Banks on Sentence

Sentencing Alert No 188

29 May 2018

Confiscation

The available amount Tainted gifts

R v Box 2018 EWCA Crim 542 D pleaded to nine frauds and two counts of making a false instrument. She caused a loss of about £4,085,000 to many people by abusing her position as a solicitor and chancellor of a diocese. She received 7 years' imprisonment. In confiscation proceedings, D called no evidence. The Judge reduced the prosecution's tainted gifts figure by considering whether there was some legal or moral basis on which D could recover the gift. The prosecution appealed. Held. All cases are different but it is hard to conceive a case where it would be proper to reduce the tainted gifts figure without hearing evidence. para 15 Section 81(1) operates to require the court to take the greater of the value of the property given at the date of the gift or the value of property 'found', as defined in section 81(2). Once it is clear that the value of the property at the time of the gift is greater than any 'found' property it is not necessary to consider further what property may exist which in any way represents the original gift. The order could not be held to be disproportionate. The Judge was persuaded to embark on a process almost akin to tracing the stolen assets, and to find that if no assets could be found which represented the gift then that gift should not be included in the recoverable amount. This is not the way the tainted gifts scheme works. It operates as an incentive for him or her to recover the proceeds of her crime from persons to whom she has passed them by whatever means are available to her. What those persons have done with them, or whether they received them knowing of their criminal origin, are likely to be largely irrelevant factors. We increase the tainted gifts figures to the prosecution's original amounts.

Detention and Training Orders, and Youth Rehabilitation Orders with Intensive Supervision and Surveillance or with Fostering

Who are persistent offenders?

SC (Zimbabwe) v Sec of State 2018 EWCA Civ 929 Court of Appeal (Civil Div) SC pleaded to four offences of using a false instrument and three false representation offences. She was given 7 months. The offending was from 2007 to 2013. The Secretary of State ordered her deportation. She appealed the decision and the crucial issue was whether she was a 'persistent offender' in Immigration Rules Rule 398. Held. We entirely agree with the decision in *Cherge v SSHD* 2016 UKHT 187 (IAC) which said, "Put simply, a 'persistent offender' is someone who keeps on breaking the law. That does not mean that he [or she] has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. We do not accept that a 'persistent offender' is a permanent status that can never be lost once it is acquired. An individual can be regarded as a 'persistent offender' even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he [or she] fits that description will depend on the overall picture and pattern of his [or her] offending

over his [or her] entire offending history up to that date. Each case will turn on its own facts. Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he [or she] has committed a wide variety of different offences over a period of time." SC was a persistent offender. Appeal dismissed.

Note: This case is not binding on a criminal court but it is exactly the approach one expects the Court of Appeal to approve of. Ed.

Immigration offences

Failing to comply with a direction from the Secretary of State

R v Ozor 2018 EWCA Crim 705 D pleaded to failing to comply with a direction from the Secretary of State, contrary to Asylum and Immigration (Treatment of Claimants etc.) Act 2004 s 35(1). D was from Nigeria. He arrived from Germany on false papers. For that he received 12 months. D then claimed asylum, which was refused. No appeal was mounted. He was taken to an asylum centre where attempts were made to get him to fill in an application form which would have enabled his deportation to take place. Without it no commercial carrier would permit him to board an aircraft. He was charged and sentenced to 12 months. He served his sentence and on his return to the asylum centre D refused to sign another application form. He was charged again and received 18 months. The Judge had started at 2 years and had given a 25% plea discount, saying he had no defence. Held. The Judge was perfectly entitled to start at the maximum, but D was entitled to a full plea discount, making **16 months**.

