1

An introduction to English sentencing

Contents

1.1 Courts and crimes

Although some common law crimes remain, most of the offences in English criminal law were created by statute and have a statutory maximum penalty. For the purposes of trial, offences were divided into three categories by the Criminal Law Act 1977 – offences triable only on indictment, offences triable only summarily, and offences triable either way. The most serious offences (e.g. murder, rape) are triable only on indictment, at the Crown Court. A large mass of less serious offences is triable only summarily, in magistrates' courts. The middle category of offences triable either way comprises most burglaries, thefts and frauds. The first question in these cases concerns the defendant's intended plea: if the defendant indicates a plea of guilty, the magistrates must assume jurisdiction and proceed to sentence, unless they decide that their sentencing powers are insufficient. If the intended plea is not guilty, the defendant will be tried at a magistrates' court unless either the magistrates direct or the defendant elects to have the case tried at the Crown Court.

The Crown Court sits with a judge and jury. There are three levels of Crown Court centre: first-tier centres, where both civil and criminal cases are tried and where High Court judges and circuit judges preside; second-tier centres, where High Court judges or circuit judges preside but only deal with criminal cases; and third-tier centres, where circuit judges or recorders deal with criminal cases, being mostly offences triable either way. The types of criminal offence

are divided into four classes, according to their gravity, and some can only be tried by a High Court judge (of whom there are around 105), whereas others can be tried by circuit judges or recorders. Circuit judges (around 650) are full-time judges, although they may divide their time between civil and criminal work. Recorders and assistant recorders (around 1,200) are part-time judges, whose main occupations are barristers, solicitors or (in a few instances) academics; most full-time judges start their judicial careers in this way. Appeals against sentence from the Crown Court go to the Court of Appeal and, if there is no point of law involved, the appeal requires that Court's leave if it is to be heard. Applications for leave are dealt with by individual High Court judges.

Magistrates' courts deal with the least serious criminal offences. There are around 29,000 lay magistrates in England and Wales, divided into local benches, and a court normally consists of three magistrates. There are also some 140 full-time and 170 part-time District Judges (Magistrates' Courts) (DJMC), formerly known as stipendiary magistrates. A DJMC must be a barrister or solicitor of at least ten years' standing, and he or she sits alone – usually dealing with the longer or more complicated summary cases. The powers of magistrates' courts are limited to imposing a maximum of 6 months' imprisonment in respect of one offence (or a total of 12 months for 2 or more offences).[1] The maximum fine or compensation order that may be imposed by a magistrates' court was formerly £5,000, but since March 2015 is unlimited. Magistrates may, having heard the evidence in a case, commit it to the Crown Court for sentence, if they form the view that the offence was so serious that greater punishment should be inflicted than they have power to impose. As mentioned above, a defendant who indicates an intention to plead guilty to an either-way offence should be sentenced by the magistrates unless they decide that their powers are insufficient, in which case they should commit to the Crown Court for sentence. A person who has been sentenced in a magistrates' court may appeal against sentence to the Crown Court. The appeal takes the form of a complete rehearing of the case, before a circuit judge or recorder and two lay magistrates, and the Crown Court has the power to pass any sentence which the magistrates' court could have imposed, even if that sentence is more severe than the one the latter did in fact impose.[2]

Summary offences are little discussed in this book, although there are frequent references to sentencing in magistrates' courts (which also deal with many 'triable-either-way' offences). Most of the statistics quoted in part 1.3 of this chapter refer to 'indictable offences', which include those triable on indictment and those 'triable either way', whether tried in a magistrates' court or at the Crown Court.

[1] Section 154 of the Criminal Justice Act 2003 provided for the ordinary maximum to be raised to 12 months for one offence (15 months for two or more offences). But this increase was intended to accompany a new measure called 'custody plus' and, for reasons explained in ch. 9, this was never implemented.

[2] For fuller details on relevant aspects of criminal procedure, see Sprack (2012).

