

# Sentencing Offenders with Mental Disorder

Mary Cowe

# Areas We Will Cover

- Put the Guidelines into their broader context; other legal and societal developments
- Review the Guidelines themselves
- Practical Points:
  - > inform representations on charge
  - > inform case prep/instruction of experts
  - > mitigation

# Context: Prison Is Not Good For Your Health

## Covid case-law:

*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.*

*R v Manning [2020] EWCA Crim 592*

# Prison Is Not Good For Your Health

Covid:

But see R v Bradley Wayne [2020] EWCA Crim 1303 (they think it's all over...)

But it isn't now <https://www.gov.uk/guidance/bristol-prison#how-to-book-family-and-friends-visits>

R v Prentice [2020] EWCA Crim 1268 – severe asthma a good reason to reduce sentence of 3 years to 2 years for PWITS class A considering the pandemic

## Question:

If it's legitimate to reduce sentences because prison conditions have worsened, particularly for those in physically poor health, what of those who have such poor mental health that any term of imprisonment will be experienced as severe?

Often said to be taken into account – but does it make the difference to sentence it should?

# Context: Mental Health Taken Seriously?

Attempts to abolish Sch 1 section 3 of the Bail Act, custody for D's own protection:

- Wrong in principle to imprison people to make up for failings in care and protection in community
- Bail can be withheld without medical/social work reports
- Erroneous belief that imprisonment can be therapeutic
- No scrutiny of use of power, but some material suggests over-used in relation to women, particularly those expressing suicidal intentions, in belief prison "safer"
- Assaults do happen in prison too

*All Parliamentary Group on Women  
in the Penal System*

# Context: Reform of Sentencing

Sentencing Act 2020 (commencement 1/12/20)

## Section 57:

(2) The court must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

(Adult Offenders)

# Context: Reform of Sentencing

Section 3 (b) states that the preceding purposes of sentencing does NOT apply

- (b) in relation to making any of the following under Part 3 of the Mental Health Act 1983—
- (i) a hospital order (with or without a restriction order),
  - (ii) an interim hospital order,
  - (iii) a hospital direction, or
  - (iv) a limitation direction.

(repeats s 142 (2) of CJA 2003)

No “purposes of sentencing” equivalent in MHA 1983



# R v Edwards

## R v Edwards [2018] EWCA Crim 595

In assessing the seriousness of the offence, s. 143 (1) of the Criminal Justice Act provides that the court must consider the offender's culpability in committing the offence and any harm caused, intended or foreseeable. Hence the structure adopted by the Sentencing Council in the production of its definitive guidelines and the two pillars of sentencing: culpability and harm. Assessing the culpability of an offender who has committed a serious offence but suffers from mental health problems may present a judge with a difficult task but to comply with s.142 and the judgment in *Vowles*, he or she must attempt it.

(s 143 is replicated as section 63 of the Sentencing Act 2020)

# Relevance of Mental Health

- Poor mental health at time of offence may afford a defence (insanity; lack of intention)
- If no MH defence and D convicted, Court can take into account MH at time of offence in assessing culpability
- MH at time of sentence – hospital order?
- If MHA 1983 disposal not required, but MH will make D's experience of prison more severe, this is personal mitigation

# Don't Cross The Streams!

## Law's Empire

- Personal agency (wide) “culpability”
- Strict liability/negligence (social policy)
- Risk (widening)
- Traditionally backward looking

## Clinical Considerations

- Personal agency (more attenuated) “responsibility”
- Clinical policy/pragmatism
- Risk (wide)
- Traditionally more forward looking

# New Guideline

- Applies to offenders aged 18 and over sentenced on or after 1<sup>st</sup> October 2020
- Applies on conviction only e.g. not for those found to have 'done the act'
- Press release cites 23% of prisoners had some prior contact with MH services
- Emphasis on individualistic approach to culpability and consequences

# Mental Disorders, Developmental Disorders, Neurological Impairments

Annex A contains a list of “more common disorders likely to be relevant”

