

Intentional Non-Fatal Strangulation: Quick Sentence Guide

By [Jonathan Underhill](#)
3PB Barristers

Introduction

1. The political and evidential background underpinning the implementation of the offence of Intentional Non-Fatal Strangulation (INFS) will be well known to anyone who habitually works in the Criminal Justice System.
2. Anecdotally, defence practitioners – both Solicitors and Counsel – have seen an increase in the number of cases in which the offence is charged, often alongside more obviously physical assault charges.
3. The increasing prevalence of the offence, notably in the context of Domestic Violence cases where there may be insufficient evidence to charge anything other than a common assault (or assault by beating), means that the approach to sentencing is being considered more frequently by the Courts.

Lack of Guidelines

4. It is perhaps unfortunate that the Sentencing Guidelines Council (SGC) were not a little quicker off the mark in considering definitive guidelines for what was always going to be a commonly used and frequently sentenced offence.
5. Whilst strangulation and asphyxiation have been recently added as significant factors to be considered in cases of serious violence; there is to date no guideline for INFS offences, nor any indication as to any time frame for consultation on the same.
6. Not having a definitive indication from the SGC is now a rarity and initially gave rise to some difficulty in achieving uniformity of approach. It was hard for practitioners to both advise clients as to eventual outcomes, and to address tribunals without reference to analogous guidelines – something which the SGC and the higher courts actively discouraged.

7. The Court of Appeal has stepped in and provided guidance to assist practitioners and judges alike. The triumvirate of authorities stem from the case of R v Cook and have been developed in the cases of R v Borsodi and R v Yorke. Taken together they provide a framework for Judges and practitioners to rely upon.

Rex v Cooke [2023] EWCA Crim 452

[Non-fatal strangulation | Sentencing Guidance | Appeal refused; 18 months detention would have been appropriate. Therefore the 15 months given was not excessive (technical correction to sentence type made)]

8. Useful guidance on the proper approach to sentencing is found at paragraphs 14 to 17. It should be noted that :
 - (a) starting point should not be set by reference to the ‘actual harm’
 - (b) Nor should it be directly linked to the level of physical injury caused
 - (c) It is not necessary to prove physical harm as an element of the offence.
 - (d) There is “real harm inherent in the act of strangulation” due to the fear and likelihood of loss of consciousness, even if no visible injuries are left – a point which is driven home hard in the decision in R v York (See below).
9. Headlines for both practitioners and Judges alike:
 - (a) A custodial sentence will be appropriate save in exceptional circumstances.
 - (b) ‘Ordinarily’ that sentence will be one of immediate custody.
 - (c) The starting point will be 18 months’ custody irrespective of the gender of the perpetrator.
10. The starting point may be increased by reference to the following factors (this list is not exhaustive):
 - (a) History of previous violence. The significance of the history will be greater when the previous violence has involved strangulation.
 - (b) Presence of a child or children.
 - (c) Attack carried out in the victim’s home.
 - (d) Sustained or repeated strangulation.

- (e) Use of a ligature or equivalent.
- (f) Abuse of power.
- (g) Offender under influence of drink or drugs.
- (h) Offence committed whilst on licence.
- (i) Vulnerable victim.
- (j) Steps taken to prevent the victim reporting an incident.
- (k) Steps taken to prevent the victim obtaining assistance.

11. Statutory aggravating factors will also apply:

- (a) Previous convictions, having regard to (a) the nature of the offence to which the conviction relates, and its relevance to the current offence; and (b) the time that has elapsed since the conviction.
- (b) Offence committed whilst on bail.
- (c) Offence motivated by or demonstrating hostility based on any of the following characteristics, or presumed characteristics of the victim, disability, sexual orientation, or trans-gender identity.

Rex v Borsodi [2023] EWCA Crim 899

[Intentional strangulation | Appeal against a sentence of 10 months imprisonment | Appeal dismissed (due to A's deportation) but noting that a suspended sentence would otherwise have been imposed].

12. An authority which is of significant use to Defence practitioners, given the potential dire consequences of a strict reading of the position in R v Cook. Particular attention should be paid to para. [17]:

We are in no doubt that the Learned Judge did misinterpret the first two sentences of [16] in Cook. The first sentence makes clear that in view of the inherent conduct required to establish this offence a custodial sentence will be appropriate, save in exceptional circumstances, and such a custodial sentence may be immediate or, in appropriate cases, may be suspended. The second sentence makes clear that: "Ordinarily the sentence will be one of immediate custody". "Ordinarily" is not to be equated with "exceptional circumstances", which is where the Learned Judge fell into error.

Rex v Yorke [2023] EWCA Crim 1043

[Assault occasioning actual bodily harm; Intentional strangulation | Appeal against a total sentence of 31.5 months imprisonment | serious psychological harm | 25 months imprisonment substituted]

13. The Court was very clear that it must be recognised as part of the sentencing process that ‘...a very significant degree of harm is inherent in an offence of intentional strangulation.’. This will weigh heavily in the consideration of any Judge passing sentence in such cases.

Points of General Application

14. Reference can, and should, be made to the overarching domestic abuse guidelines; with many of the aggravating features already specifically listed in R v Cook, however the additional ones are as follows:
- (a) Victim forced to leave home, or steps have to be taken to exclude the offender from the home to ensure the victim’s safety.
 - (b) Impact on children (children can be adversely impacted by both direct and indirect exposure to domestic abuse).
 - (c) Using contact arrangements with a child to instigate an offence.
 - (d) A history of disobedience to court orders (such as, but not limited to, Domestic Violence Protection Orders, non-molestation orders, restraining orders).
15. When considering mitigation, it must be remembered that: “Provocation is no mitigation to an offence within a domestic context, except in rare circumstances.”
16. Mitigating factors can include, but are not limited to:
- (a) Good character.
 - (b) Age and immaturity.
 - (c) Remorse.
 - (d) Mental disorder.
 - (e) Genuine recognition of the need for change and evidence of the offender having sought appropriate help and assistance.
 - (f) Very short-lived strangulation from which the offender voluntarily desisted.

17. Particular care should be taken when dealing with multiple offences stemming from the same incident. INFS should usually be the lead offence. This can often complicate the sentencing process, especially in cases where a serious ABH has been charged alongside which incorporates that strangulation element as part and parcel of the overall assault.

Conclusion

18. For the moment at least the three cases taken in tandem provide a relatively comprehensive framework within which to work. Defendants should expect custodial sentences; with early guilty pleas and significant mitigation being the hallmarks and realistic prospect of any such sentence being suspended.

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Jonathan Underhill

Barrister
3pb

01202 292 102
Jonathan.underhill@3pb.co.uk

3pb.co.uk