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Albion Chambers CRIME TEAM NEWSLETTER

Sex and drugs and leading roles

It is a familiar lament that we increasingly operate in an environment whereby sentencing is a mechanical and mathematical exercise, which focuses disproportionally on starting points and aggravating features. But can this be true, when the statistics stubbornly suggest that characteristics such as ethnicity and gender have a powerful influence upon the sentence a defendant will receive?

The Sentencing Council has published a research paper examining the association between race, gender and the length of sentence imposed in drug-trafficking cases. Allegations of supply, possession with intent and conspiracy to supply controlled drugs make up around 12% of the work of the Crown Court. Sentencing for such offences is governed by a Definitive Guideline enacted in April 2012.

That Guideline identifies four categories of harm, based principally upon drug quantities, and three levels of culpability (Leading, Significant and Lesser roles).

The Ministry of Justice records statistics for the sentences imposed upon certain protected groups. This is primarily concentrated upon BAME (Black, Asian and Minority Ethnic) and female defendants and whether they received sentences of immediate custody.

The Lammy Review, an independent Parliamentary review of outcomes for BAME individuals in the Criminal Justice System, found that there were significantly higher rates of imprisonment for BAME individuals, although it did not discriminate between individual ethnic or racial groups.

The statistical approach of the Sentencing Council's research group was to build a dataset which recorded each individual sentencing exercise between April 2012 and March 2015, a total of 14,000 defendants. Judges (or perhaps sometimes, their clerks) completed a form indicating which was the lead offence (i.e. which carried the longest sentence), which category of the Guideline was applied and which of the aggravating or mitigating features identified in the Guideline had been considered as relevant to that particular sentencing exercise.

By also collecting data such as age and at what stage the sentence was passed, the research allowed for comparison of various control features, to ensure the integrity of the exercise, so far as possible.

However, as a consequence of the nature of the method employed, analysis of the data throws up some interesting statistical details. These included:

- Most of the aggravating and mitigating features identified in the Guideline had precisely the statistical effect that you would expect. However 'Failure to comply with current court orders', even when identified by the sentence, had no statistical effect on length of custodial sentences.
- Likewise 'Good character/exemplary conduct' had no effect on length of custodial sentence, although it did affect the likelihood of a custodial disposal being imposed.
- 'Involvement due to pressure/intimidation/coercion' and 'Age/lack of maturity affecting responsibility' had no effect on either the likelihood of custody or the length of sentence.
- The fact of previous convictions made a statistically measurable difference to the length of custodial sentences which were imposed, but beyond that, the number of previous convictions, whether it was one, ten or more did not matter.
- Those aged between 18-21 and 22-25 had the shortest sentences imposed, but there was another statistical jump for those over the age of 50, suggesting that those who continue to offend into their sixth decade and beyond, can expect statistically longer sentences for the same offences, than those imposed on offenders aged 26-50.

The methodology, using sex rather

Editorial

While Christmas seems only yesterday, the reality is that as I write this, we have already had Burns Night, St Valentine's Day and Shrove Tuesday and by the time you read this, probably Easter will have passed as well.

That time passes quickly for those of us having the luxury of our liberty, doesn't mean that it is the same for those who don't. And on that note, all three articles in this Newsletter, by happy coincidence, follow a similar theme.

In the first article, Edd debunks some assumptions about sentencing and highlights some surprising findings from a Sentencing Council survey. Patrick writes of grappling with the knotty subject of when and how to avoid the maximum starting point in death by dangerous cases. While Rupert cautions against seeking a Goodyear indication on the hoof. And although sentence is the obvious common thread running between all three, the other less obvious is preparation and that old adage; master your brief. If you adopt the correct procedure, know your client's case inside out, apply the facts to the guidelines so that you can distinguish or adopt them, you won't go far wrong. Whether you get the result you want is, though, an entirely different matter.

Sarah Regan
Head of the Albion Crime Team

than gender and recording ethnicity within the broad categories, black, white, Asian or other, was designed to give clear patterns. And whilst the findings are straightforward, analysing the causes and consequences of the sentences imposed is a more complicated process.

For most of us, the issue that is foremost in our minds is the likelihood of a custodial sentence and, of the 14,000 sentencing exercises considered, some 8,500 resulted in an immediate custodial sentence.

