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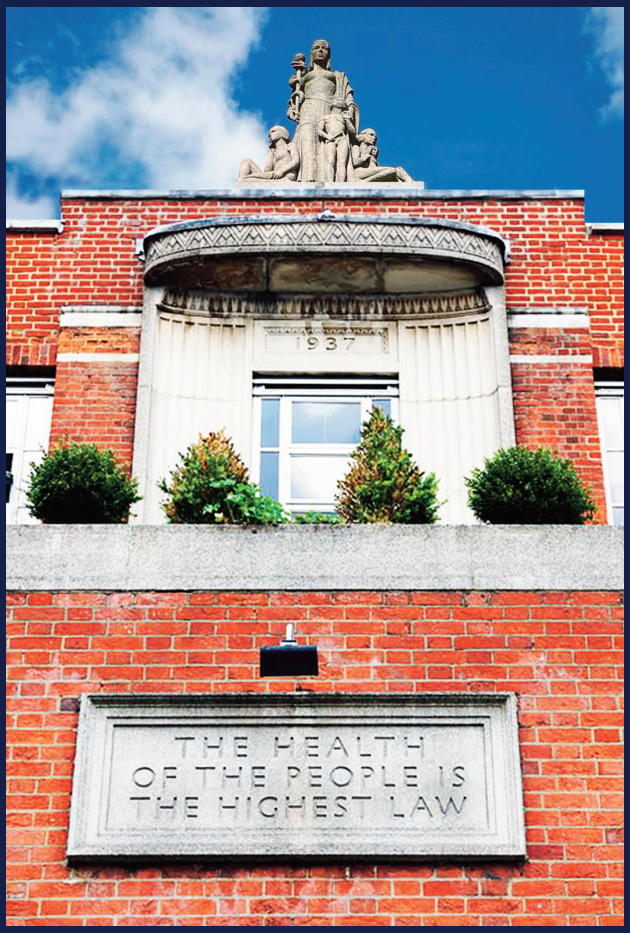
Criminal Update 2020

A survey of key criminal cases from the last 18 months



Part Two

Sentencing and Mental Health

Criminal Procedure

New Legislation, Sentencing Guidelines and Resources

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Criminal Update 2020

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Part Two

A review of recent cases concerning cases where the Defendant experienced mental ill health at the time of the offending, sentencing or afterwards, and with practice and procedure in the Crown Court. We consider the important amendment to the Sentencing Guidelines following the case of Privett and look at the new Guidelines: Sentencing Offenders with mental disorders, developmental disorders or neurological impairment which will apply to all cases sentenced on or after 1 October 2020. There are links to the new Adult and Youth Court Bench Books and a preview of two important pieces of legislation The Domestic Violence Bill and Sentencing Bill which are likely to come into force in the Autumn.

In the third part we will consider recent sentencing cases with a particular focus on driving and POCA. We will also look at the intermediaries with an update on the latest case law and a discussion about the different position of defendants and witnesses. There will also be, following the new Guidelines, some help on how best to instruct a psychiatric witness.

We hope this update is interesting and useful. Please do let us know what you think, good and bad, by emailing

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September 2020

Strange Times

The, particularly recently, over used and by now in need of a comprehensive re-fit cliche that we live in strange times does remains particularly apt. On 14 September 2020 a former Supreme Court justice, Lord Sumption was asked if he would encourage people "if they feel strongly" to flout the Coronavirus rules? He said:

I would say that people should make their own decisions in the light of their own health and the law should be a secondary consideration for them[1]

This follows hot on the heels of the Government stating that it was prepared to break international law in relation to the Brexit withdrawal agreement. In the same week the *Guardian* reported[2] that the UK plans to "opt out" of parts of the European Convention on Human Rights to speed up deportations and shield British troops from claims following operations overseas. Lord Falconer tweeted in response:

A future where the UK break its international law obligations, and opts out of Human Rights protections is a very bad future. Respected and trusted, or international pariah? not underestimate how quickly the UK's standing as a country who plays by the rules can go through the floor.[3]

From what has been leaked about the upcoming White Paper on sentencing reforms (we will deal with that in the next update) the Government is turning its face against the careful analysis contained within the Centre for Justice Innovation report "Smarter Community Sentences[4]" which says that 'those who advocate for short custodial sentences as opposed to community ones are, in short, recommending that communities and victims suffer more from crime, not less'.

It seems clear that the Government will press a "law and order" agenda that will apply to those we represent but may have less impact on those closer to the levers of power.

In this edition of our review we pay particular attention to two areas: recent cases dealing with practice and procedure in the Crown Court and cases where the Defendant experienced mental ill health at the time of the offending, sentencing or afterwards.

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[1] BBC Radio 4, Today, 14 September 2020 at 08.22
[2] https://www.theguardian.com/law/2020/sep/13/uk-government-plans-to-remove-key-human-rights-protections?CMP=Share_iOSApp_Other
[3] https://twitter.com/LordCFalconer/status/1304898239414579200
[4] https://www.justiceinnovation.org/sites/default/files/media/documents/2020-09/smarter_community_sentences.pdf

R-v-Jones provides a useful reminder that considerable care and attention is required when representing Defendants who experience mental ill health and who may be very skilled at masking their difficulties. The case is also a tribute to the work of the Cardiff University Innocence Project[5] who took up Mr Jones' appeal. The case also illustrates one of the themes that emerges from consideration of recent case law involving mental health: the use of expert evidence that has been obtained post conviction. The Court of Appeal allowed the appeal having received expert evidence obtained many years after conviction. Similarly in the appeal of Sally Challen, psychiatric evidence was allowed as fresh evidence

R-v-PS is an important case which considers the ways in which the mental health of an offender may bear on the sentence to be imposed and the need to consider the health of a Defendant both at the time of the offence and the time of sentence; a topic developed by the Court in *R-v-Philip* which posed a number of questions which will be important to consider when mitigating on behalf of Defendants who are mentally unwell. While it is likely that the new guidelines (to be issued shortly) from the Sentencing Council regarding Defendants who have mental health issues will codify the matters raised in the judgement, it will remain useful if for no other reason that it makes clear that 'self medicating' through drink or drugs may not always add greatly to the seriousness of an offence.

Hybrid orders made under s45A of the Mental Health Act allow a court to send an offender to hospital before completing their sentence in prison. Despite the Court in *Vowles* appearing to read the statutory provisions in a way that should, if applied, have made them more common, they remain comparatively rare. *Westwood* reviews the authorities and makes clear the correct approach to dealing with Defendants who are mentally unwell. Towards the end of this document we look at the new Overarching Principles from the Sentencing Council dealing with offenders who have mental health problems.

In the cases dealing with Criminal Procedure, amongst other things we look at the restriction on the use, by the Crown, of comments made by a convicted prisoner to a case worker. Other topics include the vital importance of a good character direction in a case where there was no other evidence against the Defendant apart from the complainant's.
The case of *LT* considers theway in which an identification made having viewed Facebook may be deployed.. In *Syed* the Court of Appeal appears to open the door to a situation where the ends might justify the means. And in *Barton* the test for dishonesty is clarified. Finally in *CB* the Court gives some clarity to the vexed issue of access to phones and other digital records of complainants and witnesses; if the guidance from the Court is put into practice there will be fewer phone reports obtained and those that are will likely be much shorter than before. The case does make clear that it is very important to set out, an early stage, the issues which may be relevant and that will prompt the seizure and examination of a witness' phone,. So to take a not unusual example where D is arrested for rape:

[5] https://www.cardiff.ac.uk/pro-bono/cardiff-university-innocence-project/gareth-jones

The defendant says (in instructions) that any sexual activity was consensual and was against a background of text or other communication which may bear on the arrested person's belief in consent; even where there is a no comment interview the Defendant's position should be made clear in a prepared statement.

