Banks on Sentence

Sentencing Alert No 161

12 July 2017

Appeals: Court of Appeal

Ground of appeal discovered that was not particularised

R v JB 2017 EWCA Crim 568 D's SHPO was made without objection. He appealed his custodial term for indecent images of his former girlfriend who was then aged 16. Held. We reduce the custodial term and notice that there was no power to make the SHPO, because the condition in Sexual Offences Act 2003 Sch 3 para 13 (the image must be of a person under 16) was not met. As there was no ground of appeal for that and because the prosecution are not represented today, we give them 21 days to notify us that they want to intervene. If no intervention is made, the SHPO will be quashed.

Note: In fact, the condition in Schedule 3 does not apply to the making of a SHPO, see Sexual Offences Act 2003 s 103B(8) and (9), and Banks on Sentence at para **107.5**. However, looking at the facts of the case, I consider the 'necessity' test was not made out, see Sexual Offences Act 2003 s 103(2)(b), and Banks on Sentence at para **107.3**. Far too many SHPO orders are waved through without proper consideration. Ed.

For more detail see the last case of this alert.

Children and young offenders

Discretionary reporting restriction

R v Markham and Edwards 2017 EWCA Crim 739 M pleaded to and E was convicted of two murders. They each received a minimum term of 20 years. They were then aged 14 and now aged 15. Before the trial the Judge maintained the section 39 order for both M and E. After the trial, he lifted the order noting that there was now 'a high public interest in identifying' M and E, there was no longer a need for the integrity of the trial process to be preserved and in three years' time (when M and E would be aged 18), the order would no longer apply. Held. [Cases and principles stated and applied.] para 88 The Judge reached the correct conclusion. There was no evidence that the lifting of the reporting restrictions would adversely affect the rehabilitation of M or E. M and E will still be in custody long after the ending of the order. The lifting of the restrictions was a reasonable and proportionate measure balancing the [various principles].

For additional matters see other references to the case in this alert.

Children and young offenders: custodial sentences

Basic principles and article 3

R v Markham and Edwards 2017 EWCA Crim 739 M pleaded to and E was convicted of two murders. Both were then aged 14 and now aged 15. Held. para 49 Crimes committed by children

and young persons should be considered in a different light to similar crimes committed by adults. However, that does not mean that punishment in appropriate cases is not an entirely proper approach. In *T v United Kingdom* 2000 30 EHRR 121, this Court said about the appropriate tariff for detention at HM's Pleasure of the two child murderers of James Bulger, "States have a duty under the Convention to take measures for the protection of the public from violent crime. The European Court of Human Rights does not consider that the punitive element inherent in the tariff approach itself gives rise to a breach of Article 3, or that the Convention prohibits States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention or recall to detention following release where necessary for the protection of the public."

For additional matters see other references to the case in this alert.

Consultation

Cruelty to children and causing the death of a child

The Sentencing Council has issued a consultation document for child cruelty. The consultation period ends on 13 September 2017.

They have also issued a consultation document for four different types of manslaughter. The consultation period ends on 10 October 2017.

For the documents visit www.banksr.com - Guidelines

False imprisonment

Administering drugs, with

Att-Gen's Ref 2017 Re Edwards 2017 EWCA Crim 1592 D pleaded to attempted false imprisonment and attempting to administer a drug to stupefy with intent. He put up an Internet profile with false personal details and C, a model, responded. D suggested a photo shoot. C agreed but was apprehensive so she took along a friend, V. V and C were offered a cup of tea but both declined the offer. D then ushered them into his living room claiming it was his studio and he seized V. She and C fought back and found the back door locked. Eventually the two girls locked themselves in the lavatory and D fled. Both of the tea cups were found to be laced with ketamine, a powerful sedative. Also found were chains that had been padlocked to form manacles, leather restraints, duct tape, cable ties, (some of which had been partly made up), black pillow cases, twine, thick rubber gloves and a balaclava. A notebook had 'hore (sic), prostitute and slut' written in it. D's computer revealed 'fantasy rape stories', 'how to knock someone unconscious' and 'buying restraints' as Internet search terms. The prosecution said D intended either serious physical or sexual violence against both women and there was three weeks of planning. V said she thought she was going to be raped. C said the effect on her because of the incident was phenomenal. D was aged 36 and in 2001, he received 4 years' YOI for aggravated burglary, false imprisonment and wounding. D had rung a doorbell which was answered by V2, pushed his way into the premises, and held a pruning saw to V2's throat. V2 was pushed into the kitchen and D armed himself with two kitchen knives. D told V2 to go upstairs and said, "she knew what he wanted"[1]. As they went upstairs D cut her hand. Eventually V2 escaped. Held. The impact on the two latest victims was very significant. We start at 8 years not 6, so with a full discount, 5 years 4 months. The failure of D to discuss his offending and his previous conviction means he satisfied the dangerousness test, so **8 years 4 months'** extended sentence (5 years 4 months' custody, 3 years' extended licence).

