Banks on Sentence

Sentencing Alert No 169

6 Oct 2017

Burglary

Distraction burglaries

R v Connors 2017 EWCA Crim 974 D pleaded late to three domestic burglaries. They were committed over the course of an hour with an accomplice, M, who was aged 36. M had a long history of committing these types of offence and was on licence at the time. M knocked on the door of a house owned by V1, a 92-year-old widow. On the doorstep, M told her that one of her windows had been damaged by his sister and that he needed a pen and paper to write down V1's details so that his mother could reimburse her for the damage. M gained access to the property and shortly after, V1 found him crouched down by her handbag. He then rushed out taking £83 with him. D then entered the property and searched through the drawers in two bedrooms. The same scam was played out on V2, aged 85, but nothing was taken. In the third burglary, M and D stole £200 cash and a leather jewellery box containing a small gold necklace and a lion pendant from an 86-year-old, V3, who had limited mobility. M and D drove away in a car and were stopped by police after a pursuit. The victim personal statements spoke of the victims' feeling very vulnerable, nervous and greatly upset by the offences. D, aged 23 at the time of the offences, tried to minimise his role in the pre-sentence report, saying that he had remained in the car during each burglary. D was an accomplished amateur boxer, was married and had two young children. The Judge placed the case in Category 1 because of the targeting of vulnerable victims and started at 4 years. He did not treat D's previous convictions as an aggravating factor. He gave D a 10% plea discount. Held. There can be little doubt that D became involved with these offences through M. D played an important but subordinate role to M. He is still young and has family responsibilities. The starting point of 4 years did not appropriately reflect D's culpability or personal mitigation. **2 years 8 months** not 3 years 7 months.

Confiscation

A court has no discretion once proceedings have started

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.

Fraud

Breach of trust frauds

R v Gore-Strachen 2017 EWCA Crim 644 LCJ D pleaded to fraud committed against two separate company victims. From 2008 to 2012, D worked for Webtech Wireless, a company based in Canada with an office in Reading. From 2013 to 2015, D worked for Britannia Pharmaceuticals. D acted as an accountant for both companies, for the first as 'Controller Europe' and for the second as 'Finance and Human Resources Director'. When being interviewed for the first of these companies, D failed to mention that in 2003 she had been convicted of fraud in a previous employment for which she had been sentenced to 18 months' imprisonment and ordered to pay £93,000 compensation. During D's time with Webtech, she diverted funds that should have been paid to the companies' vendors into accounts controlled by herself. That loss was £130,983. D also created false VAT penalty notices, diverted VAT and PAYE payments and also diverted royalty payments into the accounts of companies of which D was a director. The total fraud involving Webtech was around £810,000. When Webtech became aware of the frauds, they hired forensic accountants, who froze D's assets. Meanwhile, D started employment with Britannia and made no mention of her previous employment with Webtech. D used much the same tactics with Britannia as she had with Webtech to divert funds into her own accounts. D persuaded Britannia to dispense with a third-party company which provided employees on a temporary basis and she put in place a new company of her own. She then pretended to pay bonuses to employees which her company then kept. The total fraud involving Britannia was around £1m, making about £1.8m for both frauds. A percentage of the money taken from Britannia was used to pay part of D's liability to Webtech's insurers arising from the first fraud. When arrested in 2015, D admitted the Webtech frauds but denied the Britannia offences. Later, when D was re-arrested, she admitted the Britannia offences and showed considerable remorse. Victim impact statements from both companies spoke of the breach of trust, the significant financial loss, the damage to the companies' brands and the effect on their employees, some of whom lost their jobs as a result of D's actions. Over £1m of the money stolen was diverted to Zimbabwe, where D had a logistics company. The money was used to purchase vehicles for the company which had since been stolen. D was aged 42 at the time of sentence. She enjoyed a number of luxurious holidays and owned several properties. The Judge said, "The frauds were sophisticated, sustained over a number of years by duplicating and falsifying documents, and involved new companies whose names were designed to mislead and avoid detection. They involved the use of 35 different accounts in one form or another." The Judge also described the offending as, "About as bad a case as there could be" in view of the aggravating features, namely a) the impact on the victim companies, and b) D's previous conviction. He considered that there was high victim impact and that consecutive sentences were called for. For each set of offences, the Judge started at 9 years, reduced to 6 for the pleas. He made the sentences consecutive. Held. Because of the gross breach of trust, it was a Category 1A case. We start at 8 years for the first set of offences and 8½ for the second set. It was appropriate that there should be consecutive sentences because of the separate victims. The appropriate reduction for totality would bring the figure down from 16½ years to 141/2, so with full credit **9 1/2 years** not 12.

Money laundering

285.11 ***Category 5 Drug money***

R v Thompson 2017 EWCA Crim 734 D was convicted of three counts of money laundering. D's home address and car were searched and police found £67,040 in cash. They also found half a kilo of phenacetin, an analgesic commonly used to cut cocaine. In interview, D said he was a professional gambler and the cash was his gambling float. He also said the phenacetin was for personal use to alleviate his eczema. Investigations into D's financial arrangements revealed that D's last declared income was from 2009 when he received £283 from Next Plc. D had accounts at two local casinos and had made a profit of around £6,000 through his gambling. Two bank accounts revealed deposits in cash totalling around £30,000. He purchased a £12,000 Mini and spent £4,500 on a holiday. D was aged 26 at the time of sentence and had two previous convictions. One was for possessing cocaine with intent to supply (4 years). The Judge said he was sentencing on the basis that D was the money man in a drug trafficking operation. The Judge placed the culpability between medium and high, based on the conclusion that D was not playing a leading role. Harm was placed at Category 5. The Judge said D played a significant role and he took account of the harm associated with trafficking class A drugs. D's previous conviction was considered a significant aggravating factor. Held. D's sentence was nearly as long as that for a supply offence (starting point 8 years), of which he had not been convicted. We start at 3 years and move to half-way between that and the 8 years. The Judge's approach was well structured, but **51/2 years** not 71/2.

Sex Offences Historical

Oral penetration Victim(s) aged 13-15 Defendants then aged 18-20

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.

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