



Prison and Pregnancy: Looking Beyond the Offence

The Case of *R v Bassaragh (Maya Tiger)*
[2024 EWCA Crim 20]

Keywords

Sentencing, mandatory minimum sentence, pregnancy in prison, firearms offences, criminal justice

This case concerns an extension of time for permission to appeal against sentence. A 22-year-old black woman was sentenced to the statutory minimum term of five years imprisonment following an early guilty plea to the charge of possession of a prohibited firearm. In February 2023, the appellant was found in possession of a self-loading 9 mm pistol, which contained a magazine holding three bullets. The following explanation for her actions accompanied her guilty plea:

1. The firearm and the ammunition did not belong to her.
2. Prior to her arrest, she was asked by her then-boyfriend to ‘look after something’ – which she did so without thinking.
3. After agreeing to do so, a bag, clothing and an item wrapped in a blanket were delivered to her home via taxi.
4. A few days later, her then-boyfriend arrived at the property and asked to inspect the bag. During the inspection, she did not see what was in the bag as she was distracted by a dog that he brought with him. Later that day, he gave her a key, but she was still unaware of the contents of the bag.
5. Later, she became curious as to the contents of the bag and discovered it contained a safe. After unlocking the safe, she found the firearm but was unaware it contained a magazine with live ammunition.
6. She contacted her boyfriend to remove the firearm from her home. He claimed he could not because he was concerned about being stopped by the police. She kept on at him to remove it; he agreed to do so, but on the day of collection – the police executed their warrant and discovered the firearm.
7. As such, she entered a guilty plea as she was the custodian of the firearm.

At sentencing, the judge found no exceptional circumstances would allow a deviation from the statutory minimum term of 5 years imprisonment.

Upon entering prison, the appellant discovered that she was pregnant – which she was not aware of at the time of sentencing. She was placed in the Mother and Baby unit, and she unfortunately developed pre-eclampsia, a condition that affects some women during the second half of pregnancy. Symptoms include, but are not limited to, severe headaches, vision problems, pain below the ribs, vomiting and swelling of extremities. Whilst most cases of pre-eclampsia cause no long-term problems, there is a risk that the mother could have ‘fits’, which would be life-threatening to both mother and baby. The Pre-eclampsia Foundation states that black women are 60% more likely to develop the condition than white women. Owing to her condition, she was advised to have a caesarean section two weeks after her appeal hearing.

During the appeal, the court heard from experts who highlighted various issues around her pregnancy. This included the propensity to be at risk of the condition because of her ethnicity, the family history of premature labour and previous pregnancy loss. The appellant argued that the evidence not available at the time of sentencing – identified several risks for her and her unborn child when the surrounding facts were viewed holistically; a five-year custodial sentence was arbitrary and disproportionate. She asked the court to find exceptional circumstances not to impose the statutory minimum term.

Held – Appeal allowed.

The court allowed the extension of time and permission to rely on evidence unavailable at the time of sentencing and the appeal. Whilst the court acknowledged that the firearm was a lethal weapon, loaded with viable ammunition, there was strong personal mitigation, which allowed the court to depart from the statutory minimum term of 5 years imprisonment. The Court of Appeal disagreed with the original trial judge and suggested the case did present exceptional circumstances that (at [5]):

1. Justified not imposing the minimum sentence of 5 years.
2. Meant a custodial term commensurate with the seriousness of the appellant's offence could be set at 3 years after consideration of the personal mitigation, reduced to 2 years after making the appropriate reduction for the appellant's guilty plea.; and
3. Considering points 1 and 2, the Court of Appeal could take the exceptional course of suspending the sentence.

The court understood that the National Health Service (NHS), the Prison Ombudsman and the Ministry of Justice (MoJ) all classify pregnancies in the prison estate as 'high risk'. Furthermore, the Court stated that women in custody were likely to have complex health needs, which would increase the risks associated with both Mother and baby (at [26]). Furthermore, giving birth in prison could lead to difficulties in receiving specialist maternity treatment, and these concerns were illustrated by:

- (i) The increased rate of stillbirths in prison when compared to the community.
- (ii) Increased rate of premature birth, low birth weight, and perinatal mental health difficulties when compared with the community.; and
- (iii) statistics that one in ten prison pregnancies result in birth in prison or *en route* to the hospital because of limitations in the availability of urgent transport and that between 2020 and 2022, one in four babies born out of prison pregnancies required admission to a neonatal unit (the national average being one in seven) (at [27]).

These concerns were coupled with the appellant's ethnicity. As a black woman, the rates of an adverse outcome of the pregnancy were higher compared to white women. Whilst these general issues are concerning, there were individual circumstances that ought to be considered as well. These included:

- (a) the family history which suggests a predisposition to premature labour.
- (b) being in prison suggested a real and present danger to delivering her baby safely.
- (c) A personal history of pregnancy loss.
- (d) Being in prison whilst pregnant would be frightening, disorientating and traumatic in a way that was far beyond any unavoidable norm.
- (e) The recent development of pre-eclampsia, a condition which was diagnosed in the days before the hearing and which requires a level of monitoring and a reliable means of rapid specialist intervention, which presents particular challenges in the prison setting (at [29]).

