

Banks on Sentence

Sentencing Alert No 181

5 March 2018

Costs

Defendant paying prosecution costs ***General principles/Appportioning costs***

R v Rahal 2017 EWCA Crim 1779 para 10(1) The order to pay costs should not exceed the sum which it is reasonable to expect the defendant to be able to pay, having regard to his means and any other financial order imposed upon him para 10(2) The purpose of the costs order is to compensate the prosecution for the costs it has incurred, not to penalise the defendant. para 10(3) The order should not exceed the costs that the prosecution had actually incurred. Those costs may include costs incurred in relation to the court hearing and the costs of the investigation, see *R v Associated Octel Ltd* 1996 EWCA Crim 1327, 1997 1 Cr App R(S) 435. The prosecution costs may include costs incurred in relation to the court hearing and the costs of the investigation. para 10(4) Where there is more than one defendant, a defendant is generally to be held liable only for the proportion of the costs attributable to the prosecution against him. In that regard the court should consider what would be the amount of costs if the defendant had been tried alone, see *R (Gray) v Crown Court at Aylesbury* 2013 EWHC 500 (Admin).

Defendant paying prosecution costs ***CPS scale of costs***

R v Rahal 2017 EWCA Crim 1779 D was prosecuted by Southwark Borough Council for obtaining a council flat by pretending she had a child when she had no child. She was convicted. Held. para 14 It was said that the Crown Court should have used the CPS scale of costs. The Judge was not required to do that. If the costs incurred are ones reasonably incurred, they are in principle recoverable. We uphold the order except the council cannot claim for two counsel to prosecute the case as that was not a just or reasonable expense.

Court of Appeal

Advocate appearing by video

R v Lane 2017 EWCA Crim 1439 The prosecution counsel was in a trial elsewhere that was overrunning. Held. We are grateful for the arrangements that have been made and grant permission for counsel to appear by video link.

Firearms

Firearms Act 1968 s 16A ***Imitation weapons etc.***

R v Meade 2017 EWCA Crim 2166 (D pleaded to section 16A and possessing a firearm when prohibited. D was seen on CCTV with a pistol which fired blanks and was not a lethal barrelled object. D wanted to reinforce his status as someone not to be messed about with. He had 19

previous convictions including old convictions for robbery (supervision order) and attempted robbery (12 months' DTO). In 2006 he received 10 years for a conspiracy to rob. The Judge gave 3 years and 1 year consecutive. Held. For section 16A, we start at 18 months, so with plea 12 months. For the prohibited count, we start at 9 months, so with plea 6 months. The sentences were consecutive, making **18 months.**)

Minimum sentences *Stun guns*

R v Manders 2017 EWCA Crim 1474, 2018 1 Cr App R (S) 11 (p 58) D pleaded at the end of the prosecution case to possessing a disguised firearm. He was convicted of wounding (section 20) (18 months consecutive) and aggravated vehicle taking (6 months concurrent). D sat on a wall with another. Both had their hoods up. D's crack and heroin supplier, V, arrived in a van and D pulled him out of the van. The three men fought. V was stabbed in the stomach. D drove away in the van at speeds up to 54 mph in a 30-mph limit. V went to hospital. D hit a parked car and was arrested. D's flat was searched and police found a stun gun shaped like an iPhone in a kitchen cupboard. The Judge rejected in a *Newton* hearing D's account that he had found it at the back of a sofa. D had 74 previous convictions at 28 court appearances. Four were for drug supply and one was for possession of an offensive weapon. The defence said the exceptional circumstances were: a) he was lightly convicted for weapon and violent convictions, b) there was a gap in his record since 2013, c) D had helped with mentoring those with drug problems, d) he had pleaded guilty (albeit with a lost *Newton* hearing), and e) the nature of the weapon. Held. We reject the suggestion that this Court has consistently found exceptional circumstances for stun gun offences. Each case depends on its own facts. The factors relied on were unexceptional. There was D's history of drug dealing and the finding of the stun gun after the stabbing. It cannot be said the Judge's approach was incorrect.

