

Sentencing Update 8th June 2020

HARRY O'SULLIVAN

BARRISTER AND AUTHOR OF BANKS ON SENTENCE



GOLDSMITH
CHAMBERS

Overview

- ▶ Impact of Covid-19 on sentencing
- ▶ Newly amended release arrangements for certain cases
- ▶ Alcohol Abstinence Monitoring Requirement
- ▶ Statutory Surcharge
- ▶ New Guidelines

Covid-19

- ▶ **AG's Ref Re: Manning [2020] EWCA Crim 592:**
 - ▶ A case in which the A-G sought to refer as unduly lenient a 12-month suspended sentence for sexual offending against a child. Leave was granted and a 24-month suspended sentence substituted.
 - ▶ Court of Appeal considered the impact of the Covid-19 emergency on those serving sentences of imprisonment.
 - ▶ The Court recognises that owing to Covid-19, prison sentences are potentially harsher than they otherwise might have been.
 - ▶ It suggests that this might be a decisive factor in considering whether to suspend a sentence.

Covid-19

- ▶ **AG's Ref Re: Manning [2020] EWCA Crim 592:**
- ▶ "[41] ... We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison...
- ▶ The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well.
- ▶ Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be.
- ▶ Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19." (My emphasis)

Covid-19

- ▶ *Other considerations:*
- ▶ Covid-19 will inevitably lead to delay in cases reaching the point of sentence, through no fault of the defendant.
- ▶ The effect of delay on fairness is well-established and constitutes important mitigation. Overarching Principles guideline:

• Delay since apprehension

Effective from: 01 October 2019

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence if this has had a detrimental effect on the offender.

Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.

Covid-19

- ▶ *Other considerations:*
 - ▶ *Delay gives opportunities to demonstrate prospects for rehabilitation.*
 - ▶ *Delay in cases where defendants have been remanded may lead to their serving longer than the eventual sentence.*
 - ▶ *Sentencing Guidelines Council (old, but still applicable):*
 - 1.1.38 Where an offender has spent a period of time in custody on remand, there will be occasions where a custodial sentence is warranted but the length of the sentence justified by the seriousness of the offence would mean that the offender would be released immediately. Under the present framework, it may be more appropriate to pass a community sentence since that will ensure supervision on release.

Covid-19

- ▶ Offences under Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ([SI2020/350](#))
 - ▶ In force 26th March 2020, with 3 further amendments since then, most recently those in force from 1st June 2020 ([SI2020/558](#)).
 - ▶ Closure of certain premises, restrictions on business activities, movement, gatherings.
 - ▶ Primarily enforced through prohibition notices issued to businesses and directions to individuals.
 - ▶ Fixed Penalty Notices: £100 (£50 if paid within 14 days), rising with each subsequent offence to £3,200 for a 6th notice
- ▶ Offences punishable upon summary conviction by a fine.

Covid-19

- ▶ [Prison and Young Offender Institution \(Coronavirus\) \(Amendment\) Rules 2020 \(SI2020/400\)](#):
 - ▶ Permits the Secretary of State to direct specific classes of prisoners who may be released on temporary licence in response to concerns about the impact of coronavirus on the prison population. “End of Custody Temporary Release”.
 - ▶ Only certain types of prisoner are eligible to be included, primarily those of lowest risk to the public as well as pregnant and otherwise vulnerable offenders.
 - ▶ Initial reaction has been poor with very few prisoners actually released and some released in error.
 - ▶ A draft statutory instrument has been laid which would extend HDC release eligibility from 4 ½ months to 6 months prior to release. Not yet enacted.

Release Arrangements

- ▶ **Terrorist Offenders (Restriction of Early Release) Act 2020:**
 - ▶ Effective for all “terrorist offenders” from 26th February 2020 who are serving ordinary determinate-length sentences.
 - ▶ Takes retroactive effect in that it applies to those sentenced before its commencement, unless they had already been released on licence.
 - ▶ Prevents automatic release of these prisoners after serving half their sentence.
 - ▶ Instead, release is at the discretion of the Parole Board, no earlier than 2/3 of the sentence.

Release Arrangements

- ▶ Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 (SI2020/158):
 - ▶ Effective from 1st April 2020, for any offenders sentenced after this date.
 - ▶ Offenders who are:
 - ▶ 18+;
 - ▶ Convicted of “relevant violent or sexual offences”; and,
 - ▶ are imprisoned for 7 years or more
 - ▶ Are no longer eligible for release after serving half their sentence, instead their release eligibility is after serving 2/3.

