Banks on Sentence

Sentencing Alert No 168

22 Sept 2017

Confiscation

A court has no discretion but to proceed

R v Parveaz 2017 EWCA Crim 873 D pleaded to production of cannabis. In a Newton hearing, the Judge said he could not be sure that D had produced cannabis for commercial supply. In their section 16 statement, the prosecution said D had available assets worth at least £178,000. D's section 18 statement gave no explanation as to how he had funded his interest in various properties or explained various cash transactions. The Judge held it was disproportionate and unjust to allow the assumptions to be made, see para 1. He refused to permit proceeding to continue to a final hearing. The prosecution appealed. Held. It was not open to the Judge to do that in this particular case. The Judge had not been made sure to the criminal standard, that there was production for commercial supply. To focus on the findings at the Newton hearing masks the true nature of the exercise before the Judge, which was to focus on the general criminal conduct of D and not the particular criminal conduct. The Judge had not been concerned with the preceding six-year period, and rightly had made no findings in that regard. He was not entitled to address the question of whether or not it was proportionate to embark upon a Proceeds of Crime application. That was for the prosecution. If any challenge could be made to such a decision, it would have to be made by way of judicial review, and such proceedings very rarely can be successfully entertained. para 33. There can be cases where, for example, a particular basis of plea is expressly accepted by the Crown, which may then be wholly inconsistent with pursuit thereafter of confiscation proceedings based on the lifestyle provisions, see *R v Lunnon* 2004 EWCA Crim 1125, 2005 1 Cr App R (S) 24 (p 111). para 36. The Judge seems to have thought that his own conclusions in the Newton hearing, equated to a finding that there had been no such commercial supply in the preceding six-year period. But it did not. para 41. The Judge's conclusion was both wrong and premature. We set aside the judge's decision and send the case back to the Crown Court.

Cruelty to Children

Neglect

R v Holden 2017 EWCA Crim 774 D pleaded nearly a year later, to an offence of cruelty to a child under 16. D has three sons, aged 12, 9 and 5, by two different fathers. She was in a relationship with B, the father of her youngest two children. B had a drug habit and D had used drugs in the past. At 1.30pm D's youngest son V, was seen running into the street naked and covered in faeces. He was skinny and pale. V asked a member of the public who was out shopping with her own children, "Can I go with you, I need help?" When asked where his mother was he replied, "She always goes to sleep." Another member of the public took the boy back to his house but V ran out again shortly afterwards. Social services attended and noted the state of the house. Dirty clothes and crockery were in most of the rooms and there was diarrhoea and vomit in some places. The children were removed that day and placed with the father of the eldest child and D

was arrested. Her basis of plea was that the filthy state of the house was detrimental to the health of the children and she had failed to supervise V. D was aged 39 at the time of the appeal and had no previous convictions. A pre-sentence report said that D had been struggling to cope with the three children at the time of the offence, each of whom had issues to deal with. Since the arrest, D had split from B, changed her address and remained drug free. The offence was placed between Categories 3 and 4. The Judge noted the difficulties of raising children who themselves had problems and the fact that D had managed to improve her life. He also considered that the danger in which V was placed put the culpability into Category 3. Held. There are a number of factors that suggest a suspended sentence would have been appropriate, including the facts that this was a case of neglect rather than deliberate harm, that D now had fortnightly contact with her children and the recommendation for training as part of the community order. **6 months suspended** with requirements, not immediate custody.

Defendant

Mercy should season justice

R v Golamaully 2017 EWCA Crim 898 D pleaded to Terrorism Act 2000 s 153. She was instructed by her husband to transfer £219 to her nephew, who was fighting for Islamic State in Syria. Her husband's starting point was 3 years (no appeal). Her starting point was 2 ½ years reduced to 22 months with the plea discount. Held. We start around 2 years, [which would, with plea, be 16 months]. Because D was a brilliant mother and her four children would lose both parents, as an act of mercy we make it 8 months.

