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I must start by apologising that this "summer" edition of The London Advocate is being circulated at the start of the distinctly unsummery month of September. I hope it has been worth the wait.

The consequences of all formal lockdown restrictions ending in July are yet to be felt, given the holiday period and the (sometimes) better weather, and so it is difficult to predict what impact Covid will have on the CJS over the coming months. What does seem clear – anecdotally at least - is that clearing the Covid (and pre-Covid) backlog is encountering significant problems: tales of cases being removed from lists at very short notice and without explanation, trials of straightforward investigations being listed up to five years after a suspect's arrest and sentencing hearings being adjourned because the courts have no cell capacity. I wish I could be optimistic that the tone of my message in the next edition will be brighter

The kind of failings referred to above, far from an exhaustive list, take place against a backdrop of ever-stricter approaches to sentencing (both legislative and judicial) and what can only be described as hyperactive policing in areas where it is unwarranted. This edition focuses on these areas, with articles on the important case of Plaku (from April) which solidified the restrictive approach to credit for guilty pleas, on the change to early release arrangements so that prisoners for many offences will now serve two-thirds of their sentence in custody rather than half, and on the damage done to young people by the criminalising response to "Everyone's Invited". Bruce Reid's usual cast of reprobates being on holiday has allowed him to contribute his robust thoughts on Plaku, and other related matters, as well.

I hope you will find the contents interesting, if perhaps not uplifting.

Ed Smyth, Editor
(esmyth@kingsleynapley.co.uk)

LCCSA NEWS

COMMON PLATFORM ROLL-OUT

Common Platform began at Wimbledon Magistrates' Court earlier in the year and was rolled out to a number of other courts (Ealing, Lavender Hill, Uxbridge Willesden Mags; Harrow and Isleworth Crown) on 5th July. The schedule for the further roll-out is as follows:

25th October – Westminster and Highbury Magistrates' Courts, Central Criminal Court and Southwark Crown Court. –BTP and City of London Police will also go live on this date

15th November – Thames, Stratford, Barkingside, Romford Magistrates' Courts, Snaresbrook and Wood Green Crown Courts

7th December – Croydon, Bromley, Bexley Magistrates Courts', Inner London, Woolwich and Croydon Crown Courts

If they have not already done so, members are strongly encouraged to set up their own accounts before they are likely to need to attend a CP hearing. Once the registration process is complete, it may take a few days for the set-up link to arrive (and it may end up in your "junk" folder, so be sure to check).

Set-up involves setting a password and authenticating a device to associate with the account. Users will also need to have a mobile phone to assist with the security process, and may need to install the "Microsoft Authenticator" app (using the "other account type" option).

The registration form, a useful video guide and the latest version of the defence learning guide are all online.

CHANGES TO THE CRIMINAL PROCEDURE RULES

Readers should be aware of the forthcoming amendments to the CrimPR, which come into force on the 4th October. A guide setting out the changes can be found here:

https://www.lccsa.org.uk/wp-content/uploads/2021/07/criminal-procedure-amendment-2-rules-2021-guide.pdf

Of note, Goodyear Indications are coming to magistrates' and youth courts and in cases where a defendant is committed for sentence, the time limit to appeal the conviction will begin on the date of committal rather than the date of sentence in the Crown Court.

CONTRACTUAL COMPLIANCE AND SUPERVISION OF PS REPRESENTATIVES

The Association has been invited to share the LAA's announcement that supervisors should inspect and approve the accuracy of information for police station representatives; link below:

https://www.gov.uk/government/news/crime-news-updating-the-police-station-representatives-register

The link contains information on how to record details of those who may not have met minimum attendance volumes owing to the pandemic. Providers should receive an email direct from the DSCC with further instructions.

FEEDBACK TO THE LAA ON COVID CONTINGENCIES

At a meeting on 7th September the LAA will be holding a lessons learned session on how it has supported the legal aid sector during the pandemic. The LAA would like to hear from practitioners to understand:

- What contingency arrangements worked well?
- What did not work well?
- What was lacking?
- What might the LAA do differently should we be faced with a similar event in the future?

Members are invited to send any thoughts to the editor or Sara Boxer (admin@lccsa.org.uk).

REMOTE POLICE INTERVIEWS (JIIP)

Negotiations continue over arrangements for how and when remote interviews will be facilitated following the national easing of lockdown restrictions. The Association hopes to be in a position to update members shortly. Meanwhile, and as before, please send your views and any positive/negative experiences to admin@lccsa.org.uk

TRAINING EVENT – EXTRADITION LAW – A PRACTITIONER'S GUIDE (3rd EDITION) – BOOK LAUNCH AND ONLINE SEMINAR WITH THE AUTHORS,

9th SEPTEMBER 17:00-18:00

Edward Grange (Corker Binning) and Rebecca Niblock (Kingsley Napley), the authors of the third edition of this important book, by, are hosting a free online seminar to coincide with its launch on 9th September.

