

# Banks on Sentence

## Sentencing Alert No 106

18 June 2015

### Cannabis

#### *Calculating the factual background Judicial guidance*

*R v Solomon* 2015 EWCA Crim 64, 1 Cr App R (S) 57 (p 401) D pleaded to cultivating cannabis. The indictment said there were 18 plants. The Judge said the guideline assumed a yield of 40 grams per plant, which meant the 28 plants in the guideline for Category 3, would have a yield of 1,120 grams. In D's case there was expected to be a yield of between 680 and 1,077 grams which was closer to a Category 3 case than a Category 4 case. He also said the category was between 3 and 4 and the operation was more akin to a commercial operation than a domestic one. D received 9 months imprisonment. Held. The Judge was entitled to reach these findings. 9 months was at the top end but not manifestly excessive.

### Dangerous driving Causing Serious Injury

See also: *R v Buckle* 2015 EWCA Crim 229, 1 Cr App R (S) 68 (p 477) (Plea. 2 ¼ times over drink/drive limit. Left pub with two children. Drove whilst disqualified. Children sustained fractures and internal bleeding. One now has difficulty in walking. Aged 34. 81 previous convictions including burglary, robbery, 10 TDAs and motoring offences. Drink/drive convictions in 1994, 2004, 2006 and 2013. Judge started at maximum of 5 years, making **42 months** with plea. Upheld.)

### Firearms

#### *Minimum sentences Are these exceptional circumstances? Stun guns*

*R v Withers* 2015 EWCA Crim 132, 1 Cr App R (S) 64 (p 455) D pleaded to possession of a stun gun, (section 5(1A)(a)). Police searched her flat and found a taser-type device that looked like a mobile phone in her bedside cabinet. There was no charger with it and the battery was flat. D said it was given to her by a friend. She also said in September 2013, her previous flat had been burgled. Next month, she had moved and there were continuing problems in the area. It was confirmed she had made a call to the police about the problem before the search. A large man under the influence of drugs had knocked on her door at night. She had difficulty in getting him to leave and he had returned

and kicked her front door in. Her door remained insecure and she remained concerned about anti-social behavior in her area. D accepted she knew it was unlawful to possess a stun gun. The landlord refused to repair the door because D was in rent arrears. It was then she obtained the stun gun. D was aged 28 and had two minor convictions. A psychiatrist said D had an emotionally unstable personality disorder, which would mean she was likely to cope with imprisonment badly. Held. We cannot ignore the dangers of people possessing disguised stun guns. The answers to the *R v Avis* 1998 2 Cr App R (S) 178 questions were as follows, 1) The weapon did not shoot bullets, 2) No use was made of the weapon, 3) D's intention with the weapon was effectively known, save a defensive intention by which she hoped a 'buzz' would frighten away an intruder and 4) D's previous were not of any particular relevance. The minimum sentence was arbitrary and disproportionate. Her personal circumstances and her vulnerability had to be considered. **2 years** not 5 years.

## **Fraud**

### ***Breach of trust***

### ***Post-guideline case***

*R v Ousey* 2015 EWCA Crim 984 D pleaded (full credit) to fraud at the Magistrates' Court. For 23 years he was employed by a group of companies and he became financial director and then Chief Financial Officer. Over four years, he submitted 11 bogus invoices worth about £227,000. He paid the money into a bank controlled by himself. He was able to buy two properties in Portugal. It was also discovered he had paid himself substantial benefits which he was not entitled to. The group issued civil proceedings for that loss. He settled with them by paying about £1.4m to them, which included him giving up his pension rights and paying back the £227,000 as well. D helped in the investigation and paid money for that. D also paid the money before the criminal proceedings were started. D was aged 51 and of good character. He was remorseful and had a very favourable prison report. The Judge put it as Category 2A and started at 5 years as that was the guideline figure. Held. There was very substantial mitigation available. There were no aggravating factors. We start at 4 years, so with the plea **32 months**.

## **Life imprisonment**

### ***2003 dangerous provisions and the abolition of IPP***

*R v K and Others* 2015 EWCA Crim 850 K and others were convicted of a campaign of rape against vulnerable children. They were given life with minimum terms up to 17 years. Held. para 23 Criminal Justice Act 2003 s 225 will lead to life being imposed where previously IPP would have been given. That is what Parliament intended and that ensures effective protection of the public. The consequences of the change is more life sentences will be imposed.

## **Murder**

### ***Defendant aged under 16***

See also: *R v Cornick* 2015 EWCA Crim 110, 1 Cr App R (S) 69 (p 483) (LCJ Plea. Aged 15. When aged 12, developed a hatred of Spanish lessons. On Facebook talked of brutally killing and torturing V, a

Spanish teacher. Stabbed V, aged 61, seven times in a lesson with large kitchen knife, in front of other pupils. Had responsible, loving and caring parents. Judge started at 12 years and with aggravating factors moved it up to 25 years. Two years off for plea and three years off for youth and his adjustment disorder made **20 years**. Upheld.)

