

Banks on Sentence

Sentencing Alert No 94

12 December 2014

Affray

Domestic premises, On

R v Gilbert 2014 EWCA Crim 1533 D pleaded (full credit) to common assault and affray which arose from the same occasion. The police were called to a domestic incident at D's flat. V saw that D's partner's car was damaged and went and told her. D then appeared and remonstrated with V at the door saying that it wasn't any of his business. D then grabbed V's jacket and head-butted him in the forehead (the common assault). D went back into the flat and produced a meat cleaver. V, frightened, ran back to his flat with D following him for a short distance. A *Newton* hearing was due to be held, but D's partner didn't turn up. D had a poor record, having already served custody for violence which included witness or juror intimidation. Held. **15 months**, not 21 for affray. **3 months concurrent** for assault unaltered.

Appeals

Disparity

R v Saliuka 2014 EWCA Crim 1907 D was convicted of possessing class A and B drugs with intent to supply and other charges. Following a *Goodyear* indication, D's co-defendant H, on a plea, received "an incredibly lenient" 3 years 7 months. D received 7 years. On appeal the defence relied on disparity. Held. The logical extension to the appellant's argument is that if an unduly lenient sentence was passed upon one [defendant], that requires the court to pass an unduly lenient sentence upon another offender. Right-thinking members of the public would then rightly think that something had gone wrong with the administration of justice. One sentencing error is not cured by making another. Disparity is an argument often deployed in this court but it seldom succeeds. Undue leniency shown to H is no reason for reducing a perfectly proper and otherwise entirely appropriate sentence passed upon D.

Blackmail

Bills, To enforce unreasonable

R v Swift 2014 EWCA Crim 2065 D pleaded (25% credit) to blackmail. D made numerous persistent demands of his parents for money, despite the fact that they were unable to support him. They handed D £6,820 over two years, typically giving him money three times a week. D had repaid only £75. D sent his mother, V, a text message purporting to be from a step-brother of his partner. The message stated that D's friends had stolen £100 from D's partner and that, if it was not found, D would be in trouble. This message was resent twice and D then alleged that his partner's brother would not leave D's house until he was given the £100. Further messages were sent, including that D was going to be sectioned and needed £1,000 a week for his rehabilitation. The message implied that D was in danger and had been kidnapped over a £125 debt. This same message was sent throughout the evening and into the next day with V and D's father being utterly terrified and reporting the matter to the police. Following a large police investigation, D was found safe and well and arrested. He denied sending the text messages in interview. D was aged 38 on appeal with good character. He said the £125 would have covered utility bills and rent due and that he would no longer ask for money. Held. Blackmail is a very nasty offence and a serious view will always be taken. Starting at 1 year not 2, **9 months**, not 18

Offences Against the Person Act 1861 s 18

Bullying/Showing off

R v King 2014 EWCA Crim 2030 D pleaded to section 18 assault (20% credit). V was walking home with a friend past D in a group of around nine men. V knew some of them, including D. The group were drinking and smoking cannabis. Fighting then broke out. D put V in a headlock and, pulling a ring from V's finger, told him to empty his pockets. D then head-butted V in the face. The group of men then tried to rob V and his friend, but both fled. V ran to a house, asking that they let him in, but the occupants were too scared to do so. As D caught up with V, V shouted in Arabic that he was disabled and had a brain injury. V had previously suffered a compressed skull and a brain injury in 2012 which was well-known to locals, including D. Two other members of the group caught up with V and one of them punched him and broke his jaw, nearly knocking him over in the process. The other kicked V in the head and foot. All three then repeatedly punched V in the head, jaw and back, notwithstanding that someone had tried to intervene. V's pockets were also rifled through, he suffered facial bruising and his jaw was broken in two places, needing surgery. Upon arrest, D smelt strongly of alcohol and had V's ring and mobile on him. D was aged 26 on appeal and had nine previous convictions. He was on a suspended sentence following a racist ABH in 2013 and had committed five assaults from 2007-2012. The PSR noted that D was impulsive, unpredictable and had no control over his violence. He also posed an imminent risk to the public but did not presently, although he could become dangerous. The Judge accepted this assessment. Held. This was a Category 1 offence but the starting point should have been 12 to 12 ½ years not 14, so **9 years 10 months**, not 11 years 2 months and the 2 months of the activated suspended sentence consecutive.

Note: What the motive was, is far from clear. Ed.

Perverting the course of justice

Witness interference

R v Banbury-Taylor 2014 EWCA Crim 1927 D was convicted of witness intimidation and pleaded to common assault and ABH. D indecently exposed himself outside a school (which he later pleaded to). Six months later, D saw the witness, V1, who had reported him and knocked on her door. V1 and her family answered the door and they then tried persuading D who was drunk to go away. D refused and demanded to know why V1 had called the police and for her to apologise for doing so. V1's daughter, V2, filmed the incident but D pushed her phone from her hand. D then punched V2 repeatedly and dragged her to the ground, causing scratches and bruising. In interview, D admitted being drunk, but denied being aggressive. His alleged intention had been to apologise. D was aged 31 at appeal and had four previous convictions, all non-violent and non-custodial. He was remorseful. Held. The assault was a Category 1 offence. **3 years** for the witness intimidation, but the assaults to be concurrent, making 3 years in total, not 5.