1.2 The available sentences

Recent years have seen frequent legislation on the sentencing powers of the courts, and three statutes are particularly important for present purposes. The first is the Criminal Justice Act 1991, which was the first major attempt for over 40 years to establish a coherent sentencing structure. After a series of further statutes in the 1990s, Parliament consolidated sentencing law in the Powers of Criminal Courts (Sentencing) (PCCS) Act 2000. This consolidation was a wonderful idea, since it promised the great convenience of bringing the various powers together in one place. Sadly, the statute had already been overtaken by new provisions by the time it came into force, and after three years large parts of it were replaced by the now principal statute, the Criminal Justice Act 2003. That Act, in turn, has been amended and added to by several subsequent statutes.

This part of the chapter gives a preliminary sketch of the courts' sentencing powers, referring also to the different sentences available in relation to young offenders. Most of these sentencing powers are discussed in detail in later chapters, and in part 1.4 of this chapter we examine the reasons why only a small proportion of the crimes committed in any one year result in offenders being sentenced in court.

1.2.1 Sentences for adult offenders

A court's duty in all cases involving injury, death, loss or damage is to consider making a *compensation order* in favour of the victim or, in a case of death, the victim's family: ss. 130–134 of the PCCS Act 2000. This forms part of a policy of increasing recognition of the needs, wishes and rights of the victims of crime, although it is subject to the means of the offender.[3] In 2013, over half of offenders convicted at magistrates' courts of indictable offences of criminal damage were ordered to pay compensation; as for those convicted of offences of violence, 30 per cent in the magistrates' courts and 9 per cent in the Crown Court were subjected to compensation orders.[4] A compensation order will usually be made as well as another order, but it may be made as the sole order against an offender.

The most lenient course which an English court can take after conviction is to order an *absolute discharge*, under s. 12 and Schedule 1 of the PCCS Act 2000. A conviction followed by an absolute discharge does not count as such for most future purposes. The power is used in fewer than 1 per cent of cases, and is generally reserved for instances where there is very little moral guilt for the offence.

[3] Victims of crimes of violence also have the possibility of applying to the Criminal Injuries Compensation Scheme: see below, ch. 10.4.
[4] Ministry of Justice (2014), Table A.17.

The power to grant a *conditional discharge* is also to be found in ss. 12–15 and Schedule 1 of the PCCS Act 2000, and once again the conviction does not count as such for most future purposes. The condition is that the offender must commit no offence within a period, of not more than three years, specified by the court. If the offender is convicted of an offence committed during that period, then he or she is liable to be sentenced for the original offence as well. As Tables 2 and 3 (see Appendix B) demonstrate, conditional discharges continue to be used in substantial numbers of cases, although there has been a decline in recent years to 46,000 adult males and around 15,000 adult females in 2013.

The *fine* remains the most used penal measure in English courts, largely because of its widespread use for summary offences. Its use for both summary and indictable offences has declined steeply. As Tables 2 and 3 demonstrate, the totals had declined to 478,000 adult males and 215,000 adult females by 2013. Maximum fines are usually unlimited for indictable offences tried in the Crown Court, and from March 2015 this is also applicable in magistrates' courts. The leading principle (in s. 164 of the Criminal Justice Act 2003) is that the fine should reflect the seriousness of the offence and the offender's ability to pay; and a court should give priority to a compensation order over a fine where the offender has limited financial resources and appears unable to pay both.

A court may only impose a *community sentence*, states s. 148 of the 2003 Act, if satisfied that the seriousness of the offence(s) is sufficient to warrant such a sentence. Having reached this decision, the court must then select the requirement(s) which (i) are most suitable for the offender and (ii) impose restrictions on the offender which are commensurate with the seriousness of the offence. There are now 15 possible requirements for adults, such as unpaid work and alcohol or drugs treatment, and the details are discussed in Chapter 10.6 below. In 2013 some 70,000 adult male offenders were given a community sentence and some 15,000 adult females, a decline probably attributable to the increased use of the suspended sentence order (below).