"Extradition Law – A Practitioner's Guide" balances a clear and thorough explanation of the law with practical tips on representing the client and preparing the case. It is written with the duty solicitor in mind, designed to be brief and accessible to be used in court, but is essential reading for all solicitors and barristers acting in extradition proceedings. As Mrs Justice Arbuthnot (former Senior District Judge) says 'this book may be short but it packs a big punch'.

Ed and Rebecca have extensive experience of defending individuals in extradition hearings and appeals and they understand the need for criminal practitioners to have clear and accessible guidance and find the answer at their fingertips in minutes. In their seminar, they will be providing an overview of major updates to the book, such as the significant changes as a result of Brexit and the Trade and Co-operation Agreement that all practitioners need to be on top of.

Registration is free, and registrants will have the opportunity to buy the book at a 10% discount (£38 as opposed to the usual £45). Tickets are available at this link:

https://www.eventbrite.co.uk/e/extradition-law-a-practitioners-guide-book-launch-and-seminar-tickets-163068453133

COMMITTEE MEETINGS

The LCCSA committee meets on the second Monday of each month at 6:00pm. All members are welcome so if you wish to participate (in person or remotely) please contact the editor or Sara Boxer (admin@lccsa.org.uk).

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ARTICLES

R V PLAKU AND OTHERS (CREDIT FOR GUILTY PLEAS)

On April 23 2021, the Court of Appeal gave significant guidance on how to interpret and apply the Definitive Guideline issued by the Sentencing Council on "Reduction in sentence for a guilty plea". Philip Stott, barrister at QEB Hollis Whiteman, analyses and assesses the judgment ([2021] EWCA Crim 568).

What were the cases being appealed?

The Court of Appeal heard three cases together for the purposes of providing this judgement (1) R v Isuf Plaku and Eduart Plaku - an appeal against sentence; (2) R v

Simon Bourdon - an appeal against sentence; and (3) R v Benjamin Smith - an application by the Attorney General on the basis that the sentence passed was unduly lenient.

What did the Court of Appeal say about the relevant Guideline on credit?

The Court set out the terms of the Guideline - which has been in effect since 1 June 2017 - and stated that it appeared from the issues in the cases under consideration that there was still some misunderstanding of it. The Court emphasised three points [6]:

(1) A sentencing court must follow the guideline unless satisfied that it would be contrary to the interests of justice to do so (by virtue of s.59 of the Sentencing Code, formerly s.125 of the Coroners and Justice Act 2009).

(2) The guideline focuses on when a guilty plea is indicated, not when it is entered (as per the wording of s.73 of the Sentencing Code)

(3) The guideline drew a clear and deliberate distinction between the reduction available at 'the first stage of the proceedings' and the reduction available 'at any later stage' (see section D of the guideline)

The Court also highlighted that there was a difference drawn in the guideline (section F1) between (a) cases where it was necessary to receive advice and/or see evidence to determine whether the defendant was in fact and law guilty; and (b) cases where a defendant delays guilty pleas in order to assess the strength of prosecution evidence and the prospects of conviction or acquittal. The former would be entitled to full credit, the latter would not. [9-10]

In disposing of these appeals, the Court focused on the meaning of 'the first stage of the proceedings' for the purposes of attracting full credit under the guidelines. The Court noted that in respect of both 'either-way' offences (by means of s.17A of the Magistrates' Court Act 1980) and 'indictable-only' offences (by means of rule 9.7(5) of the Criminal Procedure Rules), it was a necessary part of the initial procedure at the Magistrates' Court that the defendant was asked whether he would, or intended to, plead guilty. Furthermore, the Court observed that the current 'Better Case Management' form [the "BCM form"] contains a box recording the defendant's intention as to plea, and noted that completion of that form by the parties was obligatory. [11-16]

The Court reviewed the relevant recent case law which made it clear that any indication of a guilty plea had to be 'unequivocal' in order to attract the relevant level of credit. In particular, the Court considered [17-25]:

(a) The case of R v Hodgin [2020] EWCA Crim 1388 where it was held that even in respect of indictable offences, the 'first stage' of the proceedings for indicating a guilty plea was the Magistrates' Court. The Court of Appeal here endorsed those principles by observing that an indication of a 'likely' or 'probable' plea, or any other qualification about the plea, should in future be avoided.

