Banks on Sentence

Sentencing Alert No 139

26 October 2016

Appeals

Power to hear apparently concluded appeals

R v Powell 2016 EWCA Crim 1539 In 2008, D had his confiscation order reduced. In February 2012, he applied to the CCRC to refer the case back. They thought the appropriate remedy was to apply for a certificate of inadequacy. Although not agreeing with that advice, an application was made and it was refused. It agreed that the realisable assets figure was nearly £22,900 too much. Held. The CCRC did not understand that the problem was with the confiscation order itself. The original order was in error. D faces a wrong amount and interest added on the amount too. Unless we correct it there will be an injustice. Enough time and precious resources have already been spent on this. We must end this unhappy saga. Applying *R v Yasain* 2015 (see above), we correct the error.

Cruelty to children

Neglect

R v CT 2016 EWCA Crim 1193 D pleaded to three offences of cruelty. D, now aged 50, had a daughter V, who was aged 22 at the date of sentence. V was aged 4-10 when the offending took place. When aged 10, V was taken into care. During V's childhood, D had been addicted to drugs and abused alcohol. Two co-accused were partners D had had when V was young. The first count was when V was deliberately locked out of her flat by D and left alone and unsupervised in a communal area. The second count was when D and S (a co-accused) were having sex with V present. The third count was when D left V with S and did not prevent him from sexually assaulting her when she was aware of the risk of sexual abuse. D had one conviction, (common assault in 1999). The pre-sentence report said D gave greater priority to alcohol than to the care of V. D had herself been abused as a child and the Judge accepted she probably never was a capable mother. The Judge made the offence Category 2 and started at 3 years. Because D was in a wheelchair he made it 2 years and with plea arrived at 20 months. Held. There was protracted neglect. V had suffered significant psychological harm. Because of the strong mitigation, (D was a victim of cruelty, neglect and abuse, her low IQ, the long periods D had spent in care, the control her partners exerted, her children being taken away and her mental health problems), **10 months**.

Extended Sentences

Significant risk How to assess General principles

R v Ali 2016 EWCA Crim 1335 D pleaded to GBH with intent, ABH and dangerous driving. He drove at the doorman of a club, V, and continued to drive when V was underneath his car. V had catastrophic brain injuries. He also drove at two other people, one of whom was injured. His alcohol reading was 102 µg and there was cocaine in his blood. D was aged 19 and when aged 14, he was convicted of two batteries. The pre-sentence report said the offences were out of character and D had good victim empathy. The psychiatric report said there was no evidence of mental illness and considered the most likely explanation for the offence was intoxification. Neither report supported a finding of dangerousness. The Judge said the authors of the reports were not lawyers and the facts of the offending showed he was dangerous. The Judge started at 15 years and passed a 15-year extended sentence (11 years' custody and 4 years' extended licence). Held. A judge is not bound by the findings in reports. We do not say a judge cannot find dangerousness solely on the facts of the offence. However, there must be a proper basis for such a finding. It is not sufficient simply to say that the offending was truly appalling and given the background history as set out in the pre-sentence report [or] the psychiatric report, dangerousness was made out. Judges must be careful when finding dangerousness for young offenders, especially when there is no pattern of offending. The Judge did not explain why he rejected the findings in the two reports. Nor did he explain how the offence gave rise to the required risk. The sentencer must explain how he reached his finding. There was no proper basis for the finding of significant risk.

The court has a discretion whether to pass an extended sentence when dangerousness is found. para 32 Here, had a finding of dangerous been justified, the appropriate sentence would still have been a determinate sentence.

Note: This last finding appears to have been based on the pre-sentence finding that D will address his risks and the safeguards built into the Parole Boards' discretion whether to release a prisoner, see para 31. Ed.

Licence extension How long should they be?

R v Williams 2016 EWCA Crim 1506 D was convicted of burglary with intent to commit GBH and ABH. He was in breach of a suspended sentence. D was with his former partner and she went home without him after some bad behaviour from him. D followed her home and smashed a window to get in and he punched and kicked her. She had multiple bruises. D had numerous convictions for violence. Held. There was nothing wrong with the 6-year custodial term of the extended sentence. Although D had a history of domestic abusive and violent behaviour, a 5-year extension, which was the maximum, was too long. **3 years** instead.

