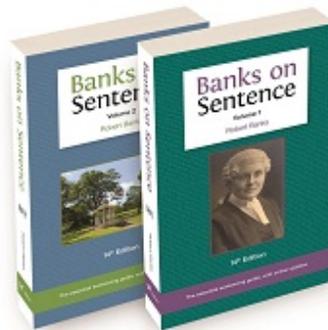


# Banks on Sentence

## Sentencing Alert No 220

15 April 2019



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To be published 10 May 2019.

### ABH

#### ***Unprovoked/No reason No weapon, no kicks***

*R v Shuttleworth* 2019 EWCA Crim 333 LCJ D pleaded early to ABH. V went to a rock concert with her relatives. They were standing in an area where the crowd was pushing backwards and forwards. She had not been drinking. V saw D being aggressive to some people, who were knocked to the ground. V was also 'shoving' some people. V and D were standing near each other and D suddenly rotated his body and punched V with a clenched fist. It was a 'haymaker blow'. V felt that D's whole bodyweight went into the punch. The blow broke V's eye socket. D punched her twice more with full-force blows. V was covered in blood, but D got away. In hospital, V was treated for a 2-inch cut, bruising and a whiplash injury. By coincidence, D was also in the same hospital after he broke his wrist when he had punched a wall. By a chance remark, V was able to identify D as her assailant. In interview D made full admissions and was very apologetic. D was aged 18 and was reading graphic design at university. He was of good character. There was a 13-month delay between offence and sentence. V still had trouble sleeping because of the pain of the injury and was worried and stressed. She had a prominent scar on her face. D said he had been drinking heavily at the concert. He could not say why he had hit V. He suggested he had been angry about his T-shirt being ripped and punched the wrong person in error. The pre-sentence report said there was a low risk of re-conviction. A deputy head teacher, a police sergeant and an employer, who gave him work experience, provided glowing references. The Judge made the offence a Category 1 offence, due to the degree of injury and the three blows. Held. This was a nasty, brutish assault against a defenceless woman. We think the case is Category 2. In any event

there was no reason to move from the starting point of 18 months to 21 months. This was a paradigm case where suspension was appropriate. **12 months'** YOI not 14 and **suspended** not immediate, with a 25-day rehabilitation activity requirement.

## **Burglary**

### ***Persistent offender (non-dwelling offence)***

*R v Finch* 2018 EWCA Crim 2930 D pleaded to burglary. In the small hours, he used a sledgehammer to smash the front window of a branch of WHSmith. D entered the shop, armed with a chisel, and forced the lock of a tobacco cupboard and stole some tobacco, worth just less than £2,500. The repair to the window cost about £500 and £400 was lost because the store lost trading time. D was aged 33 with 93 previous convictions (details not given). He had been released from prison a few days before the offence. Held D was a career criminal. We start at 3 years not nearly 4, so with plea **2 years** not 2 years 7 months.

## **Firearms**

### ***Minimum sentences                      Basic principles***

*R v Nancarrow* 2019 EWCA Crim 470 D pleaded to possessing five stun guns, an electrified knuckle-duster and other offences. The stun guns and the knuckle-duster triggered minimum sentences. Held. 1 The purpose of the mandatory minimum term is to act as a deterrent. 2 Circumstances are exceptional if 5 years would be an arbitrary and disproportionate sentence. 3 It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional. In order to justify the disapplication of the five-year minimum, the circumstances of the case must be truly exceptional, *R v Dawson* 2017 EWCA Crim 2244 para 12 and 19. 4 It is necessary to look at all the circumstances of the case together, taking a holistic approach. It is not appropriate to look at each circumstance separately and conclude that, taken alone, it does not constitute an exceptional circumstance. There can be cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances makes the case exceptional. 5 The court should always have regard, amongst other things, to the four questions set out in *R v Avis* 1998 2 Cr App R (S) 178. The reference in [Firearms Act 1968 s 51A(2)] to the 'circumstances of the offender' is important. It is relevant that an offender is unfit to serve a 5-year sentence or that such a sentence may have a significantly adverse effect on his health. 7 Each case is fact-specific and the application of the principles dependent upon the particular circumstances of each individual case. Limited assistance is to be gained in cases involving facts that are not materially identical. The Judge was wrong to a) treat a rejection of the basis of plea as determinative against there being exceptional circumstances, and b) to ignore the medical evidence because on its own it did not amount to exceptional circumstances. On the facts, we dismiss the appeal.