(b) The case of R v Yasin [2019] EWCA Crim 1729, where it was held that it was for the parties and their representatives, not the court, to complete the BCM form. Where a defendant was not asked to indicate a plea, but did not complete a BCM form, a deduction of one-third would not be available if a guilty plea was later entered at the PTPH.

As such, the Court held that, in normal circumstances, only unequivocal indications of guilty at the Magistrates' Court stage in respect of either-way or indictable-only offences would attract one-third credit. The Court was of the view that there would be very few occasions where a defendant who had not indicated a plea at the first stage (or did not come within one of the exceptions in the guidelines) would obtain more than a one-quarter reduction. It followed that even unequivocal indications of guilt entered very shortly after Magistrates' Court (for example by letter) would not obtain the maximum discount. [26-27] Additionally, it would not normally be correct for any Crown Court judge to be able to order that 'full credit' (in the sense of one-third) be preserved as a result of any adjournment of arraignment. [31]

Matters such as early admissions of elements of the offence, co-operation with the police investigation, or being the first of a number of defendants to 'break ranks' and plead guilty, were all capable in the Court's view of being taken into account as separate mitigating factors, but should not affect the amount of credit formally given for a guilty plea under the guideline. [29-30]

What was the result of the specific cases under consideration?

(1) Isuf and Eduart Plaku were brothers charged with one count of conspiring to supply a substantial quantity (43kg) of cocaine to another. No indication of guilt was made at the Magistrates' Court when the case was sent to the Crown Court, and no BCM form appeared to have been completed on their behalf at that stage. At an adjourned PTPH, both brothers pleaded guilty, and were sentenced to imprisonment to 15 years and 15 years 9 months, taking account of a credit figure of 25% for their pleas of guilty entered at that stage. [33-37]

Result: Given Yasin, the sentencing judge was correct to withhold full credit. [39-41]

(2) Simon Bourdon was charged with stalking causing serious alarm or distress and other related offences. At the Magistrates' Court, a BCM form was completed stating 'G pleas anticipated to most of these charges at PTPH' on the basis that it was hoped that discussions with the prosecution might reduce the number of charges. At the PTPH, Mr Bourdon pleaded guilty to the offences listed above. He was sentenced to an extended determinate sentence of imprisonment for 8 years and other concurrent sentences, all taking into account a credit figure of 25% for the pleas of guilty. [43-51]

Result: The appellant had chosen 'to keep his options open' at the Magistrates' Court, in the hope of a better result, and as such the sentencing judge was correct to withhold full credit. [52-56]

(3) Benjamin Smith was charged with two offences of aggravated burglary, an offence of false imprisonment and an offence of unlawful wounding relating to an incident where he broke into the home of a couple in their seventies, tied them up and assaulted one of them with a hammer. The BCM form completed at the Magistrates' Court stated, 'potential indicated plea' and 'possible basis of plea to be mooted'. It appeared that at the Magistrates' Court, the defence indicated that Mr Smith was likely to plead guilty but did not accept some of the matters alleged. At the PTPH he pleaded guilty to all counts on the indictment and did not put forward a basis of plea. He was sentenced to an extended determinate sentence of imprisonment for 13 years and other concurrent sentences, all taking into account a credit figure of 33% for the pleas of guilty. This was on the basis that counsel for the parties agreed that the defendant had entered those pleas at the first reasonable opportunity, given the indictable-only nature of the offences. [59-69]

Result: Given Hodgin, the judge was led into error in allowing full credit and only 25% credit should have been given. However, as conceded on behalf of the Attorney General, that error alone did not make the sentence passed unduly lenient. [70-75]

What is the major impact of this case likely to be?

The Court of Appeal has re-affirmed, and, if anything, enhanced the importance of defendants, where possible, entering an unequivocable plea of guilty at the Magistrates' Court. Phrases such as 'likely guilty plea' or 'probable guilty plea' are now effectively worthless for the purposes of preserving full credit, and no practitioner should, in normal circumstances, use them. Furthermore, all practitioners must, in future, complete the BCM form, including an unequivocal indication of guilty pleas, to be sure of attracting the full one-third discount.

What problems may this present?

As anyone involved in representing defendants at the early stages of the criminal justice process knows, there can be significant difficulties in providing proper and full advice by the stage of the police interview or first appearance. The case against the individual may well be substantially unparticularised, with a significant risk of any allegations later growing in scale and scope. In very many cases, particularly publicly funded ones, those representing people at the police station or Magistrates' Court are the most junior in the legal system and therefore the least experienced.

