Banks on Sentence

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Alert material

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Blackmail

Debt collecting

R v Atkinson and Others 2018 EWCA Crim 746 D was convicted of conspiracy to commit blackmail. D and the other three defendants acted as enforcers of a drug debt of £300,000 owed by J. J had been involved with drug supply and owed the money to his suppliers who were higher up the hierarchy. The defendants were hired to secure repayment of the debt. J had disappeared to evade detection by his creditors. Unable to locate him, the defendants agreed to intimidate various members of J's family and friends. They demanded to know where J was and threatened unpleasant consequences if they were not given information. J's brother's house was the main target and the defendants visited the property four times. They spoke to J's sister-in-law and told her to provide a contact number for J or to get him to come to the house within two hours. J's family were told that the people he owed money to were 'not nice'. A photograph of a couple, who were friends with J, was taken from a WhatsApp profile page and sent to the friends in question. The profile picture of the sender was a pair of black leather gloves. D was aged 43 on the date of sentence and had some old and insignificant previous convictions. The Judge identified the following aggravating factors: a) this was a criminal scheme intended to assist another criminal scheme, b) it had involved a number of people who were persistent, c) the scheme had been carried out over a number of weeks, and d) the defendants paid no heed to the vulnerability of their victims, in particular J's sister-in-law, who was heavily pregnant at the time of the visits to her house and had a 2-year-old daughter. The Judge considered that D had the leading role in the scheme of enforcing and had recruited the others, who had become his 'heavies'. Held. There was no violence inflicted. No weapons were used and the offending, though persistent, was of a relatively short duration. For D, **5 years** not 6. For the others, who had visited the house and who all had convictions (which for three of them were old and for the fourth of little relevance), 4 years not 5, 4 years not 5 and 3 years, 3 months not 5 years. The last defendant had a more limited role and better personal mitigation.

Confiscation

European Convention on Human Rights Article 1

R v Reid 2018 EWCA Crim 628 D was convicted of five money transfer offences. Held. para 20 Proceeds of Crime Act 2002 is framed in broad terms and its language must be given a fair and

purposive construction in order to give effect to its legislative policy. The Act must, so far as is possible to do so, be read and given effect in a way which is compatible with Article 1 of the first Protocol of the European Convention. This imports by the rule of fair balance the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in the deprivation of property as a form of penalty and the legitimate aim which is sought to be realised by the deprivation.

Note: The Judge must have meant to say there is a fair balance between rights of the defendant and the two principles listed and not a fair balance between the two principles. Ed.

Determining the benefit Goods restored to the loser

R v Reid 2018 EWCA Crim 628 D was convicted of five money transfer offences. The issue was what the benefit was in a remortgage fraud. Held. para 21 It will in general terms be disproportionate to make a confiscation order when a defendant has restored to the loser any proceeds of crime which he had ever had, or where restitution is assured or certain, see *R v Waya* 2012 (above) at para 28 and *R v Davenport* 2015 EWCA Crim 1731 at para 66. It would not achieve the statutory objective of removing the proceeds of crime but simply be an additional financial penalty.

Custody: Time on remand

Licence recall and delay/Waiting for co-defendant's trial to end

R v Walker 2018 EWCA Crim 1018 D was serving an IPP sentence. He was released and recalled to prison, so for a new offence the remand period from that date didn't count. He pleaded at an early stage. He could not be sentenced until the co-defendant's trial had taken place, which was 10 months after his plea. Held. It was clearly the intention of Parliament that periods on recall should not normally count. Had there not been a co-defendant's trial he would have been sentenced earlier. We want to reflect that period so we reduce the 30 month sentence by 20 months [so the sentence was the same as it would have been if he had been sentenced when he pleaded.]

