

This is the first edition of the bi-monthly information update which will be produced by the Office of the Sentencing Council (OSC). It is intended to provide a helpful update regarding Court of Appeal cases for offences where there are no existing guidelines or where the case relates to general sentencing principles. The inclusion of one case (or the omission of another) should not be taken as signifying endorsement by the Sentencing Council of a particular approach to sentencing an offence.

The case summaries should be treated as such and not as a substitute for consideration of the cases themselves. They are not listed in any order of priority.

If you are dealing with a case that you think would be relevant for inclusion in a future update, please email: info@sentencingcouncil.gsi.gov.uk.

IPP/Dangerousness

R v Waller [2010] EWCA Crim 728

The appellant was sentenced in November 2006 to 18 months imprisonment for public protection for 12 offences of making an indecent photograph of a child. He had a previous conviction from January 2003 for 10 offences of making an indecent photograph of a child when he was sentenced to 8 months imprisonment with an extended period of 24 months. In April 2006 he was sentenced to 36 weeks imprisonment, suspended for 2 years, for 9 offences of possession of indecent photographs of children with a view to their distribution or sharing. He was then made the subject of a Sexual Offences Prevention Order (SOPO).

The Court of Appeal (LJ Thomas, Mr Justice Roderick Evans, Mr Justice Coulson) reviewed the cases of R v Terrell [2007] EWCA Crim 3079, R v Hicks [2009] EWCA Crim 733, R v Cheshire [2009] EWCA Crim 447 and R v Sackman [2010] EWCA Crim 19. They quashed the IPP, finding that the link between the offending act of downloading the images and the possible harm to children was too remote to say that the appellant's reoffending caused serious harm. They went on to state, however, that their ruling did not mean that an IPP would never be appropriate for offences of child pornography/downloading and emphasised that lengthy prison sentences would be appropriate for repeat offending.

The IPP was replaced with a determinate term of 3 years, as calculated by the original sentencing judge in setting the IPP.

R v Bretton [2010] EWCA Crim 207

The Court of Appeal (LJ Hooper, Mr Justice Wyn Williams, Recorder of Croydon, sitting as a Judge of the Court of Appeal Criminal Division) confirmed the imposition of an IPP on an appellant who pleaded guilty to offences of arson, breach of a non-molestation order and breach of an anti-social behaviour order where that appellant had previously been convicted of an offence of attempted robbery with an imitation firearm. The latter offence was a serious specified offence as it was contained within Schedule 15A of the Criminal Justice Act 2003 and carried a maximum sentence in excess of 10 years. As a result, section 225 (3A) of the CJA 2003 allowed the court to impose an IPP. An extended sentence was also available to the Court under section 227 (2A). In considering which type of sentence to impose, the Court was entitled to take into account the fact that if sentenced to an extended sentence, the appellant would have to be released half way through the determinate term. The Court should consider this in the context of the facts of the case.

In this case, the offence of arson was committed against the appellant's ex-partner following a history of domestic violence against her; the non-molestation order and the ASBO had both been imposed as a result of that violence. The arson involved the appellant threatening the complainant, following her to a friend's address and setting fire to her car in the presence of 2 young children. The Court of Appeal, however, reduced the notional term to one of 3 years not 4 years, thereby reducing the minimum term to 18 months not 2 years having regard to the nature of the offence and the guilty plea.

Murder & related offences

R v Barney & Others [2010] EWCA Crim 211

Minimum terms of 30 years and 28 years were manifestly excessive where the defendants had been convicted of murder following trial; they were reduced to 27 years and 24 years for defendants who were aged 24 and 18 at the time the offence was committed and in the absence of previous convictions for really serious violence.

The Court of Appeal (LJ Maurice Kay, Mrs Justice Sharp DBE, Sir Peter Cresswell) agreed that the trial judge had correctly identified the starting point as 30 years under Schedule 21 of the Criminal Justice Act 2003 as it was a murder committed for financial gain. The facts of the case were described as "extremely disturbing" involving a prolonged, violent attack on a 75 year old victim (suffering from cancer) in his own home, including the use of a knife to torture him resulting in a painful and prolonged death. Notwithstanding the grotesque nature of the violence used and the aggravating features of the case (a previous burglary committed by one of the appellants on the same victim a month earlier and a further attempted burglary on the same victim) the Court of Appeal found that a minimum term of 28 years for an 18 year old defendant was set too high and that the judge did not differentiate sufficiently between the 2 appellants. The Court emphasised that each case turned on its own factors and there could not be a mechanistic and/or arithmetical approach to fixing a minimum term.

Attorney General's Reference No 73 of 2009 - R v B (Carl Wayne) [2009] EWCA Crim 2701

The appellant was convicted following trial of the murder of his stepson, J, wounding his stepdaughter, K, with intent to do her grievous bodily harm and attempted murder of his wife G. He was sentenced to life imprisonment with a minimum term of 16 years in relation to the murder, with concurrent sentences of 7 years for each of the other 2 offences.