Importation

Heroin About 12 kilos

R v Birks 2017 EWCA Crim 810 D was convicted of importing heroin. K arrived in the UK at Luton airport to start a new driving job. K was driven to Rotherham, where D lived. There he met D who gave him the keys to a flat-bed lorry (which D had hired), £200 cash, paperwork for ferry crossings and instructions to deliver the lorry's load to an address in Belgium. D purchased the ferry tickets. K then drove the lorry to Dover and met D again who gave him directions for the ferry. D crossed the channel shortly before K. Whilst on the continent, D drove up in another vehicle alongside K and the vehicles stopped. They then drove in convoy to Turnhout where they stayed overnight in a hotel. The next day, D said there was a problem with the load and that it would have to be returned to the UK. D placed a black hold-all under the passenger seat in the lorry. The two travelled separately. D crossed the channel shortly before K who was stopped at Dover. The hold-all was found. It contained a total of 12.86 kilos of heroin (average purity of 60%) with a street value of about £1.5m. At D's home were invoices for the lorry rental. In interview, D lied. The prosecution said D had used his business as a cover for the operation and K was vulnerable. D was now aged 44 and had numerous previous convictions, including one in 2004 for importing controlled drugs, for which he received 5 years' imprisonment. The Judge said that D had financed the enterprise, was an organiser and had played a leading role. He considered the high purity of the drugs and the previous conviction. He also said D had used an intellectually weak man who was found unfit to plead. Held. Although **20 years** was severe, it is not manifestly excessive.

Rape

Historical cases (vaginal and anal) Victim then aged under 13

R v Liddiard 2017 EWCA Crim 865 D was convicted of rape and a multi-offence rape count (not less than 10 incidents). Each involved V. D was then aged 13-15. He was now aged 22. D and V's mothers were friends. When V was aged 6 or 7, D asked V if she wanted to look at a video game in his bedroom. Once V was there, D spoke about her breasts and fondled her under her clothing. D told her not to tell her mother because she would not be believed and they would disown her. Next, he tried to put his finger in her vagina and she resisted. Then he forced himself on her and

put his penis in her vagina. This happened every time V visited the house and sometimes she cried in pain. D would put his hand or some bedding over her mouth and pin her down. The offending stopped when D was given a referral order for sexual assaults on other girls. When arrested for V's offences, D denied them. V still suffers from flashbacks and panic attacks. D had no other convictions and suffered from dyslexia. He had a partner and children and was in work. There was no remorse. No reports were ordered. Held. V was a troubled girl and had problems beyond those connected with this case. She suffered greatly from these offences. These were very grave offences. We ordered a pre-sentence report and a report from the Youth Offending Service. They have been most valuable. We now know D had learning difficulties, cognitive problems, oppositional behaviour, hyperactivity and emotional difficulties. At the time, he was immature and had emotional difficulties. Because of the new information, **8 years** not 10.

Sex Offences: Historic

Digital/oral penetration Victim aged 13-14 Defendant then aged 18-19

Att-Gen's Ref 2017 Re DK, 2017 EWCA Crim 892 D was convicted of four counts of indecent assault on a male and one count of indecency with a child. D, aged 18 to 19, was employed in the family business working in the office. D's cousin V1, aged 13 or 14, worked after school as a cleaner in the office. Often only D and V1 were in the building. After a couple of months, D started touching V1's crotch over his trousers. This continued daily for 4-6 months with each incident lasting longer than the previous time. On other occasions D would masturbate V1 to ejaculation under the suggestion of teaching V how to be with girls. The last incident happened in the toilet when D placed V1's hand onto his erect penis and told him to suck it, which he did. D ejaculated in V1's mouth. After this, V1 rejected D's advances. V1 left the job and was replaced by V2, aged 13. The same pattern of behaviour started and D told V2 that he had done things with V1 and that everyone does it. On one occasion D sat V2 on his lap, took out V2's penis and masturbated him to ejaculation. D also placed V2's hand on D's penis and moved it up and down. The offending came to light when V2 told his girlfriend which led to V1 also revealing his story. D denied the allegations. The offending lasted two years and the prosecution suggested there might have been over 100 incidents. In the victim impact statements, V1 said he had tried to block it from his mind and hated himself for the pain he had inflicted on his family. V2 said the abuse had ruined his life and he suffered stress and depression. D was aged 34 at the time of the appeal and had no convictions. In his pre-sentence report, D continued to deny the allegations. He said that at the time he had difficult personal circumstances. By the time of the report he had been married for 13 years and had two daughters. After the arrest, he attempted suicide and was sectioned. The Judge found no evidence of lack of consent or grooming. Held. Rather than consenting, the boys felt obliged to endure what came their way. The oral ejaculation count was Category A culpability and Category 1 harm and the other offences were Category 2A. We start at 4 years for the penetration and 3 years for the other offences. Totality reduces that to 6 years making **4 years** with the genuine suicide risk, not 24 months suspended.