

# DRYSTONE

## CHAMBERS



**Kenniesha Stephens** considers the recent Court of Appeal decision highlighting the importance of rehabilitation, delay and the high prison population to sentencing decisions on whether custody has to be immediate.

5<sup>th</sup> March 2023

### **The King v Arie Ali [2023] EWCA Crim 232**

In this case the Court of Appeal held that the exceptional factor relating to the overcrowding conditions of the adult male prisons can properly be taken into account by a sentencing judge, particularly for short term prison sentences.

This case concerned an appeal against sentence of 6 months imprisonment imposed on 6<sup>th</sup> February 2023 for one count of assaulting an emergency worker. The offence was committed on the 20<sup>th</sup> September 2019 whilst the Appellant was a serving prisoner at HMP Maidstone. Mr Ali threw the boiling contents of his mug into a prison officer's face, as he had omitted to unlock his cell doors. This caused a burn about the size of a hand on the side of the prison officer's face and he suffered a first-degree burn; which was treated with cream and healed in 2 to 3 weeks. Mr Ali did not have any previous convictions for violence.

#### **There were three grounds of appeal:**

1. The sentencing judge erred in not ordering a pre-sentence report.

The Court of Appeal agreed with the sentencing judge that a report was unnecessary, given the letter from probation;

2. The length of the sentence was manifestly excessive.

Again the Court of Appeal rejected this argument, stating that the sentence was proportionate given the seriousness of the aggravating factor.

3. The sentencing judge erred in imposing a sentence of immediate custody.

The Court of Appeal considered there was merit in this ground of appeal, given the exceptional circumstances of the case. They agreed that in the vast majority of cases, offences of this nature (committed in prison, against a prison officer) merited immediate custody.

The exceptional circumstances identified were that:

- the appellant had not been charged from 16 months after the offence was committed and over 6 months after he had been released from prison;
- he was not sentenced until 2.5 years after he had been released and had remained out of trouble throughout that time;
- the sentencing court had the benefit of a positive reference from a probation officer.

An exceptional factor arose from the fact that at the time the appellant was sentenced there was a high prison population. On the 30<sup>th</sup> November 2022 the Minister of State made a statement announcing Operation Safeguard and requested 400 police cells to hold people who were remanded in custody or serving prison sentences in the adult male prisons. On the 6<sup>th</sup> February 2023, when the sentence was passed, a further announcement was made when the Ministry of Justice gave the National Police Chiefs' Council 14 days' notice to make cells in the North of England and the West Midlands available, following a rise in the number of inmates. There was also an announcement by the Deputy Prime Minister to the Lord Chief Justice, stating that operating very close to prison capacity will have a consequence on the conditions in which prisoners are held; as more of them will be in crowded conditions while in custody and have reduced access to rehabilitative programmes. Prisoners held in police cells under Operation Safeguard will not have access to the full range of services normally offered in custody, including rehabilitative programmes.

The Court of Appeal referred to *R v Manning* [2020] EWCA Crim 592, where the court re-stated established principles which apply in situations such as this and the courts could take into account the current conditions in prisons when considering whether to suspend a sentence.

The Court of Appeal observed that the sentencing judge did not take into account the above consideration and concluded that there were strong arguments for suspending the sentence in this exceptional case. Further, any doubts the Court of Appeal had on the issue was resolved by the additional factor of Operation Safeguard and the overcrowding of the adult male prisons and the lack of rehabilitative programmes as a result. The Court of Appeal observed that the exceptional factor will likely apply in shorter sentences, "*... because a significant proportion of such sentences is likely to be served during the time when the prison population is very high*" [22].

This factor will apply to sentencing passed during this time. The Court of Appeal identified the starting point as the implementation of Operation Safeguard, 14 days after the 6<sup>th</sup> February 2023 and highlighted that it would be for the government to communicate to the courts when prison conditions have returned to a more normal state. It stated at [22] of the judgement, that *"sentencing courts will now have an awareness of the impact of the current prison population levels from the material quoted in this judgment and can properly rely on that."*

The Court of Appeal quashed the sentence of 6 months imprisonment in the case of Mr Ali and substituted it with a suspended sentence order.