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Albion Chambers CRIME TEAM NEWSLETTER

Sentencing Guidelines Council vs Sentencing Council

Much Ado About Nothing?

Sections 118 to 136 of the Coroners and Justice Act 2009 establish the 'Sentencing Council' of England and Wales. Section 135 abolishes the Sentencing Guidelines Council and Sentencing Advisory Panel. These sections were brought into force on 6th April 2010 (S.I. 2010/816). They mean: a great deal of difference in the process of sentencing on paper; very little difference in the result; and a great deal more time spent (or wasted?) reaching that result. Do not expect to be fascinated by what follows! However, it is important for practitioners to be fully aware of how judges will need to approach the guidelines in passing sentence.

Functions of the Sentencing Council

The functions of the Council are predictable and the statute provides a framework for the provision of guidelines for the Magistrates' and Crown Courts. One of the foci of the Council is now the cost of sentences. Section 120 requires the Council to have regard to a number of factors when setting guidelines including the cost of different sentences and it is required to assess and review the resource implications of the guidelines and legislative proposals (e.g. in relation to prison places and probation and youth services). The Council must promote awareness of sentencing practice and matters including the cost effectiveness of different sentences. This is the first time financial considerations have been given a statutory footing alongside principle in the sentencing landscape. It will be interesting to see whether this has a noticeable effect upon the guidelines issued in the future.

The statutory framework

Section 125(1) of the CJA 2009 provides that:

Every court –

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and;

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function unless the court is satisfied that it would be contrary to the interests of justice to do so.

The effect of the transitional provisions within the schedule to the Act is that this applies to guidelines already issued by the Sentencing Guidelines Council as well as those which have yet to be issued by the Sentencing Council.

Where "offence specific" guidelines have been issued, the court must identify and sentence within the "offence range" (Section 125(3)(a)), and, where the guidelines describe categories of cases, the court must identify which of the categories most resembles the defendant's offence in order to identify the "category range" and relevant starting point (Section 125(3)(b)). In other words, having identified the offence range, the court must also identify the category range and starting point. However, having done so, section 125(3) enables the court to completely ignore the category range and corresponding starting point in passing sentence. The offence range, however, cannot be avoided subject to the residual discretion in section 125(1) not to follow the guidelines where it would be contrary to the interests of justice to do so. Section 125(4) provides that the court may simply state that it believes that none of the categories sufficiently resembles the defendant's case; a common problem, particularly in relation to the guidelines for ABH owing to premeditation featuring in all but one category.

Having identified the offence and category ranges, the court can then consider discounts for guilty pleas, assistance to the prosecution and totality (section 125(5)). Section 125(6) preserves what might be called the usual sentencing provisions e.g. custodial sentence must be for shortest term commensurate with seriousness of the offence, mandatory minimum sentence provisions etc. The effect of section 126 is that although the court's duty in sections 125(2) and (3) is subject to the power to order IPPs and extended sentences, the guidelines must be followed in the calculation of notional determinate terms in relation to IPP, extended sentences and life sentences.

In relation to guidelines to be issued in the future, Section 121(2) requires categories to be identified illustrating in general terms the varying degrees of seriousness with which the offence may be committed having regard to the defendant's culpability and the harm which was caused/foreseeable/intended and such other factors as the Council considers relevant. This will presumably lead to new guidelines in the same format as we are used to seeing in the existing guidelines, with categories and ranges. However, this format is not mandatory; section 121(1) only requires the Council to have regard to the desirability of producing guidelines which relate to a particular offence being set out in the way described in subsections 2-9, i.e. in a way which identifies an offence range and category ranges. It is surprising that it is not mandatory for guidelines to be issued in this format given that it is mandatory for the court to apply the guidelines by identifying the offence and category ranges.

Application of the legislation

The first point of note is that the Act imposes on the courts a mandatory duty to 'follow' the guidelines, as opposed to a duty merely to 'have regard to' them,

as previously required under Section 172 of the CJA 2003. However, what the difference between the 'duty to follow' and the 'duty to have regard to' is given that the duty to follow is subject to the get out clause which allows the court not to follow the guidelines where it would be contrary to the interests of justice to do so, is a moot point. One might come to the view that the effects of Section 172 of the CJA 2003 and Section 125(1) of the CJA 2009 were exactly the same, were it not for the fact that in endeavouring to ensure that the courts follow the guidelines, Section 125(2)-(3) of the 2009 Act set out a process which the courts must adhere to.

