

Serious Crime Bulletin No. 5

November 2024

The Serious Crime Bulletin is a quarterly brief providing a snapshot of prominent decisions and news with implications for general crime practitioners.

In the news

- 1 October 2024: Former solicitor pleads [guilty to defrauding](#) predecessor to Legal Aid Agency relating to failure to disclose referral fees and making unsolicited approaches
- 17 October 2024: Government [announces](#) that Magistrates' Court powers to impose a sentence of up to 12 months' imprisonment for a single offence will be re-activated and will come into force 18 November 2024
- 24 September 2024: Sentencing Council publishes [perspectives](#) on Reconceptualising the Effectiveness of Sentencing

Identification

[Wilkie \[2024\] EWCA Crim 741](#)

D was convicted of wounding V with intent, contrary to s.18 Offences Against the Person Act 1861. Following the incident V called her sister (S) by telephone, then S sent V a Facebook profile picture. V immediately recognised the male in the image as her attacker. She later identified D at a formal identification procedure.

At trial identification was in dispute. The judge's Turnbull warning included the specific weakness that V had viewed a digital image of D before making her identification at the police station. However, the judge did not explain the significance of this fact.

The CACD although dismissing the appeal, agreed (at [18]) that a Turnbull direction "should identify specific aspects of the evidence that may undermine" the evidence of identification, and that the jury "needs to understand not only what matters amount to weaknesses but also why."

Joint enterprise

[ARU \[2024\] EWCA Crim 1101](#)

There was a fatal stabbing when two groups of youths fought. The trial judge upheld a submission of no case to answer. The prosecution sought leave to appeal pursuant to s.58



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Criminal Justice Act 2003. Dismissing the appeal the CACD held that it was open to the judge to conclude that the defendants had no case to answer: there was no evidence from which a reasonable jury might infer that there had been an agreement, either made in advance or occurring spontaneously, between the defendants and another group, to stab each other or be stabbed at.

The CACD considered the principles set out in *Gnango* [2011] UKSC 59 and concluded:

“[48] Cases in which opposing sides engaged in violence have a common purpose of the kind required to fix all participants with liability for the death of anyone resulting from the violence will be rare. The reported examples indicate the unusual factual background which will be required. *Gnango* involved the actions of two men involved in a continuing feud who agreed to shoot at each other in a residential area. We anticipate that such an archaic method of settling a dispute is very unlikely to recur....”

[49]..... Groups of young males in towns and cities have a tendency to drift around the area where they live. Some will carry knives. When two such groups meet, violence can break out for no consequential reason. It would require very clear evidence of an agreement to stab and be stabbed for the participants in the violence to be fixed with liability for a fatal outcome. The evidence in this case fell far short of that requirement. Any attempt to extend the principles in *Gnango* to incidents of the kind which occurred on 29 September 2023 should be avoided. As Lord Dyson said, a mere fight is to be distinguished from the unusual facts giving rise to the criminal liability which arose in *Gnango*.”

Sentencing: Sexual Offending and Firearms

R v AB [2024] EWCA Crim 1028

- When sentencing a person for causing another to engage in sexual activity without consent, the judge had taken the wrong table from the guideline. In error, the judge had considered the relevant starting point to be *eight* years, rather than the correct starting point of *two* years.
- To that extent, the CACD allowed the appeal against sentence and reduced the sentence on the relevant count from eight to three years (with aggravating features taken into account).



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R v Earl-Ocran [\[2024\] EWCA Crim 1031](#)

Unlike possession of a firearm with intent to cause fear of violence, possessing a prohibited firearm *without more*, contrary to section 5(1)(ab) of the Firearms Act 1968 is not an offence specified within Schedule 18 of the Sentencing Act 2020. The judge had, therefore, wrongly imposed an extended sentence. To that extent, it was quashed.

Evidence and Procedure: Murder

R v Hutchinson [\[2024\] EWCA Crim 997](#)

- The issue concerned whether or not the prosecution departed from the proper and established procedure in calling an accomplice (and former co-defendant) as a witness for the prosecution (at [2]).
- The CACD dismissed the appeal. As an accomplice may have an incentive to lie in their own evidence, the jury must be given a proper warning to the jury as to the dangers inherent to the evidence of such a person and how to assess their evidence. Where the charge is especially serious, that incentive may be very strong, unless the issue has resolved itself by the time the witness gives evidence (at [55]).
- Although it was unacceptable for the prosecution to adopt the approach of ‘wait and see’ (as it did), the offer of no evidence against the apparent accomplice (coupled with an undertaking in respect of manslaughter) before he gave evidence meant that the situation was addressed in time (at [69]).
- In general, so long as all the circumstances in which the alleged accomplice came to be a prosecution witness and what they stood to gain are openly before the jury with an appropriate direction (though sometimes cases will exist where no direction could cure the possible prejudice), the mischief will be addressed (at [77]).

Legal Elements: Firearms

R v Cox [\[2024\] EWCA Crim 892](#)

- The case concerned a gun that had been found in a handbag. The applicant had been tried for possessing a firearm. The issue concerned the meaning of possession (and any implicit ingredient of knowledge).



