71.20 *Warn counsel, Judge must*

R v G 2014 EWCA Crim 1302 The Judge failed to warn counsel he was about to pass an extended sentence. Held. There was a clear obligation on Judges to give an indication where there is consideration of dangerousness so that both counsel could address that matter. Here the lack of warning was a failure on the Judge. Sentence reconsidered and varied.

71.48 *Downloading indecent images from the internet*

R v Cheshire 2014 EWCA Crim 627, 2 Cr App R (S) 53 (p 430) D pleaded early to 'child pornography offences'. Police visited his home and he tried to conceal a stylus pen. It was seen and he claimed it was for a sat nav device. He showed the officers such a device and they left. They later discovered that the stylus pen could be used on devices such as Internet smartphones and iPads. They returned to D's home and D denied having any device that could access the Internet. Police found a hidden pouch on D containing a mobile phone capable of accessing the Internet. The mobile had about 1,700 child images in it which were Level 1-5. On a memory card and the memory within the phone there were 55 Level 4 images and at least three Level 5 images including a 9-10-year old girl having oral sex with a dog. D was now aged 63. In 1978, he received 9 months for indecent assault on a man aged over 16. In 1995, he received 3 months for distributing indecent images of children. In 1998, he was convicted of inciting a child to commit gross indecency by leaving notes and money in a park. In 1999, a Sex Offender Order was made following his approach to two children under the age of 10. By 2000, there were eight breaches of sex offender order. Also in 2000, there were three offences involving him being in prohibited areas, four other breaches and five sexual image offences. D received 7 years. In 2006, D pleaded to further child pornography offences and was sentenced to IPP (subsequently quashed by the Court of Appeal who substituted a sentence of two years). In 2011, D was sentenced for further indecent images offences. The Judge felt unable to pass an extended sentence and sentenced D to 3 years and a SOPO. D breached that order by committing the instant offences. In 2013, for the instant offences the Judge gave him an extended sentence (4 years' custody and a 3-year extended licence). The PSR had requested such a sentence saying, 'should the opportunity arise, D would commit contact sexual offences against children.' D was aged 63 at appeal. Held. A finding of dangerousness may be appropriate if the significant risk of serious harm can properly be inferred from, for example, a greater frequency of offending, a risk of contact offending or an escalation in the gravity of the relevant images. Since 2009, there had been a significant escalation in the risk posed by D, in particular, the sheer persistence and scale of offending since 2009, the extreme lengths to which D was prepared to go to conceal his offending (including the concealed pouch) and D's failure to engage with processes designed to help him. There was an escalation in offending and there was a clear risk that D could revert to contact offences of the type he committed previously. The Judge was therefore entitled to find that D was dangerous and impose an extended sentence (4 years' custody and a 3-year extended licence). Appeal dismissed.

Note: The problem is that the decision was formulated by the author of the PSR who does not give any convincing reasons why there would be an escalation to contact offences involving serious harm and was not available for cross-examination. The reason given by the sentencing Judge and the Court of Appeal appears to be the frequency of the offending and the image seriousness is escalating. Why that would establish an escalation is not revealed. Normally one looks to someone's past behaviour to determine future behaviour. That past from when he was 18, over 45 years, indicates D does not progress to child contact offences. Now D was aged 63, it would be hoped his interest would wane not escalate. Although the result might be attractive the reasons don't point to the substantial risk of serious harm. Ed.

See also: *R v Joy* 2007 EWCA Crim 3281 (It was not reasonable to draw such an inference. IPP was not appropriate)

71.62 *Bad behaviour with no conviction for it Using reports*

R v LE 2014 EWCA Crim 1939 D pleaded to having sex with an adult relative (×7) and perverting the course of justice and was given an extended sentence. The PSR said D posed a risk to children and vulnerable adults. It was based, at least partially, on V's reports of abuse by the complainant which were the basis of the trial and when she was much younger but the earlier abuse was not accepted. The report also relied on reports of abuse from former partners of D which were again denied. Held. It would not be right for this Court to take account of an assessment which was based, in part at least, on such disputed factors that had not been either admitted or been the subject of convictions. Pre-appeal report set aside. However without that material, we conclude the 'dangerousness' test was made out.

71.83 *Consecutive extended sentences*

R v Francis 2014 EWCA Crim 631 On 5 December 2012, D was convicted of section 18 and a firearm offence. He was sentenced to an extended sentence (13 years' custody and a 5-year extended licence). About 6 months later, D was convicted of arson with intent and sentenced to an extended sentence (11 years' custody and a 5-year extended licence). The Judge made the custodial sentences consecutive and the licence periods concurrent. This made the custodial period 24 years and the total period 29 years. Held. Consecutive extended sentences are not unlawful, but where possible judges should avoid them by structuring their sentences in a different way. It was not lawful for the Judge to make the sentences partly consecutive and partly concurrent. The total custodial period was too long so 21 years not 24. The licence extensions periods should be 3 years and 2 years consecutive which would be the sentence the Judge intended.

