Criminal Law Update

6th December 2005

There have been a number of important developments since the last update in July this year. References to Criminal Law Week are abbreviated to CLW with the year, issue and paragraph number given.

Hearsay

Although we still await the first case from the Court of Appeal on the hearsay provisions of the CJA 2003 the Court has at least confirmed in **R.v. H (Evidence: Admissibility)** ***The Times,*** **August 22, 2005 [2005] EWCA Crim 2083** that the new provisions do apply to all cases such as trials or Newton hearings begun on or after 4th April 2004. This was an entirely predictable outcome by analogy with R.v. Bradley [2005] 1 Cr. App.R. 397 relating to the bad character provisions since the hearsay provisions are to be found in the same part of the CJA namely Part 11.

ASBOs

Those of you who have been faced at court on a sentencing hearing with an application for a "bolt-on" ASBO for which no notice has been given to the defence will be glad to see that the CA has disapproved this practice as well as suggesting that the CA are at last becoming a little less enthusiastic about the rush to implement such orders. In **R.v. Kirby [2005] Crim. L.R. 732, [2005] EWCA Crim 1228 (CLW 05/33/42)** the CA held that to make an ASBO where the main purpose was to provide for greater penalties in the event of further offending was not a proper exercise of the power and that such orders should not normally be made as part of the sentencing exercise. This was especially the case where the offending behaviour did not involve intimidation or amount to harassment or distress. Where it is appropriate to invite the court to make such an order proper advance notice should be given so that suitable consideration may be given to the propriety of the order. In future therefore we would appear to be fully entitled to invite the court to either simply refuse the application or at least adjourn the application rather than try to deal with it on a sentencing hearing.

Kirby was followed in **R.v. Williams, [2005] Crim. L.R. 872 [2005] EWCA Crim 1796,** ***The Times*****, July 15, 2005 (CLW 05/27/9)** where the CA said that it was wrong to make such an order in the case of a person who habitually commits serious driving offences in such terms that the commission of a further offence would automatically breach the order where the objective was to provide for considerably higher sentences than the underlying offence would have attracted. R.v Kirby was also followed in **R.v. Lawson [2005] EWCA Crim 1840 [2005] 8 Archbold News 4 CA (CLW 05/36/23)** where the Court said that in the absence of exceptional circumstances it was an inappropriate use of the court's power to make an ASBO simply to give the court higher sentencing powers in the event of further similar offending particularly where no specific intimidation, harassment or distress was involved. See also **R.v. Morrison [2005] EWCA Crim 2237(CLW 05/38/06) and R.v. Boness; R.v. Bebbington and others [2005] EWCA Crim 2395,** ***The Times,*** **October 24,2005 (CLW 05/39/18)** where the CA again adopted the reasoning in Kirby as to the propriety of ASBOs and added that the aim of an ASBO is to prevent anti-social behaviour which can be curbed before it happens rather than as a way of adding to the penalties already available to the courts by way of punishment.

Unfortunately the Court of Appeal has not been entirely consistent in its approach to ASBOs because in the case of **R.v. McGrath [2005] 2 Cr. App. R. (S.) 525** the Court upheld such an order in the case of a person convicted of theft from a motor vehicle although the original terms were varied. The Court held that there was no requirement that the acts prohibited by the order should by themselves give rise to alarm, harassment or distress. As this case has been reported in the Sentencing Reports there is a danger that judges will seek to rely on to the exclusion of the other cases referred to above so there may still be work to be done in dealing with such orders in the Crown Court.

Credit for time on remand

In cases where sentence is under the CJA 2003 (i.e. offence committed after 4.4.05) credit for time spent on remand in no longer automatic. The judge has to make an order under s. 240 (3). If the judge fails to do so when he should have done the case should be re-listed before the sentencing judge within 28 days under the slip rule provided by Powers of Criminal Courts (Sentencing) Act 2000 s. 155 – see **R.v. Oosthuizen [2005] EWCA Crim 1978 (CLW 05/33/46**). The CA suggested that even if the error is not spotted until after the 28 day period allowed by PCC (S) A 2000 the CC still appears to have jurisdiction to rectify the error and the fact that the judge may have made a mistake in omitting to give credit is NOT likely to give a separate grounds for appealing to the CACD.

Sentences for attempted murder

In the GCN seminar on sentencing powers under the CJA 2003 we anticipated that sentences for attempted murder would be likely to rise to fill the gap created by the increased minimum terms likely to be set in murder cases based on in Schedule 21 to the Act. That trend appears to have begun. In **R.v. Ford [2005] Crim. L.R. 807, [2005] EWCA Crim 1358, (CLW 05/36/6)** the CA held that there should be a corresponding increase for attempted murder cases although in practice this would only arise in cases where a 30 year starting point would have applied. The court said that it would be appropriate to fix the sentence for attempted murder at a level such that the offender would in fact serve about half the minimum term that would have been set for the completed offence.

Drugs

In **R.v. Evans [2005] EWCA Crim 2437 (CLW 05/38/5)** the CA has reminded practitioners that the levels of sentencing identified in R.v. Afonso: R.v. Sajid: R.v. Andrews [2005] 1 Cr. App. R. (S.) 560 in the case of out of work drug addicts, with no stock of their own who supply under cover police officers only was intended for those with no criminal record. Those who do have a significant record even without convictions for drug offences are likely to receive higher sentences.

