

Sentencing Alert No 116

14 September 2015

ABH

Sporting offences

R v Noble 2015 EWCA Crim 1454 D was convicted of ABH. Five minutes after coming onto a football pitch as a substitute, D was closely marked by [another] during a goal kick. Both men, D and V, stood their ground and suddenly D struck V in the face with considerable force. V suffered mouth injuries. One of his teeth broke in half and another was loosened and hanging. In interview D said V was pushing and hitting him and would not stop. Out of frustration he used his arm to send V a message. D, aged 25, was a hardworking man with no convictions. The Judge held the assault was deliberate and V was knocked out for a few seconds. Held. The defendant had no history of violence except for a caution for common assault in 2009. This was a serious assault which comfortably passes the custody threshold. If the offence was Category 1 then it was at the lower end of the scale. **9 months** not 2 years.

Compensation/Confiscation

Matrimonial property

R v Parkinson 2015 EWCA Crim 1448 D pleaded to theft. He stole brass parts worth just over £64,620 from his employer. The prosecution applied for a confiscation order and a compensation order. It was agreed the benefit was about £39,330 and the available assets was just under £14,690 which was his share of the matrimonial home. The Judge accepted that this order would make it likely the home would have to be sold. Held. para 21 D's share in the matrimonial home constituted free property and part of the available amount for the purposes of section 9. Further, [the fact] that another person may also have a beneficial interest in such property has no impact, for the purposes of a confiscation order, on that outcome. para 22 If a confiscation order alone had been sought the order could properly [utilise] D's share in the matrimonial home. para 30 A Judge, when considering whether or not to make a compensation order, may take the [fact] that the property was a matrimonial home into account. para 32 Making both orders might raise issues of

the proportionality, applying *R v Waya* 2012 UKSC 51, 2013 2 Cr App R (S) 20 (p 87) and *R v Jawad* 2013 EWCA Crim 644, 2014 1 Cr App R (S) 16 (p 85). para 36 *R v Beaumont* 2014 (see above) is a decision on its own facts. Whilst a potential consequential forced sale of the family home is a matter to be taken into account, it is not to be taken as some kind of trump card in resisting the making of a compensation order or a section 13(6) direction, let alone with regard to the making of the confiscation order itself. para 38 Crown Court Judges should nowadays be a little careful, in the course of confiscation or compensation proceedings, in too readily assuming that the making of a compensation order in such circumstances inevitably will require a jointly owned property to be sold. That may well be the consequence. But under modern jurisprudence there is at least some prospect for a spouse or partner having the remaining beneficial share in the family home, and perhaps also where there are dependent young children, at least raising an opposing argument as to sale or possession: such arguments being potentially available in the course of enforcement proceedings in the courts which have been subsequently undertaken to realise the value of the defendant's beneficial interest. Such arguments in opposition are capable of placing reliance on the considerations arising under article 8 of the Convention or on wider equitable principles. If the enforcing court in subsequent sale and possession proceedings does not consider it in any particular case to be unjust or disproportionate to order sale and possession, then that is suggestive of it not having been unjust or disproportionate to have made the original compensation order. para 39. We endorse the judge's approach. Appeal dismissed.

Importation

Cocaine/heroin

R v Nunez-Lopez 2015 EWCA Crim 1451 D pleaded to importation of cocaine. He was stopped in his Spanish registered lorry at Dover and under a false floor in his cab, customs found about 50 kilos of cocaine with an average purity of 70%. In interview he said he had bought the vehicle himself. D was now aged 38 and treated as being of good character. The Judge considered D's role was between a leading role and a significant role. He also held that D was using his business as cover and there was an expectation of substantial financial reward. The defence contended D was a courier who had no involvement higher up the chain. They relied on *R v Virgradaula* 2014 EWCA Crim 1200 where a 10-year sentence was given for a lorry driver with 63 kilos of cocaine and a full plea discount. Held. There was no evidence D was acting in a leading role. The use of a

legitimate business cover was limited to the concealment of the drugs amongst a legitimate cargo. There was no evidence of an expectation of substantial gain. In order for there to be a significant role there had to be evidence of an operational or management function within a chain, or that he involved others, or was motivated by financial or other advantage, or had some awareness of the scale of the operation. Whether or not he had an operational function or had involved others, clearly this appellant was motivated by financial reward and in our view he had some awareness of the scale of this operation. His role was therefore a significant one. However, there was no evidence that he personally had helped to load the cocaine into this lorry or knew precisely how extensive the operation was. We start at 15 years, so with plea, **10 years** not 14.

