LINCOLN HOUSE CHAMBERS

Criminal Update 2020

A survey of key criminal cases from the last 18 months

Part Three
Recent Sentencing Cases of Note

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Part Three

Happy New Year. This is the final part of our review of some of the important cases of the last 18 months. We look particularly at sentencing decisions but have included cases relating to POCA and R-v-Killick a useful reminder of the limitations on DNA evidence.

Hodgin is a useful reminder to make sure the Better Case Management (BCM) form is fully completed, especially if it is known at the point of sending that the Defendant will plead guilty in the Crown Court.

As the delays caused by a lack of funding and Covid continue to affect cases and especially trials, the case of Beattie-Milligan may be helpful in mitigating the length of sentence where there has been a delay for which the Defendant is not responsible.

It is not always clear what some phrases used in the Sentencing Guidelines actually mean; there have been a number of cases this year which bring some clarity.

We hope these updates have been helpful. As always any feedback is greatly appreciated.
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Sentencing

General Principles

Attempts

AG's Ref (Zaheer) [2018] EWCA Crim 1708, [2019] 1 Cr App R (S) 14

As a general principle sentences for attempts will be lower than those for the completed offence; the degree of reduction depends on the circumstances which include both the stage at which the attempt failed and the reason the offence was not completed. Where, as in this case, the attempt was "pretty close to the full offence" a sentence which was close to the sentence that would have been imposed for the full offence will be appropriate.

Covid

R-v-Jones [2020] EWCA Crim 764, [2021] 1 Cr App R (S) 6

While the sentence (eight months immediate imprisonment) was not excessive there are, at present, exceptional circumstances which make it appropriate to consider the conditions in which a prisoner will be held when assessing the length of sentence; six months substituted.

Credit for plea

R-v-Price [2018] EWCA 1784, [2019] 1 Cr App R (S) 24

D pleaded guilty at the Plea and Trial Preparation Hearing. Although admissions were made in interview there was no indication of plea in the Magistrates' Court; therefore a discount of 25% was correct. Admissions in interview could be taken into account when dealing with personal mitigation.

R-v-Hodgin [2020] EWCA Crim 1388, [2020] 4 WLR 147

The Defendant was charged with a conspiracy to burgle. In the Magistrates' Court the Defendant's solicitor endorsed the BCM form "likely guilty pleas". In the Crown Court he pleaded guilty, he received 25% credit. The Court of Appeal reflecting on recent authority that where, as in this case, a plea could not be entered in the lower court, generally an unequivocal indication of a guilty plea was required to ensure credit of one third; "likely to plead" was essentially meaningless. The Defendant was not entitled to more than credit of 25%.

R-v-Bannergee [2020] EWCA Crim 909, [2020] 2 Cr App R (S) 55

The Defendant pleaded not guilty to s18 wounding and an offence contrary to s20 which was an alternative. When medical evidence was served the Defendant pleaded guilty to causing actual bodily harm. When being sentenced the judge gave him 15% credit for his plea. The Defendant argued that he should have received 25% as it was only after he had seen the medical evidence, which confirmed the injury was superficial, was he in a position to offer a plea. The Court said, if it was the case that the Defendant knew he was responsible for the injuries caused but did not know the extent he could and should have indicated a plea to s47 to the court and prosecution; it was irrelevant that the Crown would not have accepted such a plea at an earlier stage. The Defendant was not entitled to 25% credit.

R-v-Williamson [2020] EWCA Crim 1085

Where a defendant in a multi-handed case absconds and on being arrested three months pleads guilty at the PTPH, the date of his co-defendants sentence, there is no error in principle in affording only 10% credit *there can be no complaint that his very belated and enforced engagement with the trial process resulted in only very limited credit*. Where credit for a plea is reduced, there should be no additional penalty for any Bail Offence.

Credit for time spent awaiting deportation

R-v-Keeley [2018] EWCA Crim 2089, [2019] 1 Cr App R (S) 13

Time spent in custody awaiting deportation to the UK is not automatically credited against any custodial sentence imposed upon return, and while courts do have a discretion to reduce a sentence to reflect time spent awaiting deportation, it will be rarely used.

Credit for time spent in Local Authority care

R-v-A [2019] EWCA Crim 106, [2019] 2 Cr App R (S) 11

Time spent on remand in local authority accommodation does not automatically count towards any sentence of detention imposed; a reduction in the sentence imposed can be made by the judge, the amount of credit will depend on the facts of the case, more particularly the type of regime the Defendant was subject to, it is not a purely mathematical exercise.

