to pass the custody threshold, it should consider whether a youth rehabilitation order with intensive supervision and surveillance could be imposed instead. If not, the court should explain why.

Sentencing adult for offence committed when under 18 – guidance

Ahmed [2023] EWCA Crim 281 Summary

The CACD considered the correct approach to sentencing an adult for an offence committed when they were a child. Five unconnected appeals were concerning historical sexual offences committed by offenders under 18.

The CACD held that the proper approach was as follows:

- Whatever D's age at the time of conviction and sentence, the Sentencing Children and Young People guideline was relevant, and had to be followed unless it would be contrary to the interests of justice to do so.
- The court had to consider the maximum sentence that was available at the time, or shortly after the time, of the offending. Depending on the nature of the offending and D's age, that maximum could be:
- the same as would have applied to an adult offender;
- limited by statutory provisions setting a different maximum for an offender who had not attained a particular age; or
- limited by statutory provisions restricting the availability of different types or lengths of custodial sentence according to D's age.
- The starting point was the sentence which was likely to have been imposed if the child offender had been sentenced shortly after the offence.
- If, in all the circumstances, the child offender could not in law have been sentenced (at the time of their offending) to any form of custody, then a custodial sentence could not be imposed.
- Where some form of custody was available, the court was not necessarily bound by the maximum applicable to the child offender. That maximum should, however, only be exceeded where there was good reason to do so. The mere fact that D had since attained adulthood was not in itself a good reason.
- The starting point would not necessarily be the end point. Subsequent events might enable the court to be sure that the child offender's culpability was higher, or lower, than would likely have been apparent at the time of the offending. They might demonstrate that an offence was not, as it might have seemed at the time, an isolated lapse by a child, but rather a part of a continuing course of conduct. The passage of time might enable the court to be sure that the harm caused by the offending was greater than would likely have been apparent at that time. In each case the issue to be resolved would be whether there was a good reason to impose on the adult a sentence more severe than they would have been likely to have received if they had been sentenced soon after the offence as a child.

Nothing in the instant judgment affected the sentencing of adult offenders for crimes committed after they had attained the age of 18.

The court found that the all the sentences imposed had been manifestly excessive.

Analysis

This decision provides a clear endorsement of the decision in Limon [2022] EWCA Crim 39. The distinction in levels of culpability between adult and juvenile offenders do not alter because of an elapse of time so that an offender was an adult when sentenced for offences committed as a child. The "likely sentence" which D would have received if sentenced at the time of the offending is the key. Once the historic "likely sentence" has been determined, the passage of time may reduce or aggravate the sentence. The sentencing Judge must be informed of the actual harm occasioned to the victim as a result of the offending.

Qualifying curfew

Sothilingham [2023] EWCA Crim 485

D released on bail in 2019. He spent 845 days on remand, subject to a qualifying electronically monitored curfew. The electronic tag was never fitted. S was convicted and sentenced to 57 months' imprisonment. The judge gave limited credit by deducting three months.

The Court held that S was entitled to appropriate credit under s.325 SA 2020 even though the tag had never been fitted.There was no wording which placed any duty on S to ensure that he was tagged. The principle was no different when the administrative error involved the mistaken removal of a tag, as opposed to never fitting one in the first place (see Marshall [2015] EWCA Crim 1999).

Sentencing offences of intentional strangulation – guidance

Cook [2023] EWCA Crim 452

Guidance on sentencing an offence of intentional strangulation contrary to s.75A Serious Crime Act 2015. D, aged 20, appealed against his sentence of 15 months' imprisonment imposed following a guilty plea (25% credit) to an offence of intentional strangulation. The sentencing judge considered the Sentencing Council guideline on ABH - strangulation appeared as a high culpability factor.

General guidance for sentencing the s.75A offence, pending a Sentencing Council guideline was provided.

Save in exceptional circumstances an immediate custodial sentence should be imposed.. The starting point -18 months' custody – aggravating factors which might increase that (i) history of previous violence; (ii) presence of a child; (iii) attack carried out in the victim's home; (iv) sustained or repeated offence; (v) use of a ligature or equivalent; (vi) abuse of power; (vii) offender under the influence of drink or drugs; (viii) offence committed on licence; (ix) vulnerable victim; (x) steps taken to prevent the victim reporting an incident; and (xi) steps taken to prevent the victim obtaining assistance.

Statutory aggravating factors would apply. The Sentencing Council's overarching principles in relation to domestic abuse were relevant, and the Sentencing Council's Overarching Principles guideline. Mitigating factors included: (i) good character; (ii) age and immaturity; (iii) remorse; (iv) mental disorder;(v) genuine recognition of the need for change and evidence of the offender having sought appropriate help and assistance; and (vi) very short-lived strangulation from which the offender voluntarily desisted.

In this case, as there had been a previous strangulation (before the new Act so charged as common assault) a significant uplift to 30 months starting point reduced to 24 months by mitigating factors. The proper sentence was 18 months. The sentence should have been detention in a YOI.