Importation/Supply

Guideline Determining the role

R v Nunez-Lopez 2015 EWCA Crim 1451 D pleaded to importation of cocaine. He was stopped in his Spanish registered lorry at Dover and under a false floor in his cab, customs found about 50 kilos of cocaine. In interview he said he had bought the vehicle himself. The Judge considered D's role was between a leading role and a significant role. He also held that D was using his business as cover and there was an expectation of substantial financial reward. The defence contended D was a courier who had no involvement higher up the chain. Held. There was no evidence D was acting in a leading role. The use of a legitimate business cover was limited to the concealment of the drugs amongst a legitimate cargo. There was no evidence of an expectation of substantial gain. In order for there to be a significant role there had to be evidence of an operational or management function within a chain, or that he involved others, or was motivated by financial or other advantage, or had some awareness of the scale of the operation. Whether or not he had an operational function or had involved others, clearly this appellant was motivated by financial reward and in our view he had some awareness of the scale of this operation. His role was therefore a significant one. However, there was no evidence that he personally had helped to load the cocaine into this lorry or knew precisely how extensive the operation was. With plea, **10 years** not 14.

Offences against the Person Act 1861 s 18

Baseball bat, With a

R v Smith 2015 EWCA Crim 1482 D was convicted of section 18. He pleaded to two burglaries and section 20 (an alternative to the section 18 count). D was separated from his wife, W, who began a relationship with V. Whilst V and W were away on holiday, D sent texts to W with naked pictures of herself, taken when the two were together. On return V and W went to V's house. At about 3 am, D broke in with a baseball bat. Fearing violence, W threw herself on V. D told her to get out of the way and hit V with the bat causing two fractures to his arm and lacerations to his forehead, requiring nine stitches. W rang the police and the police could hear her screaming. V punched D but V felt disoriented and dazed and lay on the bed. D then swung the bat at V with such force the bat broke in two. This caused V lacerations behind his ear which required two stitches. V carried on resisting and D left. D was of good character. The Judge considered D treated the break-up of the marriage as an affront and he suffered from high self-regard. The Judge found there was some remorse and categorised the case as Category 1. Held. The differences between Category 1 and 2 are stark as far as the penalty is concerned. The injuries were significant but they could be worse. para 4 In the harm category in the guidelines it says, 'serious injury must normally be present'. 'Normally' is an indication that an offence may abnormally be a Category 1 offence even where the harm is less than serious. The only reason the Judge gave for finding 'higher harm' was that the blow required hospital treatment, stitching and had a considerable lasting effect. The question is whether 'the injury was serious in the context of the offence'. That means the violence must go beyond what is inherent or par [for the course] in a standard section 18 case. It must be significantly above the serious level of harm which is normal for section 18. Here there was one blow amounting to section 18. It was sufficient to break the bat. It was a serious attack. Given the great disparity between Categories 1 and 2, it was nasty but it was not Category 1. However the previous blow makes it more serious and closer to Category 1. Because V was dazed, he was vulnerable. The two blows, one of which was not a section 18 blow, would not normally amount to a 'sustained or repeated assault'. This case was either at the top end of Category 2 or on the borderline between Categories 1 and 2, so we start at 9 years. The aggravating factors were the location, manner of entry, it was at night time, the continuing effects on the victim, W's presence and the [vulnerability] of V prone on the bed. The mitigating factors were the good character, the limited number of blows, the injuries were not that bad, that it was an isolated incident out of character, the lack of premeditation and the part pleas. With all these factors **9 years** not 12.

Sexual offences:Images

Extended sentence

R v D 2015 EWCA Crim 1456 D pleaded (full credit) to five counts of making indecent photographs and six counts of possession of indecent photographs. Police on a SOPO check visited D at home. He tried to put them off saying he was expecting guests. In his bedroom they found various USB sticks in a vase and one in his hand. About 44,000 indecent images were found. They were categorised as follows:

	Category A	Category B	Category C
Possession offences	24	66	21,864
Moving images	22	2	6
Making images	29	66	22,633
Moving images	29	2	14

The age range of the children was from 4 to 13. In interview, D explained he downloaded the images straight onto a USB stick. In 2010, D pleaded to 18 offences of making or possessing indecent photographs. He was given 28 months and a SOPO. He had breached one of the computer conditions but no indecent images were found. The pre-sentence report said D had a history of mental health difficulties and there was a high risk of serious harm to children. There was however a clear motivation to address his behaviour. A psychiatrist said D had an adjustment disorder. The Judge put the case in Category A and passed an extended sentence (4 years custody and 2 years extended licence). Held. For an extended sentence there must be a close link between the type of offending and the serious harm that would be occasioned. Here there was no escalation in the seriousness of the offences committed. The level of image was essentially the same as the previous time. There was no suggestion D actually took or distributed the photographs. There was no evidence there was a potential for contact offences. We quash the extended sentence. **18 months.**