

## Sentencing Alert No 117

25 September 2015

### ABH

#### *Unprovoked/No reason*

*R v Daines* 2015 EWCA Crim 1475 D pleaded to ABH. At 2.30 am on New Year's Day, D, with another, walked passed V who was waiting for a taxi. All were under the influence of alcohol. After about 10 metres, D walked back and punched V hard in the face. V fell and was unconscious for about five minutes. V's friends intervened and D turned his attention to them. D's actions became out of view of the CCTV. In interview, D said he thought V had said, "What are you looking at?" which V had not said. D was 23. He had a good work record and was a valuable asset to his employer. In 2010, when 19, he received 4 months suspended for GBH. In a night club, D had fractured a man's jaw. The suspended sentence was extended when D committed a public order offence. In 2012, when drunk, he committed criminal damage. Held. The case was at the very top of Category 2. It was a single punch. [We start at 12 months] not 15, so with full credit, **8 months** not 10.

### Burglary

#### *Dwelling, Occupied*

*R v Oracka* 2015 EWCA Crim 1471 D pleaded to seven burglaries and two attempted burglaries. They were all daytime residential burglaries. Only in one were occupiers present. D stole cash or other items of low value. He absconded when released on police bail (14 days imprisonment at the Magistrates' Court). D was a Slovakian national and aged 42. He was of good character prior to his arrest. D claimed the proceeds were for his sick sister in Slovakia. Held. The Judge did not structure the sentence properly. We start at 3 years not 4 ½ years because of the defendant's good character and other personal mitigation, so with plea **2 years**.

### Confiscation

### ***Was properly obtained?***

*R v Moss* 2015 EWCA Crim 713 LCJ D pleaded to three record keeping offences and one charge of failing to dispose of a cow's carcass. The prosecution case was that D had unlawfully slaughtered and/or butchered 209 unaccounted for cattle. His benefit was £1,000 per item. The prosecution suggested that D had a criminal lifestyle because two of the offences were committed over six months and D had benefitted by £5,000 or more. The defence said that had not been charged. The Judge found that D had been involved in the unlawful slaughter and butchery of 116 cattle. He calculated the benefit at £83,000, which was less than his realizable assets. Held. Taken in isolation [none] of the offences involved the obtaining of any property or pecuniary advantage. paras 57 and 11 The Judge was wrong to find D had benefitted from the offences, so order quashed.

### **Immigration offences**

#### ***Large-scale organisations***

See also: *Att-Gen's Ref No 49 and 50 of 2015* 2015 EWCA Crim 1402 (Convicted conspiracy to breach immigration law. One, a part-time lecturer who was the mastermind (aged 68) and the other, a director of a company recruiting overseas students who were in ill-health. 117 students with false documents. Value of fraud probably close to £300,000. No previous. Held. We consider the acute human misery to the students. **8 years** and **5 years** not 5 and 2 ½.)

### **Manslaughter**

#### ***Mentally disordered defendants***

*R v Brennan* 2015 EWCA Crim 1449 and 2014 EWCA Crim 2387 D pleaded (full credit) to manslaughter based on diminished responsibility. He was tried for murder and his conviction was quashed by the Court of Appeal because it was not open to the jury to reject the unchallenged medical evidence. D was obsessed with videos featuring ritualistic and satanic killings. His sexual experiences had always been with men. He worked as a male escort and one of his clients was V. D said V required him to engage in particularly disgusting sexual acts which he particularly disliked. D was in a relationship with B and when B was away D used a set of keys he had cut to use B's