Sentence Guidelines

There have been two recent decisions dealing with cases of decoys pretending to be children. Following *R-v-Privett and others* [2020] EWCA Crim 557 the Sentence Council has provided additional guidance to the Definitive Guidelines in relation to offences contrary to s14 Sexual Offences Act 2003[6] where no child victim exists. The effect of *Privett* and the revision to the Guidelines is that sentences imposed in cases involving adult decoys will probably be longer. And, the Supreme Court in Sutherland[7] surprised no one by confirming that the Article 8[8] rights of a child and the obligations of the State to vindicate those rights have priority over any supposed countervailing rights of a paedophile.

On 22 July 2020 the Sentencing Council published a new guideline; *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*. The guidelines will apply to those over 18 who are sentenced on or after 1 October 2020, irrespective of the date of the offence. The Sentencing Council's accompanying press release states that the Guideline will "for the first time … provide clarity and transparency around the sentencing process for this group of offenders". While welcome, the Guidelines in fact contain little that is new, drawing together threads from authorities and statutes. It represents a missed opportunity to confront a lack of training and funding when dealing with the complex and often intractable issues thrown up by the intersection of mental health and the law. It remains to be seen if the declared ambition to "*make sure that courts have the relevant information when sentencing offenders with mental disorders to make sure their rights and needs are balanced with protecting the public, and the right of victims and families to feel safe*[9]" applies in practice.

Finally, we draw attention to the latest editions of the Magistrates' and Youth Court bench books and to two pieces of legislation which will be on the statute book before too long. The Sentencing Act will consolidate all the current law on sentencing; our colleague Louise Cowen will provide a guide to the Act which will be available on the Lincoln House website when the Act receives the Royal Assent. The Domestic Abuse Act defines abuse and gives the courts and Police powers to circumscribe the activities of abusers.

[6] Arranging or facilitating the commission of a child sex offence
[7] UKSC 2020/0022
[8] Article 8, European Convention on Human Rights; Right to respect for private and family life
[9] Sentence Council press release

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Mental Health

R-v-Jones (Gareth) [2018] EWCA Crim 2816, [2019] Crim LR 344

In July 2008, D[10], 24 at the time and with no previous convictions, was convicted of an offence contrary to s38 of the Sexual Offences Act 2003; sexual activity by a care worker with a person who has a mental disability. With the assistance of the Cardiff University Innocence Project, an appeal against conviction was commenced out of time. Experts who assessed D some considerable time after the trial found that he suffered from a significant learning difficulty, symptoms included memory deficiency, problems with articulation and confusion. He was highly vulnerable. D was able to mask the true extent of his difficulty and his parents were keen to present him as someone who could cope, thus there was a failure to appreciate his learning difficulty at the time of his trial; as a consequence of which he would have appeared far more compliant and suggestible, and would have had a tendency to acquiesce with questions when exposed to robust cross-examination. As he would have had difficulty in dealing with leading questions asked in cross examination, he should not have been regarded in the same way as other witnesses. The Court of Appeal said it would be very rare that medical and psychological evidence could be successfully deployed many years after a trial, but concluded in the highly unusual circumstances of the case, the conviction was unsafe.

R-v-Mahmoud (S), [2019] EWCA Crim 667, [2019] CLR 796

As is well known, it is not the role of the intermediary to provide expert opinion on the cognitive skills or the intellectual functioning of a supported witness or defendant, and without more, the appointment of an intermediary does not indicate the level of the supported person's intellectual functioning - it simply indicates that they need help communicating and participating in the proceedings. And so where there is no expert evidence as to the Defendant's level of intellectual functioning the jury will make their own assessment. In a cut throat case, counsel is entitled to suggest that the supported Defendant was sheltered from more robust questions by the presence of the intermediary, and, so long as it is relevant, to ask questions about the level of functioning. The judge should direct the jury that because there was an intermediary, counsel is not able to ask questions in the normal form.

[10] throughout we use D to indicate, Defendant, Appellant and Applicant

R-v-Challen, [2019] EWCA Crim 916, [2019] Crim LR 980

In 2011 D was convicted of murder. In her appeal she relied on new evidence, from psychiatrists, to the effect that she was suffering from an abnormality of mind, and from a sociologist, Professor Evan Stark, which dealt with the coercive control exercised by the deceased over the defendant; there was also a report on the development and understanding of coercive control from Professor Marianne Hester. It was submitted on behalf of D that (i) had expert evidence on coercive behaviour been available, the jury may have reached a different conclusion on diminished responsibility, and (ii) the new material went to the issue of provocation helping to establish that D was provoked to kill the deceased because of his controlling and coercive behaviour. It was argued that at the time of the trial in 2011, there was insufficient understanding of coercive control (as distinguished from physical violence - 'battered person syndrome') as a form of domestic abuse and that the jury may not have been aware of the extent of the abuse suffered, and the impact upon her. An effect of the controlling behaviour of the deceased was that the personality and mood disorder, from which the Defendant suffered, was masked and did not become apparent until later.

The hurdle for the admission of fresh evidence is a high one. Defendants may not, as a general rule, run one defence at trial and try for an alternative on appeal.

Had it stood alone, coercive control, on the facts presented to the court, would not have afforded D a ground of appeal. However, it did not stand alone as there was evidence that D suffers from a borderline personality disorder, and severe mood disorder (probably bi-polar affective disorder) and that she suffered from those 'disorders' at the time of the killing. It is in that context that coercive control may be relevant to both diminished responsibility and provocation.

The Court expressed no view as to whether or not D was the victim of coercive control, and if she was, no view as to the extent to which it impacted on her ability to exercise self control or her responsibility for her actions.

Only the psychiatric evidence was received as fresh evidence; it did undermine the safety of the conviction which was quashed and a re-trial was directed.

R-v-Rendell [2019] EWCA Crim 621, [2019] All ER (D) 33

In 2012 D, who had a substantial antecedent record for violence and had been on licence for two months prior to committing the instant offence, pleaded guilty to wounding with intent, s18 Offences Against the Person Act 1861, and was sentenced to an indeterminate sentence with a minimum term of three years. At the sentence hearing there was a

pre-sentence report and a report from a forensic psychologist, but no psychiatric report, and no consideration given to whether or not the Defendant was suffering from a mental disorder as defined by section 1 Mental Health Act 1983. Thus he was sentenced on the basis that he did not have any form of mental illness. While in prison there developed a consensus that the Defendant was suffering from an emotionally unstable and dissocial personality disorder and he required intensive psychological treatment. A consultant psychiatrist recommended that he be transferred to hospital which in September 2015 he was, with a restriction, under ss47 and 49 Mental Health Act. In April 2018 an appeal was filed with an application to rely on fresh evidence in the form of two psychiatric reports. The Crown did not oppose the application to receive fresh evidence, and the Court being satisfied it fulfilled the statutory test, received it. Considering the questions set out in *R-v-Vowles* [2015] EWCA Crim 45, [2015] 2 Cr App R (S) 6 the Court came to the following conclusions:

(i) there was no dispute the Defendant needed treatment for the mental disorder with which he suffered, therefore the condition in s37(2)(a) of the Mental Health Act was fulfilled, as was the requirement in s37(2)(b); is a hospital order the most suitable method of disposing of the case?
(ii) the Defendant had some understanding that his behaviour became particularly aggressive when under the influence of drink or drugs, but part of the reason the Defendant took drink or drugs was the personality disorder which he experienced; his culpability was, therefore, moderate,
(iii) having reviewed the regime of post-release supervision from both the Probation Service and mental health services the Court concluded that in the "unusual circumstances of the case" they were satisfied that the appropriate sentence was a hospital order with a restriction, ss 37 and 41, Mental Health Act; the IPP was quashed.

R-v-PS, Abdi Dahir, CF [2019] EWCA Crim 2286, [2020] 4 WLR 13

While there are no guidelines dealing specifically with offenders who experience mental health issues (the Sentencing Council consultation on the topic concluded in 2019 and definitive guidelines are expected sometime in July 2020), the mental health of an offender is a factor which sentencers are required to take into account at Step one or Step two (see the expanded explanations which are now online) when following offence specific guidelines, and where there is no specific guideline, the 'overarching principles guideline' (in force 1 October 2019) identifies mental disorder or a learning disability as a factor reducing seriousness or something which reflects personal mitigation. While the mental health of an offender may make little impact on the sentence, there will be occasions when the effect is substantial. Both practitioners and judges need to be alert to the possibility that the mental health of an offender is an issue.

