

# Banks on Sentence

## Sentencing Alert No 158

22 May 2017

### **Appeals: Court of Appeal**

#### ***New advocate instructed***

*R v Singh* 2017 EWCA Crim 466 D, using a new legal team, sought to appeal his conviction. Held. "In any case where fresh solicitors or fresh counsel are instructed, it will henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are, in exceptional circumstances, good and compelling reasons not to do so. It is not necessary for us to enumerate such exceptional circumstances, but we imagine that they will be very rare."

#### ***Civil court judgments, Using***

*R v DF* 2017 EWCA Crim 485 D was convicted of child rape and other child sex offences. Although it did not form part of the evidence against D, the Judge was told about abuse allegations against D, made by other complainants. The charges were 'withheld for lack of sufficient evidence'. The Judge was told that one of the complainants had given evidence in care proceedings and the Court had found D had sexually abused her. The Judge used that finding in considering whether D was dangerous. The Judge also found that the social service records showed D had a complete disregard for a prohibition order made about his access to the family address and to [specified] children. Held. The Judge was right to take into account the findings in the family proceedings when assessing dangerousness and D's culpability. He was correct to remind himself that the finding was to a lesser standard of proof.

### **Death by Driving: Dangerous driving**

#### ***Single misjudgement***

*R v Allen* 2017 EWCA Crim 458 D pleaded to causing death by dangerous driving. D was not an experienced driver and was returning home on an August evening after a potentially tiring weekend. He was driving his works van which he was not fully familiar with. On a straight stretch of road, he ran into a motorcyclist, V, who was travelling in the same direction as him. V was thrown forward and became trapped under D's jeep. D tried to help V but V died at the scene. It was established that the motorcycle's lights were on and with the weather conditions, V would have been visible to D for 400 metres. Excessive speed was ruled out. There was evidence of mist which may have altered visibility. In interview, D said he saw the motorcycle and moved to overtake. He then moved to check his mirrors and the motorbike was at his bumper. D was aged 21, with a positive good character and had a clean driving licence. He showed the deepest remorse. Since the accident, D was diagnosed with dyspraxia which affects the ability to co-

ordinate movements in driving. As a result, D had surrendered his licence. The Judge said it was not a relevant factor but D knew he was not a good driver. The Judge found a) the weather to be rain and patchy fog, b) D was travelling at 70mph and took no steps to avoid the collision and c) the most likely explanation was D was tired and lost concentration. He found two aggravating factors, i) there was evidence of poor driving before the accident which should have been a warning and ii) he was able to see V's motorbike for 400 metres. Held. The second suggested aggravating factor was why the offence was made out and therefore was not an aggravating factor. The Category was at the bottom and not at the upper end of Category 3. None of the guideline aggravating factors applied. D had lived a very honourable life. We start at 18 months, so with the plea, **12 months** not 2 ½ years. We do not think we should suspend that.

## **Explosive offences**

*Att-Gen's Ref 2017 Re Schiavo* 2017 EWCA Crim 491 D pleaded to causing an explosion likely to endanger life etc., having a bladed article, possession with intent to supply a class C drug, Diazepam, custody of counterfeit notes and possession of ammunition when prohibited. V was at home with her daughter, V2, in the afternoon. There was a loud 'boom' as if something large had fallen against the house. V1 and V2 were upstairs and V1's son was downstairs. V1 saw grey smoke in the hall coming from the porch. In the porch there was thick, dense smoke. The front door was badly damaged and about to fall off its hinges. There was debris all over the floor. Bits of metal from the door, drainpipes and some tyres were over the drive and V2's car, which was on the driveway, was badly damaged. D was seen acting suspiciously nearby by an alert two in a car. They filmed him which enabled D to be found. V1 was extremely upset and it was noted that the porch was structurally unsound. D was arrested and took off his shirt and started to chew it. A large hunting knife was found in the bushes, where D had been seen. D's home was searched and 86,400 Phenazepam (a form of Diazepam) tablets were found. If sold at 50p each they were worth £43,200. There were also 1,423 counterfeit £20 notes, some blank cartridges and a large quantity of fireworks which had had their explosives removed. The damage to the house was estimated to about £12,000 and there was about £9,000 damage to the car. An expert believed the explosives from the fireworks were placed outside the front door in a metal tin and were ignited by a fuse. D was now aged 53 and had worked selling fireworks. In 1989, D had a conviction for supply (3 years). He also had theft and public order convictions. The Judge considered D went out dressed like some survival expert. He found the motive was to damage and frighten rather than to injure and the evidence suggested D had had a mental breakdown, illness or disorder. Further the house had not been specifically targeted. Held. The effect on V1, V1's husband and V2 was very significant. It was pure good fortune that no one was significantly injured. The knife offence should have been subject to a minimum term. Without totality for the explosive offence we would have started significantly in excess of 6 years. With the plea, that's **4 years**, not 28 months. In total the other offences make it 7 years, not 42 months, in all.