Immigration offences

Driving illegal immigrants through ports etc. No reward

R v Walid 2016 EWCA Crim 1120 D pleaded (full discount) to assisting unlawful immigration to a Member state. In August 2015 D travelled from the UK to Italy by car with a group of people, some of whom were his family. The pretence was a short holiday. One of the passengers was D's daughter who left the group once in Europe. In Rome an Iraqi lady, H, joined the group and the party tried to return to the UK with H posing as D's daughter and using the daughter's passport that had been left with D. H was stopped near Calais and refused entry into the UK and D was arrested. He admitted that H was not his daughter but had been in a relationship with one of his sons. D claimed that if H's parents discovered the relationship H might be the subject of a so-called honour killing and so he was trying to get her to safety. D was aged 44. H was permitted to stay and had married D's son in a religious ceremony. Held. It was not a particularly sophisticated offence, nor was it done for a reward. **10 months** not 12.

Offences against the Person Act 1861 s 18

Prison officers, Against

Att-Gen's Ref No 36 of 2016 2016 EWCA Crim 748 D pleaded on the first day of his trial to GBH with intent. D was imprisoned for 10 years 3 months for robbery and other offences committed in 2011. In 2014, whilst in prison he was moved to a single occupancy cell in the health care wing

due to concerns for his mental health. He was a paranoid schizophrenic and had refused to take anti-psychotic medication. A male officer was called to the cell and D asked for a drink. D was told he would have to wait and then became angry. D made threats to the officer including one of slashing his throat with a razor he claimed to have in his cell. The officer left to report the incident and in the meantime D had activated a personal alarm for his cell. A 51-year-old female officer, V, responded to the call. D had filled a bowl with boiling water from his kettle and stood out of sight in his cell so that V had to look very closely into the door hatch to see him. D then threw the boiling water through the hatch at V, hitting her face, arms, chest and body causing her severe pain. She was taken to hospital and, once discharged, spent several weeks as an outpatient. Her dressings needed changing every three days. Her skin was permanently discoloured. V also suffered from psychological distress, had to leave her employment and was reminded of the incident every time she undressed. D was now aged 17 and had 42 previous convictions, a large number of which involved violence and offensive weapons. The robbery offence was a domestic offence with a knife. He said he had no recollection of the incident and later denied that his mental health played any part in it. The pre-sentence report said he was evasive and posed a high risk of serious harm to others. D has since moved to a hospital and is said to be cooperating better with his medication regime. Held. This was clearly a Category 1 case. There were extensive second degree burns causing excruciating pain and long-term pain with psychological consequences. There was high culpability meaning a starting point of 12 years. D's previous record, the fact he was serving a sentence and V's loss of job aggravated the offence. We make some allowance for D's mental state. With totality in mind, **15 years** extended sentence (11 years' custody and 4 years' extended license) to run consecutively to the previous robbery sentence, not 11 years, 8 months' extended sentence (7 years 8 months' custody and 4 years' extended license).

Rape

Abuse of trust

R v Horley 2016 EWCA Crim 427 D pleaded on the first day of his trial to three anal rapes, three sexual assaults and to production of and distributing indecent photographs. V, a boy, aged 10, came to live with D and his wife temporarily. D and V became close and when it was suggested that V returned to live with his mother, D resisted the move. V did return to his mother and she asked that contact ceased between D and V. Contact was maintained through an iPad and then an iPhone that D bought for V. V returned to live with D and his wife after social services suggested it might be better for V. After V returned to his mother for the second time, the mother found messages from D to V regarding a gay foot fetish website. She also found requests for videos of V. D was interviewed and his phone was seized. 230 indecent images and three videos were found including one of V masturbating D with his feet. D had sent some of these images to another internet user. The police spoke to V who cried and said that D had put his "willie up his bum" and mentioned multiple anal rapes and masturbation. D ejaculated each time and the rapes caused soreness. V also suffered severe psychological harm. There were said to be 10-11 rapes. V was rewarded by D with points for games and also money. D had said he would kill V's mother and burn her house down. In interview, D denied the offending and suggested V had been set up to lie by his mother and D's wife. D was aged 43 (character is not revealed). The Judge found V had been groomed and he had turned D against his mother. Further V was particularly vulnerable and there was an abuse of trust. The Judge placed the case in Category 2A. The Judge started at 16 years for the rapes and reduced it to 15 because of totality. With 10% for the plea that made 13 ½ years. For the sexual assaults the Judge started at 6 years and with the plea made it 5 ½ years consecutive. For the production of photographs, he started at 3 years which with the plea made 2 years 9 months' consecutive, making **21 years and 9 months** in total. Held. The consecutive sentences were correct. 24 years before the plea discount was justifiably severe but not too long. Appeal dismissed.

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