

Banks on Sentence

Sentencing Alert No 202

10 Oct 2018

Alert material

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ABH and GBH

Football offences

R v Lufudu and Zahed 2018 EWCA Crim 1963 L pleaded to GBH and Z pleaded to ABH. Both received 25% plea credit. At a city sports ground two local teams played an important match in a Sunday league where the result mattered.¹ L and Z played for Sharrow Vale United and V played for Burnsmeer FC. Burnsmeer FC won 2-1. There was a great deal of rivalry and the atmosphere was tense. After the match the situation deteriorated with players arguing fiercely. The referee and the team coaches calmed the situation down. V was outside the changing rooms and V and L exchanged words. L punched V's face hard. V fell to the floor and L's friends helped him to his feet. Z then struck V over the head with a sharp-pointed football pump spike. V felt dizzy. He had a wound to his head and a fractured jaw, and metal plates were inserted to repair it. V was off work for a month with some loss of income. He was not able to eat properly for six weeks and required dental treatment. V also missed some key football matches. L was now aged 23 and was described in glowing terms. Z was aged 26 and was described in positive terms. Both were of good character. The Judge said that when V was being helped to his feet he was particularly vulnerable. Held. There was a degree of provocation [not revealed] and a lack of premeditation. The aggravating factors were the assaults were at a sporting venue and the continuing effect on V. L's injury to V was serious. It was a Category 2 offence. We start at 20 months not 30, so with plea, **15 months**. Z used a weapon when V was particularly vulnerable. It was a Category 1 offence. The location and timing were aggravating factors. We move to 14 months, so with plea, **10 months**.

1. Some of the facts have been obtained from the Internet.

ID Documents

To obtain employment etc.

R v Aberemi 2018 EWCA Crim 1502 D pleaded to possession of an ID document (section 4(1) and (2)) and working when disqualified (4 months concurrent, no appeal). In 2013, D arrived in the UK on a student's visa to attend university. He didn't attend there. In 2014, his leave to remain was revoked. D remained. On 16 August 2017, D went to a recruitment agency and showed them a false Dutch ID card, which it was inferred he had obtained quite recently. He was checked out and the ID was considered suspicious. On 1 September 2017, D went to another agency and he was able to work in a brewery for about 10 weeks earning about £2,875. He was arrested and co-

operated with the police. He said he paid a friend £350 for the ID. D was aged 38 and of good character. Held. The use of the ID card was limited to obtaining work. If the Judge had been shown *R v Ovierakhi* 2009 EWCA Crim 452, 2 Cr App R (S) 91 (p 607), he would have not started at 2 years. We start at 12 months, so 9 months with the mitigation, making **6 months** with the plea discount, not 14 months.

Rape

Attempted rape Judicial guidance

Att-Gen's Ref 2018 Re Zaheer 2018 EWCA Crim 1708 D was convicted of attempted rape of V. Held. A sentence for an attempted offence will ordinarily be less than a sentence for the substantive offence itself. But the degree of reduction will depend on the circumstances, including the stage at which the attempt failed and the reason for non-completion. Here D only stopped because V had succeeded in frustrating his designs.

Note: One of the reasons why there needs to be a significant reduction for an attempt is that V did not suffer the actual penile entry. Ed.

Attempted rape Case

Att-Gen's Ref 2018 Re Zaheer 2018 EWCA Crim 1708 D was convicted of attempted rape. D owned a mobile repair shop. V, who was aged 16, took her mobile to be repaired. V returned three days later as the shop was closing. She spoke to D, who said she should come back between 7.30 and 8.00 pm. At 7.40 D called V and said the mobile was ready for collection. At 7.45, she returned and only D was there. The shop shutters were half down. For 10 minutes, D remained behind the counter. D said the phone would not be ready for another 10 minutes and tried to flirt with her. When V complained about the cold, D shut and locked the front door. D put his arms round V and said he could do a very good deal for her and he wanted a relationship with her. V said she was just there for her phone. D continued to flirt with V and V felt sorry for him and gave him a hug. He put his arm under V's outer clothing and took her to the rear of the shop saying he was going to show her some jewellery. D put his arm around her and she said, "Don't touch me". He led her to a storage area and put his hands all over her body. V was scared. She had had no previous sexual experience. D said he was going to the lavatory and V headed for the door. D met her and led her back to the storeroom. He undid his trousers, which fell to his knees while he was standing behind her with his body up against V's. D put his hands under her top and touched her bra. V went to the lavatory followed by D. She went to the front door and found it locked. The CCTV shows her resignation as she returns to the rear of the shop with D. She begs D not to do 'this'. D lifted up her skirt and pulled her knickers down. Next he put his fingers around V's vagina. He tried to insert his penis and she 'made it not go in'. Several attempts failed. D rubbed his penis against her vagina. She asked why he was doing this and he said he was sorry. D asked her not to tell anyone and gave her £20 and her phone. D then unlocked the door and V left. The CCTV showed V was visibly upset. There was about 19 minutes before the first physical contact and 14 minutes afterwards. For four months V did not want to go out. She left her A-level course. There were sleepless nights and flashbacks and she would cry uncontrollably. When D was arrested he claimed not to have been present. D was now aged 25 with no convictions. He had references. Held. The Judge was able to place the case in Category 3B. It was close to 2B and there was planning, a significant age gap and an element of false imprisonment. The Judge was able to start at 6 years. However, as D made several attempts and was stopped by V, the Judge's reduction was too great. Because it was 'pretty close to the full offence' and the aggravating factors, we move to **5½ years** not 3 years 9 months.

