

# Banks on Sentence

## Sentencing Alert No 203

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### Alert material

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### Extended sentences

#### *Licence extension*

#### *How long should it be?*

*R v Phillips* 2018 EWCA Crim 2008 D pleaded to three offences of attempting sexual activity with a child. In breach of his SOPO, D set up a Facebook account pretending to be 14-year-old boy. This led to messages with someone who said she was a 14-year-old girl. D wrote to her about taking her virginity with pictures of his penis. The girl was fictional. D was aged 28. In 2014, he had a conviction for inciting a female aged 16 to engage in penetrative sex (2 years). In 2017, D breached his SHPO (15 months). D was sentenced to a 14-year extended sentence (6 years' custody 8 years' extended licence). D appealed only the extended licence, which was the maximum. The defence said D was relatively young and had not been able to complete a sex offending course, the pre-sentence report appeared to say that D would address his desires and the Judge did not give the crushing effect of the sentence enough weight. Held. We see merit in those points. The licence is not tied to the seriousness of the offending. It should not be longer than necessary and should be just and proportionate. It should not crush the defendant. The Judge paid insufficient attention to the section about offender rehabilitation in the *Dangerous Offenders Guide*, [www.banksr.com](http://www.banksr.com) Other Matters Guidelines tab, at para 9.3.6. **4 years'** extended licence not 8.

### Cruelty to Children

#### *Causing serious injury to a child*

*R v AT* 2018 EWCA Crim 1890 D was convicted of causing serious harm to a child. D lived with her partner, M, and their very young baby, V. When the baby was nearly six weeks old, neighbours heard the sound of an argument coming from D's house. They heard one of D's older children saying, "Stop mummy, stop". M was also heard saying words to the effect of "Don't drop the baby". The neighbours and M called the police at around the same time and M told the operator that D had thrown their baby onto the floor. The police found M with V at the neighbour's house and took V to hospital where it was discovered he had suffered bilateral skull fractures which had caused bleeding in the brain. V had also suffered two separate blows to the head involving severe force and rib fractures as a result of having been gripped hard. The child made a good [physical] recovery and a doctor was optimistic about the prognosis, but the Judge said that the long-term effects had not yet been fully determined. D claimed she had dropped the baby by accident. D was aged 29 at the time of the offence and had, in 2015, been cautioned for an offence of battery

when she had slapped M. There were numerous positive references. A pre-sentence report described D's relationship with M as 'unhealthy' and noted that there had been police involvement on a number of occasions. D's older children were known to Social Services because of a background of domestic abuse. The report concluded that D posed a high risk of harm to children. In sentencing, the Judge concluded that D had directly caused serious harm to V. The offence was aggravated by the fact that the incident occurred in the presence of the father of the child and D's two young children. Held. The Judge made no suggestion that D had intended really serious harm. The *Assaults Guideline 2011* and the *Assaults on Children and Cruelty to a Child Guideline 2008* can be considered, but not the draft guideline the Judge used. The significant factors are: a) the victim was particularly vulnerable, b) there was an abuse of trust, c) there was especially serious physical injury, and d) there were others present at the time. By considering the appropriate guidelines and the overall circumstances of the offence, we are satisfied that 6 years' imprisonment was manifestly excessive and that the finding of dangerousness was wrong. 5 years not 10 years' extended sentence (6 years' custody 4 years' extended licence).

## **Manslaughter**

### ***Guideline***

The new *Manslaughter Guideline 2018* (dealing with unlawful act, gross negligence, loss of control and diminished responsibility manslaughter) comes into force on 1st November 2018.