Mentally disordered defendants

Asperger's syndrome

R v Newman 2017 EWCA Crim 2131 D pleaded to section 18 and possession of an offensive weapon. D and his father, F, were in a car. D attacked F with a knife, causing three significant wounds to F's internal organs. D was diagnosed with Asperger's syndrome, which was exacerbated with a 'degree of depression'. He was aged 21 at the date of sentence and was of good character. The Judge made the offence Category 1. Held. D's mental state was atypical and it significantly reduced culpability here but did not eliminate it. With that factor and before the plea we move to 12 years. With plea, **13 years'** extended sentence (8 years' custody 5 years' extended licence).

Sexual Harm Prevention Orders, Breach of

Persistent breaches

R v Lane 2017 EWCA Crim 1439 D, now aged 73, pleaded at the Magistrates Court to a breach of his SOPO. Following D's release from prison, he moved into sheltered accommodation for the elderly and the managers of the home were told D was not to have contact with children visiting residents. D befriended two residents and had contact with children. He then sent the children Christmas cards and presents. His invitation to the children to visit his accommodation was not successful. There was similar further contact two months later. These children were aged 9, 8, 5 and 3. He asked for their dates of birth, so he could buy them presents. D did give them presents. The residents gave them a photograph album containing photographs of children as a thank you gesture. This was the breach of the SOPO. D returned the photographs, saying he was not allowed them. D was arrested and admitted he had groomed the residents and that if he had been able to be alone with the children there was a 90% chance of sex offences taking place. D had 25 previous convictions. In 1996 for five sex offences against females aged under 13 and other sex offences he received 10 years. In 2003 police found images of children in his cell. In 2004¹ a SOPO was made. It was breached¹ in: 2006 (community order), 2007 (2 years) and 2010 (4 years). The Judge gave credit for the plea (but only 20%) and because he had handed the photographs back. The Judge also said it was only a matter of time before D touched a child

again, despite the long sentences he had been given. That meant the photographs were only a small part of what was going on, because D was grooming children with a view to abusing them. Wishing to protect children, the Judge said he would pass the same 4-year sentence again. Held. D was an entrenched paedophile. We should not start at the maximum for the offence. D needs full credit for his plea. We start at 41/2 years, so with plea **3 years**.

1. The judgment says it was 2014, but that can't be right because of the dates given for when the order was breached.

Supply of drugs

Psychoactive substances Judicial guidance

R v Waka 2018 EWCA Crim 125 D pleaded to supplying psychoactive substances and cannabis. Held. Where a drug [does not appear in the *Drugs Offences Guideline 2012*], sentencers should have regard to the guideline and look for the closest approximation to a drug mentioned in the guideline. As the synthetic material was cannabinoid, the closest drug in the guideline is cannabis. On different facts it might have been a class C drug.

Psychoactive substances Example

R v Waka 2018 EWCA Crim 125 D pleaded (full credit) to supplying psychoactive substances and cannabis. Police saw him in the street with another. They stopped him and he had six bags of a green matter (found to contain synthetic cannabinoid of minimal street value), two mobile phones and £480. Nearby was another bag with green matter in it (also with cannabinoid in it worth about £500 at street value). When taken into custody, another phone and £190 were found. Four months later, police stopped a car with D in it and D was found to have 11 small bags containing cannabis worth £110, two mobile phones and £450 in cash. Near him was a set of scales. D was aged 18 and had no convictions. Held. The second offending was committed on bail and D refused to give the PIN to his phone. There were no other aggravating factors. The mitigation was his youth, his good character and his remorse. It was Category 3. As the psychoactive substance was cannabinoid, the closest drug in the guideline was cannabis. We start at 11 months, so with plea, **7 months** not 16 months, making with the unaffected 8-month sentence for the cannabis offence 15 months YOI.²

2. The judgment says the sentence was detention. That is either a typo or an unlawful sentence, as D was aged 19 when convicted.

Suspended Sentence Orders: Breach of

Unpaid work completed

R v McDonagh 2017 EWCA Crim 2193 D pleaded to section 18. The offence was committed on 10 May 2016. He was sentenced to 54 months' custody. He was in breach of a suspended sentence for a section 20 offence with a very similar factual background. That was imposed on 15 February 2016. The order had 180 hours of unpaid work attached, which D had completed. The Judge said the suspended sentence had to be activated in full unless it was unjust to do so. He activated it in full. Held. There was a wider discretion than that. Because the breach occurred so soon after the suspended sentence was imposed and the second offence 'was identical in nature' the reduction for the work done should be modest. **14 months** not 18 months activated.

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