Sentencing Alert No 123

10 February 2016

Burglary

Dwellings, Occupied

R v Mendoza 2015 EWCA Crim 1834 D pleaded to three domestic burglaries. In the first, at 8.45 pm, D entered by smashing patio doors. Property worth £840 was stolen and there was £1,600 worth of damage. About four weeks later, at about 5 pm, D smashed a rear door and fled when the alarm went off. The damage was £250. Five days later, while the occupiers were out, D smashed a window of a house with a brick. He stole property from all over the house including a large amount of jewellery, some of which was of enormous sentimental value. A laptop computer was also stolen. The total stolen was worth £18,361. D was aged 38, an illegal over-stayer with no convictions. The Judge found D had targeted particular areas where he thought there would be rich pickings. Held. The Judge was right to make it a Category 1 offence because of the very significant loss and the ransacking. D had gone equipped for burglary and used a vehicle. D spoke no English and was separated from his wife and children, who were sent back to Colombia. Consecutive sentences were justified to reflect the distinct criminality. Looking at the total we start at 4½ years, not 6, so with plea, **3 years** not 4.

Confiscation

Tainted gifts

R v Usoro 2015 EWCA Crim 1958 D pleaded to conspiracy to defraud. It was an advance fee fraud. The benefit was agreed at £41,000. The Judge found that the money D had given due to a court order to support his children was a tainted gift. The defence appealed, saying that D was under a legal and moral duty to pay the money. The prosecution said that if the payments were not regarded as a tainted gift, people could give their offspring the proceeds of crime without fear of a confiscation order. Held. It is clear that the policy of Proceeds of Crime Act 2002 in relation to gifts is to prevent criminals from dissipating the proceeds of crime by distributing them and then resisting confiscation proceedings on the basis that gifts had been made. para 18 In other confiscation contexts the prosecution authorities have accepted the principle that bringing up children and looking after the family home should be considered adequate consideration to displace the suggestion that the application of the proceeds of crime were gift [1] and caught by the provisions of the relevant confiscation legislation, *Gibson v Revenue and Customs Prosecution Office* 2008 EWCA Civ 645. The Judge fell into error. He heard no evidence as to the value of maintaining the children and whether that value was significantly less than the amount of the payments which was crucial to his finding that section 78(1) applied. [2] He did not hear any evidence because the issue was not contested. para 21 Moreover, his focus on whether the payments were tainted gifts deflected his consideration from the prior question of whether they were gifts. It is only after one concludes that the payment has been made for a consideration of value significantly less than the amounts of the payment that section 78(1) requires the payments to be treated as a gift. The payments thus wholly or partly discharge his legal duty to or in respect of his children. We adjust the confiscation order accordingly.

[1] The Judge clearly didn't mean to say this as an application cannot be a gift, but precisely what he did mean to say is not clear.

[2] This again is not clear.

Curfew and tags appeals

R v Marshall and Others 2015 EWCA Crim 1999 Various defendants asked for their tag time to be credited. Held. para 12 The advice in *R v Thorsby and Others* 2015 could not be clearer, yet still applications are being lodged without agreement from the Crown on the number of days spent on qualifying curfew, and with no accompanying statement from the applicant's solicitor setting out why an extension of time should be granted. They are being lodged late, so that they demand an urgent response from the Court of Appeal Office.

Further, some local Crown Prosecution Units are not responding to requests from the defence solicitors for an agreement. As a result, the Court of Appeal Office is spending a disproportionate amount of time and resources on correcting errors. para 13 In future, if the requirements in *R v Thorsby and Others* 2015 have not been complied with, the Criminal Appeal Office will no longer progress applications. The Registrar will notify the applicant's solicitor of the duty to comply with *R v Thorsby and Others* 2015 before anything can happen. The CPS Appeals Unit has undertaken to assess the number of days. If the calculations are agreed, the single judge will be able to give leave and send the matter to the full court for a formal declaration without any need for representation. If the calculations are not agreed, the single judge may prefer simply to refer the matter to the full court for resolution, without giving leave or making a representation order. If the Registrar is satisfied that the Crown Court has used the appropriate words, allowing them to amend the days administratively, he will notify the parties that the Crown Court retains jurisdiction and that initially he intends to treat the application as ineffective. The applicant can then ask the Crown Court to re-list the matter and resolve the issue. para 14 Practitioners must appreciate that there may come a time when, in the case of serious misconduct, the court will be forced to report any offender to their professional body for a failure to comply with their professional obligations and/or consider making a costs order. The liberty of the subject is at stake and this issue is not to be taken lightly.

