Sentencing Alert No 90

16 October 2014

Compensation

Promise of money in the future

R v Carrington 2014 EWCA 325, 2 Cr App R (S) 41 (p 337) D pleaded to fraud and other charges. At work she made false claims for overtime and petty cash. In all she obtained just under £50,000. Counsel said D was keen to pay the money back as soon as possible. He suggested a £10,000 or £15,000 compensation order based on D and her partner borrowing money. He also said, "Courts really cannot take into account monies that other people are borrowing or monies that they would lend". In fact D was now unemployed, on a very modest pension and relying financially on her partner. With her good character, age etc. the Judge made a suspended sentence order with a £15,000 compensation order. Held. Counsel's statement was not entirely accurate. [Where] the cash flow position of a defendant is not such as to equip him to make an immediate payment for a compensation order, then [funds may be borrowed]. If a judge has sufficient material to conclude that there were sound prospects that a defendant would be able to repay [such a loan], then a compensation order would not be wrong in principle. However, in this case there was no such material. Order quashed.

Guilty plea, Discount for

Defendant requires advice

R v Creathorne 2014 EWCA Crim 500, 2 Cr App R (S) 48 (p 382) D pleaded to death by careless driving. He was interviewed three months after the accident. D said he was suffering from amnesia but made no comment. He pleaded not guilty at his PCMH and was treated later as still suffering from amnesia. He pleaded shortly after, following the service of the collision report, toxicology evidence and a report of D's tyres. The Judge decided that D was only entitled to a 25% discount. D appealed, arguing he was entitled to a full discount as he had been suffering from amnesia and has thus pleaded at the first opportunity having received legal advice. Held. In *R v Caley* 2012 EWCA Crim 2821, it was held that, against the backdrop of a need for consistency in sentencing discounts, the determination of the 'first reasonable opportunity' was a matter for the sentencing judge and he or she had a residual discretion to treat cases individually. The Court in *Caley* also recognised the need to avoid an investigation into every case and slow down the administration of justice. Following this approach, the Judge determined the first reasonable opportunity was at the PCMH. The central question is therefore at what point in time was the advice given to D. D's amnesia at his PCMH meant his ability to form a considered decision as to his plea depended upon the ability of his legal advisers to review sufficient evidence to proffer sensible advice. In cases such as this, legal advisors should ordinarily be entitled to see all the material evidence before advising their client. What the material evidence will be will vary from case to case. In this case, the Judge did not analyse what evidence was available to D's legal advisers. A court should also normally be slow to go against the professional judgment of legal advisers where they say there is relevant evidence they have not had sight of. D should have received a full one-third discount.

Offences Against the Person Act 1861 s 18

Defendant aged 15

R v T 2014 EWCA Crim 1906 D and K were convicted of s 18 assault and K was also convicted of possession of an offensive weapon. D was aged 15 and arranged to meet V in a park as V had been "disrespecting" him over a video. D abruptly changed the venue of the meeting to a take-away shop. On arrival D told V to wait for K. D and V remained separate and then K arrived. K told V to walk along and, as he did so, he stabbed V in the chest. The knife, which was never recovered,

penetrated the muscle layer and the wound later required seven stitches. V ran away, bleeding, pursued by D and K. D tried to punch V and the attack stopped only when a friend intervened. When interviewed, D denied arranging K's attendance or any intention that V be stabbed. D had one conviction for robbery, committed a year prior to the instant offence (9-month referral order). He also had been excluded from school for violence. The PSR noted it was a gang offence and D's impulsivity, poor temper control and aggression. D continued to lie about his involvement. It recommending an extended sentence for public protection. K was aged 18 and, having received a *Goodyear* indication, pleaded guilty. The Judge held that the section 18 was borderline Category 1 or 2. With a 6-year starting point, he received 4 1/2 years' detention. Held. The discount for D's age and immaturity, borne out at trial and in the PSR, was insufficient. An appropriate discount from the sentence for an adult results in **4 1/2 years' detention**, not 6.

Pre-sentence reports

Reference to bad character where there is no conviction/Asking to amend

R (S) v Leicestershire & Rutland Probation Trust 2014 EWHC 3154 (Admin) High Court D was convicted of raping his step-daughter (×5) and indecently assaulting another girl. D appealed asking (amongst other matters) for references in the report to the facts for an offence for which a Judge directed an acquittal to be removed and the report to record that D was acquitted of raping his ex-wife. D's concern was the use of the report at Parole Board hearings. After a High Court hearing the report was redrafted. D asserted that the new report should not refer to a) his ex-wife as a victim (because he was acquitted of this matter) and b) a police claim that there were indecent images on his computer when no charges were brought. Held. The OASys[1] assessment in the report must contain all relevant facts, including those relating to an unpursued allegation, provided it is clearly and unequivocally stated that no charges were brought and no conviction ensued. A mere recitation of facts, however vigorously denied, is permissible. The same approach is adopted to the dropped rape charge as it is clear that the judge rejected it as there was no case to answer, a strong finding in favour of D. There is nothing in the report to suggest these matters were treated as correct [or relied on for their recommendations]. If the Parole Board draws an incorrect inference from this, judicial review proceedings could be pursued at least in theory. I reject this application as the inclusion of these matters is neither irrational nor unreasonable. D is able to raise matters of concern with the authorities.

