GENERAL CRIME BRIEFING NOTE

R V MANNING [2020] EWCA CRIM 592: SENTENCING DURING A PUBLIC HEALTH EMERGENCY

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Executive summary

In a judgment dated 30 April 2020, the Court of Appeal, including the Lord Chief Justice, held that:

- Where particular sexual activity is incited but does not take place, the appropriate harm category in the relevant sentencing guidelines is 'other sexual activity' (rather than the category describing the sexual activity being incited). Previous authorities to that effect should be followed.
- During the current public health emergency caused by the Covid-19 pandemic, there is a greater impact of custody on offenders
- Sentencing judges should take that factor into account when determining whether sentences of immediate imprisonment can properly be suspended.
- The greater impact of custody identified by the Court may also be of relevance to more general questions of bail and custody.

The facts

The offender, aged in his late 40s, had pleaded guilty (at a stage attracting a 20% discount from the appropriate sentence after trial) to four counts of engaging in sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003, and a fifth count of causing or inciting a child to engage in sexual activity, contrary to section 10 of the 2003 Act.

The victim in each case was the same 15-year-old girl. The two had initially met at a darts competition and the offender had eventually asked the victim out telling her he was attracted to her. They had then met up alone a number of times. The first time they kissed four or five times (Count 1). The second time they kissed and the offender put his hand on the girl's breast, over her clothing (Count 2). The third time they kissed and the offender placed the girl's hand on his erect penis, over his clothing (Count 3). The fourth time the same activity as before occurred (Count 4) but the girl's parents had followed her and came across the offender and the victim in his car. The fifth count related to inciting the girl to take part in penetrative activity evidenced by the above actions and text messages to that effect from the offender to the victim.

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The offender was originally sentenced to imprisonment for 12 months, suspended for 24 months with a nine month electronically monitored curfew and other rehabilitation programme requirements and ancillary orders. This was in large part on the basis that, in the sentencing judge's assessment, the appropriate category for the purposes of the relevant sentencing guidelines for the incitement count was Category 3 ('other sexual activity') with a starting point of imprisonment of six months, rather than Category 1 ('penetration of vagina or anus' or 'penile penetration of mouth') with a starting point of imprisonment for five years. The Solicitor General applied for leave to refer the case to the Court of Appeal as an 'unduly lenient' sentence.

In relation to the facts of this particular case, the Court of Appeal reiterated (as per *Attorney General's Reference No 94 of 2014 (R v Baker)* [2014] EWCA Crim 2752 and *R v Cook* [2018] EWCA Crim 530) that, because the incited sexual activity (penetrative sex) did not actually take place, the appropriate 'harm' category for the purposes of the relevant guidelines was Category 3 ('other sexual activity') rather than Category 1 ('penetration of vagina or anus' / 'penile penetration of mouth'). As such, the sentencing judge's overall categorisation of the seriousness of that particular offence was correct.

The Court of Appeal went on hold that the escalation and number of the incidents, plus the seriousness of the incitement offence even within the appropriate category, was such that the appropriate starting point after trial should have been imprisonment of 30 months after trial, rather than the 15 months the sentencing judge identified. It followed that the sentence was unduly lenient.

However, the Court of Appeal also considered the particular circumstances in which the Reference had come before the Court. At paragraphs 41-42 the Lord Chief Justice stated:

"41. […] We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.

42. Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended."

The Court of Appeal went on to allow the application by the Solicitor General to the extent that it substituted a custodial term of 24 months for the original term of 12 months. That term remained suspended however, and all the other orders were unaffected.

Analysis

R v Manning does not break any new ground in terms of sentencing for sexual offences alone as the issues in the application relating to the particular offences being referred were relatively straightforward.

The great significance of *R v Manning* in the forthcoming months lies in the particular observations of the Lord Chief Justice regarding Covid-19 quoted above. Those comments (coming as they do from the highest judicial level in England and Wales) will potentially have ramifications for many sentencing cases during the coronavirus crisis and may also affect other areas of law as well.

The Lord Chief Justice's statement that '*The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence'* will of course have a considerable impact those cases falling on the 'cusp' of a decision by the sentencing tribunal as to whether or not to suspend a custodial sentence.

It may also be the case that, where a short *immediate* custodial sentence (measured in the weeks or months) is the only realistic option for a particular defendant, *R v Manning* could be used to argue that the sentence should properly be shorter than normally, because custody is likely to be so much more onerous in the current situation.

However, the observations of the Lord Chief Justice potentially raise a number of other important issues as well.

The Court's reasons for determining that the coronavirus causes a greater impact on prisoners mention three specific points (i) the confinement of prisoners to their cells for 23 hours a day (ii) the inability to receive visits and (iii) the anxiety caused by the risk of transmission of the disease in confined quarters like prisons.

In relation to the confinement of prisoners, the Court of Appeal is no doubt right to highlight that these amounts of 'lock-up' make custody extremely difficult for those in prison and are antithetical to proper rehabilitation. Sadly, such lengthy periods of daily incarceration were already well-

reported features of some parts of the prison estate in at least 2017[1], 2018[2] and 2019[3]. Her Majesty's Chief Inspector of Prisons stated in his 2017-2018 report that 38% of detained young adults reported spending less than two hours a day outside their cells.[4] Following the end of the current crisis, if a defendant is able to demonstrate that they remain likely to be held in similarly oppressive conditions, will the observations of the Lord Chief Justice in *Manning* still operate to mean that sentencing tribunals should be more ready to consider options other than immediate imprisonment than they were previously?