Breaking that down, the report found that the odds of a male offender receiving an immediate custodial sentence was 2.4 times as large as (or 140% higher than) the odds for a female offender. While that looks very striking, if put differently, those charged with offences concerning Class A drugs have a 93% probability of going into custody if male and 85% if female. For Class B drug offences the figures were 37% and 20% respectively.

Setting aside their sex, a white offender was least likely to receive a custodial sentence, with the odds of a black offender receiving a custodial sentence being 1.4 times as large as those for a white offender. The odds of an offender of Asian or other ethnicity receiving immediate custody were 1.5 times as large as the odds of white equivalents.

Again, looking at that in percentage terms, those sentenced for Class A drug offences had a 93% likelihood of custody if white, and 95% if either black or within the 'Asian or other' category. For Class B offences, this becomes 37% for white offenders, 44% for black defendants and 46% for Asian or other.

Those findings are actually far less stark than the MoJ analysis, which suggested that the odds of immediate custody for a non-white offender was 2.4 times that of a white offender. The increased detail in the statistical modelling of the new research, whilst still demonstrating a clear difference in outcomes, was able to show a slightly more nuanced picture.

So, men are more likely to receive immediate custodial sentences than women, even where the offences are comparable by reference to the most obvious characteristics of gravity. Likewise, black offenders are more likely to go to prison than white offenders, but not as likely as those of Asian and 'other' ethnicities.

And in terms of the length of sentence, male offenders received, on average, sentences 14% longer than women convicted of comparable offences. Interestingly, black offenders did not receive sentences that were in any way statistically different to their white counterparts. However, Asian offenders did tend to receive longer sentences, but only by 4%, equating to an average of one month longer in custody per sentencing exercise.

These figures have been factored into a new Consultation document aimed at producing a new Guideline. The consultation remains open until April 2020 and anyone with experience of disparate sentencing should consider making a submission, as it remains far from clear quite how the Sentencing Council has designed their new scheme to specifically meet these obvious statistical trends.

Edward Hetherington

Death by dangerous driving

When is it deserving of the maximum?

In December last year, I represented a Romanian respondent to an Attorney General's Reference, which raised the question of when a court should set the starting point for sentence in a death by dangerous driving case at the maximum.

My client was 22 when he went out in a friend's car at night, whilst drunk, disqualified and uninsured. He drove over the speed limit on an A road and, whilst doing about 70mph on the wrong side of the road, he had a catastrophic collision with a car coming the other way. The occupants of that car, an elderly couple, were both killed instantly, as was my client's passenger. Evidentially, it was utterly overwhelming, so he pleaded guilty at the PTPH and, on any view, it seemed to be as bad a case as could be imagined.

HHJ Paul Cook passed a sentence of 6 years and 8 months concurrent on all three counts. Solid and now unimpeachable case law prohibits consecutive terms, despite the attempts of the previous Attorney General, Robert Buckland QC, to persuade the court to find otherwise – see *R v Brown 2018* EWCA Crim 1775.

Somewhat unusually, my case was one that was rich with powerful points in mitigation, principally his extensive, near fatal and long-lasting injuries. In addition, his conduct after his release from prison in going back to work showed great strength of character, and the operation of the deportation provisions would result in permanent separation from his partner and young family. This allowed the judge to come down from his initial starting point of 11 years to start at 10 years. He then applied the full one-third discount, despite an indication of plea not having been given in the Magistrates' Court as there had been no interpreter at court and no legal aid in place at that stage. Nevertheless, success at the Crown Court was tempered by an unease that the Attorney General may be asked to step in. And he was.

The Reference pleaded three cases (*Brown* cited above, *Chudasama* 2018 EWCA Crim 2867 and *Kroker* 2017 EWCA Crim 2472) and argued that the circumstances of this case meant that the starting point should have been 14 years. This was on the basis that the sentencing guideline states that in level-1 cases as this, where the combination of the determinants of seriousness and aggravating features are sufficient, the starting point should be raised toward the maximum. The Attorney General further submitted that the mitigation was limited and that the injuries were of no effect as they had been 'self-inflicted'.

The argument in the referral was, therefore, centred around the submission that this was the type of case in which the starting point should be uplifted to 14 years. The Court in Brown established the principle that the maximum sentence is not reserved for 'some notional case, the gravity of which cannot be matched by any other case'. Therefore, if the case in question were serious enough, then the maximum sentence could be passed even if 'one could envisage some even more grave set of circumstances.' Clearly, this provided the Court scope to find that this case was serious enough

to move it to the top of the range, and the circumstances seemed to leave little room for arguing to the contrary. Defending HHJ Cook's application of the guidelines in light of that, presented something of a challenge.

