

Banks on Sentence

Sentencing Alert No 210

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Alert material

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Defendant

Health of defendant, Poor Mercy should season justice

R v F 2018 EWCA Crim 2693 D was convicted of three indecent assaults and one indecency with a child. Between 1960 and 1962, when D was aged 14-16 and V, his sister, was aged 11-13, he would enter V's bedroom and touch her all over. To keep her quiet, he would put a hand over her mouth or a flannel in her mouth. The offences related to: a) D touching V's breasts, b) digital penetration of V, c) D making V masturbate him, and d) D making V perform oral sex on him. For each, the prosecution said it happened at least twice. V said she had carried the effects of the abuse ever since and suffered from anxiety and depression. D was now aged 71 and of good character. His marriage broke down. One son killed himself and the other died. The case took a long time to come to trial. The first hearing was in September 2014 and the sentence was in February 2018. D had advanced diabetes and many complications from this including eye damage, poor vision, and peripheral neuropathy leading to: i) numbness, ii) loss of sensation and pain in his feet, and iii) peripheral vascular disease. The vascular disease had caused the amputation of a leg below the knee and the amputation of three right toes. D could not walk and was confined to a wheelchair. Most critically, he had end-stage kidney disease and relied on regular dialysis treatment three times a week. He also suffered from unrelated conditions, including a perforated bowel (for which he spent over four months in hospital) and upper gastrointestinal bleeding, for which he required blood transfusions. Those episodes occurred during the period that the case was proceeding to trial. D was constantly in and out of hospital. His chance of surviving five years was 15-20%. Held. We restrict ourselves to eight criminal events. The maximum for each offence was 2 years. Immediate imprisonment was correct in principle. We give considerable weight to his good character. Because of his illnesses and other circumstances, no purpose is served by keeping him in prison. It is punishment enough that he was imprisoned. With mercy, **1 year** not 2.

Note: It looks as if he had served 9 months, so he would have been released. Ed.

Offences against the Person Act 1861 s 18

Intent to resist arrest

Police officers on duty

R v Smith 2018 EWCA Crim 2393 D pleaded to section 18 with intent to resist arrest and damaging property (9 weeks concurrent and no appeal). Police were called anonymously about a domestic argument. Two police officers arrived. One, P, spoke to D's partner. One, V, spoke to D,

who ran into a small kitchen. V followed and thought D was reaching for a weapon. V sprayed D with his captor spray. D then charged at V with a serrated steak knife with an 11 cm blade. V raised his arm in self-defence but the knife struck V's thumb. V tried to gain control and D became violent. P tried to help but the confined space made it difficult. Assistance was requested, which duly arrived. During about 19 minutes D struggled with the officers, spat and used abusive language while handcuffed. D also seized and broke V's watch, which was worth £100. V required a stitch in hospital and had pain and swelling. D was aged 29 and had 24 convictions on 12 occasions. There were seven criminal damages, four resisting a constable and six battery or common assaults. D had not served a custodial sentence. The Judge applied the section 18 guideline and made the case Category 2 (starting point 6 years). He recognised the injury was not serious in the context of section 18 but that it could have been more serious. Further, a weapon had been used and D went into the kitchen to look for it. Factoring the previous convictions, particularly those showing hostility to the police, with some remorse he remained at 6 years so with plea he passed **4½ years**. The defence suggested the Judge should have applied the section 20 guideline. Held. That was not appropriate. Whilst the section 18 guideline was not strictly applicable it did cater for a large range of situations and entitled the judge to take into account the seriousness of the injury and the degree of culpability. The Judge's approach in assessing culpability and harm within the section 18 guideline was not open to criticism. This was a remarkably serious offence. Taking into account the knife and the sustained and violent resistance, the sentence was fully justified.

