

# Banks on Sentence

## Sentencing Alert No 218

1 April 2019

### Affray

#### **Football offences**

*R v Ebbs* 2019 EWCA Crim 175 D pleaded to affray. A section 20 count was left on the file. D went to support Middlesbrough at Chelsea's football ground. He went to a tube station to get home. He and P and P's son, W, had some banter with some Chelsea supporters. P went to attack one of them, R. R tried to retreat and used his fists to defend himself. D and W joined in. D went through the barrier and struck out at R. He then played no further part. W tried to strike R and P hit R with his fist. The blow was so hard that R fell to the ground and sustained a serious leg fracture. D was aged 33 and effectively of good character. The defence asked for a pre-sentence report, which was refused. The Judge found P was the instigator and D was not responsible for the serious injury to R. He accepted that D's family life was going to be immeasurably harmed. The Judge started at 15 months and with plea, gave 12 months. Held. A pre-sentence report should have been obtained. The suggestion that the Judge had all the information in front of him is undermined by his minimal reference to the mitigation. We would normally order a report. However, that would only adjourn our decision. The Judge would have learnt about D's wife's mental problems and D's support for her and her four young children. D was also the stepfather to two of his wife's children. It appears that D, P and W had been drinking. The custody threshold was passed and imprisonment was unavoidable. Applying the *Imposition of Community and Custodial Sentences Guideline 2017*, we would have suspended the 12-month sentence. As he has served the equivalent of a 6-month sentence, that would not be right, so we pass 6 months, meaning immediate release.

### Burglary (non-dwelling)

#### **Persistent offender**

*R v Preece* 2019 EWCA Crim 212 D pleaded to five burglaries committed at night. The locations were an optician's (about £12,700 damage and £110 cash taken), a Co-op (thousands of pounds' worth of damage and £3,000 worth of cigarettes and Nurofen taken), a newsagent's (damage to the glass in a door and a shutter and cigarettes worth £2,700 taken), the same shop (cigarettes worth £2,700 taken), a store (glass door damaged and cigarettes worth between £5,000 and £6,000 taken) and at a service station locks were tried. In all but one, D was part of a group. Three burglaries were when he was on bail. D made denials in interview. D was aged 47 with 102 previous convictions on 26 occasions. Most were for acquisitive offences. His non-dwelling burglaries were one each in 1987, 1995 and 1996; seven between 1999 and 2008; and two in 2008. D had eight dwelling burglaries between 1988 and 1991. The defence relied on the 10-year gap for Theft Act offences. The Judge passed two 10-month and three 18-month terms all consecutive making **6 years 2 months** in all. Held. Four burglaries were Category 1. One was Category 1 or possibly Category 2. The plea credit of 12 months down to 10 for one offence could be described as generous. It was open to the Judge to pass a suitably severe sentence.

## **Murder**

### ***Defendant aged under 21 Judicial guidance***

*R v Harvey* 2018 EWCA Crim 2936 D and R were convicted of murder and two section 18 offences. They were involved in a group attack with knives and other weapons on three men who were stabbed. One died. D was then aged 16. He had numerous convictions and was on a YRO tag at the time. R was then aged 20. He was on bail for a conspiracy to rob offence and at the time of sentence had received 9 years for it. D's starting point was 12 years and R's starting point was 25 years. He had 21 convictions including robbery, possession of an offensive weapon, assaults and wounding. The Judge found D played a leading role in the offence. She passed minimum terms of 19 years on D and 25 years on R. D received 6 and 9 years and R received 9 and 12 years concurrent for the section 18 offences. The Judge adjusted R's sentence to take into account the 9 years he received for the conspiracy to rob. Held. The Judge cannot approach each defendant in isolation. Instead, he or she should generally and never mechanically move from each starting point to a position where any disparity between the sentences, all other things being equal, is no more than a fair reflection of the age difference between the offenders, see *Att-Gen's Refs Nos 143 and 144 of 2006* 2006. Appeal dismissed.

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

### ***Motive was to punish***

*Att-Gen's Ref 2018 Re Brown* 2018 EWCA Crim 2878 D pleaded to section 18 after the first jury had failed to agree and just before a new jury was to be sworn in. He and his girlfriend, G, were heroin and crack addicts. So was V, who owned a flat which he allowed D and G to use. All three consumed a very large quantity of class A drugs. What drugs were left were kept in a Kinder egg in G's vagina. V woke up and tried to take the Kinder egg out for the drugs. G screamed and D woke and attacked V. D and G subjected V to a sustained beating 'over time' in different parts of the flat. V was punched, kicked (without footwear) and stamped on. V was seriously injured and in considerable pain, but V was so intoxicated he did not realise how seriously injured he was. Neither did D or G. All three took drugs again. In the early hours, V left the flat and a friend ensured he went to hospital. His injuries were found to be life threatening. Both lungs had collapsed. He had 17 broken ribs. Many had been broken in more than one place. His spleen was lacerated. He remained in hospital for 17 days. V's stepmother said V was still unable to breathe properly and could not walk far. Because of D's drug use, some of V's injuries might have been caused by others. However, the majority were caused by D and G. D was aged 40 and had 50 previous convictions, mostly for theft and burglary. He had an affray in 1996 (2 years) and section 18 and a separate ABH in 1998 (5½ years). G pleaded to section 20. Held. This was a wholly unjustified, sustained and brutal assault. It was a Category 2 case (based on the sustained nature of the attack). The aggravating features were the previous convictions (including the previous section 18), the ongoing effect on V, the fact the offence was committed in V's home and D was under the influence of drugs. There was no mitigation. [Even taking on board the Judge's view of the case,] the least sentence after trial was 5½ years, so with plea **5 years** not 3.

