

Banks on Sentence

Sentencing Alert No 211

12 Feb 2019

Burglary, Aggravated

Dwellings

R v Jones 2018 EWCA Crim 2912 D pleaded to aggravated burglary. At about 8 am, he entered a student hostel and walked through a common room to the laundry room. D tried to force open the cash box of a vending machine which provided cards for the laundry machines. He jumped on top of vending machine to try to loosen it from the wall. D searched around and found a shovel and used it to try to force the machine off the wall. A security guard, S, who had watched D on CCTV, entered the room and challenged D. S told him to drop the shovel, sit down or he would be knocked out, and that S was calling the police. S began to use his phone and D held a Stanley knife at S. S backed out of the room and then held the door shut. S was still calling the police when D hit the door with the shovel and cracked the glass. D hit the door again and the glass shattered. S ran out of the building followed by D. S feared D would do anything to get out of the room. D was aged 30 with a long record consistent with habitual drug and alcohol abuse. He had no previous offences for violence or using a weapon. At the time, D was homeless. The Judge considered the behaviour was not very competent but was extremely determined. Held. It was likely D had used a mislaid key to enter the building. It was difficult to place this offence in the guideline. We put the offence in Category 2 not 1, so 4½ years not 6.

Concurrent and consecutive sentences

Minimum sentences

R v Asif 2018 EWCA Crim 2297 D pleaded to class A drug offences (10½ years), three firearm offences, which carried minimum terms, and possession of ammunition. The firearms were found in D's car and the single round of ammunition was found in D's home. The Judge passed 7 years, 7 years concurrent and 3 years concurrent on the firearm counts. He passed 3 years 4 months consecutive on the ammunition count. He made the three groups of sentences (drugs, firearms and ammunition) consecutive making 20 years 10 months in all. The defence relied on *Att-Gen's Ref No 57 of 2009* 2009 EWCA Crim 2555, 2010 2 Cr App R (S) 30 (p 190). Held. That case has not been followed where the firearms had been acquired at different times or stored at different locations, see *R v Gibbin* 2014 EWCA Crim 115, 2 Cr App R (S) 28 (p 229) and *R v Ullah* 2017 EWCA Crim 584. Here we must impose concurrent sentences for the firearms, making 6 years 8 months for the firearms and ammunition, and 10 ½ years for the drugs, consecutive, making 17 years two months in all. To do otherwise would be an improper attempt to circumvent the maximum stipulated by Parliament.

Note: Suppose a mother stored one firearm, to which a minimum sentence applied, and although she had very powerful mitigation, she was just unable to show exceptional circumstances. If she pleaded very early, she would receive 5 years. Suppose a lifelong criminal, with previous

convictions for storing large numbers of prohibited weapons, pleaded to possession of 100 prohibited weapons. Those weapons would inevitably be passed on to criminals. Suppose he too pleaded early and this rule was applied. He would be likely to receive 10 years (the maximum) less the plea discount, which makes 6 years 8 months on each concurrent. The 1 year 8 months' difference between the two sentences is truly absurd. Frequently two important legal principles clash. Here the suggested clash is between the normal rule about consecutive sentences and the need for adequate sentences for those who supply very dangerous weapons to criminals so they can kill, maim and terrorise others with them. There can be no doubt about which principle Parliament would consider the more important to apply. The Judge's task is to apply his or her oath of office, which is 'do justice'. In fact, I suggest the line of cases at para 260.60 in Volume 2 is wrongly decided, because both the *TICs and Totality Guideline 2012* page 7 and non-firearm past cases show that where the overall criminality is not met by concurrent sentences, consecutive sentences are appropriate, see 18.8 in the book. The guideline only says sentences for matters arising out of the same incident should normally receive concurrent sentences. The Court said that para 5 was qualified by para 7, which must be an example of the Court choosing the wrong alternative and losing sight of justice. In cases like this, the prosecution should draft respondents' notices and be represented. Ed.

