

SUBJECT	CASE NAME AND REFERENCE
<b>(A) Generic Sentencing Principles</b>	
Indication of Sentence <ul style="list-style-type: none"> <li>▪ Indication of sentence in Crown Court</li> </ul>	<b><u>R v Goodyear</u></b> [2005] EWCA Crim 888
Racially Aggravated offences	<b><u>R v McGillivray</u></b> [2005] EWCA Crim 604 <b><u>R v O’Callaghan</u></b> [2005] EWCA Crim 317
Sentence length <ul style="list-style-type: none"> <li>▪ Extended Sentences</li> </ul>	<b><u>R v Pepper and others</u></b> [2005] EWCA Crim 1181
Sentences/ Ancillary Orders <ul style="list-style-type: none"> <li>▪ Anti-Social Behaviour Orders</li> <li>▪ Confiscation Proceedings Following Sentence</li> <li>▪ Confiscation order - obtaining social security benefit by false representations</li> </ul>	<b><u>R v McGrath</u></b> [2005] EWCA Crim 353  <b><u>R v Oshungbure and Odewale</u></b> [2004] 2 Cr.App.R.(S) 47  <b><u>DWP v Richards</u></b> [2005] EWCA Crim 1491
Specimen Offences	<b><u>R v Smith and Tovey</u></b> [2005] EWCA Crim 530
Victim’s wishes	<b><u>R v Ismail</u></b> [2005] EWCA Crim 397
<b>(F) Drug Offences</b>	
Cultivating Cannabis	<b><u>R v Herridge</u></b> [2005] EWCA Crim 1410
<b>(H) Theft Acts Offences/Fraud</b>	
Benefit Fraud	<b><u>R v Graham and Whatley</u></b> [2004] EWCA Crim 2755
Robbery	<b><u>R v Allen</u></b> [2005] EWCA Crim 667

## **(A)Generic Sentencing Principles**

### **Indication of Sentence**

#### **Indication of sentence in Crown Court**

#### **R v Goodyear [2005] EWCA Crim 888**

A judge is no longer prohibited from giving an indication of sentence in advance of a guilty plea, subject to the following guidance:

1. A judge should indicate sentence only if requested by the defendant but may remind the defence advocate of the defendant's entitlement. If the defendant is unrepresented the judge and prosecuting counsel should avoid informing the defendant of his or her right as it might be perceived as improper pressure.
2. An indication should not normally be sought or provided until there is an agreed, written basis of plea.
3. Any advance indication of sentence should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought.
4. A judge is not obliged to give an indication and may refuse to do so without giving reasons. Reasons for his refusal to do so may include the belief that doing so would place the defendant under unfair pressure to plead guilty or that the request is a tactical ploy by the defendant.
5. If a guilty plea is tendered by the defendant after an indication of sentence but the judge suspects that the defendant had been intending to plead guilty anyway and that the request for the sentence was made for tactical reasons the judge may consider that the plea was not made at the first reasonable opportunity.
6. An indication is binding on the judge and any other judges who become involved in the case.
7. If the defendant pleads not guilty the indication ceases to have effect.
8. The prosecuting counsel may remind the judge of this guidance and may ask whether the judge is in possession of all the relevant material pertaining to the prosecution's case.

## Racially aggravated offences

### Sentencing for racial aggravation when defendant not charged with racially aggravated offence

*Legislation: s.29, Crime and Disorder Act 1998*

#### **R v McGillivray** [2005] EWCA Crim 604

- If it is proposed to sentence the appellant on the basis of a racially aggravated assault it is necessary for the appellant to be convicted of that offence or plead guilty to it.

#### **R v O'Callaghan** [2005] EWCA Crim 317

- Where the question of racial aggravation has not arisen at trial, either a *Newton* hearing must be held, or at the very least, plain and adequate notice must be given by the sentencer that he is considering sentencing on an enhanced and aggravated basis.

