Banks on Sentence

Sentencing Alert No 140

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Court of Appeal

Can't appeal twice/Repeat appeals

R v Geraghty 2016 EWCA Crim 1523 In October 2011 D received 20 years for importing drugs. In February 2013, the same Judge made a confiscation order and Financial Reporting Order, (FRO). In July 2013, an application to appeal the FRO was lodged. In December 2013, the application was dismissed. In March 2016, an application to appeal against the 20 years was lodged. Held. para 26 The sentencing Judge expressly treated the terms of the FRO as being inextricably bound up with the length of the prison sentence. The inescapable conclusion is that he was thereby stating that he was treating the terms of the order as substantially one sentence with the sentence of imprisonment. para 29 Both the single judge and the full Court dealing with D's FRO appeal proceeded explicitly and necessarily on the basis that the length of the prison sentence was unchallenged. Thus, we find that the applicant has thereby forfeited any jurisdictional basis upon which he may make any further applications to this Court. para 30 Cases, such as *R v Neal* 1999 2 Cr App R (S) 352, where a second or subsequent order is only made after the appeal against an earlier order has been disposed of, will continue to be capable in appropriate cases of providing an exception to the general rule against repeated applications. Moreover, as this Court recently observed in *R v Yasain* 2015 EWCA Crim 1277, 2016 1 Cr App R (S) 7 (p 34), there is a residual category of cases in which the Court enjoys a very limited jurisdiction to avoid real injustice in exceptional circumstances to exercise an implicit power to reopen a concluded appeal where it is necessary to do so.

Burglary

Ram-raiding

R v Beddoes and Others 2015 EWCA Crim 2525 LCJ B, C and E pleaded to conspiracy to cause explosions likely to endanger life and conspiracy to burgle. The plea credit was 25%. Bu and W were convicted of the same counts. Over nearly a year, a gang targeted ATMs in Merseyside, Cheshire, Derbyshire, the West Midlands, Leicestershire and Oxfordshire. They operated at night, used two-way radios and fast cars with false plates, and wore dark clothing, hats and face masks. B and C cut off an ATM safe door with an angle grinder. This enabled them to gain information about the ATM's locking design and alarm wiring. Cash was stolen from two ATMs involving B and C. Later they jemmied off the front of an ATM and inserted a pipe through which oxygen and acetylene gases were pumped causing an explosion. This caused extensive damage and enabled the cash to be stolen. From then on this method was used to steal from ATMs. There were 31 attacks in total on ATMs and at least 24 involved an explosion or an attempt to cause one. Sums

of up to £80,000 were stolen from one machine. In total about £800,000 in cash was stolen and about £500,000 worth of damage was caused. The explosions were far from controlled. A safe door weighing 60 kilos was sheared off resulting in very substantial damage to the premises. In some cases, ceilings were brought down. Once when confronted by residents, a gang member swung a golf club at them. B and C were leading figures. B has 29 previous including possession of a firearm and ammunition and a conspiracy to burgle. C had 27 previous including several for burglary. Bu was a trusted lieutenant. He had 62 previous including some for burglary. W played an important role. He had 28 previous including a conspiracy to burgle. E played a lesser role. He had 32 previous. The Judge said, a) it was very fortunate nobody was hurt or killed. b) The whole financial sector was under significant pressure and banks had to reassure frightened staff and manage disgruntled customers. c) Expensive additional security measures were deployed. d) Significant deterrent sentences were required. Held. The essence of the criminality lies in the detonating of the explosives. We accept that there was no intention to cause injury. We start at 20 years not 23 years. For B, Bu and C **15 years** not 17, for E **11 years** not 13 and for W **16 years** not 18.

Note: Although this case was heard last year, the judgment has only just been issued by the Court of Appeal.