After several years out in the cold there appears to have been a welcome rehabilitation for the evidence of an expert in the levels of consumption of drugs and what amounts are consistent with personal use. In **R.v. Edwards [2001] EWCA Crim 2185, October 19, 2001 [2001] 9 Archbold News 1 Archbold 2006 para. 26-77**, the CA held

that a judge had been right to refuse to admit evidence from Greg Poulter who had worked for the drugs charity Release for a number of years as to these matters because his evidence was based solely on his experience and not on academic research and was based on the hearsay accounts of drug users. In **R.v. Ibrahima [2005] Crim. L.R. 887, [2005] EWCA Crim 1436 (CLW 05/39/9)** the CA said that Mr Poulter should have been allowed to give evidence on these matters. Not only did he have a lot of experience of drug projects but had also done research on drug use and produced papers on the subject and had also considered the other academic literature available. The CA considered that Mr Poulter was in the same position as was the police officer whose evidence on similar matters had been admitted in **R.v. Hodges [2003] 2 Cr. App. R. 15 (Archbold 2006 ed. para.26-77**).

Bad character

The last Criminal Law update discussed a number of cases in this area. Further decisions of the CA have continued to appear. In **R.v. Renda and others *The Times,* November 16,2005, [2005] EWCA Crim 2862, 10th November 2005 (CLW 05/42/3)** the CA heard six appeals on various aspects of this area of law but declined the opportunity to lay down any new principles. The Court seems to have been anxious to avoid having to deal with the many problems thrown up by the bad character provisions and suggest that "the principles have been considered by this court on a number of occasions" as if we should all just get on with it and stop asking the court to deal with silly questions! The upshot is that it is hard to find anything of value in this case at all. More interesting and more helpful is the case of R.v. Weir and others [2005] EWCA Crim 2866 reported under the name of **R.v. Somanathan, The Times, November 18, 2005 (CLW 05/42/4)** although that was only one of five appeals heard together. Together the cases dealt with on this occasion raise a number of issues.

The case of Weir itself confirms that cautions as well as offences which a defendant had previously asked to be taken into account and which also do not count as convictions are admissible under the bad character provisions. The court also rejected an argument that as the offence to which the caution applied (taking an indecent photograph of a child contrary to s.1 protection of Children Act 1978) was not included in the category of sexual offences in Part 2 of the Criminal Justice Act 2003 (Categories of Offences) Order 2004 S.I. 2004 No. 3346 (see Archbold 2006 ed. para. 13-67) it was inadmissible as evidence of a propensity to commit an offence of sexual assault contrary to s. 7 SOA 2003. This decision appears to render the categories pointless since its logic is that whether the offence is or is not on the schedule is irrelevant to admissibility.

In the case of R.v. Somanathan itself the Court rejected the suggestion in the civil case of O'Brien v. Chief Constable of South Wales Police [2005] 2 W.L.R. 1038 that similar fact evidence must have "enhanced probative value" before it is admissible and pointed out that the CJA 2003 has completely reversed the pre-existing rule about the admissibility of evidence of bad character.

Finally in the case of R.v. Manister where the defendant had been convicted of indecent assault on a 13 year old girl the trial judge had admitted evidence that the appellant aged 39 had previously had a perfectly legal relationship with a 16 year old girl which lasted for three years because the judge considered such a relationship amounted to reprehensible behaviour and was therefore within s. 101 (1) (d) as showing a propensity to be attracted to young girls. Not surprisingly the CA thought the judge had gone a bit far in reaching this conclusion but then ruled that since the evidence of this relationship did not amount to "evidence of bad character" the abolition of the common law rules governing the admissibility of "evidence of bad character" by section 99 (1) did not apply and that the evidence was clearly admissible *at common law* (emphasis added) "because it was relevant to the issue of whether the appellant had an interest [in the girl of 13.]" A more bare faced attempt to make up the rules to admit the evidence the court thought ought to be admitted when the rules we all supposed to be working to are not adequate for that purpose would be hard to imagine.

Life sentences

In the first decision to consider the new sentencing provisions of the Criminal Justice Act 2003 relating to serious offences the CA in **R.v. Lang and others, *The Times, November* 10, 2005, [2005] EWCA Crim 2864 (CLW 05/41/9)** has given helpful guidance as to the circumstances in which life sentences and sentences of imprisonment for public protection (IPP) are appropriate and a useful summary of the criteria to be applied when such a sentence in under consideration. The court said (para. 8) that in considering the seriousness of an offence under s.225 (2) (b) or 226 (2) (b) courts should continue to apply the criteria for the imposition of a discretionary life sentence as set out in R.v. Chapman [2000] 1 Cr. App. R. (S) 77 (Archbold 2006 ed. para.5-288). The court also stated (para.10) that the procedure for fixing a minimum term for a life sentence or IPP should be the same as before the 2003 Act. Previous decisions of the CA will continue to apply to help clarify the term "serious harm" as defined in s.224, for the purposes of ss. 225 and 226. This case is indispensable reading for anyone dealing with a case where a sentence of life imprisonment or IPP is likely to be imposed.

Manslaughter by reason of provocation

The Sentencing Guidelines Council has issued guidelines on sentencing levels in cases of manslaughter by reason of provocation. The current passion for sentencing to be done by a "tick the box" approach continues. In short they have divided cases into those where the level of provocation is assessed as low, substantial and high. Where the level of provocation is low the range is said to be from 10 years to life with a starting point of 12 years. Where the provocation was substantial the range is 4 to 9 years with an 8 year starting point and where the provocation was high the range is from a non-custodial sentence to 4 years with 3 years as the starting point. Matters that both aggravate and mitigate the offence are also listed. The guidelines are available from www.sentencing-guidelines.gov.uk

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6th December 2005