Nonetheless, the points to be made on behalf of the respondent were that, as bad as the offence was, it did not merit moving it up to the maximum; and importantly, the mitigation could not simply be ignored. In nearly all such cases, the injuries will be largely, if not completely, self-inflicted and it cannot be right to ignore them for that reason. The respondent, a young man, had been in hospital for months, was condemned to wearing a colostomy bag for life, but had still left hospital and returned to work.

The Court, presided over by Fulford LJ, approached the case with care and compassion for both sides. They were plainly troubled by the task in front of them and conceded that the mitigation was 'not inconsiderable' and really could not be ignored. However, rather than adopting HHJ Cook's formula of setting an initial starting point, reducing it in light of the mitigation and then applying credit for plea, they simply set an overall starting point of 12 years, taking into account the aggravating and mitigating features, and then reduced it by one third. Their judgement was that the resulting difference of 16 months, meant that the original sentence was just unduly lenient.

Ultimately, it could be argued that the principle that the maximum sentence need not be reserved for a notional worst case allows for flexibility which can operate in favour of a defendant: even what may appear to be the worst case will arguably not be, and the power of strong mitigation may still operate to draw even the worst case back from the maximum.

Patrick Mason

A very *Goodyear*?

Many of us will be familiar with the situation. You are representing a defendant who is equivocating about whether or not to enter a guilty plea. They appreciate that the evidence against them is strong, but their prime concern is whether or not they will receive an immediate custodial sentence. You are in front of a judge you know very well. It is tempting, isn't it, to see if you can get some informal indication as to whether they would impose immediate custody on a plea?

The perils of such an approach are well illustrated by the recent decision in *R v Hobbs [2019] EWCA Crim 2137*. Mr Hobbs appealed against a sentence of immediate custody for burglary and criminal damage on the ground that the judge had indicated at PTPH that any sentence would be suspended if he entered guilty pleas. In light of that indication, his counsel advised Mr Hobbs that he would almost certainly face prison after trial but would avoid custody if he changed his pleas. The defendant was rearraigned a week later and entered guilty pleas on a basis.

The exchange at PTPH between defence counsel and judge quoted in the judgment makes for uncomfortable reading. What is quite clear – as the Court of Appeal held – is that no formal *Goodyear* application was made in accordance with CPR 3.23. It is equally clear that the judge did no more than indicate that the range of sentencing options open to him included options other than immediate custody. However, it is obvious from the nature of the exchange that counsel and judge were very familiar to each other, and that counsel may have understandably imported more meaning to the judge's words than are plain from the face of the transcript.

The appeal was dismissed on the basis that the judge gave no adequate indication of the likely sentence if Mr Hobbs pleaded guilty:

At its very highest, this exchange between judge and counsel could not be characterised as anything more than a nudge and a wink as to what counsel wanted and what the judge might be prepared to do, and that is simply not sufficient. It is not appropriate or desirable that sentencing should proceed on the basis of apparent understandings between judge and counsel.

The message seems clear – don't seek any indication of sentence without going through the formal procedure set out in the CPR. Only then will an indication given by the judge be binding… Unless, of course, the defendant does not plead guilty "after a reasonable opportunity to consider his position in light of the indication" (*Goodyear,* para 61) in which case the indication ceases to have effect.

But what constitutes a "reasonable opportunity"? And is a judge ever entitled to go back on a *Goodyear* indication even if a guilty plea is forthcoming?

Both these questions were considered in *R v Utton [2019] EWCA Crim 1341*. The appellant sought a *Goodyear* direction at PTPH in relation to two burglary offences. The judge indicated a sentence of 42 months before mitigation and the appellant entered not guilty pleas. The following day, the appellant phoned his solicitors to tell them he had changed his mind. The case was relisted two weeks later when the appellant entered guilty pleas and the judge sentenced him to a custodial term of 53 months. He appealed on the ground that the judge was wrong to increase the sentence from that indicated at PTPH, where there had been no change of circumstances in relation to either offence.

