Banks on Sentence

Sentencing Alert No 176

14 Dec 2017

Harassment section 2

Racially aggravated

R v Gargan 2017 EWCA Crim 780 D was convicted of causing racially aggravated 'intentional harassment'. V, who was 'of British mixed descent', was sitting in a pub with her boyfriend and members of her family, including two children. D approached V's table and said, "Don't you know they don't let nig-nogs in here?" The party responded 'appropriately' and the situation was prevented from escalating due to the calm response of V's boyfriend. V was understandably shocked and upset. She was left anxious and nervous and was in the late stages of pregnancy which only heightened her distress as she worried for the baby. D was in his mid-50s and helped with charity work. He had some old irrelevant convictions. The Judge concluded that an immediate custodial sentence was required. Held. The situation was aggravated by the presence of the children, one of whom was upset and asking about what had happened. A custodial sentence would not always be required for this offence where the offender offers no violence. If a custodial sentence is to be imposed, it should be very short. Therefore, **6 weeks** not 4 months.

Note: The problem with this case is that the Court of Appeal did not say that custody was required or that the sentence had to be immediate. I think most judges would give a stern warning and a non-custodial sentence. Ed.

Manslaughter

Fire, By

R v Connelly 2017 EWCA Crim 1569 D pleaded to manslaughter, reckless arson and an unrelated burglary. In the early hours of the morning, she started a fire in her flat. D was, at the time, on bail for the unrelated burglary. V, a man in his late 70s, shared the flat with D. V was in poor health and died as a result of inhalation of carbon monoxide and other toxic substances. The burglary was when D entered the home of an elderly couple. D stole a handbag. D was a long-term drug user. Social services had been involved with V's care for over a year and were concerned about the apparently domineering attitude of D and her boyfriend towards V. There were also concerns about the deterioration in V's appearance in the months before he died. The flat was in a multi-occupied building and another resident on his hands and knees tried to rescue V, but was driven back by the smoke. The resident did rescue a 96-year-old woman who lived above D's flat. D was seen in the vicinity of the flats but left after starting the fire and did not return or raise the alarm. D said she had been smoking crack cocaine and gave an account of a gas explosion. She denied starting the fire, but investigators concluded that the fire was started using a flame in the centre of the room around which furniture had been piled. D was now aged 43, and had 45 previous convictions, mainly to do with her drug abuse. She had not complied with Court orders. The Judge said she took account of the burglary in the main sentence. Held.

The better practice was to pass a separate sentence as it was a different type of offence. There was a death of a vulnerable man in poor health who was trapped. D did nothing to help him. There was significant endangerment of others. It was a multi-occupied building. There was significant damage to the building. We assume the prosecution dropped the arson with intent count because of D's drug intake. 18 years before full plea credit was too high. We start at 14 years and add 1 year for the burglary, so with plea, **10 years** not 12.

Rape

Defendant aged 17

R v Parish 2017 EWCA Crim 1595 D pleaded (full credit) to rape. V, aged 14, was camping with friends. D was also in the group and had known V for two weeks. The group was drinking vodka and at around 3.30 am V went to the local Asda to use the lavatory. She was accompanied by a friend and D. On the return trip, V's friend went on ahead leaving V and D alone. V only then noticed how much alcohol D had drunk. D started paying V unwanted attention, grabbed her arm and tried to lift her off the ground. V thought he was still messing around at this point but he then threw her to the ground where she banged her head. D managed to remove all her clothes except her shoes and socks and she was screaming throughout the incident. D also removed his clothes and said, "Why don't you want to do it?" He then raped her. She couldn't tell if D had ejaculated. V ran back to the campsite and D was found naked and asleep where the rape had taken place. When woken, D started to cry and said that he did not mean to do it. V had some superficial but very distressing physical injuries. V had flashbacks to the offence and there was evidence of self-harming. D was aged 17 at the time of the offence and had no previous convictions. The Judge made the case Category 3B (starting point 5 years). The aggravating factors were: a) the time and location of the offence, b) V's age, and c) the fact D was under the influence of alcohol and (subsequently admitted) cannabis. The Judge took into consideration D's youth, his apparent remorse and his previous good character. There was an 18-month delay before sentence. Held. The Judge was wrong to find D was a dangerous offender. We start at 5 years and with the aggravating factors move to 6 years. We reduce that to 5 years because of the mitigation, so with plea, 31/2 years' detention not 8 years' extended sentence (5 years' custody 3 years' extended licence).

Sex Offences: Historical

Genital contact Victim then aged under 7-9 Defendant then aged 18-20

R v Langford 2017 Crim EWHC 1491 D pleaded to three offences of indecent assault, committed in the early to mid 1960s. D was aged 75 at the time of the appeal. V1 and V2 were D's niece and nephew by marriage. The first count involved V1, then aged 7-9, when D would have been aged 18-20. After a fishing trip, D and V1 were sitting in front of a fire in D's flat. D reached across, undid V1's trousers, took out his penis and effectively masturbated him. The two offences against V2 occurred when she was 11 or 12 years old. D would have been aged 24-26. The first offence was an 'adult kiss' and touching and massaging of her breasts under her nightdress when she was in bed next to her younger sister. The second offence took place in a wood and D encouraged the other members of the group to go on ahead so he could talk with V2. D then kissed V2 and touched her breasts. He removed her trousers and underwear and rubbed her vagina, making it sore. He also placed her hand upon his penis. D was now 'not particularly well'. The Judge said that he had regard to the maximum sentences for these offences at the time they were committed (10 years, 5 years and 2 years respectively) and expressed regret that they would "distort the sentences which should be passed for this offending". He started at 4 years for count 1, 2½ years for count 2 and 21 months for count 3. The sentences were consecutive. Held. The real issue here is whether the starting point after a trial was manifestly excessive. These were three separate substantive offences and did not represent a continuing course of conduct, although there were two offences against V2. There was no penetration but there was contact with naked private parts. The effect on V2 was a material factor. She had reported the matters to her mother when she was in her mid-teens but was not believed. This has caused ongoing issues

for her over a number of years. There was also some degree of planning in these offences. We start at 6 years so with plea, **4 years** not 5.

Note: In the last offence, D would have been older but the offence had the lowest maximum sentence.

Theft

Theft by gangs

R v Gray 2017 EWCA Crim 1673 D was convicted of theft. D went to a farm and stole a JCB digger and trailer (value unknown). He was stopped 9 miles away towing them and said he had just picked the digger up for a friend. D was now aged 35 and in 2012 he was convicted of conspiracy to burgle a dwelling which involved stealing car keys from houses and then stealing cars parked outside. The Judge found that this was stealing to order and took significant planning including a plan as to how the digger could be converted into cash. The Judge placed the offending in Category 1B, because this was stealing 'to order' and because thefts of this kind had become common in the Yorkshire countryside and caused significant fear to the community. Held. The thefts in 2012 were committed by a gang as in this theft. It was a Category 2[B] not 1B. Therefore, **2 years** not 3.

Note: I think the sentencing Judge arrived at the right sentence by the wrong route. He should have started at Category 2B and moved up to 3 years by taking into account the seriously aggravating factors of gang crime on isolated rural communities, the previous conviction and the planning. The sentencing ranges do not box judges into passing the wrong sentence, neither do they create a ceiling for the sentence. Ed.