Credit for time spent in hospital, s37/41 Mental Health Act

R-v-Rooney [2020] EWCA Crim 1132, [2021] 1 Cr App R (S) 5

In 2016 the Defendant was found to be unfit to be tried and, to have done acts which amounted to a robbery . He was given a hospital order (s37 Mental Health Act) with a restriction, s41. There having been an improvement in his mental health in 2019 the Defendant was sent back to the Crown Court by the Secretary of State. The Defendant pleaded guilty and was sentenced to an extended determinate sentence; four years six months imprisonment and an extended licence of three years. The length of the custodial sentence was reduced by the sentencing judge however the Defendant appealed on the basis that the reduction was not for the full period of his hospitalisation and it should have been. The Court of Appeal refused leave; time spent in hospital having been made subject of a hospital order was not the same as time spent on remand, a hospital order is to ensure treatment, it is not punitive. It was a matter for the sentencing judge if, and to what extent, credit would be given for time in hospital and while there was no "hard and fast rule" a judge will have regard to

(i) the period of time over which treatment had been provided;
(ii) the approach of the offender to their treatment and their response to it;
(iii) any other matters of mitigation and rehabilitation;
(iv) the regime to which the offender had been subject, whether or not that was a hospital order, and whether or not this also had a restriction order attached to it;
(v) the nature and circumstances of the particular offence or offences;
(vi) the length of sentence overall; and
(vii) the punitive element of sentence

Culpability

***R-v-Luckett* [2020]** EWCA Crim 565

The Defendant was a serving Police Officer. He was suffering from mental health difficulties. He was involved in a road traffic collision with V. V later pleaded guilty to driving with excess alcohol. Having been warned not to have contact with V he engaged in a consensual sexual relationship with her. The Defendant pleaded guilty to misconduct in public office and was sent to prison for 12 months. On appeal the Court found that while the reputation of the Police was damaged the course of justice was not harmed. However, punishment and deterrence could only be achieved by an immediate sentence of imprisonment. The Defendant's mental health difficulties reduced his culpability and there was considerable personal mitigation; four months imprisonment substituted.

Delay

R-v-Whitmore-Drew, R-v-Richards [2019] EWCA Crim 2131; [2020] 1 Cr App R (S) 56

Where a sentence Guideline refers to a "lapse of time" (delay) between arrest and sentence where this does not arise from the conduct of the offender; the Guideline is not to be read as only referring to "misconduct". In the Court of Appeal's view sentencers are entitled to take full account of all factors and all aspects of the conduct of the defendants and prosecution when considering the question of delay and what effect that might have on sentence.

R-v-Beattie-Milligan [2019] EWCA Crim 2367

D was arrested in September 2017 but was not told she would be prosecuted until August 2018. She was convicted after trial; a fact for which the Court said she is not to be punished. The case was relatively simple and the delay appeared unjustified; it imposed a strain on the Defendant and her family and could not be ignored. Two years imprisonment reduced to 18 months.

Goodyear

R-v-Almilhim [2019] EWCA Crim 220, [2019] 2 Cr App R (S)

The summary of this case which appears in *Archbold*[1] might somewhat mislead as it states that *it is not wrong in principle to impose the sentence indicated after having heard mitigation*. In this case the sentencing judge had heard a six day trial when the application for a Goodyear indication was made and was aware of the Defendant's personal mitigation when he gave the indication.

Guidelines - meaning of:

"severe psychological harm"

R-v-Chall, [2019] EWCA Crim 865, [2019] 2 Cr App R (S) 44

While a judge may be assisted by expert evidence, expert evidence is not a necessary precondition to a court finding a victim has suffered severe psychological harm. Judges may assess if such harm has been caused on the basis of evidence from the victim and observation of the victim when they gave evidence. A judge is not making a medical decision but is making a factual assessment: has the victim suffered psychological harm and if so, is it severe. If the evidence was not such as could provide a sufficient foundation for the judge's assessment, the point may be raised on appeal. Whether or not the contents of the Victim Personal Statement is sufficient to provide evidence of severe harm depends on the circumstances of the case. The contents of the VPS which had to comply with the requirements of the CPD should be served in sufficient time, and if there was a real problem with late service, an adjournment could be sought.

