Sentencing Alert No 118

7 October 2015

Theft Offences Guideline 2016

On 5 October 2015, the Sentencing Council issued the Theft Offences Guideline 2016. It provides guidelines for a) general theft (theft from a dwelling, a person, a motor vehicle, a pedal bicycle and theft in breach of trust), b) theft from a shop or stall, c) handling stolen goods, d) going equipped for theft or burglary, e) abstracting electricity and f) making off without payment. The guideline comes into force on 1 February 2016.

Sexual Offences Guideline 2014

The Sentencing Council has also issued an amended Sexual Offences Guideline 2014. This guideline amends the schedule of penalties for historic offences. Banks on Sentence had let them know it contained errors.

ABH

Persistent offenders

R v Elkington 2015 EWCA 659 D pleaded (25% credit) to ABH and assault by beating (4 months' concurrent). D, aged 42, was in an on/off seven year relationship with V, aged 26. They both lived in a Salvation Army hostel. They argued and D told V she was a prostitute and she should go and sell herself. She laughed and D pushed her into a wall and she slumped to the ground. Feeling dizzy she went upstairs to her room. D followed her and shouted abuse at her. She ran out of the room so she could be in the street. D followed her outside and punched her in the eye. She fell down and D kicked her and punched her. The following day, D knocked at her door and D pushed his way in and knocked her over. This was the beating charge. V had bruising and swelling around her eye and bruising to her arms. She was in pain from the kick in the ribs. D had 37 court appearances for 121 offences between 1983 and 2012. They included: 1997, manslaughter (8 years); 2003, common assault (3 months); 2005, ABH (extended sentence 17 months) and 2012,

section 20 (extended sentence 56 months) for which he had been recalled. There were assaults on police in 1993, 1995, 1996 and 2004. D did appear to show remorse. The pre-sentence report said he presented a high risk of re-offending and high risk of harm to V and members of the public. Held. The starting point was one month short of the maximum. The sentence could not be justified by fear of future violence. 5-year extended sentence was correct but the custodial term should be **36 months** not 44.

Court of Appeal

Relisting appeals

R v Yasain 2015 EWCA Crim 1277 LCJ D was convicted of rape, robbery and kidnap. He appealed the sentence and on 12 June 2015, the Court of Appeal quashed the kidnap conviction because the transcript indicated that the jury never returned a verdict on that count. The trial Judge made enquiries and it was discovered that the transcript was wrong and D had been properly convicted of kidnap. The case was relisted on 14 May 2015. Held. This court has, like any other court, an implicit power to revise any order pronounced before it is recorded as an order of the court in the record of the relevant court. If [the relevant court] has recorded the order of this Court, then the power to revise the order is strictly limited. The first question to determine is whether the order made by this Court has been properly recorded. The time at which the record was formally made is when the Crown Court officer amended the record of the Crown Court. para 21. In *R v Blackwood* 2012 EWCA Crim 390, 2012 2 Cr App R 1 (p 1), this Court held that, as the Registrar had sent the order allowing the appeal to the Crown Court with a request that the records held on CREST be updated and the record on CREST had been updated, it was too late to order a retrial. The formal record had recorded an acquittal with no provision for a retrial. para 23. There are two exceptions to this general rule. First, where the previous order is a nullity. An example of this is *R v Majewski* 1976 62 Cr App R 5, where the court summarily dismissed an appeal when there was a point of substance. The referral had been procedurally invalid. The court had not performed its function. The second exception is where there was a defect in the procedure that may have led to some real injustice. In *R v Daniel* 1977 64 Cr App R 50, due to an administrative error the renewed application was listed, heard and dismissed on 14 June 1976 without notice to the applicant's lawyers. The order was recorded by the Crown Court. The Court held that if because of a failure of the court to follow the rules or well-established practice, there is a likelihood that injustice may

have been done, then the case should be relisted for hearing. Further, the 'likelihood of an injustice' is for this Court to decide. There may not be a likelihood of injustice if it is clear beyond argument that the application cannot succeed. para 28 In *Taylor v Lawrence* 2002 EWCA Civ 90, the Court of Appeal Civil Division considered the scope of its power to re-open a concluded civil appeal. The defendants in that case appealed on the ground of judicial bias. The appeal was dismissed. The defendants later discovered fresh facts relating to the claimed bias. The court concluded that, "it has an implicit power to re-open a concluded appeal in exceptional circumstances, where it was necessary to achieve its two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice. Further there is a tension between a court having a residual jurisdiction and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice." para 38 We can see no basis for any distinction between the Civil Division and the Criminal Division as to the principles applicable. There is the strongest public interest in finality. The jurisdiction to rehear is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission.

Here it is far better to determine the matter on the basis that this court's jurisdiction is based on *Taylor v Lawrence* 2002. It would be appropriate if the Criminal Procedure Rules Committee can formulate a rule similar to that set out in CPR 52.17. Although the recording of the order by the Crown Court was highly unsatisfactory, it was recorded. The fact that there was a serious error in the material before it and the Court acted on that error does not make the order a nullity. On the facts we set aside the decision of this Court and dismiss D's conviction and sentence appeals.

