LOCKDOWN LAW

Digest of Recent Developments

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LEGISLATION

STATUTES

Coronavirus Act 2020

Highlights for current purposes include:

1. The Act expires 2 years after the date it was passed (so 24 March 2022) though there is power to make provision for the expiry of any provisions (section 89)

2. **s.10 and Schedule 8** – amends the requirement for evidence from medical practitioners for sentences / orders under MHA 83; circumstances where the evidence of just one registered medical practitioner will suffice.

3. **s.30**: for deaths resulting from Covid 19 there is no need to hold an inquest with a jury

4. **s.51 / schedule 21**: powers regarding potentially infectious persons (defined as a person who is or may be infected or contaminated with coronavirus (CV) and there is a risk he might infect or contaminate others; or has been in an infected territory outside the UK within the last 14 days). The Secretary of State (SoS) makes a declaration when he is of the view that the incidence of and transmission of coronavirus (CV) constitutes a serious and imminent threat to public health in England and that the powers under this schedule will be an effective means of delaying or preventing significant further transmission in England (a declaration he is required to revoke when he ceases to be of that view), then:

    a. a public health officer as defined may direct a person to go to a location for screening or request a constable to remove that person to that location;

    b. under paragraph 7 a constable who has reasonable grounds to suspect that a person in England is potentially infectious may direct that person to go to a location for screening / assessment;

    c. At the screening / assessment location the public health officer can require a sample for analysis;

    d. A constable can detain the person at that location for 24 hours awaiting the arrival of the public health officer; this can be extended for a further 24 hours;

e. If the sample tests positive the public health officer has powers to impose requirements and restrictions on the person including restrictions on movement;

f. Those responsible for children are required to comply with directions made against those children (paragraph 18)

g. Failure to comply with directions, requirements etc is an offence punishable by fine (paragraph 23)

h. Appeal against requirements is made to the magistrates' court (paragraph 17).

5. **s.52 / schedule 22**: when the SoS makes a declaration that the incidence of and transmission of coronavirus (CV) constitutes a serious and imminent threat to public health in England and the powers under this schedule will be an effective means of preventing the spread of the disease or deploying medical personnel and resources in England, then:

a. this section / schedule provides powers to issue directions in relation to events, gatherings and premises (defined to include vehicles and vessels) in order to control the incidence and transmission of CV.

b. The SoS may prohibit specified events or gatherings or events / gatherings of a specified description;

c. he may limit entry into premises; he may close premises

d. Failure to comply with the directions etc is an offence punishable summarily by a fine

e. Officers of bodies corporate can be held liable

6. **Section 53-56 and schedules 23 – 26**: live links for hearings:

a. Schedule 22 amends s.51 CJA '03 to allow the greater use of live link hearings **(for a useful guide see Criminal Procedure (Amendment No,2) (Coronavirus) Rules 2020)**. Note: jurors cannot attend by live link. The new s.51(4) CJA '03 sets out the requirements to be met before the court makes a live link hearing direction.

b. Schedule 24: extends the new rules to enforcement hearings

c. Schedule 25: gives power to all courts from magistrates up to CA to direct that live link proceedings be broadcast or recorded. Unauthorised recording / transmission is an offence

d. Schedule 26: appeals against requirements imposed on potentially infectious persons are to be wholly video proceedings

Terrorist Offenders (Restriction of Early Release) Act 2020

7. Inserts a new section 247A into the Criminal Justice Act 2003 governing the release on licence of those serving fixed term sentences for terrorist offences (listed at Schedule 19ZA CJA '03 part 1) and those offences listed at Schedule 19ZA CJA '03 part 2 where the sentencing court determined the offence to have a terrorist connection.

8. Once the terrorist has served two thirds of his sentence the SoS must refer his case to the Parole Board (PB). If the PB directs release then the SoS must do so but the PB must not so direct unless satisfied his confinement is no longer necessary for the protection of the public.

