Sentencing Alert No 102
8 May 2015

Custody

Global sentences

R v Lindo 2015 EWCA Crim 735 D pleaded to possession of cannabis with intent to supply, driving without a licence and driving without insurance. His car was stopped by police and 17.33 grams of skunk were found in a bag with five small packets of herbal cannabis. At his home was found scales and self-sealing bags. The Judge increased the sentence because of the driving matters. Held. That was wrong because those convictions did not carry imprisonment. 12 months was appropriate so with plea 8 months not 18.

Defendant

Co-defendant's personal mitigation

R v F(J) and Another 2015 EWCA Crim 351 LCJ J, a boy aged 14 ½ and D, a girl aged 16 were convicted of manslaughter. The Judge chose not to differentiate between them. Held. Because of the reports (no details given) and the seriousness of the offence, 3 years detention was not manifestly excessive. Because of the progress D had made and because she will be moved to a different type of establishment when she becomes 18, we reduce her sentence to 2 years. Because the defendants were treated the same by the Judge we do the same for J.

Manslaughter

Defendant under 18

R v F(J) and Another 2015 EWCA Crim 351 LCJ J, a boy aged 14 ½ and D, a girl aged 16 were convicted of manslaughter. They were acquitted of arson being reckless whether life was endangered and convicted of arson. They and two others, X and Y visited a derelict building. Inside the basement, one needed torches to be able to see. J and D set fire to a discarded duvet which was on top of some tyres. On a table there was a tin of baked beans. X and Y asked what they were doing and said a man could have been inside. Within five minutes acrid smoke filled the basement rooms and shortly after they all ran off. A homeless man who was inside was killed. J admitted he knew people slept there. J had an IQ of 68-74. He was said to be child-like. The Judge chose not to differentiate between them. Held. Because of the reports (no details given) and the seriousness of the offence, 3 years detention was not manifestly excessive. Because of the progress D had made and because she will be moved to a different type of establishment when she becomes 18, we reduce her sentence to 2 years. Because the defendants were treated the same by the Judge we do the same for J.

Prostitution Offences

Child prostitution

Post-guideline case

R v Gribbin 2015 EWCA Crim 736 D was convicted of causing child prostitution and two counts of paying for sexual services. He initiated conversations with V, aged 16, in an Internet chatroom. He

posed as a girl of a similar age saying ‘she’ provided sex for money and asked if V wanted to sell her body. V claimed to be aged 17 and played along with the suggestion. V’s mother was ill and V was worried about the family debt. D then posed as ‘Dean’ and contacted V as a client. He drove to V’s home town and took V to a park. D gave V £50 and had sexual intercourse. Although he used a condom, it split and he gave her £20 for a morning-after pill. Four days later he paid her for more sexual intercourse in the park. Another four days later, they met again but V was unwell and there was no sexual intercourse. D paid her anyway. There was no more contact. Police monito ring the chatroom traced R and then D, who admitted the sex but denied paying for it. D was aged 40 and had a caution for sending a letter with an indecent or grossly offensive message. He had texted a sex worker and asked her if she would help him instruct his 13-year-old step-daughter in the ways of sex with him. In fact he had no step-daughter. There were character witnesses. He made derogatory remarks about V to the probation officer. He also said that he liked all age groups of women unless they were ‘heifers’ and that he had no intention of abiding by any restrictions placed on him. He was assessed as having a high risk of re-offending. The Judge said D deceived V who was vulnerable, he made V a prostitute, there was a considerable impact on V who had lost self-esteem and lost some of her friends. Further she was degraded and manipulated. He noted the planning, the grooming and the ejaculation. Held. This was a Category 1 case in Band B. The starting point was 4 years and that was the right overall sentence not 6.

