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Sentencing: Covid Discounts on the wane?

By Fahrid Chishty – June 2021

It is a cardinal principle of the sentencing regime in this jurisdiction that custodial sentences should only be imposed on offenders where otherwise unavoidable.[1] When a sentencing court determines that a custodial term is otherwise unavoidable, statute provides that the sentence must be kept as short as possible and commensurate with the seriousness of the offence.[2] To draw on the dicta of Lord Woolf CJ in *R v Kefford [2002] 2 Cr App R (S) 495*, the message is "imprisonment only when necessary and for no longer than necessary."[3]

When determining whether to impose a custodial sentence and the length of any such sentence, a sentencing court should have regard to the likely impact a custodial term will have on offenders in light of their particular circumstances. This makes intuitive sense: offenders come in all shapes and sizes and will inevitably experience different levels of hardship or onerousness in serving the same sentence. Consider the example of an elderly person in poor physical and mental health - he or she would obviously find a three-year custodial sentence more onerous than a twenty-something year-old with no such secondary concerns.

This principle was reappraised and given fresh judicial treatment during the first wave of the Covid-19 pandemic in England and Wales. The leading authority is, of course, the Court of Appeal decision in *R v Manning [2020] EWCA Crim 592*. That case concerned an appeal brought by the Solicitor-General against a sentence imposed by the Crown Court at Bristol on a Defendant for offences of sexual activity with a child. In his dicta at paragraphs [41]-[42], the Lord Chief

[1] See the Imposition of Community and Custodial Sentences Guideline, Sentencing Council, 1st February 2017
[2] See Section 153(2) Criminal Justice Act 2003
[3] See [19]

Justice briefly addressed the application of sentencing principles during the pandemic. In essence, he confirmed that prison conditions during the pandemic – in particular, the requirement to stay in one's cell for 23 hours a day and the cancellation of family visits - were a factor that sentencing courts could, and should, take into account when passing sentence. This factor may be relevant to the question whether to suspend a custodial term or - if the custody threshold has been passed - arguably how long the term should be.

Manning came as a welcome development – not just to criminal justice practitioners, but also to Defendants and their families at a time when Covid-19 was rapidly spreading in England and Wales and vaccines were not yet on the horizon. Naturally, most offenders facing or serving custodial terms would tend to find serving their sentence more onerous in the midst of a pandemic than in normal conditions. It is also, of course, relevant that social distancing is more challenging within a prison setting; and epidemiological studies have shown that Covid-related fatalities were higher amongst prison inmates than the general population during the period March 2020-April 2021.[4] As such, *Manning* provided defence lawyers with a strong, principled basis for applying for reduced or suspended custodial sentences during the pandemic in cases where the threshold was deemed to have been passed.

The Court of Appeal applied the same reasoning in *R v Jones [2020] EWCA Crim 764*, which crystallised the concept of "Covid Reductions". The Appellant in that case appealed a custodial sentence that was handed down to him just six days before the first national lockdown. The tenor of his application was that the sentence was manifestly excessive and that the sentencing judge was unaware that "he would be detained in conditions which would involve a greater degree of privation than would be the case but for the lock-down."[5] The Court of Appeal saw the force in his argument and reduced his sentence from eight to six months, recognising that "in the present, exceptional circumstances it is appropriate to take the conditions under which the applicant is presently held in custody into account."[6]

[4] See "High COVID-19 death rates in prisons in England and Wales, and the need for early vaccination", 16th March 2021, Professor I. Briathwaite, available in the Lancet Respiratory Medicine Journal. See https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(21)00137-5/fulltext)
[5] See Green LJ at [15]
[6] See Green LJ at [19]

In a series of appeals since set in motion, the higher courts developed the contours of Covid reductions further. For instance, in *Korta-Haupt v Chief Constable of Essex [2020] EWCA Civ 892* the Court accepted that the impact of custodial sentences during the pandemic were "likely to be heavier due to conditions in detention, lack of visits, and anxiety",[7] but roundly rejected any suggestion that defendants were entitled to automatic discounts. Instead, the decision whether to grant a discount would depend entirely on the circumstances of each case.[8]

