

Banks on Sentence

Sentencing Alert No 154

19 April 2017

ABH

Persistent offender

R v Birch 2017 EWCA Crim 161 D pleaded to ABH. D walked into a shop and punched V with a 'mighty' blow to the side of his head. V fell to the floor and was unconscious for 2 to 3 minutes. In interview, D said there was an argument the night before and he had decided to punch V. D's previous convictions included: an affray in 1997, GBH in 1998, offensive weapon in 2002, robbery and witness intimidation in 2002, ABH in 2006, common assault in 2011, assault PC in 2012 and 2013 and racially-aggravated harassment and common assault in 2014. D was also on licence at the time. Held. We start at 3 years not 4, so with plea **2 years**, not 2 years 8 months.

Guilty plea

Attempts to change plea

R v McDougall 2017 EWCA Crim 179 In July 2015, when the trial was about to start, D pleaded to child sex offences on an amended indictment. A rape charge or charges were dropped. Before that D had not indicated any pleas or accepted any guilt. D then applied to vacate his pleas and his case was put back. The case was heard in February 2016, when D's application was not pursued. The Judge gave him no plea discount, citing the extra trauma to the victims and the lack of merit in the application. The defence said the pleas were maintained and the plea avoided the cost of a trial. Held. We agree with that. There are sound policy reasons why some credit should be given. We give an 8% discount.

Murder

Knives

R v Benson 2017 EWCA Crim 120 D was convicted of murder having pleaded to manslaughter. G had moved out of her flat but still retained the tenancy. She went to the flat with her boyfriend, V, and her sister. The group walked up the stairs to the flat and were met by C. C asked the group what they were doing and said, "The flat is not a doss house". The group decided to wait for V's brother, J. J arrived shortly after and C was joined by D. C and D were aggressive and C said G had been evicted and she would knock her out. More allegations were made. C went off to get H [to provide back-up]. At some stage, D went back into the flat and came out again with a very large kitchen knife which she hid in her sleeve. The altercation continued with D shouting, "Do you know who I am?" D prodded J in the chest with her hand and J saw part of the knife. He was injured. J suggested to V they should leave. J walked down the stairs and was punched in the face by H. J said, "You lot are crack heads". J and V left. D followed them and she tried to stab V, who picked up an advertising board to defend himself. He threw it at D and ran off. D caught up with him and she stabbed him with moderate force in the chest. This killed V. There were three other

stab wounds. D was aged 33 and had 33 convictions on 17 occasions. There were five for 'offences against the person' and three for 'public order offences'. Held. This was a grave case. D pursued two people who had decided to leave and killed one of them. The starting point was 25 years and that figure accommodated the Judge's aggravating factors. The mitigation was that D had a teenage child, but that had little impact. The lack of premeditation and the lack of an intent to kill were relevant. **20 years** not 23½.

Rape

Victim drunk

R v Stott 2017 EWCA Crim 138 D was convicted of rape. On his second date with V, the two consumed a considerable amount of alcohol. They returned to V's home and started to have consensual sex. V felt exhausted, told D to stop and he did so. V fell asleep and woke up to find D having sex with her. He had one hand on her neck (with no particular pressure) and another hand or arm holding down her hair, causing her pain. V told D to stop and D ignored her. D tried to turn V over and she fell off the bed. V told him to leave and he did. V had some minor injuries, none of which could be attributed to the rape. V's work, home and everyday activities were affected. D was a builder and had a number of convictions, including in 2010, GBH to his former partner when she got in the way of an incident between D and another. A reference said he was trustworthy, caring and compassionate. Held. It was a Category 3B offence not 2B. We start at 5 years, not 8, add 1 year for the convictions, the location and the alcohol, making **6 years**, not 8.

Retail offences

Copyright offences *Judicial guidance*

R v Evans 2017 EWCA Crim 139 D pleaded guilty (full credit) to two offences of distributing an article infringing copyright and a possession of an article for fraud count. He facilitated web users to obtain music when he had no Performing Rights Society licence. His websites enabled visitors to visit 'torrent' websites enabling unlawful downloads. One of his websites had 168,000 users and facilitated 135,000 downloads. Another facilitated over 523,000 downloads, some of which sent out 40 tracks at a time. He asked for donations but received few. Held. 12 months was a well-judged sentence. We give guidance for offences under the Copyright, Designs and Patents Act 1988. The sentencing court must retain flexibility. The following (non-exhaustive) considerations are likely to be relevant [for] the unlawful distribution [of] copyright articles.