Next in ascending order of severity is *imprisonment*. Before imposing a custodial sentence, the court must be satisfied, according to s. 152(2), that the offence was 'so serious that neither a fine nor a community sentence can be justified', a formula that requires the court to dismiss all lesser alternatives before resorting to custody. If it decides on custody, s. 153(2) states that the sentence should be for the shortest term 'commensurate with the seriousness of the offence'. (These and other statutory provisions are set out in Appendix A, at the end of the book.) In determining the length of any custodial sentence, courts should apply any relevant guidelines, and take due account of aggravating and mitigating factors (see Chapter 5) and of previous convictions (see Chapter 6).

When the court has decided that a prison sentence is justified and has decided on its length, it may still have the choice between a suspended

sentence order and immediate imprisonment. This applies where the court is minded to impose a sentence of between 14 days and 2 years (s. 189 of the 2003 Act, as amended). If it decides that there are grounds for suspending such a sentence, it should consider whether to order the offender to comply with one or more requirements taken from the list available for community sentences. Non-compliance may result in return to court and the activation of the whole or part of the prison sentence. Tables 2 and 3 show the sharp rise in the use of suspended sentence orders in recent years, with corresponding reductions in the use of imprisonment, community sentences and fines.

Parliament has introduced several mandatory and mandatory minimum sentences in recent years. For example, under s. 287 of the 2003 Act there is a minimum sentence of 5 years' imprisonment for various offences of possessing firearms, from which a judge may depart only in 'exceptional circumstances'. Already in place were the minimum sentence of 7 years for the third offence of trafficking class A drugs (s. 110 of the PCCS Act 2000) and 3 years for the third domestic burglary (s. 111 of the PCCS Act 2000), from which a judge may depart if the minimum sentence would be 'unjust in all the circumstances'. The provisions of the 2003 Act for dangerous offenders were repealed and replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The two new sentences are the automatic sentence of life imprisonment for the second very serious offence, and an extended sentence on grounds of public protection. The discretionary sentence of life imprisonment is available for many serious offences, and the mandatory life sentence for murder remains in place.

Despite statutory provisions such as those in ss. 152 and 153(2) of the 2003 Act which prohibit courts from imposing a custodial sentence unless neither a fine nor a community sentence can be justified for the offence(s), and which require courts to impose the shortest custodial sentence commensurate with the seriousness of the offence(s), both the use of custodial sentences and their average length have shown general increases over the decade. As Tables 2 to 7 (see Appendix B) show, the proportionate use of prison sentences has increased by two-thirds in the last two decades, and the average length of immediate custodial sentences has increased significantly too, both at a time when the crime rate has decreased and the numbers of offenders for sentence has remained fairly stable. As the Tables show in detail, the use of immediate custody for males peaked at 103,000 in 2002 and stood at 85,000 in 2013; for females, the corresponding figures were 8,800 custodial sentences in 2002, falling to 7,125 by 2013. The actual meaning of custodial sentences depends on the operation of the system of early release under the Criminal Justice Act 2003. In broad terms, all prisoners are released after serving half their sentence, but are then on licence and subject to recall at any time until the expiry of the full sentence. The licence involves supervision only for sentences of 12 months or longer, but the Offender Rehabilitation Act 2014 will extend supervision to all released prisoners.

There is a whole list of ancillary and/or preventive orders which may be made by the courts in appropriate cases. These range from restitution orders and disqualification from driving, to the more recent flush of preventive orders – for example, serious crime prevention orders, sexual offences prevention orders and football banning orders. In some circumstances, such as drug trafficking and serious crime, a court is bound to follow the statutory procedure towards making an order for the confiscation of the offender's assets under the Proceeds of Crime Act 2002. Ancillary orders are discussed in Chapter 11.

