

1 March 2019
Paper number:

Lead official:

1 March 2019
SC(19)MAR07 – Bladed article / offensive
weapon
Ruth Pope
0207 071 5781

1 ISSUE

1.1 The Justices' Clerks' Society (JCS) has asked for the Council's view on whether the appropriate custodial sentence (minimum term) for bladed article/ offensive weapons offences can be suspended (absent a finding of particular circumstances that would make it unjust to impose the minimum term).

2 RECOMMENDATION

2.1 That the Council should:

- Confirm that references to custodial sentences in guidelines include suspended sentences (where the conditions in section 189 of the Criminal Justice Act apply¹) and that for the avoidance of doubt this applies where the custodial sentence is an 'appropriate custodial sentence' defined as 'a sentence of imprisonment for a term of at least 6 months'.
- Agree to notify the JCS of this view.

3 CONSIDERATION

Offences subject to a six month minimum sentence

3.1 The six month minimum term applies to the following offences:

Threatening with an offensive weapon in a public place, Prevention of Crime Act 1953 (section 1A)

Threatening with an article with blade/point in a public place, Criminal Justice Act 1988 (section 139AA(1))

¹ (1) If a court passes a sentence of imprisonment or, in the case of a person aged at least 18 but under 21, a sentence of detention in a young offender institution for a term of least 14 days but not more than 2 years, it may make an order providing that the sentence of imprisonment or detention in a young offender institution is not to take effect unless—

(a) during a period specified in the order for the purposes of this paragraph ("the operational period") the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment), and
(b) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect.

Threatening with an article with blade/point or offensive weapon on school premises, Criminal Justice Act 1988 (section 139AA(1))

3.2 It also applies to the following offences where the offender has one or more previous convictions for a relevant offence:

Possession of an offensive weapon in a public place, Prevention of Crime Act 1953 (section 1(1))

Possession of an article with blade/point in a public place, Criminal Justice Act 1988 (section 139(1))

Possession of an offensive weapon on school premises, Criminal Justice Act 1988 (section 139A(2))

Possession of an article with blade/point on school premises, Criminal Justice Act 1988 (section 139A(1))

Question asked of the JCS

3.3 The JCS was asked the following question:

In relation to knife crime minimum sentences, does the court have the power to suspend the sentence applying the usual criteria for suspended sentences, or must the court find it to be unjust to impose the minimum term before it could suspend the sentence?

3.4 On an analysis of the legislation, the JCS initially reached the following conclusion:

Looking at one of the mandatory minimum term provisions in isolation, section 139 Criminal Justice Act 1988,² the legislation states that the court must impose an appropriate custodial sentence (with or without a fine) unless the court is of the opinion that there are particular circumstances which relate to the offence, to the previous offence or to the offender, and would make it unjust to do so in all the circumstances.³ An appropriate custodial sentence means, in the case of a person aged 18 or over when convicted, a sentence of imprisonment for a term of at least 6 months; and in the case of a person who is aged at least 16 but under 18 when convicted, a detention and training order of at least 4 months.⁴

Turning then to section 189 Criminal Justice Act 2003, the legislation states that a suspended sentence (which has not been activated) is to be treated as a sentence of imprisonment for the purposes of all enactments and instruments.⁵

² Offence of having article with blade or point in public place

³ Section 139 (6B) Criminal Justice Act 1988

⁴ Section 139 (6C) Criminal Justice Act 1988

⁵ Subject to any provision to the contrary, section 189 (6) Criminal Justice Act 2003

We therefore take the view that a 6 month suspended sentence⁶ imposed on an adult does meet the criteria of being an “appropriate custodial sentence.” The court does not have to be persuaded of factors which would make the minimum sentence unjust before deciding whether to suspend.

R v Whyte

3.5 The JCS then became aware of the case of *Whyte* [2018] EWCA Crim 2437 (attached as Annex A) which cast doubt on this conclusion. The two Judge court stated:

10. The first matter we would observe is that due to his antecedents the appellant was subject to the minimum sentencing provisions of section 139(6A) to (6G) of the Criminal Justice Act 1988, such that in the absence of circumstances relating either to the previous offences, the present offence or the offender, which would make it unjust to impose the minimum sentence, the court was obliged to impose a sentence of 6 months' imprisonment.

11. Although section 189 of the Criminal Justice Act 2015 empowers the court to suspend a sentence of imprisonment, we consider that the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of immediate imprisonment. Furthermore, in the present case, we do not consider there is anything relating to the previous offences or the present one which would make it unjust to impose the minimum term.

3.6 It does not appear that the court in *Whyte* heard detailed argument on the question of whether it was permissible to suspend the minimum term and it is respectfully submitted for the reasons set out below that it came to the wrong conclusion.

The intention behind the legislation

3.7 The relevant legislation makes no mention of suspended sentences in relation to the minimum term provisions. There is no mention of suspended sentences in the explanatory notes to the legislation or in the circulars issued by MoJ on the commencement of the legislation. In the absence of any express disapplication of section 189 of the Criminal Justice Act 2003, it must apply to these sentences of imprisonment as it does to all others. This view is supported by the following information.