## **Money Laundering**

### ***Category 2                      Criminal conduct money***

*R v Choudry* 2019 EWCA Crim 211 D was convicted of transferring criminal property and being concerned in money laundering. He played a leading role, as co-ordinator, in a sophisticated £6m money laundering operation based at two sites, a shop and Unit 3D on an industrial site. In the indictment period the figure was £1.2m. D set up the unit. A convicted money launderer was seen with a bag which he gave to H who took it to Unit 3D. D was at the unit at the time with a co-defendant, B. D was stopped in his car leaving the unit and £125,020 and £125,000 (less one £20 note) were found in bin liners on the back seat. £300,000 was seized from H the next day. £250,000 was found in another car. At change-over points in the conspiracy, the production of a note was used as a security to match the serial number the receiver had been told. Police visited the shop that was used as a centre for a loss-making travel agency as a front for electronic laundering of money abroad. Also, false Western Union accounts were used to launder more than

£500,000. D was aged 49. In 2003, he had a conviction for evasion of duty (4 months). The Judge took the total as £6m, but accepted that some of the cash was legitimately transferred. For the three amounts of money in the cars (£250,000) he moved to 5½ years [after considering totality perhaps] and so passed 3½ years. For the wider count, he passed 8 years consecutive making 12 years in all. Held. Consecutive sentences were wrong because there was one global conspiracy. We substitute **10 years** on the second count with the other sentence being concurrent.

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

### ***Persistent offender***

*R v McFadyen* 2019 EWCA Crim 340 D pleaded to two breach offences (one regarding V and one regarding S). From November 2016 to June 2017, D was in a relationship with V. It ended because of D's violent assaults on V. That led to a conviction for battery in October 2017, resulting in a Restraining Order for V and her daughter, S. In November 2017, there was harassment against V and a breach (28 days' imprisonment). In December 2017, there was another harassment and breach (community order). From December 2017 to May 2018, D set up Facebook accounts in various names and sent V messages which frightened her, one of which was, "Wait until you bump into me". Some of the messages were abusive. Many were offensive. V suffered from PTSD and depression, which was made worse by this conduct. When interviewed, D said that 'all women were like this, trying to fuck him over and make him look bad'. He also falsely denied leaving voicemails. The victim statement from V described the intolerable effects of D's behaviour. D had in 2016 a conviction for harassment (4 weeks suspended). The Judge said the guideline faded into the margins because of D's utter failure to stop offending in this nasty way. For count 1, she moved to 3 years, and with the plea discount arrived at 31 months. For count 2, she started at 12 months and with a 25% plea discount and totality arrived at 7 months consecutive. Held. The Judge was right to identify two significant aggravating features, the misery caused to V and to a lesser extent S, and D's relentless refusal to comply with any court orders. V was particularly vulnerable because of her illness and the constant effect of D's behaviour. If this was D's first breach the suggested starting point would have been 26-29 weeks' custody. Accepting the messages were 'mild', we move, after totality, to 2 years on count 1 and 6 months on count 2. With plea that is 20 months and 4 months making **2 years** in all.

## **Sex Offences: Mentally Disordered Persons, With**

### ***Sexual penetration***

*Att-Gen's Ref 2019 Re Gezi* 2019 EWCA Crim 286 D pleaded very late to sexual activity with a child and sexual activity by a care worker with a person with a mental disorder. The victim, V, was the same in both offences. He was a psychiatric nurse in a Child and Adolescent unit. The first offence was on at least six occasions with V, one of the children in his care. The offending was from two weeks before her 16th birthday until that birthday. It involved sexual touching and oral sex. The second offence was on at least four occasions and all were after V's 16th birthday. Each of those involved sexual activity and ejaculation, once on V and three times inside V. D had first met her when she self-harmed and he was deputed to find her. When he did, he took her to a secluded location and lied to her. He would meet up with her for sex. D was aged 39, of good character and married. Held. The planning, grooming, abuse of trust, targeting of a vulnerable child, the lies and the age disparity made the child offence Category 1A. The severe psychological harm to V, the ejaculation, and attempts to conceal the evidence (asking V to delete phone messages) aggravated the offence. The care worker offence was Category 1 because of the penetration. It was Category B. We move to 11 years, so with plea **10 years** on all counts concurrent.

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