1.2.2 Sentences for young offenders

The courts' powers for sentencing offenders aged under 21 fall broadly into two groups – first, those relating to offenders aged 18, 19 or 20, who have been termed 'young adults' and dealt with in adult courts; and secondly, those relating to offenders aged 10–17 inclusive, who are dealt with chiefly in the youth court.

There are now so few differences in the structure of sentencing for young adults that it may be questioned whether it constitutes a separate category. The small differences are set out in Chapter 12.2 below, where there is also discussion of whether this category should be revived, with separate and more constructive sentencing powers, and indeed whether it should be extended to the age of 25, as in some other jurisdictions. Tables 4 and 5 (see Appendix B) show sentencing trends for this age group.

For young defendants under 18 both the procedure and the sentencing powers differ considerably. Their cases are dealt with in youth courts, except when there is a charge of a particularly grave crime. Very young children charged with murder, manslaughter, and some other serious offences are tried in the Crown Court. However, where the defendants are as young as 11 or 12, special efforts must be made to ensure that the defendants can follow and participate in the trial: a Practice Direction on the appropriate procedures for such cases was issued in 2000,[5] but further changes were required by a subsequent decision of the European Court of Human Rights.[6]

However, cases of that kind are few. In practice, as we shall see in part 1.4 below, most offenders of this age have been dealt with by a reprimand or final warning under the Crime and Disorder Act 1998, and the system is described more fully in Chapter 12.1. Section 37 of the 1998 Act declares that 'the principal aim of the youth justice system [is] to prevent offending by children and young persons', but this has now been augmented by various reforms of youth justice in the Criminal Justice and Immigration Act 2008. For those who are prosecuted in court for the first time and plead guilty, the

[5] *Practice Direction: Young Defendants in the Crown Court* [2000] 2 All ER 284, applying the decision in *V and T* v. *United Kingdom* (1999) 30 EHRR 121.
[6] *SC* v. *United Kingdom* [2005] Crim LR 130.

court is under a statutory duty to make a referral order under s. 16 of the PCCS Act 2000. The consequence of the referral order, described more fully in Chapter 12.1.2, is the drawing up of a 'youth offender contract' requiring certain commitments. In other cases the youth court has the same range of powers as do the ordinary courts when dealing with young adults, with two noticeable exceptions. The first is that when a youth court is dealing with a child under 16, it must require the attendance of the child's parents unless this would be unreasonable, and it must bind over the parents to exercise control over the child unless it gives reasons for not doing so. The second difference concerns custodial sentences, which have been relatively rare for young offenders. Details of the law are given in Chapter 12.1 below, but essentially a 'detention and training order' may only be made in certain standard lengths, as consolidated in ss. 100–107 of the PCCS Act 2000 (i.e. 4, 6, 8, 10, 12, 18 or 24 months, and not intermediate lengths). The 2008 Act introduced the youth rehabilitation order, and the expressed intention was that this should be used instead of custody in many cases. The sentencing patterns in Tables 6 and 7 (see Appendix B) demonstrate a spectacular decline in the use of custody in recent years.

1.3 The general statistical background

In order to place the sentencing statistics in their criminal justice context, we must begin by examining 'the crime rate' and its variations. Apart from scrutinizing the concept of 'the crime rate', it is important to assess the sentencing decisions of the courts in relation to the many other decisions to be taken between reporting a crime and prosecuting an accused person to conviction. Thus, as will be argued in part 1.4 below, the numbers sentenced may reflect changes in police investigation priorities or changes in the policies of the Crown Prosecution Service, rather than any increase or decrease in 'the crime rate'.