So far as that process is concerned, the first difficulty is that the guidelines already issued by the Sentencing Guidelines Council do not on their face identify either an offence range or a category range. Dr David Thomas QC has suggested that the offence range would be between the lowest sentence for the least serious category of an offence and the highest sentence for the most serious category of that offence as identified by the current guidelines (e.g. between 3 and 16 years for offences contrary to Section 18 of the Offences Against the Person Act). Being literal, it is difficult to see why the offence range would not be from 0 to the maximum penalty for an offence (eg between 0 and life for section 18 offences), but either definition is sufficiently wide to make its identification in any given case practically pointless. The category range would more obviously be the range identified for one of the categories identified under "type or nature of activity" as set out in the current guidelines (e.g. 10 -16 years in the most serious category of a section 18 case.)

The transitional provisions in Schedule 22 of the Act have the effect that the section 125 duty does not apply to courts dealing with offences committed before 6th April 2010. For offences before this date section 172 of the CJA 2003 still applies. Where an offence spans two or more days the last day should be taken as the date of the offence for determining which statute applies.

Guidelines in practice

Imagine a hypothetical indictment which contains seven offences, one of which was committed before the 6th April and five of which (all of which are different) were committed on or after 6th April. In relation to the offence which took place before 6th April, the judge must have regard to the guidelines and, if he/she departs from them, must give reasons for so doing. In relation to each of the remaining five counts he/she must: a) identify the applicable guideline; b) identify the enormously wide offence range; c) identify the category which most closely resembles the instant case, or state that the case does not fall within a category; d) identify the category range (assuming this is possible); and then e) if he wishes to, ignore c) and d) and pass a sentence within the offence range unless f) he/she is satisfied it is contrary to the interests of justice to do so.

The effect of this legislation will surely be to increase the length of time it takes a judge to exercise his/her discretion, increase the length of sentencing remarks, and make no difference to the sentence passed. Much ado about nothing for the defendant standing in the dock.

Anna Midgley

We pray to be let alone

"We have been over-legislated to. Acts amending and altering, declaring and explaining, prohibiting and encouraging, enacting and repealing heap our statute book. Every fresh meddling increases our helplessness and we pray to be let alone." *William Hone 1817*

The English satirist William Hone bemoaned the rash of legislation in the early 19th century, and almost two hundred years later many criminal lawyers echo his sentiments. The latest 'amending and altering' to our evidential and procedural rules lies within the Coroners and Justice Act 2009 (part of which came into force in January and February 2010) and the new Criminal Procedure Rules 2010 (which come into force on 5 April 2010).

The changes which will most affect criminal lawyers on a daily basis are the following:

1. There is no longer a requirement for 'recent complaint' to be 'recent' from February 2010. The CJA 2009 has removed the requirement in section 120 CJA 2003 for a complaint to be made 'as soon as could reasonably be expected'. The section therefore now permits the admission in evidence of any previous complaint by a complainant. It remains to be seen whether judges will consider that complaints made years after an alleged offence with no good reason for the delay are relevant and probative; if not they will still be inadmissible.

2. There is no longer a requirement to make a hearsay application in relation to business documents (from 5 April 2010). An application is only required if the hearsay is to be admitted under s.116 (absent witness), 121 (multiple hearsay) or 114(1)(d) (interests of justice).

3. The timetable for hearsay and bad character applications has changed (CPR 2010 parts 34 and 35, from 5 April 2010). Applications are no longer required before PCMH, but are triggered by a defendant's not- guilty plea. The Crown's application in relation to bad character of a defendant or hearsay must be made within 14 days of a defendant's not-guilty plea. The defence have 14 days after receipt of application to object.

4. In relation to those types of hearsay which do not require an application, the prosecution papers need to be read with extra care; the onus is on the defence to object to the admissibility of other types of hearsay which are disclosed on the papers. These include recent complaint statements under s.120, business documents under s.117, res gestae under s.118 etc. [CPR 2010 part 34, from 5 April 2010]. The defence must take objection within 14 days of receipt of the evidence or 14 days of the defendant's not-guilty pleas, whichever is the latest.

The introduction of procedural rules triggered by not-guilty pleas appears to be in conflict with the requirement to identify legal issues in defence statements (under CJIA 2008), and with the expectation of judges that admissibility issues will be flagged on the PCMH form. Where hearsay falls into the category for which an application is required, there is no onus on the Crown to apply before the PCMH; they only need to apply 14 days after the not-guilty plea. As this category includes applications to read witness statements where the witness is unable to attend court (under s116), the outcome of legal argument may have a significant effect on whether a trial is going ahead, and, if it is, what the proper time estimate should be. Similarly, there is no requirement on the defence under the CPR to announce an objection to hearsay evidence which appears on the face of the Crown's papers but in relation to which no application is required until after the not-guilty plea has been entered. The outcome of this 'fresh meddling' is that it may be less than clear at PCMH what legal arguments need to be determined before trial.

Kate Brunner

Bad character or not?