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- Although it had been unhelpful for the judge to use the phrase ‘strict liability’ in the written directions of law, the CACD refused leave to appeal because the elements of the relevant offences had still been summarised properly. The judge had still made clear to the jury that the issue in the trial was about whether they accepted the evidence that another person had slipped the gun into the handbag while the applicant was coming out of the car (at [42] to [44]).

Encrochat Challenge: ECHR

AL and EJ v France [\(2024\) ECHR 244](#)

- Decision handed down by European Court of Human Rights on 17 October 2024 relevant to Operation Venetic defendants.
- Two British nationals, convicted of offences in the UK supported by EncroChat evidence, complained to the European Court of Human Rights that a decision of the French authorities to hack into the French EncroChat server and share data with UK counterparts breached Article 8 (right to family life). The French authorities had acted pursuant to authorisation of a French court.
- The complaint also raised a breach of Article 6 (fair trial) on the basis that there was no remedy available to them as British nationals not resident in France to challenge the French court’s authorisation of the hacking.
- In the Court’s view the fact that the British nationals lived outside of France did not exempt them from exhausting remedies in France. It would have been open to them to apply to a French court to exclude the EncroChat data that had been provided to UK law enforcement authorities on the basis of breach of Article 8. As a remedy had not been exhausted the complaint was inadmissible.
- Indicates scope for challenging EncroChat evidence relied upon in UK proceedings via French legal system even where the defendant does not have a French nexus.



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DETAILED ANALYSIS- Applying the sentencing guidelines to Intentional Encouraging or Assisting the Commission of an offence

R v Hendron [\[2024\] EWCA Crim 338](#)

Headline: This case concerned an appeal by barrister Henry Hendron against his sentence of 14 months' imprisonment for drug-related offences. Jack Talbot, from Red Lion Chambers, was instructed by the Registrar to represent Mr Hendron on appeal. The CACD upheld the sentence but also provided guidance as to the correct approach when sentencing for offences contrary to section 44 Serious Crime Act 2007 where someone encourages or assists in the commission of an offence.

Facts

The Court of Appeal began its judgment with these words: "The facts of this case are unique. It is to be hoped that remains the case."

The Court noted that two features of this case which were both unusual and very serious are these:

- (1) This criminality was perpetrated by a member of the Bar, Mr Hendron, who had in the past been convicted of drug-related crimes but had not been disbarred for that conduct. Consequently, he was permitted to continue in practice as a barrister.
- (2) The individuals from whom he was encouraging to supply drugs to him, were prisoners on remand, both of whom were being represented by the appellant in criminal proceedings.

Highly unusually as the purchaser of drugs, Mr Hendron was indicted with and pleaded guilty to three counts of Intentional Encouraging or Assisting the Commission of an Offence, contrary to section 44 of the Serious Crime Act 2007 and a single count of Possession of a Class A Drug.

He appealed on grounds including improper use of sentencing guidelines and the fact that the sentence was manifestly excessive.

Judgment

The CACD dismissed the appeal, upholding a 14-month prison term. Interestingly, it clarified the correct approach for a sentencing court to take in relation to section 44 Serious Crime Act 2007 offences.



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The Court held as follows:

- (1) First, it is right to observe there are no guidelines of the Sentencing Council for an offence under section 44 of the Serious Crime Act 2007. The gravamen of that crime is the fact that an offender has committed an act which is capable of encouraging or assisting the commission of an offence and the offender intended so to do. By reference to section 58(3) of the 2007 Act, the offender is liable to the same maximum penalty of the "anticipated or referenced offence". In other words the maximum sentence of the crime which he encouraged another to commit. It would therefore be a difficult, if not impossible, exercise for the Sentencing Council to devise a crime-specific guideline given the variability of maximum sentences.
- (2) Second, the task of the sentencing judge is therefore to make appropriate reference to the guideline of the Sentencing Council for the crime which was encouraged by the offender and make suitable adjustments depending on the factual matrix before the court. Plainly, if there are no sentencing guidelines, appropriate decisions of this court will be the focus of attention.
- (3) Third, we emphasise that the precise factual matrix must govern the use of the relevant guideline and the applicability of it will always be a matter for the judgment of the court. It is a useful commencement of the voyage of discovery; it is not necessarily the destination.
- (4) Fourth, it is the criminal conduct which the offender encouraged or assisted which is the core of the crime and that must be, in our judgment, the driving force for sentence in a case of this kind, subject to aggravating and mitigating factors.
- (5) Fifth, the general guidelines of the Sentencing Council covering over-arching principles is of importance, where the court must view the culpability of the offender and the harm caused by him.
- (6) It is our judgment the judge was correct to view the supply guideline as the key to sentencing in this case. The appellant plainly encouraged the two men in prison, whom he knew to be drug peddlers, to supply him with drugs. He thus encouraged supply of drugs. The fact it was to himself was a factual matter of potential importance but not in relation to the guideline to be utilised to commence the search for the right sentence. The judge in this case placed the case in Category 4 for the lead offending and determined the role was analogous to a lesser role, giving a starting point of 18 months' imprisonment up to three years' imprisonment.