How can the number of crimes committed each year be measured? The best that the official criminal statistics can offer is the annual total of crimes recorded by the police. It will be recalled that the second line of figures in Table 1 (see Appendix B), 'Offences recorded by the police', shows trends in recorded crime. The statistics in that table are more representative of the crime rate than the numbers of offences which are detected or which result in a conviction (i.e. all the figures lower down Table 1), but they still give only a small part of the picture. The police are informed about crimes mostly by victims, but not all victims report incidents to the police. Figures from the Crime Survey for England and Wales (CSEW, formerly the British Crime Survey) show that in 2010–11 some 38 per cent of victims reported the crime to the police. Of those crime victims who responded to the CSEW and who failed to report the crime to the police, some 72 per cent fell within the category of 'trivial/no loss/police would not (could not) do anything', and a

further 16 per cent responded 'private/dealt with ourselves'.[7] Thus, although the figures for serious offences recorded by the police have been the most comprehensive set of statistics published regularly over the decades, they are not a reliable indicator of the number of crimes being committed, or of fluctuations in the crime rate.

Criminologists have attempted to estimate the number of unreported offences (sometimes called the 'dark figure' of crime) by two main methods. One is the self-report study, in which people are asked to divulge in confidence how many offences they have committed during a specified period of crime. An obvious defect of this approach is that some people may be reticent whereas others might exaggerate their deeds out of bravado. The second and more widely used method is to ask people to state in confidence the number of crimes of which they have been a victim during a specified period. If one then takes the results of such a study, known as a victimization study or crime survey, and compares them with the number of officially recorded crimes over the same period, an estimate of the proportion of crimes unrecorded can be made. This is the basis on which the CSEW (formerly the British Crime Survey) has proceeded since 1981. However, crime surveys are at their best when dealing with crimes with identifiable victims: the CSEW covers violence, sexual offences, burglary, robbery, theft, and damage. There is also a Commercial Victimization Survey, which estimated that in 2013 there were 7.3 million incidents of crime against businesses.[8] It is particularly hard to survey offences of which people are unlikely to think of themselves as victims, such as drug offences and consensual sexual crimes.

The CSEW consists of questions put to a large sample of citizens about crimes to which they have fallen victim in the past year. Although its scope is restricted to certain crimes, for the reasons just given, it does enable a comparison with the figures for crimes recorded by the police for those offences. It also enables comparisons of trends over time. What can be seen, from comparing the first line with the second line of figures in Table 1, is that 'Crime as measured by the British Crime Survey' peaked in 1991 and has been falling slowly but steadily since then. On the other hand, although the figures for 'Notifiable offences recorded by the police' also rose sharply during the 1980s, and then rose relatively slowly during the 1990s, they have recently begun to fall and to reflect the decline in numbers of offences found by the CSEW.

As the first line of Table 1 demonstrates, the amount of crime as measured by the CSEW in 2013 was less than half that of 1991. Some of the reductions recorded by the CSEW respondents are enormous. Thus in the 15 years from 1997, vehicle thefts declined by some 60 per cent; burglary declined by some 55 per cent; offences of violence declined by some 60 per cent; and so on.[9]

[7] Chaplin et al. (2011), p. 55. [8] Office for National Statistics (2014).
[9] Chaplin et al. (2011), chs. 3 and 4.

It is evident that for robbery and serious wounding the decline has been less than for most other offences; but there is still a decline that contrasts with the considerable rise in such categories of offence recorded by the police. The CSEW figures are more reliable over time since they have been subject to fewer changes of recording practice. These statistics are particularly important as a corrective to arguments often advanced about crime rates and penal policy: the CSEW shows a consistent decline in the rate at which people are becoming victims of crime.

Enquiries made as part of the CSEW suggest that members of the public have not changed their approach to reporting crimes in the last three decades. This is important in ruling out one possible explanation for the rise and then decline in crimes recorded by the police, since around three-quarters of offences which come to the notice of the police are reported by members of the public rather than 'discovered' by the police themselves.[10] However, reporting habits do not merely relate to the offences against individuals with which the CSEW is concerned. Many organizations learn of offences of fraud or thieving committed by their employees, and deal with them by dismissing or disciplining the employee without reporting an offence. As for the offences which the police discover for themselves, the numbers will be affected by levels, styles and targets of policing. In general, the police are much more likely to 'discover' offences committed in public places than crimes committed in the home or in business or financial settings. Furthermore, fluctuations in the number of recorded offences of possession of drugs, possession of child pornography or possession of obscene articles for gain might largely reflect priorities in police deployment. Thus, discovery of many of these crimes may only loosely relate to variations in the actual rate of offending.

