

Banks on Sentence

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Arson

Domestic premises

R v Barnard 2018 EWCA Crim 257 D pleaded to arson. He was in a one-year relationship with K, who lived in a one-bedroom flat at the top of a purpose-built block of nine flats. D and K, after taking drink and drugs, argued. K and a friend left the flat to buy more alcohol. When they returned they saw D on a bicycle and the fire brigade present with smoke billowing from the flat. The flat was 50% fire damaged. The cause was difficult to determine 'but something was set alight'. D was aged 35 and had no relevant previous convictions. At court it was said that D had recklessly started the fire when on a bed smoking drugs. The Judge said D had put other people's welfare at risk. Held. Each case is fact-specific. **4 years** not 5.

Rape

Victim aged 13-15

R v KC 2018 EWCA Crim 236 D pleaded (10% credit) to two rapes and a sexual assault (which related to two occasions when D put his fingers in V's vagina). Police became aware from an internet chat site that someone had had oral sex with his sister. They were able to discover that the person in question was D. D, then aged 16-18, lived with his sister, V, then aged [probably 13-15].¹ Their bedrooms were the only rooms on the third floor of their house. V suffered from cystic fibrosis. D would enter V's room and play fight, pull her trousers down, seize her breasts, rape her and make her suck his penis. V tried to stop D but D persisted. She would wake up in the middle of the night and find D fingering her. V said when D anally raped her, it 'hurt loads'. When D first vaginally raped V, he used a condom and she was screaming in pain, but D would not stop. The vaginal and anal rapes were each charged as having taken place on no less than five occasions. V had had to be separated from D, so she was no longer living at home with her mother and stepfather. She feared she could not go back. When in foster care she continued to self-harm and had suicidal thoughts. She was also struggling at school. The psychological impact on V as a

result of the abuse was assessed as 'enormous'. D was aged 20 when he pleaded. He had no previous convictions. D had complicated mental health issues, including post-traumatic stress disorder. The Judge made the case Category 2B. Held. This serial offending had terrible consequences. V suffered very serious psychological damage. D's disorder was probably caused by D's abusive father. We take into account D's lack of convictions, his age and lack of maturity. Concurrent not consecutive sentences were appropriate on the rape offences. We start at 8 years and move to 13 with the aggravating factors and the other rape count. With D's age and the mitigation, we reduce that to 9 years. With the plea discount that makes **8½** years. The 1-year sentence for the sex assault remains consecutive, making 9½ years' YOI in all.

1. The judgment refers to the activity lasting over three years.

Sex Offences: Historical

The steps in sentencing historical offences

Note: In *Att-Gen's Ref 2017 Re JM 2017* EWCA Crim 2458 para 8 the Court adopted the following stepped approach, which I have added to.

1) Determine the maximum sentence for the instant offence, which is the maximum at the date of the offence. For the historical maximum sentences, see para 327.1 in *Banks on Sentence (BoS)*.

2) Identify the modern equivalent offence or offences for the relevant conduct.

3) Seek a measured reference to the sentencing guideline for that modern equivalent offence. In *Att-Gen's Ref 2017 Re JM 2017*, the maximum sentence for the equivalent sentence was life imprisonment, whereas the maximum sentence for the instant offence was only 10 years' imprisonment. That meant the starting points and category ranges had to be adjusted in a measured way to reflect the lower maximum sentence for the instant offence.

4) Determine the starting point for the offending.

5) Consider the aggravating factors. The aggravating factors can be found in: a) the guideline for the offence, or b) the *Overarching Principles: Seriousness Guideline 2004* para 1.20 at para 86.40 in *BoS*, or c) they can be factors that the court considers appropriate.

6) Assess the harm done and how the offending came to light, see *Sexual Offences Guideline 2014* Annex B page 155 para 6 at para 327.2 in *BoS*.

7) Consider the mitigating factors. Criminal Justice Act 2003 s 166(1) enables a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of the sentence'.

