Banks on Sentence

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Alert material

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Children and Young Offenders: General principles

Duty to remit to the Youth Court

R v Dillon 2017 EWCA Crim 2642 D was sent to the Crown Court with an adult, AD, on a £102,000 fraud charge. D pleaded guilty and his sentence was adjourned. AD was dealt with at a separate hearing. On D's resumed hearing he was now aged 18. D's role was assessed at the lowest end and he was of good character. The pre-sentence report recommended a Referral Order but it said that order would need a remittal to the Youth Court. The matter was put back and it was suggested the Judge could sit as a district judge. The Judge made a Youth Rehabilitation Order. Held. The pre-sentence report was correct about the Referral Order. The case should have been remitted immediately after the plea (see *R v Lewis* 1984 [above]) because there was no issue of disparity and there was no direct link with AD. The Youth Court is given exclusive competence to make a Referral Order and the Judge could not acquire that by sitting as a district judge. There would have been no extra delay as a pre-sentence report was required. At the Youth Court a Referral Order had to be made. Neither we nor the Crown Court can make a Referral Order. Given the delay, the errors and D's good performance with the Youth Rehabilitation Order, we substitute a conditional discharge.

Note: Whether the Judge purported to act as a district judge or just sat as a Crown Court judge is not clear. Ed.

Confiscation

Appeals Defendant claims agreed figures are wrong

R v Yaqob 2018 EWCA Crim 1728 D pleaded to supplying class A drugs as a courier. The case was adjourned. The prosecution said there was a £200,000 benefit. D had a new counsel who thought that that figure had been agreed. The figure was formally agreed. Held. It is only in very exceptional circumstances that this Court will go back on an agreed figure. However, here the prosecution say the figure was wrong, it should not have been agreed and the appropriate figure is what the defence say it is. There are exceptional circumstances, so we substitute £2,000, the correct figure.

Firearm offences

Minimum sentences Stun guns

R v Harlow 2018 EWCA Crim 157 D pleaded to possession of a prohibited weapon, supplying class A drugs and other offences. Police entered his home, after meeting resistance, and found drug paraphernalia, a stun gun, three pepper spray containers and over £2,350 in cash. Two knuckledusters were found in his car. D had an ABH, a bladed article and a battery as previous convictions. Held. The fact that the weapon was a stun gun and his wife's cancer (from which she was now 'well') was insufficient. The drug-dealing and the number of weapons meant the 5-year sentence and the total of 7½ years was not arbitrary or disproportionate.

R v McMahon 2018 EWCA Crim 1296 D pleaded to possession of two cannabis plants and possession of a stun gun, disguised as a torch. Held. The Judge was wrong not to find exceptional circumstances, which were: a) D had been given the stun gun and not bought it, b) it was a non-lethal weapon, c) D had never used it, d) D had no intention of using it, e) D had kept it for sentimental reasons, and f) D did not know possession of it was unlawful (which we doubt but it was in the basis of plea). Remembering deterrence, **30 months** not 5 years.

Forfeiture

There must be a proper investigation

R v Jones 2017 EWCA Crim 2192, 2018 1 Cr App R (S) 35 (p 248) D pleaded to possession of 4.54 grams of crack cocaine. The Judge found that because of what was found at D's home, D was a commercial dealer. The Judge forfeited £4,600 in cash. During mitigation, D's counsel gave an explanation for the money, saying a 'lot of the money' had come from cards/roulette. Held. It is not clear whether there was a formal application for forfeiture of the money. The procedure seemed to be extremely lax. The Judge should have taken a much firmer and more formal grip on the matter. There must be a proper investigation. The Judge never expressly said he rejected D's account for the cash. As the Judge had not applied his mind properly, we quash the order.