It is already clear, then, that the number of offences recorded by the police each year is a considerable underestimate; that the number includes proportionately more offences against individuals and public order offences than offences by and against companies; and that fluctuations from year to year may reflect changes in reporting or recording practices rather than changes in the true level of crime. The next stage in the process sees another major quantitative change. Only 28 per cent of offences recorded by the police in 2007–8 were detected (Table 1, line 4; no figures available for 2013). An offence is treated as 'detected' not only if a person is convicted or cautioned but also if a person was charged or summonsed, or cautioned or warned, or given a penalty notice for disorder, or had the offence 'taken into consideration' by the court on conviction for another offence.[11] The detection or 'clear-up' rate declined gradually from 38 per cent in 1981 to reach 23 per cent in 2001, but in the subsequent years – probably as a result of the 'closing the justice gap' initiative – it increased slightly to 28 per cent. The detection

[10] Bottomley and Coleman (1981), p. 44. [11] This practice is discussed in ch. 8.1 below.

rate is certainly higher for the more serious offences. For many years about half of offences of violence against the person and a third of sexual offences have been 'cleared up', although these higher figures may owe as much to the fact that many victims recognize and can identify their attackers as to the greater efforts put into police work on these crimes. At the other end of the scale, only 13 per cent of recorded burglaries and 20 per cent of robberies were detected in 2007–8.

How do the courts use their sentencing powers? The detailed statistics for the last decade are presented in six separate tables. Tables 2 to 7 (see Appendix B) show the trends for all male and all female offenders for the years 1997–2013, showing the recent rise in suspended sentences, the decline in the use of the fine and community sentences, and the continuing high use of custody. Turning to young adult offenders, Tables 4 and 5 show how suspended sentence orders have tended to displace both custody and community orders in recent years, for both young men and young women. Tables 6 and 7 give the figures for offenders aged 10–17 inclusive. Community sentences have increased sharply throughout, largely at the expense of conditional discharges and fines, and the use of custody has seen a spectacular decline.

1.4 What is sentencing and where can it be found?

In the first three sections of this chapter, it has been assumed that the notion of 'sentencing' is unproblematic. It is what courts do to convicted offenders. However, we must now take the analysis further, and explore the concept of 'sentencing' in greater detail. Padfield, Morgan and Maguire (2012) refer to sentencing as 'the allocation of criminal sanctions', a definition that focuses on what is handed out ('criminal sanctions') but says nothing about the person or institution that is doing the handing out.[12] On this definition, therefore, a key question is what amounts to a 'criminal sanction'. Many regulatory bodies (such as the Competition Commission) have the power to impose swingeing fines on organizations that contravene the applicable rules: these are sanctions, but not *criminal* sanctions since they do not involve conviction of an offence and are part of a civil regulatory system. More contested is the category of civil preventive orders, of which there are now some 12 or more in English law: these orders can be made by a criminal court or a civil court, and are labelled 'preventive' (as distinct from punitive). The English courts have held that they are not 'penalties' as such,[13] and the Strasbourg Court has gone no further than to hold that confiscation orders are 'penalties' because of their punitive

[12] Freiberg and Murray (2012), in an article dealing with constitutional challenges to sentences in Australia, define a sentence as 'a dispositive order of a criminal court consequent upon a finding of guilt', focusing on the role of the court and excluding orders such as confiscation orders and civil preventive orders.

[13] *Clingham* v. *Kensington and Chelsea LBC* [2003] AC 787, criticised by Ashworth (2004).