

Banks on Sentence

Sentencing Alert No 147

10 January 2017

Offences against the Person Act 1861 s 20

After drinking

R v Russell 2015 EWCA Crim 2507 D pleaded late to unlawful wounding. During a heavy late-night drinking session, V accused D of taking a friend's mobile phone. V pinned D against a wall and searched him but did not find the phone. D was ordered out of the house but was followed by V who had armed himself with a knife. At first D did not have a knife. A fight ensued in which D got hold of V's knife and stabbed V four times. The most serious wound was one to V's chest which was 3-4 centimetres deep and pierced the lining of the lung therefore causing a small air leak. There were also injuries to V's thigh, hip and knee. V remained stable and no surgical intervention was needed. D received a wound to the back of each hand which was inferred was from V's knife. D, aged 41, had 118 previous convictions mostly for dishonesty and had only five which were against a person. They included a robbery and common assaults. D was a recovered drug addict who had successfully and remarkably brought his life back together and was involved with charities and did volunteer work. He had also won back parental rights for his three daughters and was now their sole carer. The pre-sentence report said D's hard work and determination had brought his family together. It recommended a community disposal so the family can be kept together. The Judge put the case somewhere between Category 1 and 2 and started at 30 months. Held. We agree with that. Insufficient allowance was made for the mitigation which was exceptional. We move to 15 months and so with plea, **12 months** not 2 years.

Perverting the course of justice

Incriminating innocent people, Trying to

Rape claims

Att-Gen's Ref 2016 Re Micher 2016 EWCA Crim 1528 D pleaded to two counts of blackmail, stalking and four other undisclosed offences. D's offending lasted over 15 years from when she first befriended and then exploited a socially awkward and vulnerable man. He was aged 39 to 54 when she was aged 29 to 44. They had a sexual relationship for a time. Over the course of their acquaintance D made frequent demands for money, often backed up by emotional pleas and promises to repay the money. If this ploy didn't work D would threaten to accuse V of rape. This threat would terrify V who always handed over the money that was demanded. D would abuse V's hospitality by inviting her friends over to his house where they would drink and take drugs in front of V. D would shout at him if he did not play the part of the perfect host. Even when D was in prison for other numerous offences she would write to V demanding he send her postal orders for £10 and £20. V was forced to withdraw money on his credit card to pay D. In 2015, on the day V's father died, D visited and said that V must be coming into money now and asked for a payment. She returned twice more that day and had taken £130 by the end of it. Some weeks later D went to V's house in the early hours and shouted through his letterbox. V ignored her and she left but returned soon after and shouted again. This time D climbed onto the roof of V's single-storey extension and knocked on his bedroom window. V hid so D climbed down and knocked on the kitchen window until V eventually let her in. He told her he had no money to give her. By now a neighbour had called the police and when they arrived they told D to leave which she did, but only to return a few hours later. Again, V let her in as she was becoming irate outside

and she demanded £80 to retrieve her TV from a pawn shop. V only had £40 in his bank and £8 on a credit card but after three hours of persuasion from D, V took her to a cash machine and gave her £20. D said it was not enough and threatened to allege rape. V ran back to his house, followed by D who again shouted through the letterbox, threatened to accuse him of rape and that V's windows would be smashed. The police arrived once more and D was arrested. By the time of the arrest V had given D all his savings, had amassed debts of nearly £4,000 on his credit card and had rent and utility bill arrears. It was claimed that D had taken nearly £40,000 over 15 years. D, aged 45 at the time of trial, had 184 convictions going back to when she was 13. 109 were dishonesty offences. In 2007 she was convicted of blackmail of another male acquaintance and imprisoned for two years. The pre-sentence report talked of D's relentless intimidation, manipulation and harassment of the victim that led to his contemplating suicide. The report mentions D's longstanding addiction to heroin and that she was only recently been truly motivated to address the problem. She was responding positively to a programme of Methadone. In a witness statement V talked of his terror of D, the impact of her threats and described her as having 'absolute power' over him. He was always anxious about paying bills as he was often left with insufficient money. He had become ground down over the years and had contemplated suicide. The prosecution said the aggravating factors were a) highly relevant previous convictions, b) committed whilst subject to other sentences, c) the duration of the offending, d) large amount of money taken and e) threats to make false report of a sexual offence. **5 years** not 2 years suspended.

Note: The problem with this decision is that the Court concentrated on what was the suitable sentence for blackmail and does not seem to have increased that for destruction of V's life over 15 years and the fraudulent obtaining of £40,000 from someone who was left with debts. It is inconceivable that the Court would have passed 5 years if the defendant had been a man and the victim a woman. Ed.

Prison offences

Conveying drugs into prison

R v Cluskey 2016 EWCA Crim 1534 D pleaded to three counts of conveying a List A article into prison. D's partner was in prison and owed money to drug dealers. This debt caused him to be beaten up by fellow inmates. Four men visited D at home and asked her to deliver a package to another inmate at the same prison. If she did so she would clear the debt for her partner. They gave her a bag and D said she was under the impression it was the legal high, spice. D delivered the package to the prisoner as instructed and shortly afterwards the prisoner was stopped and the package found. It contained a wrap of cocaine, a wrap of diamorphine and two wraps of cannabis. D, aged 45, had 29 sentence appearances for many previous convictions most of which were not for drugs offences but in 2008 she had received 42 months for Class A supply. The Judge considered the *Drug Offences Guideline 2012* and found the case was Category 4 with a significant role and started at 3 ½ years. He then increased that to 68 months because of the previous convictions and then gave a full plea discount. Held. It was a lesser role so we start at 18 months. We raise that to 3 ½ years because of the convictions, so with plea, **28 months** in all, not 45.