The mental health of an offender may be relevant to sentence in a number of ways:

(i) at the time of the offence through an assessment of culpability (see s143(1) Criminal Justice Act 2003); and where the offender's condition has been exacerbated by a failure to take prescribed medication or by 'self medication' with drink or drugs, was this wilful or was it because of a lack of insight into their condition
(ii) at the time of sentence to the type of sentence or disposal. If custody cannot be avoided, the length of sentence, can it be suspended?
(iii) in assessing dangerousness.

Judges must ensure the sentence is clearly understood and that the requirements of a community or any ancillary order are capable of being fulfilled.

Applying the above to the facts of the individual appeals:

In the case of PS's appeal against the severity of sentence imposed, the Court received as fresh evidence a report from a psychologist who diagnosed PS as suffering from mild Autism and Attention Deficit Hyperactivity Disorder which 'substantially contributes to his impulsive acting out when he feels he has been threatened and his inability to resist poor leadership', and that PS was vulnerable and at risk of depression and self harm in prison. The Court found that the factors identified in the report 'significantly reduced' PS's culpability, and that the minimum terms imposed following his conviction for *inter alia* murder was manifestly excessive; 14 years reduced to 10 years.

Abdi Dahir had been drinking for ten hours before he assaulted his victim with a broken bottle; he was convicted of a s18 assault. For sentence, an expert report had been prepared; the Defendant suffered with complex PTSD which, the author considered 'barely imaginable' had not been previously diagnosed. The sentencing judge who described the assault as a 'a sustained and dreadful attack', concluded it was a Category One offence and imposed a sentence of 14 years imprisonment. The Court agreed that the judge had failed to give sufficient weight to the report when assessing culpability; there should have been a significant downward movement from the starting point. Although D had been drinking, an aggravating factor, there was a link between his drinking, the purpose of which appeared to be mainly for 'self medication' and his mental health problems, and so it did not add greatly to the seriousness of the case. 14 years reduced to ten years.

CF (16 years old) pleaded guilty to a number of sexual offences. A psychological report prepared for sentence suggested that he was functioning at the level of a seven year old. His behaviour fit within Autism Spectrum Disorder. A report from the YOI to which he had been sent said he was especially vulnerable, he relied on staff for everything. The Court found there was force in the submissions made by counsel, that insufficient weight had been given to the Defendant's mental 'disorder' and intellectual problems which were

relevant both to culpability and the impact upon him of a custodial sentence. In conclusion the Court reminded sentencers that they must 'be careful not to treat young offenders as if he or she were simply a reduced sized version of an adult offender committing similar offences'. Five years detention reduced to two and a half years detention.

It is submitted this authority should be read together with sections 166(2) and 166(5)(a) of the Criminal Justice Act 2003, which makes clear that a court may depart from the sentence that otherwise may be appropriate when dealing with an offender who experiences mental health problems.

R-v-Woods, [2020] EWCA Crim 84, [2020] 2 Cr App R (S) 14

This is a case that considers *PS*. D made admissions when interviewed by Police but at his first appearance, when suffering from a depressive illness was "in a very poor emotional state" and not thinking clearly; he pleaded not guilty only to enter a guilty plea at the PTPH. He was entitled to a reduction of one third and not the 25% reduction applied by the sentencing judge. The offender's "moderately severe" depressive illness at the time of the offence was capable of amounting to a significant mitigating factor, reducing culpability.

R-v-Philip [2019] EWCA Crim 1694, unreported

The Defendant, 34 years of age, previous good character, pleaded guilty to offences of sexual assault and false imprisonment, following an attack on a stranger at her place of work. The Defendant had a diagnosis of schizophrenia, paranoid type; for which he was prescribed Clozapine and, at the time of sentence was relatively stable. A pre-sentence report was of the view that so long as he complied with his medication the risk he posed could be contained. When sentencing the judge referred to section 166 Criminal Justice Act 2003, he carefully considered the danger posed by the Defendant and concluded that the danger was best addressed by being supported in the community. Had there been no underlying mental health issues the sentence would have been two years and eight months imprisonment but as there were, the appropriate sentence was a three year community order with a three year mental health treatment order, 60 hours rehabilitation requirement and a six month curfew.

The Solicitor General sought to challenge the sentence imposed as being unduly lenient.

The Court in reviewing the sentence said the sentencing court needs to consider the psychiatric evidence and answer four specific questions:

(i) the extent to which the offender needs treatment for the mental disorder from which he/she suffers
(ii) the extent to which the offending is attributable to the mental disorder
(iii) the extent to which punishment is required
(iv) the extent to which the protection of the public is required

The sentencing judge carefully considered the danger the Defendant posed to the public and formed an 'entirely cogent and rational view' that the danger could best be addressed by continuing support in the community. The Reference did not address the effect, in sentencing terms, of the Defendant's mental disorder. Leave was refused.

R-v-Westwood [2020] EWCA Crim 598, unreported

In this appeal the Court reviewed the principles set out in *Vowles* [2015] EWCA Crim 45 and *Edwards*, [2018] EWCA Crim 595 which apply when sentencing a Defendant who suffers from a mental disorder.

The Defendant was 46 when he stabbed his Mother, killing her. He suffered from paranoid schizophrenia and autism spectrum disorder. The Crown accepted that he was guilty of Manslaughter on the basis of diminished responsibility. The judge, rejecting the psychiatric evidence which recommended the making of a hospital order with restriction, sentenced D to 21 years imprisonment, a custodial term of 16 years and an extension of five years with a hospital direction under s45A (a hybrid order) of the Mental Health Act with a limitation direction.

There were two main aspects to the appeal; the level of the Defendant's "retained responsibility", and what level of protection was afforded by the various modes of disposal available.

The sentencing judge found that D's "retained responsibility" was "medium to high"; that was an error, it should have been "low". The psychiatric evidence
stated that the "most important factor" in the commission of the offence was the Defendant's mental illness, he was floridly psychotic at the time and his anger against his Mother was a manifestation of his illness, not extraneous to it. In other words the offence was "largely attributable to (D's) mental disorder".

The Court re-stated the principles drawn together from the statutory provisions and case law by Lady Justice Hallett in *Edwards*[11] :

[11] at paragrpah 34 of the judgement in Edwards

(i) The first step is to consider whether a hospital order may be appropriate.
(ii) If so, the judge should then consider all his sentencing options including a s.45A order.
(iii) In deciding on the most suitable disposal the judge should remind him or herself of the importance of the penal element in a sentence.
(iv) To decide whether a penal element to the sentence is necessary the judge should assess (as best he or she can) the offender's culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions.
(v) A failure to take prescribed medication is not necessarily a culpable omission; it may be attributable in whole or in part to the offender's mental illness.
(vi) If the judge decides to impose a hospital order under s.37/41, he or she must explain why a penal element is not appropriate.
(vii) The regimes on release of an offender on licence from a s.45A order and for an offender subject to s.37/41 orders are different but the latter do not necessarily offer a greater protection to the public, as may have been assumed in Ahmed and/or by the parties in the cases before us. Each case turns on its own facts.
(viii) If an offender wishes to call fresh psychiatric evidence in his appeal against sentence to support a challenge to a hospital order, a finding of dangerousness or a s45A order he or she should lodge a s23 application. If the evidence is the same as was called before the sentencing judge the court is unlikely to receive it.

While the the making of a hospital order (s37 Mental Health Act) with a restriction (s41) does not necessarily provide greater protection to the public than a disposal under s45A in some cases it may; this was one such case. If D was ever to be released from hospital the arrangements would provide at least as much and probably more protection that the s45A regime as, after release under s45A he could not be compelled to accept medical treatment. Also, the process of recall under s45A may be slow, under s37 it can be very swift. There were other disadvantages to making a s45A order identified, if D was returned to prison from hospital, his mental health could deteriorate and he could refuse treatment.

