

Banks on Sentence

Sentencing Alert No 121

20 November 2015

Careless Driving

R v Patterson 2015 EWCA Crim 1797 D pleaded in the Magistrates' Court^[1] to careless driving and excess alcohol. D stopped at a red light and then over-accelerated away and lost control of his car. The car hit another car causing the other driver minor injury. D's alcohol reading was 91 µg, (permitted max 35 µg.). D was of good character and an oil trader with a good income. Held. For the due care, this was between the middle and highest level in the *Magistrates' Court Sentencing Guidelines 2008*. It is important not to double account. With full credit for the plea, **£4,000** global fine on excess alcohol charge not £1,000 and £5,000 as separate fines.

Note: D's £5,000 fine was the maximum sentence available because the offence was committed before the maximum was increased. The fine clearly did not reflect the early plea but this point was not mentioned in the judgment. Ed.

^[1] At the beginning of the judgment it says the pleas were made in the Crown Court. Later in the judgment it says it was in the Magistrates' Court which must be correct.

Confiscation

Compensation orders, with

R v Davenport 2015 EWCA Crim 1731 D was convicted of conspiracy to defraud. He ran companies which purported to offer finance but in fact just extracted fees from the victims. The benefit was agreed at £12m. The available amount was about £13.94m. The Judge made a confiscation order for £12m and a compensation for £1.94m, the difference between the two amounts. The defence said that was disproportionate. Held. [The Judge had failed to properly apply] the principles in *R v Waya* 2012 and *R v Jawad* 2013. The confiscation order was disproportionate. para 66. One of the essential points of *R v Jawad* 2013 is that restitution to the victims must be 'assured' or 'certain'. The making of a compensation order does not in itself ensure restitution. Moreover, the availability of (ostensibly) sufficient assets may not necessarily give such assurance: for example, those (not infrequent) cases where the defendant is adjudged to have hidden assets but where their whereabouts are unknown and their nature nebulous. Further, Micawberish's promises of 'money tomorrow' will, as Jawad makes clear, likely be disregarded. But here D had assets [with the sale of a property more than the Judge had estimated]. The Judge had given too much weight to what Mr Mitchell called "a temporal requirement" and insufficient weight to the reality of forthcoming restitution in full. We quash the order.

para 75 Where the Crown seeks both a compensation order and a confiscation order in circumstances where sections 13(5) and (6) are not applicable, we think that judges may wish, irrespective of whether or not they are proceeding under s. 6(6), to bear in mind the following points:

- 1) The Court is empowered to make both a confiscation order and a compensation order.
- 2) However, the court should be alert to any risk of double counting inherent in such a combination of orders and should be alert to the risk of making a confiscation order which is disproportionate.
- 3) The court ordinarily should not make both a compensation order and a confiscation order representing the full amount of the benefit where there has been actual restitution to the victims prior to the date of the confiscation hearing, see *R v Waya* 2012 and *R v Jawad* 2013.
- 4) Where it is asserted by a defendant that there will be restitution made after the date of the hearing then the court should scrutinise very carefully and critically the evidence and arguments raised in support of such assertion.
- 5) If the court remains uncertain whether the victims will be repaid under the compensation order then a confiscation order which includes that amount will not ordinarily be disproportionate, see *R v Jawad* 2013.
- 6) However, mathematical certainty of restitution is not required. The court should approach matters in a practical and realistic way in deciding whether restitution is assured.
- 7) Restitution to the victims in the future is capable of being properly assessed as assured, depending on the particular circumstances, notwithstanding that such restitution will not be immediate, or almost immediate, at the time of the confiscation hearing. Obviously the longer the time frame the greater force there will be to an argument that restitution is not assured: but a prospective period of delay in realisation is not of itself necessarily a conclusive reason for proceeding to make a combination of such orders without adjusting the amount of the confiscation order.
- 8) Whilst a defendant who is truly intent on making restitution in full to his victims ordinarily should be expected to have arranged such restitution prior to the date of the confiscation hearing, there may sometimes be cases where that is not possible. If, in such a case, the court has firm and evidence-based grounds for believing that restitution may nevertheless be forthcoming, albeit that cannot be taken as 'assured' at the time of the hearing, the court has power in its discretion to order an adjournment to enable matters to be ascertained.