Rape

Defendant then aged 15-17

R v Elsegood 2016 EWCA Crim 1757 D pleaded to two rapes of a child aged under 13. When he was then aged 14-16 he lived opposite a girl then aged 10-12, V. She had mental health problems and had been placed in a secure unit because of self-harming etc. When V was 10 he kissed her. Although she was shocked and upset their association continued. When V visited D's home, D would rub his fingers around her vagina and have vaginal intercourse with her. V was caused severe psychological harm. D was at the date of sentence aged just 19. He had no previous convictions. He had ADHD. The basis of sentence was 7-9 vaginal intercourses, one anal penetration and one digital penetration. Further the activity was 'consensual'. Psychiatrists found, a) D's IQ was 62, b) D had an intellectual and emotional age younger than his actual age, c) he had a learning disability and d) D had an unhappy and chaotic childhood when he witnessed domestic violence. The pre-sentence report assessed a medium risk of sexual reconviction and a high risk of causing harm to children. The report suggested a 3-year community order with a Sex Offender Programme and curfew. The Judge placed it in Category 2B, (starting point 8 years) and reduced that by half to take into account D's mental age and immaturity, before the plea discount. Held. This was a wholly exceptional case. We are struck by the delay between the

offending ceasing in July 2013 and the sentence in June 2016. Custody was wrong in principle. D had made significant progress. D's youth, immaturity, low mental age at the time of the offending and his lack of appreciation of the seriousness of his activity made the **community order with a Sex Offender Programme** appropriate, not 3 years YOI.

Sexual offences: Assault

Offence committed after drinking

R v Gaynor 2016 EWCA Crim 1629 D was convicted of sexual assault. He was acquitted of assault by penetration and ABH. D and V went to V's partner, P's, home for Christmas drinks. D was drunk on arrival. S who lived with P, woke up at 6 am and heard V and P having a drunken argument, while D sat on a sofa. S went to his room and V followed him. P and D also followed him. P then left. D lent forward and pulled V's trousers and underwear. V shouted at him and he apologized and appeared to be going to give V a hug but pulled at her bra straps. In interview D said he had been drinking heavily but didn't think he would behave like that. D was aged 51 and of good character. The Judge assessed the offence as Category 3, (26 months starting point). The Judge thought the equivalent of 10 months he had served awaiting trial was sufficient and passed 10 months. The defence pointed out that if the sentence had been less than 6 months the notification period would be 7 years not 10. Held. It was not right to make the sentence the same as time served. **3 months** was appropriate for the offence.

Stalking

Over nearly 7 years

R v Jury 2016 EWCA Crim 1560 D pleaded to two offences of stalking. In 2007, D was on a flight from the US to Heathrow and by chance sat next to a successful America author, V. They struck up a conversation and V gave D a copy of her book but did not give any contact details. A month later, D contacted V via Twitter saying "they must have developed Twitter for stalkers." D said a psychic had predicted a meeting and they were meant to be together. D then started a campaign of cyber-stalking and harassment that was to last for nearly 7 years although the period covered by the indictment is about 15 months. During the period, D had repeatedly contacted V by electronic means and had published false statements about her and her family, some of which claimed to be from her dead husband. D had monitored V's use of the internet and e-mails and demanded unwarranted payments of money from her. D turned his attention to V's daughter and told her that he loved her. He offered to stop the harassment if he was paid a great deal of money. D made racist and threatening statements about the daughter's partner. D sent presents and flowers to her home and his messages became more threatening and sexually aggressive. D flew to California and contacted V's family who became so upset they fled their house and hired a private investigator to let them know when D had left the country. D sent the family videos of himself in which he addressed the daughter directly and sent a picture of his desk and computer which showed his computer desktop image was a picture of V's daughter and her nephew. V made many attempts to stop D contacting her which included involving the FBI, the Dyfed-Powys Police and issuing proceedings in the High Court of England and Wales, where a consent order was agreed. After such actions D would stop the contact but resume again in a few days. When D was arrested in 2014, police found over 300 images of V and her family on his computer which he had accessed by breaking into private sections of various social media accounts. A further 418 images were found on a second computer. In interview D claimed that V and her daughter were goading him. He accepted he had asked for £150,000 on one occasion to stop his behaviour and said that V had made him feel irate and frustrated. D was on bail for 21 months and did not offend during that period. The pre-sentence report talked of D's acceptance that he had grown attached to V and her daughter beyond an acceptable level but said that they led him on. He found it difficult to understand the views of V and her family. A psychiatric report confirmed a diagnosis of Delusional Disorder but this did not warrant detention under the Mental Health Act although without treatment there was a strong possibility he would offend again in the future. D now aged 41, had no previous convictions. Appeal dismissed. **4 ½ years.**

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