

Banks on Sentence

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Confiscation

Step 7 Determining the benefit VAT

R v Harvey 2015 UKSC 73 Supreme Court In confiscation the benefit was assessed in part on his company's turnover, which included VAT paid. Held (3-2). para 35 The judge trying the benefit issue should be guided by two important factors. First, although the burden may be on the prosecution to establish the gross value of the benefit obtained by the defendant, the burden of establishing that a sum, and if so what sum, should be deducted from that value to reflect VAT accounted for to HMRC lies on the defendant. Second, as in many exercises involved in assessments under Proceeds of Crime Act 2002, a judge should be robust in making such a determination. There is nothing disproportionate about taking a broad-brush approach to questions of what sums were received or paid in the context of criminal activity, where the evidence is confusing, unreliable and/or incomplete. On the contrary: the risk of disproportionality may lie more in spending much time and money pursuing a precise answer which is at best elusive and more frequently unattainable.

Dangerous Dogs

The Sentencing Council has today issued a new Dangerous Dogs guideline. It will come into force on 1 July 2016.

Immigration offences

Driving illegal immigrants through ports etc.

R v Lees 2015 EWCA Crim 1779 D pleaded to assisting unlawful immigration. He drove to France and returned the same day. Police stopped his car and saw a woman and child from Iraq inside. The passengers did not have passports. D said he met them at a petrol station, was given a tank of petrol and was paid €100. D claimed a) he went to France for other reasons, b) he felt sorry for the mother and her daughter and c) he was in ill health. This was not challenged. Held. The ill health had not deterred him from going to France. With the lack of sophistication and the immediate confession, we start at 2 years, so with 10% credit for the plea, **21 months** not 43.

Manslaughter

Relationship Men killing wives etc.

R v Jones 2013 EWCA Crim 2839 D pleaded early to manslaughter. He was acquitted of murder. V who came from Korea was a student in Birmingham. In 2011, she began a relationship with D. On 23 March 2012 ¹ D assaulted her and V reported it to the police. She considered moving away to somewhere he would not know. However, she went back to D. On 8 April 2012, they had an argument and D put his hand over her mouth and the other on her chest. D straddled her body by her waist. His hand moved up her chest to her neck and he held her by the throat. V changed colour and she stopped moving. The pressure on her windpipe was for 15-30 seconds during which time signs of asphyxia appeared. His other hand was over her mouth to stop her screaming. D took her body to the bedroom and had a bath. He covered the body with a duvet and left spending the next night at her accommodation. Next day he went to Bristol to see his daughter and former partner to whom he admitted the strangulation. Her family called the police who found V's body. The cause of death was extreme asphyxia. D was aged 28 with a caution. Because of a violent incident with a previous girlfriend (the caution) and the nature of the instant attack, D was assessed as 'dangerous' (no appeal). The Judge started at 15 years, and with plea made it a 15-year extended sentence, (**10 years' custody** and 5-years' extended licence). Held. There were serious aggravating factors. D committed an act of extreme dangerousness. It was an intentional assault, intended to frighten and terrify V to demonstrate control. It was not an isolated act of violence. D's behaviour after the killing was important. He did not call for help. He went to her place and tried to wipe it and remove his belongings from it. He tried to book a flight to New York. D had every expectation that an overseas student's absence would be unnoticed. The effect on V's family was appalling. Her parents had saved for her to study here. V's sister's grief still wracks her. This all justifies the 15-year starting point. Appeal dismissed.

1. The judgment says it was 2013 but that would have been after D's trial.

Prostitution

Controlling prostitutes for gain

R v Fowler 2015 EWCA Crim 1745 D pleaded (full credit) to controlling a prostitute for gain and supplying heroin. Police received information and a police officer, P, rang D's number and asked for a girl. D said both his girls were in jail but he might be able to get Emma who charged £20. P rang again and it was agreed P would meet Emma. P went to the address he was told to go to and D told him the girl was now Jade. D said he did not know what she charged. D and P went to D's bedsit where Jade was. She was aged 27. D prepared and smoked some crack cocaine. P asked D to get him some heroin and D agreed to do that. D took £20 and purchased two £10 bags. Meanwhile P and Jade agreed on a price of £20 or £30 depending what P wanted. D was expected to receive a cut from that. D returned and Jade gave D £30 to buy some drugs. He left to buy them and no doubt to give the other two some privacy. Jade and D were arrested by other policemen. Jade told police she used D's flat and she would share her crack with him. D was aged 60. The Judge made it a Category 2B case. Held. The mitigation was D's age and he had lived for most of his life as a law abiding person, until he became involved in drugs. The judge said the prostitution offence reached the custody threshold because prostitution is illegal. It is not. This was off-street prostitution. That in itself is not a crime. Secondly, the judge said that prostitution is degrading to the women involved in it. Very frequently that will be true and where it is true, it is a significant aggravating feature. Here, however, there was no evidence of anyone being degraded or that, if they were, that was the result of anything done by D. In that sense it was the

