

Banks on Sentence

Sentencing Alert No 191

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Alert material

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Breach offences

New guideline

The Sentencing Council has issued a new definitive guideline for breach offences. It comes into force on 1 October 2018. It deals with breaches of community orders, Criminal Behaviour Orders, Disqualification from acting as a Company Director, Disqualification from keeping an animal, Non-molestation Orders, notification requirement, post-sentence supervision, Restraining Orders, Sexual Harm Prevention Orders and Suspended Sentence Orders. The guideline also deals with failure to surrender to bail and 'other breach offences'.

Burglary, Aggravated

Dwellings

R v Surgenor 2018 EWCA Crim 357 D pleaded to aggravated burglary. H contacted D and told him that he could buy some nitrous oxide from V1. They both went to V1's cottage and H went inside. V1 was given the money but no nitrous oxide was supplied as V1 asserted that H owed him £200. This led to a row in which D punched V1. V1 contacted the police. At 6.40 pm the same evening, V2, who lived at the same address as V1, discovered five youths in the hallway of the property. Their faces were covered and at least three of them were holding pieces of wood. One of the group demanded money and V2 said it was nothing to do with him. V2 was struck across the legs with the wood and the group fled in a car driven by D. D was aged 19 and had no previous convictions. After he had pleaded guilty, D went to live with an aunt in order to distance himself from his associates. Many references spoke of an excellent work ethic that D developed whilst working with his uncle. D's aunt said that the burglary had been "a wake-up call" for him. D had also done much work in the community both before and after his guilty plea. The basis of plea was that D had waited outside and only entered the address because and H asked him in. D had had to wait over a year for the sentence. The Judge described the offence as very serious and placed D's culpability in the most serious category. He said that D had organised and instigated the offence and had gone to the premises mob-handed at night time. The Judge placed the offence in Category 1 and started at 9 years. On appeal, the defence said that the offence was not one of the most serious cases of this nature and that the Judge erred by stating that a considerable amount of violence had been used, that the offence had been committed at night

and that masks had been worn. Held. We start at 5 years, so with plea, **3 years 4 months' YOI**, not 6 years.

For more detail about how guidelines should be approached, see this case at the Guidelines section.

Dangerous Driving Causing Serious Injury

Overtaking

R v Owais 2018 EWCA Crim 692 D pleaded to causing serious injury by dangerous driving. He was driving at night on unfamiliar roads after having been diverted off a motorway. D was driving on a single carriageway road and overtook two cars and then, without pulling back in, attempted to overtake a lorry. He hit an oncoming car. D said he did not see the oncoming headlights of V's vehicle and there was no way for V to have avoided the collision. V was left dazed and trapped in his vehicle by both ankles. He had surgery on his ankles and remained in hospital for nine weeks. In his victim impact statement, V said that he was depressed and anxious whilst in hospital and on his release, he had to go to stay with an aunt in her bungalow as he couldn't manage the stairs in his own house with his injuries. At the time of sentencing, V still had to walk with a stick and had a limp. He could no longer drive a manual car and had to give up dancing. He suffered fractures to his lumbar region and wrist and suffered some internal bleeding. In interview, D said that he was overtaking the lorry so that he could see the next diversion sign. He said he believed he had a clear view of the road ahead. D was aged 38. He had no previous convictions and an unblemished driving record for 21 years. His references showed he was a family man who gave a lot to the community. The Judge noted that D had two young children and that a prison sentence would jeopardise the business that D had spent many years building up. The Judge gave a notional sentence after trial of 21/2 years and gave a 20% discount for the plea. Held. Because death was not caused by this offence, the notional sentence following a trial was too high. We start at 2 years and with the mitigation move to 20 months, so with plea discount, **16 months** not 2 years.

Guidelines

Consultation

On 19 June 2018, The Sentencing Council issued a consultation paper for offences where there is no specific guideline. With it is a draft guideline for those offences. The consultation ends on 11 September 2018.

