

Banks on Sentence

Sentencing Alert No 149

23 January 2017

Corruption

Local government

R v Hussain 2016 EWCA Crim 2006 D was convicted of bribery. He was the manager and the director of a company which had a contract with Surrey County Council to provide transport for school runs, the elderly and the vulnerable. It was worth about £1m a year and there were many complaints about the company. D had regular meetings with V, who was responsible for administering and managing the contract. At one meeting D passed V an envelope containing £500 and said there would be similar amounts coming his way every month. V was also told it could be £1,000 or £2,000 or even £3,000 a month. V refused the bribe and went to the police. D was now aged 46 and had six old convictions including offences of theft and fraud. D was the sole carer of a 14 and 18-year-old daughter. The Judge considered the offence was on the cusp of Category 1 and 2. He started at 5 years and with the mitigation reduced it to 3 years. Held. We think [it was on the cusp of Categories 2 and 3 or at the top of Category 3]. So we start at 4 years. With the mitigation, we move to **27 months**.

Firearms

Possession of an imitation firearm with intent to cause fear

Att-Gen's Ref 2016 Re Ferizi and Timmerman 2016 EWCA Crim 2022 F and T were convicted of section 16A and F was also convicted of ABH. At around 8.30 pm, a 16-year-old, K, and her 15-year-old sister were in a kebab house with friends. F and T came in with at least one other and they knew the sisters. K learned T had been texting other girls and that K had communicated with another young male. T learnt of this and K thought he was jealous. T pushed K towards the rear of the premises. F seized K and said, "I'll show you something". F appeared to produce a handgun from his trousers, lifted it up above his head and brought it down on K's face. V had a circular-shaped wound on her temple. F let her go and she ran off. T then waved the handgun around at other customers shouting that he would shoot them. Just over a minute later F and T left the premises. The gun was not recovered. In the pre-sentence report, F said it was a BB gun. D was then aged 18 and had a previous conviction for possession of an air weapon. T was then aged 17 and had no convictions. Held. For the firearm, 2 ½ years for F and 2 years for T. On its own the ABH was worth 9 months. With totality, we make that 6 months, so 3 years for F. Because it was a reference, and their imminent release, we reduce the sentences to **2 years and 18 months**, not 18 months and 9 months suspended respectively.

Perverting the course of Justice

Outbursts in court Judicial guidance

R v Walker 2016 EWCA Crim 1851 D ranted at his sentencing Judge. Held. The important feature is that outbursts of this character impede the administration of justice. The same is true whether the remarks are directed to a judge, a witness, counsel, solicitors, a court official or even a member of the public attending casually in court. The positions of court officials, judges, counsel and so on are to be protected as they endeavour on behalf of the whole community to play their part in the administration of justice and the maintenance of the rule of law. The law brings

citizens together in stressful circumstances for many, and it is important that proceedings are conducted quietly and dispassionately in spite of that factor. D's remarks, whilst grossly offensive to the judge personally, amounted to a serious affront to society as a whole in its collective attempt to administer justice according to law. Judges have broad shoulders but an impression must not be allowed to develop that judges, any more than anyone else in courtrooms, can be abused with impunity.

Outbursts in court Cases

R v Walker 2016 EWCA Crim 1851 D was being sentenced for dangerous driving and disqualified driving (20 months in all). He interrupted when the judge commented about his early life. D, then in a raised voice, commented about sentencing policy generally, particularly with regard to sexual offences, and personally insulted the Judge. The Judge warned D not to interrupt and said if not he would continue in D's absence. Near the end of the remarks, D interrupted again. The Judge said it was up to D whether he wanted to wait. After D's unrecorded response, the Judge said, "Off you go then." Later that day, D was brought back to Court. The Judge described the circumstances as they appeared to him and said, "Generally judges ignore comments. D started to rant at me and suggest that the courts do not treat paedophiles in the same way and he completely lost it." The defence mitigated but there was no apology. The Judge then gave D an opportunity to speak. D then began another rant, including, "What a couple of months ago there was a dirty little paedophile." The Judge interrupted D again. D continued although the text was not recorded. The Judge interrupted him. D continued. The Judge gave D the opportunity to apologise. D said his views didn't warrant an apology. The defence advocate addressed the court. Without an apology, the Judge gave D 3 months. D replied, "Nice one, you little paedophile." The Judge directed D be brought back. D ranted insults for 11 lines of transcript with obscenities including, "You are just fucking paedophiles yourselves, you judges." The Judge directed D be removed and gave D a further 6 months. An apology to the Judge was sent to the Court of Appeal. Held. The chance to apologise was offered and declined on more than one occasion. The opportunity to do so merely produced further conduct of gross character. We note the comment in [the Criminal Practice Direction 2015] that in the majority of cases an apology and an undertaking as to future conduct may well be sufficient to secure release. Here there was no such apology, quite the opposite. The Judge did not perhaps readily allow for the desirable reflection upon the appropriate level of sentence which has now been possible in the quieter circumstances of this court. **3 months** each concurrent not 9 months in all

