

Chapter 13 (Sentencing Principles and Procedure): Update

13.3 Determining the seriousness of the offence

In *R v King* [2017] EWCA Crim 128, the Court of Appeal considered the approach to basis for sentence to be adopted in cases where more than one interpretation of the jury's verdict was possible. The court held (at [31]) as follows:

In our view the correct approach by the judge, after a trial, to the determination of the factual basis upon which to pass sentence, is clear. If there is only one possible interpretation of a jury's verdict(s) then the judge must sentence on that basis. When there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant.

13.3.2 Harm

In *R v Bondzie* [2016] EWCA Crim 552, the Court of Appeal emphasised the importance of evidence to show that an offence is particularly prevalent in a given area, and that increasing the sentence on that basis should be exceptional (given that societal harm is already taken into account in assessing the seriousness of the offence). Treacy LJ (at [10] and [11]) said:

Sentencing levels set in guidelines such as the Drugs Guideline take account of collective social harm. In the case of drugs supply this will cover the detrimental impact of drug dealing activities upon communities. Accordingly, offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributes to a harmful social effect upon a neighbourhood or community. It is not open to the judge to increase sentence for prevalence in ordinary circumstances or in response to his own personal view that there is "too much of this sort of thing going on in this area".

Firstly, there must be evidence provided to the court by a responsible body or by a senior police officer. Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made. Even if such material is provided, a judge will only be entitled to treat prevalence as an aggravating factor if (a) he is satisfied that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels); (b) that the circumstances can properly be described as exceptional and (c) that it is just and proportionate to increase sentence for such a factor in the particular case before him. It is clear therefore, that a court should be hesitant before aggravating a sentence by reason of prevalence. Judges will be only too well aware of the types of harm which are caused by drug dealing and will not be assisted by statements of the obvious. Only if the evidence placed before the court demonstrates a level of harm which clearly exceeds the well understood consequences of drug dealing by a significant margin should courts be prepared to reflect this in sentence. If judges do so, they must clearly state when sentencing that they are doing so.

His Lordship added (at [19]):

If the Crown intends to invite the court to consider that matter, it must expressly say so at the hearing, identifying the materials upon which it relies as evidence and referring the judge to the relevant guideline. If a judge of his or her own motion is contemplating prevalence as a factor, he or she should clearly identify that as a matter to be addressed in submissions to the court. Any sentence imposed should then identify if prevalence has been a factor and provide

reasoning so that the parties, and possibly this court, may understand how it has influenced the sentencing decision.

13.6 Reduction in sentencing for pleading guilty

With effect from June 2017 a new definitive guideline from the Sentencing Council governs reduction in sentence for a guilty plea.

The guideline begins by setting out some key principles:

The purpose of this guideline is to encourage those who are going to plead guilty to do so as early in the court process as possible. Nothing in the guideline should be used to put pressure on a defendant to plead guilty.

Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:

- a) normally reduces the impact of the crime upon victims;
- b) saves victims and witnesses from having to testify; and
- c) is in the public interest in that it saves public time and money on investigations and trials.

A guilty plea produces greater benefits the earlier the plea is indicated. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.

The purpose of reducing the sentence for a guilty plea is to yield the benefits described above. The guilty plea should be considered by the court to be independent of the offender's personal mitigation.

- Factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should not be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.
- The benefits apply regardless of the strength of the evidence against an offender. The strength of the evidence should not be taken into account when determining the level of reduction.
- The guideline applies only to the punitive elements of the sentence and has no impact on ancillary orders including orders of disqualification from driving.

Under this guideline, the level of reduction is determined as follows:

The maximum level of reduction in sentence for a guilty plea is one-third

Plea indicated at the first stage of the proceedings

Where a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made ... The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court.²

Plea indicated after the first stage of proceedings – maximum one quarter – sliding scale of reduction thereafter

After the first stage of the proceedings the maximum level of reduction is one-quarter ...

The reduction should be decreased from one-quarter to a maximum of one-tenth on the first day of trial having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date ... The reduction should normally be decreased further, even to zero, if the guilty plea is entered during the course of the trial.