## **Perverting the course of justice**

### ***To avoid prosecution***

*R v McCalla* 2018 EWCA Crim 2873 D pleaded (full credit) to conspiracy to pervert. S was assaulted by two men. One had a 9-inch knife and the other a 15-inch machete. S was kicked, punched and attacked with knives. He sustained large gashes to both hands and cuts to his head and elbow. He needed surgery. His tendons on one hand were cut. S identified D as one of the assailants and S identified him at an ID parade. D was charged with section 18. While on remand, D communicated with T on the phone using coded messages and asked whether she had contacted S. T said S wanted £3,000 and an ounce of cocaine. There was further conversation using coded language about discussing the arrangements for S to withdraw the allegations. S then went to a police station with M and told officers he had seen a person in the street which

caused him to realise he had wrongly identified D as the assailant. T and M were arrested. At the PTPH D pleaded not guilty to the section 18 and no evidence was offered. D pleaded to the perverting. D had 49 previous convictions on 23 occasions, including robbery and possession of offensive weapons. The pre-sentence report described T as a vulnerable individual who was susceptible to manipulation. The Judge found D had committed the section 18 offence. Held. That was wrong. Whether he was guilty or not was irrelevant. This was an extremely serious case. We consider first the seriousness of the offence the subject of the perversion. As knives were used, the starting point for a man of good character was 12 years. Second, there was a degree of persistence. D had recruited two women, one of whom was vulnerable. There was a degree of persistence and the perversion was successful. D was the orchestrator of the conspiracy and the benefactor. With plea, **4 years** not 5.

## **Restraining Orders etc.: Breach of**

### ***Persistent offender***

*R v Green* 2018 EWCA Crim 2682 D pleaded to two breaches of a Restraining Order. After his relationship with V ended, D harassed and stalked her and her seven-year old son. A Restraining Order was imposed. There were repeated breaches and D was given 18 weeks. Two weeks after D's release, D called V and asked to meet her. D made 298 calls to her which went to voicemail. Because of automatic delete features the number might have been about 400. On two days, D spoke to V at the store where she worked. D was aged 46 with 21 previous convictions, including a) burglary and arson (30 months) and b) harassment (2002, £100 fine; 2003, with breach, conditional discharge; 2004, £100 fine; 2005, £200 fine; May 2017, 18 weeks; November 2017, 1 month; and 2018, stalking with two breaches, 9 months consecutive to the 1 month). The earlier offences related to previous partners. Held. V had to be protected, but 3 years reduced to **2 years** with plea was well within the range.

## **Sexual Offences: Assault**

### ***Intruders, By***

*R v Hackett* 2018 EWCA Crim 2563 D pleaded to sexual assault. In the early hours, he sat outside V's home. V lived with her mother and brother. D had three bottles with him which were assumed to be alcohol. D then climbed in through one of V's windows. Once inside, he removed all his clothing and placed them in a bag he had. V and her mother saw a shadow and called the police as D was walking down the stairs. V then walked past D and went to her bedroom. D turned around, went back up the stairs and followed V into her bedroom. D pushed the door shut and walked towards V, who backed away. D then lent forward as if to kiss V but 'grabbed' her buttock with a degree of force. V felt it was a sexual touch. V pushed D away and walked past him. D then ran off. Witnesses said he returned to the property twice more but did not enter. D said he had drunk a lot. He lied in interview. D was aged 25. He had 28 convictions on 17 occasions. He had served 3 months for sexual assault, consecutive to 27 months for a racially aggravated assault. He had convictions for conspiracy to rob, going equipped for burglary and a non-dwelling burglary. The pre-sentence report said alcohol was a theme of his offending. It said his regret was only superficial. However, D had learnt a lot from his counselling sessions in prison and that D did not satisfy the 'dangerousness' criteria. A psychiatrist considered there was a significant risk of reoffending, when D was exposed to disinhibitors, such as alcohol. The Judge found the offence was Category 1B (starting point 2½ years, range 2-4 years). She moved to 5 years and with plea credit made an 8 year 1-month extended sentence (4 years 1 month's custody 4 years' extended licence). Held. With the location, timing, circumstances and the previous conviction, the Judge was entitled to go to the top of the range. The Judge appears to have adjusted the sentence so she could pass an extended sentence. We start at 4 years, so with 25% not 20% plea credit, **3 years**.

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