Regarding the inability of prisoners to receive visits, disposals other than immediate custody will undoubtedly bring great benefit to those offenders who share a household with others or who have caring responsibilities – no other visits by those outside the household (save one-on-one meetings in public open spaces) being currently allowed for the entirety of the British people in any event. There is, in normal times, great benefit for those in custody who do receive visits from friends and family, and the absence of such contact must operate to make prison harder. Does the laudable regard, expressed by the Court of Appeal in this case, for those offenders who have family considerations which would be disrupted by incarceration, represent something of a departure from the previous line of authorities stating that it would be rare for the family life of an offender to prevail over society's interest in the proper enforcement of the criminal law (see for example *R v Boakye* [2012] EWCA Crim 838)?

Concerns about the greater risk of transmission of coronavirus in confined quarters are not limited to prison environments, but also apply to many other comparable public and private institutions. It surely remains the case that it is primarily the responsibility of the government, and not the sentencing judges, properly to protect the health and well-being of those who are within the care of the State; that applies to prisoners just as much as it does to those who may be involuntary residents of nursing homes, mental health institutions, etc. It could be observed that any failure to provide adequately safe custodial facilities should be addressed by improvements in standards, resources and funding for those institutions, rather than by a change in sentencing approach. Equally, if a particular tranche of offenders can be properly and safely punished and rehabilitated in the community during a pandemic, then that may suggest that those offenders are equally

[1] https://www.independent.co.uk/news/uk/home-news/prison-riot-causes-report-hmp-bedford-riot-23-hours-day-inmates-locked-up-toilet-papers-report-a8007531.html
[2] https://news.sky.com/story/prisoners-locked-up-in-squalid-cells-for-23-hours-a-day-says-report-11511161
[3] https://www.theguardian.com/society/2019/mar/09/aylesbury-young-offenders-institution-placed-in-special-measures
[4] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761589/hmi-prisons-annual-report-2017-18-revised-web.pdf

capable of being properly accommodated outside of jail after the pandemic has passed and should be dealt with in that way anyway.

It might be thought that that, in addition to the reasoning of the Court as set out above, the Court would also have had concerns regarding pressure on the prison population as no more than a handful of jury trials are currently occurring. It has been widely reported that, by Monday 27 April 2020, only 33 prisoners (out of an estimated 4,000 eligible prisoners) had been released under a programme designed to ease pressure on the prison population during the crisis.[5] It has recently also been reported that the police are showing a renewed impetus to use out-of-court measures to reduce the backlog of cases building up.[6] In the week ending 15 May 2020, there was a 'useable operational capacity' within the prison/immigration removal centre estate of 82,254 places and a current population of 80,560. That compares with the figures for the week ending 17 May 2019 of capacity of 84,784 and a population of 82,560, indicating that the system is still very close to capacity, just as it was before the pandemic.[7] Although such methods for reducing the prison population are highly desirable (provided of course they implemented in a way which is appropriate and meets the aims of justice), it appears to be unlikely that there will be any transformative effect on the numbers currently in custody, and the provision of proper resources for the prison service remains an imperative.

Outside of the sentencing regime, the observations of the Lord Chief Justice in *R v Manning* may be capable of having some impact on decisions regarding bail. If it is right, as a matter of principle, for the criminal courts to take into account the greater impact of custody during a pandemic when considering 'borderline' sentencing cases, then it may also be arguable that exactly the same considerations should be taken into account when determining bail applications. The test for withholding the right to bail is expressed in Schedule 1, paragraph 2(1) of the Bail Act 1976 as follows: *'The defendant **need not** be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would [fail to surrender, commit further offences, interfere with witnesses etc]',* (emphasis added), demonstrating that bail is quintessentially a *discretionary* power held by the criminal courts.

Undoubtedly, there are those defendants who clearly pose such a risk to the public, or the public interest, that they should be remanded in custody pending trial or sentence, no matter what the greater impact of that detention may be during the Covid-19 emergency. There are also many more nuanced cases. It can easily be envisaged that a defendant with a particular medical vulnerability to Covid-19 could properly rely on that specific condition as a reason why they should be granted bail away from a high-risk institution like a prison. If, however, custody during the crisis

[5] https://www.bbc.co.uk/news/uk-52445806

[6] https://www.thetimes.co.uk/edition/news/criminals-to-avoid-day-in-court-while-legal-backlog-is-cleared-ffcnvbppz

[7] All data taken from https://www.gov.uk/government/collections/prison-population-statistics

is presently more onerous on *all* defendants (for the reasons set out in *Manning*) then is it right the courts should, in more borderline cases, bear that factor in mind and be more ready to exercise their discretion in favour of granting bail? Anecdotal evidence suggests that decisions are at present generally more readily being made in favour of granting defendants bail, which may also serve to ease pressure on the prison population.

Furthermore, the statutory power for extending a custody time limit as stated in s.22(3) of the Prosecution of Offences Act 1985, is similarly a discretionary one: *'the appropriate court **may**, at any time before the expiry of a time limit imposed by the regulations, extend or further that limit; but the court shall not do so unless it is satisfied that [there is good and sufficient cause and the prosecution have acted with all due diligence and expedition]'* (emphasis added).

Although experience shows that applications for extending custody time limits on the basis of the suspension of jury trials due to Covid-19 have previously generally been granted by the courts; given that such extensions, like bail, also constitute the exercise of a *discretionary* power, should the greater impact of custody on defendants during this pandemic, as recognised in *R v Manning,* similarly now form a part of the considerations when determining CTL extension applications?

No doubt these, and other questions arising from this important judgement, will be the subject of litigation and further judicial consideration over the remainder of this crisis.

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