

Banks on Sentence

Sentencing Alert No 186

16 May 2018

Burglary, Aggravated

Dwellings ***Victim over 65***

R v Smith 2018 EWCA Crim 761 D was convicted of aggravated burglary and false imprisonment. V was an 87-year-old jeweller who continued his work at home. He lived alone. At 10.25 pm, his outer front door was smashed open by D and another who were masked and armed with sledgehammers. V saw them smash his inner door. The two men surrounded V and threatened him with the sledgehammers. V, who was terrified, complied with their demands. The men demanded a key to the workshop from V and locked him in a room. Using the key and the sledgehammers, they stole £150,000 worth of jewellery including V's late wife's ring. V was scared by the attack. D was aged 28. When aged 20, he had convictions for dwelling burglary and robbery (28 months' YOI). When aged 22, there were more burglaries (3 years). In 2013, D had a fraud conviction (a suspended sentence). The Judge considered the dreadful circumstances and D's convictions permitted him to move above the sentencing range in the guideline. Held. It was a Category 1 offence. The Judge was entitled to go to the top of the range before taking into account the previous convictions. It was a dreadful offence but there was no actual violence to V so **13 years** not 15.

Note: It is surprising the Court considered no actual violence was a factor when the victim had been clearly terrorised and scared by the incident. Causing extreme fear is a form of violence. Ed.

Confiscation

Conspiracies and drug trafficking offences

See also: *R v Strange* 2018 EWCA Crim 118 (LCJ D pleaded to conspiracy to supply drugs. D's role was limited to dealing with the money. P, a co-defendant, handed over 1.18 kilos of cocaine to a courier. P met D in a car park. About £124,000 was placed in P's car. D claimed he was returning cash to P. The Judge said the benefit was the 9 kilos of cocaine seized in all (£378,000). Held. All conspirators are to be taken to [have] obtained property that any of them obtain, subject to the clear exceptions of those taking only a small or insignificant role. Order upheld.)

Conspiracy

Maximum sentence and guilty plea ***Judicial guidance***

R v Gregory and Butler 2017 EWCA Crim 1297 G and B pleaded to conspiracy to burgle. They were involved in 48 burglaries of commercial and club premises. The benefit figure was about £212,000 and the damage caused was about £½m. The Judge said he bore in mind the sentence that would have been appropriate had he been able to pass consecutive sentences. For G, he considered that the proper sentence was 14 years and gave 25% for the plea making 10½ years.

He then reduced that to 10 years as that was the maximum sentence. Held. That was not permissible. The Judge should have started with the maximum and reduced that with the plea to 7½ years.

Firearms

Possession with intent to endanger life

R v Kepple 2017 EWCA Crim 2195 D was convicted of possessing a firearm with intent to endanger life. She had earlier pleaded to possessing a firearm without a certificate. D lived with her baby daughter, her 11-year-old brother and her parents. Police executed a search warrant at the property and found the family sitting on the sofa. D was told by police that they had a firearms warrant and she immediately said, "There's something in my bedroom." She added she thought it was a gun, that it wasn't hers and that she didn't know if it was loaded. She said she didn't know if there was ammunition but said, "He told me it works though." The police found a sawn-off shotgun in three parts and five cartridges of live ammunition stored under the baby's cot. The gun was later assembled, test fired and was found to be working. In interview D said she had been given the gun by Y, who was best friends with the father of her daughter. She was told to look after it and not to look in the bag. When D took the bag, there were people running in the street and passers-by told her there had just been a shooting. An internet search confirmed this and D thought the gun was related to the shooting. D admitted to having received £65 per week for keeping the gun and she had had it for about 3-4 weeks. D was aged 20 at the date of the offence and had no previous convictions. The Judge identified the aggravating factors as: a) the length of time D held the gun, b) the gun was stored under a cot in a room that could be accessed by D's young brother, and c) D exposed her parents to the risk of an aggressive police raid. She added that D had facilitated, aided and assisted in a way which elevated this to a most serious example of a section 16 offence. Held. This offence was much more serious than simple possession of a firearm. D was prepared to look after the gun knowing it had been used very recently in a shooting. She was prepared to keep it for a number of weeks. D received payment for storing it and knew it would go back into circulation. Punitive and deterrent sentences were called for. 14 years was a severe sentence for a woman so young with a baby to look after but people need to understand how seriously they will be dealt for such offences, so **12 years**.

Perverting the course of justice

Judicial guidance where there was no arrest for offence perverted

R v Bunce 2017 EWCA Crim 2567 D pleaded to perverting the course of justice. V reported him for sex abuse and he tried to get her to withdraw her complaints. No decision had been made by the CPS whether D should be charged with an offence. Held. This case was difficult because there was no reliable evidence to find whether the underlying offence had been committed. Sentencing must be proportionate. D was perverting an investigation [and not a sexual offence prosecution] so it is different from most cases. A court is not entitled to assume that an offence had been committed. We start at 3 years, so with plea **2½ years** not 7.

Public Order Offences

Consultation On 9 May 2018, the Sentencing Council published a consultation paper on Public Order offences which included affray, Public Order Act s 4, 4a and 5 and riot offences. The consultation paper also deals with public order offences which are religiously or racially aggravated. The consultation ends on 8 August 2018.

Sex Offences: Historical

Manual contact **Child then aged 12** **Defendant then aged 25+**

R v MD 2018 EWCA Crim 829 D was convicted of indecent assault. In the summer of 1959, when D was in his late 20s, he went on a family holiday to Wales. D shared a bed with his 12-year-old nephew, V. In the middle of the night D put his hand inside V's underpants and tried to masturbate him. V pulled the hand away and went to sleep in another room. D was now aged 87 with many medical issues and a good character. Held. This was an isolated incident which was out of character. The circumstances were exceptional, so **9 months'** suspended not 2½ years.

Sex Offences: Images

Extended sentences and possession of three Cat A images

R v Wheeler 2018 EWCA Crim 774 D pleaded guilty to three section 1 and one section 62(1) image offences. His police sex offender case manager called at his home and found a laptop which had not been present on a previous visit. D denied it was his, but it was seized and examined. Three Category A images, 18 Category B images, 232 Category C images and 24 prohibited images were found. They all involved children. One showed a 12-year-old being vaginally raped and two showed an adult male having sex with a female with a child's face superimposed on the image. One showed a 'very small child' who was bound and gagged. Another showed an adult male holding his hand over the mouth of a 'very young child' during a rape. In interview D made full admissions. He was now aged 70 and in 2009 he was sentenced to 12 years for five rapes and one gross indecency involving girls all aged under 16. The Judge found the following aggravating factors: a) the previous convictions, b) the ages of the children, c) the fact some of the girls on the images were raped, some bound and gagged, d) there were moving images, and e) there were searches on the Internet. The mitigation was the comparatively small number of Category A images and some remorse. Held. *R v Terrell* 2007 remains relevant and helpful. It is important to consider not only the significant risk but also the nature of the risk. The new offences took place within 12 months of D's release from prison. The risk here is the risk of committing offences involving images rather than the risk of contact offences. When reaching his decision about the extended sentence, the Judge did not have regard to the fact that he was making an SHPO. Had he done so he would have concluded the criteria for an extended sentence were not made out. Order quashed. We too start at 12 months, but move to **3 years** not 6, making 2 years not 4.

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