1. This remark is what the judgment says, but it is not clear what it means. It may be that D said this in interview and that the speech marks are misplaced, or that 'he' should be 'I'.

Murder

Guilty plea ***Judicial approach***

R v Markham and Edwards 2017 EWCA Crim 739 M and E were jointly charged with two murders. M pleaded on the day his case was fixed for trial, and his girlfriend, E, was convicted. They planned to kill E's mother and E's 13-year-old sister. Both were then aged 14 and now aged 15. Both admitted the killing. M pleaded on the day of his trial which was shortly after medical evidence was received which indicated M had no defence to murder. E had medical evidence to support a defence of diminished responsibility which was not accepted by the jury. Held. para 70 The Judge was keen that they both received the same sentence. The only difference between the two was that one had a positive report and the other didn't. This is not a normal case and it is hard to see why the Judge's wish should not be fulfilled. para 71 This analysis should not be taken as indicating that in every case of murder, pursuing a defence of diminished responsibility should not deprive a defendant of [full] credit. In most cases, a defence of diminished responsibility depends on a version of facts which in large part emanates from the defendant. If those facts are rejected by the jury, there should be no question of credit for admitting manslaughter beyond that in Criminal Justice Act 2003 Sch 21 para. 11(c), namely the mitigating factor, 'mental disorder or mental disability [which] lowered his degree of culpability'. Furthermore, depending on the nature of any disorder or disability, adults will be in a different position to children, and more likely to be able to make informed decisions based on an assessment of the evidence. Each case must be considered on its own merits. The Judge was right to move from the 12-year starting point to 21. Here we apply a one sixth discount, so 3½ years off for both, making 17½ years.

For additional matters see other references to the case in this alert.

Sex offences: images

Images of someone aged 16-17

R v JB 2017 EWCA Crim 568 D pleaded to making indecent photographs of his former girlfriend, G, who was then aged 16. D was aged 38. D made 26 indecent images and five movies involving G. Six were Category A, four were Category B and 21 Category C. Some were printed off. None of the acts depicted were unlawful and the images were for D's private use. Held. There were no statutory aggravating factors present. The extent to which the non-statutory aggravating factors, such as the fact that there were moving pictures as well, actually aggravate the case is open to question. There was a considerable amount of favourable evidence to D from a wide range of sources. It was important that D had deleted all the material from his mobiles and it was only recovered using specialist equipment. D had also shredded the paper copies. D was probably unaware that he had broken the law. We proceed on the basis that this was an exceptional case warranting a departure from the guidelines. Before plea, we think the sentence should have been 3 years, making **2 years** on a plea, not 32 months. That should be **suspended** with a 60-day rehabilitation requirement. However, because D has served the equivalent of 10 months, we reduce that to 14 months suspended.

Note: This case is truly baffling. There were some suggestions made about D being controlling etc. but the prosecution chose to drop them. If G indulged in consensual lawful sex and knew at the time that she was being photographed, I cannot understand how the images (which were solely for the use of the defendant and have since been destroyed) warrant more than an absolute discharge. What the public interest was, in prosecuting D and giving him a custodial sentence, is hard to imagine. For further details, see the first case in this alert. Ed.

CLICK HERE TO GO BACK