Death by Driving: Dangerous driving

Defendant fell asleep

R v Vinayagasivampilla 2015 EWCA Crim 1769 D pleaded early to causing death by dangerous driving. D worked a 12-hour night shift at Sainsbury's, seven days in a row. After the last shift, at 7 am he went home and had a shower. His uncle, U, asked D to drive him to a cash and carry in a van. D did that and dropped U back at U's home. At about 11 am, D drove in the van to U's shop to drop off the goods that had been purchased. D drove at an appropriate speed but fell asleep and the van hit V who was jogging on the verge. D continued to drive for about 100 metres when he stopped and returned to V. Police arrived and noticed D was falling asleep. This was repeated at the police station. V died the next day. V was married with a 21-month daughter. Her husband continues to suffer from depression and a stress disorder. It was discovered V was not insured to drive the van. D had convictions for excess alcohol and two for driving whilst disqualified and when uninsured. He came from a very poor background in Sri Lanka. D was now suffering from depression and said he never wanted to drive again. Held. It was a Level 3 case with a range of 2-5 years. We take into account the earlier convictions, his references and D's genuine remorse and assiduously hardworking character. We start at close to the top of the range, 4 ½ years, not 6, making with plea **3 years** not 4.

Prison offences

Attacks on staff

See also: *R v Jeter* 2015 EWCA Crim 1804 (In 2008 given a 27-year-term for murder. Convicted

of two attempted murders on prison staff. One officer had 10 cm long and 2 cm deep wound to neck with blade that had been created. Three prison adjudications for violence. Worth 26 years so 13-year-minimum term needed to be added to term left to serve. New **34-year minimum term** made. Upheld.)

Rape

Victim vulnerable through alcohol

Att-Gen's Ref No 51 of 2015 2015 EWCA Crim 1699 D pleaded early to rape. V, who was now aged 19 and a virgin, was very drunk. She vomited in a taxi and had to walk home. She was nearly home when D took her to an alleyway where he vaginally raped her causing her pain and a tearing sensation. The impact on V was severe, causing her panic attacks and to break down in tears over little things. D had no convictions. He did have a reprimand for common assault. The pre-sentence report said D posed a high risk of harm to vulnerable women. Held. As the victim was particularly vulnerable, it was in Category 2B not 3B, so we start at 8 years not 6, making **6 years** not 4.

Sex Offences: Historical

Oral penetration

Att-Gen's Ref No 57 of 2015 2015 EWCA Crim 1762 D was convicted of two indecent assaults and two indecencies with a child. When aged 20 or 21 he lived opposite V, aged 7 or 8. When babysitting V, D played what he called a game which ended with both of them fully naked. They touched each other's penises. Later with V's mother's permission, D took V to an isolated wooded area. D produced his erect penis and made V masturbate him. At the same time D touched V's penis and told V to kiss it and to open his mouth. He held V's head back and put his penis in V's mouth and thrust it back and forth. The impact on V was lasting and severe. He suffered with depression and suicidal thoughts. Recently V visited D and assaulted him. D was now aged 48 and had previous convictions including arson which was the only one he was given custody for. There were none after 1991 and no sexual ones. D was injured in a motorcycle accident and was on disability benefits. Held. We consider the modern appropriate guideline would be the sexual assault of a child under 13 (section 7) one. With the severe psychological harm the case would be in Category 1A. The last count was aggravated by the breach of trust, the victim's age was significantly below 13, the isolated location and that D ejaculated. The lack of later sex offending and D's personal difficulties were mitigation. **5 years** was indeed lenient but not unduly lenient.

Supply

Large conspiracies

See also: *R v Clark* 2015 EWCA Crim 1771 (Plea to Class A and B drug incl. 25 kilos and 10 kilos and 9 ½ kilos (18 years). Consecutive to 7 years for about £1.5m drugs money laundering. Because of totality **23 years**, not 25 years (which had a starting point of 34 ½ years.)

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

book@banksr.com

www.banksr.com

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

[CLICK HERE TO GO BACK](#)