Rape

Defendant has a mental disorder/Defendant is vulnerable

Att-Gen's Ref 2018 Re Waddoups 2018 EWCA Crim 1711 D was convicted of four rapes. In 2014, D, then aged 20, and V, then aged 19 or 20, were students at a specialist residential college for those over 16 with learning difficulties. V's difficulties were more severe than D's. V had a severe language disorder with a language ability of about an 8-year-old. He did not have a proper understanding of sexual matters. D had autism spectrum disorder. One expert said he suffered from a personality disorder based on D's lack of empathy and disregard of social norms. D had an intermediary at trial. Twice D seized V round the neck, dragged him into V's room and removed V's trousers. D locked the door and raped V anally. D persisted despite V telling him to stop. The two other rapes took place in a shed in the college premises. D threated V that if he disclosed the offences D would assault V or rape his sister. V made a general complaint to staff but did not specify rape. They took no action. Later V told his mother about them and they were degrading and very painful. In the mother's impact statement for V, she said V had been profoundly affected and suffered nightmares. V was on medication and had bouts of uncontrolled crying every few days. Both V's parents had been seriously affected too. D was now aged 24 and of good character. The Judge made the offences Category 2B and gave D 7 years. Held. They were Category 2B offences with severe psychological harm to V. Because of the multiple Category 2 factors we move upwards. There was also: a) targeting of a vulnerable victim, b) ejaculation, c) the causing of V to leave the college, d) the threats made to stop reporting, and e) the harm to V's parents. The most important mitigation was D's mental health and his lack of maturity. The four rapes were a highly material factor. That factor elevates the case from Category 2B to 1B, so a 12-year starting point. The aggravating factors move that to 14 years. The mitigation moves it to **10 years**. The section 45A hybrid order was not challenged.

Note: The alternative approach is to have a pre-discount figure of 12 years (which is 50% more than the Category 2B starting point) and reduce it by 5 years for the mental problems (both

concerning the offence and the future), D's vulnerability, his age and lack of maturity and his good character. That would arrive at the same figure as the Judge and go some way to keep the mentally ill and very vulnerable out of custody. This is particularly so as judges can't decide how hybrid orders are implemented. Ed.

Sex Offences: Children, With

Victims Assessing victims who may encourage offence/Ostensive consent/Cultural considerations

R v Buica 2018 EWCA Crim 1870 D pleaded to rape of a child aged under 13. In 2016, D, aged 24, returned home to Romania and he met W, a 12-year-old girl. Shortly after, they married according to Romany custom with the blessing of both families. They both considered they were in love and in a genuine marriage. D brought W to England and W did not consider herself in any way a victim and considered the age gap was nobody else's business. An expert said the age of consent in Romania was 16 but no one would have sought to question the relationship as it was normal. D's mother lived with them and W became pregnant. The police became involved when they investigated child workers at a car wash. The Judge considered *Att-Gen's Ref 2016 Re Gribby* 2016 EWCA Crim 1847, 2017 1 Cr App R (S) 18 (p 129), which said, 'The inability of a child under the age of 13 to consent to penile penetration is inherent in the offence. If there is force or violence or threats or coercion, that renders what is in itself already a serious offence an even more serious offence, as the categorisation in the *Sexual Offences Guideline 2014* illustrates. But the converse is not true; in the sense that "consent" by the underage victim, even if it is of itself some relevance, does not cause the offence to be considered as in some way exceptional. Children under the age of 13 require protection for their own benefit. They need to be protected from themselves. Their emotional immaturity precludes the notion of any informed consent. That in fact may be particularly in those cases (not this case we stress) where the child under the age of 13 is seemingly an enthusiastic participant'. The Judge put the case in Category 3. She found the emotional immaturity of the appellant to be an important mitigating feature. A consultant clinical psychologist said, "D does what he is told, and particularly by his parents and elders", which the Judge accepted. She found no aggravating factors. Held. Following *Att-Gen's Ref 2016 Re Gribby* 2016 there may be exceptional circumstances in which consensual sexual intercourse with a young girl might warrant an exceptional outcome when the absence of force or coercion may in an exceptional case justify such a departure. The background was the cultural context [which was] consensual sexual intercourse within a lifelong, loving union, which had the blessing of her family and their community and which took place without any force or coercion. Sexual activity of [this] kind should not be forced [into] a guideline which simply did not contemplate a situation of this sort. A more nuanced approach is required to reflect the far lower level of culpability of D than even the lower category in the guideline contemplates. However, that relatively low level of culpability has to be balanced against the fact that the appellant and the girl left their community for this country. The appellant has to recognise that, whatever his community thought of marriage to a girl as young as this and of the physical love between them which their marriage entailed, the view in this country of such a marriage is different. While he is here, he has to comply with our law. We start at 5 years, not 8, so with plea, **3 years 4 months** not 6 years.

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