9. Once he has served his full term ('appropriate custodial term' as defined by various sections) he must be released.

10. Other release provisions are disapplied to terrorists.

STATUTORY INSTRUMENTS

Criminal Procedure (Amendment|) Rules 2020 in force 4 April:

11. Amongst other changes inserts a new rule 3.29 for hearings to notify the court that the prosecution holds material which is not to be disclosed as PII or which the prosecution considers does not meet the disclosure test, where P thinks it necessary to inform the court in order to avoid unfairness to the accused, prejudice to the fair management of the trial or prejudice to the public interest

12. Also amends rule 7 to allow the prosecution to charge a person with an offence different to that which he was required to attend the magistrates court for;

13. Amendments made in relation to knife crime prevention orders

The Criminal Procedure (Amendment No.2) (Coronavirus) Rules 2020

14. Amends the Criminal Procedure Rules to extend the definition of live link to cover 'zoom' etc

15. There are limitations on the use of live audio links for hearings

16. **The notes to rule 9 give a very useful summary of the extent of permissible use of live video and audio links for various hearings**

17. Rule 12: refers to the provisions of s.10 and schedule 8 of Coronavirus Act 2020: providing for sentences under the Mental Health Act 1983 to be made on the evidence of only one registered medical practitioner.

LASPO Act 2012 (Commencement Order No.14) Order 2020

18. The alcohol abstinence and monitoring requirement for community orders etc comes into effect on 19 May 2020

Other

19. The Sentencing Council Consultation on sentencing guidelines for assault and attempted murder is open until 15 Sept 2020

20. **The Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2020** sets out the sums to be charged as 'victim surcharge'. The figure depends on the age of the offender and the sentence imposed. The order contains the following useful table for new rates that will apply from 14 April 2020. There is also a guide on the MoJ web site that sets out the amounts charged.

CASE LAW: COURT OF APPEAL CRIMINAL DIVISION

21. There have been a series of recent decisions of note, in particular on dishonesty and on sentencing.

APPEALS AGAINST CONVICTION

Dishonesty

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

22. This case followed the Supreme Court obiter dictum of Lord Hughes of Ombersley in ***Ivey v Genting Casinos* [2017] UKSC 67 [2018] AC 391** to the effect that the *Ghosh* test for dishonesty was wrong. The CACD here confirmed that Lord Hughes was

correct. The second part of the '***Ghosh test'*** does not correctly state the law and directions based on it must not be given.

23. Instead where dishonesty is an issue the tribunal of fact must:

    a. Ascertain the actual state of the accused's knowledge or belief as to the facts;

    b. Did he genuinely hold that belief? It is not a requirement that his belief is reasonable; whether his belief is reasonable is relevant only to whether he genuinely held that belief.

    c. Once his state of mind / knowledge is established the question whether his conduct was dishonest is a matter for the tribunal of fact applying the standards of ordinary decent people.

    d. There is no requirement that the accused must appreciate that what he did was dishonest by the standards of ordinary decent people.

24. The case arose from the management of a nursing home in Lancashire: Barton Park; this was run by Barton and managed by Booth.

25. Over almost 20 years Barton befriended elderly residents and through various devices deprived them of their wealth. He was assisted in this by Booth. The victims agreed to the various transactions and had capacity to agree; they were happy to be living at Barton Park and were well treated when they were there; however, the prosecution alleged they were highly vulnerable and isolated from advisers when they agreed to the transactions.

26. The trial lasted a year from May 2017 to May 2018.

27. Barton was convicted of 10 counts including conspiracy to defraud various residents, fraud and theft; the sums involved totaled over £4million obtained and efforts to obtain a further £10 million.

28. Booth was convicted of conspiracy to defraud 3 residents.

29. Barton was sentenced to 21 years imprisonment and Booth to 6 years.

30. In directing the jury the trial judge directed them by reference to ***Ivey*** rather than ***Ghosh***. On appeal counsel for Barton and Booth argued that the comments of Lord Hughes in ***Ivey*** were not essential to the judgment and thus were 'obiter' and the correct direction in law was ***Ghosh***.