"significant degree of planning"

R-v-Dogra [2019] EWCA Crim 145, [2019] 2 Cr App R (S) 9

Guidance about the meaning of "significant degree of planning" as it appears in the Sentencing Council's Sexual Offences Definitive Guideline; not a matter of semantics given the impact a finding has upon the starting point. Some indication of the threshold envisaged was found by considering the other matters that created a raised level of culpability. The Defendant's conduct: a "protracted pursuit" of his victim who he followed for three-quarters of a mile, overtaking and doubling back before the attack, albeit the

[1] Archbold 2021, First Supplement, 5A-123

intention to follow formed in the moment D saw his victim; was not a clear case that could be categorised "a significant degree of planing", although it was significant in another way: D pursued his victim for for some time and was determined to attack her.

"serious in the context of the offence"

R-v-Xue [2020] EWCA Crim 587, [2020] 2 Cr App R (S) 49

The Defendant was convicted of wounding contrary to s18 Offences Against the Persons Act 1861. "Serious in the context of the offence" distinguishes between the level of violence that makes the offence and that which goes beyond it. Sustained or repeated mean different things - sustained may not involve a substantial number of blows, an assault may be repeated where there are a number of blows over quite a short period of time.

"measured reference"

R-v-DL [2020] EWCA Crim 881

When sentencing historical sexual offences, the phrase "measured reference" when used in relation to the definitive guidelines does not mean a mathematical exercise; it does mean, balancing the current guidance with the applicable maximum sentence.

Guidelines - aggregation of harm factors

R-v-Lawrence [2020] EWCA Crim 1465

It is open to a sentencing judge, at step three, to find that the presence of a number of harm factors moves the offence into a higher category. However where a harm factor is used in this way, the same factor cannot be used to aggravate the offence at step four

<u>Totality</u>

R-v-Green [2019] EWCA Crim 196, [2019] 2 Cr App R (S) 16

In 2018 D was convicted of 17 offences of indecent assault and sentenced to 12 years imprisonment. In 2014 he had received a sentence of nine years imprisonment for offences of a similar nature. D appealed against the sentence imposed in 2018. Had it

been on its own it could not have been criticised, but by failing to take into account the 2014 sentence, the sentence was too long. It is not simply a case of deciding the overall sentence for all offending and deducting the length of sentence already imposed. The sentencing judge should have considered all the circumstances in deciding what, if any impact, the previous sentence should have had on the new one; those circumstances may include:

- how recently the previous sentence was imposed;
- the similarity of the previous offences to the instant offences. In this regard, it would usually be helpful to obtain as much information as possible about the previous offences
- whether or not the offences overlapped in terms of the time they were committed;
- whether or not, on the previous occasion, the offender could realistically have "cleaned the slate", by bringing the further offences to the attention of the police, and asking them to be taken into consideration. The court could envisage cases of historical sex abuse against multiple victims many years before, where the offender might genuinely have forgotten some of his offending and had made a genuine but in fact incomplete effort to clean the slate
- whether or not taking the previous sentence into account would, on the facts of the case, give the offender "an undeserved, uncovenanted bonus which would be contrary to the public interest" as referred to in *McLean* [2017] EWCA Crim 170. This would particularly be the case where a technical rule of sentencing had been avoided, or where for example, the court had been denied the opportunity to consider totality in terms of dangerousness
- the age and health of the offender, particularly if the latter had deteriorated significantly as a result of his incarceration, and any other relevant circumstances, including, for example, his conduct while in prison
- whether, if no account was taken of the previous sentence, the length of the two sentences was such that, had they been passed together to be served consecutively, it would have offended the totality principle.

Having taken account of the above and reached the appropriate sentence, the judge has a discretion to make some further allowance to take account of the earlier sentence. If the judge who sentences considers all matters appropriately, and decides there should be no reduction to take account of the earlier sentence, the Court of Appeal will be slow to interfere.

Young Offenders

sexual offending

R-v-O [2018] EWCA Crim 2286, [2019] 1 Cr App R (S) 28

The Court of Appeal refused an application by the Attorney General to refer a sentence of two years detention. The Defendant who was 19 years of age at the time of sentence and had no previous convictions, pleaded guilty to two counts of rape and one count of causing/inciting a child to engage in sexual activity when he was 15 years of age; his victim was six. This was not properly to be regarded as a historical offence and so the judge had not erred by focusing on the sentence that would have been imposed had the Defendant been convicted shortly after the offences had been committed. The judge was correct to consider into what category the offence fell if committed by an adult, and then take account of the Guidelines dealing with Children and Young People. The criticism of the judge made on behalf of the Attorney General that the court should have had regard to *Forbes* [2016] EWCA Crim 1388, [2016] 2 Cr App R (S) 44 and the Annex B of the Sexual Offences Guidelines, was not well founded. And while the sentence was very lenient it was not unduly so.

