Banks on Sentence

Sentencing Alert No 143

23 November 2016

Burglary, Dwelling

Minimum 3 years' custody Is it unjust?

Att-Gen's Ref No 118 of 2015 2016 EWCA Crim 1108 D pleaded to a dwelling house burglary and an attempted burglary. He accepted six burglary TICs. He faced a minimum sentence for a third time. Held. para 32 This court has indicated that section 111 gives the sentencer a fairly substantial degree of discretion as to the categories of situations where the presumption can be rebutted, see *R v McInerney* 2002 EWCA Crim 3003, 2003 2 Cr App R (S) 39 (p 240) at para 16. When there is a sustainable and proper basis and when the overall circumstances permit, this court will support sentences which are merciful and which, for instance, seek to address a cycle of offending by enabling the offender to be released immediately or early into the community because this will place him or her in the best position to address the offending and the circumstances that cause or motivate the offender to commit crimes. An obvious and relevant example of this is where an offender has been making real efforts to reform or conquer his or her drug or alcohol addiction. In this case, however, the evidence pointed in the opposite direction.

Persistent burglars etc.

Att-Gen's Ref No 118 of 2015 2016 EWCA Crim 1108 D pleaded to a dwelling house burglary and an attempted burglary. He accepted six burglary TICs. At around 1:45pm, D attempted to burgle a flat in Brighton. A neighbour described hearing a popping sound and seeing a man walking away carrying a box. Five minutes later the neighbour heard the sound of breaking glass. On investigation, she saw the same man walking away and saw that glass in the front door had been smashed. The owner of the flat was called and discovered that the man had not been able to gain entry but had caused £165 worth of damage to the front door. D was arrested and bailed. Two weeks later D burgled a property at around 12.45pm. The owner returned from work to find the front door wide open and one of the panels had been smashed. Several items of jewellery had been taken, some of which had a high sentimental value. Police searched D's home and found several of the stolen items of jewellery. He drove around Brighton with the police and indicated various properties he had burgled in the past. D, aged 34 years, had 33 previous offences on his record most of which were dwelling house burglaries. A recall report said that D would start off working positively with the Probation service (with regards to a community sentence or being released on license) but would soon start lying about where he was living or claiming he is homeless. It also said the offending was 'underpinned' by a long history of heroin and cocaine misuse. Held. D had turned his back on the assistance that was offered to him. The starting point was 4 ½ years, so with plea, **43 months,** not 1 year.

Note: D pleaded at the first opportunity and was entitled to a third off for his plea. In fact, the Court only gave him 20% under the mistaken belief that was what the statute provided. As long as the sentence does not go 20% below the 3-year minimum sentence, the defendant is entitled to the full discount, see *R v Gray* 2007 EWCA Crim 979, 2 Cr App R (S) 78 (p 494).

Child Destruction

Case

R v Wilson 2016 EWCA Crim 1555 D was convicted of causing GBH with intent and child destruction. D and V had been in a relationship as students which lasted several months but came to an end by the end of their course. They remained on good terms. Sometime later they went to Ibiza with a group of friends and slept together. They had unprotected sex again back in London three months later. V became pregnant and told D who said he was not ready for a baby. He tried to persuade her to have an abortion. V refused and D became angry and unpleasant. Some months later in the pregnancy, when V was telling people who the father was, D became extremely offensive and abusive towards her. D denied he was the father and suggested V had been sleeping around. V told D's mother who the father was and the mother said she would speak to D and get him to call her. There was no further contact. A month later when V was returning home from work in the evening, D and D's friend T attacked her wearing crash helmets. As she was on the floor D stamped on V and kicked at her stomach. T attacked her from behind. V shouted at them to stop and tried to protect her unborn baby with her arm. D and T eventually ran off taking V's phone. V needed an emergency Caesarean section to deliver her stillborn baby boy and surgery to counteract life-threatening internal bleeding. A post-mortem showed the baby was healthy and would have been born a few weeks later. DNA confirmed that D was the father. D denied involvement in the attack and put forward an alibi. D was aged 21 and had no previous convictions. There were excellent character references. D always appeared quiet and polite, came from a loving family and worked as a mentor for children having trouble at school. V was severely affected by the attack and the trial. Her personal life became public knowledge across national media and she had to move away from her friends and family. The day on which she had to bury her son was the worst day of her life. The Judge found the aggravating factors were: a) the attack was pre-meditated and involved planning, b) it was sustained, c) there were two victims, the mother and the unborn child, d) D, as the father, had a responsibility for the wellbeing of mother and baby, e) the injuries were life-threatening, f) the attack had significant psychological effect on V, g) the attack happened outside V's home, h) V's phone was stolen in the attack, and i) D was the prime mover in the offences. The Judge said life should be reserved for offences of the utmost gravity, which this was. He started at 32 years for both offences after considering totality. Held. It was as the Judge said, a cowardly, vile, callous and unspeakably wicked attack. The Judge was entitled to find the dangerousness provisions made out despite the opinion of the psychiatrist's that there was no danger to the general public and D's good character. That decision was correct. The deliberation and planning with the recruitment of a much younger man, with learning difficulties, were extremely worrying features. The child destruction was worth 18 years or possibly longer. **Life** with a minimum term of **14 years** not 16, only because of totality.

