

# Banks on Sentence

## Sentencing Alert No 113

17 August 2015

### Burglary

#### *Dwelling*      *Attempted burglary*

*R v Lothan* 2015 EWCA Crim 1316 D pleaded at his PCMH to attempted burglary. Police noticed a ground floor window of a flat had been broken. A blood stain enabled D to be linked to it. D had 64 offences on 29 occasions. He had burglary convictions in 1997 (twice), 2001 and 2004 (21 months). There was regular and serious offending up to this offence. The Judge referred to his addiction to drink and drugs. Held. This was a Category 2 case with lower culpability. While the victim was at home there was limited damage to the property. The harm was neutral. As it was an attempt, **18 months**.

### Criminal Behaviour Orders

#### *Test to apply*

*DPP v Bulmer* 2015 EWHC 2323 (Admin) para 22 B had a long record of anti-social behaviour offences and breaches of court orders, but she was unable to manage her chronic alcoholism. The District Judge refused to make a Criminal Behaviour Order because there was no positive requirement to assist her with her alcoholism and an order would not prevent her anti-social behaviour, partly because the proposed order did not give her assistance with alcoholism. Held. para 22 The removal of the requirement of necessity was designed to reduce the hurdle required before an Order can be made. para 21 The legislative language is a shade less clear than it was under the purely prohibitory regime of the 1998 Act. The addition of a power to impose positive requirements has not changed the emphasis from 'necessity and protection' to 'help and prevention'. para 23 There is no obligation to order a positive requirement. para 24 The wording of section 22(4) of the 2014 Act does not mean that, where an offender's problem, whether it is a disease, alcoholism or drug addiction, means that he or she is totally unresponsive to an order and where it is not possible for the underlying cause of the behaviour to be tackled by a positive requirement, the condition in section 22(4) of the 2014 Act is not met. The District Judge erred by focusing on these elements. para 30. Section 22(4) makes no reference to the burden or standard of proof. It is concerned whether, once the gateway in section 22(3) has been passed, the court 'considers' that making the order will 'help in preventing' anti-social behaviour which caused or was likely to cause harassment, alarm or distress to any person. Had Parliament wished the criminal standard to apply, it could have used the appropriate language. The inquiry under section 22(3) is a factual one whereas that under section 22(4) is one of judgment and evaluation. para 35 The court should proceed with a proper degree of caution and circumspection

because such orders are not lightly to be imposed. Satisfaction to the criminal standard is not required in what is an evaluative exercise. para 41 The fact that a person has not responded to orders and other disposals in the past is not in itself a reason for deciding not to make an order. para 44 Relying on the ordinary power of the police to arrest on reasonable suspicion may be insufficient to provide pre-emptive protection from a person with a history of anti-social behaviour to those who are or are likely to be affected by the behaviour. An order imposed on a person who causes criminal damage by spraying graffiti preventing him or her from being in possession of spray paint in a public place gives the police the opportunity to take action in advance of the actual spraying or acts of preparation. para 47 Had the District Judge concluded that the condition in section 22(4) of the 2014 Act was met, he would have had to consider its proportionality.

### ***Geographical restrictions***

*DPP v Bulmer* 2015 EWHC 2323 (Admin) para 22 B had a long record of anti-social behaviour offences and breaches of court orders, but she was unable to manage her chronic alcoholism. The vast majority of her offending was in the centre of York and the CPS wanted a prohibition preventing B from going within the area bound by the York Outer Ring road. The District Judge refused to make a Criminal Behaviour Order because there was no positive requirement to assist her with her alcoholism and an order would not prevent her anti-social behaviour as B would just commit it outside the area. Held. para 40 One of the factors the courts have emphasised when considering exclusion areas in ASBOs is the clarity they provide as compared with prohibitions of certain sorts of behaviour. Such prohibitions are difficult to police and those subjected to them may find it difficult to assess whether they are breaching the order because of their disabilities or other problems, whether alcoholism, drug addiction or something else. para 43 It must, however, be emphasised that the order must be tailored to the specific circumstances of the person on whom it is to be imposed, and that assessments of proportionality are intensively fact sensitive. para 39 If the fact that she would simply move her anti-social activities to another location is seen as an important factor against making the order that was sought, the court would in effect be deciding not to protect those in her primary area of activity.