The Court referred to the case of *R v Charlton* [2021] EWCA Crim 2006, [2022] Cr App R (S) 18, which was similar in circumstance. Here, the offender was also handed down a minimum sentence, but she did not know she was pregnant at the time of sentencing. She was convicted of a '3rd strike' domestic

burglary, which invoked a statutory minimum sentence of 3 years, as per s.314 of the Sentencing Code, unless circumstances made it unjust to impose such a sentence. In this case, the Appeal Court stated that 'prison would be a far heavier punishment for this applicant than for most prisoners ... pregnancy and births can be expected to increase her motivations to remain drug-free... it is [also] necessary to have regard to the rights of children who, as things stand will be born in prison' (at [14]).

Regarding these circumstances, the Court believed it would be unjust to impose the minimum sentence, and they substituted the original 3-year term for one of 2 years, suspended for 2 years, with a drug rehabilitation requirement for 9 months and a rehabilitation activity requirement for 15 days'. The Court also considered the case of *R v Stubbs* [2022] EWCA Crim 1907. Whilst this case did not involve a statutory minimum sentence, the offender was pregnant when receiving a custodial sentence. Her application for leave to appeal was dismissed as the baby would be born after she was expected to be released. As such, the sentence was reduced from 21 months to nine months rather than being suspended.

The Court readily acknowledged the presence of strong personal mitigation in the case, which will be separated from the issue around her pregnancy. Firstly, she was of previous good character and had been in regular employment. Secondly, she entered a guilty plea at the earliest opportunity. Thirdly, she was still a young adult but was assessed by the author of the pre-sentence report and a psychologist to be 'unusually naïve ... immature who would be extremely vulnerable in custody and ... the experience of custody would be particularly hard' (at [37]). Fourthly, there was a low risk of reoffending, with a strong prospect of rehabilitation – evidenced by her exemplary behaviour in prison.

Like the decision in *Charlton*, the court was satisfied that the pregnancy, the strong personal mitigation, and exceptional circumstances would render a custodial sentence of 5 years as 'unjust' (at [47]). Moreover, she had already served 14 months in prison by the time the appeal was heard. Considering these circumstances, the court concluded it was in the interests of justice to take the exceptional course of suspending the sentence for this type of offence [para 48]. Therefore, the original 5-year sentence was substituted for 2 years imprisonment, suspended for 2 years (at [49]).

Commentary

Similar to the *Charlton* case, the issue of pregnancy was not apparent at the time of the original trial. The court took an extremely kind-hearted approach to sentencing an extremely serious offence. The court considered a raft of evidence around both mother and baby's physiological and emotional well-being. It is of vital importance that the court consider the person-specific health concerns presented by the appellant – namely, being a black woman, thereby having a greater propensity for pre-eclampsia, the previous pregnancy loss suffered, as well as the broader issues around the quality and availability of care within the prison system or whilst being transferred to hospital, should the need arise. However, this approach begs the question of whether prison is the correct place for female offenders.

In 2022, the Prison Reform Trust reported that 58% of prison sentences given to women were for under six months, despite widespread recognition that short prison sentences were both 'harmful and ineffective' (<https://prisonreformtrust.org.uk/six-in-10-women-sent-to-prison-serve-sentences-of-less-than-six-months/>). Furthermore, the most frequent type of offence was acquisitive crime, with theft from shops making up more than 36% of prison sentences handed down to women, more than double their male counterparts (16%). The Female Offender Strategy Delivery Plan 2022–2025, sought to ensure the independent judiciary had an increased understanding of specific issues faced by women who commit criminal activity (Ministry of Justice, 'Female Offender Strategy Delivery Plan 2022–25 p 16). Whilst this commentary is not to suggest that female offenders ought to avoid custody by the fact they are female, custody will be the correct option for some women who commit crimes of such gravity, which means that no option exists. However, these cases are extremely rare. Further, custody for women enhances a particular set of vulnerabilities, including but not limited to a higher prevalence

of mental health issues than males, being seven times more likely to self-harm in prison than males (Ministry of Justice, 'Female Offender Strategy Delivery Plan 2022–25 p 20).

If the court can take this gender-centric approach to very serious offences, they ought to be able to stem the tide of female incarceration. As of 4th November, there were 3533 women in prison, making up a little over 4% of the prison population (Ministry of Justice, Weekly Prison Population Figures for 2024). The prison system is readily seen to be in crisis. In September 2024, the government released 1700 prisoners to ease the overcrowding within the prison system. In October 2024, the government planned to release a further 1000 prisoners, meaning that in the autumn of 2024, 2700 prisoners were released or, to put it another way, 76% of the whole female prison population (Sima Kotecha 'More Prisoners Freed Early to Ease Overcrowding' BBC News 22 October 2024).

The Howard League for Penal Reform suggest that 'most women entering prison to serve a sentence have committed a non-violent offence, they tend to commit less serious offences than men and most do not pose any serious risk of harm to the public' (Howard League Blog, 8 March 2024). The types of offences that are generally committed by women fall within the non-dangerous category. In the year ending June 2022, women accounted for 75% of prosecutions for TV License Evasion, 69% of child truancy prosecutions, and 58% of benefit fraud prosecutions (Ministry of Justice, 'Female Offender Strategy Delivery Plan 2022–25 p 10'). For more serious offences, including theft, non-motoring summary offences and miscellaneous crimes against society – women were 11% more likely to be imprisoned than males, thus suggesting a gender imbalance when it comes to sending women to prison.

The common law developments in this area have illustrated that the court can depart from a mandatory minimum sentence. With the crisis in the prison system and the general lack of serious or violent offending committed by females, we ought to depart from the overreliance on the custodial model of punishment in England and Wales. It is well established that a) the prison system is in crisis due to overpopulation and b) prison does not work. Cases like this represent an opportunity to remedy both of these problems and is an approach courts should consider.

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