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Banks on Sentence

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Defendant

Serious health issues ***Circumstances change***

R v Stephenson and Minhas 2018 EWCA Crim 318 S pleaded to causing a child to engage in sexual activity. M was convicted of rape. S suffered from psoriatic arthritis and fibromyalgia. She was either in a wheelchair or bedridden. In prison she had faced a number of difficulties. M's motor neurone disease had deteriorated since sentence and he would face exceptionally severe hardship in prison. Held. para 20 We have considered *R v Streater* 2014 EWCA Crim 2491, where this court took into account evidence of a rapid and serious deterioration in the defendant's medical condition since his sentencing. In cases of serious ill-health this court may have regard to a significant deterioration in a medical condition which was known at the date of sentencing. It will be rare to do so. The case must be within the *R v Bernard* 1997 1 Cr App R (S) 135 principles, see 240.26. The medical evidence establishing the deterioration must be received pursuant to Criminal Appeal Act 1968 s 23. Suppose the sentencing judge is aware of the serious ill-health and makes a reduction in sentence. Then there is fresh evidence showing a significant new prognosis as to the likely course of a terminal illness. There are two possibilities here: a) where the terminal nature of the illness is only diagnosed after the sentence, and b) where there has been a significant deterioration in the offender's health since the date of sentence, such that the approximate date at which death is now expected to supervene is significantly before the earliest date of release. The principles to be applied are:

a) The terminal prognosis is not in itself a reason to reduce the sentence even further than it might be reduced in accordance with the *R v Bernard* 1997 principles. The court must impose a sentence which properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter to be considered by the prison authorities and the Secretary of State under the Early Release on Compassionate Grounds (ERCG) prison provisions.

b) However, the defendant's knowledge that he must now face the prospect of death in prison, subject only to the ERCG provisions, is a factor relevant to the application of the *R v Bernard* 1997 principles. So too is the prospect that his worsening condition during his decline towards death will make each day harder for him than it already is, and much harder than it is for prisoners in good health. The terminal prognosis must therefore be taken into account in assessing whether imprisonment weighs so much more heavily on the defendant than it does on other prisoners that the length of the sentence must exceptionally be reduced, even if this court concludes that no proper application of the *R v Bernard* 1997 principles could result in such a reduction as would enable the defendant to be released before death.

For S, her case [does not fit] within the *R v Barnard* 1997 principles. The Judge gave a very significant reduction. The Judge was correct not to suspend the sentence.

For M, a doctor said motor neurone disease is one of the most unpleasant diseases. Without specialist care there will be great and needless suffering. M had served just over 10½ months. Five months ago, M was likely to die in five to eight months' time and it was estimated he would need a tube to feed in seven months' time.[1] Held. The Judge was wrong not to give any reduction. The recent significant deterioration must be taken into account. There must be a balance between medical factors and the need to punish. 5 years not 9. Compassionate release is a matter for the Secretary of State.

1. There are a number of estimates given, which may not all be correct.

Murder

Knives No 25-year starting point

R v Jobling 2018 EWCA Crim 117 D was convicted of the murder of his partner, V, aged 42. In 2014, the two began a relationship and around Christmas 2015, V's son moved into D's home with V. By then there were arguments and D's character changed after he had been drinking. Notwithstanding this, D and V became engaged. There was an improvement in the relationship, which was short-lived. D and V returned home after 'average social drinking' and D stabbed V 11 times with a kitchen knife. V bled to death. D called an ambulance and admitted stabbing V. When police arrived, D claimed V had been the aggressor. He told police that V's son was asleep upstairs. D was aged 51 with no relevant convictions. The Judge started at 15 years. She moved to 16 years because of the knife. The Judge considered it was a short-lived incident, with no intent to kill and was not premeditated. She said domestic murders attract the most serious sentences. With the presence of V's son upstairs and D's attempt to cover up the crime by faking injuries, the Judge moved to 20 years. Held. The number of wounds was significant and the uplift because a knife was used could have been more than 1 year. We are not satisfied that the location of the offence was an aggravating factor. The sentence did not reflect the mitigation, so **18 years** not 20.

Offences against the Person Act 1861 s 20

Victim seriously injured Unexpected

R v Place 2018 EWCA Crim 48 D pleaded to section 20. On a May Sunday, at about 8.40 pm, D and two others were skateboarding in school grounds. The school caretaker, V, aged 69, asked them to leave. The two left and D remained. D argued with V and stood in front of him in an intimidatory way. Next D pushed or punched V and moved away. D came back and punched V and V fell to the ground backwards. D left. V was taken to hospital and found to have a skull fracture with multiple bleeding on the brain consistent with a traumatic brain injury. V was in hospital for 12 weeks and had problems with his memory. The injury had a severe impact on V's family. D was aged 20 and had no convictions. He expressed remorse. The pre-sentence report said the offence was motivated by anger. The Judge took into account the disparity in age and fitness and that D had taken alcohol. She made the offence Category 2 and started at 33 months. Held. There was no evidence that D was drunk. That was not right. Significant allowance must be made for the

lack of premeditation, D's remorse, his good character and his relative youth. We start at 2 years, so 16 months not 22.