Crossing age threshold

R-v-Amin [2019] EWCA Crim 1583, [2020] 1 Cr App R (S) 36

On the day D committed an offence of violent disorder he was 17 years and two months old, had he been sentenced on that date, the maximum sentence would have been a detention and training order of two years. He was sentenced when he was 18 years and four months of age. Taking account of his age at the time of the offence it was not appropriate to impose a more severe sentence than could have been imposed at the time the offence was committed. Four years detention reduced to two years detention.

Considerations when over 18

R-v-Hussain & O'Leary [2019] EWCA Crim 1452, [2020] 1 Cr App R (S) 32

The Defendants were 20 and 21 when they pleaded guilty to conspiracy to steal, the offence committed ten months previously. The Court of Appeal said these principles are non-contentious:

(i) Where there is evidence that offending is linked to immaturity, the principles of youth sentencing are relevant to the assessment of culpability and disposal.

(ii) The fact that a Defendant has a serious medical condition which may be difficult to treat in prison does not entitle an offender to a lesser sentence than is appropriate, though a court may, as an act of mercy, impose such a sentence.

*(iii)*Where a Defendant has dependent children, Article 8 (right to respect for private and family life) is engaged and the sentencing court must ask whether the sentence contemplated is, or is not, a proportionate way of balancing the effect on the Defendant and his/her children with the legitimate aims the sentence must serve.

*(iv)*if there are sufficient factors against immediate custody, a judge has a discretion to suspend a sentence even where she takes the view that immediate custody would, all things being equal, be the only appropriate sentence

(v) the Court of Appeal will only interfere with a judge's exercise of judgment in deciding whether or not to suspend a sentence when the decision is plainly wrong in principle or the sentence is manifestly excessive.

Applying the principles to the facts of the appeal, in the case of one Defendant (19 at the time), a psychological report and the PSR linked her offending and her immaturity; her youth, immaturity, mental health and personal circumstances meant the immediate sentence of detention imposed was manifestly excessive. In the case of the second Defendant, where there was a realistic prospect of rehabilitation, strong personal mitigation and immediate custody would have a harmful impact of an offender's three year old child, for who she was the sole carer, and would be a disproportionate interference with their Art 8 rights, the sentence should have been suspended; that it was not resulted in a sentence which was manifestly excessive.

Methodology for calculating sentence

R-v-RB [2020] EWCA Crim 643, [2021] 1 Cr App R (S) 1

RB and others were committed to the Crown Court for sentence, they had pleaded guilty to offences of robbery and handling stolen goods in the Youth Court. An adult, sentenced for these offences would have expected a starting point of ten years; taking account of their pleas and youth the sentence was three years, 10 months detention. While the Court of Appeal dismissed appeals against sentence, it gave set out the appropriate sequence having concluded that a custodial sentence was unavoidable:

(i) consider the correct sentence that would be imposed on an adult offender, making the necessary adjustments for aggravating and mitigating features and personal mitigation that will not be taken account of when reducing the sentence to reflect the age of the offender

(ii) make the appropriate reduction to reflect the age of the offender

(iii) make any reductions required to reflect a guilty plea.

Although the order in which sentences are calculated would not ordinarily make much if any difference, it might if the court took the view that the youth offender was entitled to greater credit than would be afforded an adult in a similar situation.

Specific Offences

Arson

R-v-Lee Batchelor [2018] EWCA Crim 2506, [2019] 1 Cr App R (S) 32

A sentence of two years imprisonment, suspended for two years, imposed for an offence of arson being reckless if life was endangered was unduly lenient. The Defendant, who had no convictions, worked shifts; had became increasingly troubled by loud music from a neighbouring flat and started a fire by pouring white spirits on their front door. Although D's offending was not linked to a mental illness, a psychiatric report suggested that he was likely to have suffered from adjustment disorder with depressive symptoms, or a mild depressive episode triggered by increased stress as a result of shift patterns and noise from his neighbours. He indicated a guilty plea in the Magistrates' Court and entered his plea at the first hearing of the Crown Court. Taking account of the Defendant's good character, the stress he had suffered, that he had a job and was supporting his family, the appropriate sentence was two years imprisonment suspended for two years. Although the Court of Appeal found that the Defendant had come to the end of his tether this was an offence with a high degree of culpability, six years would be reduced to five to take account of mitigation;, with credit for his plea, the sentence should have been 40 months. A sentence 38 months imprisonment was substituted for the suspended sentence originally imposed.

