

## Mitigating Covid – 19:

The coronavirus pandemic (“Covid-19”) has significantly affected people across the world, in a seemingly indiscriminate fashion, with the devastating impact well publicised. However, one area that has not featured heavily in the mainstream media, is the impact that Covid -19 may have had on the sentencing exercise for Defendants. To that end, as the nation remains in lockdown, are the current conditions in the UK prison system a factor which should be considered by a tribunal when considering the appropriate sentence to impose? This article will outline and discuss the recent decision of the Court of Appeal in the *R v Manning* [2020] EWCA Crim 592 (“Manning”) and seek to answer that question.

### The prison environment:

It is important to consider the context in which the Court of Appeal considered the case of Manning in relation to the UK prison environment.

The UK prison environment has been described as an epicentre for infectious diseases like Covid – 19 due to higher levels of risk factors for infections<sup>1</sup>. As a result, prisons create high risk settings for large outbreaks of Covid – 19, because of the close contact conditions and overcrowding (on 17<sup>th</sup> April 2020 the prison population in the UK totalled 81,500<sup>2</sup>), alongside housing individuals in clinically vulnerable groups<sup>3</sup>.

Strategies were put in place to reduce the total population inside UK prisons (which is currently operating at 107% capacity<sup>4</sup>), but this has not been successful. One scheme included the release of

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<sup>1</sup> Briefing paper: Prison population management considerations in response to COVID-19. Prepared by: Dr. Éamonn O’Moore, National Lead for Health & Justice and Director UK Collaborating Centre, WHO Health in Prisons Programme (European Region) Date: Tuesday, March 24, 2020.

<sup>2</sup> Ministry of Justice (2020) Population and Capacity Briefing for Friday 17 April 2020, London: Ministry of Justice <https://www.gov.uk/government/statistics/prison-population-figures-2020>

<sup>3</sup> Briefing paper: Prison population management considerations in response to COVID-19. Prepared by: Dr. Éamonn O’Moore, National Lead for Health & Justice and Director UK Collaborating Centre, WHO Health in Prisons Programme (European Region) Date: Tuesday, March 24, 2020.

<sup>4</sup> <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930984-3>

prisoners<sup>5</sup>. However, on 14<sup>th</sup> April 2020 it was confirmed that only 4 prisoners had been released under this strategy<sup>6</sup>. Given these statistics, it seems that prisons are still as described; an epicentre for Covid-19. Prisoners are still exposed to the disease through no fault of their own, with little protection and in environments ill equipped to deal with the current pandemic<sup>7</sup>.

The number of deaths within UK prisons is unclear as reporting on the issue has been rather limited, but, it can be argued that offenders are being put at a very high risk of contracting Covid-19. Considering the crowded, unsanitary conditions faced by many prisoners, is this something that the Court should take into account during sentencing?

#### The case of Manning:

On 30<sup>th</sup> April 2020, the Court of Appeal considered the sentence imposed upon Mr. Manning who had pleaded guilty to four counts of sexual activity with a child, contrary to Section 9(1) of the Sexual Offences Act 2003, and to one count of causing or inciting a child to engage in sexual activity, contrary to Section 10(1) of the same Act.

The facts in short were as follows<sup>8</sup>:

- i. Mr. Manning and the Complainant had met through darts. Although she was a teenager, the Complainant played for an adult darts team due to her high level of skill at the sport. It was at a match for their respective teams that they met.
- ii. On her 15<sup>th</sup> Birthday Mr. Manning asked the Complainant out on a date.
- iii. On the first occasion that they met, they kissed four or five times.

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<sup>5</sup> Briefing paper: Prison population management considerations in response to COVID-19. Prepared by: Dr. Éamonn O'Moore, National Lead for Health & Justice and Director UK Collaborating Centre, WHO Health in Prisons Programme (European Region) Date: Tuesday, March 24, 2020.

<sup>6</sup><https://committees.parliament.uk/work/254/coronavirus-covid19-the-impact-on-prison-probation-and-court-systems/publications/>

<sup>7</sup> <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930984-3>

<sup>8</sup> R v Manning [2020] EWCA Crim 592 paragraphs 12 - 21

- iv. On the second occasion, they met on an industrial estate, where they kissed again, but this time Mr. Manning placed his hand on the Complainant's breast over her clothing.
- v. By the time of their third meeting, Mr. Manning had sent messages to the Complainant, which referred to the possibility of penetrative sex. At the third meeting, Mr. Manning placed the Complainant's hand onto his erect penis over his clothing. In the evening Mr. Manning requested pictures of the Complainant in a bikini which she sent.
- vi. On the fourth occasion, again the pair kissed, and Mr. Manning placed her hand onto his erect penis through his trousers.
- vii. The final count related to the messages sent by Mr. Manning to the Complainant. A basis of plea was accepted in relation to this which stated that there was an intention for sexual activity, not in the immediate future, but some time before the Complainant's 16<sup>th</sup> birthday.

