

Sentencing Alert No 124

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Affray/Violent disorder

Public transport, Offence connected with

R v Jones 2015 EWCA Crim 2070 D pleaded to affray. V, who was driving a bus carrying about 30 passengers, had to stop when his path in a one-way street was blocked by an Audi. V flashed his lights and sounded his horn. The driver's door of the Audi opened and F leaned out of the door and shouted aggressively. The door closed and 5-10 seconds later F stepped out of the car. F approached V's window in a very aggressive way. D and his brother left the car went to the bus too. F tried to force the driver's window open and D joined him acting aggressively. D spat at the windscreen and the three tried to enter the bus by pressing the emergency door release. Luckily V was able to override this action. V was so worried about his passengers' safety he reversed the bus around a corner and then called the police. While the bus was reversed, the three gesticulated and shouted abuse. D then went to a pub while the others involved themselves in a much more serious incident. D was incapacitated through drink. D was aged 23 and had 14 previous convictions, including possession of a firearm with intent to cause fear of violence, two for threatening behaviour, an affray in 2009 (24 weeks) and being drunk and disorderly. D's pre-

sentence report said D's lifestyle had involved binge drinking since he was aged 18. The likelihood of reconviction was high. Held. This drunken rampage was a frightening episode of public disorder with three men acting as a group. It was very distressing. We take into account the previous convictions. However, there was no actual violence. We start at 2 years, not 34 months, so with plea **16 months** not 22.

Burglary

Persistent offenders

R v Bown 2015 EWCA Crim 2057 D was convicted of burglary. D stayed at a campsite in Dorset with his girlfriend. They used false names. At a nearby holiday park, a small shop was locked up for the night. In the morning, the manager found the front door of the shop had been damaged, the glass in the door had been smashed and the cigarette cabinet had been broken into. Cigarettes, cigars and tobacco worth £3,600 had been stolen. CCTV showed two individuals fumbling around outside the shop just after midnight and an hour later the same two breaking in. When arrested, D had tools including a cordless drill. Glass samples found on his jacket matched the smashed glass. In his interview D lied. D was aged 52, with 38 court appearances for 80 offences, 50 of which were burglaries (both domestic and commercial). They started in 1974, when D was aged 11, and the last prison term was in April 2007 when D received 30 months for a domestic burglary. D was in breach of a community order. Held. This was a Category 1 burglary. The harm was borderline. There was a significant economic loss. There was targeting and a substantial degree of planning and two people were involved. Culpability was particularly high. The offence was committed at night. D's convictions may have reduced over the last decade but D was a professional burglar who, in the 1980s and 1990s, was making between £50,000 and £100,000 a year. He had spurned attempts to help him reform. However, where a defendant has a significant criminal record, it is important that the sentence bears an appropriate relationship to the crime committed. **3 years** not 4.

Fraud

City frauds ***Judicial guidance***

R v Hayes 2015 EWCA Crim 1944 LCJ D was convicted on eight counts of conspiracy to defraud. He manipulated the London Interbank Offered Rate (LIBOR) in order to advance his trading interests, the profits of the bank for which he worked and indirectly his bonuses and his status, to the disadvantage of the counterparties to the trades. The Judge considered that it was hard to overstate the seriousness of the appellant's conduct and said: "High standards of probity are to be expected of those who operate in the banking system. This case has shown the absence of that integrity that ought to characterise banking. The reputation of LIBOR is important to this city and to the banking industry. Probity and honesty are essential [in that area]." Held. The Judge correctly identified all the relevant factors. Those who act dishonestly in these markets must receive severe sentences to deter others from criminality that is often hard to detect and has such a damaging effect not only on the markets, but more broadly on the general prosperity of the state. However, conduct of this type will result in severe sentences which, depending on the circumstances, may be significantly greater than the present total sentence (11 years).