- 1) Illegal downloading and distribution is very often difficult to investigate and detect. It can give rise to serious problems and losses (none the less real for not being readily quantifiable) to the music and entertainment industry. Deterrent sentencing in such a context is appropriate.
- 2) The length of time (and any continuation after service of cease and desist notices) of the unlawful activity will always be highly relevant.
- 3) Third, the profit accruing to the defendant will always be relevant.
- 4) Whether or not a significant profit is made by the defendant, the loss accruing to the copyright owners will also be relevant, as will be the wider impact upon the music industry even if [it is] difficult to quantify in precise financial terms, because wider impact there always is.
- 5) There may be cases where it will be helpful to have regard to the Fraud, Bribery and Money Laundering Offences Guideline 2014.
- 6) Personal mitigation, assistance to the authorities and bases and pleas of guilt are to be taken into account in the usual way.
- 7) Unless the unlawful activity of this kind is very amateur, minor or short-lived, or in the absence of particularly compelling mitigation or other exceptional circumstances, an immediate custodial sentence is likely to be appropriate in cases of illegal distribution of copyright infringing articles.

Offences against the Person Act 1861 s 18

Defendant aged 10-14

R v M 2017 EWCA Crim 76 LCJ D pleaded to section 18. There was some ill-feeling between B, D's 16-year-old brother, and S, which appeared on Facebook. S and V, aged 17, who shared the same surname, walked towards a boxing club. B lunged at V and pushed him to the ground. V regained his footing but B punched V in the face. B and D, aged 13 ½, dragged V to the ground and B stamped on and punched V's head. B then turned to attack S. D continued to attack V who lay motionless on the ground with the upmost viciousness. There were 13 kicks with considerable force, then three punches. Next there were 13 stamps on V's head and two more punches to the head. B punched and kicked S. D and B sauntered off. V had severe trauma to the head and multiple areas of bleeding and bruising to the brain. At the appeal hearing, V was unable to talk and remained in hospital. It is unlikely he will ever be able to function as a normal adult. Only by luck was S not seriously injured. In interview D declined to comment and laughed at the CCTV of the attack. V's family were devastated and suffered huge difficulties. D lived in a family where there was significant violence. Police were involved in a number of violent incidents where D's father attacked D. D had no convictions but had poor behaviour and non-engagement at school. The Judge considered D had been led on by B. He took into account D's age and moved the starting point to 8 years and with 25% plea credit gave D 6 years' detention. A report from a secure unit said D had many excellent qualities but he posed a high risk of harm to others. He had assaulted staff on several occasions. Since then there was another serious assault on a member of staff. Held. We cannot remember an attack of such unparalleled brutality. The Judge could well have started at 16 years. There was no fault in the Judge's sentence.

Sex Offences: Children, With

Child aged 13-15 Defendant aged 25

Att-Gen's Ref 2016 Re Wigmore 2016 EWCA Crim 1813 D pleaded to four counts of sexual activity with a child, (section 9(1)). D aged 25, befriended a 15-year-old schoolgirl, S, knowing her age. After some messages which became sexual, they met. The first time they kissed and touched. On the second meet there was oral sex. On the third and fourth occasion there was unprotected sexual intercourse. S's father went to the police. S said D had been good to her and she was disappointed the relationship had ended. At first D denied the sex but after DNA tests he admitted it. D was in full-time employment and was a volunteer fireman. He had supportive references. He had a drink/drive conviction. D told probation S was the only girl who had not been horrible to him. The report recommended a suspended sentence. Held. It is not necessary to depart from the guidelines. There was greater harm and greater culpability. It was Category 1A. There was a 10-year age gap. We make allowances for D's immaturity. Had there been a single offence the starting point would have been 4 years. We start at 5 years, so with full credit, **3 years 4 months**.

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