3.8 The [Impact Assessment](#) of the Criminal Justice and Courts Act 2015 published by the Ministry of Justice states at paragraph 14:

⁶ Prior to any reduction in sentence for credit for a guilty plea

Judges will continue to have the discretion not to impose custody if there are particular circumstances where they deem it unjust to do so, and the court also has the ability to impose the minimum sentence and suspend it. There are, therefore, reasons to expect that not all of those affected will be sentenced to immediate custody. This is currently the case where other minimum sentences apply.

3.9 Parliamentary Questions were asked about the implementation of the legislation after it had come into force:

Q: To ask the Secretary of State for Justice, how many and what proportion of all sentences handed down for (a) possession of and (b) threatening with a knife were custodial sentences in the last year for which figures are available.

A: In 2017 11,809 possession of a blade or point offences resulted in a conviction and of these 7,339 received some form of custodial sentence (62%). A custodial sentence can be either an immediate custodial sentence or a suspended sentence order. There were 649 threatening with a blade or point offences in 2017 receiving a conviction and of these 522 received some form of custodial sentence (80%).⁷

3.10 Courts are, in fact, imposing suspended sentence orders where the minimum term provisions apply. In approximately 30 per cent of cases where the minimum term applies and a sentence of six months or more is imposed, that sentence is currently being suspended.

3.11 If all such cases were subject to immediate custody, this could lead to a requirement for approximately 200 more prison places per year.⁸

The guidelines

3.12 The [Bladed articles and offensive weapons – threats](#) and [Bladed articles and offensive weapons – possession](#) guidelines do not refer to suspended sentences. The only Sentencing Council guideline that explicitly refers to suspended sentences is the [Imposition of community and custodial sentences](#) guideline in which it states: 'A suspended sentence is a custodial sentence.' The whole thrust of the Council's work in developing and promoting the *Imposition* guideline was to ensure that this message was understood by sentencers.

3.13 The issue of whether the minimum term can be suspended was raised in a Council paper during guideline development, but the decision log shows that the discussion was deferred. There is no record of the issue being discussed at a later meeting, but the

⁷ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-05-08/141740/>

⁸ These figures are estimates based on the available data. The data we have available on 'second strike' possession offences is not broken down by sentence length and so has been estimated.

recollection of those involved is that the Council did not want explicitly to mention suspended sentences in this guideline, as it does not do so in any other offence specific guidelines.

The JCS response

3.14 The JCS has drafted two different responses to the question at paragraph 3.3 and seeks the view of the Council as to which is the correct one. From the magistrates' court viewpoint the issue is whether the decision in *Whyte* is binding:

Concluding that the minimum term cannot be suspended	Concluding that the minimum term can be suspended
<p>In <i>R v Whyte</i>⁹ the Court of Appeal clearly decided as part the judgement in that case that the minimum sentence could not be suspended. The magistrates' courts are bound by this judgement as the legislation is ambiguous. The minimum sentence provisions make no specific reference to whether the minimum sentence must be immediate or may be suspended.</p> <p>We are aware that some commentators take the same view:</p> <p><i>It is submitted that, notwithstanding the CJA 2003, s. 189 (power to suspend sentence of imprisonment), the reference in s. 1A(6)(a) to 'sentence of imprisonment' must mean 'sentence of immediate imprisonment'. Blackstone's Criminal Practice 2019, E5.17</i></p>	<p>Whilst the Magistrates' Courts must normally treat decisions of the Court of Appeal as binding or persuasive, the courts must first follow the legislation literally if it is clear. The sections do appear to be clear and unambiguous. A suspended sentence is to be treated as a sentence of imprisonment. We therefore take the view that a 6 month suspended sentence imposed on an adult does meet the criteria of being an "appropriate custodial sentence." The court does not have to be persuaded of factors which would make the minimum sentence unjust before deciding whether to suspend.</p> <p>We are not persuaded that the inability to suspend a Detention and Training Order supports the contention that the legislation must mean an adult minimum sentence of imprisonment is immediate. A different sentencing regime applies to youths.</p>

⁹ 2018 EWCA Crim 2437

3.15 The Council is invited to conclude that the decision in Whyte is not binding on magistrates' courts because the legislation (supported by the *Imposition* guideline) is clear - a suspended sentence is a custodial sentence.

3.16 The Criminal Appeal Office is looking out for any other cases that raise this issue so that the Court of Appeal can address the question more fully and clarify the position. In the meantime if the Council felt able to write to the JCS stating its view, this would enable them to settle on the advice they should give.

Question 1: Does the Council agree that courts do have the power to suspend an appropriate custodial sentence of up to two years?

Question 2: If so, does the Council agree to write to the JCS stating that it is of that opinion?

4 RISKS

4.1 As stated at paragraph 3.11 there is a danger that if the legislation and the guidelines are interpreted as excluding the option of suspending minimum term sentences, there could be a significant impact on prison resources.

4.2 By explicitly stating that the minimum term can be suspended (something that the Government avoided drawing attention to during the passage of the relevant legislation) the Council could draw criticism for undermining the minimum sentence provisions.