Defendant

Health of defendant , Poor

Circumstances change

R v Gumble 2018 EWCA Crim 1800 D pleaded to possession of a reactivated American back-up pistol. On 23 March 2018, the Judge found exceptional circumstances and passed 3 years, which was not considered excessive. D had complex, serious medical problems. On 19 April 2018, his wife was diagnosed with a serious illness and was expected to die soon. On 21 May 2018, D appealed because of this. On 30 May 2018, the wife died. Held on 13 June 2018. We apply *R v Stephenson and Minhas* 2018. The Judge properly took into account D's very poor state of health. The death of D's wife may justify a temporary release but is not a ground to say the sentence was manifestly excessive. There is no evidence that D's health had deteriorated. We are sympathetic but we dismiss the appeal.

Note: The only real ground of appeal was mercy, but it does not appear to have been relied on. Ed.

Firearms

Firearms Act 1968 s 5

R v Boyle 2018 EWCA Crim 2035, 2019 1 Cr App R (S) 9 (p 65) D pleaded to possession of a prohibited firearm and ammunition. During a police firearms amnesty, D tried to hand a firearm over at a police station. He was told the front desk was closed. D left and later phoned the police and said he needed help and wanted to hand a gun in. Police arrived and arrested him. A .22 revolver was found. D was now aged 27 and had 'grim' convictions for violence. He also had mental health problems. The Judge found exceptional circumstances. Held. D did not know about the amnesty, nor had he handed the firearm in at a police station. As there was no application to stay the proceedings, the Judge was able to ignore the issue of amnesty. D said he had acquired the firearm illegally. A starting point of 5-6 years was appropriate, so **4 years** was not manifestly excessive.

Note: There are many issues with the case. The main ones are: a) the courts should encourage people to surrender firearms, not punish them, b) why was there no application to stay, and c) there is nothing in the quote from a police press release that says that to qualify for the amnesty, the individual has to know about it or hand the item in at a police station. Ed.

Murder

Sadistic murders

Judicial guidance

R v Kolman 2018 EWCA Crim 2624 D was convicted of murder. He, over several hours, beat V to death. V was homeless, disabled and an alcoholic. There were a number of heavy blows from punching, kicking and stamping. There were repeated kicks to the genitals. Both counsel said there was a 15-year starting point. The Judge noted what was said in *R v Bonellie and Others* 2008, para 16: 'Sadly it is often the case that those who attack others derive pleasure from so doing. Many a person kicking someone else on the ground derives such pleasure. A person, too, may gain pleasure from baiting a vulnerable individual, or showing off to his friends. That is not enough to bring the case within [the sadistic] subsection. The [sadistic] subsection contemplates a significantly greater degree of awareness of pleasure in the infliction of pain, suffering or humiliation, perverted though the pleasure we have described may be.' The Judge said the motive was a desire to control and bully V with pleasure in beating V to death. He said the conduct was sadistic. Held. Most cases involving repeated beatings will not, for the reasons in *R v Bonellie and Others* 2008, justify a starting point beyond that contained within paragraph 6. It will be a very unusual case where it is appropriate to use the length of a beating by a drunken man upon another drunk to justify a finding of sadistic conduct. It would be wrong to interfere here with Judge's assessment. However, we see no reason to increase the term to 35 years, so **30 years**.

Variation of sentence

Crown Court On the facts suitable for variation

R v Ochesanu 2018 EWCA Crim 2772 D and B pleaded to section 20. B was sentenced on the basis that he had: a) picked up the weapon in a street attack, b) used it on V, the victim, c) continued to kick and punch V, and d) kicked V in the head. D was sentenced on the basis he had not [held] the weapon, that he had not kicked V in the head and he was not the prime mover. B received 2 years 3 months. D received 2 years suspended. After the hearing, it was discovered on the CCTV that the person wielding the weapon and kicking V in the head could not have been B. The case was relisted 12 days after the sentences. The Judge found that D had launched himself at V, struck him over the head and body and had kicked and punched V on the ground. D's sentence was varied to 2 years' immediate imprisonment. B's sentence was varied to 2 years suspended. Held. That was lawful, rational and fair.

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