8) Where there is an absence of further offending over a long period of time, especially combined with evidence of good character, this may be treated by the court as a mitigating factor. Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor, see *Sexual Offences Guideline 2014* Annex B page 155 para 8 and para 327.2 in *BoS*.

9) The maximum term for the instant offence must not be exceeded. The maximum must be reserved for the most serious cases, see 28.19. However, where there are low maximum sentences, this rule is applied more loosely. Where there is a plea of guilty the appropriate discount must be deducted from the provisional sentence in the normal way. The sentencer may use consecutive sentences to pass an appropriate sentence, see para 18.12 in *BoS*.

10) Where a) the defendant was aged 18+ at the time of one of the offences, b) custody is appropriate,³ c) a life or an extended sentence is not required, and d) the case involved rape or the penetration of a child aged under 13, an Offender of Particular Concern Order is required, see para 81.5 in *BoS*.

11) Where appropriate, consider the *Imposition of Community and Custodial Sentences Guidelines 2017*, because even if the custody threshold is crossed it does not follow that a custodial sentence is inevitable.

Offenders were who were aged under 18 at the time of the offence

12) The maximum term that could have been imposed on the offender at the time because of his or her youth must be ignored, if some form of custody was available, *R v L* 2017 EWCA Crim 43, 1 Cr App R (S) 51 (p 402) at para 15 and para 241.31 in BoS.

13) Inquire into the offender's maturity at the time of the offence to determine the extent to which that affected his culpability for his actions. In the absence of reliable evidence as to his maturity, the maturity should be assessed by reference to the maturity of a youth of the offender's age at the material time, see *R v Forbes and Others* 2016 EWCA Crim 1388 at para 21 and para 327.4 in BoS.

14) In assessing the offender's culpability, the sentencing court is entitled to take into account the *Sentencing Children and Young People Guideline 2017*. Paragraphs 1.5 and 4.5 of that guideline emphasise that a child's lack of maturity can 'impact on their decision making and risk-taking behaviour' and so it is important for the court to consider whether the offender acted impulsively and whether he was aware of what the consequences of his actions could be.

15) Deduct the plea discount from the provisional sentence and pass the appropriate ancillary orders.

3. See Criminal Justice Act 2003 s 236A(2) at para 81.2 in BoS. This enables, in the rare case, community orders and Hospital Orders to be made.

Threats to kill

Prisoners, by

R v Thompson and Others 2018 EWCA Crim 639 (5-judge court) F pleaded to ten counts of threats to kill. In prison, he passed a letter to a prison officer, P, saying he wanted to kill a fellow prisoner and then have sex with his corpse. The letter also said he wanted to commit various sex offences on P, other officers and prisoners. A week later, he told P that he would slit P's throat if he was ever out of prison. A few days later, there was another letter handed to a prison officer saying he was going to kill two prison staff or the governor and he wanted to have sex with their bodies. Further, he wanted to kill a particular officer. Three weeks later, F handed another letter to an officer, containing similar intentions to kill staff, governors and after an escape F's probation officer. Two further letters were received with similar threats, but this time included a named District Judge and some unidentified children. F was aged 38 and in 2011 and 2013 had convictions for possessing a knife. He was serving a 2½-year prison sentence for possessing a bladed article. He had telephoned police saying he was going to kill someone and then himself. F had repeatedly self-harmed both in and out of custody. F explained he had overwhelming sadistic urges and fantasies of killing men and adolescent boys and sexually interfering with their bodies. He was assessed as possessing a grave and immediate danger to the public. A mental health disposal was not available. The Judge started at the 10-year maximum and with plea passed 9 years on the first five counts, all consecutive making 45 years. Held. The sentence was entirely disproportionate. We pass extended sentences with 6-year custodial terms on all counts. Counts 1-5 will be consecutive to counts 6-10 making in total 20 years' extended sentence (**12 years'** custody 8 years' extended licence.)

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