The safest approach to take where there is no sentencing guideline is to apply the Sentencing Council's general guideline: Overarching Principles, but on occasions the CACD has endorsed a reference to an analogous offence guideline.

Sentencing intentional strangulation
Butler [2023] EWCA Crim 800

D, aged 30, convicted in the Magistrate's Court of intentional strangulation and abh. He admitted breach of a NMO. Sentenced to 3 years imprisonment for the abh and 12 months concurrent for the strangulation, ten weeks' consecutive for breach of the order. The D and V were in a relationship. They fell out because V thought D had been drinking and did not want him to pick up the baby.
D strangled V and pushed her to the floor, put her in a headlock, and then pushed her downstairs. The

assault was witnessed by the children. The sentence was not manifestly excessive. No criticism of the consecutive term for breach of the non-molestation order. The court made the following points in giving judgment:

- No requirement for a PSR where the defendant had numerous previous convictions.
- In future, the best approach is to consider the strangulation offence as the lead offence and then to consider to what extent to increase the sentence to reflect the additional criminality, guarding against double counting the strangulation which, under the assault guideline, is a factor which means that the assault offence is category A for culpability.
- It may be more appropriate to regard the assault as the lead offence.

The appeal against sentence was dismissed.

Restraining order on acquittal
Oshosanya [2022] EWCA Crim 1794

A restraining order for five years under s.5A Protection from Harassment Act 1997, was imposed following D's acquittal for an offence of stalking involving fear of violence or serious alarm or distress. The prosecution had offered no evidence at trial. A restraining order under s.5A did not require proof that the substantive offence had occurred – it only required that the court considered it to be necessary to make the order "to protect a person from harassment by the defendant".The issue under s.5A did not directly concern the nature of the subjective fears of the complainant(s) or require proof of fear on their part. Did the evidence establish the risk of future harassment, making it necessary to impose the order.

Special custodial sentences
WJ [2023] EWCA Crim 789

D, (69) was convicted of indecent assault x 4 on a male and of buggery. Between 1975 and 1982, D, in his early 20s, committed offences against his younger brother (up until he was aged 10) in the family home when their mother was out at work. The impact of the offending upon V had been highly damaging and its effect upon V's life was profound. Now counts 1 & 2 sexual assault of a child under 13 (max 14 years), range of community order to 9 years, counts 3 & 4 - assault of a child under 13 by penetration (maximum life, with a sentencing range of 2 to 19 years) and count 5 would be charged as rape of a under 13 years (maximum

life, with a range of six to 19 years). Court could not impose a greater sentence than the maximum available at the time. For counts 1 to 4 that was 10 years. The judge imposed a special custodial sentence (for offenders of particular concern) of 17 years on count 5, under s.278 SA 2020 (16-year custodial term and a one-year extended licence period), but imposed no separate penalty in respect of the counts 1- 4. Counts 3-4 would also have attracted special custodial sentences under s.278.

The judge erroneously said that D would be eligible for release at the "halfway point of the custodial term". The sentence was passed after 26 June 2022, so D would have to serve two-thirds before becoming eligible for release.

- The judge's error in relation to the applicable early release provisions did not affect the validity of the sentence: (*Patel* [2021] EWCA Crim 231).
- The sentences of "no separate penalty" in respect of counts 1 to 4 were a matter of concern. Section 278 does not in terms oblige the judge to pass a custodial sentence. The reason given for imposing "no separate penalty" was totality. The CACD held that it is only ever appropriate to impose no separate penalty for additional offences if the additional criminality involved in the offences concerned has been fully and adequately reflected in the sentences imposed for the other offence or offences. It was wrong in principle to impose no separate penalty for serious sexual offences which plainly crossed the custody threshold, and each of which merited substantial custodial sentences under the applicable sentencing guidelines.

The CACD quashed the sentences of "no separate penalty". It substituted, on each of counts 1 and 2, determinate sentences of five years' imprisonment; on each of counts 3 and 4, special custodial sentences of six years comprising a custodial term of five years and an extended licence period of one year, those sentences ordered to run concurrently with each other and with the special custodial sentence of 17 years comprising a custodial term of 16 years and one year's extended licence which was imposed on count 5.The guidance provided by Treacy LJ in LF (also known as Fruen) explains that concurrent sentences would have been required to comply with s.278, but the extended licence periods would run concurrently with the extended licence period in respect of count 5. The eligibility of D for consideration for early release should be calculated and announced in court.

Incorrect use of "no separate penalty"

Butler [2023] EWCA Crim 676 Summary

D pleaded guilty to possession of cannabis and not guilty to intent to supply and to money laundering. D was convicted of both the latter offences at his trial. He was sentenced to a total of two-and-a-half years' imprisonment. The CACD noted that "no separate penalty" had been recorded for the offence of simple possession to which D had pleaded guilty. Cole [1965] 2 QB 388, a guilty plea does not amount to a conviction until a sentence is passed. If D is later acquitted of the more serious offence, he can then be sentenced for the offence to which he has pleaded guilty. If D is convicted of the more serious offence, D will be sentenced for that offence and the earlier admitted offence should be ordered to lie on the file. The proper approach is set out in Archbold at 5A-169c.