31. The CACD disagreed and concluded that Lord Hughes in ***Ivey*** was correct and that the appropriate direction as to dishonesty is to tell the jury that they must:

    a. Determine the state of mind / knowledge of the accused;

    b. Did the accused act dishonestly according to the standards of ordinary decent people.

32. There were various other grounds of appeal against conviction, all unsuccessful. Barton's sentence was reduced from 21 years imprisonment to 17.

33. Reference was also made to Professor David Ormerod QC's note in the UK Supreme Court Yearbook 2018 Vol 9 pp 1- 24 for issues that arise from the ***Ivey*** approach

Admissibility of Co-conspirator's Guilty Plea in a Closed Conspiracy

R v Horne (Joshua) **[2020] EWCA Crim 487**

34. The CACD allowed the appellants appeal against his conviction for conspiracy to pervert the course of justice, on the basis that the guilty plea of his alleged co-conspirator, Ryan Parry, was wrongly admitted and should have been excluded under s. 78 PACE 1984.

35. The indictment at the appellant's trial for the conspiracy included counts of attempted murder, causing grievous bodily harm with intent and attempting to cause grievous bodily harm with intent. The appellant was acquitted of these other charges.

36. The prosecution's case on the count of the conspiracy to pervert the course of justice was that the appellant had conspired with Ryan Parry to persuade two witnesses to the events giving rise to the counts of attempted murder and GBH to alter their evidence or avoid testifying altogether.

37. On 7 November 2017, Nequan Powell was hit by a BMW X5 on Hillsborough Road, Leicester, suffering life-changing injuries. His friend Liam Roberts, saw the collision and identified the appellant as the driver, telling his father, Barry Roberts, that the appellant had been driving. The prosecution case against the appellant was that he had deliberately driven at Nequan Powell.

38. Liam and Barry Roberts were the two witnesses that were said to have been interfered with. Liam Roberts received a telephone call from the appellant in which he was told to say a black male had been driving the BMW. Barry Roberts was contacted first by Ryan

Parry, who told him the appellant had said that Barry Roberts should change his witness statement, then by the appellant, who asked him to withdraw the statement he had made and say instead that he saw a mixed-race man driving the BMW.

39. The appellant's case was that he did not know what Ryan Parry had been doing or saying when he contacted the witnesses. He accepted he made the telephone calls, but said he was trying to ensure they told the truth and were not pressurised into providing an account that falsely implicated him.

40. The terms of the count on the indictment stated that the appellant and Ryan Parry conspired to pervert the course of public justice. Ryan Parry pleaded guilty on the first day of trial. His guilty plea was admitted in evidence, pursuant to **s. 74(1) PACE 1984**. It was admitted not as a mere plea of guilty, but including all the detail in the count.

41. The Judge gave directions to the jury saying they could only take this evidence into account as providing support for the truthfulness of Liam and Barry Roberts. The CACD held that there was a fundamental logical difficulty with the judge's attempt to limit the relevance of the guilty plea to the discrete and subsidiary issue of the witnesses' truthfulness. It would necessarily have been ineffective because the truthfulness of the witnesses was directly relevant to the issue of the guilt of the appellant.

42. Therefore, there was a high risk that the jury would have drawn the conclusion that Ryan Parry's admission that he had conspired with the appellant meant inevitably that the appellant had conspired with him.

43. The CACD relied on the case of ***R v Derek Nathan Smith*** **[2007] EWCA Crim 2105**, quoting a passage from that judgment that included the following:

> *"16. …section 74 should be sparingly applied. The reason is because the evidence that a now absent co-accused has pleaded guilty may carry in the minds of the jury enormous weight, but it is nevertheless evidence which cannot properly be tested in the trial of the remaining defendant. That is particularly so where the issue is such that the absent co-defendant who has pleaded guilty could not, or scarcely could, be guilty of the offence unless the present defendant were also. …*
>
> *17. ... It remains of considerable importance to examine whether the case is one in which the admission of the plea of guilty of a now absent co -defendant would have an unfair effect upon the instant trial by closing off much, or in some cases all, of the issues which the jury is trying."*

44. The CACD was in no doubt that the introduction of Ryan Parry's plea would have tended significantly to close down the central issue of whether the appellant entered into this conspiracy with Ryan Parry. The latter could not have been guilty of this offence unless the appellant was also guilty.