Forgery

R v Cano-Uribe and Others 2015 EWCA Crim 1824 F, C, L, D, H, W and K were sentenced for various forgery offences. The group worked for a company which was contracted by the Department of Work and Pensions (DWP) to provide courses to help people obtain work. The firm was paid for 588 claims and at least 345 had substantial irregularities. 167 files were forged by ten individuals and the loss was £288,595. An advisor received £50 for each person who found work. The Judge found it was not a victimless crime and the use of targets and bonuses had caused a high degree of pressure and stress, but this did not justify the wholesale fabrication of documents. It was agreed that the offences did not fit neatly into any of the guidelines. The Judge took a benchmark figure of 5 years from which she worked out the sentences. Held. [That was wrong] because there was no overarching allegation. There was an element of abuse of trust and public money was involved. F pleaded to nine specimen counts. The loss involved for her was £44,395 and her gain was only £1,150. She was aged 32, with only motoring previous convictions. We start at 18 months so with plea, **12 months** not 22. C was convicted of conspiracy to make a false instrument and forgery. She was involved in the overall control of the contract with staff. There was no financial motive for her offending. C was aged 39 with no convictions. She had two young children. We start at **9 months** and pass that sentence not 18 months. L pleaded to 13 counts. He was involved in 29 forged files which was 54% of the total. The loss to DWP was £51,503 and L made £1,450. He had no relevant convictions and gave evidence for the prosecution. The Judge started at 40 months. **12 months** not 15. D pleaded to seven counts of forgery. She was involved in 16 transactions and the loss to DWP was £6,216. Her gain was £350. We start at 15 months, so with the plea **10 months** not 15. H and W were charged with conspiracy to make a false instrument with C. H was a team leader and W was a whistle-blower. They made no money from the offence. The activity was to deceive the auditor. H was W's boss. H was aged 31 with no convictions. W was aged 27. K was convicted of forgery of one file. He was uneasy about taking part. **6 months suspended** not 12 suspended for H, W and K.

Murder

Knives

R v Jefferson 2015 EWCA Crim 1953 D was convicted of murder. He went to a party and was drunk and in a bad temper. He left the party and became involved in an argument with two youths in the street. D punched one of them, a girl, and knocked her out. People shouted abuse at D and he shouted back. D's co-accused, [3] N, was dancing in the street and waving a knife about which he had taken from the kitchen where the party was held. V had also been drinking and was in a foul mood. V came 'after N' and shouted, "Well come on then, you've got the knife". The two chased each other around. N dropped the knife and the confrontation appeared to have ended. Others told V to leave. D then approached V and started to usher him away. D had a concealed knife and as the two walked away, D thrust the knife into the back of V's thigh. The knife had originally come from kitchen drawer where the party was being held, but there was a conflict

of evidence as to whether it had been taken by D or he had found it in the street. As V walked away, D kept thrusting the knife firmly into V's thigh. The wound had two tracks, one 7 cm long and one penetrating 18 cm though skin, muscle and tissue. That wound completely severed the femoral vein and partly severed the femoral artery. V collapsed. An ambulance attended but V died. D was aged 22 and had 33 previous convictions. When aged 15 he had been convicted of affray and possessing a bladed article, (Referral Order). His only custodial sentence was 12 weeks for driving offences in 2012. The Judge could not completely rule out the possibility that the knife was not taken to the scene. He also found a) the stabbing was not spontaneous and there was an element of guile, b) the previous convictions were insignificant, c) D had not started or provoked the disturbance, d) there was no intent to kill, e) his youth was a factor, and f) none of these factors carry great weight. The Judge started at 15 years. Held. The knife was used in the course of a serious incident of disorder. The Judge was entitled to take into account the use of the knife, the thrusting blows, the fact that the situation had calmed down and that he was walking away. The most important factor was the lack of an intent to kill. Taking that and D's youth into account, **18 years** minimum term, not 20.

[3] News reports say he was convicted of affray and possession of offensive weapons.