The more serious a crime is, the greater the benefit of obtaining 33% credit rather than 25% will be (more than a year in respect of sentences of imprisonment of over 12.5 years). Equally however, the more likely it also is that the defendant will appear in court immediately after charge (and in custody), with few details as to the evidence against them, adding exponentially to the difficulties of advising them fairly. This judgment does not address or alleviate those issues.

Philip Stott is a sought-after junior at QEB Hollis Whiteman, with a broad criminal practice in both defence and prosecution work.

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RELEASE OF PRISONERS (ALTERATION OF RELEVANT PROPORTION OF SENTENCE) ORDER 2020

When sentencing defendants subject to the new, harsher regime governing early release, should judges reduce the overall term if a defendant is sentenced after the new provisions came into force due to a delay that is no fault of his own? In this article, Jo Sidhu QC (25 Bedford Row and No5 Chambers) reviews the key recent Court of Appeal judgment of R v Patel & Ors [2021] EWCA Crim 231, in which he acted.

The New Regime

On 1 April 2020, the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 (*'2020 Order'*) came into force. The principal effect of this Order is on the early release provisions as they relate to offenders convicted of certain violent or sexual offences, and who are sentenced to a fixed term custodial sentence on or after 1 April 2020 of at least 7 years. The Order applies to sentences passed on or after that date

irrespective of the date of the commission of the offence or the date of conviction. No transitional or saving provisions accompanied the new Order.

Prior to the 2020 Order coming into force, offenders subject to a fixed term of imprisonment were entitled to be released at the half way point. As a result of the Order, certain defendants must now serve two thirds of their custodial term before such an entitlement arises. The increase in the minimum threshold plainly marks a more severe approach taken by the government to serious offenders.

The purported justification for the new provisions was to ensure that the time spent in custody by those described as dangerous and serious offenders *"reflects the severity of their crimes and takes account of the risk they pose to the public."* (2020 Order, Explanatory Memorandum).

The Appeal

13 appellants sought to challenge their respective sentences. One of them was Levar Thomas, who I had also represented at trial.

Thomas had faced charges of conspiracy to rob, murder and an alternative charge of manslaughter. On 5 March 2020, he (and two of his co-defendants) were acquitted of murder but convicted of manslaughter and conspiracy to rob. The sentencing hearing was fixed for 20 March. However, between the date of conviction and the scheduled date for the sentence, both leading and junior prosecuting counsel had to isolate themselves due to experiencing Covid symptoms. As a result, shortly before 20 March the court adjourned the date for sentence administratively to 23 April. No consideration was given to arranging for prosecuting counsel to appear via a link. Nor was any opportunity given to the defence to object to the postponement. On the adjourned date, the appellant received a term of imprisonment of 11 years and 3 months. Since the new Order had come into force 3 weeks prior to the adjourned sentence date the appellant, through no fault of his own, was now obliged to serve an additional substantial period in custody before he would be entitled to be released.

Leave was granted to appeal for Thomas on the following ground:

The Appellant suffered a substantial unfairness caused by the postponement of his sentence hearing (made at the request of the prosecution) because, in consequence of the delay, he ceased to be entitled to release after serving one half of his sentence. Instead, due to the coming into force of the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019 on 1st April 2020, he would only be entitled to release after serving two thirds of his sentence. The difference between one half and two thirds in the Appellant's case was 2 years, 2 months and 2 weeks. The learned Judge wrongly declined to reduce the otherwise proportionate length of imprisonment imposed so as to remedy the unfairness caused to the Appellant.

The Appellant's case was joined with a number of other appeals where similar complaint had been made that sentencing had been adjourned until after 1 April 2020, mostly for reasons related to delays caused by the Covid-19 pandemic, and in all cases in circumstances where it could not be said that any of the appellants had been responsible for the postponement. As such, all the appellants had suffered unfairness. All argued, therefore, that the sentencing judge in their respective cases should have discounted the term of imprisonment (otherwise justified) to reflect the additional time that would have to be served consequent to the Order coming into force. (para 29 of Judgment)

Key Submissions on Appeal

a. While it was accepted that, as a *general* principle, the release regime was not a matter for the sentencing judge, that principle was neither universal nor inflexible. Whether the principle applied depended on the specific circumstances of each case. Judges are entitled to take an exceptional course where such a course would avoid a serious injustice.

b. The Appellants had a legitimate expectation that each would be sentenced in accordance with the sentencing regime applicable at the time of both conviction and the original sentence hearing date. In such circumstances, a sentencing judge retained a residual discretion to correct an injustice visited upon a defendant by exercising his inherent powers to adjust the sentence, and thereby to eliminate the injustice caused.