Incest

Historic

R v GB 2015 EWCA Crim 1501 D pleaded (full credit) to incest and two indecent assaults. D was now aged 68 When he was a child he lived with his parents, V, his sister and two younger siblings. All six slept in the same bedroom. V was 15 months younger than D. When D was age 14 and V aged 13, D would touch V between her legs under her bedsheets. He would also digitally penetrate her. This lasted for six months and ended when the family moved house and V was given her own bedroom. Subsequently when D was aged 15 and V aged 14, he came home from work and went to V's bedroom. He told her to lie on her side and told her not to make a sound. He had vaginal

sex with her but did not ejaculate. When he had finished he gave her a £1 note. V had a troubled adult life. She suffered from depression and self-harmed and made two attempts to kill herself. She blamed D for the breakdown of all three of her marriages. In 2008, V confronted D about the incidents and recorded admissions and an apology by him. D was of positive good character and had nine letters of support from his family including V's daughter who he had looked after at V's request when V was aged 18. D has supported the whole family financially including V. He paid for one of her weddings and took her on family holidays. Held. The maximum sentence for incest at the time was 7 years and the maximum for the assaults was 2 years. The modern equivalent offences would be Sexual Offences Act 2003 s 25 (sexual activity with a child family member). The current guideline provides a starting point of 18 months DTO when there is penetration. In cases where there are no aggravating factors the starting point is a community order. The guideline also states that for younger offenders, that is those under 17, a court should consider a lower starting point because of the offender's age and maturity. There were no aggravating factors here and the disparity in age was small.

D is not being sentenced as a 15-year old youth. It is necessarily artificial for a court to put itself directly into the position of [sentencing him as if he was]. The court must do its best. Today a 15-year-old offender might receive a non-custodial. D had not contributed to the delay [by threats etc.]. He had lived an honest and industrious life for 50 years. He had been of considerable assistance to his family. He is remorseful. We do not overlook the harm suffered by V, but an immediate custodial was wrong in principle. Because D had served 11 weeks, we substitute a community order with a one week residential condition.

Note: The Court did not say they had factored in the early acceptance of guilt and the full plea discount which would be a significant factor. Ed.

Murder, Attempted

Criminal gangs

R v Shah 2015 EWCA Crim 1250 D was convicted of attempted murder, section 18 and possession of a firearm with intent. At about 10.30 pm D rang V and asked for a lift. V agreed and they met. V agreed to pick up V2 and later X. With four in the car, V and V2 were sitting in the front seat of a car and D and X were in the back. D or X asked the driver to pull over which he did. D and X then produced sawn-off shotguns. V and V2 tried to reach for the guns but three shots were fired. Two

missed V. The other one took off V's thumb and 50 shotgun pellets lodged in his chest. 35 could not be removed by surgery. V2 was struck in the face with the butt of the gun in the ensuing struggle. V ran away and heard a further shot and D shouting at X to shoot V2 in the head. Both attackers had difficulty in getting out of the jeep because the child locks were activated. The motive for the shooting was unclear. D was about 35 with a domestic violence conviction (10 months prison). The Judge considered the 30-year minimum term if it had been a successful killing by shooting and said there was no way of knowing what sort of danger D would pose 'years hence'. Considering the *Murder, Attempted Guideline 2009,* he selected a 40-year determinate term making a 20-year IPP sentence. Held. IPP was almost inevitable. The protection of the public is [a matter for] the Parole Board. It was not appropriate to go outside the top range of the *Murder Attempted Guideline 2009* (35 years) so we substitute a **17-year** minimum term.

Robbery

Persistent offenders

R v Brown 2015 EWCA 707 D pleaded to robbery. He and two others entered a Wandsworth post office. A sliding door was wedged open and all three jumped over the counter. V1, an employee was knocked backwards in his chair and his shin was cut. V1 struggled and a second robber tried to make V1 release him. This was unsuccessful so the second man seized V2, another employee, around the throat and told V1 not to do anything stupid or V2 would be hurt. V1 released his grip and the robbers began stealing cash. D was in the secure area and stealing cash. As he jumped back over the counter he slipped or was kicked and he fell. He dropped his cash. All three robbers left and £5,000 was stolen. The only injury was V1's shin which did not need any medical attention. Eight days later, D rang 999 saying he wanted to hand himself in. Later that day he went to the police station and made full admissions. D was aged 37. He had 20 previous offences. In 1994 and 1998, there was a robbery. In 2000, there were five robberies of post offices (8 years). In 2007, there were three conspiracy to rob offences (9 years 8 months). There were also burglaries and other dishonesty offences. The Judge considered it was a Level 2 robbery but disapplied the guidelines. Held. We start at 12 years, so with plea **8 years** not 10.

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