Banks on Sentence

Sentencing Alert No 171

19 Oct 2017

Confiscation

Compliance order

R v Pritchard 2017 EWCA Crim 1267 D's confiscation order was for about £93,000. The benefit figure was about £246,240. D had lived in Spain until 2011. His ex-wife and his two non-dependent daughters lived there. The Judge found £88,920 worth of hidden assets. The Judge made a compliance order which ordered a travel[1] restriction order, which prohibited D from leaving the UK and made him surrender his passports etc. Held. para 20 The Act says the order is made not when 'it is necessary' but when the court 'believes it is appropriate' to ensure that the confiscation order is effective. para 25 The word 'appropriate' does not require any gloss. However, the making of the order must be justified. Such an order therefore can only be made if there is proper reason for so doing. Proportionality must be involved in the decision-making process. A travel restriction involves a restriction on freedom of movement, an important right in itself. The court has to strike a balance between the need to ensure that the confiscation order in question is effective and the risk of that confiscation order being rendered ineffective if no travel restriction is made, on the one hand, and the impact upon the individual defendant if a travel restriction is made, on the other hand. Here the decision to make the order was unassailable. The order was indefinite in time. Those orders should be considered the exception rather than the rule. The circumstances to consider on deciding the length are, amongst others, the length of time of the custodial sentence to be served and what is a reasonable period of time to ensure enforcement and to ensure the effectiveness of the confiscation order. In all such orders where made it would be good practice expressly to write in that the travel restriction will expire on satisfaction in full of the confiscation order in question and to refer also to the liberty to apply to vary or discharge and vary the length of the order.

Note: A compliance order was created by the Serious Crime Act 2015 s 7, which inserted Proceeds of Crime Act 2002 s 13A. The section came into force on 1 June 2015. The court is obliged to consider making an order but it is not a mandatory order.

1. The judgment says the Judge made a traffic restriction order. I assume that was a typo.

Importation of drugs

Heroin etc. Weight higher than the Category 1 weight 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.

Offences against the Person Act 1861 s 18

Glassing

Att-Gen's Ref 2017 Re Russell 2017 EWCA Crim 1113 D pleaded to unlawful wounding, just before his trial. He accepted the wounding in his defence case statement. D was convicted of wounding with intent. D was in a club and there was some pushing and commotion on the dance floor. D was in the crowd but not involved in the pushing. V was not in the crowd. D ran out of a crowd and hit V across the head with a glass causing it to shatter. V sustained lacerations on his forehead (2 cm) and over his left ear (1 cm), which were sutured with glue. He had a Facebook conversation the next day in which D said that V had tried to knock him out. In a victim personal statement, V said he still had a visible scar across the left side of his head and therefore had to keep his hair longer than he normally would to hide it. He lost seven days of work due to the attack and found it painful to wear a hard hat when he returned to work. D was aged 24 and had an ABH (a fractured cheekbone) when aged 15, criminal damage (a table during the same incident), and another ABH and threatening behaviour six months later (a headbutt at a football match and a hammer when he returned to the pitch). When aged 16, he received a 9-year extended sentence (6 years' custody 3 years' extended licence) for wounding with intent. After a street altercation, D had gone to a house and struck V2 with a machete, causing no injury. Later outside the house D slashed V2 across the neck with a large knife. The 6 inch wound could have been fatal. Soon after D's release, he punched a man in the face, knocking him out (ABH). The Judge recognised the offender's past problems in controlling his temper but noted that this offence had occurred in the heat of the moment and that D had made considerable progress in changing his attitude. The Judge said that at age 24, D was a very different person from what he had been. D now had a partner and was engaged to be married. He had also won a number of awards through a scheme for helping troubled individuals including awards for sports leadership and first aid. The Judge said that aggravating features included a) the use of a glass as a weapon, b) D's previous convictions, c) the offence was committed in a busy nightclub, d) D was under the influence of alcohol, and e) the offence was committed on licence. Held. It was a Category 2 offence. We take into account that the injury was not as bad as it could have been, the delay and that D pleaded to wounding. There were, however, significant aggravating factors in this case. **6 years** not 31/2.

Rape

Historical cases Victim then aged 6 or 7 Defendant then aged 13 to 15

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.

Terrorism

Consultation On 12 October 2017, the Sentencing Council published a consultation document about terrorism. It contains nine draft guidelines. One is for Explosive Substances (Terrorism only) offences. The rest apply to Terrorism Act 2000 s 11, 12, 15-18, 36B and 57-58, and Terrorism Act 2006 s 1, 2 and 5. The proposed starting points range from life imprisonment (35-year minimum term) to 1 year's custody. The consultation period closes on 22 November 2017.

Threats to kill

Acquaintance

Att-Gen's Ref 2017 Re Watts 2017 EWCA Crim 1009 D pleaded to sending a malicious communication and was convicted of making a threat to kill. The malicious communication was a series of texts to the sister of a friend who owed him money. Five texts were sent within half an hour which made offensive and violent threats. D visited the home of the sister and his friend and filmed himself shouting threats and kicking the front door. He then ran off. D was known to his local mental health services. During his sessions with one psychiatrist, D told him that he fantasised about killing people and talked about killing him and animals. D told another psychiatrist that he had paid a friend to drive him to the house of another friend whom he wanted to kill. This was the threat to kill. He said he also wanted to burn the house down but the driver refused to take him once he discovered D's intent. The psychiatrist concluded that D was dangerous and contacted the police. D was arrested and his mobile phone was found to contain pictures of him with masks, guns and knives. D was aged 22 and had a number of previous convictions (one arson, when aged 15, three batteries, when aged 17, and racially aggravated harassment, when aged 16). In 2014, D received 2 years for assault with intent to rob and later that year, 3 months consecutive for common assault and causing unnecessary suffering to an animal. In the assault a knife was used and there were kicks and punches to a victim over a mobile phone. In the cruelty case a puppy was thrown against the wall and killed. The Judge relied on *R v Donovan* 2009 EWCA Crim 1258. The defence said that weight should be given to the fact that the target of the threat has not been clearly identified. Held. We have been concerned by V's criminal record and the views of the psychiatrist, which state that V had clear capacity and knowledge of his actions at the time he uttered his threats. The offence was also committed by someone who was at liberty to carry out his threats, unlike in *R v Donovan* 2009 where the defendant was in prison and threatening someone on the outside. The Judge aligned himself too closely with *R v Donovan* 2009. **30 months** in all, not 15 and 1 month consecutive for the communications offence.

CLICK HERE TO GO BACK