c. Moderating a sentence to reflect an unusual or unprecedented situation had previously been justified in a range of other circumstances. For example, in consequence of the effects of the Covid-19 crisis in the prison system (R v Manning) or where a defendant had assisted the prosecution as a police informant.

d. The test that should be applied was therefore four fold (para 32):

   i. Has an unfairness arisen in consequence of a delayed sentence?

   ii. Has the unfairness arisen in consequence of a legitimate expectation that has not been met?

iii. Does a judge have the authority to remedy that failure to meet the legitimate expectation?

iv. Is there a precedent for judges to remedy such a frustrated legitimate expectation?

It was submitted that all four questions should be answered in the affirmative.

Court of Appeal's Decision

In rejecting all of the appeals, the Court gave the following reasons:

1. As a general principle, *"It is no part of the sentencing court's function to set the point at which the offender will be released, or to calculate the sentence by reference to the date at which the offender will be released. The date at which the offender is entitled to release is a consequence of the sentence that is imposed, rather than an inherent part of the sentence. The determination of the release date is undertaken administratively in accordance with the statutory regime and (where appropriate) any decision of the Parole Board."* (para 8)
2. *"It follows that the sentencing court's role is limited to determining the sentence and . . . The judicial function of determining the length of sentence must be undertaken by reference to the statutory provisions and guidance without regard to the practical effect of the early release provisions".* (para 9)
3. *"Nothing in the legislative framework, or the definitive guidelines of the Sentencing Council, requires, or explicitly permits, a sentencing court to take account of the impact of the early release provisions on these decisions."* (para 22)
4. *"It would defeat the statutory purpose of the early release provisions if their effect were ordinarily to be taken into account when passing sentence".* (para 23)
5. *"Accordingly, the courts have consistently made it clear that a sentencing judge should not ordinarily take account of early release provisions when deciding the length of a determinate custodial sentence".* (para 24)
6. A harsher early release regime did not amount to a mitigating factor for the purposes of sentencing. (para 42)
7. The Court of Appeal cited a number of authorities in support of the above-stated principles, including:
   - *R v Bright* [2008] EWCA Crim 462 [2008] 2 Cr App R (S) 102
   - *R v Giga* [2008] EWCA Crim 703 [2008] 2 Cr App R (S) 112
   - *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) [2020]
8. In the view of the Court, *"This represents an extensive, consistent and binding body of authority, rooted in principle, that has been considered and endorsed by the Supreme Court. It is based on the different roles played by the judiciary and the executive."* (para 25).
9. Notwithstanding these authorities, the Court acknowledged that in *R v Round [2009] EWCA Crim 2667 [2010] 2 Cr App R (S) 45*, while restating the general principle that *"ordinarily"* judges should ignore release provisions when sentencing, Hughes LJ observed that *"there may be particular cases in which an unusual course is justified."* (para 24(3), para 26). Further, that *"nothing in the authorities explicitly ruled out the possibility that there may be exceptional cases where it is appropriate to take account of the impact of early release provisions."* (para 37).

So When is a Case Exceptional?

The common issue for the thirteen appeals argued before the Court was not a dispute about the principles set out in the authorities, but *"whether exceptions to that general principle should be made in these particular cases."* (para 27)

The Court, rather unhelpfully, was unwilling to define the ambit of any exceptionality save to observe:

"If there is any exception to the principle that Hughes LJ identified in Round then the exception must, itself, be rooted in principle and consistent with the legislative framework that governs sentencing. The mere fact that the sentencing process has been delayed is not sufficient, as the authorities show. Nor is it sufficient that the process has been delayed for reasons that are beyond the control of the individual appellant, as Francis shows. Nor is it sufficient that the reason for the delay was unforeseen or unforeseeable." (para 43)

In relation to the specific appeal on behalf of Levar Thomas, the Court rejected the proposition that *"the fact that the offender has been given an expectation that he will be sentenced before 1 April 2020, or otherwise sentenced in a way that defeats the change introduced by the 2020 Order, amounts to a justification for departing from the principle identified in Round if, in the event, sentencing takes place after 1 April 2020 . . there is no "legitimate expectation" because any expectation engendered is contrary to the legislative framework and the principle identified in Round. This is not capable of founding an enforceable right based on the principle of legitimate expectation"* (para 44)