Court of Appeal

Fresh evidence

R v Kelly 2016 EWCA Crim 1505 D appealed his confiscation order and sought to admit in evidence some bank statements and some information about loans. The defence contended the material was not fresh evidence. Held. An application to admit the evidence was necessary. The Court may admit evidence if it thinks it is necessary or expedient in the interests of justice to admit it. It wasn't either here. The documents were not sent to the Court or the prosecution until last week. The prosecution has had no opportunity to consider them properly. It would not be proper to adjourn the matter. Application refused. Appeal dismissed.

ID Documents

Document to gain employment

R v Brahami 2016 EWCA Crim 1477 D pleaded (10% credit) to possession of an identity document with an improper intention. The guilty plea prompted the prosecution to drop two other lesser related charges. D was an Algerian and held a valid Algerian passport. She came to the UK on a student visa and was raped during her stay. Her visa expired and she was terrified of returning home as it would be discovered when she married in Algeria, that she was not a virgin. D stayed in the UK and obtained a Portuguese passport with a false name. It showed her photograph and she used this passport to gain employment for three months. There were many court hearings during which time D started a long-term relationship with a naturalized British citizen. They married and D became pregnant and was due to give birth two weeks after the appeal hearing. She had spent one month on remand. D was sentenced to 10 months. A pre-appeal report mentioned the stress that prison was having on her and how her various medical conditions continued but were being managed by the prison. D was expected to give birth within

two weeks of the appeal. Held. The rule in *R v Ovieriakhi* 2009 EWCA Crim 452, 2 Cr App R (S) 91 (p 607) is not inflexible. Because of her pregnancy, 6 months suspended. Because she had served the equivalent of 3 months there would be no requirements.

Rape

Historic

R v RD 2016 EWCA Crim 821 D was convicted of two rapes and four indecent assaults. D pleaded guilty to two indecent assault. The victim for all the offences was his sister V. When D was aged 14 and V aged 5-6, he started to touch her vagina and persuaded her to touch his penis (this activity was admitted). This progressed to digital and oral abuse. On some occasions he ejaculated in her mouth and when she refused he ejaculated on her back. For the rapes, D made V sit on his penis which caused her considerable pain. She hated it. It was not easy to tell when the rapes started but it ceased when V was aged about 12 and D was then aged 19 or 20. There had been no sexual offences since then. D told V that if she told anyone he would be sent to prison and she would be put in a children's home which would mean there would be no one to protect their mother from their violent father. V was very close to her mother. The impact on V was very considerable. D was now aged 47. He had one previous, a supply drugs offence (suspended sentence). The Judge considered it was a Category 2A case (starting point 13 years) and because there were two offences he gave 12 and 14 years for the rapes. Held. V was highly vulnerable. The fact D was very young and immature at the time was of real significance in this case. However, the offences remain very serious. **10 years** not 14 years for the rapes. The other sentences remain and remain concurrent.

Theft

Shop theft Persistent offender

R v Benham 2016 EWCA Crim 1648 D pleaded to theft (10% credit). She and her partner, P, travelled from Bournemouth to Tesco in Chichester. They placed 16 joints of expensive meat and 14 jars of Nescafe´ coffee in the middle of their trolley and surrounded the trolley with cardboard. They got in their car and drove away. The goods, worth over £700, were recovered. P was convicted of dangerous driving which related to him driving at a security guard in the car park while trying to get away (14 months). D was aged 45 and had a bad record for shoplifting. There was a 'hiatus' in her CRO between 1996-2006 and 2006-2010. There was a nearly two-year delay between arrest and her trial date (when she pleaded). During that period there were two shopliftings committed. She had never had a custodial sentence. The Judge said this was professional shoplifting either to order or to sell on. Held. It was a Category 2B case. The aggravating factors were her convictions and she was stealing to order. The mitigation was: a) the delay and b) her ill-health (triple bypass, insulin dependant and depression). We start at **12 weeks**, so with plea 10 weeks not 9 months.

Note: Had there been no delay or ill-health and she had previous prison sentences which had not stopped her shoplifting, I would expect many judges would decline to follow the guideline by applying Criminal Justice Act 2009 s 125(1). Then a significant deterrent sentence could be passed in the same way long sentences are passed for persistent burglars.

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