The guideline goes on to give guidance on the application of the reduction. It makes the following points:

- The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another (e.g. reducing a custodial sentence to a community sentence, or reducing a community sentence to a fine). Where a court has imposed one sentence rather than another in order to reflect the guilty plea, there should normally be no further reduction on account of the guilty plea. However, if the less severe type of sentence is justified by other factors, the appropriate reduction for the plea should be applied in the normal way.
- When dealing with more than one summary offence, the aggregate sentence is limited to a maximum of six months. Even after allowing for a reduction for each guilty plea, consecutive sentences might result in the imposition of the maximum six-month sentence. Where this is the case, the court may make a modest additional reduction to the overall sentence to reflect the benefits derived from the guilty pleas.
- Reducing a custodial sentence to reflect a guilty plea may enable a magistrates' court to retain jurisdiction of an either-way offence rather than committing the case for sentence to the Crown Court. In such cases, a magistrates' court should apply the appropriate reduction to the sentence for the offence(s) arrived at in accordance with any offence specific sentencing guideline and, if the resulting sentence is then within its jurisdiction, it should go on to pass sentence.

The guideline also considers exceptions to the usual approach. These include the following:

- Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made. In considering whether this exception applies, courts should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is, in fact and law, guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.
- In circumstances where an offender's version of events is rejected at a *Newton* hearing, the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction (the guideline does not suggest by how much).
- If an offender is convicted of a lesser or different offence from that originally charged, and has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made. In the Crown Court, where the offered plea is a permissible alternative on the indictment as charged, the offender will not be treated as having made an unequivocal indication unless the offender has entered that plea.

13.6.2 First reasonable opportunity

In *R v Hackney* [2013] EWCA Crim 1156, the judge, when deciding how much credit to give for the defendant's guilty plea, took account of the fact that the defendant had sought a sentencing indication pursuant to *R v Goodyear* (see chapter 10.1.1.2). Mackay J (at [10]) said:

The judge was, in our judgment, wrong in principle to be influenced in any way as to the extent of the credit to which this applicant was entitled by the fact that he had exercised his right to seek a *Goodyear* indication from the court. That was in our judgment a legitimate use of court procedure designed to enable defendants to make informed decisions about their plea and a procedure which is designed to assist in the administration of justice and avoid unnecessary trials. In our judgment, it should not result in any loss of credit to the defendant invoking it in the way this applicant did. It was however the case that this applicant pleaded guilty only at the plea and case management hearing and it is now fairly widely accepted that that can be expected to be rewarded with a 25 per cent reduction rather than one-third. We see no reason to depart from that in this case.

In *R v Creathorne* [2014] EWCA Crim 500; [2014] 2 Cr App R (S) 48, the defendant was convicted of causing death by careless driving while under the influence of alcohol. He was suffering amnesia as a result of the collision and had originally entered a not guilty plea. However, he subsequently pleaded guilty after receiving legal advice regarding additional evidence that had come to light. The question was what reduction in sentence was appropriate because of the guilty plea. The court quoted extensively from *R v Caley* [2012] EWCA Crim 2821 and went on to note that, in the present case, the defendant's 'ability to form a considered decision as to whether or not to plead guilty depended upon the ability of his legally advisers to review sufficient evidence to proffer sensible advice'. When the trial date was set, the evidence 'was clearly incomplete'. In such a case, 'legal advisers should ordinarily be entitled to see all the material evidence before advising the client on the course of action to be taken in relation to a plea' (per Green J at [31] and [32]). The court went on to hold that this defendant should have been given the full one-third reduction in sentence.

13.6.3 Credit where prosecution case overwhelming

In *R v Kadiri* [2014] EWCA Crim 1106, the Court of Appeal concluded that the case against the defendant whilst 'very strong, was not overwhelming'. It was open to him, for example, to contest the identification evidence and thus to contest the charge. While such a defence may well not have succeeded, by accepting in interview that he had committed the offence, and by pleading guilty at the first opportunity before the magistrates, the defendant had saved valuable public time and resources. It followed that the judge had erred in not giving the defendant the full one-third discount for his plea.