## **Rape**

### ***Fathers/Stepfathers etc., By***

Example: *R v DL* 2015 EWCA Crim 74, 1 Cr App R (S) 58 (p 404) (D was convicted of two rapes on his daughter when she was aged 13-14. Two other sex offences against her. She was vulnerable. D was aged 33 with, in 2007, 3 sex assault previous convictions (Victim just aged 14. 3 years imprisonment on a plea) and significant non-sex previous. Judge made offence Category 2A. Held. Particularly gross breach of trust. 20 years extended sentence (**15 years** custody and 5 years extended licence) was not manifestly excessive.)

### ***Victim(s) aged 10-12 Pre-guideline case***

*R v K and Others* 2015 EWCA Crim 850 K was convicted of three conspiracies to rape, 5 rapes, two of arranging child prostitution and trafficking. AD was involved in the same counts save there was one less conspiracy. J and B were convicted of slightly fewer charges. It was a campaign of rape against three vulnerable children aged 11+. [Over what period of time is far from clear. Ed.] The children were ordered to recruit others. The girls were given gifts, supplied with drugs (including cocaine and heroin) and shown apparent affection. They also suffered extreme physical and sexual violence and threats were issued if they tried to escape. V1 was told her house would be burnt down. In particular there was oral, vaginal and anal rape and gang rape. Knives, meat cleavers and sex toys were used causing physical injuries. A hairbrush was inserted into V1's vagina. Girls were bitten, scratched, urinated on, suffocated, tied up and burnt with cigarettes. Some had to endure men licking their injured vaginas and watch the abusers smell their dirty and stained underwear. The girls were sold to other men to have sex with them. V2 was threatened with a gun. A baseball bat was inserted into V3's vagina. AD was aged 22-26 and had testimonials. He started offending in 2004 and stopped offending in 2008. He wasn't arrested until 2009. The Judge started at 34 years for D and AD. J was aged 19-21 when he was involved, was of effective good character and was described by the Judge as a follower and not a leader. He was only involved with two victims and stopped offending on his own account. B was involved with two girls and he was not a prime mover. His involvement ended in about 2009. Held. The impact on the girls had been devastating and of the utmost severity. They had been scarred for life. There was a multiplicity of aggravating factors. **Life** was appropriate in all cases. For D and AD a **17-year** minimum term was justified. For J no complaint can be made of a **12-year** minimum term. For B a **15-year** term reflected the behaviour.

## **Robbery**

***Street etc. robbery      Defendant has significant record***

See also: *R v Lewis* 2015 EWCA Crim 165, 1 Cr App R (S) 66 (p 467) (D pleaded early to robbery. One man attacked a woman from behind, putting her in a stranglehold, while D removed her diamond ring, valued at £40,000. Victim lost consciousness and was injured. Attempts made to steal her Rolex watch. 80 convictions including robbery (33 months) and firearms (5 years). Cat 2 Level 2 with a range of 2-7 years. The aggravating factors meant starting at 9 years making **6 years** on a plea not manifestly excessive.)

## **Sex Offences: Children, With**

### ***Physical contact under clothing guideline case***

***Child aged 10-12***

***Defendant aged 25+ Post-***

*Att-Gen's Ref No 7 of 2015* 2015 EWCA Crim 963 D was convicted of eight sex offences including four of causing a child to engage in sexual activity and three of sexual assault. In a residential street, he befriended V, aged 12, whose parents lived close to him. They would play badminton together in the street. During one game, D hit a shuttlecock into an enclosed garden and while the two looked for the shuttlecock D took out penis and asked V to touch it. Reluctantly V did so. Other activity took place on different days. Three further times D asked V to masturbate him. V was told not to tell anyone. V was also asked to suck D's penis and V refused to do so. In the garden, D 'required' V to remove his trousers and pants and to bend over. D put his penis between the boy's buttocks. A similar incident took place in a park. Finally D touched V's bottom and said it was like his wife and said, "I could fuck you". D reached for V's penis but V resisted. When told, V's family was outraged. V felt misery and anger. D accused V of lying. He was married with children. The pre-sentence report said D was manipulative and predatory. The writer said D presented a high risk of causing serious harm to young boys. The Judge put the sexual assaults in Category 2A. He put the causing sexual activity in Category 3A. Held. The aggravating factors included that there were multiple offences against the same boy over 5 months. D's good character was a mitigating factor. 5 ½ years was the least sentence, not 3 ½ years.

## **Theft**

### ***Persistent offenders***

See also: *R v Arthey* 2015 EWCA Crim 965 (D pleaded to theft of a bike and breach of an ASBO imposed for bike theft. He used bolt cutters to steal a bike placed there by police so they could see who stole it. In breach of a suspended sentence for burglary. 23 appearances for 56 offences between 2012 and 2014. Many of them for dishonesty. Drug addict. **18 months** not 3 years, consecutive to the suspended sentence of 10 months.)

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