## **Offences against the Person Act 1861 s 18**

### ***Racially aggravated offences***

*Att-Gen's Ref 2018 Re Wenham and Siksnys 2018 EWCA Crim 1926* W pleaded guilty to section 18 and S was convicted of the same offence. At about 1.30 am, V, a Romanian, left a public house. Shortly after, W and an unknown man, U, approached him outside his home. W, a well-built man, and U held V by his collar and rifled through his pockets. Some of the possessions fell to the ground and W kicked them into the road. S joined them. None of the three knew V. They had not met V earlier in the evening. V ran to his front door but W caught him. V was repeatedly kicked to the face and genitals whilst he lay defenceless on the ground. V was then dragged along the ground from his driveway to the middle of the road outside his home and all three repeated the attack, kicking and punching him until he was rendered unconscious. Once unconscious the attack continued despite the attempted intervention of an onlooker who shouted at them to stop. While V was being attacked he was called "a fucking immigrant" and "fucking Polak cunt" by W. The attack lasted at least 10 minutes. U fled. Police arrived and asked W about whose blood was on his hand. W replied, "That cunt's, not mine. The thieving robbing cunt. He took my dead mother's key ring." He also said, "He got a kicking for being a thieving Polak cunt." When interviewed, W said he assaulted V because he had taken his jacket at the pub with the key ring that had belonged to his mother. CCTV at the pub showed this claim to be false. S claimed to be a mere witness to the event. W appeared drunk. He later said he had 4-5 pints of lager. V had fractures to the jaw, cheek, eyes and nose which required reconstructive surgery. Three metal bars were inserted. W was aged 36 and had cautions for common assault, criminal damage and battery. S was aged 23 and had no convictions or cautions. W was S's supervisor at work. The Judge found S was involved in the kicking and a kick to the head, before he tried to pull W away from V. Held. It was a brutal and vicious attack. There was greater harm. For higher culpability there were the shod feet and the racial element, which was incidental to the drunk-fuelled rage. A lack of premeditation and a degree of provocation indicated lower culpability. The degree of provocation was because both thought V had stolen W's jacket. W and S had the 'highest' character references. We don't dissent from the Judge's finding that the case was at the upper end of Category 2. The timing and location aggravate the offence. For W, we give the greatest discount for the mitigation, and move to 7½ years. With a 20%, not 25%, discount for the plea we reach **6 years**, not 3 years 9 months. For S, **5½ years**, not 4.

## **Public Decency, Outraging**

## **Case**

*R v Smith* 2018 EWCA Crim 1510 D pleaded to two outraging public decency counts. In June 2018, at about 3 pm, D appeared at the window of a community centre and a class of adults, mostly in their 60s, saw him masturbating. D moved to another window and to the next until one of the class gestured for him to go away. He went to a tree about 20 feet away and carried on masturbating. At one point an 11-year-old girl walked past. D was still masturbating when the police arrived. He was arrested and released on bail. In October 2017, D masturbated in Peterborough Cathedral during a wedding service until someone spoke to him. He then moved and continued in the same way. D was told to leave and he carried on masturbating in a car park until he was arrested. D was aged 54. His previous convictions were: 2013, exposure (community order, varied to a suspended sentence); November 2014, a public order offence, exposure and outraging public decency (community order); November 2016, outraging public decency (18 weeks) and breaches of notification requirements in February 2014, March 2014, May 2014, December 2015, March 2016 (two offences) and December 2016 (custody). D had a history of schizophrenia and refused to engage with a mental health evaluation. The Judge noted there was persistence in the first offence and the second was in a cathedral and when D was on bail. Held. There was considerable nuisance and significant distress. His previous offending was very persistent. There was no indication D will move to contact offending. The first offence involved an 11-year-old. We start at 12 months, not 15, and with plea move to 10 months not 12. The second location was chosen for impact. There are usually children at weddings. We start at 15 months, not 24, and with plea move to 13 months, not 21. With totality we reduce that to 8 months and 10 months making 18 months not 33.

## **Rape**

### **Stepfathers Child aged 13-15**

*R v JCD* 2018 EWCA Crim 1286 D was convicted of rape, indecent assault, sexual assault of a child aged under 13, two counts of sexual activity with a child and two counts of sexual assault. All these counts involved V1 and all except the last one were multiple occasion counts. D was also convicted of sexual assault of a child under 13 and three counts of making indecent photographs of a child (including eight images at Level A). These counts involved V2. [How the two sets of counts matched the evidence is not clear.] V1 was D's stepdaughter and the offending was from when she was aged 6 to 15. V2 was a 9-year-old friend of V1. D was residing at the same caravan park where V2 was staying. Both V1 and V2 spent the night at D's caravan. While V2 was asleep, D pulled down her pyjamas and touched her vagina. V2 told her mother. V1 was spoken to and she revealed that D had abused her for 10 years. In the early hours, D would come into her room, often after he had been drinking, and move her hand on his penis. He would hold open her mouth and insert his penis. This happened from when she was 13-15. D also performed oral sex on V1. After this D would visit the bathroom and come back to her bedroom and say how sorry he was. In interview D denied the incidents. His phone revealed Internet searches about child sex and bestiality. There were indecent photographs on D's laptop. The impact on V1's mother and V2 had been profound. D was now aged 50 with convictions for assault and battery. There were no sex convictions. The pre-sentence report recorded D's denials and concluded D posed a high risk of harm to girls. The Judge found D had groomed V1 to ensure her silence, there was a flagrant breach of trust and D's denials were a grave cause of concern. Held. It would have been surprising if the Judge had not found D dangerous. Standing back and looking at the whole case, 21 years' extended sentence (**16 years'** custody and 5 years' extended licence) not 25 years' extended sentence (20 years' custody and 5 years' extended licence).

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