

Banks on Sentence

Sentencing Alert No 177

3 Jan 2018

Harassment Section 4

Racially aggravated

R v Narey 2017 EWCA Crim 1681 D pleaded to two racially aggravated harassments. A common assault was not proceeded with. On Boxing Day 2016, D and his sister, T, were in a take-away. T started shouting racial abuse at the man behind the counter. V was also in the take-away and knew D and T, having spent time with them at V's house that morning. V told T to leave and T smashed a vodka bottle in her face. The police attended and arrested D, who was still nearby. When handcuffed he began to abuse the two officers saying, "You fucking black bastard, you black cunt, you nigger, you Paki, you fucking Muppet." This was in the street in the presence of children. The abuse was repeated later at the police station when D was being booked in. D was aged 26 at the time of appeal and had a number of previous convictions including assaults, threatening behaviour, and intimidation of a witness. In 2010 he was sent to a Young Offender Institution for affray. The Judge accepted that D was ashamed of his behaviour and said that he was a young man with potential. He explained that the sentences had to be consecutive since there were two instances of racial abuse that occurred at different times and different places. The aggravating features were the element of racial aggravation and D's previous record. T received 20 months. Held. There were undoubtedly two incidents here, separated by time and place. However, we have taken the view that although rightly consecutive, the individual sentences were too long. Therefore, 6 months on each making **12 months**, not 18.

Murder

Knives 25-year starting point

R v Whelan 2017 EWCA Crim 1370 W, L and E were convicted of murder. One morning, there had been a violent disagreement about drugs between W and V. After that W called L and E asking for assistance. W then drove to a bail hostel to collect L (who had recently been released from prison following a lengthy sentence for a violent robbery) and then collected E. The three armed themselves with at least two knives including a combat hunting knife with a serrated blade about 6 inches long, and started to search for V. They searched outside his home and CCTV footage showed the three dressed in black with their hoods up and drawn tightly around their faces. Shortly before 7 pm the men found V and chased him down an alleyway and onto a grassed area. V was stabbed three times and died at the scene. The stabbing was witnessed by a number of local residents including two teenage boys. W returned to his car and drove away. He disposed of two mobile phones and took steps to change his appearance to evade detection. W was aged 24 at the time of sentence and had seven previous convictions including robbery and possessing a bladed article in a public place. L was now aged 23. He had 23 convictions on 18 occasions, including section 18, robbery and possession of a bladed article. He was on licence. E was now aged 29. He had 23 convictions on 15 occasions, but none for violence. The Judge described the offence as "callous and cold-blooded" and noted the attackers showed no mercy to V nor any remorse since. He found an intent to kill and said although it could not be established who inflicted the fatal blow, all three shared the common purpose of finding V and stabbing him. The Judge started at 25 years and found that there was a significant degree of premeditation with W recruiting L and E and then taking some time to find V. The Judge found that W was the ringleader. He made W's previous convictions an aggravating factor. Held. For W, the elevation

should be 3 years not 7 years. Those 7 years equate to a 14-year determinate term. For W, **28 years**, not 32. For L, **26 years** not 30. For E, **25 years** not 28.

Racially aggravated offences

Publishing racially inflammatory material

R v Burns 2017 EWCA Crim 1466 D was convicted of stirring up racial hatred by: a) publishing written material, and b) through his words or behaviour. D was a member of a far-right white supremacist group and was an avowed racist. Between August and September 2014, D posted a series of racist updates, comments and links to a Facebook account he operated under an alias. They were vile and deeply offensive. The gist of the messages was to promote militant action against the Jewish and Afro-Caribbean communities and so eliminate them. Those posts gave rise to count 1. Count 2 related to a speech D made whilst on bail for count 1. It took place during a demonstration outside the United States Embassy and contained highly inflammatory language directed towards non-white immigrants and Jews. The speech was recorded and posted on YouTube. D was aged 20, and 23 at the time of sentence, with some previous convictions unrelated to these matters. The Judge said that whilst freedom of speech is a fundamental right, D's conduct went far beyond what was acceptable and encouraged the listeners to move from ideas into action. Held. Consecutive sentences were right. Because of D's age, his low intellect, his poor educational background and his immaturity, **2½ years** not 4.

