Banks on Sentence

# Sentencing Alert No 213

# 27 Feb 2019

## ABH

### *Relationship offences*

*R v Malloy* 2018 EWCA Crim 2647 D pleaded to two ABHs and common assault. V was D's partner and had been for around four years. The police received a call from V's son, who said that he had received a call from V. V was screaming and then the call was terminated. The police traced V and found her on the sofa in her apartment in a very distressed state. There was fresh blood on the duvet and she had facial injuries. She would not say how she got them. An officer discovered fresh blood in the bathroom and around the toilet and V was covered in bruises. It transpired that D and V had been out for some drinks a few days earlier. V had returned to the apartment first and fallen asleep. She was violently awoken by D who dragged her out of bed by her hair, causing some of it to be torn out of her scalp. D then went on to beat V for an hour, during which time he stamped on her back and threw her against the toilet. The attack seems to have stopped at one point because D thought he might have broken V's back. A second assault happened two days later when D again dragged V around by the hair and punched and stamped on her, giving her a second black eye and multiple bruises. On the day that V had called her son, she had been taking a bath 'all day' to relieve the pain of the previous attacks. D had knocked the phone out of V's hand and thrown her along the corridor into the bathroom. D threw V into the bath, which was full of cold water, and pushed her back in every time she tried to get out. She may have become unconscious. That constituted the common assault charge. D was now aged 49, of good character with references. The Judge considered that these were Category 1 offences. He gave full plea credit for each ABH offence. Held. By making the sentences consecutive, the Judge effectively made the overall starting point 3 years before the plea discount. Despite the seriousness of the assaults, which is not to be underestimated, we start with 2 years for both incidents together not 18 months for each. Therefore, with plea, **16 months** not 2 years.

Note: Bearing in mind the terror inflicted, the length of time these offences lasted and the fact that the victim had no escape, three years for the two incidents seems entirely appropriate. From that figure there could have been a small discount for good character and totality and then plea discount. Ed.

## Concurrent and consecutive sentences

### *Driving offences*

*R v Naeem* 2018 EWCA Crim 2938 D pleaded to dangerous driving, disqualified driving, drug driving (four times over the cocaine limit), failing to stop and no insurance. He was sentenced on 26 February 2018. In September 2017, he drove a stolen car and at some stage saw the police. In a police chase, he drove at speeds up to 118 mph and weaved in and out of cars. D only stopped when he crashed into a wall. He fled and was arrested. D was now aged 34 with 51 convictions on 23 occasions. Many of the convictions were for motoring offences including

disqualified driving and two drink/drive offences. They included in May 2017, drug driving (fine and 12 months' disqualification); in November 2017, TDA, driving whilst disqualified and no insurance (18 weeks suspended and 28 months' disqualification); and in January 2018, driving whilst disqualified and no insurance (18 weeks plus the 18 weeks suspended sentence activated in full making 36 weeks). The magistrates took a plea to the no insurance and imposed a fine but treated the fine paid because of one day served. The rest of the offences were committed for sentence. The Judge found the driving dangerous in the extreme and considered it lucky that no one was killed. Further the offences were committed shortly after D had been disqualified. The Judge started with the maximum for the three main offences and gave a full plea discount. That made 16 months, 4 months and 4 months. He gave no penalty for the no insurance [although it had not been committed for sentence]. That made 24 months. He made that consecutive to the sentence D was serving. At the invitation of prosecution counsel, he made the disqualification 2 years and 3 years consecutive. Held. The 8 months in total for the two summary only offences was unlawful as the maximum is 6 months. Following the *TICs and Totality Guideline 2012: Crown Court* page 6, as the offences arose out of the same incident all the sentences should be concurrent. The consecutive disqualification was unlawful. The disqualification was not extended. No one at the Crown Court mentioned that two of the offences carried minimum disqualification terms (3 years and 1 year). No one mentioned that an order for disqualification until a test was passed was obligatory for dangerous driving. We impose that order. We are unable to extend the disqualification beyond the 5 years as we cannot rearrange the disqualification without treating D more severely. So, 5 years' disqualification for the drug driving and the dangerous driving and 2 years' disqualification for the driving whilst disqualified, all concurrent. There should have been an endorsement on the no insurance count, so we order that.

