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Banks on Sentence

Sentencing Alert No 189

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Alert material

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Dangerous driving causing serious injury

Speeding

R v Miah 2018 EWCA Crim 364 D pleaded to causing serious injury by dangerous driving. In a 30 mph area, some pedestrians walked across a pedestrian crossing when their red light was lit, because there was no traffic. D's car approached at speed and the pedestrians speeded up. A 77-year-old woman, V, continued briskly but D's car hit her. It was estimated that D's speed at 52 metres away was 57 mph. At 40 metres away there was significant braking. At 25 metres away, the speed was 50 mph. V was in good health. She suffered a head injury, a dislocated shoulder, three vertebra fractures and leg fractures. V was discharged from hospital five weeks later on crutches. She remained in pain and felt unable to leave her house. At the scene, D gave assistance to the emergency services and spoke to the police. D was aged 24 and of good character. He had a 5-year-old clean driving licence. D demonstrated remorse and had references. The insurance, unknown to D, only covered drivers aged over 26. **2 years** not 3.

Factual basis

Basis of plea *Basic principles*

R v Marsh and Cato 2018 EWCA Crim 986 The defence served a basis of plea and the prosecution counsel said they took no issue with it and 'it wasn't contrary to their evidence'. The prosecution counsel then opened the case contrary to the basis of plea and the Judge departed from it too. The defence appealed. Held. We don't understand how it could be said the basis of plea wasn't contrary to the evidence. Had the prosecution not been prosecuting 18 defendants they would have sorted it out. The basis of plea was not signed by the advocates, as it should have been if agreed, so the Judge was free to ignore it. The prosecution made their case crystal clear in their opening. In our view, the defence had sufficient notice of the case that they had to meet. This ground of the appeal is dismissed.

Note: This seems contrary to the basic principles of sentencing. Defendants should not receive extra imprisonment because agreed documents are not signed. It is important that parties should be able to rely on what the prosecution say. A basis of plea should be checked in the same way whether there is one or 18 defendants. The excuse given that counsel didn't have time is no real excuse. Once the opening had been given, the Judge or the defence should have intervened. The fact that the defence knew when the opening was given what the case was is not the crucial

issue. What was important is that the defence were denied an opportunity to have a *Newton* hearing (as the time for having one had passed) because they trusted what the prosecution said. If a judge wants to depart from an agreed basis of plea, the defence should be told, see 57.56 in Banks on Sentence. If the prosecution are: a) told what the defence case is, b) the difference between the accounts is significant, c) the prosecution don't ask for a *Newton* hearing, and d) the judge does not raise the issue, the defendant is entitled to be sentenced on his or her version of the facts, see 57.57 in Banks on Sentence. Ed.

Hospital Orders

General judicial guidance/Step by step guide

R v Edwards and Others 2018 EWCA Crim 595 para 12 Mental Health Act s 45A could have been better drafted but the position is clear. Section 45A and the judgment in *R v Vowles* 2015, see above, do not provide a 'default' setting of imprisonment, as some have assumed. The sentencing judge should first consider if a Hospital Order may be appropriate under section 37(2)(a). If so, before making such an order, the court must consider all the powers at its disposal including a section 45A order. Consideration of a section 45A order must come before the making of a Hospital Order. This is because a disposal under section 45A includes a penal element and the court must have 'sound reasons' for departing from the usual course of imposing a sentence with a penal element. Sound reasons may include the nature of the offence and the limited nature of any penal element (if imposed) and the fact that the offending was very substantially (albeit not wholly) attributable to the offender's illness. However, the graver the offence and the greater the risk to the public on release of the offender, the greater the emphasis the judge must place upon the protection of the public and the release regime.

para 13 The reason for the court's emphasis on the penal element of any sentence in *R v Vowles* 2015 is to be found in the purposes of sentencing set out in Criminal Justice Act 2003 s 142. They are: a) the punishment of offenders, b) the reduction of crime (including its reduction by deterrence), c) the reform and rehabilitation of offenders, d) the protection of the public, and e) the making of reparation by offenders to persons affected by their offences.

para 14 It follows that, as important as the offender's personal circumstances may be, rehabilitation of offenders is but one of the purposes of sentencing. The punishment of offenders and the protection of the public are also at the heart of the sentencing process. In assessing the seriousness of the offence, Criminal Justice Act 2003 s 143(1) provides that the court must consider the offender's culpability in committing the offence and any harm caused, intended or foreseeable. Hence the structure adopted by the Sentencing Council in the production of its definitive guidelines and the two pillars of sentencing: culpability and harm. Assessing the culpability of an offender who has committed a serious offence but suffers from mental health problems may present a judge with a difficult task.

The steps are:

i) Consider whether a Hospital Order may be appropriate.

ii) If [it is], the judge should then consider all his sentencing options including a section 45A order.

iii) In deciding on the most suitable disposal the judge should remind him or herself of the importance of the penal element in a sentence.

iv) To decide whether a penal element to the sentence is necessary the judge should assess (as best he or she can) the offender's culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions.

v) A failure to take prescribed medication is not necessarily a culpable omission; it may be attributable in whole or in part to the offender's mental illness.

vi) If the judge decides to impose a Hospital Order under section 37/41, he or she must explain why a penal element is not appropriate.

vii) The regimes on release of an offender on licence from a section 45A order and for an offender subject to section 37/41 orders are different but the latter do not necessarily offer a greater protection to the public, as may have been assumed in *R v Ahmed* 2016 EWCA Crim 670 and/or or by the parties in the cases before us. Each case turns on its own facts.

viii) and ix) [Not listed. Restatement about the rules for grounds of appeal and fresh evidence.]

Sex Offences: Children, with

Asking for sexual activity Child aged 13

R v Cook 2018 EWCA Crim 530 D pleaded early to inciting a child to engage in sexual activity, three counts of possession of indecent photographs and possession of an extreme image. A police officer posed as a 13-year-old girl, F, online and D, who was also a police officer, responded. D steered the communications to sexual matters and eventually asked if he could take F's virginity. He asked for pictures of F and sent a picture of himself with an obvious bulge in his underwear. D was arrested. He was applying for a DBS check to act as a sports coach. D's phone was examined and 32 Category A images and 74 Category B images were found. They depicted girls aged 8-10. There were also two images of a female and a dog. D was aged 31 and of good character. The Judge compared the offence to Sexual Offences Act 2003 s 10 at Level 1A because of the desire for penetration and the grooming. Held. There was no actual contact. It was Category 3A (starting point 6 months) and we take into account the fact that he was seeking full sex and the indecent images. We move to 21 months, so with plea, **14 months** not 3 years.

Supply

Prisoners, Supplying to

R v Whittaker 2018 EWCA Crim 701 D pleaded to possession of crack cocaine with intent to supply and a class B and C supply count. He was found with 0.8 grams of crack, 0.9 grams of spice and five diazepam tablets when visiting a friend of his in prison. The Judge declined to place the offence in Category 4, saying he did not want to be constrained by the guidelines. Held. The Judge misconstrued the guideline. Section 125 does not impose a duty to impose a sentence within the category range. There is a considerable discretion given to the sentencing Judge. We start in Category 4 and, like the Judge, make the role significant. This gives a starting point of 3½ years. The supply into prison moves that up. The sentence needs a modest uplift as it was a global sentence. D's good character was a 'very important' mitigating factor. We arrive at 4 years not 6, so with plea and good character, **2 years 8 months** not 4.

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