R v S 2014 EWCA Crim 968 D pleaded and was convicted of various sex abuse offences against four members of extended family. For V1 the abuse started when she was aged 5. For three offences of indecency with a child, D was sentenced to 20 months on each, consecutive, making 5 years. (Note: The maximum would appear to be 2 years on each[1]. Ed.) For an indecent assault on V1, D received 3 years consecutive. (Note: The maximum would appear to be 10 years.[2] Ed.) For sexual assault on V2 which carried a maximum of 14 years, D received 3 years on each of the two counts, concurrent with one another. For V3 the abuse started when she was aged 15. The maximum again was 14 years and D received 2 years on each concurrent. V4 was aged between 25 and 32 when the abuse occurred. The maximum was 2 years and D received 1 year concurrent on each and to the other offences. This sentence was not part of the extended sentence. The Judge passed a total of 13 years (5 + 3 + 3 + 2 all consecutive) and said that was an extended sentence of 18 years (13 years' custody and a 5-year extended licence). Held. The sentence was fully justified. We adopt the headnote in the *R v Pinnell* 2010 (for the case see above), where it was explained that short sentences can be aggravated by associated offence to create a sentence that satisfies the 4-year requirement. Whilst consecutive sentences were appropriate because the offences were against different victims, it would have been proper to pass a concurrent sentence of 4+ years so an extended sentence could be passed. The sentences for V1 (8 years in all) remained the same. The sentences for V2 (3 years × 2) and V3 (2 years) would be increased to 5 years. The overall sentence was therefore be the same.

1 This is because V1 was said to be aged 5 in 1985. Therefore the offence must have been committed before 1997, when the penalty was increased to 10 years. Ed.

2 If V1 was aged 5 in 1985 and the offences were committed when she was aged 8-10, the offence must have been committed after 1985, when the penalty was increased. Ed.

Note: The problem with this is that the sentences for three 20-month sentences for the V1 offences the sentences are all under the 4-year minimum period and those sentences have a 2-year maximum which is below the 4-year minimum. The total of those three sentences is 5 years which is a constituent part of the extended sentence. This would be unlawful because inferentially Criminal Justice Act 2003 s 226A(5) means that an extended sentence must relate to a particular offence and so an series of consecutive extended sentences must each satisfy the 4+-year requirement. This area of law lends itself to argument. The low maximum sentences for historic offences, the need for a guilty plea discount, the desire for adequate sentences and the needlessly complex legislation provides an explosive mix. Ed.

See also: *R v Watkins and P* 2014 EWCA Crim 1677 (D pleaded to attempted oral and anal rape, two conspiracies to rape and 19 other sex assault and image offences. The Judge said he passed a 35-year extended sentence made up of two 15 year (concurrent) and two 14 year (concurrent) but consecutive to each other and a 6 year extended licence. Held. The Judge must have been well aware that he could not pass extended sentences which had consecutive custodial terms and concurrent extended licence periods. We determine that only the 14-year sentences were extended sentences with the 6 year extended licence.)

Note: There was no issue that D satisfied the dangerousness criteria. The Judge would clearly have wanted the more serious offending (the two offences with a 15-year custodial term) to be the subject of an extended sentence rather than the other less serious offences (the offences with the 14-year custodial term). The only proper inference was that he wanted all the sentences to be extended. That is confirmed by the fact the Judge told the defendant he would serve two-thirds of the 29-year term. He clearly wanted a 6-year extended licence period but forgot to divide the period by two giving all the sentences a 3-year extended licence. That would mean when the pairs of sentences were made consecutive, there was a 6-year extended licence period. Ed.

71.85a ***Extended sentences and defendant already on a licence***

R v Ceolin 2014 EWCA Crim 526 D was given an extended sentence when he was already subject to a licence from an earlier IPP sentence. Held. That was not wrong in principle. The criteria for an extended sentence was well satisfied. The sentence can be justified even though it achieves no actual benefit in terms of public protection, *R v Smith and Others* 2011 EWCA Crim 1772, 2012 1 Cr App R (S) 82 (p 468). It can be justified by the need to emphasise to the Parole Board both the risk that D still presents and that he offended while subject to his licence.

71.86 ***Extended sentences and determinate sentences***

R v Prior 2014 EWCA Crim 1290 It is generally undesirable to pass a determinate sentence consecutive…to an extended sentence. The best way [to sentence] is to treat the extended sentence as a lead sentence and expressly increase the custodial term on the other offending. The departure from best practice…did not, however, in this instance render these sentences unlawful or provide a ground of appeal.