Note: I doubt this is an authority for any legal principle except that the application of the law in the courts is in disarray. It is listed to show the pitfalls judges and others can fall into. If the transcript is accurate (which I doubt), there are the following errors. I think TDA or theft of the car should have been charged. The vehicle had false plates and D fled when he saw the police. **Magistrates Court** I can't see why the fine for the serious offence of driving with no insurance was remitted. D could have paid it from savings or applied for time to pay on his release. In any event the Court was obliged to make a collection order. I think the better course would have been to commit the offence for sentence. **Crown Court** 1) The unlawful 4 months and 4 months consecutive which exceeded the maximum sentence. 2) The passing of an order for the no insurance when the matter had not been committed. 3) The failure to pass a sentence for the failing to stop. 4) The failure to address the issue of the two minimum sentences. 5) The failure to extend the disqualification. 6) The failure to pass a disqualification until test is passed order. I think the Court was right to pass consecutive sentences. **Court of Appeal** 1) It is arguable whether the three driving offences arose out of the same incident because two of them started when D began to drive. The dangerous driving is only known to have occurred when D saw the police. But even if it arose out of the same incident, I do not see any reason why the gravity of the three serious offences cannot be marked by consecutive sentences, like armed robbery where the gravity of using a firearm is marked by a consecutive sentence. The guideline only says sentences for matters arising out of the same incident should normally receive concurrent sentences. There is no rule that says you can commit an offence which enables you to commit two more different offences without any extra penalty. The principles are set out at para 18.4 in the current edition (which deals with the exceptions), para 18.8 in the current edition (which deals with cases where the maximum is inadequate) and *R v Hardy* 2005, *R v Kirkland* 2004 and *R v Shafi* 2007. The other cases in this paragraph I consider *per incuriam* and should not be followed. 2) The Court misunderstood its powers under section 11(3). They considered that the test was whether the new disqualification orders treated D 'more severely' for the disqualification. They should have considered whether the sentences taken as a whole treated the defendant more severely. 3) They altered the penalty for the no insurance, which had not been committed for sentence. Ed.

## Confiscation

***With compensation***

*R v Sachan* 2018 EWCA Crim 2592 D pleaded to fraud. In his basis of plea, D promised to pay £51,450 in confiscation. He was sentenced to 3 years 3 months and ordered to pay the promised amount in compensation. It was known that confiscation proceedings would follow. Over 18 months later, a confiscation order was made for nearly £19,000. The prosecution asked for it to be paid in compensation and it was. D appealed the second confiscation order, which was refused. He than applied to appeal the first compensation order. The defence said the first order was unlawful, because of section 72A(9), so it should be quashed. Held. para 16 Parliament did not intend that non-compliance with section 15(2) would render a compensation order invalid because a [premature] compensation order was made. There was no reason to set the order aside or vary it. The Crown has undertaken not to enforce more than the £51,450.

## Rape

### *Relationship rape*

*R v Whitehall* 2019 EWCA Crim 62 D was convicted of rape, threats to kill and coercive behaviour (the last two offences 2 years concurrent). In December 2017, D was in a relationship with V. He was immediately possessive and controlling. He spat at V and used his physical presence to 'suppress' her will. V worked a late shift, which angered D, and by 10 pm D had had a great deal to drink. V came home and was utterly terrified of D. There was an argument and V said she did not want to be with D anymore. His response was to tell her he was going to kill her and it would be her last night. She said she was going to the toilet but she left the house and went to a pub. D followed V and caught up with her. D produced a knife. He repeated that he was going to kill her. V felt entirely broken. D verbally abused two other women near the pub and V returned to her home. D got into V's bed. V did not want him there. In the morning, V went to the lavatory. D grabbed her from the lavatory before she had a chance to wipe herself. D took her into the corridor, held her against the wall and injured her arm. She returned to the bathroom to wipe herself but D dragged her out, pushed her into the bedroom and forced her onto the bed. D turned her onto her back and said, "I am not doing this without you looking". He forced her legs open and raped her vaginally. V injured part of her knee as she tried to fight him off and told him, "No" and "Stop". When she began to cry, he got off her. He did not ejaculate or use a condom. D forced her into the bath and made her wash her vagina to remove any DNA. He then left the house. V went to her mother's house and was too traumatised to speak. She was able to speak to a cousin and the police were called. D tried to stop V reporting the incident. D was now aged 25 with 13 previous convictions on eight occasions committed in 2012 and 2013. They included battery, damaging property, threatening words and possession of an offensive weapon. One conviction related to throwing his then partner to the floor in a KFC restaurant, after which her head hit the floor and he kneed her in the stomach. A member of staff who tried to intervene was then pushed over and had his head slammed on the floor. The Judge found the offence was prolonged and sustained with degradation and humiliation. The Judge treated the previous convictions, the fact V had to leave her home and D's attempt to stop V reporting the offence as aggravating factors and passed a global sentence. Held. The Judge was able to find the offence was a Category 2A offence (starting point 10 years). There was an element of double counting, so wrong to move from 10, to 9 and then to 12. With the previous convictions we move to **10 years** but not 12.

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