

Banks on Sentence

Sentencing Alert No 146

21 December 2016

Death by Driving: Careless driving

Single misjudgement

R v Apsey 2016 EWCA Crim 1001 D pleaded early to death by careless driving and dangerous driving (driving with an indicator not working, which could not have contributed to the accident). In the morning rush hour, D was driving a large scrap metal lorry in slow moving traffic. V was cycling to work wearing a florescent jacket, a helmet and headphones. D indicated to turn left and looked to see if there was anything on his left. However when he did turn he did not look again and was talking to his brother on a hands free mobile. V's bike became caught between D's front wheels and was dragged under. V was crushed and died. D was deeply shocked. V was aged 29, and had recently become engaged. D was aged 48 and of positive good character. He had one speeding conviction on his driving licence in 26 years. Held. V cycling between the curb and the lorry was a contributing factor. D's carelessness was not looking twice and the defective indicator. Neither of those necessitated immediate custody, so **6 months suspended** not immediate.

Manslaughter

Fighting

R v French and Others 2016 EWCA Crim 1644 F was convicted of manslaughter. D was convicted of murder. On D's 39th birthday, he and a male friend abused and threatened staff in a local shop. At around 10:45pm, they left the shop, went to an alleyway next to V's house and D kicked down a fence at the side of the property. D was abusive to V's partner and neighbours and V chased D with a pickaxe handle. D managed to turn the weapon on V. F, who was D's cousin, happened to be passing, joined in the attack and kicked and stamped on V. D and F then fled the scene together. D was found lying face down in the street and was resuscitated by the emergency services before being airlifted to hospital. V died two days later from a hypoxic ischemic brain injury which caused loss of brain stem function. He had inhaled blood from a nose injury whilst unconscious. After the attack, D and F went to F's home where F's partner, W, washed D's bloodstained clothes and used bleach to wipe down the pickaxe handle. Police attended W's house the next day and found the axe handle wrapped in a bin bag under a child's cot. It held DNA from W, F and D. F surrendered to the police and said he had been trying to stop the fight but did kick V twice in the upper body. F said D had stayed at his house that night but left early the next morning and that F had travelled to see D and tried to persuade him to give himself up. F had convictions for two ABHs (Suspended Sentence Orders), battery (£150 fine), criminal damage and TDA. The three violent convictions were about unprovoked group attacks. One ABH involved a glass bottle. The Judge found the following aggravating factors: a) it was a joint offence in a public street, b) the use of a weapon, c) V left greatly injured, d) help was not summoned, e) evidence was concealed or sought to be destroyed and f) arrest evaded. Further F was a weak man who could not resist joining in the violence. The Judge also found the only mitigating factor was that V was armed and had pursued D and struck him. Held. F, 13 not 15 years' extended sentence (**10 years** not 12 years' custodial period with 3 years' extended licence).

Murder

Revenge, Motive was

R v French and Others 2016 EWCA Crim 1644 D was convicted of murder. There were two co-accused. F was convicted of manslaughter and W pleaded to perverting the course of justice. On D's 39th birthday, he and a male friend abused and threatened staff in a shop. At around 10:45pm, they left the shop, went to an alleyway next to V's house and D kicked down a fence at the side of the property. D was abusive to V's partner and neighbours and V chased D with a pickaxe handle. D managed to turn the weapon on V. F, who was D's cousin, happened to be passing and joined in the attack. D and F then fled the scene together. D was found lying face down in the street and was resuscitated by the emergency services before being airlifted to hospital. V died two days later from a hypoxic ischemic brain injury which caused loss of brain stem function. He had inhaled blood from a nose injury whilst unconscious. After the attack, D and F went to F's home where F's partner, W, washed D's bloodstained clothes and used bleach to wipe the pickaxe handle. D surrendered to the police and said in a statement that he had been trying to run away from V but his flip-flops prevented him from escaping so he turned to confront V. D described hitting V in the nose with the axe handle and on his shoulder when V was on the floor. D said he thought V was alive when he fled the scene. D had one previous conviction for production of cannabis, (Suspended Sentence Order). The Judge said it was a savage, brutal and sustained beating and D was drunk. D had acted out of revenge and in anger. She found the following aggravating factors: a) it was a joint offence in a public street, b) a weapon was used, c) V was left greatly injured, d) help was not summoned, e) evidence was concealed or sought to be destroyed, f) D fled the scene and g) arrest was evaded. The Judge said the only mitigating factor was that V was armed and had pursued D and struck him. Held. There was no intent to kill¹ which was a mitigating factor, **16 year** not 18.