## Sentence length

### Extended sentences

*Legislation: s. 85, Powers of Criminal Courts (Sentencing) Act 2000*

*The provisions of the Powers of Criminal Courts (Sentencing) Act 2000 relating to extended sentences have been superseded by the dangerousness provisions in the Criminal Justice Act 2003. The latter apply to offences committed on or after 4 April 2005.*

#### **R v Pepper and others** [2005] EWCA Crim 1181

- R v Nelson [2002] 1 Cr.App.R.(S) 134 should continue to be the authority on extended sentences.
- When sentencing for several offences, sentencers should always take care to identify the offence to which the extended sentence is intended to relate. This will assist in focussing on whether such a sentence complies with the statutorily prescribed criteria, bearing in mind, in particular, the following:

- whether the offence was committed before or after the 30<sup>th</sup> September 1998 (and therefore whether s.85 applies)
  - the need not to exceed the maximum sentence for the offence and the different restrictions applicable to sexual and violent offences (namely, for a sexual offence the extension period must not exceed 10 years and, for a violent offence, the custodial term must be at least 4 years and the extension period must not exceed 5 years).
- The purpose of an extended sentence (by virtue of s.85 (1) (b) of the Powers of Criminal Courts (Sentencing) Act 2000) is to prevent the commission of further offences and to secure the offender's rehabilitation and not, for example, to protect the public from serious harm, which is the role of a longer than commensurate sentence (see s.80 (2) (b) of the 2000 Act).
  - A judge, who is minded to impose an extended sentence, should always, before passing sentence, invite submissions from counsel on this aspect, in order to minimise the risk of error.
  - The Court reminded counsel of their duty in two respects: the prosecution counsel's duty to draw the court's attention to the relevant statutory provisions and authorities and, if an error is made by the judge in sentencing, particularly in relation to his powers, counsel (both prosecution and defence) should be alive to the possibility of rectifying it under the slip rule provisions of s.155 of the Powers of Criminal Courts (Sentencing) Act 2000.

## **Sentences/Ancillary orders**

### **Anti-Social Behaviour Orders (ASBOs)**

*Legislation: s.1C, Crime and Disorder Act 1998.*

#### **R v McGrath [2005] EWCA Crim 353**

- Provided the offender has acted in an anti-social manner after the relevant commencement date (1<sup>st</sup> April 1999), in determining whether an ASBO is necessary the court is entitled to have regard to the totality of an offender's conduct both before and after the commencement date.
- There is no requirement that the acts prohibited by an ASBO should, by themselves, give rise to harassment, alarm or distress.

- The terms of an ASBO must be clear and commensurate with the risk it seeks to guard against. Whether the terms of an ASBO were disproportionate depended on the facts of each case.
- ASBOs are not to be imposed lightly, as the sanction for breach may well be a term of imprisonment.

### **Confiscation Proceedings Following Sentence**

#### **R v Oshungbure and Odewale [2004] 2 Cr.App.R. (S) 47**

- If a judge knows he is likely to have to conduct fact-finding exercises as part of confiscation proceedings which follow sentence he should not express himself at the sentencing stage, or at an earlier stage, in a way which might sensibly be perceived to show that he was biased against the defendant and unlikely to believe anything the defendant might say in the future. It is a matter of practical convenience and common sense that the same judge who had conducted the trial should generally conduct the confiscation proceedings.
- As confiscation proceedings now follow sentence, it is incumbent on judges passing sentence to bear in mind, in the observations which they make, that they would themselves be conducting proceedings which might involve them adjudicating on further evidence from the defendant.

### **Confiscation order - obtaining social security benefit by false representations**

*Legislation: s.71, Criminal Justice Act 1988*

#### **DWP v Richards [2005] EWCA Crim 1491**

- The fact that the appellant might, if he had acted honestly, have obtained a sum not very much less than that which he dishonestly obtained, in no way mitigates the seriousness of the offence he had committed when it comes to confiscation proceedings.