## **Firearm offences**

### ***Prohibited weapons      Stun guns***

*R v Iqbal* 2017 EWCA Crim 449 D pleaded to possessing a disguised firearm, (section 5(1A)(a)). After a road accident, D was arrested. His home was searched and police found a stun gun designed to look like an iPhone. It was in clear view in D's bedroom. It was charged and in full working order. D made no comment in interview but in a prepared statement he said he had bought what he thought was an iPhone for £50, ten months before. He thought it would be used as a joke on friends and he thought he had thrown it out. This was accepted by the prosecution. D had conviction for aggravated vehicle taking and possession of class A drugs, but none for firearms or violence. The Judge found exceptional circumstances and said there was no evidence it had been used. Held. The answers to the *R v Avis* 1998 2 Cr App R (S) 178 were largely favourable to D. We start at 2 ½ years, so with plea, **22 months** not 3 years.

## **Perverting the course of justice**

## ***Shops***      ***Firearm, With***

*R v Parish* 2017 EWCA Crim 470 D was convicted of robbery. He entered an off-licence with two others. They had arrived in D's car and they wore disguises. The shopkeeper, V, who was alone, was approached by one of them brandishing a gun. The gun was held towards V and V was told to give them all his cash. A second man ushered V to the till. Cash, cigarettes and a bottle of vodka was stolen. D stayed by the door. The gun was later found to be disabled. V's impact statement revealed no physical or serious psychological harm but V had become stressed and socially withdrawn. D had previous convictions for ABH, driving offences, theft and criminal damage. Held. This was a less sophisticated commercial robbery. Culpability was high as a firearm was used. The harm was towards the bottom of Category 2. That means we start at 5 years and adjust it downwards to reflect the mitigation and his working history. We then move up to reflect D's leading role, his disguises and his previous convictions, although none had warranted immediate custody. **6 years** not 9.

## **Sex Offences: Assault**

### ***Touching of breasts over clothing***

*R v James* 2017 EWCA Crim 455 D was convicted of sexual assault. V lived in assisted living accommodation and suffered from short- and long-term memory loss. She became friends with another resident, R who began a relationship with D. R moved out to live with D. V visited R. D was there and D sat next to V. D put his head on her shoulder and said things like, "I love you" and "I think you are pretty." She tried to ignore him. D persisted and grabbed her breast over her clothing for a few seconds. V pushed him away and told him to 'Fuck off". R was present throughout and V left the flat. D had no convictions after 1994. In 1987, when he was 16, he had a conviction for indecent assault, in May, a conviction for gross indecency in August and another indecent assault. D has learning difficulties. He cannot read and has problems with spoken language. His IQ was 70, which was in the bottom 2.3%. His verbal comprehension IQ was 58, which was in the bottom 0.3%. The case took 13 months to be tried. There was a five-month gap between conviction and sentence. V's impact statement said she worried about the incident every day and was concerned for her friend. The Judge considered the offence was a Category 2 offence because of V's vulnerability. Making the case 2B he started at 1 year. D had spent about 6 weeks in custody. Held. The offending was humiliating and demeaning. We pass a **community order** with 80 hours unpaid work and 20 days of rehabilitation activity, not 8 months.

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