The Court concluded there were sound reasons from departing from the need to impose a sentence which contained a penal element - the low level of retained responsibility, the likelihood he would need psychiatric treatment and supervision that was most effectively provided through orders under s37 and s41 of the Mental Health Act and, the regime which applied in the event of his release.

R-v-Roberts [2019] EWCA Crim 1270, [2019] 2 Cr App R 33

Where a Defendant is found to be unfit to be tried, s4 Criminal Procedure (Insanity) Act 1964, they are not competent to appeal in person against the ruling as to fitness nor any

subsequent finding made by a jury, s4A. The advocate appointed by the court to put the case for the Defendant (CPR 25.10(3)) must consider if there is an appeal; if grounds are not settled there can be no valid appeal. If a Defendant who has been judged to be unfit does try to apply for leave in person, the Registrar will check with the appointed representative; if there are no grounds the papers will go to the single judge who, if the judge thinks there may be arguable grounds, may direct fresh counsel is instructed. If the Defendant has, or asserts they have recovered their capacity, fresh psychiatric evidence will be required. See Rule 39 of the amended Criminal Procedure Rules which sets out the procedure now to be followed.

R-v-Foy, [2020] EWCA Crim 270

The Appellant appealed his conviction for murder. At trial expert evidence was not called because it did not support a defence of diminished responsibility. After conviction a second psychiatrist was instructed. The new expert concluded that diminished responsibility was available as a defence. The Court concluded that it was not acceptable to wait the outcome of the trial to seek to "resurrect" a defence by commissioning a fresh report from a different expert and it was not in the interests of justice to admit the new report as fresh evidence.

R-v-Roddis [2020] EWCA Crim 396, [2020] 4 WLR 69

Some 12 years after his conviction for terrorism offences the Court of Appeal heard a reference from the Criminal Cases Review Commission. The basis for the appeal was a post conviction diagnosis of Autistic Spectrum Disorder (ASD) which may affect the safety of the conviction. Prior to trial a psychiatrist saw the Appellant and concluded that he had a personality disorder and was insensitive to prevailing social norms and conventions. No expert was called by the defence at trial not least because the expert may have given evidence which contradicted the Appellant's own case.

Notwithstanding the change in diagnosis there were a number of features common to both personality disorder and ASD, a lack of social reciprocity being an important common trait for the purposes of the determination of the appeal and that material was available and could have been called at trial, although for tactical reasons it was not. The effect of the diagnosis post conviction was minimal and the appeal was dismissed.

R-v-Cleland [2020] EWCA Crim 906

In 2014 D's appeal against a sentence of detention for life imposed the year before for an offence of attempted murder was dismissed. The case was referred to the Court of Appeal

by the Criminal Cases Review Commission on the basis that at the time of the offence D had (undiagnosed) Autistic Spectrum condition and that the appropriate disposal was a hospital order with a restriction (sections 37 and 41 Mental Health Act).

At his sentence hearing there was a psychiatric report which said there was no evidence D was mentally ill and a psychologist's report which opined that he was unlikely to meet the diagnostic criteria for Autism Spectrum. The sentencing judge concluded that protecting the public could only be achieved by imposing a life sentence.

Following his sentence D was transferred to hospital (sections 47 and 49 Mental Health Act) and it was there that he was diagnosed with Autism. Autism was "at the very least" a significant contributor to the offence. The appeal was on the basis that a hospital order would best serve D's rehabilitation and the protection of the public. The Court received as fresh evidence, expert psychiatric evidence.

It was submitted on behalf of D that the public would be better protected by the making of a restricted hospital order; conditions on release were, it was argued, stricter and more effective, and he could be treated against his will; features which probation supervision lacked.

Balancing the various features:
(i) D's continued need for treatment
(ii) the offending was contributed to, in significant part, by D's Autism
(iii) the need to punish, though as D had almost served all of the minimum term, the need for punishment carried little weight
(iv) protection of the public, which was very important

And on the basis that:
(a) treatment was available which allowed for management, not cure
(b) the imposition of a life sentence did not bar D from being treated
(c) if it happened transfer to an adult prison, though not inevitable would have probably have an adverse effect on D's treatment
(d) irrespective of the label attached to his detention, D would remain in hospital for a considerable period of time
(e) when released the s37/41 regime will result in better monitoring of D and will increase prospects of early identification of a potential increase in risk

In the circumstances of this case a hospital order with a restriction offers the greater prospect of managing D's return to living in the community in a way which is most likely to reduce risk.

Procedure

R-v-Isleworth *CC ex parte Ewing*, [2019] EWHC 288, [2019] 2 Cr App R 9

While any general policy or practice preventing members of the public from entering court rooms is unacceptable and unlawful; there are some times: swearing a jury, a witness taking their oath, a jury returning its verdict or when a judge is passing sentence, when it is necessary for the court to be still and access by the public may be restricted at those times.

R-v-H [2018] EWCA Crim 2868, [2019] 1 Cr App R (S) 25

Having been convicted and sentenced for murder, D, a youth, spoke while in custody to a case worker from the Local Authority. D told the worker, *inter alia*, that he did not mean to kill the deceased. Some time later D decided to appeal against his conviction. At a lifer assessment panel attended by a Police Officer, the case worker summarised what D had said, she was later asked by the Police to provide a statement. A successful application was made to a circuit judge for disclosure of the case worker's notes so that it could be used by the Crown in resisting the appeal as fresh evidence of a confession by the Defendant. The Court said that the application should not have been made in the Crown Court, directions should have been sought from the Court of Appeal. The Court of Appeal refused to admit the notes; while the discussion between D and the case worker was not afforded legal privilege it was contrary to public policy to breach the confidentiality of discussions of this type; contrast this position to disclosure necessary to avoid imminent criminality or, the contents of a pre-sentence report which may be used by the Crown in an appeal against conviction.

R-v-Dania [2019] EWCA Crim 796

The Court reviews the decision in *Russell-Jones* [1995] 1 Cr App R 538 which sets out the principles which dictate whether or not the Prosecution is obliged to call or tender a witness. The starting point is that generally, the Crown should have at court all witnesses whose statements were served as part of the Crown's case. The Crown has an obligation to keep the evidence they intend to call under review as the trial proceeds, and decisions taken at an early stage may have to be reviewed. A witness who is not capable of belief will not assist the jury and so, not only is there no duty to call or tender that witness, the Prosecution should not do. Where Defence counsel wants to call a witness and a summons is required, a judge should be slow to refuse the application and should not trespass on the jury's role by forming her own, adverse, view of the witness' credibility. Equally, the judge must not impose her own opinions as to the wisdom of calling a witness or unfairly subordinate the interests of the Defendant who wants to call the witness to a co-defendant who does not.

R-v-McChleey [2019] EWCA Crim 2100

Where a Defendant is entitled to a good character direction comprising both limbs, there should be a clear direction to the jury from the judge, explaining the relevance of character to credibility and the likelihood that he has committed the offence (propensity); and in a case where an assessment of credibility was central and there was no other evidence pointing to the guilt of the Defendant other than the complainant's account, the absence of a good character direction means the conviction was unsafe.

R-v-Coker [EWCA] Crim 420 [2019] 2 Cr App R 10

D was charged with being concerned in supplying a controlled drug (s4(3)(b) Misuse of Drugs Act) but not offering to supply (4(3)(a)); when summing up, the judge had directed the jury that the Crown had to prove participating in the supply of a controlled drug, or making an offer to supply. The Court said the judge's direction was incorrect, there is no room for an either/or direction when the prosecution choose to proceed on one of the three offences created by s4(3) of the Misuse of Drugs Act; they are separate offences '*and distinct*' offences. The Court was critical of the treatment of the offence in the 2019 editions of both *Archbold* and *Blackstone's;* the 2020 editions have taken that criticism on board and amended accordingly.