45. So the appeal had to be allowed. The CACD noted in closing that the learned judge had not been taken to the critical line of authority which included ***Derek Nathan Smith***. They very much doubted that he would have admitted the evidence if this jurisprudence had been drawn to his attention.

Disclosure During Cross-Examination of the Accused

R v Thomas (Ashley) **[2019] EWCA Crim 2491**

46. This was an unsuccessful appeal against conviction advanced on the ground that the learned judge should have acceded to an application to discharge the jury after the prosecution raised matters in cross-examination that were said to have compromised the fairness of the trial to such an extent that the trial should be stopped.

47. The appellant was convicted of the possession of an imitation firearm with intent to cause fear of violence and two offences of possession of Class A drugs with intent to supply. He was acquitted of the offences of attempting to rob and the possession of an imitation firearm at the time of committing an offence.

48. The facts of the offence involved two incidents between the appellant and the complainant, Mr Hothi. In the first the appellant pursued the complainant's car with his own then subsequently rummaged in the boot of the complainant's car. In the second incident the appellant threatened the complainant with an imitation firearm and was found in possession of several wraps of cocaine and diamorphine when he was subsequently arrested.

49. The prosecution case was that the appellant was a drug dealer with a lavish lifestyle and lack of legitimate income who saw the complainant move items from one car to another and formed a plan to rob him. He was said to have: pursued the complainant in his car and forced him to stop; rummaged in the boot hoping to find something to steal, as he threatened the complainant with an imitation firearm; pursued the complainant on foot after he tried to escape by running off; threatened him with the imitation firearm and struck him over the head with it after catching him.

50. The applications to discharge the jury arose after the following happened during the trial:

a. In cross-examination the prosecution sought to challenge the appellant to provide the PIN code to unlock a Samsung mobile telephone so the police could conduct a full investigation. The appellant had given quite a lot of evidence about the absence of suspicious calls on a different phone.

b. The prosecution put to the appellant bank statements, which had not been previously disclosed, and sought to ask him about the source of the funds. This was prompted by the appellant in his evidence having produced screenshots of his bank account which showed a 'snapshot' of his financial status.

51. Although the prosecution was wrong to cross-examine on the point of the provision of the access code to any telephone before clarifying the position, the learned judge had stopped the prosecution from asking any further questions about the telephone in issue.

52. Although the prosecution should not have responded to the appellant's late production of the screen shots by seeking to use previously undisclosed material, the learned judge prevented counsel going further in cross-examination on the financial background until the defence had seen the relevant material. She ordered disclosure of the bank statements, as she was obliged to do, and she allowed the defence time to take instructions on it before cross-examination proceeded.

53. These issues did not justify allowing the appeal. The learned judge gave proper directions and warnings to the jury and resolved the matters in a fair and proportionate way. The issues for the jury to decide were: whether they were sure about the credibility and reliability of the complainant when he gave evidence of the production of the imitation firearm; and whether they were sure the prosecution had proved the appellant's possession of the quantities of the drugs and his intention to supply to others. The verdicts returned accorded with the evidence and there was no doubt about the safety of the convictions.

APPEALS AGAINST SENTENCE

Section 18 OAPA 1861

R v Fa Xue [2020] EWCA Crim 587

54. Mr X was convicted after trial of wounding with intent contrary to section 18 OAPA 1861, and ABH (s.47). The facts in brief were that he attended at the flat of the victim (V) and forced his way in following a struggle at the door. He slashed V to the face with a knife or razor that he had brought to the scene. He grabbed a female occupant (F) by the neck and tried to throttle her.

55. V suffered injuries as follows: 1 x superficial 5c, laceration to left side of cheek, 1 x 0.5 x 0.5 x 0.5 deep triangle laceration to left side of face above jawline; also two lacerations to the hip measuring 1cm and 0.5cm respectively. There were small grazes to the chest and abdomen and other injuries to his hand and neck. The cuts were sutured under local anaesthetic. Photographs were taken after suturing. In a VPS V stated the injuries caused him continuing pain and anxiety; he had trouble sleeping and suffered low mood and anxiety. He stated the injuries to his face were obvious knife injuries that would cause people to look at him differently.

56. In sentencing the judge referred to the attack as "vicious and terrifying" and the injuries as "horrible". He noted the scarring was still present when he gave evidence 6 months after the attack. They were he said in sentencing "disfiguring".

57. In addressing the guidelines the judge stated this was a category 1 case: greater harm and higher culpability.

58. Counsel accepted there was higher culpability but argued on appeal that there was not greater harm. The judge had so concluded on the basis the injuries sustained by V were serious in the context of the offence and that it was a sustained or repeated assault on the same victim.

"Injuries serious in the context of the offence"

59. Counsel referred to ***R v Duff*** **[2016] EWCA Crim 1404** where the victim lost half an ear during the attack and the CACD agreed that the injury was not at the top end of the scale and therefore should have placed the case in category 2. He also referred to ***R v Grant Smith*** **[2015] EWCA Crim 1482** where the CACD stated:

"In our view given that there is such a marked disparity in the starting point between categories 1 and 2, the sorts of harm and violence which will justify placing a case within category 1 must be significantly above the serious level of harm which is normal for the purpose of section 18."

60. The CACD in the present case agreed that the injuries suffered by V, while very serious, were considerably less grave than the injuries suffered by victims in many cases involving section 18 offences.

"Sustained or Repeated Assault"

61. Counsel referred to ***R v Grant Smith*** **[2015] EWCA Crim 1482**, a case where the appellant broke into V's home carrying a baseball bat. He struck V with the bat fracturing his arm and causing lacerations to his head; there followed a tussle during which V punched the appellant in the face; V became dizzy and lay down; at this point the appellant struck a second blow with the baseball bat to the rear of V's head, causing the bat to break into pieces. V was able to fight back and the appellant fled chased by V. While the case did involve repeated blows the CACD stated:

"We have doubts whether a difference between one blow and two blows could justify moving the starting point from a category 2 (6 year) level to a category 1 (12 year) level. If this were so there would be very few attacks that were not category 1."

62. In the present case the court noted that V sustained at least 4 blows; the blade cuts were to two different areas of the body but it was not a sustained or repeated assault that was so prolonged or persistent as to take it out of the norm for section 18 offences and therefore to constitute greater harm justifying a starting point of 12 years rather than 6 years custody.

63. Having considered aggravating and mitigating factors the court quashed the sentence of 12 years imprisonment and replaced it with 8 years.

'Harm' Where Child Sexual Offences Incited but not Committed

R v Privett and others **[2020] EWCA Crim 557**

64. The case addressed in particular the approach to 'harm' when sentencing for offences under s.14 SOA 2003 (arranging or facilitating the commission of a child sexual offence). All the cases joined in the appeal involved accused who arranged via the

internet to commit an offence with a child not realising they were in fact corresponding with a police officer.

65. The prosecution argued that it would be wrong to categorise all such cases under the lowest category (3); instead there should be a flexible approach.

66. The facts are important: each of the appellants had corresponded with undercover officers with a view to abusing (raping) children. They were arrested on arrival in Taunton and there was evidence they came equipped and planning to carry out the crimes arranged.

67. The sentencing judges for each of the accused categorised harm as category 1 and culpability as category A.

68. The appellants argued that where there is a fictional child the case must fall into the lowest category and be categorised as 'other sexual activity' and hence within harm category 3.