Dangerous Driving

R-v-Ali [2018] EWCA Crim 2359, [2019] 1 Cr App R (S) 27

An appeal against sentence for an offence of causing death by dangerous driving. The judge had found, as an aggravating factor, that there was a 'high degree of prevalence … (of) … bad and lethal driving in residential areas'. The Court of Appeal reminded judges of the need to take account of paragraphs 1.38 and 1.39 of the Sentence Guidelines Council's *Overarching Principles (Seriousness)* guideline, and that is is essential that sentencers 'have supporting evidence from an external source to justify claims that a particular crime is prevalent and that, as a consequence there is a compelling need to treat the offence more seriously

Drugs

"social supply"

R-v-Wade [2018] EWCA Crim 2429, [2019] 1 Cr App R (S) 31

Two years imprisonment reduced to 12 months for D, 36, no relevant convictions, a regular user of cocaine who had on, not less than 40 occasions over 34 months, supplied friends with cocaine for no financial gain (often referred to as 'social supply'); the offending fell more neatly into the lesser role category. While the identity of the person supplied could be an aggravating feature, that was not present here, supplier and supplied were friends.

Suspended sentence

R-v-Tame [2019] EWCA Crim 2013

An AG's reference. While this was not an appropriate case for a suspended sentence, judges should be reminded that where a Defendant is a drug addict a community order with a drug rehabilitation requirement may be a proper alternative to immediate custody. See the Sentencing Guidelines definitive guidance:

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.

Third offence

R-v-Wooff [2019] EWCA Crim 2249

Where the Defendant is to be sentenced for a third Class A drug trafficking offence the sentencing judge should first decide where the offence fits within the guidelines. In deciding if it is unreasonable to impose a minimum sentence of seven years (or 2,045 days if credit is given for any plea) it is permissible to consider the two sentences and the difference between them but, a too liberal interpretation of 'unjust' which circumvents the intention of Parliament is not. There must be a deterrent element.

Explosives

R-v-Harvey [2018] EWCA Crim 755, [2019] 1 Cr App R (S) 23.

D, who had fallen out with his noisy neighbours decided to teach them a lesson by making a small explosive device which he suspended over the fence which divided their properties. Before anything further could happen the Police arrived and arrested D. While sentences for firearms offences may assist the sentencing courts, there was guidance from cases from the Court of Appeal from which the following had to be considered:

(a) the background of the offence and motivation of the offender
(b) the potential for harm posed by the explosive substance/device
(c) the strong need for deterrence.

False Imprisonment

R-v-Clarke [2018] EWCA Crim 1845, [2019] 1 Cr App R (S) 15

D, 53 and with no relevant convictions, pleaded guilty to two offences of false imprisonment, having an imitation firearm (a deactivated sawn-off shotgun) and two offences of having an article with a blade or point. The event lasted four hours; it was very serious, planned in advance, gave rise to a large public incident during which hostages were detained, although they were not tied up, degraded or humiliated. A sentence of 13 years, six months imprisonment after trial would have been appropriate; there was nothing to suggest the judge exercised their discretion incorrectly in imposing an extended sentence. *R-v-Wheeler* [2002] EWCA Crim 65, [2002] 2 Cr App R (S) 61 does not provide useful assistance and should not be cited. The cases the Court did consider when coming to their decision and which therefore may be of assistance in the absence of Guidelines are:

AG Ref (92 of 2014), [2015] 1 Cr App R (S) 44,
AG Ref (102 and 103 of 2014), [2015] 1 Cr App R (S) 55, and
R-v-Warren and others, [2016] EWCA Crim 1344.

Firearms

R-v-Asif [2018] EWCA Crim 2297, [2019] 1 Cr App R (S) 26

Where a prohibited firearm and prohibited ammunition are found in the same location, concurrent sentences ought to be imposed, and so the maximum sentence available was ten years, less credit for plea.