On the 26th May 2021 the Court of Appeal revisited *Manning* once more. This time, it not only fine-tuned the guidance it first gave, but clarified its scope of application. The instant case was *R v Dixon [2021] EWCA Crim 797.* This was a reference brought by the Solicitor General. The Court of Appeal deliberated whether, *inter alia*, an eighteen-months' reduction in sentence, given to a Defendant on the basis that he faced a twelve-month delay between entering his plea and being sentenced, and was made to endure harsh prison conditions in the interim period – spending 23 hours a day in his cell, without hot water, family visits, legal consultations, psychologist appointments or any purposeful activities to engage in - was excessive. The Court allowed the reference and ruled that it could not accept that "a reduction of 18 months was justified even in the unusual circumstances of this case." It held that "the combination of the delay and the prison conditions should have reduced the sentenced by no more than six months."[9]

The Court established that the *Manning* principles related primarily to offenders serving or facing shorter custodial sentences. The position in *Dixon* was, however, qualitatively different: the Defendant in that case had been sentenced to a lengthier custodial term and was, therefore, less susceptible to a Covid Discount as Thirlwall LJ enunciated at [64]:

> "the court's focus there [in Manning] was on much shorter sentences than those we are considering here. As a proportion of a much longer sentence

[7] See Flaux LJ at [30]
[8] See Flaux LJ at [30]
[9] See Thirlwall LJ at [66]

> 12 months of living in Covid conditions is less than it would be of a shorter sentence."[10]

Accordingly, the Court of Appeal has drawn a distinction between offenders serving lengthy sentences and those serving shorter sentences. The former are less eligible to receive Covid Discounts on the basis that, as compared with the latter, the amount of time spent enduring pandemic conditions in prison, relative to their overall total sentence, is likely to be lesser. This accords with an earlier decision, *R v Whittington [2020] EWCA Crim 1560*, which espoused a similar principle, but framed it in terms of the seriousness of the offending. Essentially, in this decision the Court established that offenders convicted of serious offences would find it more difficult to avail themselves of Covid Discounts:

> "The more serious the offence, and the longer the sentence, the less the pandemic can weigh in the balance of favour of a reduction unless there is clear, cogent and persuasive evidence of a disproportionately harsh impact on the prisoner."[11]

Dixon is a significant development in the law on Covid Discounts. In effect, the Court of Appeal has applied a check on the extension of *Manning* to offenders serving, or due to serve, lengthy custodial sentences. If a discount <u>is</u> to be made available to this category of offender, the inference is that it must be short in length; the longer the sentence, in effect, the lighter the pandemic-related hardship the offender is likely to face.

It seems clear that the intended beneficiaries of *Manning* reductions are defendants whose sentences can properly be suspended or for whom short custodial sentences can be justifiably imposed. This is helpful knowledge for defence lawyers to the extent that it clarifies when, and in what circumstances, a Covid reduction can realistically be sought. It is axiomatic that, post-*Dixon*, a Court will be considerably less likely to grant Covid-reductions to defendants convicted of the most serious offences or obliged to serve lengthy prison sentences by operation of statute and/or the provisions of the sentencing guidelines. As such, defence practitioners will be better placed to advise lay clients against mounting such an application absent exceptional circumstances

[10] Emphasis mine
[11] See [30]

- such as those set out in *Whittington*. However, it is also right to acknowledge that in cases where the term under consideration is lower the assistance from *Manning* is on the wane. Counsel and solicitors should be aware of the same when giving advice, as well as when making submissions or advancing mitigation before sentencing courts.

It is quite possible, however, that clinically extremely vulnerable or unvaccinated offenders may still seek to avail themselves to Covid Discounts. For example, an offender with a chronic respiratory illness sentenced to ten years' imprisonment may reasonably invoke the *Whittington* principle in support of a significant (or at least a non-nominal) discount on account of the heightened risk they face, although this is yet to be fully tested before the higher Courts.

Does the Covid Discounts phenomenon have a shelf-life, or is it here to stay? At the time of writing, close to two-thirds of the population in England and Wales have been partially or fully vaccinated against Covid-19, and we are provisionally headed for a full re-opening of society from June 21st. One would be forgiven for thinking, therefore, that Covid Discounts will become a relic of the past. Yet, we now face renewed risk from the hyper-transmissible "Delta Variant" and many virologists opine that Covid is here to stay and we must simply "learn to live with it". If that is the case, it is possible that one of two scenarios may unfold: either Covid Discounts will become a more permanent feature of the sentencing regime and perhaps more regularly dispensed in low-level cases or, as our systems and ways of working adapt, their utility will become obsolete. In any case, the road ahead is unclear, and practitioners will want to keep a close eye on how the jurisprudence of the higher courts further defines and refines the scope of Covid Discounts in the coming months.