[1] Offender Assessment System.

Prison offences

Conveying articles into prison

R v Melim 2014 EWCA Crim 1915 D pleaded (25% credit) to conveying a listed article into prison contrary to Prison Act 1952 s 40B. D has sent two letters, marked as legal privilege letters, to two prisoners. One contained 33 grams of cannabis resin, the other, 18 grams. D was aged 48 at sentence and had no relevant or recent convictions. The Judge bore in mind the drugs guidelines, but did not follow them. Held. The amount of drugs involved in the instant case would result in category 4. Three principles in cases such as the presents emerge from the case law, a) reflecting culpability in the drugs guidelines, the role is normally said to be at least significant, b) where the quantity would otherwise fall within category 4 and the supply is by a non-prison employee, then that is the level of harm to be applied, and c) the fact that the offending comprises supply of drugs within or into prison is to be regarded as a highly aggravating feature, normally placing the level of sentence at the top end of the appropriate range as described in the guidelines. 4 ½ months consecutive, making **9 months** not 3 years concurrent.

Supply

Prisoners, Supply to Guideline/Judicial guidance

R v Saliuka 2014 EWCA Crim 1907 In D's cell were found 40 wraps of heroin and wraps containing 7 grams of skunk cannabis and 81/2 grams of cannabis resin. D organised the smuggling of the drugs and had done so on several occasions. Held. The supply of drugs within the prison system is a serious social evil. Because of the high price that drugs fetch within prison, it enriches and gives power to ruthless prisoners who may exploit others to create debts which are difficult to service without resorting to bullying and intimidation or the commission of further crime inside or outside the prison. The trade has an inherently corrosive and corrupting influence. Furthermore, it is capable of feeding the addiction of other prisoners who should be able to make use of their time in prison to become drug free.

For more details see 351.36.

Prisoners, Supply to Cases

R v Saliuka 2014 EWCA Crim 1907 D was convicted of possessing class A and B drugs with intent to supply and of possessing a phone and SIM card inside a prison. In D's shared cell, prison officers found 40 wraps of heroin and wraps containing 7 grams of skunk cannabis and 81/2 grams of cannabis resin. The phone and SIM card were also discovered. D blamed his cell mate but recordings on a prison issue mobile phone showed both men discussing drugs and getting them into the prison. D was aged 24 with an appalling record. He was on recall. The Judge found that D organised the smuggling of the drugs and had done so on several occasions, inferred from the wide range in purity. Held. **7 years** (51/2 years drugs and 18 months consecutive for the phone and SIM possession) was perfectly proper.

Voyeurism

Post-guideline case

R v Adams 2014 EWCA Crim 1898 D pleaded (at the earliest opportunity) to voyeurism (×6) and making indecent photos of a child (×3). D sold an MP3 player to a shop and staff found footage of people using a lavatory in a local hospital. D had placed a disguised camera under the sink, pointing at the lavatory. About 50 people, male and female, were filmed and their genitals were seen. D had been filming once or twice a week for three years, but had stopped of his own accord about two years ago. Upon a search of D's home, the camera was found and data storage devices with deleted films of a dozen or so people using the same toilet were found. This included girls of 10-14. That particular film had been copied three times. D denied involvement initially but later handed himself in and made frank admissions. D was aged 54 on appeal and effectively of good character. He had Parkinson's and also mild depression following his wife's death. The positive PSR recommended a community order with Sexual Offender Treatment Programme. Held. The facts here are unusual. There were aggravating factors. This was in effect a campaign of voyeurism with a significant degree of planning. The toilet was used by hospital outpatients who may have been vulnerable or unwell and where they were entitled to feel entirely safe. The images of girls were isolated and copied. These factors justify this as a serious category 1 case. However, due to D's Parkinson's, custody would be harder for him to cope with than others. For the voyeurism, we adopt an overall starting point of 27 months and for the indecent images, 18 months on each count. The sentences ought to be concurrent, not consecutive, as they related to a single course of conduct. Taking into account D's plea, **18 months** for voyeurism with the indecent image counts concurrent.