Sexual Offending - decoy

R-v-Woolner [2020] EWCA Crim 1245

The Defendant pleaded guilty to an offence of attempting to arrange or facilitate the commission of a child sex offence for which he received six months imprisonment; he had admitted a number of other offences and the total sentence was 12 months imprisonment. At the sentence hearing prosecuting counsel submitted that had the child been real this would have been a 1A offence but as a decoy was involved it was a 3A offence for the purposes of the Guidelines; this was a position adopted by the sentencing judge. The Solicitor General appealed; it was submitted that in light of *R-v-Privett* [2020] EWCA 557 this should have been dealt with as a 1A offence; on the basis that court should have asked when deciding the level of harm - what was the harm actually intended? The Court of Appeal agreed, albeit a significant reduction was to be made to reflect the fact that there was and could have been no sexual activity. A sentence of two years imprisonment was substituted.

Although *Privett* and this case are attempts to commit offences contrary to s14 Sexual Offences Act, attempts to commit offences that would be contrary to sections 9 or 10 of the Act may need to be explored further in the light of these decisions.

Ancillary Orders

Community Orders

National Probation Service-v-CC at Blackfriars [2019] EWHC 529 (Admin), [2019] 2 Cr App R (S) 24

A community order which includes an unpaid work requirement remains in force until the unpaid work has been completed or the order has been revoked. Time can be extended for completion of the order after the time specified at the time of sentence.

Compensation

R-v-York [2018] EWCA Crim 2754, [2019] 1 Cr App R (S) 41

When making a compensation order there are six principles that must be borne in mind:

1 D must give details of their means
2 the court must enquire into and make findings about D's means
3 the court has to take into account D's means
4 D must have the means to pay the order within a reasonable time, three years would be exceptional
5 an order should not be made on the basis that someone other than D would pay it
6 the court should decide what can be paid by instalments and over what period and make that part of the order.

Deportation

R-v-Ali Hafeez [2020] EWCA Civ 406

The Defendant was a German national who had lived in the UK since 2006 or 2007. In 2015 he was convicted of a number of offences, including rape, and received a sentence of seven years imprisonment. Under Immigration (European Economic Area) regulations 2016 the Home Office decided he should be deported to Germany. When an EEA national has lived in the UK for ten years or more they cannot be deported unless it is on "imperative grounds of public security". The First Tier Tribunal rejected the Defendant's appeal as did the Upper Tribunal. The High Court decided that periods of imprisonment do not count towards establishing ten years' residence. In this case the Defendant had been sent to prison when he had been in the country for six years, his three and a half years in prison did not count towards establishing his period of residence. Accordingly, the Defendant, while entitled to some protection could only avail of that which accrues after being resident for five years *viz* he may be removed on serious grounds of public policy and public security. But, in the circumstances, the 'imperative grounds' would have applied in any event.

Sexual Harm Prevention Order

R-v-Ashford [2020] EWCA Crim 673

Absent an application made in the required manner, there is no power to vary a Sexual Harm Prevention Order on conviction for breach of a SHPO.

POCA

R-v-Fulton [2019] EWCA Crim 163, [2019] 4 WLR 123

D was a foreign exchange dealer, employed by one of a number of money services bureaux who were involved in laundering the proceeds of a fraud, where the loss to the authorities was in the region of £17m. He was convicted after trial. A confiscation order was made; the benefit was £17.8m and the available amount, £104,228. The Defendant's appeal against the making of the confiscation order was dismissed: neither the Defendant's position as an employee nor his lack of legal interest in the company, led to the conclusion that he did not "obtain" the funds he controlled. The Defendant's part in the conspiracy was to disguise the fraud, the amount by which he benefited was the value of the property obtained and was not limited to the amount of tax evaded, the salary he received or the commission paid on the unlawful deals.

R-v-Andrews (Jon) [2020] EWCA Crim 1055

In a case of obtaining employment through fraud the Defendant lied about his qualifications, employment and background when he applied, successfully, for the job as Chief Executive Officer in a hospice and later as Chair of an NHS Trust. When the truth emerged, he was charged with obtaining property by deception and fraud. In confiscation proceedings it was said that the Defendant's benefit was £643,602 and the recoverable amount, £96,737. The judge decided that it was not unreasonable to make an order requiring the Defendant to pay £96,737 as this was less than 15% of the benefit. On appeal the Court found that the Defendant had properly performed his duties and that by providing his services for the renumeration received he had given full value and thus had made full restoration. In the circumstances, confiscation would be disproportionate. Prosecuting authorities should think carefully if, in employment fraud cases, it was appropriate to use their discretion to begin confiscation proceedings.