Note: The golden rule in these cases is to avoid custody tit for tat when each sentence triggers another insult and another sentence. The best approach is to nip it in the bud before the incident escalates. With this in mind, most Judges, where bad conduct has occurred, adjourn to the next day. Then the dust has settled and invariably an apology is forthcoming, so a warning is sufficient. Here, doing the sentence on the same day meant the insults kept coming and there was no opportunity given for mitigation for the second contempt (for understandable reasons). Ed.

Rape

Servicewomen

R v Heslop 2016 EWCA Crim 1951 Court Martial Appeal Court D was convicted of assault by penetration. D, a Lance-Corporal, awaiting posting as a full Corporal, was housed in the same block as V, a more junior soldier. V was invited out for a drink with D and some other female soldiers. V was not gay. D made remarks that she would make V gay. There were drinking games. D's drinking was measured. However, she ensured V had plenty of drink and by the end of the session V was extremely drunk. D took V back to their barracks. V fell asleep and D removed V's clothing from the lower part of the body, but remained clothed herself. D inserted four fingers into D's vagina which bled and was painful. V woke and saw D between her legs. D then left. D told other soldiers she had fisted V. This caused additional embarrassment and humiliation. In interview D said her actions were with consent and instigated by V. The Court found V didn't consent and was incapable of consenting. D was now aged 25. She joined the Army at aged 19. She had a good service record, medals and character references. Her previous convictions were held not to be relevant. D had served in Afghanistan and Cyprus. She had volunteered to help in the Ebola crisis in Sierra Leone and put herself in great danger. Held. It is not just a matter of applying the guideline as there are the additional military principles to consider that include the maintenance of discipline and the reduction in service offending. There were elements of double accounting here. V was vulnerable as she was asleep. D's drinking was not relevant. D had suffered a particularly troubled and deprived youth with no stability. It was Category 2B, so we start at 6 years. D had targeted V and ensured she drank too much. D took advantage of a more junior soldier. That raises it to 7 years. D had powerful mitigation. Her background was troubled,

she had turned her life round, her record was good and she had lost her career. That reduces it to **6 years**, with dismissal with disgrace.

Sex offences: Historical

Physical non-penetrative contact Victim aged 11-12 Defendant then aged 25+

R v Nixon 2016 EWCA Crim 2036 D pleaded to eight indecent assaults. D became friends with M when they were both in care. Several years later they both started living close to each other. D got on well with M's boy, V, and he babysat for M's children. M decided to leave the area and placed her children with other people. When V was aged 11 or 12, M asked D to look after V. D was aged in his late 20s. [It appears this would have been the early 1980s.] To start with they shared a single bed but D secured a bed for V. V thought D was like a father to him. From the beginning until V was aged 15, D fondled V's penis and masturbated V and himself on a regular basis. V said he was terrified to the point of passing out. V's personal statement said the offending had caused him grave psychological harm, made him feel unworthy and he had turned to drink and drugs as a result. D was now aged 55. He was treated as being of good character. He had been brought up without a family and was abused both physically and sexually. He had got his life together and held down a stable job. However in many respects he was a lonely man. The pre-sentence report said D accepted full responsibility. He was assessed as posing a medium risk of harm. The author asked for a community order to be considered. The Judge considered there was a significant abuse of trust. The Judge started at 6 years as a Category 1A case. She moved up to 9 years and down to 8 because of D's background. With full credit that made it 5 years and 4 months. Held. In some ways they both loved each other. V was conflicted as to what had happened. The offending was made worse by it being in V's home. The offending was at least a substantial contributor for V's psychological damage. It was Category 1A. V was particularly vulnerable. We take into account the admissions, his background and his good character. We don't think the sentence should have been increased from 6 to 8 years, so with plea, **4 years**.

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