Two or more men acting together

Att-Gen's Ref 2018 Re Mamaliga and Mamaliga 2018 EWCA Crim 515 D and M, who were brothers, were convicted of rape. At 7.15 am, they chatted on a canal towpath with V, who was on her narrowboat in Acton. The conversation lasted about five minutes and D and M were friendly. A few hours later the two returned intent on [raping] V. V invited them onto her boat and V went swimming. She wore a top and some leggings. On her return to the boat, she went to her bedroom and D asked to use her lavatory. V pointed to the bushes. D then seized her. M joined

him and put her face down on the bed. They tied V's hands together, forced a towel in her mouth and her face was pushed into a pillow. V's tights and swimming costume were removed and her hands and legs were bound with shoelaces which the two had brought to the scene. One held V while the other put his fingers into her vagina. While one parted her buttocks the other tried to anally rape V. That failed only because V struggled. V was then raped vaginally. During the attack V was physically attacked and the scratches and bruises to her body, neck and face were the ABH. The attack lasted about 25 minutes. The two stole V's mother's jewellery, which was of great sentimental value to her. It was not recovered. D and M were identified by DNA from a French database. V thought she was going to die through asphyxiation during the attack. Her life was 'in ruins'. The attack had a psychological effect on her. D was aged 29 and M was aged 30. In 2012, both of them were jointly convicted of aggravated rape of a stranger in France. They each held the victim down while the other raped her. They had recently been released from prison after serving the 10-year sentence for that. Held. We agree with the Judge, the offence was beyond hideous, beyond horrific and beyond heinous. We place the cases in Category 1A not 2A, because of the extreme nature of one or more of the Category 2 factors. We are alert to the risk of double accounting of the aggravating factors which go to the categorisation but see grooming, the ties and the theft of the sentimental items as aggravating factors. We start at 15 years and with the aggravating factors move to 18 years, which makes a 24-year extended sentence (18 years' custody 6 years' extended licence) not a 20-year extended sentence (12 years' custody 8 years' extended licence).

Note: This case neatly shows a common misapplication of the guidelines. It is one of many cases where it should not make any difference which starting point is used, because the aggravating features for the lower starting point would be greater than for the higher starting point and both starting points should be increased to the same sentence, because the sentence is set by the facts of the case and the starting point is only an entry point. If the starting point in the guidelines is misapplied it can be the equivalent of a roulette wheel. These issues are particularly acute in murder cases, where the difference between a 15-year starting point and a 30-year starting point may be factually very small.

Where there are two or more aggravating factors which make the offence Category 1A, the Judge is not restricted from giving full effect to those factors. It is not double accounting to take into account the additional factors which categorise an offence. I consider the dominant sentencing factors here are: a) there were two men acting together with one holding V while the other raped and abused V, b) the sheer terror of the event, c) V's fear of being asphyxiated, d) V's arms and legs were tied up, e) the use of the pillow and the towel, f) the catastrophic effect the offence had on V, and g) the exceptionally relevant previous convictions. Having just been released from serving a sentence for a very similar offence must be worth 3 years extra. These factors (whether or not they go to categorisation) should raise the 12-year or 15-year starting point to 22-24 years. The Court mentioned the so-called grooming and the theft as aggravating factors, which are relevant, but the horrific nature of the rape needs to be properly reflected in the sentence. Ed.

Supply

Custodians/Warehousing

R v Salia 2018 EWCA Crim 1118 D pleaded to two counts of conspiracy to supply. One involved heroin and one involved cocaine. Following a police surveillance operation during which D was not observed, M was seen to leave D's address with a large carrier bag. He was stopped by the police and M said the bag contained 4 kilos of cocaine. Police entered D's flat and D showed them a wardrobe in a child's bedroom where 30 kilos of heroin and cocaine was found. The heroin was 770 grams at 56% purity. The cocaine was of an 'extremely high' purity. D said the drugs had arrived earlier that day. R was seen to park near M's vehicle. R was arrested. D's basis of plea was that he agreed to store the boxes and that they would be collected the next day. It also said that D had not had any involvement until the day of seizure. D was aged 32 and of good character. The Judge held D was a very significant member of the organisation. M received 18½ years and R received 15½ years. The prosecution now accepted that the role was 'significant'. Held. Because the issue of when the defendant became involved had not been resolved and his personal mitigation, we start at 14 years not 16, making with plea **11 years 9 months** not 13½ years.

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