The convictions arose out of a single, prolonged incident when the appellant attacked and stabbed to death his 15 year old stepson whilst he lay asleep in a bedroom. The attack was carried out with a wooden table leg and a large knife – the force used damaged 4 ribs and severed his spine, amongst other injuries. The appellant's 9 year old son witnessed some of the blows inflicted. The appellant's wife and daughter heard the attack and encountered him on the stairway when he attempted to stab his wife but was prevented from doing so by his step-daughter standing in the way. She sustained two stab injuries to her arm. The appellant had been drinking heavily on the night of the incident and there was evidence of him as an oppressive controlling force in the life of all family members.

The appellant's defence of diminished responsibility was rejected by the jury at trial. The Court described him as setting "out on a charade of trying to persuade the police that he was confused and unaware of his surroundings and condition".

The Court accepted the following aggravating features:

- the victim was particularly vulnerable as he lay asleep at 3am
- the appellant was in a position of trust
- there was a background of abusive control of the family
- the attack was pre-meditated
- the appellant had armed himself with 2 weapons by the time of the attack
- there was an intention to kill evidenced by the severity of the injuries inflicted
- once child of the family witnessed one of those weapons being used
- the appellant tried to kill his wife and wounded his stepdaughter.

The Court found that despite the absence of any of the features expressly identified in paragraph 5 of Schedule 21 of the Criminal Justice Act 2003, this was a case of particularly high seriousness which was aggravated in the extreme by the circumstances of the associated offences.

The minimum term was increased to 25 years.

R v Hylton [2009] EWCA Crim 2604

The Court of Appeal upheld a 15 year minimum term imposed following a guilty plea to murder for an offender aged 17 at the time of the offence.

The appellant had sought out the victim, whom he regarded as a love rival. The appellant armed himself with a knife, concealed his face with a full face mask and ferociously attacked the victim with the knife – one injury was caused by the knife passing through 8mm bone before entering the brain. The appellant ran from the scene.

The appellant surrendered himself to police and gave an account in interview that the victim had been armed with a knife and that he, the appellant, had acted in self defence. He resiled from this account by the entry of his guilty plea and accepted responsibility for the offence in the pre-sentence report. He had one previous conviction for assault occasioning actual bodily harm.

Although the sentencing judge had not specifically set out the way in which he had fixed the original sentence of 16 years which he subsequently reviewed to 15 years, the Court of Appeal had no doubt that the aggravating elements identified above were treated as such by the judge and that the limited mitigation had been taken into account.

Diminished Responsibility

Attorney General's Reference no 83 of 2009 – R v Moore EWCA Crim 2611

The defendant had pleaded guilty to an offence of manslaughter on the grounds of diminished responsibility (based on alcohol dependency syndrome) and was sentenced to an IPP with a minimum term of 38 months imprisonment.

The Court of Appeal (the Lord Chief Justice Lord Judge, Mr Justice Simon, Mr Justice Royce) increased the minimum term to one of 6 years, as the facts revealed a grave offence which had resulted in death. The defendant had no injuries other than those caused by his attack on the deceased. The original sentencing judge regarded the violence used by the defendant as considerable; however, it was not of a level that required a life sentence as there was not an intention to kill throughout the attack nor were weapons carried or used.

The Court of Appeal noted the extent of the defendant's previous convictions for violence including at least one previous conviction for major violence. They indicated that care needed to be taken not to double count the absence of premeditation or intention to kill in a case such as this, where culpability for the death had already been reduced from murder to manslaughter on the grounds of the defendant's diminished responsibility.

Witness intimidation

R v Bishop [2010] 2 Cr App (R) (S) 100 (17)

The Court of Appeal (Lord Justice Scott Baker, Mr Justice Owen, Mr Justice Cranston) reduced a sentence from 4 years to 30 months for an offence of witness intimidation under section 51(1) of the Criminal Justice and Public Order Act 1994.

Following his arrest by a police officer, the defendant sent an anonymous poison pen letter to the officer's girlfriend (also a police officer) to their home address. Over a 5 day period, he also made 18 silent phonecalls to the officer or his girlfriend. Both gave evidence that this behaviour had caused them a great deal of worry and distress. The defendant had pleaded not guilty and was convicted by a jury following trial. The defendant had no convictions for similar offences and there was a gap of 10 years since his most recent conviction.

The Court of Appeal regarded it as a nasty offence and accepted that the courts should treat psychological harm as a serious matter.

The maximum sentence for this offence was 5 years imprisonment; even where the mitigation was not particularly strong, this was too high a sentence. The appropriate sentence in the circumstances was 2 years 6 months imprisonment.

Effect of personal mitigation

R v Evans [2010] EWCA Crim 1313

The defendant had pleaded guilty to 8 offences of obtaining property by deception involving her failure to notify the Department of Work and Pensions of changes to her circumstances which would have removed her entitlement to housing benefit or council tax benefit. She had claimed those sums for a period of 9 years and was overpaid by a sum of almost £36,000.

The Court of Appeal found that whilst the Recorder who dealt with the sentence had done so properly, they had further information before them which (just) tipped the balance in favour of suspending the sentence of imprisonment against the defendant for a period of 12 months.