Cruelty to children

Violence to child aged 4 months

R v LS 2016 EWCA Crim 1336 D pleaded to ABH (25% credit) on his child and witness intimidation. D and W, the co-accused, had a four-month-old daughter, V. Before V was born, she was made the subject of a child protection plan due to concerns about domestic violence and because of D's common assault conviction in 2015 against his pregnant partner. Social services were also aware of D's alcohol abuse and D had signed a contract which stated he would not reside in the family home or have any unsupervised contact with the expected child. When V was four-months-old, W was staying away for the night and left D in charge of V, which she knew she was not to do. The phone records from the evening show D asking W if he could leave V whilst he went to the shops. W replied that she often did as long as V wasn't screaming. D then sent 23 messages to W over the course of the evening but got no response. He became irate and around midnight said he was going for a walk. D's mother, P, had regular contact with her grandchild and had arranged to collect her the following day because of a Facebook posting advertising a party at V's house that night. When P collected V she noticed marks on her face which D attributed to V scratching herself. P contacted Social Services and V was taken to hospital and given a CT scan because of a suspected fracture. There was no skeletal injury but there were three linear bruises on the right side of V's face and under her chin. Also scratches could be seen under the bruising and on the left side of her face. The doctor concluded the injuries had been caused by heavy pressure or impact from the fingers of a hand and bruising of that type on a non-mobile child suggested non-accidental injuries. Another man had also been present at the house in the evening but had left to go to hospital as he had drunk too much. D's brother said the baby had cried all evening despite D changing and feeding her. D took her upstairs for the night and D's brother slept downstairs. In the morning the brother commented on the marks on V's face but was told she had done it to herself. The expert evidence suggested squeezing of the face. It was agreed the assault was aggressive mishandling, a loss of temper in frustration as opposed to deliberate sadistic violence. The Judge found the following aggravating factors, a) D was in breach of the child protection plan, b) he had invited people round for a party, c) he was drinking, d) his texts suggested he left the child for periods of time and e) in interview D had blamed the injuries on his parents which devastated them. It was accepted V was vulnerable, there was abuse of power, a position of trust and a failure to seek medical help. D was aged 25 years and had two previous convictions one for criminal damage and the common assault. There was 1 month concurrent for breaching the community order imposed for the assault (no appeal). The witness intimidation charge was about D sending threatening messages to P, intending to obstruct the investigation into the assault (9 months consecutive, no appeal). Held. Due to the lack of serious injuries we start at 2 years, so with plea **18 months** not 27 months for the assault, making 27 months in all not 3 years.

Custody

Maximum must be reserved for the most serious cases Total sentence above the maximum

R v Nelson and Shaibu 2016 EWCA Crim 1517 N was convicted of possessing a prohibited weapon and assisting his co-defendant, S. N controlled, in a gang, a number of drug runners. Following two shooting incidents where in one a police community support officer was shot at, but not injured, N hid the Scorpion sub-machine gun involved in a loft. The assisting offence was based on N knowing that S had put the gun to active use and N assisted in concealing the gun, to impede the prosecution of S. The Judge passed 8 years for the firearm offence (maximum 10 years) and 4 years for the assisting count (maximum 7 years) consecutive making 12 years in all. Held. In principle it is not wrong to impose a [total] sentence which exceeds the maximum for the highest of the offences charged. But where this happens we would expect an explanation of exactly which facts and/or other considerations justified this course. The possession and the assisting are interlinked on the facts and even if, (to test the argument), this case was treated as an aggravated and serious case of possession (to take account of the concealment of the weapon to assist an offender), the sentence should have fallen short of the maximum 10 years' custody. There is no doubt but that the offending was indeed grave; but it is possible to imagine many much worse scenarios, for instance when the weapons caused actual injury or even death or was proven to have been used in repeated violent criminality over a long period. 9 years, bearing in mind the degree of overlap between the two counts and the statutory maximums.

Sex offences: Images

Category A Penetration Possession About 500 images

R v Colgate 2016 EWCA Crim 1598 D pleaded to three counts of making indecent photographs of children. He downloaded over 4,000 such images over 5 years. They were mainly of pre-pubescent girls. 498 were Class A images. Some involved penetrative sexual activity between adults and pre-pubescent girls. D was now aged 78 years and had an unblemished character. The pre-sentence report assessed D as posing a low risk of harm to the public. Held. This is a very sad case. The SHPO effectively prevents his renewing this interest and repeating this offending. We do not create a precedent but this is a classic case for the imposition of a suspended sentence. The gravity of the offence is met by the imposition of a prison sentence. **12 months suspended** with a 2-year supervision requirement not immediate.

Supply of drugs

Joint purchase of drugs

R v Ghalghalj 2016 EWCA Crim 140, 1 Cr App R (S) 66 (p 494) D pleaded to supply. He was a heroin addict who purchased some heroin and cocaine wraps with a fellow addict for personal use. He handed over his friend's share and was arrested. D had had 21 previous court appearances. In 1998 he had a robbery (8 years). He had two breaches of drug testing and treatment order imposed for shoplifting offences. He had no prison sentence from 2007 and 2014. Until 2015 there was only one drug offence (class C). While awaiting trial, he was fined for shoplifting and given a community order with a drug rehabilitation requirement for drug possession. The pre-sentence report suggested a community order with a drug rehabilitation requirement. Held. We don't know the weight of drugs but we assume it was less than a gram in all. His previous was less serious than the Judge said. It was a Category 4 not 3 offence. Because of the offences on bail and his previous, a community order was not appropriate. We start at 18 months not 2 years. With plea, that's **12 months**. The current community order with drug rehabilitation requirement was currently working, so we make it **suspended** with requirements.

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