Banks on Sentence

Sentencing Alert No 103

19 May 2015

Confiscation

Companies Piercing the corporate veil

R v McDowell and Singh 2015 EWCA Crim 173 M and S's cases were not connected but joined because they shared similar points. M was an arms dealer convicted of two counts of supplying goods subject to a prohibition. S pleaded guilty to carrying on a business as a scrap metal dealer without being entered on the Register. M and S carried on their businesses through a company of which they were sole shareholder and director. para 3 Both said it was inappropriate to lift the corporate veil. Held. Merely because a director had control of funds on behalf of a company, it could not be said that he had 'obtained' those funds save in his capacity as the company's employee. We observe that the need to identify the capacity in which a defendant received and handled the proceeds of crime had been emphasised by the court in *R v Sivaraman* 2008 EWCA Crim 1736, 2009 1 Cr App&nbs p;R (S) 80 (p 469), since approved by the Supreme Court in *R v Ahmad and Others* 2014 UKSC 36, 2 Cr App R (S) 75 (p 580). For M, it is not necessary to lift the corporate veil. M did not attempt to hide his trading behind the cloak of his company. As the judge put it he was the *alter ego* of the company. He used it openly as his trading vehicle in the transactions. The Crown Court was entitled to examine the receipts and profits of the company from the criminal conduct of the appellant personally. He was the beneficial owner. For S they were his records so no issue arises.

Step 7 Determining the benefit Benefit figure must be proportionate

R v McDowell and Singh 2015 EWCA Crim 173 M and S's cases were not connected but joined because they shared similar points. M was an arms dealer convicted of two counts of supplying goods subject to a prohibition. His company was agent in an aircraft sale to Ghana. para 14 The gross profits of the company were in 2006-7 about £530,000, in 2007-8 about £400,000 and in 2008-9 about £340,000. M had received emoluments of about £170,000 per year. The benefit was assessed as just over £2.55m. The benefit figure included a commission payment of nearly £2m. The available amount was almost £292,500. The confiscation order was made in that sum. M was sentenced to a 2-year suspended sentence. S pleaded guilty to carrying on a business as a scrap metal dealer without being entered on the Register. The Judge based the benefit on the receipts of the company which was near ly £966,000. The available amount was just over £176,000. The confiscation order was made in that sum. S was fined £350. Both M and S argued that the benefit figure was disproportionate and relied on Article 1. Held. para 44 The test of proportionality is applied to the benefit. para 51 The application of the proportionality assessment requires examination (as in *R v Sale* 2013 EWCA Crim 1306, 2014 1 Cr

App R (S) 60 (p 381)) as to whether the finding of benefit the defendant is liable to repay is a proportionate means of achieving the legitimate objective of depriving him of the proceeds of his criminal conduct. The judge may need to examine both causation under section 76(4) (para 34 of *R v Sale* 2013) and the certainty of double recovery (para 29 of *R v Sale* 2013). We agree with the approach in *R v Sale* 2013, where the underlying transactions producing the appellant's receipts were lawful and not criminal. The cost of those transactions to the defendant may, on the grounds of proportionality, properly be treated as consideration given by the appellant for the benefit 'obtained'. There may be no 'loser' as contemplated in *R v Waya* 2012 and in *R v Jawad* 2013. The underlying principle is the same, the defendant has not gained by his conduct to the extent that he has given value for his receipts. Each case must be decided according to its particular facts. For M it was proportionate. para 64 For S, the Judge determined that the entire business was criminal. S's contentions about the finances of the business were not substantiated. The burden was on S and his argument failed [the test].

Community order

Determining the length of a community order

R v Khan 2015 EWCA Crim 835 D pleaded to production of cannabis for his own use. He was given a community order with 100 hours unpaid work. There was no complaint about that. The Judge said the community order should run for longer than the time the unpaid work was performed so there was some control or power to recall D. She made the order for two years. Held. This order cannot exist other than as a vehicle for the requirement to be performed. The Judge could have imposed a supervision requirement, but she did not. The order cannot be an empty order. It must contain requirement(s). The Judge had no power to make the order for 2 years, so **12 months** instead.