1. The Judge listed GBH was intended as an aggravating factor but it was a mitigating factor.

Rape

Victim(s) aged under 10 Defendant aged 25+

Att-Gen's Ref 2016 Re SC 2016 EWCA Crim 1670 D pleaded to rape and sexual assault of a child under 13, on the first day of his trial. He lived alone with his daughter, V, aged 6. About three years previously, V's mother had died in child birth losing his child as well. D set up an 'establishment' with the father of V's siblings, U. U seriously stabbed D and was given a lengthy prison sentence. D was lonely and depressed, and had a drink problem. D offered V some sweets and rolled them around his exposed penis. He then put a sweet on his exposed penis and asked V to take it off with her mouth. V didn't want to do it but D told her that unless she did it she would never eat again. V put his penis in her mouth by about 1-2 mm. D then licked her vulva despite her shouting at him to stop. This was the only occasion D had done this sort of thing. The next day V reported the incident and V was taken into care. D was now aged 40 with only relatively minor previous and no sexual ones. There was nothing found to suggest D had a sexual interest in children. Held. It was a serious breach of trust. The Judge was entitled to make the case category 3A. The sentence had to reflect the overall offending. The Judge was entitled to go to the bottom of the range. We reflect the leniency the Judge desired and D's situation at the time. With 10% not 25% plea discount **7 ½ years** not 5 ½.

Sex Offences: Historical

Judicial guidance

R v Forbes and Others 2016 EWCA Crim 1388 LCJ The Court considered eight historic sex appeals and the guidelines. Held. para 8 It is important to recall that under the provisions of the Coroners and Criminal Justice Act 2009 the duty of the court under s.125 (1)(a) to follow the guidelines only applies to offences committed after the coming into force of the Act on 6 April 2010: see the commentary to the decision on *R v H* 2011 at para 157. para 9. The phrase 'have regard to' (which was intended to have the same meaning as 'by measured reference to') was intended to make it clear that the judge should not simply apply the relevant guideline applicable at the date of sentence, subject to any lower statutory maximum sentence applicable at the date the offence was committed, but use the guideline in a measured and reflective manner to arrive at the appropriate sentence. It is therefore important for the sentencing judge to guard against too mechanistic an approach, either in terms of an equivalent offence or in adopting the figures in the guideline without having regard to the fact that generally higher maxima are provided for some of the modern day offences. Whilst a judge should have regard to the current guidelines in this way,

the judge should go no further and should not attempt, as the judge mistakenly did in *Att-Gen's Ref No 27 of 2015* 2015 EWCA Crim 1538, to construct an alternative notional sentencing guideline. para 11 The appeal of Rouse, [see para 125] provides an illustration. The judge correctly identified that the equivalent offences to the counts of indecent assault on a male contrary to Sexual Offences Act 1956 s 15(1) were a) Sexual Offences Act 2003 s 5(3) in relation to inserting his penis into the mouth of the complainant, and (b) section 6 in relation to digital penetration of the anus. However he did not take into account that the modern offences have significantly higher maximum sentences. para 29 Passage of time in cases where there are threats or other conduct designed to discourage the complainant from reporting the offence is not a mitigating factor of any material weight. para 152 For Rouse the sentence was not manifestly excessive.

Historical abuse Defendants then under aged 18 Judicial guidance

R v Forbes and Others 2016 EWCA Crim 1388 LCJ The Court considered eight historic sex appeals and the guidelines. BD was aged 11-13 for some of the offences. Custody was not then available. Held. para 13 The court is not concerned to ascertain what sentence would have been passed if the case had been tried shortly after the offence had been committed; it is only concerned to ascertain the statutory maximum. There may be rare cases where a broader inquiry is necessary as in BD who was under the age of 14 when he committed some of the indecent assaults. BD could not have been sentenced at the relevant time to any custodial sentence for those offences because of his age. Taking into account his European Commission of Human Rights Art 7 rights and the common law requirements of fairness, it would not be right to impose on him a custodial sentence for those offences. That appeal is to be contrasted with that of Rouse where, although only a little older, a custodial sentence would have been available at the time of the offending. The rare circumstances of the appeal in BD should therefore not operate as encouragement or licence to courts to consider a similar exercise in any other situation.

para 21 In the absence of reliable evidence of the maturity of the particular offender when he committed the offences, the maturity of a youth should be assessed by reference to the maturity of a youth of the offender's age at the material time. The *Youths Sentencing Guideline 2009* and *Sentencing Offences Act 2003 Guideline 2008* Part 7 will not be generally applicable as they are predicated on the basis that the offender is still a youth. Their relevance in these circumstances is confined to the emphasis placed in each on the significance of immaturity at the time of the offending to the assessment of culpability. They are not relevant for any other purpose. para 119 For BD Article 7(1) was engaged. Custody was wrong.

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