Conclusion

The decision in these appeals was premised on an explicit recognition that each appellant would face a longer period of incarceration in consequence of a delay in their sentencing hearing through no fault of his own. Although the Court was not prepared to state so expressly, it must therefore have been recognised that each had suffered

unfairness, if not an injustice. Yet the Court took the view that, in line with previous authority, nothing could be done or should be done to correct that unfairness. In essence, the rationale behind the decision was that to interfere with the sentences would elide the constitutional separation of powers between the judiciary, the legislature and the executive. However, in the case of *R v Round* (ante) Hughes LJ had left the door open for the courts to do just that: to step in where the unusual and extraordinary circumstances of a case justified, if not demanded, the intervention of a judge to prevent a legitimate sentencing regime from inflicting illegitimate consequences upon a blameless defendant. At the very least, the Court of Appeal in this judgment could have offered some clarification on what considerations or circumstances might permit a departure from the general principle. Instead, it merely provided a definition of exceptionality based on what it is not rather than what it might be. The Court was clear that any exception to the general principle must itself be rooted in principle. However, following this decision, it is doubtful that anyone is any wiser as to what exactly that principle might be.

Jo Sidhu QC is a leading criminal silk with particular expertise in terrorism cases, homicides, and conspiracies involving frauds, robberies and drugs trafficking. As of 1st September 2021, he is Chair of the Criminal Bar Association.

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BEING ACCUSED OF SEXUAL MISCONDUCT AS A CHILD

As a criminal defence solicitor specialising in defending allegations of sexual misconduct and representing children, Sandra Paul of Kingsley Napley describes the perfect storm that has erupted since the launch of Everyone's Invited and how the fallout has made her privy to some of the saddest and most distraught children she has ever advised.

The testimonies posted on that website, supposedly on an anonymous basis, do not necessarily stay that way. Behind the scenes in a process of identification enabled by DM (direct messages), social media and school rumour, those accused – children let's remember - are identified and then vilified. They are ostracised, either deliberately by their previously "solid besties" or by the fact they choose to isolate themselves so that their friends are not tainted by association with them. They face a harrowing time for allegations as yet untested.

I have seen boys as young as 14 doxxed online buckling under the weight of other children and unknown adults threatening to "come for you", "rape you" (so you know how it feels), telling you that you are a "worthless piece of s***".

I have seen boys subjected to an investigation process by their school which is not always fair, even handed and robust in the way it is conducted.

I have seen boys face questioning by the police for allegations that normally would not merit their attention but for the fact that schools in their panic, or need to manage their reputation, report issues directly or to their LADO who in turn involve the police.

Much has been written recently about the rape culture in schools and amongst young people. But not all of the incidents on Everyone's Invited concern such. Some are more akin to the type of natural experimentation behaviour that we all got up to as youngsters – from determined flirting to drunken fondling. Granted the more modern problem of sexting is evident there too.

Yet a common thread in the situations my clients find themselves under scrutiny for is that those accused didn't realise what they were doing was unwanted, thought the feeling was mutual or believed that the encounters were consensual. They are often surprised, shocked and saddened to hear experiences cast in a vastly different light.

I have received distressing phone calls from parents who had deliberately raised feminist sons and are equally shocked by the accounts as portrayed. Horrifying also is the prospect their son may be cut off from his studies whilst an investigation takes place and even have to leave his school, regardless of the outcome of that review process. For often, even if the allegations against him come to nothing, the boy's position at his school becomes untenable and that school is no longer a safe environment for him to learn, thrive and grow.

Ofsted recently urged schools to do more to create a zero tolerance culture regarding sexual harassment which makes me fear that we are going to see more of the type of cases described above. Yet the Ofsted report also found that children felt that the relationships, sex and health education (RSHE) they received didn't give them the information and advice they needed to navigate the reality of their lives and addressing this was a central recommendation.

With this I concur. But it is not only schools that bear this responsibility. Educating children about sex and consent is something we all need to take seriously, engage with and recognise the importance of.

Hand on heart, how many of us as parents have talked to our children about agency, choice or consent; how many of us as adults understand what it looks like in practice? We have a choice now about how we respond. We can choose to discuss and educate or we can condemn a whole generation of boys as rapists and sex pests. Those boys will as a consequence grow into broken men.

For the avoidance of doubt I absolutely encourage those children who feel that they have been wronged, treated badly or believe themselves to be the victims of crime to report this to their school and/or the police.

I hope that this results in an even handed and fair process that allows everybody to be heard; that the process takes place in a way that respects the rights and confidentiality of both parties at least until there is a determination by some competent person as to whether an offence has been committed and what is to be done about it.

But I also want them to tell their parents about it and be supported in working out what they would like to do about that experience. Involving the school and the police is not the only solution.