R-v-Roth [2020] EWCA Crim 967

Rents paid by 12 tenants to a landlord who had criminally failed to comply with an enforcement notice limiting the number of flats in a building to three; were a benefit for the purposes of the Proceeds of Crime Act 2002. The fact that the landlord, had he complied with the notice, could have received rent from three tenants was neither here not there.

R-v-Lowther and others [2020] EWCA Crim 1387, [2020] 4 WLR 152

For the purposes of the benefit figure, property is worth what someone is prepared to pay for it. But when calculating the recoverable amount, costs of sale should be deducted from to give a net value which is what is included in the available amount to meet the confiscation order.

R-v-Bevan [2020] EWCA Crim 1345

D stole £1.5m which having been transferred to bank accounts belonging to him or his wife was laundered by buying property, cars and racehorses. The Defendant's wife asserted that she had a 50% stake in the matrimonial home (now mortgage free, D having paid it off) and in relation to other assets in her name the beneficial interest should follow the legal title. The Crown's case was that it was neither legally nor mortally appropriate that she should benefit from money stolen by her husband. At first instance the judge found that the Defendant's wife had no entitlement to any share in property which had funded through theft. The Court of Appeal came to a different conclusion; the Defendant's wife was entitled to 50% of the equity in the matrimonial home, they couple had always held the house in equal shares and this was unaffected by D paying off the mortgage with stolen money, legal and equitable rights could not be adjusted to suit fairness or public policy considerations. This principle also applied to the property held in her own name.

DNA Evidence

R-v-Killick [2020] EWCA Crim 785

A hairdressers was broken into by two individuals who wore crash helmets which made visual identification impossible. CCTV showed one of the burglars drop something, a screw driver was recovered which had a full DNA profile matching the Defendant. The Defendant was arrested, he denied any involvement in or knowledge of the offence, he was unable to account for the presence of his DNA on the screwdriver; as the Police did not

show him a picture of the screwdriver or, the screwdriver itself he was not able to talk about something he had not seen. At trial a submission of no case was made at the close of the Prosecution's case. The only evidence was the DNA on the, moveable, screwdriver. The prosecution replied that in the absence of an explanation from the Defendant as to why his DNA might be present on the screwdriver there was sufficient evidence to go to the jury. The Defendant's submission was successful, the Crown appealed against the trial judge's finding and in relation to a bad character application which was refused.

The Court of Appeal agreed with the judge in relation to both of his conclusions. The bad character application related to the Defendant's drug habit and the possibility that as a result he may have debts which would be enforced; this was capable of adding little to the Crown's case it was a speculative motive for committing the burglary; what it did add was outweighed by it prejudicial effect. In relation to the DNA evidence the Court made the following findings:

(i) there was an overwhelming inference that the burglar had dropped the screwdriver

(ii) the jury could be sure the DNA on the screwdriver originated from the Defendant

(iii) there was no evidence as to how the DNA got on the screwdriver, in others words which method direct or indirect transfer was most likely

(iv) CCTV did not help with the question, did the burglar deposit his DNA, he may have been wearing gloves

(v) the above was the only evidence which connected the Defendant to the crime

(vi) the absence of an explanation from the Defendant did not, in itself, provide additional support for the Prosecution's case on a submission of no case

The Prosecution could not exclude the possibility that DNA had been deposited long before the night of the burglary either directly or by indirect transfer. While the circumstances were suspicious no reasonable jury could safely exclude the reasonable possibility that the Defendant's DNA had been deposited otherwise in the course of or in connection with the burglary.

Update

Sentencing Act

The Sentencing Act 2020 received the Royal Assent on 22 October 2020, it came into force on 1 December 2020. It applies to anyone who is convicted of an offence on or after 1 December 2020, irrespective of when the offence was committed.

While the Act brings together sentencing legislative provisions it does not deal with release and recall provisions. It also does not apply to appeals and 'slip rule' hearings or to breaches where the conviction pre-dates 1 December 2020.

Disclosure

A revised version of the AG's Guidelines on Disclosure is in force from 31 December 2020, a copy can be found here

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946082/Attorney_General_s_Guidelines_2020_FINAL_Effective_31Dec2020.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.

LINCOLN HOUSE CHAMBERS

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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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