

Banks on Sentence

Sentencing Alert No 170

12 Oct 2017

Burglary

Dwelling, Unoccupied More than one offence

R v Fountain 2017 EWCA Crim 967 D pleaded to two dwelling burglaries. He asked for a further 21 house burglaries to be taken into consideration. The TICs were mainly based on D showing police houses he had burgled. Both indicted burglaries were committed in the daytime when the homeowners were out. The first involved items worth about £360. The second involved D taking items and jewellery worth around £14,000. A camera and memory card were taken which held photographs of the homeowner's daughter's recent trip to India for charity work. A highly sentimental First World War medal was also taken. D was aged 37. He had 15 sentencing appearances for 29 offences. The most recent conviction attracted a 3-year prison sentence for burglary and 10 TICs. The burglaries were committed to fund a long-standing drug habit. The Judge emphasised the distress, anxiety and feelings of violation suffered by the victims. He found the first burglary was Category 2 and the second was Category 1. The Judge did not mention the *Allocation, TICs and Totality Guideline 2012*. He said, "The only real credit here is credit for a guilty plea." He started at 3 years and 5 years and with the TICs made that 10 years. With the plea he made that 3 years and 4 years consecutive, making 7 years. The defence pointed out that was a 30% plea credit not full credit. Held. There were significant mitigating factors, his frank admissions and his assistance to the police. An 8-year global sentence would be more appropriate, so with the plea discount, **5 years 4 months**.

Note: Neither the judgment nor a local news report makes it clear whether any of the TICs were for burglary of occupied dwellings. Ed.

Cruelty to Children

Neglect

R v Holden 2016 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.

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.

Public Decency, Outraging

Previous offending

R v Pennant 2017 EWCA Crim 1180 D pleaded to three outraging public decency counts and three breaches of a SOPO. At various times throughout the day, D was seen sitting on an electricity box on the corner of a road in Nottingham. He was masturbating and seemed to take an interest in females as they walked past. D was subject to a SOPO which prohibited him from using 'sexual words or gestures towards any female with whom he is not in a relationship and without her consent...' D had previous convictions between 2007 and 2011 for 12 counts of exposure. In 2014, he committed a sex assault. In 2008 and 2014, he had breached court orders. This offending was whilst he was on licence. The Judge said that D was becoming a menace and passed 16 months on each indecency count consecutively, and 16 months for each breach, concurrent, making 4 years. Held. There can be no doubt that the Judge was entitled to pass a custodial sentence but we must consider totality. Before plea, 3 years would have been sufficient, so with the plea discount, **2 years** on all counts concurrent.

Restraining Orders: Harassment

Victim's views

R v Herrington 2017 EWCA Crim 889 In November 2015, D was sentenced to 11 months for ABH against V. A matter of hours after his release he slapped V five to six times, and when a member of the public intervened he threatened to attack him. D was arrested. D was aged 37 and had 36

court appearances for 97 offences. In March 2017, at the sentencing hearing, the probation said there was a very high risk to V, their staff, the public and [her child]. They asked for a Restraining Order. V was in Court supporting D and had refused to make a statement. D was sent to prison for 12 months and a Restraining Order was made. Held. We caused the police to contact her and she told them unambiguously that she wants this Restraining Order revoked. D is a violent and an unruly man. But we cannot prevent an adult from living with who she wants. V has the right to live with him if she chooses. The child may require the protection of the court but the appropriate course is for proceedings in the family court. If the probation service is concerned about its staff it can apply for an order protecting them. We cannot protect their staff by keeping D and V apart. Order quashed.

Sex Offences: Children, With

Physical contact over clothing

R v Strickson 2017 EWCA Crim 698 D pleaded to three offences of sexual assault. The offences took place on different days and involved different victims. V1 was aged 16 and travelled on a bus. D sat behind V, reached between the seats and touched her hip and bottom over her clothing. When V looked at him, D quickly removed his hand. CCTV footage showed D moving his hand between the gap in the seats. He admitted the offence in interview and said he suffered from Asperger's Syndrome and autism. He admitted obtaining sexual gratification from what he did. Two months later, D was travelling on a train whilst on bail for the previous offence. During the journey, he touched V2's bottom over her clothing. V2 was aged 14. Another passenger intervened and told D to move. One month later, D boarded a train and sat next to V3, aged 22, despite many empty seats being available. V3 felt D rubbing her thigh and he moved his hand quickly away when she looked at him. V2's victim personal statement spoke of her shock about what had happened and that it was the first time she had travelled alone by train. D was aged 22 at the time of sentence and had one previous conviction for sexual assault, for which he received a conditional discharge. The pre-sentence report says that D had a clear understanding of what he had done and accepted responsibility for his actions. He talked of the difficulty he had in forming relationships due to his mental health problems. The report recommended a community order. The Judge said D targeted lone females on public transport, two of whom were children and so were particularly vulnerable. He said it was a serious aggravating feature that D already had an identical offence recorded against him. The Judge disagreed with a suggestion that D should not receive a custodial sentence because of his mental health problems. With full credit for the pleas, the Judge gave 2 years' custody for each offence and, as an act of mercy, made them concurrent. Held. The offences were placed in category 2A of the *Sex Offences Guideline 2014* which deals with the touching of naked genitalia and the victims being particularly vulnerable. Whilst it is true the women were vulnerable, as they were travelling on their own on public transport, that doesn't amount to 'particular vulnerability' as stated in the Guideline. The fact the offences were committed on public transport is a seriously aggravating factor but not enough to put it into Category 2. We can see no features that put the offences into Category A. We would start at Category 3B. The aggravating factors are a) the previous conviction, b) there were three offences, c) two were committed on bail d) the age of two of the victims and e) the location. These factors raise the matter into 2B. The fact D suffers from Asperger's Syndrome is a significant mitigating factor. **Community order with treatment** not 2 years custody.

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