Banks on Sentence

Sentencing Alert No 173

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Benefit fraud

About £30,000 loss

R v Hedman 2017 EWCA Crim 830 D was convicted of failing to notify a change of circumstances. D received various forms of benefit including income support, housing and council tax benefit. The claims to start with were legitimate. D claimed she had no savings but as of August 2009 she did have savings, which fluctuated from £9,750 to £43,823 by 2014. All [the later] benefit claims were therefore dishonest by reason of her failure to declare those savings. The total fraudulently obtained by D was about £30,500 of which £500 has been repaid. D had some previous convictions relating to theft and ill-treatment of children in 2016 (2 years' imprisonment). The Judge started at 38 weeks with a range of community order to 21 months, and listed the aggravating factors as: a) a lack of remorse, and b) the period of offending. Held. Immediate custody was inevitable in this case. However, there were some points in mitigation which could have been taken into account, namely that D had children and grandchildren. **15 months** not 20.

Note: The Judge did not adjourn for a pre-sentence report and D had been convicted of ill-treatment and sent to prison. This would imply that the children were not dependent children. Ed.

Court of Appeal

Power to rehear concluded appeals/counsel must know the unpaid hours worked

Att-Gen's Ref 2017 Re Campbell (No 2) 2017 EWCA Crim 1372[1] D had his sentence increased from a suspended sentence to an immediate prison sentence. The Court asked whether any unpaid work had been done. Counsel said he had no information about the number of hours that had been performed. Three days later the case was relisted and the Court was told that 69 hours had been performed. Held. We have power to vary the sentence, *R v Yasain* 2015 EWCA Crim 1277, 2016 1 Cr App R (S) 7 (p 34). Counsel has a duty to find out the hours done. 30 months not 32.

1. The judgment is entitled *R v Campbell* 2017 EWCA Crim 1372.

Informants

Formal agreements Discretion of the authorities to refer the case back for resentence

Re Loughlin 2017 UKSC 63 Supreme Court S and his brother, D, gave assistance to the police in Northern Ireland with a formal agreement. They pleaded guilty to murder and other offences. The normal penalty would have been life with a minimum term of 22 years. The Judge gave S and D a 75% reduction for their assistance and with the plea discount gave them life with a minimum term of 3 years. Various people were put on trial using S and D's evidence. All were acquitted except one, who was convicted on other evidence. The trial Judge found that S and D had lied to

the police and to the Court. He also found that S and D had understated their role and exaggerated the role of others. Held. para 12 Where offenders fail to give assistance in accordance with their agreement, the specified prosecutor must consider whether it is in the interest of justice to refer the case back to court. That [issue should not be determined by asking] whether there is a necessity. para 33 Here the official in her report had demonstrated a careful, perfectly legitimate investigation into the question of the interest of justice and her conclusion cannot be impeached.[2]

2. I'm not sure whether Lord Kerr meant that a decision in principle cannot be impeached or whether this particular decision could not be impeached.

Offences against the Person Act 1861 s 20

Defendant aged 16-17 at the time of the offence

R v Harkness 2017 EWCA Crim 1249 D pleaded to unlawful wounding. D and the co-accused, W, had an altercation with V in the street in broad daylight. The argument was about a robbery connected with drugs and V was blamed for being a part of this robbery. V backed away from the pair but as he did so D swung a punch. V ducked the punch and then hit D in the face. V then ran off after noticing a knife in W's hand but tripped and fell to the ground. V was kicked in the head twice by D and stabbed in the back by W. There were families in the vicinity and people walking by. V was taken to hospital and there was no internal damage other than the stab wound. D was aged 17 and 10 months at the time of the offence. He had 15 previous findings of guilt including assaulting a PC and five battery offences. The pre-sentence report indicated that D expressed regret and remorse but also minimised his behaviour. The Judge sentenced D as an adult starting at 3½ years and gave full credit for the guilty plea. Held. In his sentencing remarks, the Judge did not refer to the fact that D was aged 17 at the time of the incident and the *Youths Sentencing Guideline 2009* was not drawn to his attention. With the 24-month maximum available, if he had been sentenced at the time of the offence, the guilty plea and the circumstances of the offence, **18 months'** YOI not 28.

