

# Banks on Sentence

## Sentencing Alert No 109

14 July 2015

### Cannabis

#### *Post-guideline cases Lesser role*

*R v Sobarasua* 2015 EWCA Crim 1137 D pleaded to producing cannabis, abstracting electricity and possessing cannabis with intent. On 26 February 2013, police officers noticed a strong smell of cannabis coming from a van in convoy with a BMW driven by D. They stopped the vehicles and found in the van 15 potted cannabis plants in bags. The two men were arrested. At V's address, police found 137 cannabis plants in two stages of growth. The electricity meter had been bypassed. D made no comment in interview and was bailed. D was then told no action would be taken against him. In the middle of 2014, D was summonsed to court in October 2014. His basis of plea said he was in debt to his dealer and had allowed the dealer's plants to be grown in his house to cancel the debt. D was of good character and had a positive pre-sentence report. The Judge started at 5 years, gave 20% credit for D's plea at the PCMH, and a year off because of the delay. Held. The Judge could pass a global sentence on the production count. There was no reason why the credit should not be 25%. 24 months for the production and 3 months consecutive for the abstraction count making **27 months** not 3 years.

### Confiscation

#### *Step 8 The available amount Expenses*

*R v Yu and Another* 2015 EWCA Crim 1076 D and his wife pleaded to four Trade Mark offences. During the confiscation hearing the Judge was unable to accept their account due to inconsistencies. She found the pair had failed to satisfy her that the available amount was less than the benefit. The main issue on appeal was how the court should deal with expenses when considering the available amount. Held. para 30 Dating back certainly to *R v Comiskey* 1991 93 Cr App R 227, expenses are capable of being taken into account when calculating the available amount. It was said at page 233 that, "the court cannot close its eyes to the obvious and cannot ignore the fact that some expenses must have been incurred" and that must be read subject to the burden of proof on the defendant contained in Proceeds of Crime Acts 2002 s 7(2), see 25.119. A defendant who fails to satisfy that burden will not succeed in reducing the recoverable amount beneath the value of his benefit. Appeal dismissed.

#### *Step 8 The available amount Hidden assets*

*R v Yu and Another* 2015 EWCA Crim 1076 D and his wife, W, pleaded to four Trade Mark offences. During the confiscation hearing the Judge was unable to accept their account due to inconsistencies. She found the pair had failed to satisfy her that the available amount was less than the benefit. Held. para 35 The Judge did not move directly from disbelieving D and W to finding not only that they had hidden assets but that these were necessarily in the same amount as their benefit. The Judge was amply entitled to reject the various tangled and inconsistent explanations offered by D and W. If there was nothing other than the evidence which was disbelieved, there was no or no proper basis for the Judge concluding that the value of the appellants' realisable property was less than the value of their benefit. Having regard to the burden of proof resting on the appellants and once having disbelieved them, there was no proper evidential foundation for the Judge [to accept the defence's suggestions about the finances]. The Judge was both entitled and bound to reach the conclusion to which she came. Confiscation order upheld.

## **Offences against the Person Act 1861 s 18**

### ***Pubs Fights in***

*Att-Gen's Ref No 24 of 2015* 2015 EWCA Crim 927 D pleaded (full credit) to section 18. D was drinking in a pub when he was approached by V, who tried to sell him a watch. D said he had bought one of V's watches before and it had stopped. D ushered V, who was much smaller than him, to outside the pub and the two talked. V turned his back on V and D moved to stop him. D then delivered a considered heavy punch to V which propelled V across the width of the pavement. V hit the side of a low wall next to the kerb. D then kicked V with his steeled capped work boots in the face. D next punched V in the face three times. After the first punch there was a pause. D was left on the ground. He managed to take refuge in a shop. V was found to have suffered injuries under his eye, his nose and his cheek. His jaw had multiple fractures. A metal plate had to be inserted. V's lip was bitten through. Two teeth had to be removed. For months V was frightened, anxious and had trouble sleeping. He also had difficulty eating. D was aged 30 with a conviction in 2009 for common assault on and harassment of his former partner. His family were supportive and he was a hard worker with testimonials. The pre-sentence report assessed he posed a medium risk of causing harm in the future. It was assessed that imprisonment would place a considerable strain on the family's financial stability which included the mortgage on their house. D had performed 19 hours of unpaid work. Held. The three punches were separate, calculated and deliberate blows on an effectively helpless man. It was Category 2 case. The starting point was not less than 5 years. Being generous we reduce that to 4 years for the personal mitigation. With plea discount **2 years 8 months** not 2 years suspended.