Sex Offences: Historical

Digital and oral penetration Child then aged 6 Defendant then aged 25+

Att-Gen's Ref 2018 Re Griffith 2018 EWCA Crim 977 D was convicted of 10 counts of indecent assault and an indecency count all involving V. V was aged 6 when her mother, R, started a relationship with D. D had recently been released from prison. He assaulted R, which V saw, and sexually abused V. While R was at work, D rubbed his penis on V's thigh until he ejaculated. After taking heroin, D repeatedly entered V's room and digitally entered her vagina when V pretended to be asleep. D would masturbate himself and place his penis in V's mouth until ejaculation. V said she cried herself to sleep. Sometimes D took V downstairs and abused her in the same way. The regular digital penetration caused V vaginal pain. The abuse occurred about once a week over four years. It ended with D masturbating in front of V (the indecency count). D's relationship with V stopped in about 2009, when R discovered he was involved with another woman and had two children by her. In 2015 V, now aged 28, reported the abuse. D was now aged 53 and had 33 previous convictions on 17 occasions. They included: a) in 1987, robbery, possession of a firearm with intent and wounding (11 years), b) in 1998, 26 months for burglary, and c) other offences (26 months). His last conviction was in 2002. He had no previous conviction for sex offences. In 2016, D suffered a major heart attack. The Judge made the offence Category 2A. Held. **15 years** in total, not 12 years, Offender of Public Concern Order, based on three 5-year sentences for three of the offences consecutive, with a 3-year extended licence.

Suspended Sentence Order, Breach of

New offence relatively minor

R v Oduntan 2018 EWCA Crim 295 D pleaded to possession of a 'small amount of cannabis'. He was stopped in the street and admitted the offence immediately. D was aged 19 and had started university. He was in breach of two suspended sentences. One was for supplying heroin and cocaine (18 months), with 200 unpaid hours, which had been completed. The other was possession of a bladed article (6 months), with 100 unpaid hours, and 10 extra unpaid hours were added for the breach of the earlier order, 20 of which had been completed. The two orders were 13 months apart and the second order was six weeks before the cannabis offence. In between the suspended sentences he was given a community order for a false representation offence and no penalty for possession of cannabis. The Judge gave credit for the compliance with the terms of the order. When the last suspended sentence was ordered, D was told this was his last chance. The Judge imposed 1 month and activated the orders in full but made the sentences concurrent making 18 months in all. Held. There should have been a greater reduction, so 9 months, 4 months and 1 month concurrent, making 9 months in all.

Note: This still seems disproportionate for the offence and the university training should not have been stopped for so trivial an offence. The previous Judge saying, "last chance" was before anyone knew the breach was going to be for possession of cannabis. With D's age and good response to the orders a more constructive approach would have been to fine D for the cannabis and extend the operational periods of both the suspended sentences. This was the solution in *R v Bathgate* 2016 EWCA Crim 930, where the defendant was a drug addict who breached three suspended sentences imposed on the same day by committing a possession of cannabis offence. There was no fine, just extensions of the terms. Ed.

Threats to kill

Relationship offences

R v Furmage 2018 EWCA Crim 433 D pleaded[1] to two threats to kill. D had been in a relationship with V, aged 17, but it had ended. D tried to reignite the relationship with a series of WhatsApp and Snapchat messages but this plan failed and the messages changed in tone and contained threats to kill V and one of V's friends, T, also aged 17. D made threats such as, "If you make me pull my gun out, I will fucking murder you." There were a number of messages of this kind and they accompanied a photo of a firearm on a sofa. The sofa was identified by V as the sofa in D's house. A message from D to T, who was advising V against re-starting the relationship, read, "Don't get involved and I won't spread your chest." V and T contacted the police immediately. D was aged 20 at the time of the offences and had already had 10 convictions for a variety of offences including battery, assault PC and GBH. For the GBH (16 months' YOI), V was an ex-girlfriend of D's who had rejected his advances. D had punched her in the face causing a double fracture to her jaw. The Judge said that D presented a significant risk of serious harm to the public and said he regarded D as a "very dangerous young man and a very worrying defendant". The Judge failed to pass an extended sentence because he misunderstood the law. He identified the aggravating factors as: a) the previous convictions, b) offence was committed whilst D was on licence, c) the threat involving firearms, d) the vulnerability of V and T, they being only aged 17, and e) the fact that D committed these offences under the influence of alcohol and cocaine. Held. The sentence of 5 years' detention amounted to a sentence of 7½ years after trial. We start at 6 years, given D's very bad previous record and the aggravating factors. With full credit for plea, **4 years** not 5.

1. The judgment says this was after a conviction, but that cannot be right.

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