In dismissing the appeal, the Court held that what is a reasonable opportunity to consider a *Goodyear* indication "will depend on the circumstances", but, in the present case, the period lapsed on the day of the PTPH when the appellant, having spoken with his legal advisers, entered his not guilty pleas.

In a useful review of the authorities, the Court re-emphasised that the reasons why a judge may revise their view of sentence after a Goodyear indication has lapsed include not just "where the evidence has worsened for the defendant, but also extend to the case where the judge has simply had time to apply his mind with greater care and having heard the evidence to the proper balance of sentence between defendants." (*R v Patel [2009] EWCA Crim 67*)

The Court also confirmed the principle in *R v Newman [2010] EWCA Crim 1566* that a judge is entitled to go back on a Goodyear indication – even when a guilty plea immediately follows

– if it later becomes apparent that they have fallen into error and no prejudice is caused to the defendant. In *Newman* the judge had indicated a three-year custodial term but realised in light of the pre-sentence report that such a term was wholly inadequate. He had also failed to contemplate the possibility that the defendant might be found to be dangerous and thus eligible for an indeterminate sentence. The Court held that a *Goodyear* was not absolutely binding as "the public interest in an appropriate sentence must trump any question of disappointment". In *Newman* the judge had also offered the defendant an opportunity to vacate his plea in light of the new proposed sentence and so he could not now complain of any injustice having declined to do so.

Both *Hobbs* and *Utton* appear to be authority for the proposition that an indication of sentence only becomes binding if a proper application is made in accordance with CPR 3.23 and the defendant pleads guilty within a "reasonable period" (save where exceptional circumstances such as those in Newman apply). However, another case from last year demonstrates that the position may not always be that simple.

In *R v Smith [2019] EWCA Crim 2319* the appellant appealed against a sentence of 15 years imposed for three robberies of public houses committed together with two co-accused. The appellant indicated guilty pleas to two robberies in the magistrates' court and his co-defendants indicated guilty pleas to one. The appellant then entered a guilty plea to the third matter on the first day of trial in the Crown Court. Sentence was adjourned until the conclusion of the trial of his co-accused on the two outstanding robberies.

At some point thereafter, the judge indicated in open court that he had adequate sentencing powers for the two remaining defendants in respect of two robberies. The Crown took this to mean the sentence would be the same for the two men on trial, whether they were convicted of two robberies or three. The prosecution consequently indicated that pleas to one or other of the remaining robberies on the indictment would be acceptable.

The co-defendants sought a *Goodyear* direction and were refused. Neither defendant changed their pleas. They were convicted after trial of one robbery but acquitted of the other.

The appellant was sentenced to consecutive custodial terms for each of the three burglaries to which he had pleaded making a total term of 15 years. His co-defendants were also sentenced to consecutive terms for the two robberies of which they were convicted which also amounted to 15 years, reflecting the fact that each had worse records than the appellant, and were either on licence or bail at the time of the offences.

The appellant's argument was that the judge's indication that total sentence for two robberies would be no different to sentence for three should, in fairness, have applied to the appellant as well as his two co-defendants, despite the fact that he had already pleaded to all three. The appropriate course should, therefore, have been to make sentence on one of the robberies concurrent to his sentence on the other two, which would result in a shorter overall term for the appellant than his co-accused.

Somewhat surprisingly, despite the fact that no formal *Goodyear* had been given to either the appellant or his co-defendants, and any indication the judge had given to the co-defendants lapsed when they chose to continue with the trial, the Court allowed the appeal and reduced the appellant's sentence by two years. The Court rationalised the decision as follows:

We conclude that the judge's indication on sentence to the co-defendants did result in unfairness and cannot be overlooked. In particular, this is because the position of the appellant on sentence was dependent on the fortuity of whether his co-defendants have entered pleas in response to the judge's indication. The clear effect of the judge's indication, from which he did not subsequently resile, was that he would treat a defendant who was guilty of three robberies no more severely than one who was guilty of only two.

So, it would seem there are exceptional circumstances where a judge can be bound by an indication in relation to sentence even when it is made to a co-defendant and that co-defendant declines to change their plea as a result.

The lesson to be derived from these recent decisions? Perhaps only that both counsel and judiciary alike need to tread very carefully when seeking or giving any indication on sentence – and that any implicit 'understanding' between the Bench and the Bar is no substitute for a strict adherence to the Criminal Procedure Rules.

Rupert Russell

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