flat. D texted V suggesting they meet at the flat. At that time he typed into his computer, 'Hide in bedroom stab heart cut throat bang head cut solar then groin at mo of death Krishna rhade jaya jaganatha place body in pentagram'. At about 9.15, V went to the flat. Just after midnight V left the flat and rang 999 saying he had murdered someone. D later said to the police, "I have killed someone. I hate men. They just do what they want." Police went to the flat and found V naked in the bedroom and dead. He had been stabbed 22 times, primarily in the back but also in the chest. Three knives were used. Two hammers were also found. D said in an interview that the scratching and scorings on V's back was to release V's spirit. Police discovered that after the killing D had cleaned himself, put on new clothes, taken V's car keys and cash from the flat, thrown some of the cash in the street and left a note on the flat door with a pentagram symbol saying, "Do not enter, call 999 straight away." Forensic examination found no sign of sexual activity. At D's home were found pagan material corresponding with those found at the murder scene. D was aged 22 and had no convictions. He was small in stature. He had personality and mental health problems going back to when he was aged 13. D had suffered repeated abuse from another family member. At school he was bullied. There were incidents of self-inflicted violence including smashing his face with a rock. Around the time of the killing he was increasingly depressed and unwell. D told his appropriate adult that he had been having thoughts of killing people. D's mother said he was obsessed with witchcraft and Hare Krishna. A psychiatrist said D's behaviour was consistent with Schizotypal Disorder and Emotional Unstable Personality Disorder. She believed drink and drugs had inhibited him and made the killing easier. She did not think that sexual activity triggered the killing. Held. This was a shocking and savage murder on a defenceless man. D was a deeply troubled and damaged young man. However, he retains significant responsibility for the killing. On the one hand there was a high level of culpability. On the other, D was in an almost total mental turmoil. Since his remand there had been a profound improvement. Two psychiatrists said because of the treatment his risk to others was low. D was not [now] dangerous whatever the position was in 2013. We start at 23 years, so with plea discount **15 years**.

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

***Sexual intercourse    Child aged 13-15    Defendant aged 25+***

*R v Hopkins* 2015 EWCA Crim 1409 D pleaded to two sexual activity with a child counts. He and his cousin, F, invited C, aged 15 years 4 months, to join them for a sleepover. The three slept in a

tent in the back garden. At about 4 am, F was woken by the sound of D and C kissing. F left the tent. The activity went beyond kissing but C did not wish to make a complaint so D was sentenced on his account. That was that C and he had been attracted to each other before that day and on the day C had approached him, undone his trousers and he knew she was only aged 15. He had licked one of her breasts and she had sucked his penis three times. He had ejaculated over himself. D was now aged 25 and had no convictions. He had learning disabilities and some history of mental health problems. D could not read or write very well. He lived with his aunt as he spent all his money on drugs and alcohol. The Judge started at 5 years, went down to three years and with the plea gave two years. Held. The case was exceptional because he had provided the evidence against himself. The disparity in the ages was mitigated by D's learning difficulties. The mitigating factors in the guideline were all present except for one. We start at 16 months, so with plea **16 months**.

Note: C was in a joint enterprise. The fact C was a few months below the age of consent is not a factor in the guideline and was not mentioned in the judgment. This is a classic example of how the guidelines encourage sentencers to pass unnecessary sentences when there is no victim. The Puritans relentless search for victims continues.

## **Sexual Offences: Images**

### ***Category A Penetration***

*R v Nestoros* 2015 EWCA Crim 1424 D pleaded (full credit) to ten counts of making and possessing indecent images and two counts of possession of prohibited images. Police visited D at home and he was candid and helpful. Over two years he had downloaded 4.2 million images. 10,000 were graded. 5,000 were grade A. 643 were grade B. 2009 were grade C. There were 60 prohibited images. There were 463 Category B moving images and 1,000 Category C moving images. D was 64 and in 1989 he was fined £75 for possession of one indecent photograph. He had chronic health issues which required three-monthly visits to a hospital. The defence said it was difficult to see how he could have used so many images. Held. The guidelines give a starting point of 12 months. The Judge must have started at more than 7 ½ years. We start at 4 years, so with the plea, **2 years 8 months** not 5 years.

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[1] The report says the Court substituted a 172-day sentence because that was the time she had served. As she was serving a 7-month sentence she would have been released much earlier. What the true situation was is unclear.

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