Neutral Citation Number: [2018] EWCA Crim 2437

No: 201802937/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 19 October 2018

B e f o r e:

MR JUSTICE JEREMY BAKER

MRS JUSTICE CUTTS DBE

R E G I N A

v

GRAHAM PATRICK WHYTE

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr S Stephens (Solicitor Advocate) appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. MR JUSTICE JEREMY BAKER: On 11 July 2018, Graham Patrick Whyte, appeared in the Crown Court at Birmingham and having previously pleaded guilty in the Magistrates' Court and committed for sentence, he was sentenced to 12 months' imprisonment for an offence of possession of a bladed article in a public place, contrary to section 139(1) of the Criminal Justice Act 1988.
2. His application for leave to appeal against sentence has been referred to the Full Court by the single judge. We grant leave.
3. The circumstances giving rise to the offence were that on the evening of 28 July 2017 a motor vehicle was being pursued by firearm officers in the Erdington area of Birmingham. There were three occupants in the vehicle, one of whom was the appellant who initially gave a false name on his arrest.
4. After being conveyed to Perry Barr custody facility, where he was going to be stripped searched, the appellant disclosed that he had a lock-knife clipped to his boxer shorts from where it was recovered.
5. Initially the appellant made "no comment" in interview but later said that he carried the knife for protection as people had tried to shoot him in the past.
6. The appellant is 32 years of age and has a number of previous convictions including robbery in 2003, possession of heroin with intent to supply and having an article with a blade in 2006 and robbery and possession of an imitation firearm in 2009, for which he received a total sentence of 5 years and 3 months' imprisonment.
7. In his sentencing remarks the judge stated that knife crime, including the possession of knives, was regarded by the public with great concern, due to the potential for serious harm or death being caused by those who carry them. He determined that under the Sentencing Council's Guideline for Bladed Articles and Offensive Weapons this was a category 2A offence, culpability A being present due to the possession of a bladed article and harm 2 being indicated in the absence of any of harm 1 factors being present. Therefore, the appropriate starting point was 6 months' custody with a category range of between 3 months and 1 year.
8. However, the judge also indicated that in his judgment the appellant's antecedents disclosed a worrying pattern of his possession of carrying weapons, including a lethal one, the last two convictions showing that he had firstly, a knife and secondly, an imitation firearm in order to facilitate firstly, drug supplying and secondly, robbery. He noted that there was a gap in the appellant's offending since his release from custody in 2012, but maintained that the pattern of offending was a serious aggravating factor of his present offending, such that it was necessary to impose a period of custody outside the category range. He determined that after a trial a period of 18 months' custody would be justified, which after deduction of 33% to reflect the timing of the appellant's plea of guilty would be reduced to 12 months' imprisonment.

9. In his grounds of appeal, it is argued that the judge was wrong to determine this offence justified going outside the category range under the guidelines. Secondly, that the judge failed sufficiently to take into account the mitigation available to the appellant. Thirdly, it is argued that any sentence of custody ought to have been suspended in its operation.
10. The first matter we would observe is that due to his antecedents the appellant was subject to the minimum sentencing provisions of section 139(6A) to (6G) of the Criminal Justice Act 1988, such that in the absence of circumstances relating either to the previous offences, the present offence or the offender, which would make it unjust to impose the minimum sentence, the court was obliged to impose a sentence of 6 months' imprisonment.
11. Although section 189 of the Criminal Justice Act 2015 empowers the court to suspend a sentence of imprisonment, we consider that the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of immediate imprisonment. Furthermore, in the present case, we do not consider there is anything relating to the previous offences or the present one which would make it unjust to impose the minimum term.
12. We have been asked to consider whether, as the present offence was the first one committed after the appellant's release from custody in 2012, and the appellant has an offer to study for a Certificate of Higher Education Skills in the Workplace at Wales University, these are factors which might make it unjust to impose the minimum sentence. In our judgment, given the nature and extent of the appellant's previous convictions, we do not consider that these matters, taken either in isolation or in combination, would make it unjust.
13. However, although knife crime was rightly described by the judge as a matter of "great public concern", especially, as here, where there has been repeat offending, we are concerned as to whether the facts of this case, taken in combination with his antecedents, justified a sentence outside the recently introduced sentencing guidelines for such offences. It is necessary to have regard to the fact that although the maximum sentence for possession of a bladed article is 4 years' custody, this was not a category 1A offence under the guidelines. Moreover, the last time upon which the appellant was convicted of being in possession of a bladed article was now some 12 years ago.
14. In these circumstances, we are of the view that whereas the judge was entirely correct in treating the appellant's antecedents as a serious aggravating factor, justifying a sentence after trial at the top of the relevant category range, we do not, with respect, consider that it justified going outside the category range on this occasion.
15. In these circumstances, we propose to quash the sentence of 12 months' imprisonment and to substitute a period of 8 months' imprisonment, which reflects a sentence after trial at the top of category 2A of the guidelines, less a full 33% discount to reflect the timing of the appellant's plea of guilty in the Magistrates' Court.
16. To this extent the appeal is allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk