Serious Crime Bulletin No. 2

April 2023

The Serious Crime Bulletin is a quarterly brief of recently decided cases and news spanning homicide, firearms, drug and sexual offences. Our aim is to provide a snapshot of prominent decisions and news with implications for general crime practitioners.

In the news

- January 2023: Ministry of Justice publishes Female Offender Strategy 2022 – 25 directed at reducing women offending and better conditions for women in prison

- March 2023: Ministry of Justice publishes plans to increase sentences for persons who kill in a domestic setting, which will include consultation on whether a higher starting point than 25 years should be applied in murder cases

- April 2023: The Criminal Procedure (Amendment) Rules 2023 (SI 2023/44) amend the Crim PR 2020 with effect from 3 April 2023, includes amendment to Rule 5.8 concerning when information about bail decisions needs to be provided

- New Sentencing Guidelines for the sale of knives to persons under 18 come into effect on 1 April 2023. There are separate sentencing guidelines for individuals and organisations.

- The Sentencing Council has published details of amendments that have been made to a number of sentencing guidelines following consultation. These include: amendments to the wording regarding minimum sentences in drug and burglary offences guidelines; and additional wording for the unlawful act manslaughter guideline relating to the required life sentence for an offence committed against an emergency worker. The amended versions of the guidelines come into force on publication (1 April 2023).

- The Domestic Homicide Sentencing Review: was published: 17 March 23.

  Recommendations include:

  that the starting point of 25 years which applies in circumstances where a knife or other weapon is taken to the scene should be disapplied in cases of domestic murder because it denotes a starting point in which the vulnerability of the victim is not given any consideration; and

By Michael Goodwin KC, Jack Talbot, Anita Clifford & Alex Benn

that where there is a history of coercive control that this should be an aggravating or mitigating factor and that paragraphs 9 and 10 of schedule 21 should be amended accordingly.

- The Forensic Science Regulator Code of Practice has been issued: dated March 2023, into force from 2 October 2023. This sets quality standard requirements for forensic science activities related to the investigation of crime.

- The application of sentencing principles during a period when the prison population is very high – statement from the Chairman of the Sentencing Council William Davis LJ (20 March 2023). This clarified that when a court has to decide whether a custodial sentence must be imposed immediately or whether the sentence can be suspended, the high prison population is a factor to be taken into account.

Prison conditions, Covid delay and sentence mitigation

In *R v Ali* [2023] EWCA Crim 232 the appellant pleaded guilty on the first day of a (much delayed) trial. At sentence, although there was no pre-sentence report, the Probation Service informed the court that Mr Ali had complied fully with his previous licence and had fully engaged. Applying an uplift because the offence concerned an assault on an emergency worker (a prison officer), the sentencing judge imposed a sentence of six months' imprisonment. On appeal, the Court of Appeal quashed the sentence of six months' imprisonment, substituting a suspended sentence order of six months' imprisonment, suspended for eighteen months [23].

Key points

- There were 'exceptional' circumstances in the case, as the appellant had not been charged until sixteen months after the offences and over six months after his release from prison, there had been significant delay until sentence, he had remained out of trouble since, and a probation officer had provided a very positive reference. Together, those circumstances meant that there was a realistic prospect of rehabilitation.
- The court, however, identified one further exceptional factor, namely 'that the appellant was sentenced at a time of very high prison population' (paragraph 18). The court gave further detail about the issues, citing *R v Manning* [2020] EWCA Crim 592 (in the context of 'the COVID-19 emergency') that 'the likely impact of that sentence continued to be relevant to the further decisions as to its necessary length and whether or not this could be suspended'.
- The court emphasised 'this additional factor', which 'will principally apply to shorter sentences because a significant proportion of such sentences is likely

to be served during the time when the prison population is very high'. But the court qualified that '[i]t will only apply to sentences passed during this time'. Overall, the court concluded that '[s]entencing courts will now have an awareness of the impact of the current prison population levels from the material quoted in this judgment and can properly rely on that. It will be a matter for government to communicate to the courts when prison conditions have returned to a more normal state' [22].

