Banks on Sentence

Sentencing Alert No 163

28 July 2017

Criminal Damage

Graffiti cases

R v Ryan 2017 EWCA Crim 676 D pleaded to conspiracy to damage property. D, along with his co-conspirators, over nearly three years, was responsible for 26 offences of graffiti damage to trains and 12 of graffiti damage to rolling stock and track infrastructure. After a long and complex investigation by police which included the analysis of mobile phones, computers and Facebook and Instagram accounts to determine where the conspirators were when specific offences were committed, D and his co-accused were arrested. D was found with a high-visibility jacket covered in paint. He was implicated in 15-20 incidents. The Judge spoke of the 'victims' being the railway company and the public, whose fares would increase due to the £50,000 cost to the railway company of cleaning up the damage. D was aged 18 at the time of sentence but had been aged 13-17 when committing these offences. He had no previous convictions. The pre-sentence report said D showed remorse and fully accepted responsibility for his actions. The Judge said despite the mitigation, there had to be an immediate custodial sentence. She started at 9 months' YOI. The defence said that the Judge gave insufficient weight to D's age at the time of the offences and the lack of offending in the over two-year period between D's original arrest and the case being finalised at the Crown Court. Held. The damage caused huge inconvenience and cost to the railway company and the public. Repeat offenders should expect a custodial term. We think there is some force in the defence submission that the sentence of 6 months should have been suspended. Having regard to the time D has already spent in custody, **12 weeks**' YOI not 6 months.

Cruelty to Children

Violence to child aged less than 2 years

R v LH 2017 EWCA Crim 658 D pleaded to two counts of cruelty. D lived with V, his 5-month-old daughter, and her mother. V cried and after a momentary loss of temper, D shook V for 7-8 seconds. V cried out and became floppy and drowsy. She also vomited. V was taken to hospital and D did not tell the doctors about his shaking. (This was the second cruelty/neglect offence.) Two days later, V became unresponsive and an ambulance was called. Again, D did not tell the doctors about the shaking. V was treated for suspected meningitis. In fact, V had three injuries. There was a bleed on the brain, intracranial spinal bleeding and retinal haemorrhaging. D was interviewed and made no admissions. Eleven days later he did reveal his part in V's injuries. Three years after the injuries, V had very limited speech, was virtually blind, only able to use one hand and had limited mobility. V required constant supervision and had the intellect of an 18-month-old child. She had to drink from a baby's bottle. D was aged 28 and of good character. He had references saying he was gentle, kind and hard-working. The pre-sentence report said D suffered emotional trauma as a child. The Judge started at 7 years. Held. The harm was obviously at the highest level. For culpability, V was an extremely vulnerable victim. The 7-8 second shake

was a relatively prolonged attack. There was an abuse of power and a breach of trust. The culpability was not at the highest level but it was significant. For a global sentence, we must factor D's failure to disclose his shaking of V. The case was either at the top end of Category 2 or the bottom end of Category 1. With D's good character and remorse, we arrive at 5 years. With the plea discount, **3 years 4 months**, not 4 years 10 months.

Factual Basis

Can the Court of Appeal hold a Newton hearing?

R v Kennedy 2017 EWCA Crim 654 The Judge failed to hold a *Newton* hearing and failed to explain why she had not done so. The Court of Appeal was invited to hold one itself. Held. It is not for this Court to hold a *Newton* hearing. The holding of a *Newton* hearing and the calling of evidence, even the appellant alone, would appear to fall foul of the provisions of Criminal Appeal Act 1968 s 23, see 4.30. Even if it were permissible, the taking of such a course would also preclude any appeal were this Court to make assailable findings of fact. On the facts the Judge would have inevitably rejected part of the basis of plea but not the other two parts. Due to the lack of a reasoned approach and the two arguable parts of the basis of plea, we reduce the sentence.

Note: The Court made reference to Att-Gen's Ref Nos 3-4 of 1996, 1997 1 Cr App R (S) 82 (p 281) where it was said the Court of Appeal can hold a Newton hearing. The Court can admit material that should have been admitted at the lower court, like medical reports in Hospital Order cases. Criminal Appeal Act 1968 s 23 proves a filter process, not a bar to doing that. Further, the fact that there is no appeal from a new finding of fact by the Court of Appeal does not prevent the Attorney-General from presenting a more serious factual basis than the one presented at the Crown Court, see para 8.34 in Banks on Sentence 2017. It is time the powers and duties of the Court of Appeal were reformed, so that it was a court able to pass a sentence for what the defendant had done and not restricted if a Crown Court judge made a mistake. Ed.