Rape

Relationship rape

R v A 2015 EWCA Crim 177 D was convicted of rape and assault by penetration. The counts were multi-allegation counts. D and V were married and they lived with D’s parents. In 2010, they had a child. V thought D’s family treated her badly because she had been married before. V also thought D had an affair with the consent of his parents. V said D did not show her consideration even when there was consensual sex. When she resisted, D beat and attacked her. In July police were called. Police were able to see a long mark on her arm. The psychological effect on her had been serious. D was now aged 29 and was treated as of good character. The Judge considered V was very vulnerable and D had treated her appallingly. Held. Because the Judge wrongly applied the multi-allegation provisions, we sentence for just two offences for each count. As the offending was at the bottom of Category 1, 12 year s not 16.

Sample counts/Specimen counts/Representative offences

Multiple count charges

R v A 2015 EWCA Crim 177 D was convicted of rape and assault by penetration. The counts were multi-allegation counts. Held. There is a long-established rule that it is for the judge to determine the factual basis of sentencing, apart from the rare cases in which the jury is asked to return a special verdict. But there is an undoubted difference between establishing the facts that are relevant to the charge and deciding how many times a defendant [has] committed the crimes for which he is to be sentenced. Generally, when the prosecution allege that a defendant has perpetrated a number of similar acts on different occasions, it is impermissible for the accused to be charged with a single offence as representing, or constituting, the entire course of conduct for the purposes of sentence. The cardinal rule is that the judge may sentence only for those offences in respect of which the accused has been conv icted, or which he has asked to be taken into consideration on sentence. para 47 The central answer to this problem [of determining the proper basis for sentencing] is to be identified in the purpose underpinning multiple counts. It is to enable the prosecution to reflect the defendant's alleged criminality when the offences are so similar and numerous that it is inappropriate to indict each occasion, or a large number of different occasions, in separate charges. When the prosecution fails to specify a sufficient minimum number of occasions within the multiple incident count or counts, they are not making proper use of this procedure. In cases of sustained abuse, it will often be unhelpful to draft the count as representing, potentially, no more than two incidents. Indeed, in this case, if there had been a multiple incident count alleging, for example, "on not less than five occasions" with an

alternative of one or more specimen counts relating to single incide nts for the jury to consider if they were unsure the offending had occurred on multiple occasions, the judge would have had a solid basis for understanding the ambit of the jury's verdict and he would have been able to pass an appropriate sentence. Therefore, the prosecution needs to ensure that there are one or more sufficiently broad course of conduct counts, or a mix of individual counts and course of conduct counts, such that the judge will be able to sentence the defendant appropriately on the basis of his criminality as revealed by the counts on which he is convicted. In most cases it will be unnecessary for the counts to be numerous, but they should be sufficient in number to enable the judge to reflect the seriousness of the offending by reference to the central factors in the case: e.g. the number of victims, the nature of the offending and the length of time over which it extended. Therefore, in drafting the indictment, a balance needs to be struck between incl uding sufficient counts to give the court adequate sentencing powers and unduly burdening the indictment. As the editors of Archbold Criminal Pleading Evidence and Practice 2015 at paragraph 1- 225 have observed, the indictment must be drafted in such a way as to leave no room for misinterpretation of a guilty verdict and regard must be had to the possible views reached by the jury and to the position of the judge, so as to enable realistic sentencing. Because this wasn't done, the only fair way is to sentence D for just two incidents for each count.

Supply

Cannabis

Post-guideline case

R v Lindo 2015 EWCA Crim 735 D pleaded to possession of cannabis with intent to supply, driving without a licence and driving without insurance. His car was stopped by police and 17.33 grams of skunk (street value £173-£346) were found in a bag with five small packets of herbal cannabis (street value £50-£100). At his home, scales, a grinder and self-sealing bags were found. Supply messages were found on his mobile. D was aged 25 and had ten previous convictions including four possessions of cannabis and one possession of cocaine convictions. The Judge considered the case as Category 3 with a significant role. He increased the sentence because of the driving matters. Held. That was wrong because those convictions did not carry imprisonment. 12 months was appropriate so with plea 8 months not 18. Three months disqualification to remain.