Criminal Law Review

2015

Case Comment

R. v D

Court of Appeal (Criminal Division): President of the Queen's Bench Divsion (Sir Brian Leveson), Green and Goss JJ: October 30, 2014; [2014] EWCA Crim 2340

Lyndon Harris

Subject: Sentencing. **Other related subjects:** Criminal law

Keywords: Child sex offences; Extended sentences; Time limits; Unlawful sentences; Variation of sentence

Legislation: Powers of Criminal Courts (Sentencing) Act 2000 (c.6)

Case: R. v D [2014] EWCA Crim 2340; [2015] 1 Cr. App. R. (S.) 23 (CA (Crim Div))

***Crim. L.R. 227** The appellant, D, had been convicted of a number of sexual offences including attempted rape, sexual activity with a child and sexual assault. When sentencing him, the judge said he intended to impose an extended sentence of 19 years, comprising a custodial term of 14 years and a five-year extended licence. However, when articulating the sentence, the judge stated the custodial sentences to be imposed on each count, totalling 14 years, and then stated that there would be a five-year extension period, but in doing so failed to associate the extension period with a sentence on any particular count.

The Judge subsequently realised that the sentence, as articulated, failed to comply with the requirements of the legislation, however the 56-day period during which the judge could have varied the sentence under the Powers of Criminal Court (Sentencing) Act 2000 had expired. The judge considered that he was able to make an "adjustment" to what was an inchoate order, concluding that he had jurisdiction to adjust the order that he had made if he could do so equitably and in a manner which did not cause an adverse consequence to a third party, relying on the decisions in *Michael [1975] 3 W.L.R. 731* and *Saville [1981] Q.B. 12; (1980) 2 Cr. App. R. (S.) 26*.

D appealed against sentence, submitting, inter alia, that the judge had no power to vary the sentence as he did outside of the 56-day period permitted by the 2000 Act.

Held, that the judge had no power to act as he did. Subsequent to the decisions in *Michael* and *Saville*, in *Menocal [1980] A.C. 598; (1979) 69 Cr. App. R. 148*, the House of Lords made clear that any variation of substance made after the expiration of the time limit of (then 56) days would be of no effect.

In addition it was clear from a study of the authorities that any variation should be made in the presence of the defendant unless either expressly or by application his right to attend had been waived. In the present case, although the judge had apparently communicated by email with the defence representatives, he did not ***Crim. L.R. 228** communicate with the Crown and he did not order the case to come back into court; there was a failure to comply with those requirements.

In the circumstances the sentences would be adjusted to accord with the judge's intention and an extended sentence of 19 years (14 years' imprisonment with a five-year licence) would be substituted.

Cases considered: Menocal [1980] A.C. 598; (1979) 69 Cr. App. R. 148; *Michael [1975] 3 W.L.R. 731*; *Pinnell [2010] EWCA Crim 2848; [2012] 1 W.L.R. 17; [2011] 2 Cr. App. R. (S.) 30 (p.168)*; *Saville [1981] Q.B. 12; (1980) 2 Cr. App. R. (S.) 26*.

T. Dyke for the appellant.

A. Hossain for the Crown.

Commentary

This decision, though short, has quietly impacted upon the power to alter a sentence outside of the period permitted by statute.

One would be forgiven for being taken in by the tone (and length) of the judgment pertaining to the issue of the variation; the court appears simply to apply past authority and in so doing regard its decision as unremarkable. However, the effect of the decision is quite to the contrary.

In *Saville [1981] Q.B. 12; (1980) 2 Cr. App. R. (S.) 26*, the court relied upon "the total unimportance of the alteration performed" by the judge to distinguish that case from the circumstances in *Menocal [1980] A.C. 598; (1979) 69 Cr. App. R. 148*. From the line of authority it can therefore be seen that the legality of such a variation depends on its nature; an "unimportant" variation is permissible, whereas a variation of substance is not. It therefore fell to the court in the instant case to consider whether or not the variation was one of import or substance.

Even a cursory examination of the sentencing judge’s remarks reveals that the sentence was an extended sentence of 19 years (such is obvious from the explanation as to the release provisions) and so the conclusion that the "adjustment" to the sentence—in effect imposing a global sentence upon the appellant and correcting the error with the formation of the sentences—was of no practical effect. It simply gave effect to the intention of the judge—an intention which can be taken to have been understood by the appellant. It certainly cannot be said that the judge’s alteration of the sentence was to the appellant’s detriment. However, the court considered that the judge had no power to act as he did, the clear implication being that the alteration was one of substance. It is unclear the basis on which the court so found, as the judgment contains no discussion as to the effect of the alteration.

The effect is, quite unnecessarily, to significantly narrow the scope of this power.

Report and commentary by Lyndon Harris, Barrister

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