

Banks on Sentence

Sentencing Alert No 216

19 March 2019

Attorney-General's References

The discretion whether to increase the sentence

Att-Gen's Ref 2018 Re Costa 2018 EWCA Crim 2778 D pleaded (25% discount considered appropriate by the Judge) to conspiracy to supply cocaine. Her partner received 5 years after a full plea discount. D was aged 25 and of good character. She suffered from a disease which causes painful boils. While on a 1-year remand, she was admitted to hospital for an operation. Post-operative care did not take place. The Judge started at 6 years and said that had there been a full discount, D would have just 1 year to serve. He then passed a 2-year suspended sentence with unpaid work. Since the sentence, D had been wholly co-operative and compliant with the order and found part-time employment. Also, her father had been diagnosed with lung cancer and had only a few weeks to live. Held. 4 years was justified. It was wrong to then depart so much from that. The sentence was unduly lenient. The key features are D's conduct since the sentence, the medical hardships if there was a return to prison and the father's illness. The very long wait for the sentence, the miserable time after the operation and her exemplary conduct as a prisoner were relevant factors. With these factors, prison will be significantly harder for her. Returning her to prison would be unduly harsh and not necessary. We do not vary the sentence.

Children and Young Offenders

Appointment of intermediaries

R v Biddle 2019 EWCA Crim 86 D was convicted of rape. He was at trial aged 17. He was granted an intermediary. The trial Judge said there was no need for an intermediary for the whole trial, just for the giving of evidence. The intermediary provider declined to attend. Relevant cases were cited. Held. The courts and the MoJ have recognised the important role an intermediary may play in facilitating the proper participation of a vulnerable defendant in their trial. It is not for the provider to dictate the duration of the need for an intermediary. The provider can make a recommendation but it is just that, a recommendation. Ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary. Other Judges might have made a different decision, but the Judge was entitled to rule as he did.

Committals

Committal invalid

R v Day 2018 EWCA Crim 2637 D was committed to the Crown Court for being in breach of his Crown Court 6-month suspended sentence (section 6). At the same time, D was committed for a burglary, two thefts and an attempted theft (section 6). He was sentenced to 12 months for the

burglary. Held. That sentence was justified. However, the Crown Court was restricted to the Magistrates' Court powers for the burglary, so the maximum was 6 months, which we substitute.

Note: If D pleaded guilty, which appears to be the case, the new sentence would be wrong if 6 months was the maximum as he should have had a discount. The exact committing power is not referred to. The alternative was to proceed in a robust way, see para 98.43 in the book, and ensure that an adequate sentence was passed. Ed.

Contempt of Court

The procedure must be complied with

R v Khan 2018 EWCA Crim 2641 One Friday, in the absence of the jury, the Judge expressed his displeasure at defence counsel's interruptions during the prosecution closing speech. The Judge refused to allow one counsel to raise a point of law and D clapped his hands about six times as the Judge was about to rise. The Judge said he would deal with the matter on the Monday. On Monday, D's counsel, C, gave D's explanation for the conduct. The Judge then ruled D was in contempt of court and sentenced him to a 7-day sentence consecutive to the sentence he was serving. C said on the appeal, he was putting forward an explanation and the speed of the process was not what he anticipated. C also said the allegation was never put to D. Held. The Judge never said he considered D was in contempt of court or why. Criminal Procedure Rules 2015 2015/1490 Rule 48.5 and 48.6 were not complied with. The Judge failed to afford C the opportunity to make submissions about the sentence. The finding of contempt must be quashed.

Murder

Judicial flexibility

R v Croxson 2019 EWCA Crim 34 D was convicted of murder. He attacked a very vulnerable man, V, by repeatedly stamping on him and kicking him. V was also hit with a vodka bottle. D left V and V died. D had 27 offences against the person including rape and ABH. The Judge started at 15 years and passed 24 years. Held. A sentence well below the starting point may be justified and as long as it is justified and explained by an analysis of the facts of the case, it will be upheld. A sentence well above a starting point may be necessary and again the same analysis is required. Sentence upheld.

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.

Supply of drugs

Defendant aged under 18

R v Ogunjimi 2019 EWCA Crim 201 D, when aged 17, pleaded to conspiracy to supply. He played a significant role in a county lines heroin and cocaine dealing operation. The prosecution said it was industrial dealing over many months when D was subject to a Youth Rehabilitation Order imposed for a section 20 offence. The Judge made D's case Category 2 and started at 8 years. She increased that to 8½ years for the breach of the YRO. The Judge reduced that for age, mitigation and role and made the sentence 70 months (a 31% reduction). The defence asked for a greater reduction. Held. We must focus on the facts of the appellant's crime and what it tells us about his culpability given his youth. Here, D has, for a number of weeks at least, encountered the victims of drug abuse day in and day out and persisted in supplying them with class A drugs in exchange for money. It would not be reasonable to conclude that D's youth diminished his appreciation of the damage he was involved in doing to any substantial extent. Added to the assessment of his maturity and capacity to understand the consequences of his action was of course the previous conviction for a serious offence of assault and the intensive supervision of which he was the beneficiary. The reduction applied was entirely appropriate.

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