The enactment of sections 98 to 113 of the Criminal Justice Act 2003 (CJA 2003) dealing with evidence of bad character has already been the subject of much discussion. However, much of that has focused on the defendant's bad character, the gateway under which it can be admitted and once admitted, the use to which it can be put. What has been overlooked is evidence in respect of a non defendant's alleged bad character. And with one advocate currently facing the prospect of bearing the costs of an ill advised application to adduce such evidence, it is clear that there is confusion as to exactly what amounts to non-defendant's bad character evidence and how it should be sought to be admitted into evidence.

We are by now all too familiar with the definition of bad character as defined by s. 98. However, it seems that many practitioners reading that definition assume that what a defendant asserts in his proof of evidence automatically falls within the exception provided by s. 98 thus making a bad character application unnecessary. A common example is where a defendant charged with burglary accepts that it is his fingerprints that have been identified as having been found in the property. However, he states that rather than being a trespasser, he had been invited into the property by the owner in order to purchase drugs.

It is to be hoped that most practitioners would detail that in a defence statement but most then fail to consider how it can be advanced as part of the defendant's case at trial. Such an assertion is merely an explanation advanced by the defendant as to how his fingerprints came to be in the property. It does not have anything to do with the alleged facts of the offence (such as a fight where the defence is one of self defence and there is no dispute that blows were thrown by both) neither is it evidence of misconduct in connection with the investigation. Therefore, an application to adduce it as bad character must be made before the witness can be cross examined about it.

It would be rare for such an application to be refused by the trial judge and indeed, in most cases the Crown would I suspect agree to the evidence being admitted as it forms the basis of the defence. However, such applications should not be made lightly; in most cases it will simply be a bald assertion by a defendant unsupported by any other evidence such as in the current example, a previous conviction on the part of the witness in respect of the possession or supply of drugs. In those cases the Crown, subject to the rule of finality, may well seek to counter the assertion by evidence that not only does the witness not have any convictions, cautions or warnings in respect of drugs offences but that there is also no intelligence indicating that the property has any connection to drugs. A defendant faced with that rebuttal and his own convictions being placed before the jury as a consequence of his attack on the character of the witness may find that what was already an uphill task suddenly becomes even harder.

I suspect that no one will have any difficulty accepting that the assertion that a witness who is a drugs dealer is clearly evidence of misconduct. But what about an allegation of misconduct based upon the perceived bias of an expert witness. In a recent case on circuit, an expert was instructed on behalf of the defendant. The expert was highly regarded in his field and had published the leading text book on his particular area of expertise. As such he was well known to the prosecuting authority as he had given evidence on behalf of a number of defendants in trials brought by the agency.

In addition, he was the director of a number of companies, some of whom had themselves been successfully prosecuted by the same prosecuting authority and an application was made to adduce those convictions as evidence of misconduct on behalf of the defence expert. Had such evidence been admitted, the defence would clearly have been left in an untenable position, either having to call the expert knowing that the jury would hear about the previous matters involving the companies he had connections with or they would have been forced to attempt to obtain a report by another expert. That would require authority for additional funding which is by no means be a certainty but more importantly, they would have been forced to instruct an expert who wasn't considered to be the top in his field of expertise.

Fortunately that was a quandary that the defence didn't have to face because when the application from the prosecution was considered, it was successfully submitted that it was misconceived and ill founded. The matters sought to be relied upon by the prosecution did not in fact amount to misconduct and as such could not be relied upon as bad character. Some of them could possibly be said to demonstrate a potential bias against the prosecuting authority but that was something that the expert would be able to deal with adequately in evidence and did not fall within the definition of bad character.

Another area where misunderstandings often arise is in relation to previous sexual allegations made by a victim in sex cases. If the allegations are to be relied upon for any other reason than to suggest that they are false, for instance to rebut the sole explanation for sexual knowledge being as a result of misconduct on behalf of the defendant, then the appropriate application would be in accordance with s. 41 of the Youth Justice & Criminal Evidence Act 1999. However, if the reason they are sought to be relied upon is that she has made false allegations in the past and that this is just another of those then that is an allegation of misconduct and has to be made the subject of an application to adduce it as such.

A failure to seek to adduce the evidence in the right way can have catastrophic consequences. In the case involving the allegations against the expert, the issue was dealt with as a preliminary point, in advance of the trial. The expert, being concerned for his reputation and no doubt future livelihood, instructed Queen's Counsel to argue the point for him forcing the prosecuting authority to do likewise. It is the cost of that hearing that falls to be considered at the conclusion of the trial.

But it is not only in unusual cases such as that one that the unwary practitioner could find themselves facing the wrath of the court. It is equally likely that an advocate who proceeds upon a course of cross examination without having made the necessary application and which results in a jury being discharged, would also be facing the possibility of a not insubstantial order in respect of the wasted costs of the aborted hearing.

Sarah Regan

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