Road Rage

ABH

R v Higgins 2018 EWCA Crim 2786 D pleaded to ABH. D was driving his BMW behind a bus full of schoolchildren driven by V, aged 64. The bus approached some roadworks in a 40 mph zone where two lanes were filtering into one, and the bus driver changed lanes. This caused D to slow down and then D undertook the bus. Traffic came to standstill a little further on and D got out of his car and shouted expletives at V. D then got onto the bus and started hitting V. V described the blows as "rapid, multiple and forceful". The attack lasted 20 to 30 seconds and then D got back into his car and drove off. V said the pain of the attack was such that he thought his ear was being pulled off. He had tried to shield himself with his arms but D had pulled them aside and continued the attack. Children on the bus were crying and hyperventilating during the attack. V drove the last 15 minutes of the journey to get the children to school and was visibly shaking when he arrived. V sustained many cuts and bruises to his face and forearms. He had a CT scan to check for internal bleeding. Fortunately, there was none. When D arrived at work he told his employer what he had done. He contacted the police, made full admissions and expressed considerable remorse. D said that he had an anger problem. V's immediate physical injuries put him off work for three weeks. When he eventually returned to work, he had lost confidence after having driven for 40 years. He switched to working part-time and suffered consequential financial losses. D had one previous conviction but there was an undercurrent of uncontrolled and occasionally violent behaviour which had resulted in three cautions and a reprimand in the period from 2008 to 2016. D, his family and his doctors confirmed that D had suffered significant mental health problems since about 2016, which led to a diagnosis of depression and alteration of both mood and behaviour. Some time before the assault, the prescribed dosage of D's medication had become hard to obtain and so D had started to skip doses in an attempt to eke out the medication he had left. There was a substantial body of character evidence which attested that this incident was out of character for a man who is usually hard-working and decent. The pre-sentence report suggested that an immediate custodial sentence would have a particularly adverse effect on D. The Judge said that this was a Category 2 case but that there were considerable aggravating features that justified "a movement outside the category range and a higher starting point". He listed the aggravating features as: a) previous violent conduct, b) the attack happened in a public place, c) the attack happened in front of children who were affected by it, and d) the attack was against someone who was just going about his business in public service. The Judge's mitigation was the efforts by D to address his offending behaviour, his guilty plea and his genuine remorse. It was accepted that D was suffering from mental health issues but the Judge thought that they were not the kind of issue which justified a significant reduction in D's culpability. He started at 2

years and said that he would not suspend the sentence because it would not mark the seriousness of the offence. Held. This road rage was significant and shameful. It was a Category 2 case and the aggravating features alone would have pushed this up to the lower end of a Category 1 offence. But once personal mitigation is taken into account, we move to 12 months' imprisonment, so with plea **8 months**, not 16.

Robbery

Shop

One offence

Att-Gen's Ref 2018 Re Brennan 2018 EWCA Crim 2188 D pleaded to a single offence of robbery. At 7.45 pm, D entered a convenience store and zipped up his hood so that only his eyes were visible. V, aged 65, was working behind the counter and, despite D's efforts at disguise, she thought she recognised D as someone who was banned from entering the store. D put a meat cleaver onto the counter, rested his hand on it and said repeatedly "Give me the money." V recognised D's Irish accent, which confirmed to her who he was. V refused to give any money to D and told him to get out. D took three bottles of wine and left the shop. D was later arrested. The three bottles of wine were recovered (although two were empty) and the meat cleaver was found in an alleyway. The incident had a severe psychological impact on V. She lost her confidence, she wouldn't leave the house unless she had to and was afraid to talk to people she didn't know. After the robbery, V failed to ask a customer for identification to purchase alcohol, which led in turn to disciplinary re-training for her. D was now aged 32 and had a number of previous convictions for offences including possession of a flick knife, threatening behaviour and assault. For some there were short custodial sentences. D was on bail for possession of a lock knife. A pre-sentence report said that D had no memory of the robbery as he had been under the influence of heroin, crack cocaine and alcohol at the time. D claimed he was on a downward spiral due to a recent suicide attempt by his mother. The Judge made it Category A for culpability and Category 2 for harm. The aggravating factors were the attempt to conceal his identity and the disposal of the meat cleaver. There was mitigation in his drug and alcohol addiction and his remorse. D had served the equivalent of 7 months on remand. The Judge started at 5 years. Held. The Judge rightly recognised that this was a Category 2A offence. This was a man who had relevant previous convictions and was on bail for possession of a bladed article. We start at 6 years, so with discount for plea and being mindful that the Judge had indicated a term of 31/2 years if the original sentence was breached by D, **31/2 years**, not a 3-year community order.

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