## Specimen offences

### R v Smith and Tovey [2005] EWCA Crim 530

- Where sample counts are charged against the offender in the context of multiple offending, the proper approach to be adopted is that identified in R v Canavan [1998] 1 Cr.App.R. (S) 243; that an offender may be sentenced only for an offence proved against him (by admission or verdict). That approach is not to be qualified by reasonable inferences drawn by the judge from the evidence heard.
- In accordance with the approach taken in Barton v DPP [2001] EWHC Admin 223, it is permissible to charge a course of conduct as one offence if the defendant has no specific explanation for individual instances of offending and puts forward the same defence for each.
- Where an offender pleads guilty to conduct on a basis wider than that specifically charged, doing so is the equivalent of an informal invitation to the court to take into consideration other offences and a sentencing judge can properly proceed to pass sentence on the wider basis admitted. There is no requirement to be excessively technical provided that there is a clear admission or finding of guilt.
- Where the evidence of the prosecution and defence concurs in relation to all the acts said to be part of the same activity, for the purposes of trial, the acts may be charged as a single activity, provided that there is no unfairness caused to the offender.
- The decision of the Divisional Court in DPP v Barton demonstrates the importance of not falling into the error of allowing technicalities, as to the framing of indictments, to obstruct the administration of justice. The principles identified in R v Canavan were not concerned with technicalities but with the basic requirement that a person should only be sentenced for an offence, which has either been proved, or which he has admitted.
- The problems that will arise can be alleviated by the proper framing of the indictment. Further, such problems as will arise could be mitigated by the use of rule 5(2) of the Indictment Rules 1971.

## **Victim's wishes**

**R v Ismail** [2005] EWCA Crim 397

- For offences which appear to have had a significant impact on the victim, it is essential for sentencing judges to have victim impact statements, especially where a sexual offence has been committed against a young victim, so that that impact can be taken into account when determining the appropriate sentence.

## (F) Drug Offences

### **Cultivating Cannabis**

*Legislation: s.6, Misuse of Drugs Act 1971*

*Maximum sentence: 14 years imprisonment*

### **Sentencing for Cultivation of Cannabis**

(Effect of downgrading of cannabis to Class C)

**R v Herridge** [2005] EWCA Crim 1410

- Given that a significant element of calculated defiance of the law is required to commit the s.6 offence even on a small scale, a custodial sentence would ordinarily be merited.
- However given the vast range of culpability that s.6 covers there should be a widening of the gap in sentencing between those cases where supply is an object and those where it is not.



## (H) Theft Acts Offences/Fraud

### Benefit fraud

#### R v Graham and Whatley [2004] EWCA Crim 2755

The Court reviewed the authorities in relation to cases of benefit fraud, as set out in R v Stewart and others (1987) 9 Cr.App.R. (S) 135, given the increasing prevalence of benefit fraud.

#### Guidelines

- R v Stewart should continue to apply but the figure of £10,000 should be updated for inflation. The Court referred to an inflation table that indicates that £1.00 at the time the case of Stewart was heard is approximately equivalent to £1.80 in the present day. Accordingly, where imprisonment is necessary, short terms of up to about nine to 12 months will usually be sufficient, after a trial, where the over payment is less than £20,000
- The Court endorsed the aggravating and mitigating features as identified in R v Stewart.
- Due to the increasing prevalence of social security fraud, and the fact that the offences are easy to commit and expensive to detect, contrary to R v Stewart, there will be cases where courts will be justified in imposing a sentence which contains a deterrent element, for example Armour and Sherlock [1997] 2 Cr.App.R.(S) 240.

*With regard to the issue of prevalence please also refer to the 'Overarching Principles – Seriousness' guideline published by the Sentencing Guidelines Council on 16 December 2004.*

## **Robbery**

### **Robbery committed by a group in a confined space, such as a train carriage.**

*Legislation: s 8, Theft Act 1968*

*Maximum penalty: Life imprisonment*

**R v Allen** [2005] EWCA Crim 667

- The guidelines outlined in AG's ref. No.s 4 and 7 of 2002 (Lobban and Sawyers) [2002] 2 Cr.App.R.(S) 77 are not to be taken as a yardstick for group robberies, involving an intimidating gang of young people and victims who are vulnerable by reason of being trapped within a train or other public transport or similar confined spaces. Such offences should be considered more serious than offences of street robbery which were dealt with in the judgment referred to.