Note: There is no mention of the critical factor, namely, that D attacked a person in authority acting in the course of his duty. V was aged 69, alone and clearly vulnerable to attack. The offence was arguably more serious than hitting a policeman or policewoman, who are younger, trained and equipped to respond to these situations and who usually go around in pairs. This critical factor should have made the offence 'higher culpability' but the guideline prohibits that as only the listed factors can be taken into account. With the very serious injuries and the impact on the family, 3 years even with the minor mitigation seems the appropriate starting point after uplifting the offence from a Category 2 starting point. Although the injuries were taken into account to make the offence 'greater harm', the very serious injuries should warrant a small uplift. Unfortunately, the courts seek to put cases into the ill-fitting guideline boxes and then are overinfluenced by the starting points and ranges which frequently result in inappropriate sentences. Ed.

Rape

Fathers Child under 10

Att-Gen's Ref 2018 Re CMT 2018 EWCA Crim 53 D pleaded, on the first day of his trial, to rape of a child under 13 and rape. Both counts involved his daughter, V. D raped V from when she was aged 9 to when she was aged 18. Just before ejaculation he would withdraw. There was violence used and the threat of violence. V's silence was bought with clothes and toys. D controlled her, even preventing her from getting a job. D refused to allow her friends to visit. At times he locked V in the house to stop her from going out. Finally, she ran out of the house to a place of safety. D ran after her, but she got away. V called her mother. V was found to have a 2 cm bruise on her wrist, two bruises on her arm, a bruise on her thigh, and a red abrasion on the top of the outside of her vagina. In interviewed D lied. D was aged 71 and had no previous convictions. He was unemployed and could not read or write. A psychologist said D's verbal reasoning skills were impaired and his IQ was in the bottom 3%. His mental age was estimated to be about 11 years. D lied to probation who said he had no insight into the extremely serious offences. D was assessed as a very dangerous sex offender. The Judge started at 18 years and because of D's impaired intellect and plea reduced that to 12 years. With the good character and the plea, he reduced that to 10 years. Held. We start at 20 years. We move to **15 years** (Offender of Particular Concern Order with a 1-year extension) because of the reduced culpability and the plea.

Sex Offences: Basic Principles

Meaning of breach / abuse of trust

Att-Gen's Ref 2018 Re Waqar 2018 EWCA Crim 265 D was convicted of eight sexual assaults on a child, V, aged under 13. He, aged 33, abused his niece when she came for a sleep-over. The Judge concluded there was no breach of trust. Held. D was a 33-year-old uncle and carer of V, aged 8. V's parents trusted D to look after V. Abuse of trust may include parental or quasi-parental relationships or [those that] arise from an ad hoc situation, e.g. where a late-night taxi driver takes a lone female fare. What is necessary is a close examination of the facts and clear justification given if abuse of trust is to be found. A familial relationship will not necessarily impose a position of trust but here there was undoubtedly a 'parental or quasi-parental relationship'. Abuse of trust was present here.

Sex Offences: Children, With

Internet offences Directing children to abuse themselves

R v Allen-Howe 2018 EWCA Crim 158 D pleaded to 21 counts of Sexual Offences Act 2003 s 8, 10 and 13, eight counts of inciting child prostitution or pornography and two counts of making indecent photos. From when D was aged nearly 17 to when he was aged 181/2, D used the

Internet to contact 15 boys aged 12-15, when pretending to be a teenage girl. He persuaded them to engage in master–slave relationships while claiming he was a multi-millionaire. He offered the boys gifts and money. The boys were incited to strip, masturbate themselves and penetrate their anus digitally (four boys) or with a toothbrush (one boy). Two boys were encouraged to abuse their sisters. One boy, aged 13, was encouraged to lick a dog's genitals and penetrate the dog's anus. Recordings of the activity were kept. There were also about five boys aged 16 and 17 who were encouraged to act in a similar way (not unlawful) and who were filmed, which was unlawful. Sometimes he would ask the boys to swallow their urine and semen. D was now aged 22 with no previous convictions. He had a troubled family background. D said he was trying to avoid the guilt of being gay and after a time he became addicted to the activity. The pre-sentence report said D did not pose a significant risk in the dangerousness provisions. The defence relied on D's age, his early (but not complete) admissions, totality, the fact that there was no direct contact and the delay between arrest and sentence (caused by international inquiries). Held. This activity, known as cat fishing, has the potential to cause psychological damage to victims. The 12-year starting point was severe but not wrong, because of the total number of victims etc. 8 years upheld

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