### **False imprisonment**

#### ***Victim tied up/Violence used***

*R v Yousef* 2015 EWCA Crim 1315 D was convicted of false imprisonment and ABH. V was invited to a party by D and she arrived at 11.30 pm. Another guest took V to a bedroom and raped her. V was punched by him during and after the rape. V told D and others she had been raped and she intended to call the police. D and another 'dragged her out', pulled her hair and forced her into another room. The two kicked V without shoes but caused bruises and other injuries. They took V's mobile and kept her for at least two hours. V was able eventually to escape. V had bruising to the face and loose teeth. D was aged 45 and had a conviction for child cruelty (Community Rehabilitation Order) which she breached (12 months imprisonment). She did not co-operate with probation properly. The Judge said a) the assault was to humiliate and frighten V, b) it was very nasty and terrifying, c) it was designed to stop V calling the police and d) and that it was to protect her tenancy. The defence relied on her depression from her experiences during the Somalian civil war. Held. It was traumatic, but the assault was relatively short. **4 ½ years** in all not 6.

### **Perverting the course of Justice**

## ***Evidence, Interfering with***

*R v Talbot* 2015 EWCA Crim 1238 D pleaded (25% credit) to perverting the course of justice, possessing indecent photographs and making indecent photographs. D lived with his wife who was a rector. He was also a Church of England priest. For three years D had been the chaplaincy co-ordinator for the Cambridge Constabulary. It was an unpaid role. For a number of years he had accessed the Internet to view pornography. He became worried that his Internet provider might have become aware of this<sup>[1]</sup> so he e-mailed the Assistant Chief Constable of Cambridgeshire, C, and offered to resign forthwith. C phoned him and D said he was in a very dark place. D told C about accessing child pornography on the Internet. C said the matter would have to be referred and was worried D might harm himself. Police attended D's home and seized his computer equipment. D explained the computer he used to download material had been destroyed. Police visited the places D had said the parts of the computer had been deposited and it was discovered the bins had been collected that morning. This was the pervert matter. [A news report says the Judge was told D's wife was instantly dismissed from her job as rector and the two were given 24-hours to leave their home.] D was interviewed and said the missing computer had a small fraction of child pornography on it. The Court accepted that. On D's home computer only 18 images were found and one was Category A. It was oral sex with a 12-14 year-old girl. One was Category B and the rest were Category C. The pictures were of young girls aged 8-16. D was aged 63, of impeccable character and overcome by remorse. There was an array of impressive testimonials. The pre-sentence was positive saying he had good motivation to address his behaviour. Held. The pervert was the most serious offence. We start at 12 months not 20. With plea, **9 months**. The image offences remain concurrent.

## **Sex Offences: Assault**

### ***Intruders, By***

*Att-Gen's Ref No 37 of 2015* 2015 EWCA Crim 1210 D pleaded (full credit) to sexual assault and burglary. D, after drinking, asked a friend to go to a club with him and the friend refused. D left. About four hours later, he smashed a lower floor window with a spade and entered a dwelling. He stole some relatively insignificant articles and then went to V's room. V woke up, saw D and without her glasses was unable to recognise the person and screamed. She was absolutely terrified. D stood over the bed and said, "You are not going to make any noise are you?" V said she would not. She tried to keep D talking and thought D had a weapon. D pulled the duvet from V's legs, touched her bottom with his hand, and moved it up to her upper thigh area over her clothing. Next he pulled her legs apart and cupped her vagina over her pyjama bottoms. D then moved his hand to the back of her waist band and began to pull at it. At this point another resident came into the bedroom. She directed D out of the house and he left. Shortly after he was seen by a police officer who considered D was smelling slightly of alcohol. The stolen articles were found in his pockets. D lied then and in interview. D was aged 19 with no convictions. He continued with the lies when seen by a probation officer who checked his account that he was a victim of sex abuse and found it was true. V described her feelings of vulnerability and how she now never felt safe. Held. Forced entry was indicative of greater harm in every case. The offence was committed at night and under the influence of alcohol. The victim exemplifies the feelings of distress, invasion and future fear as to their safety in their own home. We start at **4 years** so with plea and 2 months off as he now goes into custody, **2 ½ years** not a community order.

## Theft

### *Shop thief*

*R v Megia-Grande* 2015 EWCA Crim 1205 D pleaded to two thefts. He went into John Lewis and put fragrances worth £460 into an empty John Lewis bag and tried to leave the shop. He held the bag above his head to try to avoid the detectors. He was stopped and he lied. He was bailed and five months later went to Waitrose and took items of clothing into a fitting room. He concealed the clothing about his person and equipped himself with an empty Waitrose bag. He then stole some food. The total value of the Waitrose goods was £250. When he was arrested he lied. He was bailed. About three weeks later D pleaded to both matters and was bailed. Two days later he shoplifted some clothing and footwear (worth over £100) and he had with him a de-tagging device. He was given a community sentence the next day. D was 22 and had no previous convictions. Held. There was a significant element of deliberation and planning. The third matter could not aggravate the earlier conduct, but the Judge could have it in mind. We start at 3 months, so with plea **2 months** not 6.

[1] A news report says the Judge was told all that happened was his Internet went down.

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