City frauds Post-guideline case

R v Hayes 2015 EWCA Crim 1944 LCJ D was convicted on eight counts of conspiracy to defraud. Between 2006 and 2010 D, together with others, agreed to manipulate Yen LIBOR in order to advance his trading interests, the profits of the bank for which he worked and indirectly his bonuses and his status, to the disadvantage of the counterparties to the trades. The separate counts related to employment with different banks. He conspired with employees of other banks and inter-dealer brokers in the fixing of the rate. It was not possible to estimate the loss to the counterparties. D was aged about 27 when he started the fraud and was now aged 36. He was of good character and married with a young child. He had been diagnosed with Asperger's syndrome which two doctors assessed as mild (another said it was very mild). In 2006, his pay was £40,726 (including a bonus of £11,983). By 2009, his pay was £409,821 (including a bonus of 112,911). In December 2009, D was paid £1.96m when he joined Citibank, and his pay in the next 9 months was £1.54m (including a bonus of £943,225). Held. The Judge correctly set out D's high level of culpability, the serious harm and correctly identified all the relevant factors. The conspiracy was over a very substantial period of time. D was a trader and not a manager, whose conduct was condoned, if not encouraged, by his immediate managers. Consecutive sentences were appropriate. A deterrent element was plainly required. However, with his age, his non-managerial position in the two banks, and his mild Asperger's condition, **11 years** not 14 years.

Perverting the course of justice

Mitigation, Bogus

Att-Gen's Ref No 123 of 2015 2016 EWCA Crim 28 In 2007, D was convicted of soliciting to murder and racially aggravated public order offences which occurred in 2006. This related to protests outside the Danish Embassy. He received 6 years. In 2012, D pleaded to three counts under Terrorism Act 2000 s 58. This related to two documents on his laptop. One was of a violent nature but of limited practical assistance to a would-be terrorist. The other referred to the tradition of assassination. It was not said that D had tried to access the documents since 2006. One document was in Arabic, which D could not read. Both documents were freely available on the Internet. The mitigation included reference to the fact that D was now a changed man and was a law-abiding industrious person. The defence produced a reference from a university multi-faith centre which outlined D's 'big role in the success of the centre'. Another reference claimed to be from a satisfied customer admiring the work D had done to his website. D was given 12 months. It turned out the references were inaccurate. D had played no part in the faith centre and the reference was written by D's wife. The signature from the faith centre was genuine. For the other reference the customer had only been helped in a personal capacity and when his employer read the reference, D was sacked. In February 2013, D was arrested for perverting the course of justice. Owing to prosecution failures, the trial did not start until September 2015. D was convicted. The Judge found the references were far from being the heart of the mitigation, but they would have had a limited influence on the sentencing Judge's mind. Taking into account the delay, D was given **4 months**. Held. The [use] of false character references is a very serious matter. Magistrates' and Crown Courts are routinely given references, often on the date of the hearing. The system cannot operate if those references cannot be relied upon. Ordinarily immediate custodial sentences, normally of some significance, can be expected for people putting in false character references. That message must be maintained. However, the Judge was entitled to make a very substantial reduction for the very great delay, as well as other matters. Without these matters, **12 months** would be expected. D now has a young family. His conduct in prison has been exemplary. He is due to be released in just three days' time. We decline to interfere with the sentence.

Sex Offences: Historical

Digital/oral penetration

Att-Gen's Ref No 75 of 2015 2015 EWCA Crim 2116 D was convicted of three counts of indecent assault. The first two were for specific offences. The last was representative of a substantial course of conduct. D lived with V's mother. Between early 2000 and late 2003, when V was aged between 5 and 9 and D was aged between 29 and 33, he made V perform oral sex on him and on every occasion made V swallow the ejaculate. The offending was 'continuous' and took place when V's mother was out and either in D's bed or in his living room. V was told if she did not comply with the demands, she would never see her mother again and V would go to prison. On occasions D bribed her. V believed the threats and was frightened of D. It happened so regularly V thought it was normal. In 2013, when V was at university, she went to the police. V suffered from persistent nightmares as a child. When aged 16 she was diagnosed with depression and has taken anti-depressant medication ever since. She has very low self-esteem and has self-harmed. In 2014, she suffered severe anxiety attacks. V felt that the abuse she had suffered had affected her education, her employment, her ability to sustain personal relationships and her ability to trust people. Her anxiety etc. about D's trial caused her to resign her employment. D was now aged 45 with a good work record and had no previous convictions. He cared for his disabled elderly parents. Held. V was particularly vulnerable and has suffered significant psychological harm. The offending was an abuse of trust and was compounded by threats. D showed no remorse. The ongoing psychological consequences for this victim are severe. [Because of the change in the law], the relevant section of the *Sexual Offences Act 2003 Guideline 2008* is not the rape of a child under 13 section but the causing a child under 13 to engage in sexual activity with a child section. The offending would be in Category 2A with a starting point of 8 years. The lowest suitable sentence is **14 years**. The Judge should not have felt restricted by the 10-year maximum for the offence. We keep the specimen count at 9 years but make the other two offences 5 years consecutive.

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