- Psychotic illness e.g. schizophrenia
- Depression and anxiety disorders, PTSD
- Substance use disorders
- Intellectual disability
- Autism
- Conduct disorders/ADHD
- Personality disorders
- Dementia
- Acquired brain injury

# General Guidance

- An impairment or disorder should always be considered but will not always have an impact
- Individualistic approach, issue focussed; how does MH affect the offending or the offender?
- Don't make assumptions; MH fluctuates; stigma particularly acute for some communities.
- Drugs/alcohol can mask disorder or be co-morbid
- Experts can disagree
- Be aware of participation issues
- If D currently unwell, get a report (s157 CJA 2003)

# Assessing Culpability

- Make initial assessment based on guideline then consider impact of impairment/disorder
- Must be a “sufficient connection” between MH and offending to reduce culpability
- Must state clearly if culpability reduced, reasons for and extent of sentence reduction and reasons for not following expert (if didn't)
- The sentencer is in the best position to assess the material

# (Not a) Checklist for Culpability

“A useful starting point”

- Was their exercise of judgment/making of rational choices/understanding nature & consequences of their actions impaired?
- Disinhibition due to MH/impairment?
- Failure to take medication wilful or function of their illness?
- Self-medication; did they appreciate drugs/alcohol would make their condition worse?
- Presence of some insight into disorder/need to take meds will not automatically increase culpability; matter of degree



# Approach to Sentence

- Step 1 consideration where D's impairment/disorder linked to offence (reduces culpability)
- Step 2 consideration where not linked (personal mitigation)
- Overlaid on that, if D currently unwell, have regard to MHA 1983 disposals
- May be relevant to dangerousness assessment

# Types of Sentence: non-custodial

- A fine/discharge may still be appropriate if offence is minor
- Bespoke conditions for community order; MHTR with ATR and DTR; RAR days
- MHTR may be a proper alternative to short or moderate custodial sentence if compliant
- Current motivation and ability important for any community order

# Types of Sentence: custodial

- Disorder or impairment may make custody disproportionate
- Custody may be more severe/may exacerbate MH conditions
- “Can only be taken into account in a limited way so far as the impact of custody is concerned”

# MHA Disposals

- Nature of offence
- Antecedents
- Behaviour when unwell
- Insight
- Compliance
- How risk may escalate
- Protecting the public and release regime

# MHA: Order of Decision Making

- Is some sort of MHA disposal appropriate?
- If so, and D 21 or over, consider if section 45A appropriate first and if not, say why no penal element
- If not section 45A but section 37 met, consider section 41 (necessary to protect the public from serious harm having regard to offence, antecedents, risk of further offences)

# Reps on Charge?

## CPS Guidance on Mental Health

- Overarching legal framework/ECHR
- The civil framework
- Need to avoid assumptions

## Pre Charge considerations

- Culpability
- Impact of prosecution
- Gravity of offence
- Likelihood of repetition (treatment options)
- Need to safeguard public (feedback loop)

# Expert Assistance

- Obtaining existing reports may help in making representations about charge
- May assist with fitness/defence/disposal options
- Targeted questions that go to culpability assessment e.g. connection with offence/judgment/disinhibition
- Treatment options/vulnerability in custody/dealing with 'dangerousness'

# Mitigation

- Is MH/impairment connected to offence?  
Culpability; MH/impairment likely to be interconnected to other aspects of D's life
- Will MH/impairment affect D in custody?  
Does custody remain proportionate? Impact of removing pro-social factors
- Alternative package including rehabilitation to offer



# References

<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>

<https://www.cps.gov.uk/legal-guidance/mental-health-suspects-and-defendants-mental-health-conditions-or-disorders>

<https://howardleague.org/wp-content/uploads/2020/10/APPG-For-their-own-protection-FINAL.pdf>

<https://www.legislation.gov.uk/ukpga/2020/17/contents/enacted>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417412/Reference\\_Guide.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417412/Reference_Guide.pdf)