Prison offences

Prison officers as defendants

Att-Gen's Ref 2017 Re Bozkurt 2017 EWCA Crim 1415 D, a prison officer, pleaded to bringing list A and B articles into prison. For several months, she took prohibited items into prison at the request of a former inmate, who paid her in cash. The items included cannabis (count 1), mobile phones, SIM cards and phone chargers (count 2). D was not pressurised into conveying the goods, but she was in debt to a credit card company and was the sole carer for two children and so needed the money. Prison staff had noticed D behaving inappropriately with a prisoner and, as a result, decided that staff would be searched coming into prison on a particular day. D was stopped on that day and was found to be carrying 117 grams of cannabis (worth, in prison, between £5,850 and £11,700), three mobile phones (worth, in prison, £500 to £1,000 each), 18 SIM cards (which could be rented out for £50 a fortnight) and five mobile charging wires. D had earned several thousand pounds in cash from transporting items over a number of months. D was aged 28 and had no previous convictions. A pre-sentence report focused on D's children and what might happen to them if D received a prison sentence. It also noted that D was an educated woman who was doing a master's degree in criminal justice. The Judge found a leading role and made it a Category 3 case, because she intended to supply the drugs in prison. He started at 4 years' imprisonment. The Judge said he was going to pass whatever length of sentence that would enable him to suspend it. Held. The offending here was serious. The value of the items conveyed was significant and they helped to maintain a criminal economy and power structure within the prison. Conduct such as this on the part of a prison officer means immediate custody. We apply the *Drug Offences Guideline 2014* and start at 48 months for the drug offence and take into account the second offence and the children and stay at 48 months. With full plea credit, **32 months** immediate custody, not 2 years suspended.

Rape

Victim asleep/drunk ***Rape by a friend***

R v Bunyan 2017 EWCA Crim 872 D pleaded to assault by penetration (two fingers in V's vagina for 20 seconds) and sexual assault (touching V's breasts). D and V were close friends and housemates at Durham University. V had given D considerable support for his problems with depression. They had been out drinking since 4 pm and left a pub at 11 pm. V returned to her room in halls. V woke with a burning pain in her vagina and noticed that her jumper was pulled up around her neck and her bra was unclasped. She sensed someone was beside her in the bed but went back to sleep crying. She awoke in the morning distressed and shaking and messaged D to ask if he had been in her room. D eventually admitted to being there and said he had 'felt her up' and 'fingered her briefly' while she had been asleep and he was sorry. He said, "I essentially raped you." V contacted police some three weeks later and D made a full admission in interview. D was aged 20 at the time of the offence and had no previous convictions. There were references. The psychiatric report said that D had suffered from a mild to a moderate depressive episode but that disorder did not contribute to his offending. The cause was considered to be alcohol. D was extremely frightened about the possibility of a prison sentence and the author of the report proposed a suspended sentence. The Judge took account of D's mitigation, which included a) the fact that this was entirely out of character, b) the genuine remorse, and c) V did not want D to have detention. The Judge found it was a category 2B offence with a starting point at the very bottom of that category. **2 years** not 32 months.

Sex Offences: Children, With

Seeking penetrative sex ***Child aged 14***

R v Gustafsson 2017 EWCA Crim 1078 D pleaded to attempting to incite a child to engage in sexual activity. D was communicating online with someone who he believed to be a 14-year-old girl called Jodie. 'Jodie' was in fact an adult male who referred to himself as 'paedo-hunter'. Over about three weeks,[3] D asked 'Jodie' if she 'fucked' and discussed various things that would happen when they met. D told 'Jodie' he was 19, when he was in fact 34. He asked for photographs of naked genitalia and D was sent an indecent photo of a naked female. D talked repeatedly about penetrative activity, mentioning backwards and forwards. Eventually, the man posing as Jodie reported D to the police and gave them a recording of all the conversations. D was arrested. He had recently received a 3-year community order for a similar offence. A pre-sentence report said that D failed to recognise his own responsibility as an adult to protect children. He was assessed as being a medium risk to children with a high risk of re-conviction. The Judge said the fact that D was prepared to commit this offence so soon after being given the chance by the community order meant he had ignored that chance. He treated as mitigation that sexual activity could never have happened and found the case was Category 1A. The aggravating factors were D's previous offending and that D had breached the order so quickly. Held. Although there was no harm done, that was through no credit or action of D. However, there was no sexual activity and [no child at risk], which was highly material. Here there would be a very substantial downwards movement from Category 1. There were two factors of higher culpability. D lied about his age and he solicited indecent material from someone who he thought to be a child. We move down to Category 3, applying *R v Buchanan* 2015 EWCA Crim 172. We start at 18 months. We treat the quick breach of the community order as part of the global term. With those factors and D's intellectual impairment, we move to 30 months. With full plea credit, **20 months** not 32.

3. There is reference to the activity lasting four weeks as well.

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