Commentary

- There is obvious utility in paragraph 22 for those wishing to draw attention to the reality of prison conditions when making submissions about the length and character of a sentence, particularly in cases where suspension is an important issue.
- However, equally important is precision: the court did not make the sweeping statement against short prison sentences that some practitioners seem to think it did. The court also did not leave the question open-ended. It specifically limited its observations to the period in which the prison population remains so heavily overcrowded. In short, it is a useful decision, but not without limits.

Modern slavery and abuse of process

In *AFU* [2023] EWCA Crim 23, the Court of Appeal quashed a conviction for abuse of process more than six years after the appellant had pleaded guilty. The appellant had pleaded mid-way through trial to conspiracy to produce cannabis. In interview, he had said he had come from Vietnam with a male who placed him in a house and referred to being exploited. His basis of plea was consistent with his interview but acknowledged that he could have "done more to get away". The following year there was a NRM referral by a non-police organisation and a positive Conclusive Grounds decision. In subsequent immigration proceedings, the appellant was also found to have been a victim of torture and human trafficking. The appellant sought to appeal his conviction out of time as the s. 45 Modern Slavery Act defence would have been available to him.

Key points

- International and European law is the foundation for the State's legal duty to identify victims of trafficking. They must "act on their own motion" and early identification is key [81 – 86]
- Conclusive Grounds decisions are not admissible at trial but are on appeal and will generally be respected [88]

- Although the Court is cautious when overturning convictions following a guilty plea there are three categories of cases contemplated: 1) where plea is vitiated due to, for example, being under the influence or incorrect legal advice; 2) where the prosecution is an abuse of process; 3) where it is established the defendant did not commit the offence [94]
- The Crown must be alive to indicators of trafficking and follow guidance which extends to making enquiries where a person might be a victim of trafficking. This applies regardless of plea expectation or request for a NRM referral [132]
- Had the case been properly reviewed the indicators of trafficking were obvious and it would have been discontinued or stayed [137]

Commentary

- Failure to observe CPS guidance on potential modern slavery cases can amount to abuse of process.
- The lack of defence request for a NRM referral or positive NRM decision at the time of prosecution is not a barrier to finding an abuse in due course.
- The judgment will inevitably be useful to defence practitioners making representations for discontinuance in advance of trial where the modern slavery defence may be in issue but there has been little effort by the Crown or police in considering it.

Directions on majority verdicts

In *R v HG* [2023] EWCA Crim 287, the Court of Appeal considered the appellant's argument that the trial judge had misdirected the jury as to returning a majority verdict. In July 2022, the appellant had been convicted of a number of sexual offences involving a child [2]. Having retired to deliberate, a jury note was sent, stating that they may not be able to agree unanimously, but querying if the court would accept a majority verdict and noting that some jurors wished to abstain [9]. Having heard submissions, the judge directed the jury that abstention was 'simply not an option' and that they 'must return a verdict' (whether 'guilty' or 'not guilty') [14]. The primary ground of appeal was that the judge's direction had 'mandatory terms' that put pressure on those jurors wishing to abstain to comply with the majority's view [16].

Key points

- The Court of Appeal dismissed the appeal. While 'in the abstract' the compulsion to return a verdict could 'seem troubling', the judge's remark was as to the process and its emphasis was on the sworn duties of the jurors [23].
- There is 'no requirement generally to tell the jury that if they cannot agree they must say so' [24].

- In the circumstances, the judge's direction did not put any 'improper pressure' on the jury [26].

Commentary

- A point of general importance for all cases tried by jury (whether the most or least serious), the court must exercise a great deal of care in directing the jury as to acceptable verdicts.
- However, simply stressing the mandatory nature of the jurors' participating in the processing of reaching verdicts does not misstate the law or unduly pressure jurors. It is essential, though, that a judge's emphasis on that participation is about the *process*, rather than a particular *outcome* (i.e. guilty or innocence).

Terrorist offences and change of mindset as mitigation

In R v Musins [2022] EWCA Crim 1625 the appellant pleaded guilty to membership of a proscribed neo-Nazi organisation. He had no previous convictions and was sentenced to three years' imprisonment. On the facts, he had been a member of the organisation between 2016 and 2017. He was not a prominent member but had been very active and was described as holding "specific and extreme" views. By the time of his arrest four years letter, he had long renounced membership and held a responsible job. The appellant had received a 25% reduction on the basis of mitigation. On appeal it was submitted that the renouncement of membership and the change in mindset should have led to a reduction in the region of 50%. The application for leave to appeal sentence was refused.