Prevalence of the offence in the locality

R v Khalid 2017 EWCA Crim 592 The Judge said: "There is too much of this sort of behaviour and I hope that this message reaches people like you and this sort of driving comes to an end in this city." Held. para 11 It is now well established that courts should be hesitant before increasing a sentence because of prevalence. Principles stated. para 13 Where a judge of his or her own motion contemplated prevalence as a relevant consideration, that should be identified as a matter to be addressed in submissions to the court and any sentence then imposed should identify whether prevalence had been a factor in the decision and reasons should be provided therefor.

Rape

Defendant then aged 15-17

R v Skinner 2017 EWCA Crim 666 D pleaded to rape and sexual assault of a child. V, aged 15, lived with her father due to ill-treatment from her mother. Social services were involved and V had a history of self-harming and was extremely vulnerable. D would visit V's house from time to time. On the night in question, D arrived when V's father was at work. D was high on crystal meth and asked V, who was in bed, if he could sleep on the sofa in her room. V agreed but D instead got into her bed and started kissing her. V asked him to stop and went to the toilet. When she returned she thought he was asleep and so got back into bed. D then held her arms down and raped her without protection and V was unsure if he had ejaculated. After the assault, V took an overdose of tablets and was admitted to hospital. She was on a drip for 4 days. Later she admitted herself into a psychiatric unit where she stayed for a year. V later disclosed to a friend's mother what had happened and, in an ABE interview, said that the appellant used to play "mums and dads" with her when they were younger which involved touching her over her clothing and kissing her. These repeated sexual assaults were when V was aged 10-12 and was the sexual assault. V made disclosures at the time but refused to be interviewed and D denied the

allegations. When D learned that V was intending to report the rape to the police, D handed himself in. In a police interview he said it was rape as she was underage but he hadn't forced her. D said he deserved to go to prison because V needed justice. V's impact statement described panic attacks and a fear of D coming back. D was aged 18 at the time of the offence and had previous convictions for battery and theft. The psychiatric report said he had had a chaotic upbringing, had suffered physical abuse and had been exposed to pornography and sexual behaviour from an early age. The Judge took into account that there was no violence during the rape but also said that D knew V was vulnerable and had returned to offending against her since their childhood. The Judge also mentioned that D was under the influence of drink and drugs when the most recent offence was committed and that it happened in a place where V had felt safe. The Judge started at 12 years. Held. We move to Category 2B. D was young and had been damaged by his chaotic upbringing and the physical abuse he had suffered. Balancing all the factors, we arrive at 9 years. With plea, **6 years 9 months** not 9 years.

Sex offences: Children

Sexual intercourse

R v Edmonds 2017 EWCA Crim 637 D pleaded to three counts of sexual activity with V, who was aged nearly 14. D, aged 32, was a friend of V's mother and V saw him as a father figure. D started text communication with V and said she was a good-looking girl and that he was starting to have feelings for her. V agreed the same and D suggested she go to his flat. There was kissing and cuddling on the first couple of occasions and then full intercourse on the day after her fourteenth birthday. D ejaculated on her stomach. They had sex around seven or eight times after that. D was evicted from his flat and did not see V again for a number of weeks. The police were informed what was going on by an anonymous phone call and D was arrested. It was only in V's Achieving Best Evidence interview that she told her mother what occurred. V said D had asked twice for anal sex but V had declined. She said they also exchanged explicit photographs. In interview D admitted to sending flirty texts and Facebook messages but denied sexual contact between them. D had seven previous convictions, mostly for violence, though none for sexual offences. At the time of the offences, D was serving a licence period of an extended sentence. The pre-sentence report said D represented a high risk of harm to the general public and to teenage girls in particular. The report said the Parole Board noted, when reviewing his last sentence, that prison had not provided a deterrent to further offending. The Judge said it was a Category 1A offence (starting point 5 years). The Judge said the aggravating factors were a) grooming (texts and images), b) disparity of the ages and, c) the "pre-planning". He gave 25% for the plea. Held. A starting point of 10 years should be reserved for the most serious of cases involving psychological or physical harm to the victim, pregnancy or transmission of disease etc. None of those features appeared in the present case. We start at 7 ½ years, so with plea, **8 years' extended sentence** (5 years' custody, 3 years' extended licence) not 11 ½ years' extended sentence (7 ½ years' custody and 4 years' extended licence).)