New Park Court

Criminal Briefing

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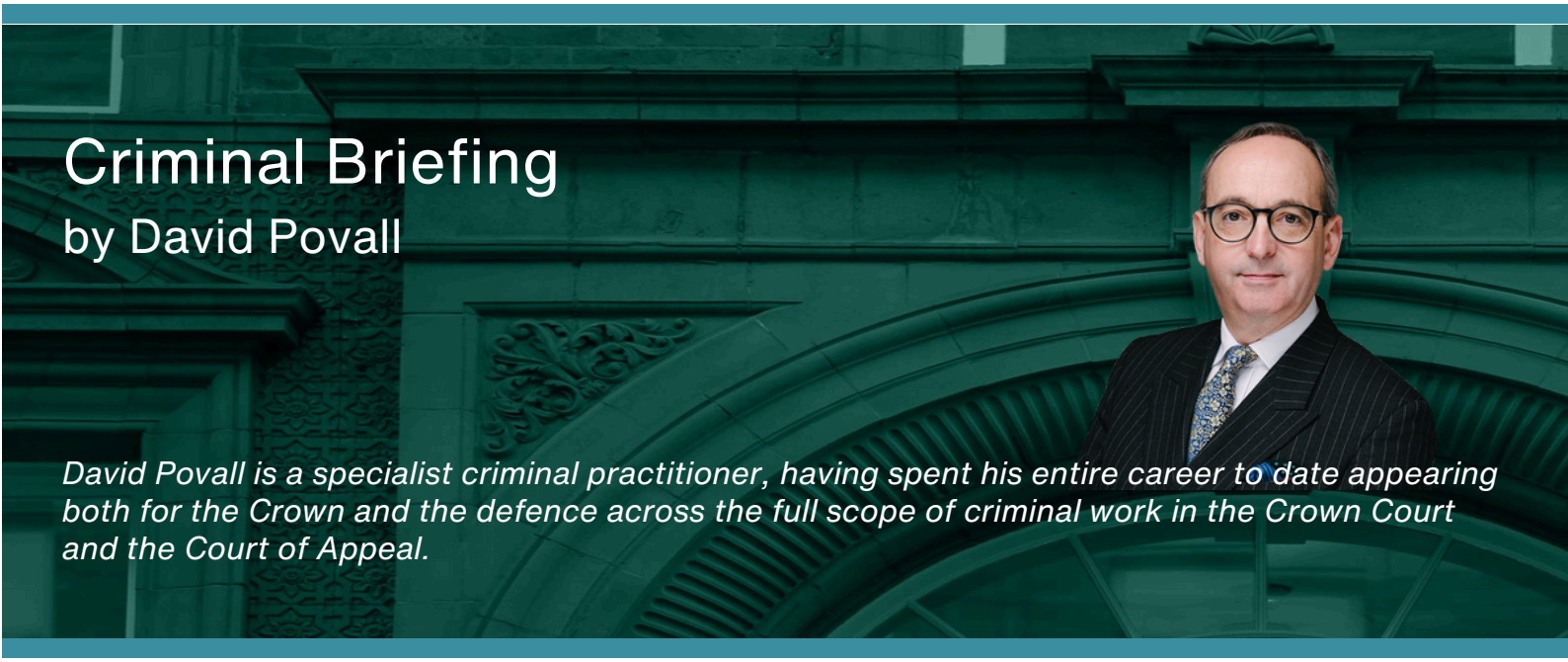
by David Povall



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Sentencing Historical Sexual Offences

"It's a riddle wrapped in a mystery inside an enigma" - WS Churchill

Sentencing historical sexual offences

As if sentencing contemporary sexual offences were not tricky enough, historical cases add a thick layer of additional complexity and a number of traps for the unwary. Sadly, much of the fun of reading chunky Court of Appeal authorities and considering how the Children and Young Persons Act 1933 was amended by the Criminal Justice Act 1988 has been denied us, because there are now useful and accessible summary resources available: the key is to know where there might be a problem and where to look for the answer.

Maximum sentences – adults

There are no particular issues here. The normal principle applies: the maximum sentence available is that at the date of commission of the offence. A useful table is provided in the Sentencing Council's Guideline, found here.

Be alert to those offences where the maximum sentences changed over time, or where they depended on particular combinations of circumstances. The most commonly encountered will be indecent assault on a woman (Sexual Offences Act 1956, s.14) and indecency with a child (Indecency with Children Act 1960, s.1): both of these may well be used to charge conduct that would now amount to more serious offences with very heavy sentences. Buggery (Sexual Offences Act 1956, s.12) needs particular care, as the offence as drafted encompasses conduct that could now be either rape or not a crime at all.

Common problems can be avoided if sentencing powers and relevant dates are considered when the indictment is drafted. The problem of counts that straddle relevant dates is considered below.

Maximum sentences – youths

This is where life gets more ... interesting. How is the court to treat an adult who committed serious sexual offences while a youth? The abolition of *doli incapax* from 30th September 1998 has increased the number and complexity of cases concerning sexual offences committed by children.