69. The prosecution argued that to 'pre-categorise' such cases without considering the facts would be wrong and that these cases may come within category 1A. They referred to **s.143(1) CJA '03**: *Determining the seriousness of an offence: (1) In considering the seriousness of any offence, the court must consider the offender's culpability … and any harm which the offence caused, was intended to cause or might foreseeably have caused.* They went on to argue that the offence under s.14 is notably focussed on what the accused intended to do, not simply what was in fact done.

70. The CACD considered the jurisprudence including:

    a. ***R v Bayliss*** **[2012] EWCA Crim 269** where Openshaw J observed the fact that there was no child required some reduction from the starting point for the offence contemplated by the accused.

    b. In ***AG's Ref 94 of 2014 (R v Baker*****) [2014] EWCA Crim 2752** Sir Brian Leveson P stated that because the offending did not go beyond incitement it was "other sexual activity" and hence category 3. However, ***Baker*** concerned a charge of inciting a child; as the activity did not proceed beyond incitement, it was 'other sexual activity'.

    c. Similarly, the cases of ***Solanki*** **[2017] EWCA Crim 1282,** ***Gustafsson*** **[2017] EWCA Crim 1078,** ***Cook*** **[2018] EWCA Crim 530**, where the offending was considered to be category 3 because there was in fact no child to be abused.

d. Other authorities where the fact the abuse did not actually take place or was regarded as less significant were considered: ***R v Collins*** **[2015] EWCA Crim 915** (10 years plus 2 years extended sentence for a s.14 offence in relation to a fictional 10 year old); ***R v Lewis*** **[2016] EWCA Crim 304** (s.14 offence in relation to fictional 15 year old girl considered to be category 1 harm and category A culpability).

71. In summary there were two competing lines of authority. Those where this type of case was classed as category 3 harm and those where the harm intended determined they were category 1. The difference in sentence between the two categories is significant.

72. The CACD here ruled (at paragraph 67) that for a section 14 offence the judge should:

a. Identify the category of harm the defendant intended (by reference to the type of activity "arranged or facilitated");

b. 'Adjust' the sentence in order to ensure it is commensurate with or proportionate to the applicable starting point and range if no sexual activity had occurred. This rather unhelpfully phrased paragraph is clarified at para 68 by reference to ***Bayliss***. It seems therefore that this adjustment is akin to a reduction from the appropriate sentence for a substantive offence to that which is appropriate for an attempt.

73. The effect of this decision is likely to increase the sentences for all such offences.

74. The appeals were dismissed.

Criminal Behaviour Orders

R v Brain [2020] EWCA Crim 457

75. B appealed his sentence for breach of a criminal behaviour order imposed on him on 12 April 2019; he also appealed the terms of the CBO imposed in 2016.

76. The facts concern Mr Brain having used social media to form relationships / friendships with women on the basis of a fictitious account of his identity, personal history and intentions. He then stole from them. He had relationships with several women at any one time and would be grooming others. He claimed to have served in the special forces (though in fact he was in the Navy from February 1988 to July 1990). His stories included being homeless and waiting for a payout from the Royal Marines. This would lead to the women paying him money on the basis it would be paid back. He used their bank cards without authority; he stole their jewellery. In 2016 he pleaded guilty to ten offences of fraud by false representation and four of theft. There were 18 offences taken

into consideration dating from January 2011 to June 2015. He had 12 previous convictions spanning 1999 to 2015.

77. He received a sentence of 4 years' imprisonment.

78. The prosecution applied for a Criminal Behaviour Order under s.22 of the Anti-Social Behaviour Crime and Policing Act 2014. It was unopposed save for a term relating to being intoxicated in a public place. There were 9 prohibitions as follows:

a. Access or use any internet-based dating or social networking sites. ("Prohibition 1")

b. Use any device capable of accessing the internet unless:

    i. It has the capacity to retain and display the history of internet use, and.