Key points

- Change of mindset is plainly a mitigating factor reflected in the sentencing guideline and it will be for the sentencing judge to consider how much reduction is appropriate
- A reduction of 50% will be reserved for a case where a person has not just resiled membership but has actively assisted in undermining the organisation which has led to the arrest of others involved [21]

Guest feature: Does drill music and gang affiliation always go hand in hand ?

Issue 1 considered R v Heslop & Ors [2022] EWCA Crim 897, a recent Court of Appeal judgment addressing the admissibility of drill music as evidence of gang membership and involvement in criminal activity. RLC member, Paul Jackson, shares his experience defending in a recent case where drill music was in issue.

Drill music = gang affiliation/membership until you make it?

Since its arrival in the UK in 2012 from the USA, drill music has developed an ever increasing following and popularity. It is a legitimate form of musical entertainment, notwithstanding that the genre's lyrics necessarily include reference to violence, firearms and gangs. Power ballads they are not. Yet despite that legitimacy, the Crown frequently seek to rely upon the lyrics and accompanying videos to show that the artist, with aspirations of fame and fortune, is in fact affiliated with a particular gang and glorifies the use of weapons and violence. Obviously, every case is fact-specific and undoubtedly there will be occasions when that stance is entirely justified. For example, when a defendant effectively confesses to a violent crime within the lyrics or when it is combined with some other form of evidence such as Instagram posts saying *"Touch one of mine and its black on black time"* or *"Bro said he's on that yout I'm on him too I ain't gotta ask why #16th #Loose".*

Recent experience, however, showed that whether or not a drill performer has the backing of a record label will be relevant to the Crown's perception of gang membership. In an attempted murder shooting trial I defended, which the Crown asserted had all 'the hallmarks' of being gang related, the Police treated an established drill music star very differently to the wannabe co-defendant. One of the co-defendant's drill videos 'More Muni' (90 Bagz x Yxng Bane - More Muni [Music Video] | GRM Daily - Bing video) had all the normal ingredients but also included throughout the celebrated artist 'Yxng Bane'. The Crown produced stills from that video with accompanying text boxes setting out who featured and what was known about them. Of course, it was asserted the co-defendant's presence and rapping supported the suggestion he was a member of the Custom House gang. The following was said about 'Yxng Bane' however: "In the pink hoodie is … Yxng Bane (who) is now a successful rapper. He is from the Custom House area and his early music involved rapping with Custom House Gang members". It seems that according to the Police Gang Expert who prepared the evidence, until you're signed by a record label, if you feature in a drill video, you're a gang member. The co-defendant's 1 million views on YouTube were not enough for him to be viewed solely as an artist.

In the same case, another interesting point arose. The Crown sought to rely upon my client's December 2018 drill video called 'Custom Goons', which was a Pacman TV film production which the defendant had paid for. On their website (Pacman TV Ltd – Video production Company), Pacman TV describe themselves as a video production company. They routinely produce videos of this type which are said to encourage deadly gang conflict. In fact, it was Pacman that added the gun firing sounds and the bullet hole visual effects to my client's video which the Crown were most interested in. Yet the Police seem not to take issue with them.

There is a considerable grey area between a legitimate artist and a genuine violent gang member and so any trial judge must be urged to take care before allowing such lyrics and videos, especially if not supported by other evidence, to go before a jury as potential evidence of gang affiliation. Defence cases may benefit from expert evidence on this genre of music. If I were to summarise the position in a sentence, I would quote, with slight amendment, a 50 Cent album title: "Get Rich or Go to Prison Tryin' because, even though you were merely present at the scene of a violent attack, your attempts to get rich can be used against you to establish gang affiliation and therefore joint enterprise involvement.

Paul Jackson is a highly regarded and much sought-after specialist defence criminal barrister. For many years now he has been instructed to defend in cases of the utmost seriousness including a multitude of murders, serious sexual offences, multi-handed violence, a wide range of drug offences, gun offences and serious

CONTRIBUTORS: MICHAEL GOODWIN KC, JACK TALBOT, ANITA CLIFFORD AND ALEX BENN

GUEST FEATURE: PAUL JACKSON