

Burglary in a dwelling

In the Magistrates' Court Sentencing Guidelines, pages 34/35 provide a summary of the effect of the Court of Appeal guideline judgment in *McInerney* and *Keating* as it applies both to mode of trial (allocation) and to sentencing decisions in a magistrates' court. In the light of experience and pending any fuller consideration by the Sentencing Guidelines Council, that judgment has been reviewed and clarified by the Court of Appeal in *R. v. Saw and others* [2009] EWCA Crim 1.

The purpose of this note is to clarify the effect of the decision on the application of this part of the Magistrates' Court Sentencing Guidelines.

Approach to sentencing - Key points

1. The aim of the judgment is to achieve consistency of approach, clearly recognising the seriousness of this offence - not only is it an offence against property but it is also an offence against the person. Particular focus is required on the impact of the offence on those living in the burgled house; sentences should reflect the level of harmful consequences even when not intended by the offender.
2. The sentence must reflect the criminality of the offender. Previous convictions and the record of an offender are of more significance than in the case of some other crimes. Burglary of a dwelling should be treated as more serious when committed by an offender with previous convictions for relevant dishonesty than an identical offence committed by a first offender.
3. The judgment states that it does not add anything to the Magistrates' Court Sentencing Guidelines, emphasising the importance of addressing the aggravating and mitigating factors referred to in the judgment. The Magistrates' Court Sentencing Guidelines currently provide for committal to the Crown Court where an aggravating feature is present and sentence within the powers of the Crown Court is included within the range in some other circumstances.
4. A non-exhaustive list of aggravating and mitigating features commonly encountered in burglary is provided in the judgment; this is more extensive than the list in the Magistrates' Court Sentencing Guidelines derived from *McInerney* and *Keating*. They are summarised at the end of this note. The importance of the aggravating features derives from the *increase in the impact* of the offence that results from them, or from the *increase in the culpability* of the offender that they demonstrate, or from a combination of the two.

The guideline - categories of seriousness

The Magistrates' Court Sentencing Guidelines set out three categories of offence seriousness:

Category 1 - Offences likely to be able to be sentenced within the jurisdiction of a magistrates' court (when committed by a first time offender) are those where the entry to the premises was unforced, the property stolen of low value and there were no aggravating features; the starting point is a community sentence. In determining whether an aggravating feature was present, the court should refer to the list set out in *Saw and others*.

Category 2 - Where the entry was forced, the goods were not of high value, and there were no aggravating features, the sentencing range commences within the jurisdiction of a magistrates' court but ends within the jurisdiction of the Crown Court; the starting point is 12 weeks custody. In determining whether an aggravating feature was present, the court should refer to the list set out in *Saw and others*.

Although Saw and others requires particular focus on the impact of the offence on the victim, it confirms that a low level burglary with minimal loss and minimal damage and without raised culpability or raised impact, committed by a first time offender, may be dealt with by way of a community order rather than an immediate custodial penalty.

Category 3 – An offence would be expected to be committed to the Crown Court where the goods stolen were of high value or any aggravating feature was present.

Saw and others provides that the court must address the overall criminality of the offender (in the light of previous convictions) and the impact of the offence on the victim(s):

- where there is *limited raised culpability and/or impact*, it is likely that the sentence will be within a general range of 9 to 18 months custody; a shorter sentence (including the making of a community order) may be appropriate where it is established that the offender played a subsidiary role or was exploited by other offenders;
- where there is *seriously raised culpability and/or serious impact*, the starting point should be a custodial sentence in excess of 18 months; a community order should be considered only in the most extreme and exceptional circumstances.

As noted on page 34 of the Magistrates' Court Sentencing Guidelines, where a case otherwise appropriate for sentence in the Crown Court is, on its own particular facts likely to attract a community order, it should nonetheless be sentenced in the Crown Court so that any sanction for non-compliance can be imposed with the powers of that court rather than within the more limited powers of a magistrates' court.

Aggravating and Mitigating Features (not exhaustive)

Aggravating features:

- the use or threat of force on or against the victim (NB: this would make the offence triable on indictment only),
- trauma to the victim beyond that normally associated with this type of offence,
- pre-meditation and professional planning or organisation, such as by offenders working in groups or when housebreaking implements are carried
- vandalism of the premises burgled,
- deliberate targeting of any vulnerable victim,
- deliberate targeting of any victim,
- the presence of the occupier whether at night or during the day,
- high economic or sentimental value of the property stolen or damaged,
- offence committed on bail or shortly after imposition of a non-custodial sentence,
- two or more burglaries of homes rather than a single offence,
- the offender's previous convictions.

Mitigating features:

- nothing, or only property of very low value is taken,
- offender played a minor part in the burglary, and treated by others in group as if he were on the fringes
- exploited by others
- offence committed on impulse
- age and state of health (mental and physical)
- good character
- evidence of genuine regret and remorse
- ready co-operation with the police
- positive response to previous sentences

CONSULT YOUR LEGAL ADVISER FOR GUIDANCE