

Sentencing Alert 108

7 July 2015

Appeals

Applications to call fresh evidence

R v Thames Water 2015 EWCA Crim 960 LCJ D, the defendant company, pleaded to polluting a watercourse with raw sewage. On appeal, the defence tried to dispute certain of the Judge's conclusions by introducing new statements. Held. The Court may receive new evidence when it thinks it is necessary in the interests of justice. This material should have been set out in the basis of plea, as required by the Criminal Practice Direction VII B.11(a), see 61.39. We emphasise the importance of both parties complying strictly with those requirements. It is only in the rarest of circumstances we will allow a party to advance a case not deployed in the court below. The application to admit the evidence is refused.

Cannabis

Cases

R v McGrath 2015 EWCA Crim 1108 D was pleaded early to production of cannabis and possession of cannabis with intent to supply. D was stopped in his van and police found a small amount of cannabis and a cannabis grinder. He gave his mother's address but police were able to search his real address. Police found 44 cannabis plants about 32" high. There was also 10 large bags of prepared dried cannabis and a set of digital scales. Three further bags of cannabis were found in the freezer. An expert said each plant was worth between £280 and £840, making between £11,200 and £33,600. The bags in the freezer (2.40 kilos) was valued at £24,000 and the 10 bags (2.45 kilos) at £24,500. The overall total was between £59,760 and £82,160. D was aged 28 and had 27 sentencing hearings for 77 offences. In 2003 and 2005, he had convictions for possession of cannabis. In 2006 he had cocaine supply and other supply and possession counts (4 years YOI). The pre-sentence report said the risk of re-offending was very high. There was a *Newton* hearing where the defence account was rejected. The Judge said the production offence was Category 2,

because the operation was capable of significant production. Held. The Judge was entitled to consider that the operation was capable of significant production. However **30 months** not 3 years.

Extended Sentences

Old convictions used to assess dangerousness

R v Halliwell 2015 EWCA Crim 1134 D pleaded to section 18 and ABH. D stabbed his daughter in the shoulder area and in the back. D was now aged 45 and between 1982 and 2005 he had 13 sentencing hearings for 29 offences, He had two section 47 offences in 1984 (a fine and 21 days detention). In 1987, he had a section 20 wounding (community order). He also had a long history of alcohol abuse. Held. The 1984 and 1987 offences were historic and [could not be used] to assess dangerousness. There had been no violence on his record for 25 years. We quash the extended sentence.

Manslaughter

One-punch manslaughter

R v Lynch 2015 EWCA Crim 1130 D pleaded to manslaughter. D and V, aged 62, had been close friends for a number of years. They lived in the same block of flats and had a father/son relationship. They socialized and drank together. D and his brother, B, went drinking after work and that led to an impromptu party at D's flat. As the night wore on, D and B began to argue, which became confrontational. D became extremely agitated and told everyone to leave. When they didn't, D lost his temper. He threw a coffee table into the air and put his foot through the TV screen. D, now worse for drink, attacked B, The confrontation spilled out onto the landing at the top of the stairs. V, acting as a peacemaker, tried to separate the two men. D swung a blow at B but hit V by mistake. V fell backwards and banged his head. There was some delay in calling an ambulance and when a call was made, the phone was handed to D who said, "We have all had a fight and I have hit my neighbour too hard. He is paralysed and I didn't mean to do it". V had a severe fracture to his neck. Corrective surgery was carried out and V had a stroke. This caused irreversible brain damage and V died. D was very remorseful. D was aged 41 and only had a conviction for spitting at his girlfriend. The Judge accepted there was no animosity between D and V. Held. The blow was deliberate and aggressive. The culpability was high. The punch was thrown in the context of

a fight. Before that there had been criminal damage. The level of sentencing was in the order of **6-8 years**. We agree with a 6 year starting point, the credit for the mitigation and the 20% credit, making **4 years 3 months**.

Note: The fact the death was caused by the fall rather than the severity of the blow was not taken as a factor by the defence or the Court. Ed.

Preventive Orders

Child contact prohibitions Employment issues

R v W 2015 EWCA Crim 434 D was convicted of rapes of children under 13 and other sex offences. He was sentenced to 20 years and given an SOPO. Held. The SOPO was necessary, however it was too draconian. We substitute, 'W is prohibited from 2) making an application for or occupying any employed or voluntary position, whether paid or not, which involves any contact with a female under the age of 16, save as in the exceptions within prohibition 1), (see 90.50).

Rape

Victim(s) aged under 10

R v W 2015 EWCA Crim 960 D pleaded (full credit) to four rapes, three indecent assaults and three gross indecencies with a child. The counts were specimen counts covering regular activity. Between 1971 and 1982, starting when he was about 25, he abused V (who appears to be his niece) when she was aged 7 to 18. The first act was digital penetration which was painful. D was told to stop but didn't. D bought her treats and groomed her. Also in 1971, he bought V a large teddy bear and asked her to his flat to see it. He then raped her. V was also obliged to suck D's penis and masturbate him. The second rape was in 1977. During the next five years the rapes became regular. The other sex offences related to when he licked her vagina and put his penis into her mouth. It stopped when V left the country. V said D swore her to secrecy by threats. In interview he did not dispute the account and claimed not to recall specific incidents. He also said he had been running [away] from these allegations for 40 years. D was now aged 68 and had no previous convictions. V now thought a long custodial sentence would not benefit anyone and she did not believe she had sustained long term harm. The Judge passed consecutive sentences

making 19 years 10 months in all. Held. That would mean a starting point of almost 30 years. The case involves the destruction of a childhood. We start at 24 years making **16 years** after the plea.

Sex Offences: Children, with

R v K 2015 EWCA Crim 1141 D pleaded to sexual activity with a child (section 9) and failing to answer his bail (4 months concurrent no appeal). D, aged 19, took V, then aged 13, to his home. She was in care but had absconded. After watching TV, they had consensual sexual intercourse. V stayed the night. Next evening, the police attended and took V to the station where she denied there had been sex. She later admitted there had been sex but refused to co-operate with the police. D on the other hand co-operated fully with the police, made full admissions and gave details of his electronic contact with V. Later D was given custody for ABH and breached his bail for this matter. He had 13 sentencing hearings for 18 offences but none for sex. D was assessed as immature for his age, with a poor educational record and a medium risk of causing harm to children. The Judge said there was no force, no threats and no intimidation. She considered D knew V was aged 14 or less and made the offence Category 1A. On appeal, the defence said it was 1B. Held. His unusual immaturity rendered the age difference less stark than the guideline is aimed at. The offence straddled the two categories, so **2 years** YOI not 3 years 4 months.

Theft

Vehicles Stealing from them

R v Buttler 2015 EWCA Crim 1028 D pleaded (full credit) to 23 thefts and an attempted theft. He asked for 14 TICs to be considered. Nine of the counts were committed when D was on bail for the others and in breach of a bail term. D was a persistent thief of property in cars parked in secluded spots. He would smash the rear window and steal what he could. They included mobiles, computers, shoes and some items of sentimental value like jewellery. D was 40 with eight children and said he wanted to pay off his debts. He had 48 previous for theft or dishonesty offences. The defence said the starting point the Judge must have had was nearly 7 years. Held. Keeping the sentences in proportion, 21 months for each set of counts consecutive making **42 months** in all.