

Criminal Law Update

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References to Criminal Law Week are abbreviated to CLW with the year, issue and paragraph number given. If a date is given this is the date of the judgment.

Low Copy Number DNA – are previous convictions safe?

No one can doubt that advances in scientific knowledge have played an important part in the resolution of criminal cases. In particular DNA has played a crucial role in both convicting the guilty and acquitting the innocent, even if the latter often receive justice too late in the day as to which the case of Stefan Kizsko was such eloquent testimony. But the withering judgment of Mr Justice Weir in the Omagh bombing case (*R.v. Sean Hoey*) [judgment](#) appears to have seriously undermined the future for Low Copy Number (LCN) DNA. From personal experience this technique, which allows a DNA profile to be obtained from microscopically small amount of cellular material, seems to have already become a regular feature of cases involving DNA profiling. Perhaps it is a measure of the fact that in most of the cases I have done the DNA was not the most important evidence but I am surprised to see that the judge felt able to attack the credibility of the technique including the lack of proper validation when I, for one, have not been aware of dissent within the scientific community. If it is the case that the technique lacks adequate validation from peer review (as opposed to the experts themselves writing papers to say how wonderful their technique is) then the admissibility of this evidence should be challenged on the basis that this is not acceptable as “a reliable body of knowledge or experience” as laid down in the South African case of *R. v. Bonython* (1984) 38 S.A.S.R. 45 – see Archbold para. 10-65.

In future (including in particular current ones) all cases involving LCN DNA will need to be subjected to the most rigorous challenge. I note from the [newspaper coverage of the judgment](#) (21st and 22nd December 2007) that the CPS have already announced a review of current cases involving LCN DNA and the police have announced a suspension of its use. I suspect that Professor Allan Jamieson of the Forensic Institute who gave evidence for the defence in the case of Sean Hoey and other scientists prepared to challenge LCN DNA are going to be busy for some time to come. Quite apart from current cases solicitors and their clients will wish to consider all the previous cases in which convictions have been obtained in reliance at least in part on the technique. It seems likely that many such persons will be seeking advice as to the safety of their convictions. If the evidence should not have been admitted because the technique was never properly validated that would appear to make any conviction in reliance

on that evidence unsafe. Alternatively it would seem reasonable to assume that such evidence will have been relied upon in many cases by juries to convict and if it is arguable that without the DNA evidence it cannot be said that the jury's verdict would nevertheless have been one of guilty then it would seem to follow that the conviction was unsafe. See Archbold para.7-73. It could be a busy New Year for us all! The author of the article in 10 Archbold News 2007 page 3 “Are All our experts and Laboratories “Fit for Purpose”? could not have chosen more appropriate moment for publication.

Inferences from silence

There are often good reasons for deciding that a prepared statement given to the police before interview and to be followed by a “no comment” interview is the best way to protect the client's interests. *T v. D.P.P.* [2007] EWHC 1793 (Admin.) [judgment](#), serves however as a reminder that solicitor advocates will have to give careful consideration as to whether they may be called upon to give evidence about what happened in the police station which will obviously prevent them from acting as advocate at trial.

Imprisonment for public protection

Where a court in sentencing for a non-serious specified offence has to consider the dangerousness provisions in section 229 CJA 2003 and correctly decides that they are fulfilled but then imposes an unlawful sentence of IPP (with a minimum term of 18 months) the CA could substitute the sentence that should have been imposed (extended sentence under s. 227 – three years custody and two year extension of licence) – *R.v. Mackie* [2007] EWCA Crim 2486 (30/10/2007) (CLW 07/42/7) [judgment](#).

The need for the sentencing judge clearly to identify the reasons for a conclusion that an offender satisfies the seriousness provisions of the CJA 2003 was emphasised in *R.v. Nobes* [2008] 1 Cr. App. R. (S.) 72 where the CA said that it will usually be *unreasonable* to conclude that the presumption applies unless some information shows a significant risk of serious harm from other offences.

The problem of imposing an IPP sentence on a prisoner already serving a determinate sentence was considered by the CA in *R.v. Ashes* [2007] Crim. L.R. 68 (CLW 07/45/10) [judgment](#)

Hearsay and identification

Where a witness who attended an ID procedure at a police station was asked what she could recall the person she had identified had done in the course of a violent disorder, her answer which explained his role was admissible as hearsay under CJA 2003 s.114 (1) (d) (in the interests of justice). The CA said that despite the fact that the evidence was not admissible under the principle in *R.v. McCay* [1990] 1 W.L.R. 645 nor under s. 114 (1) (a) of the 2003 Act (statutory provision makes it admissible) the statement of the witness "was exactly the kind of statement intended to be covered by s. 114 (1) (d). *R.v. Lynch (William Stewart)* [2007] EWCA Crim 3035 (22/11/2007).