Alcohol Abstinence Monitoring Requirements

- ▶ [Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(Commencement No. 14\) Order 2020 \(SI2020/478\)](#)
- ▶ Brings into force [LASPO 2012 s76](#) effective from 19th May 2020: AAMR for Community Orders and Suspended Sentence Orders.
- ▶ Previous piloting commences deemed successful (London (2014-2018) and Yorkshire, Humber, Lincoln (June 2017- April 2019))
- ▶ AAMRs permit monitoring of alcohol abstinence by a transdermal tag, capable of detecting alcohol in sweat. Monitoring to be provided by outside agencies designated by the Secretary of State.
- ▶ Order must be for at least 120 days and may prohibit all alcohol intake or require alcohol consumption to be below a specified level or not at certain times. AAMR only available where local arrangements have been put in place.

Statutory “Victim” Surcharge

- ▶ Unnecessarily complex, frequently amended, misleading name!
- ▶ Best advice is for the Court to simply declare that “if it applies, it is ordered”, then calculate the amount administratively.
- ▶ [Criminal Justice Act 2003 \(Surcharge\) \(Amendment\) Order 2020 \(SI2020/310\)](#): Surcharges values have again been amended for offences committed on or after 14th April 2020 (increases of £1 to £9)
- ▶ [R v Abbott & ors 2020 EWCA Crim 516](#): CACD’s best efforts to make sense of the surcharge in some complex situations:
 - ▶ 1) Where fine or custody imposed for more than one offence, surcharge is based on the total fines or custody imposed in aggregate and not the sentence for a the single offence which caused the highest surcharge value.
 - ▶ 2) Offender who breaches an order is not given the surcharge again when the Court deals with breach.
 - ▶ 3) New offence + Breach, the surcharge value for the new offence should be based on the applicable surcharge on the day that the earlier offence was committed (the one for which an order subsequently breached was originally imposed!).



Upcoming Legislative Changes

- ▶ Sentencing Code
 - ▶ Law Commission project to consolidate the existing primary legislation on sentencing now nearing enactment.
 - ▶ Will replicate the existing law in one, sensibly organised and user-friendly Act.
 - ▶ Headline change is the approach to changing the law: historic layers of overlapping legislative changes will be swept away.
 - ▶ The law as stated in the Code will apply to all cases where conviction occurs on or after its commencement. (Subject to Article 7 safeguards)
 - ▶ Any future change to the law should take the same approach based on conviction date not offence commission date!
 - ▶ The draft Code Bill can be found: <https://services.parliament.uk/bills/2019-21/sentencing.html>
 - ▶ A paving Bill which gives effect to the consolidation had its third reading before Parliament on 4th June 2020.

Public Order Guidelines

- ▶ New Definitive Guideline Effective from 1st January 2020:
 - ▶ Riot s1
 - ▶ Violent Disorder s2
 - ▶ Affray s3
 - ▶ Threatening Behaviour s4
 - ▶ Disorderly Behaviour with intent s4A
 - ▶ Disorderly Behaviour s5
 - ▶ (Racially/ Religiously aggravated equivalents s31 CDA 1998)
- ▶ Stirring up hatred based on race, religion or sexual orientation ss18-23, 29B-29G

Upcoming Guidelines

- ▶ Assault and Attempted Murder Guideline consultation open until 15th September 2020:
 - ▶ Specific guidelines for emergency worker assaults, particularly to reflect the 12-month maximum sentence available.
 - ▶ New high-culpability factor “Intention to cause fear of serious harm, including disease transmission” with reference to spitting/coughing.
 - ▶ Attempted murder guideline to be revised in line with the stepped approach in Schedule 21 “weapon taken to scene” etc
 - ▶ More, narrower categories of harm and culpability.
- ▶ Drug Offences Guideline consultation now open until 7th May 2020:
 - ▶ Exploitation of children/ vulnerable persons in drug dealing/ cuckooing
 - ▶ Updated and new guidelines, including for Psychoactive Substances Act 2016 offences.

For further information or enquiry

Please feel to ask any questions you may have.

Thank you for attending this webinar.

Harry O'Sullivan - Goldsmith Chambers

h.o'sullivan@goldsmithchambers.com

Clerks: Michael Johnson, John Francis, Lynn Pilkington

clerks@goldsmithchambers.com

Tel: 020 7353 6803