R-v-Syed (Haroon) [2018] EWCA 2809, [2019] 1 Cr App R 21

There may be a tension between protecting society by combating serious crime and the right to a fair trial. Although they may be expressed in different terms there is no material difference between the jurisprudence of the European Court of Human Rights and the case of *R-v-Loosley* [2002] 1 Cr App R 29 on the subject of entrapment. An unduly literal reading of the language of the judgements is misplaced. The questions to be asked are: what is the rationale of the doctrine of entrapment, and has the officer gone beyond offering the Defendant 'an unexceptional opportunity to commit the crime'? In the course of the judgement the Court said the "ends do not always justify the means", and later 'ends do not necessarily justify means'; this in contrast to a Canadian case also quoted in the judgement "it is deeply ingrained in our democratic system that the ends do not justify the means".

R-v-Myers [2018] EWCA Crim 2191, [2019] Crim LR 181

During D's trial, albeit in the absence of the jury, the judge indicated he thought the Defendant was guilty and should be given 'robust advice'; the judge remanded the Defendant in custody after he had given a Goodyear indication of immediate custody just before she was due to give evidence and roughly upbraided D's 14 year old daughter when she complained. The judge asked questions of D that seemed more like comment or cross

examination. The Court stated it was not appropriate for the judge to make comments indicating his view as to the strength of the evidence during the trial. The comments made and the withdrawal of bail were handicaps to the Defendant giving her best evidence. Taken together the conduct of the judge may well have led the Defendant to conclude that he had taken an adverse view of her case, and fear that she would not receive a fair trial. She may have been handicapped in the giving of her evidence. The Defendant did not receive a fair trial and the conviction was unsafe.

R-v-LT [2019] EWCA Crim 58, [2019] 1 Cr App R 30

A prosecution appeal against the exclusion of identification evidence. The complainant (C) had an altercation with a male during which a gun was produced. The two were about eight feet from each other. The next day C went to the home of a friend (AH) who showed him a photograph of the Defendant but did not at that stage say anything, C said that was the person who had threatened him and provided a copy of the image to the Police. The Defendant was arrested and C picked him in an identification procedure, he was 100% sure. At trial the judge excluded evidence of C's identification on the basis there was a 'very significant' risk he had been influenced by AH, although during a *voire dire* this was something C denied. The Crown appealed the "terminating ruling". Although the Court of Appeal is reluctant to interfere when judges make decisions to exclude evidence pursuant to s79 Police and Criminal Evidence Act 1984, there was no proper basis for the judge's conclusion that C's identification had been influenced or contaminated by AH; when the identification was made AH had not said anything to C. The Court reviewed the authorities and repeated the observations in *Alexander and McGill* [2012] EWCA Crim 2768, [2013] 1 Cr App R 26 concerning Facebook identification:

(i) the Police should obtain as much information as possible about the initial identification and how it came to be made
(ii) the jury should have as much material as possible to enable them to assess the circumstances in which the identification was made
(iii) if needed the jury should be directed and warned about the circumstances of the identification.

R-v-Godi*r* [2018] EWCA Crim 2294, [2019] Lloyds Rep FC 207

Where being knowingly concerned in something is part of the *mens rea* the Prosecution must prove knowledge; recklessness is not sufficient. In simple terms one can be said to know something if one is sure that it is so. Being reckless means taking an unjustified risk. Wilful blindness may equate to knowledge but it is not the same as recklessness.

R-v-Kurtz [2018] EWCA Crim 2743, [2019] 1 Cr App R 19

Where D is accused of ill-treatment or neglect contrary to section 44 (2) Mental Capacity Act 2005 the Prosecution must prove that P lacked capacity or that D reasonably believed P lacked capacity (s44(1) (a)) and that D ill-treated or neglected P. Simply establishing that D was the appointee of an Enduring Power of Attorney referred to in section 44 (1)(b) Mental Capacity Act is not enough.

R-v-Tas (Ali) [2018] EWCA Crim 2603, [2019] 1 Cr App R 26

D and two others were charged with murder following a stabbing. D and his two co-accused had looked for an individual and when driving had seen whom they were looking for, within a group of other individuals. D, who was driving the others, parked close to where the group were seen; there was a fight and V was stabbed. At the time of the stabbing D was in the car which had been positioned to make a quick getaway if needed. At trial D said he did not know there was a knife and that he had withdrawn from the fight before the stabbing. The trial judge decided that participation in a joint enterprise to do some harm to V, who died, would mean D was guilty of manslaughter even if he did not know there was a knife. On an appeal against conviction for manslaughter the Court ruled that D's actions encouraged or assisted the principal offender, and the production of a knife was not something that D could not have contemplated; it was not an 'overwhelming supervening act' and the judge was right not to leave that issue to the jury.

R-v-Barton and Booth [2020] EWCA Crim 575

The law took a wrong turn in *Ghosh* [1982] QB 1053 and this case confirms that the correct test for dishonesty is that given in the judgement of the Supreme Court in *Ivey* [2017] UKSC 67, [2018] AC 391 namely: (i) what was the defendant's actual state of knowledge or belief as to the facts and (ii) was his conduct dishonest by the standards of ordinary decent people? The test of dishonesty is a test of the Defendant's state of mind - his or her knowledge or belief - to which the standards of ordinary decent people are applied. Dishonesty is assessed by society's standard, not the Defendant's understanding of them. The standard of what is honest conduct is not subjective; if a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. What leads someone to act forms the first test, when the facts that led the Defendant to act in the way they did are established, those facts are then judged by reference to the usual burden and standard of proof.

R-v-Bush [2019] EWCA Crim 29, [2019] All ER (D) 11

In an appeal against a finding that there was no case, the Prosecution have a high hurdle; the Court may only intervene if the judge erred in law or principle or reached an unreasonable decision. Where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on the basis that every possible adverse inference must be drawn against a defendant, especially when the judge considers that the totality of the evidence points in the opposite direction. There may be a fine balance between allowing the application, thereby taking on the jury's job and, on the other hand, leaving a case to the jury where the evidence is barely sufficient. As a result there is a margin of judgement which the Court allows to a trial judge who has heard the evidence; the Court "will always acknowledge and respect the position of the trial judge who is usually much better placed to make an assessment of the evidence".

Faltec Europe Ltd-v-HSE [2019] EWCA Crim 520, [2019] 4 WLR 77

The Court, erroneously it seems, states that the Criminal Practice Directions do not state what the maximum length of a skeleton argument should be in proceedings in the Court of Appeal; CPD XII, D17 does say that skeleton arguments should not normally exceed 15 pages and, at IX 39F: they should be as succinct as possible, with each submission stated in not more than one or two sentences. In this judgement the Court says it favours not more than 25 pages, not less than 12 point font and 1.5 line spacing. Lengthy documents may be declined with a requirement they are re-served in a "dramatically shortened version".

R-v-Parsons [2019] EWCA Crim 1451, [2020] 1 Cr App R (S) 8

Arithmetical errors, made when passing sentence, for example the calculation of credit for a guilty plea, are not for the Court of Appeal:they should be dealt with under the slip rule.

R-v-George [2019] EWCA Crim 2177, [2020] 4 WLR 41

Where sentences of two years and six months imprisonment are increased, using the slip rule, to three years and three months, the Court found that the judge had not erred in correcting a mistake made. There is a strong public interest in courts' imposing the correct sentence, and if there are errors in relation to the law or the application of the Guidelines which would lead to a material increase in the sentence, they need to be corrected. The interests of the Defendant (who may have a justifiable sense of grievance that the sentence imposed will be increased) can be addressed by being given an appropriate level of discount to the new sentence; in the instant case, three months was deducted from the final sentence.

R-v-Reynolds [2019] EWCA Crim 2145, [2020] 4 WLR 16

Whatever may have been the position in the past, if there are criticisms of the summing up they should be taken at the time. If the advocate does not raise an issue with the judge the Court of Appeal may conclude that what was said was not regarded as an error or material at the time; trawling through the transcript of a summing up looking for errors or perceived errors is not likely to yield positive results.

R-v-Horne [2020] EWCA Crim 487

In a closed conspiracy consisting of two participants and where one of the two has pleaded guilty; evidence of the guilty plea should not be admitted as it would have an adverse effect on the fairness of proceedings.