For a case where hearsay was admitted in the form of the edited witness statement of a nightclub employee who had witnessed the possession of controlled drugs see *R.v. Adams* [2007] EWCA Crim 3025 (23/11/2007) (CLW 07/46/5) [judgment](#). The CA held that the evidence was not admissible under s. 116(2)(d) because it was not satisfied that all steps that were reasonably practical to find him had been taken but was admissible in the interests of justice under s. 114 (1)(d).

Whilst Commonwealth cases are often of very limited value in English courts the decision of the Supreme Court of Canada in *R.v. Khelawon* [2006] 2 S.C.R.787 (14/12/2006) would be worth a read. Not only will it induce a sigh of regret for the passing of a principled system that excluded hearsay except in very restricted circumstances but it contains some very useful arguments that can still be deployed in this jurisdiction when faced with a hearsay application particularly under s.114(1)(d). In the absence of access to the law report, the case is digested at CLW 07/46/24.

Bail

The fact that a trial will occur promptly (here a re-trial for murder after the previous conviction was quashed on appeal where the defendant had been on bail until conviction) is not a justification for pre-trial detention – *Gault v. United Kingdom*, *The Times*, November 28, 2007 E.C.H.R. (CLW 07/44/2) [judgment](#). The Sentencing Guidelines Council has published a definitive guideline on failing to surrender to bail which applies to those over 18 sentenced on or after 10th December 2007. (CLW 07/44/44).

See www.sentencing-guidelines.gov.uk for the guideline itself.

Bad character

If evidence of bad character is going to be admitted it is essential that the judge directs the jury properly as to what the effect of the evidence is and to what use they can or cannot put it. If the judge fails to do so and fails to distinguish such

evidence from that which is directly relevant to the allegations the jury are trying the conviction is likely to be unsafe – see *R.v. Lowe (Donnette)* [2007] EWCA Crim 3047 (14/12/2007) [judgment](#)

Police Officers on Juries

The apparent dislike of the senior judiciary for having police officers in juries continues to be apparent. In *R. v. Alan I* [2007] EWCA Crim 2999 (25/10/2007) the CA appears to have gone further than the HL in *R.v. Abdrikov* [2007] 1 W.L.R. 2679 or the CA in *R.v. Pintori* [2007] EWCA Crim 1700 and held that since it is the appearance of bias rather than actual bias that is the proper test to apply that where a police officer juror personally knows police officers who are to give evidence he or she should be asked to stand down even if there is no obvious challenge to their evidence.

This issue is currently a bit of a hot topic and the CA has now listed a number of appeals raising similar points before the Lord Chief Justice for hearing on 29th and 30th January including the case of Ilyas Hanif (mentioned in [previous updates](#)) in which Mark George of GCN appears. It would seem that the CA wish to give this important matter their full consideration no doubt in an attempt to stem the tide of similar cases which will otherwise occur. The GCN website will keep readers fully informed of the outcome of that appeal.

Indictments

The Criminal Procedure Rules seem to change so often that it is hard to keep up and often hard to find the text of the changes. See CLW 07/45/3 for important changes so far as cases where the prosecution are seeking trial by judge alone in cases involving multiple counts of similar conduct. The commentary is also worth reading for its criticisms of the proposed changes and in pointing out the problems applications under s.17 of the *Domestic Violence, Crime and Victims Act 2004* (Archbold para.4-267h) are likely to face.

Alternative verdicts

See *R.v. Foster*; *R.v. Newman and others* [2007] EWCA Crim 2869 (30/11/2007) (CLW 07/46/1) [judgment](#) on the issue of when it is right to leave alternative verdicts for the jury to consider. The CA considered the recent House of Lords case of *R. v. Coutts* [2006] 1 W.L.R. 2154; [2007] UKHL 39 (Archbold para. 4-463) and seem to have sought to distinguish that case from those they were hearing themselves. In such a situation in future it would be as well to consider both of these important authorities.

Mark George - 4th January 2008