Death by driving: Dangerous Driving

Defendant speeding

Att-Gen's Ref 2018 Re Morrison 2018 EWCA Crim 981 D was convicted of death by dangerous driving and causing serious injury by dangerous driving. In the morning, driving conditions were atrocious with high winds and heavy rain. Two Highways England traffic officers, V1 and V2, were clearing away debris at the site of a car accident on the M6 motorway. A temporary advisory 50 mph speed limit had been imposed as a warning to traffic to be careful when approaching the scene of the accident. D was driving on the motorway and for the 20 miles prior to the site of the accident had been averaging 81 mph. During this time D had been sending and receiving text messages on a regular basis. The last message was sent some 96 seconds before the collision. D lost control of his vehicle, probably due to a patch of standing water. He then travelled at speed across three lanes of the carriageway before he hit V1 and V2, who were standing on the hard shoulder. V1 died at the scene. V2 survived but with catastrophic injuries. He is paralysed from the chest downwards. There were victim personal statements from V1's partner and from V2. The devastation caused to their two families was immense. D was now aged 37 and had no previous convictions. In 2012, D received fixed penalty notices for speeding and using a mobile while driving (the car was then stationary). He was a family man with a young son and was in good employment with favourable references. During the trial, D expressed remorse. The Judge said that he was in no doubt that D's "persistent bad driving" created a substantial risk of danger so that the proper sentence was at the upper end of the range at Level 2 of the guideline. The Judge also noted that the injuries to V2 were a very serious aggravating feature and said that the overall sentence must reflect the effect on both victims. He said that were it not for matters of mitigation, the combination of aggravating factors would have taken the sentence into the Level 1 range. Held. Those aggravating factors significantly outweigh D's personal mitigation and the

remorse which the Judge accepted D had demonstrated. Concurrent sentences were required so the injuries to V2 increased the sentence. **9 years** not 7.

Extended sentences

Licence extension How long should it be?

R v Hale 2018 EWCA Crim 813 LCJ D pleaded to 24 child sex and child-image offences. D was then aged 16-19 years and the four known female victims were aged 14 or 15. Other victims could be seen on the sex images. There was consensual vaginal intercourse. One girl was plied with alcohol to assist him having sex with her. The images included oral and vaginal penetration of children aged 5-8. D was now aged 20 with no convictions. He was sentenced to a 14-year extended sentence (10 years' custody 4 years' extended licence). Held. para 41 The 4-year extension does not reflect D's age and the availability of treatment on his release, and is disproportionate. 2 years instead.

Factual basis

Evidence Co-defendant's trial

R v Marsh and Cato 2018 EWCA Crim 986 paras 6 and 44 Judges should not make findings of fact based on evidence called in a trial conducted without the defendant present or represented which run counter to the mitigation or a basis of plea without informing the defence of their intention to do so, so that the defence can make submissions.

Sexual Harm Prevention Order

How long should the order be?

R v Sokolowski and Another 2017 EWCA Crim 1903 D pleaded to making indecent photographs. Held. para 6(v) An SHPO should not be made for an indefinite period, unless the court is satisfied of the need to do so. It should not be made indefinite without careful consideration or as a mere default option. Where an indefinite order is made, unless it is obvious, reasons (even if brief) should be given as to why it is necessary, see *R v McLellan and Bingley* 2017 EWCA Crim 1464 at para 25. para 35 Here, the order should be no longer than the notification period, so **10 years**.

Variation of Sentence

Attendance of the defendant

R v Ghaus 2018 EWCA Crim 1209 After a muddled sentencing hearing, prosecution counsel pointed out an inconsistency. The Judge (a Recorder) then appeared to alter the sentence. Both counsel tried to work out what the sentence was and decided to go back into Court to seek help. In Court, without the defendant, the Judge said the sentence was 38 months. It wasn't clear whether this was a statement of what the sentence was or a variation. After that defence counsel were told that the Judge without the attendance of anyone had increased the sentence to 45 months. Held. The sentencing remarks were riddled with errors and contradictory findings. A section of them was deplorable. For the second hearing, the Court erred by increasing the sentence in the absence of the defendant, contrary to Rule 28.4(4)[1]. [There was another variation hearing on a later date in which the sentencing remarks were also defective.]

1. The same principle would apply to the increase which was made without a hearing.

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