least serious kind of offence under section 53 which is capable of being committed. The court is required to focus in assessing seriousness in these prostitution offences on the extent to which the offender is in control of prostitution, identifying any exploitation and harm caused to the prostitutes, and assessing the level of any benefit obtained by the offender. Here there was very little control and no coercion at all. It appears to have been Jade who was in charge of the transactions and the appellant acted as a broker and facilitator. As it was at the lower end of the range of seriousness, the starting point is therefore not the 12 months suggested but (other things being equal) a **high-level community order**. We start at 18 months for the drug offence, reducing it to 15 months for the mitigation and with the plea 10 months. The prostitution offence should be a concurrent 4 months. The sentence could be suspended so because of 2 months served we make the drugs sentence 6 months suspended.

Robbery

Weapon used

Judicial guidance

R v Robinson 2015 EWCA Crim 1839 D pleaded to robbery (full credit). He robbed V, a cashier, at a petrol station. D put his hand in his pocket in such a way that V thought he had a weapon, although none was produced. The Judge considered it was a Level 2 offence because 'Use of a weapon to threaten was capable of including a disguised weapon, real or imagined'. He found the following aggravating features: the offence was at night, the victim and the premises were vulnerable and D's poor record with possession of weapons. The defence contended it was a Level 1 offence because no weapon was produced. Held. A case might be at Level 2 even if the prosecution cannot prove production and use of a weapon. It will all depend on the judge's assessment of the seriousness of the offence. The seriousness of the offence is determined by the following factors, namely degree of force and or nature and duration of threats, degree of injury to victim, degree of fear experienced by victim and value of property taken (see page 10 para 5 of the guideline). The guideline says that 'whether a weapon used was real or imitation is not a major factor because the amount of fear created in the victim 'is likely to be the same'. Here V experienced a very high degree of fear. She believed that D had a weapon and she was in a very vulnerable position. Her vulnerability, and the vulnerability of people like her, no doubt explains why the Council added in the introduction 'The levels apply to all three categories of robbery but it will be very rare for robberies of small businesses or less sophisticated commercial robberies to have the features of the lowest level of seriousness.' This case does not come into that very rare category. On any view this is more serious than a Level 1 offence, but it was not the most sophisticated robbery of its kind.

Weapon used Case

R v Robinson 2015 EWCA Crim 1839 D pleaded to robbery (full credit). V, a cashier at a petrol station, tried to lock the door to prevent D entering her shop. She failed. He pretended to make a number of purchases and then requested a refund. After a series of exchanges V shut the till. V stood in front of V and asked her to open the till. He lunged towards her saying, "I am going to do you one if you don't open it." V tried to talk to him. D put his hand in his pocket in such a way that V thought he had a weapon, although none was produced. V opened the till, fearful of what he might do. He took the contents, about £120, and ran out. V was very distressed, felt violated and thought the incident might be the last straw as far as her job was concerned. D was now aged 30 and had 33 previous convictions between 2001 and 2012. They included in 2004, a dwelling burglary (29 months' detention) and in 2007, possessing a firearm with intent to cause fear (54 months) consecutive to dangerous driving and theft offences (total 63 months). He was released and recalled. In 2012, there was an affray (10 months). The Judge considered it was a Level 2 offence because, 'use of a weapon to threaten was capable of including a disguised weapon, real or imagined'. He found the following aggravating features: the offence was at night, the victim and the premises were vulnerable and D's poor record with possession of weapons. The Judge also found remorse and co-operation with the police. The defence contended it was a Level 1 offence because no weapon was produced. Held. Here, V experienced a very high degree of fear. She believed that D had a weapon and she was in a very vulnerable position. On any view this is more serious than a Level 1 offence, but it was not the most sophisticated robbery of its kind. We start at 4½ years not 6, making with the plea **3 years** not 4.

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