R-v-Yasin [2019] EWCA Crim 1729, [2020] 1 Cr App R (S) 43

It is the responsibility of the parties, not the court, to complete the Better Case Management form in the Magistrates' Court. If no indication of plea is given in court and the form makes no reference to likely plea, the sentencing judge should work on the basis that no indication was given and need not give more than 25% credit for plea if entered at the plea and case management hearing.

R-v-Canterbury Crown Court [2020] EWHC 453

There is no basis for the proposition that, because a Defendant was released under investigation, he will be bailed when charged.

R-v-CB, R-v-Mohammed [2020] EWCA Crim 790

An important case which considers the retention, inspection, copying, disclosure and deletion of electronic records held by complainants and Prosecution witnesses. The Court notes there has been, over the past forty years, an exponential change in the way people gather, store and exchange information digitally. However, the ease with which material is accessible does not make it more susceptible to scrutiny than would have been the case had it been in the form of letters, diaries, photograph albums etc. There is no automatic and unfettered access by investigators, much less Defendants, to a complainant's digital information. Mobile 'phones and other devices should not be obtained by investigators from witnesses as a matter of course.Quoting from the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases[12] the Court emphasised that complainants do not

[12] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/Disclosure+Protocol.pdf

waive their right to privacy by making a complaint; any interference with a complaint's Article 8[13] rights must be in accordance with the law and must be necessary in pursuit of a legitimate public interest.

Four issues of principle were identified:

The first issue

When does it become necessary to review a witness' digitally stored communication and, when is it necessary to disclose digital communication to which investigators have access?

There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded, any more than there is a presumption that investigators will attempt to look through material held in hard copy. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation. In other words there must be a proper basis, usually that there are reasonable grounds to believe there may be material relevant to the investigation or the likely issues at trial.[14] Reasonable does not mean fanciful or inherently speculative, there has to be an identifiable basis that justifies the steps taken.

The second issue

When it is necessary, how should the review of the witness's electronic communication be conducted?

Investigators need to adopt an incremental approach. The first question is - is it necessary to look at a witness's mobile device at all?. So where, for example, the line of enquiry is communication between a suspect and a complainant, then is it possible to obtain the relevant information from the suspect's phone? Social media can be reviewed online provided passwords are provided.

If there is a proper reason to examine a mobile device consideration has to be given to the fact that the loss of a witness's mobile device may be an intrusion into an individual's private life, apart from considering the privacy issues with respect to its contents. Will a discrete part of the digital record suffice? Or, can focused questions together with viewing any relevant recorded information and taking screen shots mean it is not necessary for the device to be examined in more detail?

[13] Article 8, European Convention on Human Rights; Right to respect for private and family life
[14] at the Police Station thought needs to be given to establishing in general terms what the issues at trial may be to trigger and/or focus this enquiry

There will be cases where it will be necessary to make a detailed examination of the witness's phone; the examples in the DPP's 2018 Guide[15] do not provide an exhaustive list. Sampling and search terms rather than a page by page inspection may be necessary, and is perfectly proper, where there is a great deal of material. The ambit of the review will be set out in the Disclosure Management Document - *practical and timely engagement by the defence with the DMS is critical as part of advancing his or her interests.*

The third issue

What reassurance should be given to the complainant/witness as to the ambit of the review and the circumstances of any disclosure of material that is relevant to the case?

The witness should be told:

(i) the defendant does not have a general right to examine the contents of the witness's device,

(ii) the Police will only seek to examine the contents of such devices when pursuing a reasonable line of enquiry,

(iii) the witness is not obliged to cooperate with a Police request but, if (s)he fails to do so there is a risk that it will be impossible to pursue the investigation, a witness summons may be issued and any trial may be halted,

(iv) the device will only be copied and examined to the extent necessary,

(v) only material which might reasonably be considered capable of undermining the case for the prosecution or assisting the defence will be disclosed to the defence, necessary personal details and irrelevant information will be redacted,

(vi) witnesses will be consulted about the disclosure process.

The Court suggests that a witness should be warned that they should not delete potentially relevant material as to do so may impede a fair investigation.

The fourth issue

What is the consequence if a complainant refuses to permit access to a potentially relevant device or, deletes relevant material?

The trial court may need to consider, if an application is made, whether the proceedings should be stayed on the basis that it is impossible to the defendant to have a fair trial. The refusal of a witness to give up the contents of their device does not, on its own, constitute bad faith or misbehaviour on the part of the police or prosecutor.

[15] https://www.cps.gov.uk/legal-guidance/disclosure-guide-reasonable-lines-enquiry-and-communications-evidence

Although it may be an exceptional course, an application can be made for a witness summons; the witness would have an opportunity to assert their Article 8 rights and make any other representations.

Sentence Guidelines

Sexual Offences

Following *R-v-Privett and others* [2020] EWCA Crim 557 the Sentence Council has provided additional guidance to the Definitive Guidelines in relation to offences contrary to s14 Sexual Offences Act 2003[16] where no child victim exists. The effect of *Privett* and the revision to the Guidelines is that sentences imposed in cases involving adult decoys will probably be longer.

In *Privett* a decision of the Court of Appeal, Lord Justice Fulford reminded practitioners and sentencers that an offence contrary to s14 Sexual Offences Act 2003 is a preparatory offence which does not depend on a child sex offence having been committed or even being possible: it is complete when the arrangements are made.

Plainly the absence of a real victim does not reduce culpability. However over the years the absence of a victim has had an impact on the assessment of harm: *R-v-Buchannan* [2015] 2 Cr App R (S) 13 states that *'the absence of any physical contact is highly material to the sentence imposed'*. In *R-v-Copley* [2016] EWCA Crim 894 the Court concluded that in the case it was deciding, as no harm was or could be done to a child, this should be reflected in a "*substantial discount from the sentence that would have been appropriate for the full offence*".

In future courts, and practitioners advising their clients on sentence, must look at the harm intended. Judges should identify the category of harm intended and, in the case of no victim, adjust the sentence so that it is commensurate with, or proportionate to the starting point and range if no sexual activity had occurred. Usually, where the child is fictional there will be some reduction to reflect the lack of harm.

Although *Privett* specifically refers to offences under s14 it may be expected to affect sentences in other distance child sexual offences where an adult is pretending to be a child.

Sentencing Offenders with mental disorders, developmental disorders or neurological impairment

While the number of people in prison who have a mental illness is not known with any precision, the government does not know how much is spent on mental health in prisons or whether what is being done is achieving its objectives. In 1998 it was estimated that

[16] Arranging or facilitating the commission of a child sex offence

90% of the prison population was mentally unwell. In 2016 there were 40,161 incidents of self harm in prison, a 73% increase since 2012 and 120 self inflicted deaths; twice the number in 2012. In 2017 37% of the adult prison population reported having mental health or emotional well being issues at any one time and at least 10% of the adult prison population were receiving treatment[17].

On 22 July 2020 the Sentencing Council published new a new guideline; *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*. The guidelines which will apply to those over 18 who are sentenced on or after 1 October 2020, irrespective of the date of the offence; can be found on the Sentencing Council website

https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/

Although dealing with offenders who have experience of mental health problems it does not affect those who, because of their il health, are unfit to give instructions or to be tried.

The title of the new Guideline has changed as a result of the consultation process but includes the word 'disorder' which some respondents said was pejorative. The rationale for retaining 'disorder' is that it reflects legislation and is clear as to what the guidelines covered and, in the context of the guideline, is used along with 'impairments' as an umbrella term for the conditions listed in Annex A.

Courts are reminded of the provisions of section 125(7) of the Coroners and Justice Act 2009,

Nothing in this section or section 126 is to be taken as restricting any power (whether under the Mental Health Act 1983 (c. 20) or otherwise) which enables a court to deal with a mentally disordered offender in the manner it considers to be most appropriate in all the circumstances.

and of the savings for powers to mitigate sentences and deal appropriately with mentally disordered offenders in section 166 Criminal Justice Act 2003.

There was an interesting and illuminating difference between two responses. The response of the Howard League for Penal Reform objected to the inclusion of
"the mere fact that an offender has such a condition or disorder does not necessarily mean that it will have an impact on sentencing."