    ii. He makes the device available on request for inspection by a police officer. ("Prohibition 2")

c. Delete such history using any programme that is capable of deleting and then overwriting data on a computer hard drive or any other digital media capable of data storage in order to remove all traces of their activity. Includes, but not restricted to internet history, registry file usage and overwriting deleted files. ("Prohibition 3")

d. Be in possession of any uniform that he is not entitled to wear by dint of services. ("Prohibition 4")

e. Wear any medals or other military paraphernalia to which he is not entitled as a result of his service. ("Prohibition 5")

f. Hold himself out to be a member of any service, regiment or corps that he has not served in. ("Prohibition 6")

g. Be in possession of any other person's bank card, chequebook or bank account details in any form (including electronically) unless expressly authorised by the person without duress. ("Prohibition 7")

h. Use another person's bank card, chequebook or bank account for any transaction (including any electronic transfer) unless expressly authorised by the person without duress. ("Prohibition 8")

i. Make any false claim in the submission of an application of employment or any other position of trust whether for payment or not. ("Prohibition 9")"

79. He was released from prison on 31 August 2018. Almost immediately he set up new profiles on Facebook and Instagram under a false name and accessed them repeatedly, describing himself as inter alia “ex special forces”. He was charged with two breaches of the CBO. He pleaded guilty and was sentenced to 2 years imprisonment. The judge took the offending to be category A1 – very serious or persistent breach with an ongoing risk of serious criminal or antisocial behaviour - and elevated the starting point from 2 to 3 years.

80. The CACD referred to the 2014 Act. The two conditions to be satisfied for a CBO under s.22 are:

a. That the court is satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person; and

b. The court considers that making the order will help in preventing the offender from engaging in such behaviour;

81. In deciding whether to make an order the court can take into account conduct occurring up to 1 year before the commencement of the 2014 Act (per s.33(5)). Hence only conduct after 24 October 2013 can be taken into account.

82. There is no ‘burden of proof’ on the prosecution; it is an evaluative exercise for the court.

83. In this case the judge in 2016 took into account all the behaviour of B prior to the application; he did not confine himself to events post 24 Oct 2013. However, the CACD concluded the post 2013 conduct was sufficient for the judge to conclude that a CBO could be appropriate (assuming appropriate prohibitions could be identified).

84. Regarding the prohibitions:

a. The blanket ban on the use of social networking sites in prohibition 1 was too broad; it would inhibit his employment prospects and the use of social networking sites is ingrained into society. Therefore, this was replaced with a ban on the use of internet dating sites.

b. Prohibitions 7, 8 and 9 the CACD accepted the argument that this behaviour is adequately dealt with by the criminal law in any event and prohibitions should not be imposed in relation to conduct which would constitute a criminal offence.

85. Thus to a limited extent the appeal succeeded. However the sentence of 2 years remained.

Meaning of "related offence" in s.240ZA CJA 2003

***R v Horne (Joshua)* [2020] EWCA Crim 487**

86. The case of *Horne* (c.f. para 34 to 45 above) also included an unsuccessful renewed application for leave to appeal against sentence.

87. The applicant had previously pleaded guilty to offences related to smuggling a mobile phone into prison (conveying a list B article into or out of prison) and making unauthorised telephone calls from mobiles whilst in custody (unauthorised transmission of an image or sound by electronic communication from within a prison) ("the phone offences").

88. These were calls made to organise the alleged interference with the witnesses in the applicant's attempted murder trial. He was sentenced for the phone offences and for the conspiracy to pervert the course of justice offence on the same occasion and received 9 months' imprisonment for the former.

89. The application for leave to appeal against sentence was made on the ground that the starting point for the time served should be from the date the appellant was remanded into custody for the attempted murder and GBH offences.

90. The applicant based his application on the similarity between the definition for a 'related offence' in s.240ZA CJA 2003, and the test of joinder under s.4 Indictments Act 1915 and the CrimPR. Section 240ZA(8) defines a related offence as *"an offence…the charge for which was founded on the same facts or evidence as"* the offence for which sentence is being imposed. Joinder is permitted were offences are 'founded on the same facts', where 'same' does not require the facts to be identical in substance nor virtually contemporaneous.