Joint enterprise – murder

R v BHV EWCA Crim 1690

Appeal against a terminating ruling. BHV and others were charged with murder of a person who was not the intended victim. Each faced possession of an offensive weapon. Before the close of the prosecution case, it was submitted on behalf of BHV that there was no case for him to answer. The trial judge agreed. The prosecution case was that those involved in the joint enterprise also had a conditional intent to inflict really serious harm on anyone who 'got in the way'. The judge rejected that argument indicating that this would involve an exercise in speculation and that there was no evidence from which such an intention could properly be inferred. The judge relied upon R v Jogee [2016] UKSC 8 relied and a passage from the Crown Court Compendium: 'D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim'.

The CACD stated that the contentious issue which the judge had to resolve was whether the jury could properly conclude that BHV intended anyone other than the intended victim, in particular 'anyone who got in the way', to be attacked with relevant intent and deliberately gave assistance to any such attack. The CACD held that there is no legal principle that the target of a joint enterprise attack is clearly identified does not mean that the joint enterprise cannot include a conditional intention to attack anyone who gets in the way. It is a matter for a jury who will carefully evaluate the prosecution evidence. The Court analysed paragraphs 92-94 of R v Jogee and its confirmation that conditional intention can still apply in circumstances where the

intended target of the attack is clearly identified. The Supreme Court's judgment in Jogee is unlikely to affect the outcome of submissions of no case to answer in such circumstances.

Dangerous Driving

H, 17, rode a stolen scooter with his 14-year-old friend (B) as pillion passenger. Neither wore a helmet. H was speeding between 37 and 44 mph on a narrow residential road with a 20-mph speed limit. H lost control of the scooter, which struck the kerb and overturned. B died at the scene. The CACD held that driving was dangerous if the conditions of s.2A of the Road Traffic Act 1988 were met. The judge had been right that it would be open to the jury to decide that H's driving fell far below the standard to be expected of a competent and careful driver, and that it would be obvious to a competent and careful driver that driving in the way he did would create a risk of injury to himself and his passenger. The court observed that the test as to whether driving was dangerous was a purely objective one. It had been open to the jury to consider the absence of a helmet in two respects: in concluding that a careful and competent driver who knew he had a young pillion passenger without a helmet would not have driven in the manner that he did, and that his driving in that manner regardless fell far below the requisite standard; in deciding whether it would have been obvious to a competent and careful driver that driving in that way would be dangerous because of the obvious risk of injury to his passenger.

Sentencing guidelines

1 April 2023:

Child cruelty offences

Sale of knives to persons under 18 Miscellaneous amendments to other guidelines

1 July 2023:

Totality.

Motoring offences (12 new or revised guidelines).

Animal cruelty offences.

Primary legislation

Public Order Act 2023

Domestic Abuse Act 2021 (Commencement No. 1) Regulations 2023 (SI 2023/406)

Legal Update

- Mary Prior KC

- Winter 2024

Brought into force ss.68, 77 and 82 of the Domestic Abuse Act 2021. S 68 amends the definition of "personally connected" for the purposes of the offence of coercive and controlling behaviour in s.76 Serious Crime Act 2015 so that the offence applies regardless of whether the persons concerned are living together. Relate only to controlling or coercive behaviour occurring after 5 April 2023.

Home Office guidance - revised code of practice H in connection with the detention, treatment and questioning by police of people in police detention under the Terrorism Act 2000 s.41 and Sch.8; under s.43B and Sch.8; and under the Counter-Terrorism Act 2008 s.22.

A revised Covert Human Intelligence Sources (CHIS) code of practice provides guidance on authorisations for the use or conduct of CHIS by public authorities under the Regulation of Investigatory Powers Act 2000 s.29, and on criminal conduct authorisations under s.29B. It also provides guidance on the handling of any information obtained by authorisation of a CHIS.

An updated Home Office interception of communications code of practice reflects developments in the law since the code was brought into force in 2002. It provides information on the safeguards that apply to the security and law enforcement agencies' exercise of interception powers.

The Proceeds of Crime (Money Laundering) (Threshold Amount) Order 2022 (SI 2022 No. 1355)
This Order increases the threshold amount i.e. the value of criminal property below which a bank or similar firm (a deposit-taking body, electronic money, or payment institution) can carry out a transaction, in operating an account for a customer, without committing one of the main money laundering offences in sections 327 to 329 of POCA. from £250 to £1,000 specified in s.339A of the Proceeds of Crime Act (POCA) 2002.

Police, Crime, Sentencing and Courts Act 2022 (Offensive Weapons Homicide Reviews) Regulations 2022 (SI 2022/1261)

This sets out conditions for an offensive weapons homicide review ("OWHR"), additional those in section 24 of the Police, Crime, Sentencing and Courts Act 2022.

Mary Prior KC

36 CRIME

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