Rape

Relationship rape *Post-guideline case*

Att-Gen's Ref No 64 of 2014 2014 EWCA Crim 2050 D was convicted of assault by penetration. V was D's partner of 12 years and they had two children. However the relationship had been on and off and blighted by domestic violence. V had reported the violence on four occasions. D and V went out for the night, having engaged in consensual sex. They consumed drugs and alcohol. On their return to a hotel, V angered D by blowing away some cocaine powder. As V climbed into bed, D pushed her to the floor and then tried to pull down her nightwear. V asked him to stop and D reacted by trying to force two fingers into her vagina. V called D "evil" to which he replied, "Evil. I'll show you fucking evil." D then proceeded to cover V's face and repeatedly forced his hand, in a fist, into her vagina with such force that it moved her entire body. V was in immediate pain and asked D to stop. She was so distressed that people next door heard and raised their concerns. D's violence caused a 10-12 cm tear in V's vagina which bled considerably. Two hours later, D began to panic and, upset, purportedly threatened to kill himself. D phoned his mother who later called the emergency services and he also phoned for an ambulance five times. When the ambulance arrived an hour later, V had breathing problems and had lost two litres of blood. She underwent surgery, receiving the equivalent of ten stitches in one continuous stitch. She had a blood transfusion and was discharged the next day. She made a full recovery. D claimed V's injuries were suffered following "dirty sex" and he had stopped once V said it hurt and he realised she was bleeding. He made no comment in interview. Prior to trial, V changed her statement, saying it must have been accidental due to their intoxication. Her evidence at trial was that she had no recollection of the incident at all. D was aged 31 on appeal and had 14 convictions, including eight assaults. In 2012, he punched V leaving her needing eight stitches, (ABH and 12 months' imprisonment). His last assault conviction was in 2013. Nonetheless, V said she did not wish D to go to prison and he was a good father. The Judge did not refer to the domestic violence guidelines but, placing the sexual assault into Category 2, noted that there was some abuse of trust as D had taken advantage of V's state. Held. In addition to the sexual offences guidelines, it is necessary to refer to the domestic violence guidelines. Those guideline's principles and the victim's views are relevant generally, as was made clear in *Att-Gen's Ref No 38 of 2013* 2013 EWCA Crim 1450, para 86 (see 328.68). In relation to domestic violence, particularly where there is a history of such conduct, such that the approach of a victim to an offender may well be a consequence of what has happened in the past, that approach is all the more important. In this case, it is beyond argument that this sentence fell well outside the bracket but the Judge effectively ignored not only the guidelines but also the overarching principles on domestic violence. We start at 8 years, so **7 years**, not 3 ½.

Sex offences: Historic

Indecent assault* *Post-guideline cases

Att-Gen's Ref No 53 of 2014 2014 EWCA Crim 1929 D was convicted of two indecent assaults and indecency with a child. The offences occurred in 1991 against a backdrop of persistent regular violence towards both children of D's then-partner. V was aged seven, and her brother, aged ten, who both saw D as a step-father figure. D confronted V when she was on the toilet. D slapped V's head and told her to kneel and close her eyes. He then placed his penis in her mouth, instructing her to suck it. When she did not, he hit her again. A few minutes later, V's mother had left and D told V to bend over. He then touched V's stomach, waist and vagina, going on to insert his fingers. He also struck her bottom and threatened to kill V if she told anyone. Sometime later in 1991, in similar circumstances to the first assault, D told V to kneel and kiss his penis. She refused and was hit. The assault ended when V's mother called from downstairs. V complained to police in 1999, but withdrew her evidence when D resumed the relationship with V's mother. The offences considerably affected V and she had left school and suffered panic attacks continuing into adulthood. D's denial persisted throughout. D was now aged 48 and had several convictions. He pleaded in 1991 to ABH against V and assault against her brother but had only had a caution since. D had a back problem, bipolar disorder, depression and anxiety. D's references were positive, especially of his behaviour since 1991. The Judge, although aware of *H 2011* EWCA Crim 2753, 2012 2 Cr App R (S) 21, was reluctant to transpose these offences into their modern day equivalents. Held. V was cowed by a background of bullying and violence and today [the penetration] would be rape. Offences under the Sexual Offences Act 2003 s 7 and 9 contain factors in the guideline capable of encompassing the sort of conduct in this case. But the court should also have regard to factors which are in play when more serious offences of rape and assault by penetration on a child under 13 are considered. The approach should be to look at relevant guidelines in the round and make adjustments for the change in sentencing levels. **7 years** in all, not 4.

Threats to kill

Relationship cases

R v Humphries 2014 EWCA Crim 2033 D was convicted of threats to kill at the Magistrates' Court. He later pleaded to another threats to kill count. D suffered from depression and was visited by mental health services. For the first offence, D told them he had thoughts about killing two people. One of them, V1, had abused him during childhood and, since the CPS had decided not to prosecute, he was going to kill him. D had already researched and obtained photos of V1. D said he would kill the other man "as a trial run". He was visited again, the next day, and spoke again of killing another two people, one of whom was his neighbour, V2, and the other, his drug dealer. On both visits, D appeared calm and rational and in interview D denied intending to harm V2. Following his first conviction, D was unrepresented and said that upon leaving court he would kill his former abuser and did not care for the consequences. D was arrested and told police that it was not a threat to kill, but a promise to do so and pleaded guilty the next day. D was aged 52 on appeal with no relevant convictions and with references. A psychiatrist reported that D's depression was a major factor in causing him to act as he did and that he did not pose a high risk of violence to others. However, increasing alcohol and drug abuse as well as a preoccupation with his abuse would increase D's risk. D's mental state had improved and a mental health disposal was unneeded. The PSR said D's threat to kill V2 was a cry for help but he still intended to kill V1 and was not remorseful. The Judge concluded that D was dangerous. Held. This is an anxious case and the Judge faced a difficult task but his conclusions were justified. **10 years'** extended sentence (**5 years' custody** and 5 years' extended licence) upheld.

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