[17] https://www.nao.org.uk/report/mental-health-in-prisons/

and said it sent out *"the wrong message and undermines the significance of the guidance from the outset. The presence of a mental health problem is clearly relevant information that ought to be considered as part of the sentencing exercise. It would be most concerning, if not discriminatory, if the presence of mental disorder were to have no impact on sentence at all and it is therefore concerning that the guidance opens with this caveat without any further explanation or qualification'.*

Contrast this with the response of the Council of HM District Judges who wanted the passage above to be emphasised in bold, maintaining that courts *can become fixated on a diagnosed condition when the impact would, and perhaps should, be limited.*

The resolution from the Council is paragraph two in section one: impairments or disorders should always be considered by the court but will not necessarily have an impact on sentence.

The Guideline is divided into a number of sections:

Section One - General Approach

The guidelines apply to offenders who have either at the time of the offence or at the date of sentence any mental disorder etc, examples of which are listed at Annex A.

Repeating s157 Criminal Justice Act 2003 the Guideline reminds courts that in any case where the offender is, or appears to be, mentally disordered at the time of sentence the court must obtain and consider a medical report[18] before passing a custodial sentence unless it is unnecessary. It may be unnecessary if there is there is reliable and up to date information available.

The fact that an offender has an impairment or disorder should always be considered by the court but will not necessarily have any impact of the sentence imposed.

Deciding whether the disorder etc has an impact on the sentence requires an individual and focused assessment on the issues in the case.

Sentencers are warned to be aware that not all disorders etc are easily recognised, they may fluctuate and presentation during proceedings may not be representative of how

[18] Medical report means means a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of section 12 of the Mental Health Act 1983 by the Secretary of State [or by another person by virtue of section 12ZA or 12ZB of that Act,] as having special experience in the diagnosis or treatment of mental disorder; section 157(6) Criminal Justice Act 2003

someone was when the offence was committed. No adverse inference should necessarily be drawn if there has not been a previous diagnosis or disclosure of ill health. Offenders may not want to accept they are unwell or may not recognise that they are. Some people have a number of different problems(co-morbidity). Drugs and alcohol may mask an underlying disorder.

The culture, ethnicity and gender of an offender may be relevant in relation to perceptions of stigma and access to mental health services and prevalence especially amongst BAME females, refugees and asylum seekers and care should be taken to consider the information in the Equal Treatment Bench Book, especially chapters six and eight.[19]

It may be difficult to identity what the correct diagnosis is and while a formal diagnosis is not always required, if it is, a report from a suitably qualified expert will be necessary.

Sentences and ancillary orders should be explained in a clear and straightforward way so that their requirements, and the consequences of any breach and/or re-offending, are understood by the offender. Later in the guideline emphasis is placed on the importance of ensuring that the conditions of a community order are bespoke to the offender.

Section Two - Assessing Culpability

Culpability may be reduced if, at the time of the offence, an individual was experiencing mental ill health. Culpability should be assessed in accordance with the relevant offence guideline but will only be reduced if there is a sufficient connection between offence and behaviour. Careful analysis is required.

If there are compelling reasons to do so, the court is not bound to follow expert opinion, but if an expert's opinion is not followed this must be articulated by the sentencer, with reasons.

The guideline suggests a number of questions as a starting point, although the questions are neither a checklist or an exhaustive list:

- At the time of the offence did the offender's impairment or disorder impair their ability:
    - to exercise appropriate judgement,
    - to make rational choices,
    - to understand the nature and consequences of their actions?
- At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?

[19] https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf

- Are there other factors related to the offender's impairment or disorder which reduce culpability?
- Medication. Where an offender was failing to take medication prescribed to them at the time of the offence, the court will need to consider the extent to which that failure was wilful or arose as a result of the offender's lack of insight into their impairment or disorder,
- "Self-medication". Where an offender made their impairment or disorder worse by "self-medicating" with alcohol or non-prescribed or illicit drugs at the time of the offence, the court will need to consider the extent to which the offender was aware that would be the effect,
- Insight. Courts need to be cautious before concluding that just because an offender has some insight into their impairment or disorder and/or insight into the importance of taking their medication, that insight automatically increases the culpability for the offence. Any insight, and its effect on culpability, is a matter of degree for the court to assess.

Section Three - Determining Sentence

The ill health of the offender is to be taken account of at either stage one or stage two and may impact the type of sentence imposed and considerations of dangerousness.

The various disposals available to the court, from fines to hybrid orders, are set out.

Where an individual is on the cusp of a custodial sentence[20] the court may consider whether imprisonment is disproportionate and whether protection of the public is better served by a rehabilitative approach. If imprisonment is unavoidable, can the sentence be suspended, and does the condition of the offender affect the length of any sentence. Custody may be more difficult for the individual and may make their condition worse, and while the health of an offender may only be taken into account in a limited way the court must have regard to the impact custody will have.

The final two thirds of the Guideline are taken up with helpful summarys of the "main classes of mental disorders and presenting features", Annex A. The need for and the contents of reports, Annex B. And, in Annex C the various disposals and release criteria are helpfully set out.

[20] Section three, paragraph 22

Update

Custody Time Limits Protocol ceased to have effect on 3 September 2020. However the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 comes into force on 28 September 2020. This Statutory Instrument extends the period of time someone may be held in custody awaiting trial in the Crown Court. The time from being sent by the Magistrates' Court to the start of the trial from 182 to 238 days.[21] The amendment does not apply to someone subject to the new CTL period before 28 September. The amendment will cease to have effect on 28 June 2021.

https://www.legislation.gov.uk/uksi/2020/953/pdfs/uksi_20200953_en.pdf

Adult Bench Book, June 2020

The Adult Court Bench Book provides guidance for magistrates who sit in the adult court, it is used for reference at court and is intended to help magistrates undertake the task of decision making in a fair and structured manner.

https://www.judiciary.uk/publications/adult-court-bench-book-and-pronouncement-cards/

Youth Court Bench Book, June 2020

https://www.judiciary.uk/publications/youth-court-bench-book-and-pronouncement-cards/

A new version of the Crown Court Compendium was published on 20 July 2020

Volume One - Jury and Trial Management and Summing Up
https://www.judiciary.uk/wp-content/uploads/2020/07/Crown-Court-Compendium-Part-I-July-2020-1.pdf

Volume Two - Sentencing
https://www.judiciary.uk/wp-content/uploads/2020/07/Crown-Court-Compendium-Part-II-Sentencing-December-2019-amended-04.09.20.pdf

Criminal Practice Directions 2015, 10th amendment

Came into force on 13 May 2020

[21] Prosecution of Offences (Custody Time Limits) Regulations 1987, paragrpah 6B as ammended

https://www.judiciary.uk/wp-content/uploads/2020/05/CrimPD-10-CONSOLIDATED.pdf

Criminal Legal Aid (Renumeration) Amendment) Regulations 2020 SI 2020/903

Most of this SI comes into force on 17 September. Amongst other measures it allows for payment of a fee for considering unused material, increases the payment for cracked trials and removing the distinction in payments depending on when a matter cracks.

https://www.legislation.gov.uk/uksi/2020/903/contents/made

Ones to watch

Sentencing Bill 2020

In the last 30 years there have been 14 major pieces of primary legislation amending sentencing procedure, as a consequence the law is complex, difficult to locate and difficult to understand. The Sentencing Bill which incorporates the Law Commission's 'Sentencing Code' had its second reading in the House of Lords on 25 June 2020. When passed by Parliament it will consolidate the current law governing sentencing with the aim of making sentencing "simple, coherent and accessible … saving money, reducing delay and bringing clarity to an important area of criminal law". It consists of 420 sections and 29 schedules, covering every aspect of sentencing procedure. It is expected that the Act will apply to those convicted on or after 1 October 2020.