The Sentencing judge when passing sentence, stated that this offending arose "from what was initially a virtuous friendship. It should have stayed that way<sup>9</sup>", and that there was "one person to blame and one person only, and that is you. You took advantage of a 15 year old girl<sup>10</sup>".

In passing sentence, the sentencing judge remarked that had there been a trial, the starting point would have been one of 15 months, but this was reduced by 20% for entering a guilty plea at the PTPH to a term of 12 months. This was suspended for a period of 24 months.

In response to this, the case was referred to the Court of Appeal by the Attorney General, on the grounds that the sentence was unduly lenient in the circumstances. In essence the submissions made were that the sentence arrived at by the judge was too short, should have been longer than two years, and so the question of suspending any sentence should not have arisen<sup>11</sup>.

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<sup>9</sup> *Ibid.* at para 28

<sup>10</sup> *Ibid.* at para 28

<sup>11</sup> *Ibid.* at para 11

In considering these submissions, the Court of Appeal agreed that the starting point of 15 months was unduly lenient, and accordingly increased the starting point to one of 30 months imprisonment<sup>12</sup>. With the appropriate credit, this brought the overall sentence down to 24 months, which falls at the very top of the range at which a sentence can be suspended.

The Court of appeal concluded that the sentence could indeed be suspended due to the prospect of rehabilitation, and indeed the fact that Mr. Manning had engaged well with probation. However, one other factor which influenced the decision of the Court of Appeal was the current Covid-19 pandemic, which they stated, “would inhibit his movements to some extent anyway<sup>13</sup>”.

Of note, is the position taken by the court in relation to Covid-19 and prison sentences. In paragraph 41 of the judgement, the Court stated:

*We would mention one other factor of relevance. 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...*

*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.*

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<sup>12</sup> *Ibid.* at para 36

<sup>13</sup> *Ibid.* at para 40

### Potential affect of the decision in “Manning”:

Notwithstanding the fact that in paragraph 41 the Court of Appeal were addressing suspended sentences directly, the principle in relation to the consideration of the impact of a custodial sentence during the Covid – 19 pandemic may represent a significant change in approach to all sentences imposed during this crisis.

There is no avoiding the fact that a custodial sentence during this current crisis, as stated by the Court, will have a heavier impact upon an individual than it would have before Covid – 19 developed into the pandemic that it is today. The conditions in prison during this time are worse than before, due to the measures being put in place as stated by the Court of Appeal to mitigate against the high risk posed to prisoners.

This may see a softer approach taken by judges when passing sentence, but it is a proper and just approach.

The question this decision presents is as follows, and is in two stages:

- i. Does Covid – 19 now add an extra limb to the considerations for sentencing judges in relation to suspended sentences?
- ii. Is Covid – 19 now something that a sentencing judge should take into account when deciding length of sentence if it is one which is outside of the range that can be suspended?

### Suspended sentences:

Does the decision in Manning now mean that offenders on the cusp of a suspended sentence limit are more likely to avoid a custodial sentence during Covid – 19? The wording in the judgement of the Court of Appeal points towards this being the case.

A judge must currently consider three issues when deciding on whether or not a sentence can be suspended

- i. Is there a realistic prospect of rehabilitation?
- ii. Is there a risk to members of the public?
- iii. Will there be an impact on others? i.e. dependants etc

These three issues are usually addressed in a pre-sentence report which is designed to assist a judge in arriving at answer to these three questions. This in most cases is a fine balancing act. However, post Manning the scales may be tipped in favour of the Defendant, because those passing sentence are required to consider that the sentence will have a significantly heavier impact upon an individual during Covid – 19. However that impact may have a minimal effect on sentence for a defendant who has willingly offended during the currency of the Covid-19 pandemic and even more so if committing a corona-related offence.

#### Other sentences outside of the 2-year range:

The same reasoning in respect to the decision as to whether to suspend or not, may apply in terms of the length of custodial sentences in general that are passed during the Covid – 19 pandemic. A Court passing a custodial sentence, must now after Manning consider the fact that a custodial sentence will have a more damaging impact upon a Defendant than would usually be the case. As a result, we may see judges reducing the length of custodial sentences imposed to reflect the poor conditions and high risk posed to those in prison at this time.

#### Conclusion:

So should all advocated mitigating on behalf of Defendants now be referring a sentencing Court to Manning for all offences where the custodial threshold is passed? The answer must be in the view of the author yes. The Court of Appeal have enabled those passing sentences to make allowances for Covid – 19 if they see fit. It has also given sentencing judges a way to avoid sending a Defendant to

prison, which certainly allays the fears of those in control of the prison service in relation to overcrowding. It has also given those representing Defendants an additional line of argument when trying to achieve the best possible result for their client.

Far from being a soft approach, in this current pandemic it is a necessary approach and one that shows the Court properly adapting to the current crisis.