Banks on Sentence

Sentencing Alert No 197

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Alert material

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Confiscation

Postponement of proceedings

R v Smith 2018 EWCA Crim 1351 On 14 January 2015, D pleaded to conspiracy to produce cannabis. On 5 August 2015, the court set a confiscation timetable. No criticism was made for this delay. On 8 September 2015, the prosecution served their section 16 statement. On 16 October 2015, the defence reply was received. On 1 December 2015, there was a mention when neither D nor his representative appeared. On 16 March 2016, the prosecution sent their response. On 14 January 2017, the time limit expired. On 16 February 2017, the prosecution asked for a hearing on 17 February. On that day, directions were given about skeleton arguments. On 29 September 2017, at a hearing, the prosecution did not submit there were exceptional circumstances. The Judge held the prosecution had effectively ignored the application and there was nothing exceptional. He refused to extend the time limit. The prosecution appealed. They said a failure to follow the procedure did not deprive the court of jurisdiction and the issue was whether it would be unfair to make an order. Held. From March 2016, there was 9½ months when the prosecution failed to progress the confiscation procedure. para 13 A procedural defect will not necessarily defeat an application for a confiscation order. However, the prosecution is not entitled to ignore the timetable in section 14 and then simply invite the court to consider whether its delay has caused unfairness. That would wholly defeat the legislative intent of section 14. Such an approach would not only encourage delay, which is inherently both undesirable and prejudicial, but would then add a new type of inquiry: what prejudice has been caused by delay. The present case demonstrates a casual and inefficient approach by the prosecution and the Judge was fully entitled to act as he did. We dismiss the application.

Dangerous Driving Simple

Police chases

R v Higgins 2017 EWCA Crim 1885 D pleaded to dangerous driving, no insurance and driving without a licence. There was no penalty for the last two offences. D was seen by police speeding in a residential street, shortly after midnight. He had a passenger in his car. Two police cars followed D. During the pursuit, police learnt that the car was not insured. D drove at 50 mph through a 30 mph zone and failed to stop when ordered to do so. Instead D sped up to 60 mph, drove on the wrong side of the road, went the wrong way round a roundabout and through a red

light. D lost control of the vehicle and drove into the central reservation area of a dual carriageway. The police rammed the car. D was aged 23 and had some previous convictions for non-driving matters. He had no licence but had 6 points for driving without a licence. The Judge found little mitigation other than the absence of relevant previous convictions. Held. Because of the plea, D's age and his lack of relevant convictions, **12 months**, not 15.

Defendant

Mentally disordered and socially challenged defendants

R v H 2018 EWCA Crim EWCA Crim 1535 D pleaded to assault by penetration and other child sex offences. She was convicted of conspiracy to rape. She digitally penetrated V, a 2-year-old, on two occasions. D was related to V and D helped 'to look after her'. She acted with C, who was given a 16-year extended sentence (12 years' custody 4 years' extended licence). Some of the offences were committed by D while C watched on Skype. D encouraged C to rape V. Both D and C had significant mental problems about which the doctors did not agree. Some thought D was unfit to plead. D had an IQ of 59 and her social ability was placed in the borderline range of functioning. [D's age was not revealed.] She had no previous convictions. In prison, D displayed bizarre sexualised behaviour. One doctor thought she was unsuitable for prison. The Judge gave D a 60% discount from the appropriate sentence for an adult without D's difficulties. Held. We do not think the Judge could or should have given a greater discount. Offender of Particular Concern Order (6 years' custody 1 year's extended licence) upheld.

Perverting the Course of Justice

Contempt of Court ***Judicial guidance***

R v Yaxley-Lennon 2018 EWCA Crim 1856 D was found guilty of contempt of court on two separate occasions. Held. For one, we uphold the suspended term. For the other, we quash the finding and send the case back to the Crown Court to be heard by a different judge. The approach to sentence in cases of this sort is as follows. We apply *R v Montgomery* 1995 16 Cr App R (S) 274. The particular facts of that case concerned the refusal of a witness to give evidence but the factors material to punishment can readily be adapted and applied to cases involving breach of reporting restrictions. They would usually include:

a) the effect or potential consequences of the breach upon the trial or trials and upon those participating in them,

b) the scale of the breach, with particular reference to the numbers of people to whom the report was made, over what period and the medium or media through which it was made,

c) the gravity of the offences being tried in the trial or trials to which the reporting restrictions applied;

d) the contemnor's level of culpability and his or her reasons for acting in breach of the reporting restrictions;

e) whether or not the contempt was aggravated by subsequent defiance or lack of remorse;

f) the scale of sentences in similar cases, albeit each case must turn on its own facts;

g) the antecedents, personal circumstances and characteristics of the contemnor;

h) whether or not a special deterrent was needed in the particular circumstances of the case.

Additionally, cases involving a breach of a section 4(2) postponement order will often give rise to the following potential consequences:

a) Trials may have to be abandoned irretrievably;

b) Juries may have to be discharged and retrials ordered with all the consequent delays and expense;

c) Witnesses, some of them perhaps vulnerable, may have to face the ordeal of giving evidence for a second time;

d) The trial Judge's decision upon how to manage the trial in response to the contempt may form the subject matter of an appeal which, whether or not successful, will generate additional anxiety, delay and expense.

More generally consider culpability and harm as identified in the *Overarching Principles: Seriousness Guideline 2004.*

Note: Judges may apply those parts that are relevant to other types of contempt of court and some perverting the course of justice cases. Ed.

Reporting restrictions

Judicial guidance

R v Sarker 2018 EWCA Crim 1341 LCJ The trial Judge postponed reporting of a doctor's trial for fraud. The BBC appealed the order. The Court of Appeal set out the relevant rules and authorities. Held. In section 4(2) cases, [the applicant must show] clearly (and ordinarily in writing): i) how contemporaneous, fair and accurate reports of the trial will cause a substantial risk of prejudice, and ii) why a postponement order would avoid the identified risk of prejudice. The default position is the general principle that all proceedings in courts and tribunals are conducted in public. This is the principle of open justice. Media reports of legal proceedings are an extension of the concept of open justice. Here, fair and accurate contemporaneous reporting of the trial would not have given rise to any risk of prejudice. Order quashed. [The rest of the careful and detailed guidance is not listed.]

Theft

In public places *Persistent offenders*

R v Rigby 2017 EWCA Crim 2001 D pleaded (full credit) to an offence of theft. D and an accomplice, R, visited a bowling alley in the afternoon with a pram full of tools. R acted as look-out whilst D cut metal padlocks and removed cashboxes from arcade machines. A total of £528.30 was stolen. The pair were stopped around two weeks later on a motorway. In the car were two bolt-cutters, a crowbar, croppers and a pushchair. D was aged 31 at the time of the appeal and was a persistent thief. He has convictions for 56 offences of theft and similar and he received an 18-month prison sentence in 2014. The Judge considered it appropriate to sentence D outside the guideline (1-year starting point) on the basis that he was a career criminal with multiple previous convictions for exactly the same type of offence. Held. The Judge was entitled to sentence outside the guideline, treating the previous convictions as a serious aggravating factor. However, the sentence must bear some proportionate relationship to the offence committed and the circumstances of the defendant. We start at 3 years not 4, so with the plea, **2 years** not 2 years 8 months.