91. The CACD rejected this submission, holding that there is no justification for the cross-application of the test for joinder to s.240ZA. The telephone offences were properly joined to the attempted murder/GBH offences because they had a common factual origin, but they were not founded on the same facts for the purpose of s.240ZA. Further, the period of custody had commenced before the phone offences were committed and

it would be wholly counter-intuitive if time should be counted from a date before the relevant offences were even committed.

Domestic Burglary

***R v Isle and Harrison* [2020] EWCA Crim 468**

92. The appellants unsuccessfully appealed against their sentences for domestic burglary which they argued had been manifestly excessive because the judge had reached sentences significantly above the top of the applicable range in the sentencing guideline.

93. The appellants had entered the home of an 18-year-old mother living alone with her 2-year-old son while she slept. She was woken by banging noises they were making downstairs at 2am. They had already taken the mobile phone she had left by the side of her bed. The learned judge noted that she would have been terrified to wake up and find the men in her home. She remained traumatised by the experience 4 months later and was unable to return home. The trauma went beyond what would normally be expected of a domestic burglary.

94. No violence had been used, but Harrison had entered her bedroom to demand money and other items. He told her she was "lucky girl" after she told him all the money she had was on the bedside table; there was no doubt that this was intended to intimidate. The victim was vulnerable and was at home for the duration of the burglary, which had lasted 20 to 30 minutes. A bread knife had been moved from the kitchen into the living room; this was a sinister feature. These and other factors of greater harm and higher culpability took the offence beyond the six-year range.

95. Consideration of the aggravating features raised the sentences yet higher: there was a child at home; the burglary was committed at night; and Isle was under the influence of drugs. Both appellants also had previous convictions: Isle had served a number of substantial custodial sentences, including one of five years' imprisonments. Harrison's longest sentence had been of 18 months' imprisonment.

96. Against this, the mitigation available to the appellants was relatively limited. Harrison had two daughters, aged 9 and 13, with whom he had regular contact. He had been in full-time employment and had taken positive steps towards tackling his 20-year addiction to heroin. Isle could remember virtually nothing of the events of the night in

question, having taken tranquiliser tablets. Both men benefitted from credit for guilty pleas.

97. The learned judge had regard to the relevant sentencing guidelines and the principle of totality and passed sentences of nine years before credit for guilty plea for Isle and eight years before credit for Harrison

98. In dismissing the appeals the CACD emphasised that the sentencing guidelines are only guidelines and judges are entitled to step outside the guidelines where the circumstances justify it, as long as they recognise that they are doing so and explain their reasons.

99. The learned judge had explained his reasons in this case and was wholly justified in lighting upon the sentences he passed. The maximum sentence for burglary is fourteen years and the top of the most serious category is six years' custody. There must accordingly be some cases which fall outside the sentencing guidelines due to their seriousness and the trauma caused to the victim and this was one such case.

REFUSAL OF PERMISSION TO APPEAL

Loss of Time for Vexatious Appeals

R v Allison **[2020] EWCA Crim 465**

100. A was convicted of stalking involving serious alarm or distress, contrary to s.4A(1)(b) of the Protection from Harassment Act 1997 and acting in breach of a restraining order (s.5 Protection from Harassment Act 1997). He was sentenced to 5 and a half years imprisonment.

101. When refusing leave to appeal the single judge advised that *"You advance no arguable grounds of appeal. You criticise counsel who represented you and you have waived privilege. The more I read into your trial the more it becomes apparent that you were represented professionally and skilfully."*

102. The single judge warned of the potential for loss of time in refusing leave to appeal.

103. A sought on appeal to rely on paperwork submitted by the complainant in a civil trial as evidence to contradict her account at trial. This application was refused.

104. The CACD considered the application wholly without merit and made a loss of time order to the extent that 28 days would not count towards his sentence.

To discuss this further with either of the authors or to instruct them for advice on this or any other matter, please contact their clerk Stuart Pringle by emailing Stuart.pringle@3pb.co.uk.

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