Manslaughter

Gross negligence

R v Bowler 2015 EWCA Crim 849 D was convicted of manslaughter by gross negligence. D suffered from cerebral palsy and lived with his carer, C (who was acquitted). D had a history of physical and sexual abuse. He needed crutches and had a sexual dysfunction which meant he had difficulties in staying in a relationship. V was interested in extreme masochistic experiences and put his interest on a gay web site. He enjoyed submission and being wrapped in cellophane or PVC or both. V liked to be left after sex in a mummified state. In 2009, there was contact between D and V. V introduced D to his sexual practices and asked D to be his master. V said he had done it many times with other men. D agreed and he had sex with D using cellophane about 10-15 times. Holes were made in the cellophane to allow V to breath. D said V asked to be additionally wrapped in PVC. In 2013, V e-mailed D late asking if he could come r ound. V arrived at 11.30 pm and D wrapped him in cellophane and taped it. There were holes around his nose and mouth and over his anus. At V's request, V was also wrapped in PVC. There were no air holes but it was wrapped loosely to allow the air in. C then spanked V and D had anal sex with V using a strapped-on penis. The sex tired D and he told V he was going downstairs to rest. V agreed to this. D went upstairs half an hour later and V was moving. Next time he came up V was lifeless. Both D and C panicked. Eventually, at 5.50 am, C went to a taxi office and told his mother he had killed someone. About three hours after, D contacted his brother and the emergency services were called. D accepted the advice from the ambulance service on the phone on how to revive V. The police arrived and V had been dead for some time. Test showed V had taken ketamine, norketamine and methamphetamine in normal recreational amounts. Death was caused not by

suffocation but by a heart att ack caused by overheating while under the influence of drugs. D was aged 35 with no convictions. The Judge assessed the period of time V was left wrapped up [after the sex] at between half an hour and three hours. On appeal the defence said, V positively encouraged the bondage, death was caused in a large measure by the victim's misjudgment and D was unaware of the dangers of over-heating. The prosecution relied on the time V was left when he could not look after himself. Held. Unusual sexual practices are a matter for the individuals themselves. Here the practice of wrapping up was not an aggravating factor. The relevance of that was the creation of danger to V. The aggravating factor was the time V was left helpless and in danger. The culpability here was different to other cases because V [asked] for the actions to take place. **3 years** not 5.

Rape

Series of rapes/Campaign of rape

Post-guideline case

Att-Gen's Ref No 19 of 2015 2015 EWCA Crim 760 D was convicted of six rapes with V1, his wife, (all specimen counts), two rapes with V2 and three rapes with V3. D had a relationship with V1 for 28 years. They had six children and he treated her poorly. Her life was miserable. Between 2004 and 2011, D raped her vaginally, anally and orally usually after he had been drinking. Sometimes their son in a cot was present. The anal rapes often left V bleeding and in pain and fear. If V1 complained D would slap her. Rapes were achieved through violence. In January 2011, the relationship ended. In 1992 and January 2011, V1 reported the rapes but no action was taken. Immediately after the end of the relationship, D began a relationship with V2. There was physical and sexual violence against V2. He raped her vaginally and anally which made her bleed and cry. This annoyed D who made V2 perform oral sex with her h air grabbed and force used. In one argument, D kicked V2 and shut her head in a wardrobe. The relationship ended in December 2012, and she reported the rapes to the police who reconsidered the complaints made by V1. In March 2013, D started a relationship with V3. She was raped vaginally and anally after he had been drinking. After which he beat her with a belt and forced his penis into her mouth to the point of ejaculation. He was charged with the rapes of V1 and V2 and said to V3 if he was charged he might as well do it and raped V3 again. He had his hand round her neck. She then went to the police. D was now aged 47 with 32 convictions. There were numerous convictions for violence. The pre-sentence report said he posed a serious risk of harm to women if he was in a relationship with them. It was agreed V1's rapes were in Category 1A and V2 and V3's rapes were in Category 2A. The Judge found there were steps to prevent the offences being reported. This and the location of the offences he considered were additional aggravating factors. Held. The Judge failed to have sufficient regard to the fact there were three victims and the profound consequences the rapes had had. **20 years** in all, not 16.