## **Perverting the Course of Justice etc.**

### ***Assisting defendants***

*Att-Gen's Ref No 34 of 2015* 2015 EWCA Crim 1152 D was convicted of two counts of perverting the course of justice. Early in the morning, a 24-year old woman, V1 and another woman, V2, were shot by H and C. They had intended to hit members of a rival gang. A sub-machine gun and a shotgun were used. V1 died and V2's life was only saved by emergency surgery. Gang members were also injured. Within hours of the murder, H contacted D by phone and then H and C travelled to D's home address. D then travelled from where she had been staying back to the home address. H stayed at the home address until the afternoon of that day. In the evening, D contacted H, who then went back

to D's address and spent the night there. About six weeks later, after H and C had been arrested, D lied to the police about her contacts with H after the murder. D then made a false witness statement about it. This was the second pervert matter. She continued with the denials in interview and at trial. D was aged 25 and was treated as of good character. She was a single mother who had had a difficult childhood and background. Her two children were aged about five and about nine months. D had a history of substance abuse. H and C were convicted of murder, attempted murder and conspiracy to cause GBH. The prosecution said this was not a case of rushed short term sheltering. Held. D let H stay at her address during the critical first 24-hours of the police investigation. The underlying substantive offence was extremely serious. The assistance was important. There was no evidence of pressure. The actions of D had the potential to pervert a successful prosecution although in fact it didn't. Ordinarily a custodial sentence of **3 years** or more would be appropriate. The principle mitigating factor was the children. With that and the satisfactory compliance with the 2-year Suspended Sentence Order, **18 months**.

## **Sex Offences: Children, with**

### ***Abuse of trust***

#### **Post-2014 guideline case**

*R v Bradbury* 2015 EWCA Crim 1176 D pleaded (full credit) 'to various counts of sexual activity with children', sex assault counts, making indecent photographs of children and voyeurism. 18 boys aged 10-16 were abused over a 4 ½ year period. Many of the boys were very seriously ill. The counts were largely specimen. He was a consultant paediatric haematologist in a hospital in Cambridge. His patients had illnesses and treatments which could lead to concerns about pubertal development which was monitored. Up to a certain age, young patients would be seen with another person, usually a parent. D encouraged a number of young boys to see him alone, when he would fondle their genitals. When there was a parent present he would see the boys behind a curtain. For some boys he would pretend their problems were more serious than they were and they were given more appointments than necessary. Three boys were required to masturbate themselves. D then measured the length and width of their penises. On 12 of the counts, boys had unnecessary examination of their genitals. The boys were told to strip and D fondled their penises and testicles. The victims on seven counts were aged under 13 and their penises and genitals were touched. D attempted to use a camera pen to take images of partially clothed boys. The pen had 170,000 images but none were indecent. D had purchased DVDs. 98% of them involved boys aged 10-16. Some were at the most serious levels. Contacting 800 of the most affected families was a significant undertaking and extremely emotionally demanding. The work distracted the hospital's team from their primary role of caring for their most vulnerable patients. The impact on the children and parents had been devastating. Many parents saw significant changes in their child's personality. Boys suffered from clinical depression, panic attacks, nightmares, lack of sleep, loss of confidence etc. and needed counselling. More than one suffered severe psychological harm. Hospital colleagues felt guilt, anger and shame. The hospital's reputation suffered. D was now aged 41. The pre-sentence report assessed a high risk of serious harm to children. The Judge found D was dangerous but believed 22 years was sufficient protection for the public. The defence said that was the equivalent of 33 years sentence after a trial. Held. This was a very difficult sentencing exercise. D appears to have targeted the particularly vulnerable. The behaviour was escalating. It was a Category 2A case. We substitute an extended sentence in total of 16 years custody with a 6 year extended licence attached to it.

Note: For the 22-year sentence, he would be released after 11 years. For the extended sentence, he would be released sometime between 10 years 8 months and 16 years with an extended licence to

follow. D appears to be significantly worse off after his so called successful appeal. The judgment does not refer to whether consideration was given to whether the new sentence was more severe than the original sentence or whether counsel were given any warning of the extended sentence. A more fundamental problem is that the Court attached the 6-year extended licence to the total term which is unlawful, see 60.79. Prosecution counsel drew the court's attention to the error. The court documents show changes have been made to sentence, but the circumstances of that are not known. The judgment remains unaltered. It could be argued the court was wrong when it said there was a 16-year custodial term, as there was only a 15-year custodial term and a consecutive 12-month sentence on top. If that is right, the defendant will have to serve 10 and a half years before being eligible for parole. As no-one seems to understand the sentence, it is perhaps understandable that the court declined to explain it to the defendant. Ed.

## Supply

### *Street dealing General principles*

*R v Reid and Higgins* 2015 EWCA Crim 1165 R and H pleaded to two conspiracies to supply (heroin and cocaine). Police in an undercover operation made test purchases to catch street dealers. R was involved in 12 transactions and H was involved in ten. On one occasion they told the buyer there would be a slight delay as they were "still cutting up the gear". R was aged 24 years and had 11 court appearances for 17 offences. In 2010, he was given 9 weeks YOI for possession of cannabis with intent to supply. In 2014 he was given 18 days imprisonment for possession of heroin. H was aged 25 with convictions for dishonesty and disorder. He had no drug convictions. The Judge ascribed them with a leading role. The defence said there was no evidence of substantial gain and the role should be significant. Held. It was agreed it was Category 3. Both R and H had substantial links and some influence on the chain. They were motivated by financial gain and had involved others for reward. They were trusted with cutting the drugs. The roles were clearly appreciably above that of a sole street dealer. Their role was significant. The range was 3 ½ to 7 years. For R **7 years** and for H **6 years**.

Follow us on Twitter [@BanksonSentence](https://twitter.com/BanksonSentence)

[book@banksr.com](mailto:book@banksr.com)

[www.banksr.com](http://www.banksr.com)

To sign up to receive the Sentencing Alert emails, please [click here](#).