Railway offences

Level crossing offences

R v Hristov 2017 EWCA Crim 1736 D pleaded (full credit) to obstructing an engine or carriage using a railway and failing to stop. D was an HGV driver. At 10.40 am, D stopped at the barriers of a level-crossing in his lorry, at Roydon in Essex. The barriers rose. D drove forward but failed to notice an amber warning light which signified that the barriers were about to be lowered. D drove onto the crossing as an audible alarm sounded and the amber light changed to a red flashing light. D carried on driving, hoping to clear the crossing in time¹. A barrier came down between the cab and the trailer, trapping the lorry right across the railway line. The amber light had been on for 3 seconds before the red light flashed. Five seconds later the barriers were lowered. D got out and walked around for three minutes. A signalman had noticed the lorry on CCTV and tried to stop the barriers descending but they had already hit the lorry. He called the crossing phone, but D did not answer. D returned to the lorry and drove away, breaking the barrier in doing so. He stopped briefly on the other side and then drove off. The signalman put all trains in the area on stop. The delays to the service were estimated to have cost Network Rail £23,000 and the barrier cost £750 to repair. D said he had stopped at the crossing [presumably for an earlier train]. The barriers rose and he followed two cars over past the barrier and did not see the lights. He could not reverse because there were cars behind his lorry. D was aged 30, was of good character and had a good driving record. A prison sentence would mean D losing his job. The Judge said D had made a deliberate act to drive the lorry onto the crossing, when it was clearly unsafe and dangerous to do so. He referred to the delays and expense incurred. He also spoke of the responsibility an HGV driver must have when driving such a large vehicle and that a custodial sentence would suffice to mark the seriousness and dangerousness of the offence. Held. D's offending was not deliberate but careless and negligent. In the event, no one was actually in danger. The offending did not merit imprisonment. **£750 fine** not 8 months' imprisonment, and 12 months' disqualification from driving not 2 years (with a 4-month extension).

Note: The judgment poses a few questions and creates a few problems: a) The barriers came down 5 seconds after the red light started to flash, which makes the crossing exceptionally dangerous for long vehicles, particularly i) those driving slowly or ii) those held up by a previous train, where they would be moving off from a stationary position. b) Network Rail appears far more culpable than D. I can find no record on Google of Network Rail being prosecuted for this level crossing. In September 2016, Network Rail was fined £4m for an unsafe level crossing in Suffolk. c) There is a question whether D's account made him guilty of the offence. d) There is a question whether, if the defendant maintained his account, the Judge could have made his findings without a *Newton* hearing. e) Another problem was that the prosecution dropped a dangerous driving charge, so the defence were able to say D was negligent rather than deliberate in driving over the crossing when the lights were at amber. f) It was said no one was in actual danger. I consider a lorry stuck on a level crossing to be exceptionally dangerous. h) It is not

known how many days D served in prison or whether, if it was a significant time, the fine was appropriate. Ed.

1. The Judge said he realised his mistake, but D may have had no option but to continue.

Sex Offences: Children With

Abuse of trust Girl aged 15

R v Boobyer 2017 EWCA Crim 1619 D pleaded to meeting a child following sexual grooming (section 15). D was a married schoolteacher with an adult family. V, aged 15, was one of his pupils and had significant mental health issues. She had previously attempted suicide and spent a period of time in hospital. D visited her in hospital and only started to groom her after that incident. D sent V over 300 e-mails. At first, he used the school's e-mail system and used an overly familiar tone, referring to V as 'sweetie' and 'chicken'. D was disciplined by the school but then used a private e-mail account to continue to message her. He told her he was in love with her and called her 'gorgeous'. D actively concealed his behaviour by uploading seemingly innocent messages onto the school e-mail system so that it would appear to anyone reading them that their relationship was strictly pupil-teacher. D met V in a storage cupboard at the school. D engineered the meeting and specifically sent another student away so that he could be alone with V. There was kissing. Around this time, V was raped by another man. D had nothing to do with the rape but he was the first person that V confided in. He continued his interest in her, knowing that she was now even more vulnerable. D was arrested and released on bail, the conditions of which forbade him from having any contact with V. Undeterred, D set up another e-mail account and tried to make contact with her. A friend told the police. Despite this, D did engineer another meeting with V in a car. It lasted 15 minutes and was witnessed by another, although they couldn't see what actually happened. D admitted five to eight kisses with V and some hugs. He was in his 50s and of previous good character. A pre-sentence report spoke of V believing she was in love with D. She refused to make a victim personal statement. The headmaster of the school made a statement in which he detailed the unsettling effect that D's behaviour had on the pupils, staff and parents. The Judge said that a letter from D to him contained more evidence of self-pity than of empathy for V. The Judge highlighted the fact that this offence was committed in breach of trust and that D knew that V was particularly vulnerable. The offence was made more serious by D not reporting the rape and then contacting V again whilst on bail. The Judge made the case Category 1 (starting point 4 years). Held. We agree with the categorisation but with D's good character and the physical acts being kissing rather than anything more intimate, with plea, **3 years 4 months**, not 5 years.

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