Judicial approach

R v Surgenor 2018 EWCA Crim 357 D pleaded to aggravated burglary. The Judge placed the offence in Category 1 and started at 9 years. Held. On a strict mechanistic application of the relevant guideline this case is in Category 1. But the guideline also contains a non-exhaustive list of additional factual elements which enables a court to adjust upwards or downwards the starting point. A tariff is a tariff for the general and the sentencer is sentencing the particular individual for the particular offence, which requires a close assessment and analysis of the culpability and harm occasioned against the personal mitigation available. In this case there was considerable personal mitigation. Ultimately the sentencer, in making that analysis of culpability and harm against the personal mitigation, must ensure that a just and proportionate sentence is imposed. A strict mechanistic application of the guideline would result here in a sentence which would be contrary to the interests of justice. We start at 5 years, so with plea, 3 years 4 months' YOI, not 6 years.

Note: A summary of the principles might be to look at all the relevant factors and move from the starting point up and down to arrive at a just provisional sentence, before applying the plea discount. Ed.

Multiple incident counts

Guidance

R v H 2018 EWCA Crim 541 D pleaded to assault by penetration of a child under 13 and sexual assault on a person under 13. He accepted three assaults by penetration and five assaults. The prosecution summary set out a wider course of offending. The Judge did not address the factual dispute and sentenced for 'numerous incidents'. Held. The counts in the indictment did not specify that the counts were multi-incident. para 26 Absent an agreed basis going wider (for example, via TICs, or by way of an acceptance that the charges are samples of the extent of overall offending admitted in interview), D would be liable to be sentenced only for the two offences to which he pleaded. Charges must make clear the course of conduct that is being alleged. The number of incidents was limited to the number admitted in interview.

Rape

Victim aged 5 Defendant then aged 12-13

R v H 2018 EWCA Crim 541 D pleaded to assault by penetration of a child under 13 and sexual assault on a person under 13. V was D's half-brother¹ and was then aged 5. D was then aged 12-13. V told his mother that D had been tickling him. When asked where, V replied it was on his neck. V also said, "He tickles my willy and sucks my willy." The mother asked if D touched V's bum and V said, "He touches my bum and puts his thing that he goes to wee in my bum." The police attended later that day and D said that he had had anal intercourse with V on three occasions and performed oral sex on him on five occasions. D was placed in foster care and his behaviour was exemplary. He had been fully compliant with his social workers, the police and psychologists. D was now aged 14 with no convictions. Despite D's early admissions, he was not charged with the offences until almost a year later. The pre-sentence report noted that D was ashamed and embarrassed about the offending and had experienced a number of traumatic events which had contributed to his offending behaviour and had a significant impact on his emotional, mental and psychological development. The report proposed a Youth Rehabilitation Order. The psychological report suggested that the impact of a prosecution on D's welfare, development and future prospects could be more severe than for many other young people, due to the fact that D had a physical disability and that he had experienced developmental adversity as a child. The Judge placed the case in Category 2B. The Judge reduced the 9-year starting point by half to reflect D's age at the time of the offending, saying that only a custodial sentence could be justified. He gave full credit for the pleas. Held. The Judge referred to the *Sentencing Children and Young People Guideline 2017* but did not consider whether the custody threshold was crossed before considering the *Sexual Offences Guideline 2014*. Nor did he refer to the specific sexual offences guideline within the *Sentencing Children and Young People Guideline 2017*, which set out five steps which should be followed in sentencing. Further, the Judge did not follow the recommendation of the guideline, which was to apply a reduction of half to two-thirds for those aged between 15 and 17 but to apply a greater reduction for those aged under 15. The 50% deduction the Judge did give was insufficient. The aggravating factors were: a) the disparity in age, the extreme youth and vulnerability of V, the effect on V and the repetition of the offending. The mitigating factors were: D's disabilities, his unstable upbringing, his steps to address his offending, his good character, the immediate admissions, D's youth, the remorse and the 1-year delay. There was no doubt that these were very serious offences against a young victim and that they caused serious harm. However, D himself was young and immature and pleaded early and has demonstrated a positive and fully co-operative attitude. **Youth Rehabilitation Order** not 3 years.

1. The judgment also says D was V's step-brother.

book@banksr.com

www.banksr.com

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