Our colleague, Louise Cowen (sentencing editor for Archbold News) is writing a detailed consideration of the Act which will be available on the Lincoln House Chamber's website after the Act receives Royal Assent.

https://publications.parliament.uk/pa/bills/lbill/58-01/105/5801105.pdf

Domestic Abuse Bill 2020

This important piece of legislation which has had lengthy passage through Parliament looks set to become law within the next few weeks. Debate in the Commons was marked by the personal accounts of members who shared their experience of domestic abuse and impressed with the need for a law to better protect the victims of abuse that occurs at home. When the Bill was re-introduced into the Commons the Lord Chancellor[22] reflected on the effect of Covid 19 and the impact there was on victims of domestic abuse, increases in calls to helplines and demand for safe places to stay; increases in violence inflicted. The impact in the UK is not unique, and throughout the world there have been substantial increases in violence in the home -in one county in Hubei province calls to the Police more than tripled during lockdown in February; in Brazil cases rose by an estimated 40% - 50%; in Italy it was reported there was "an overwhelming emergency" as women who could not make contact with services without being over heard sought to make contact by text and email. The UK has followed that pattern[23], and the number of women killed by men in the three weeks from 23 March to 12 April 2020 was the highest it had been for 11 years and was double the hypothetical average for the same period over the last ten years[24].

[22] HC 28.04.20, vol 675 Col 232
[23] Home Affairs Committee report, 27 April 2020
[24] Counting Dead Women (07.07.20 so far this year 61 women have been killed by men

Although there is clearly an overlap between this Act and existing legislation it does codify various concepts; and it creates a statutory definition of domestic abuse [25] ,

behaviour is "abusive" if it consists of any of the following
(a) physical or sexual abuse;
(b) violent or threatening behaviour;
(c) controlling or coercive behaviour;
(d) economic abuse;
(e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

A Domestic Abuse Commissioner will be appointed whose function is to encourage good practice in the prevention, detection, investigation and prosecution of offences involving domestic abuse.

There are new powers for dealing with domestic abuse. Police may issue 'domestic abuse protection' notices which will prevent the subject of the notice contacting a named individual and requiring them to leave premises they are living in. Breach of a 'domestic abuse protection' notice will be an arrestable offence. Courts may make 'domestic abuse protection orders' following conviction (amongst other situations), breach may result in a sentence of imprisonment of up to five years.

Special measures will available to a witness where the offence involves domestic abuse, as defined by the Act, above.

The Act will extend the territorial jurisdiction of the courts here so that UK nationals and residents of the UK who commit offences of Murder, Manslaughter, offences contrary to sections 18,20, 23, 24 and 47 Offences against the Persons Act and s1 Infant Life (Preservation) Act 1929 while outside the jurisdiction may be prosecuted in England and Wales for their alleged conduct.

The Act will also create a statutory presumption that complainants who allege domestic abuse will have special measures and will prevent consent of a victim being used as a defence to a prosecution in domestic homicides.

https://publications.parliament.uk/pa/bills/cbill/58-01/0141/20141.pdf

[25] section one

Resources

If you have immediate safeguarding concerns about yourself or someone else, you should contact the Police on 999 or (if you are concerned about a child) the NSPCC on 0808 800 5000.

If you are in danger and unable to talk on the phone, call 999 and then press 55. This will transfer your call to the relevant police force who will assist you without you having to speak.

If you would like support or advice, the Government has published information about helplines and websites that may be able to help.

National Domestic Abuse helpline 0808 2000 247

Men's advice line 0808 801 0327

Citizens Advice 03444 111 444

Samaritans 116 123

Childline 0800 1111

Respect phone line for people who want to change and stop being violent 0808 8024040

Member of the LGBTQ community can access information here:
http://www.galop.org.uk/sexual-violence-covid-19-and-beyond/
https://publications.parliament.uk/pa/bills/cbill/58-01/0141/20141.pdf

LINCOLN HOUSE CHAMBERS

Richard English

"A notable practitioner with a signific disordered defendants. He primarily practices on the defence side, but he is also called upon to prosecute in complex multi-handed cases." Chambers & Partners 2020

"An intelligent and astute advocate." "He excels at representing clients with mental health concerns." Chambers & Partners 2020

"His preparation is first-class and his drafting of advice on complex issues is excellent." Legal 500 2019

Richard is a skilful and persuasive advocate who prides himself on providing the best advice, and the most effective representation.

Richard is a native of Dublin. He studied History at Trinity College, Dublin University. He qualified as a solicitor in England in 1996, and in Ireland in 1997 where he practiced for two years. As a solicitor he was involved in a number of high-profile and complex cases amongst them – the London City Bond fraud and the Sally Clark appeal. He became a partner with Burton Copeland Solicitors in 2000.

He was called to the Bar in 2003 and practices at the Criminal Bar, appearing in courts in the North West and throughout the country. He has a predominately defence practice, but does prosecute in complex, document-heavy, multi-handed cases.

He was a Law Society trainer on the Human Rights Acts and have been trained by Amicus in death row cases. He has advised the Irish Council for Prisoners Overseas and has written for their journal on mental health issues. ***"With Richard controlling my case I felt reassured that everything will be dealt with professionally and without any drama"*** – Client Testimonial

Specialisms

Mental Health – Richard has a particular interest and expertise in offences involving mentally disordered defendants. He is instructed because of his skill, patience and understanding of those who are particularly vulnerable when faced with the ordeal of appearing in court.

He also appears in Mental Health Review Tribunals. He is a member of the Mental Health Lawyers Association, and in 2017 he was awarded a Post-Graduate Diploma in Mental Health Law from the University of Northumbria.

Sexual Offences – Richard is regularly instructed to represent those alleged to have committed the most serious sexual offences, which very often, are said to have happened many years before. Allegations of this type are invariably devastating to all involved; they require detailed preparation, patient, and when necessary robust advice, as well as thoughtful and sensitive consideration both in and out of court.

Offences Involving Children – Over the years Richard has been involved in many cases where the Police believe a child has been the victim of serious, often fatal violence. In the process he has developed an understanding of the complex medical and other evidential issues involved.

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LINCOLN HOUSE CHAMBERS

Rachel Cooper

Rachel is an experienced barrister practising in crime, professional discipline and regulatory law.

She has a particular interest and expertise in cases where one of the participants, be they defendant, complainant or witness is experiencing mental distress or is particularly vulnerable. She is regularly instructed in these challenging and difficult cases and has a well earned reputation for her being able to give the advice that is needed when it is needed and to guide her clients though the complex and often distressing experience of appearing at court.

Rachel is well known as a tenacious trial advocate and is much sought after to prosecute and defend in serious cases. Recent instructions include: serious sexual and violent offences; large-scale drugs conspiracies; firearms and armed robbery offences and serious fraud offences. She is much sought after to appear in cases brought by Local Authorities and has been instructed by both prosecution and defendants in health and safety, trade descriptions, food safety, fire regulation and environmental prosecutions. She has considerable expertise in dealing with medical, technical and other expert evidence, particularly in the area of telephone analysis.

In professional discipline Rachel has substantial experience in representing medical professionals at tribunal hearings and appears at all levels before the GMC and NMC. Before being called to the Bar Rachel worked for the Healthcare Commission where she worked closely with medical experts; experience which she has applied to her practice generally and which is particularly helpful when representing medical practitioners.

As a former legal adviser in the Magistrates Court Rachel has extensive knowledge of road traffic law and undertakes this work on a privately instructed basis.

Recent cases include

R-v- X *- the Defendant was charged with perverting the course of justice following the death of a neighbour. Other Defendant's tried at the same time were accused of murder. Rachel was successful in persuading the High Court judge, on the basis of a complex and difficult legal argument, that there was no case against her client. https://www.bbc.co.uk/news/uk-england-lancashire-49392913*

R-v-A and others *- junior counsel in a complex and paper heavy trial involving allegations of people trafficking, rape, drug dealing and burglary.*
https://www.lep.co.uk/news/crime/members-preston-gang-responsible-child-rapes-drug-dealing-and-burglaries-sentenced-2505967

R-v-W *- the Defendant, a transgender prisoner who was accused of sexual assault and rape.*
https://www.bbc.co.uk/news/uk-england-leeds-45825838

A detailed CV and list of cases is available on Lincoln House Chambers website

https://www.lincolnhousechambers.com/wp-content/uploads/2012/05/Rachel_Cooper.pdf

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