Some situations can be more effectively dealt with by alternative dispute resolution, words of advice and support, or even an apology.

I have spoken to several girls who raised issues over the last few months and the message from them is sometimes that they simply want the boy to know "it was not ok" and to "change their behaviour". They don't necessarily want to criminalise individuals or a cohort of young men either.

My fear is that this message is being lost in all the noise.

Sandra Paul is a partner in the criminal litigation department at Kingsley Napley. The majority of her work concerns defending allegations of sexual misconduct, and she has a particular passion and aptitude for working with children and young adults.

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BRUCE REID

REGINA V PLAKU AND OTHERS – TIME FOR A REASONED CRITIQUE?

This important decision, which restates the need for a full bended-knee job to get 33% credit on sentence has been out now for a few months and deserves an evaluation.

It's rubbish.

That's it. Says it in a nutshell.

But, given that the editor wants a few more words to fill the back pages, I will expand.

The Court of Appeal are more intelligent than I am; after all, they have the wigs to prove it, but I despair when I see that intellect frittered away on a dodgy premise - Judgement of the Pharisees style - to make decisions like this. As we are in biblical mode, it's like the medieval theologians arguing if the Holy Trinity was 'Three in One' or 'One in Three' and sparking a war when they fell out.

Does it really matter whether I put 'likely plea of Guilty' or 'Guilty' on a BCM form? Where only a month later my client admits it at the Crown Court? Just what has been lost? It is still one hearing at the Crown Court for sentence. Not many dead.

I am no great fan of Sentencing Guidelines, most of my generation aren't – we don't like the **must follow** bit**.** There is a feeling that the Executive should be separated from the judicial decision-making and this is the opposite, but there is an argument that they at least provide a framework for that process.

My problem with it is when the tail wags the dog, when observance is more important than content, when administrative convenience trumps everything else and the idea that we have to speed things up at all costs, is so paramount that we all trip over.

Take R v Yasin referred to in the Plaku judgment. The defendant's representative did not complete the plea section of the BCM form and the court didn't ask him about it. He duly pleaded on the first occasion in the Crown Court – 25 % only – I doubt he'd ever read the Guideline. The advocate is to be criticised, fair enough, (there but for the grace of God…..) but do you seriously reduce credit because the defendant doesn't look over their brief's shoulder when the form is signed? Please...Please….

Their Lordships emphasise the Key Principles behind an early plea:

1/ Reduces the impact of crime on victims – Errr? Shoplifting from Tesco? Bladed articles? PWITS? Damage is certainly done to society but not to an individual.

2/ Saves victims and witnesses having to testify – they don't anyway; most pleas are entered long before trial and the rest crack on the day.

3/ Saves public time and money – again, errr, not much. The CPS don't charge unless they have got that evidence; the days of charge and cobble the evidence together later

are long gone. It might be true in fraud trials and affrays but not on the two-officer-and-a-civilian trial on a wet Wednesday or a three-strike burglar. CPS don't charge unless it's in the bag on a confession or CCTV'd. The sorry tales of a punter spending a year on RUI or BTR before a charge of supply where there are 20 wraps, 20 dodgy WhatsApps and an unexplained bundle of notes, indicate that the fault of delay might perhaps lie elsewhere……. "Just keep the 'victims' informed, chaps, don't bother with the suspect."

Neither the police nor the CPS are resourced enough to do their jobs properly so kicking that stuff into touch becomes the only way of getting a social life.

The earlier the plea the greater the benefit?

I beg to differ.

Given that their Lordships have not been to Croydon Magistrates in a while, let me remind them of their days of pupillage.

My clients include the anxious, the clinically depressed, the PTSD'd, the schizophrenic and the bi-polar; sometimes they are all five. They will have spent 48 hours in custody in a noisy cell without the drugs - prescription or narcotic - that enable them to function 'normally'. Never mind the hangover or the clucking of withdrawal. The calm deliberation of the Court Of Appeal is sadly lacking at such moments.

Think about it Your Lordships. Think about those decisions in our law-abiding lives that have decisive long term repercussions. Like: "Do I separate from my long-term partner when I am suddenly smitten with someone else? Is it a passing fancy?"

Like: "Is it the best decision to move out of London to get into a better school catchment area? Or do I send the kids to the local comprehensive; risk them being bullied and getting into trouble and/or pregnant by the local louts?"

Like: "Do I put my beloved but increasingly befuddled mother in a care home?"

Those decisions take weeks, consultation with colleagues, partners, pastors etc. and a lot of heart-searching. They are not always right but at least we have no excuse when we get them wrong.