13.7 Procedure following a plea of guilty

13.7.1 The *Newton* hearing

In *R v Martin* [2013] EWCA Crim 2565, HHJ Leonard (at [11]) said:

We have difficulty thinking of any circumstances in which a judge ought to give an indication of sentence in advance of a *Newton* hearing, not only because the judge would find it hard to predict what basis he would be sentencing upon, but because he will not know to what extent he will need to reduce the amount of credit given for his plea.

13.11 The plea in mitigation

13.11.2.2 Mitigation relating to the offender

In *R v Kazeem* [2014] EWCA Crim 1107, Hickinbottom J considered the relevance of the effect on others of imposing a custodial sentence on an offender. He said (at [11]):

When an offender commits a crime ... it is only too often the case that others suffer more than the perpetrator. Those others frequently include parents and children, for whom the offender has care. It is right that sentencers take such responsibilities into account when fixing the appropriate sentence. But where the offending is serious ... the extent to which the court can appropriately mitigate the sentence as a result of such factors may be limited ...

13.12 Sentencing only for offences of which defendant stands convicted or has admitted

13.12.2 'Specimen' or 'sample' counts

In *R v A* [2015] EWCA Crim 177, the Court of Appeal gave guidance on how to approach drafting the indictment where multiple offending is alleged (for example, in a case involving sexual offences). Fulford LJ (at [45]) noted that there are three possibilities open to the prosecution:

- a) To include a count or counts in the indictment alleging a course of conduct (rule 10.2(2) of the Criminal Procedure Rules provides that: "More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission".)
- b) To request that the judge resorts to ss 17-19 of the Domestic Violence (Crime and Victims) Act 2004, which enables the judge in particular circumstance to try the outstanding allegations following conviction (after trial by jury) on sample counts; or
- c) To include sufficient counts to enable the judge to impose a sentence which sufficiently represents what happened, but care is needed not to overload the indictment.

Fulford LJ went on (at [46]) to note that alleging a course of conduct, under rule 10.2(2), may mean that 'the extent, seriousness and timespan of the defendant's offending is unclear from the jury's verdict'. His Lordship went on (at [47]):

In our judgment, the central answer to this problem is to be identified in the purpose underpinning multiple counts: it is to enable the prosecution to reflect the defendant's alleged criminality when the offences are so similar and numerous that it is inappropriate to indict each occasion, or a large number of different occasions, in separate charges. This provision allows the prosecution to reflect the offending in these circumstances in a single count rather than a number of specimen counts. However, when the prosecution fails to specify a sufficient minimum number of occasions within the multiple incident count or counts, they are not making proper use of this procedure. In cases of sustained abuse, it will often be unhelpful to draft the count as representing, potentially, no more than two incidents. Indeed, in this case, if there had been a multiple incident count alleging, for example, "on not less than five occasions" with an alternative of one or more specimen counts relating to single incidents for the jury to consider if they were unsure the offending had occurred on multiple occasions, the judge would have had a solid basis for understanding the ambit of the jury's verdict and he would have been able to pass an appropriate sentence. Therefore, the prosecution needs to ensure that there are one or more sufficiently broad course of conduct counts, or a mix of individual counts and course of conduct counts, such that the judge will be able to sentence the defendant appropriately on the basis of his criminality as revealed by the counts on which he is convicted. In most cases it will be unnecessary for the counts to be numerous, but they should be sufficient in number to enable the judge to reflect the seriousness of the offending

by reference to the central factors in the case: e.g. the number of victims, the nature of the offending and the length of time over which it extended. Therefore, in drafting the indictment, a balance needs to be struck between including sufficient counts to give the court adequate sentencing powers and unduly burdening the indictment ... [T]he indictment must be drafted in such a way as to leave no room for misinterpretation of a guilty verdict and regard must be had to the possible views reached by the jury and to the position of the judge, so as to enable realistic sentencing.

13.15 Deferring sentence

In *R v Hazard* [2014] EWCA Crim 1124, the Court of Appeal highlighted the need to take care when setting out the court's expectations of the offender when sentence is deferred. The Court quashed an immediate custodial sentence imposed after a period of deferment, saying that the defendant was entitled to conclude from the fact of deferment there was a legitimate expectation that an immediate custodial sentence would not be imposed if he responded well during the period of deferment. However, the judge when imposing the custodial sentence had failed to explain in what way the defendant had failed to meet the court's expectations.