A series of recent decisions has been considered in *R v Ahmed (Nazir)* [2023] 2 Cr. App. R. (S.) 32. In very bald summary, sentencers will generally be limited to the maximum sentence that would have been available had the offender been prosecuted at the time and at the age he/she was at the time. While the Court of Appeal (what mischievous scamps they are!) dangled the tantalising possibility that there might be exceptional circumstances in which the contemporary maximum might be exceeded (para. 32.v), they also struggled to think of circumstances in which this would be appropriate. It will be a bold sentencer who decides to give it a go. With an evil, prosecutorial glint in my eye, I wonder whether one possibility might involve the use of consecutive sentences: an offender who committed multiple offences of indecent assault at an age when he/she could receive a maximum aggregate sentence of 2 years could perhaps receive a series of consecutive 2-year sentences in order to reach a more adequate overall sentence, especially where the indecent assaults would now be charged as much more serious offences. I don't recommend trying it, but it would be interesting to see how the Court of Appeal would view such an approach.

For those who would rather avoid a very public telling-off at the RCJ, an invaluable resource is the set of tables in Chapter A8 of *Current Sentencing Practice*. Each table summarises the availability of custody for each age from 10 to 17 over the period from 1933 to 2020. Such is my rock and roll lifestyle that I have them downloaded and saved on my laptop.

It will be a rare case indeed where offences committed before 30th September 1998 by somebody then under 14 will be charged. In consequence, there will be few problems where rape or buggery of a child is charged: from 1st August 1963, a 14-year-old could be sentenced up to the adult maximum if the offence attracted a maximum sentence of 14 years or more. Before 1st August 1963, however, the maximum for a 14-year-old could be no more than 6 months.

From 9th January 1995, any child from the age of 10 could be sentenced up to the adult maximum if the offence attracted a maximum sentence of 14 years or more. By the time, therefore, that *doli incapax* was abolished, the problem of sentencing children for the most serious offences had been resolved.

In those very rare cases where there is sufficient evidence to rebut *doli incapax* and thus charge a defendant for offences committed before September 1998 and when he/she was under 14, beware the effects of a parliamentary flipflop between 1988 and 1995. From 1st August 1963 to 30th September 1988, any child from the age of 10 could be sentenced up to the adult maximum if the offence attracted a maximum sentence of 14 years or more. From 1st October 1988 to 8th January 1995, however, this applied only to manslaughter and not to any sexual offence.

Where offences of indecent assault or indecency with a child are charged, offences that encompassed conduct that would now be charged as assault by penetration or oral rape, the court will often be constrained to impose manifestly inadequate sentences (until somebody comes up with a workaround). This situation will apply in all cases where the offending pre-dates the coming into force of the Sexual Offences Act 2003 (1st May 2004).

Charges straddling important dates

In an ideal world this wouldn't happen, but, either because of inadvertence (who, me?) or because of a lack of clear evidence, we sometimes end up with charges that particularise conduct on either side of a date that affects the court's sentencing powers (because of legislative change or because defendant or victim passed a relevant birthday). The default position remains that the offence(s) should be taken to have been committed at the time most advantageous to the defendant. It is, however, arguable that a sentencer is entitled to find that there is unequivocal evidence that the offending, or at least some of it, was perpetrated under the more severe sentencing regime. In that situation, the indictment really should have been drafted or amended to reflect the evidential position, but there is some authority for the proposition that the sentencer is entitled to make a finding of fact and sentence more severely in reliance upon that finding. See para. 30.60 in *Rook and Ward on Sexual Offences 6th Edition* and *R. v R (Paul Brian)* [1993] Crim. L.R. 541 and *R v Harries (Michael John)* [2008] 1 Cr. App. R. (S.) 255.

Guidelines

We are all by now familiar with how to apply the Sentencing Guidelines where the maximum available sentences are lower than those that would now apply: we treat the seriousness of the offending with modern eyes, but we are constrained by the historically available maximum sentences. Be alert to the fact that the septuagenarian defendant in the dock will be entitled to consideration under the Overarching Guideline on Sentencing Children and Young People if being sentenced for offences committed when he/she was under 18.

Special sentences

Section 244ZA of the Criminal Justice Act 2003. The applicability of the release provisions under this section are governed by the date of sentence and by the sentence being imposed for an offence for which an adult over 21 could receive a life sentence. Most rapes, whenever committed, will thus result in automatic release after two thirds of the sentence has been served.

Section 279 of the Sentencing Act 2020. The availability of an extended sentence is, likewise, retrospective. Specified sexual offences include many under the Sexual Offences Act 1956. Section 282 of the Sentencing Act 2020 likewise extends the power to pass an extended sentence to pre-1956 common law offences subsequently codified in the 1956 Act.

Section 278 of the Sentencing Act 2020. A special custodial sentence for an offender of particular concern is available only if the defendant was 18 or over when committing a sexual offence. So long as that condition is met, the section will bite for any offender convicted of rape of a child under 13, assault by penetration of a child under 13 (including an attempt or conspiracy to commit such an offence, or aiding, abetting, counselling or procuring such an offence), or an "abolished offence" which would now be charged as one of those offences: the obvious examples are offences under section 5 of the Sexual Offences Act 1956 (intercourse with a girl under 13), section 12 of that Act (buggery), where the victim was under 13, or sections 14 or 15 of that Act (indecent assault), where the victim was under 13 and the assault involved vaginal or anal penetration.

Conclusion

Couldn't be simpler, could it? There will be a test.