

**Burglary – We Saw it Coming. A Guide to R v Saw and others [2009]**  
**EWCA Crim 1,**  
*By Caroline Bray*

Rarely has a judicial pronouncement caused more sensation than when the Lord Chief Justice, Lord Woolf, gave judgement in *R v William Patrick James McInerney and Stephen James Keating [2002] EWCA Crim 3003*. Community sentences for burglars dominated the headlines. The press had a field day and the politicians likewise. Calls for tougher sentences, more prisons and cries that a home was no longer a mans castle ensued. In fact, on reading the judgement, I don't think that was quite what Lord Woolf was saying. Indeed therein lies the problem.

The interpretation that community sentences were the starting point for "standard burglaries" in every case is probably what has led to *R. v. Saw and others* becoming a necessity. There is a clear emphasis in the judgement in *Saw* on the seriousness with which burglary; however "standard" must always be treated.

"The starting point must always – we emphasise, always - be that burglary of a home is a serious criminal offence."

One example of this apparent misunderstanding is given in *Saw* – a Recorder sitting here in Leicester as recently as October 2008 applied the guidelines as he believed he had to and gave a community sentence when he wanted to impose custody. In *Saw* there has been an attempt to clarify and clear up the obvious difficulties that have arisen since *McInerney*. What Lord Judge said about the Leicester case was this:

"Thus, on 24 October 2008, in *R v Wong*, the Crown Court at Leicester was considering sentence on a man who had been committed for sentence by Magistrates for two dwelling house burglaries and who asked for two offences to be taken into consideration. Without commenting on the decision itself, which is not before us, we note that the Recorder observed that he wanted "the public to know that I can't send you to prison because of the guidelines that I am given...I want to send you to prison but I can't because I am restricted by what I am told to do in cases like this...I have got to give you a community sentence. And as I said earlier the public must think we have all gone mad. But that is what I have got to do".

We would be surprised if on proper analysis the guidance in *R v McInerney: R v Keating* compelled this observation, but the fact that it was made demonstrates not only that the guidance has been controversial, but that it has also proved difficult of application."

The terminology in *McInerney* has also caused problems. What is a “standard” burglary? A first time burglar? What *Saw* does is attempt to clarify the position in *McInerney* and clear up the misunderstandings it has led to about sentencing policy.

“the concept of the “first time burglar” was itself problematic, not least because what was described as the “standard” burglary assumed that the defendant had already been convicted of burglary on previous occasions.”

In *Saw* the Lords also recognised that there was confusion surrounding the separation of aggravating features into high and medium categories. The reality is that a feature is either aggravating or it is not. Also the list of aggravating features was not exhaustive, although it perhaps purported to be, which led on occasions to a failure in sentencing to address an offenders true criminality.

There is a list of aggravating features provided in *Saw* – it is not exhaustive as these lists never really can be – which appears in a note to the existing sentencing guidelines.

Aggravating features:

- the use or threat of force on or against the victim
- 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.

What is made plain is that in the case of burglary, an offenders previous convictions are important and that a burglar with relevant previous convictions should be sentenced more harshly than a first time offender committing an identical offence.

Mitigating circumstances are also listed, again not exhaustively. It is the presence of these which can result in a community sentence for an offence of burglary in some cases.

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

The real purpose of *Saw* is to bring some clarity and consistency to the sentencing of burglars and to reduce the possibility for misunderstandings. Whilst some offences which lack aggravation and in which the offender has real personal mitigation or prospect of rehabilitation may still, as they always did, attract a community disposal, there is no starting point which dictates that a Judge is compelled to impose a community sentence and prohibited from passing a custodial sentence where such sentence is appropriate. What is clear from *Saw* is that any burglary with any aggravating features present should normally and save in the case of strong personal mitigation, attract a custodial sentence.

There has been an obvious back tracking in *Saw* away from the idea of a community “starting point” as set out in *McInerney*. What a sentencer must now do (one might argue as always) is look at the seriousness of the offence and the mitigation and decide sentence. Of course, this may result in a community sentence.

As the Lord Chief Justice, Lord Judge put it in *Saw*:

“Overall, and in the end, the sentence must reflect the offender’s criminality in the context of the particular dwelling house burglary or burglaries he has committed, with appropriate allowances made for all the available mitigation. In expressing ourselves in this way, what

we are seeking in this judgment to achieve, is consistency of approach in which the starting point for every court considering dwelling house burglary involves clear recognition of the seriousness of this offence, no more, no less.”

And so, what of the press response? The popular press is much more happy with this judgement. The Telegraph ran the headline “Burglars will face stiff Prison Sentences, Lord Chief Justice warns.” The BBC reported “Tougher Burglary Sentences Urged”. A mans home is once again his castle. The BBC reported that the judgement was expected to: “act as important sentencing guidance to crown courts in England and Wales and has come after some misunderstandings of the existing guidelines on burglary sentences.”

Perhaps the new sentencing note available at the Sentencing Guidelines Council website best sums up the aim of *R v Saw* when it says:

“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.”

What is clear is that practitioners and Judges alike no longer need to distinguish between categories of aggravating features or whether a standard burglary has only one medium aggravating feature or two. The more simplistic and realistic approach in *Saw* is one which is welcome not only in the popular press for what it doesn't really say but in the Courts for what it actually does.

Senior Clerk: Sharon Easton

65-67 King Street, Leicester LE1 6RP - DX 10873 Leicester 1 - Tel: 0116 254 7710 - Fax: 0116 247

0145

email: [clerks@kingstreetchambers.com](mailto:clerks@kingstreetchambers.com)

[www.kingstreetchambers.com](http://www.kingstreetchambers.com)