We don't make them in the fifteen minutes allowed to a harassed Duty Solicitor when we have been sleepless in a cell all night.

The prospects are fraught with potential failure when they are made in that fashion. I remind a client of the discount for an early plea, outlining the pertinent Guideline and advising them that there is an entry point of custody, never mind the litany of disaster revealed by their PNC and the fact that some of that record is going to end up in front of the jury.

Their considered reply?

"Will I get bail?"

I suppose I could go over it again, but there are two more clones of this person to see this morning. Three, if that long shot on bail turns up, and the Duty Solicitor will be fretting that she can't get started on her cases because I am occupying 50% of the interview rooms and her DJ is becoming peevish.

So I don't. Not for £50 a case, I don't. Sorry Your Lordships, got to make things efficient, got to finish the caseload. Besides, now **my** DJ is getting angsty…..

Their Lordships bemoan the Defendant who knows he is guilty and yet wants to test the evidence: such miscreants cannot expect the full discount.

They know if they are guilty? Most Defendants confuse provocation with self-defence, take an unrealistic assessment of the strength of forensic evidence (having seen too many "CSI" programmes) and are often too intoxicated at the time of the offence to recall the details anyway.

So they ask *me*.

I tell them that, as usual, the IDPC is sketchy and on the face of it the CPS might have problems but it may well be all right on the night….Bit inexact…..Sorry.

It would help if I had full disclosure. Body worn footage is usually convincing, be nice to have it, when my client sees it when they're not so stressed, then they will often reconsider. How do I know if the messages in that mobile download are incriminating or possibly explicable…….

Am I seriously going to say "They may not be able to prove it but you should plead anyway"? Just see how many of my clients call me again after that advice.

Mandatory sentences don't help; more executive nonsense. You try telling that to a frightened college kid who has chosen a girlfriend in the wrong postcode. He's off for a date; hopefully going to deter the neighbourhood bullies with a blade, and I tell him that good character or not he is up for six months and it's still four months on a plea. He can hear those gates clanging. You would be surprised at the number of defences that get put up.

Guideline sentences are the same problem – take 4½ years for street dealing. Most defendants are bang to rights if the CPS manage to charge at all. The only defence that is viable in those circumstances is duress/modern slavery. I am obliged to ask the defendant this in detail, because if I don't, I get an equivocal plea later and an earful from the Crown Court Judge. Not to mention a negligence claim and the SRA on my back. Again, this has the opposite effect to that being desired, producing a large number of thugs claiming they are the ones in fear for their lives.

Besides, do the maths: entry point of 54 months – discount of 33% = 36 months. Leave it till the PTPH and the discount is 25% = 40.5 months. 4½ months difference. When you factor in early release/HDC etc. there's not much in it and there's a better chance of agreeing some more favourable factors to shift it down in the 'significant role' section. If I get him bail the chances of a realistic plea later are literally zilch.

My colleague in the police station has a similar dilemma; advise a full admission to the fact of dealing and then a NRM reference? In the knowledge that very few of those defences are established? Sure, but the credit goes down when it doesn't work, because the punter has pleaded not guilty. Back to those spurious defences again.

Going back to court, it makes matters worse that you have to accept the CPS evidence verbatim at the first hearing to get that 33%. In the magistrates' court, the CPS will not agree any significant difference from their review instructions. No horse trading till the PTPH. If I could do that sooner, I might be able to reduce the entry point to the position where my client might bend that knee, but my CPS colleague is forbidden to negotiate with me.

The Defence advocate in Bourdon (jointly decided with Plaku's appeal) had hoped to bargain a few charges/factors down at the Crown Court and so did not give an unequivocal indication of 'Guilty'. Result? 25% not 33%. "Agree the lot or I reduce it by 8% off, can't do better than that." Sounds like Sports Direct's wage offer.

Now I get as fed up as anyone with those who waste my taxes on a trial when they are bang to rights and I can see the virtue of a discount framework being necessary; but the pedantic insistence on ritual and box-ticking that we are obliged to observe since Plaku is counterproductive. You don't have sufficient information to make a reasoned decision and then give proper advice, and besides your client is not in a position to digest it anyway. You end up with people spending more time in custody just because they don't fit the box or have enough time to reach a mature decision.

Never mind that bleeding heart liberal moan about justice; this wastes money. Sentences will be higher than they should be.

Can't we leave highly trained Judges to make their own reasoned decision? Exercise their discretion? Fine tuning to fit the nuanced circumstances of the individual case?

The executive says "no". It's like talking to a bank helpline.

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