

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.

Criminal fees

It has been the common practice of retreating armies throughout history to adopt a "scorched earth" policy thereby depriving the inhabitants of the wherewithal to survive and demonstrating a vindictive spirit to the last. As the current government gathers its battered troops for the long march into obscurity and with a history littered with countless attacks on the rights of those accused of crime it seems to be determined to leave behind few lawyers prepared to take on criminal work. Such can be the only sensible conclusion from the latest proposal from the government to slash defence fees so that the rates paid to advocates for defence work are brought "more in line with the rates paid by the CPS." Since the government has noticed that they have been paying prosecutors about 23% less than defence advocates it follows, in the government's view, that they must be paying those fat cat defence lawyers far too much. At a stroke the government therefore has determined to scrap the Carter graduated fee scheme reforms only introduced in 2007 and which finally acknowledged that since defence advocacy fees had not been increased for a decade they were by then seriously lagging behind inflation. If these latest proposals (and there is of course a consultation exercise to be negotiated first) become reality it is hard to see how it can mean anything other than the further loss of solicitors and barristers willing to continue to provide their services in crime and even harder to see why any newly qualified lawyer would opt for a life of fighting rearguard actions simply to protect their modest but ever declining income and the interest of their clients.

Jury tampering / trial by judge alone

Section 44 CJA 2003 (which relates to prosecution applications for trial by judge alone) is unambiguous and requires an order for trial by judge alone to be made where the court is satisfied to the criminal standard that the relevant criteria (which relate to the magnitude of the risk of jury tampering and the extent to which reasonable steps might obviate that risk) are fulfilled. For the purposes of Article 6 ECHR it is irrelevant whether a trial takes place by judge and jury or by judge alone since in either case the trial would be conducted before an independent tribunal.

The first condition, i.e. that there should be evidence of a 'real and present danger' of jury tampering relates to the entire trial process up to verdict. A number of situations in which this criterion might be fulfilled are set out at subsection (6) but the list is not exhaustive. Equally, just because the facts of the case resemble one of the examples given at subsection (6) this does not necessarily mean the first condition will be satisfied; nor does it even create a presumption of trial by judge alone. However, the evidence which might satisfy the first condition is not confined to evidence which would be admissible at trial.

As to the second condition, i.e. that notwithstanding any reasonable steps (including police protection) that could be taken to prevent jury tampering, the likelihood that it would occur is nevertheless so substantial that trial without jury is necessary in the interests of justice, the proper approach is firstly to consider the possible measures which could be taken to prevent tampering, whether they would lead to an incurable compromise of the jury's objectivity and what the impact they would have upon the jurors' lives.

When an application is made under section 46 to discharge the jury by reason of jury tampering the court must consider whether to end the trial or continue without a jury. In making the decision the court should have regard to the fact that one of the purposes of the legislation is to prevent jury tampering and to prevent any benefit accruing to those who engage in it and therefore the usual course would be for the judge to continue the trial alone. The fact that a judge has previously seen material which has been the subject of a PII application should not normally lead to self-disqualification.

For the moment any application for trial by judge alone should be heard by the presiding judge of the circuit who will identify a senior and experienced judge to conduct the trial. **R.v. Twomey, Blake and others, The Times, June 25, 2009 C.A. (CLW 09/24/8) (05/06/09) [article](#).**

Appeals - Citation of authorities

In **R. v. Erskine; R. v. Williams, The Times, July 22, 2009, [2009] EWCA Crim 1425 (CLW 09/28/2) [judgment](#)** the CA gave guidance on the citation of authorities in appeals, seemingly in a bid to deal more expeditiously with appeals both against conviction and sentence. Advocates are reminded that only authorities which establish a principle should be cited and that the Court should not be referred to authorities which merely illustrate or restate a principle.

In conviction appeals advocates must be prepared to justify the citation of an authority and it is good practice for counsel to agree a bundle of relevant authorities. Where cases are copied the principal law report should be used and the headnote included. Passages to be relied upon should be marked by sidelining.

In conducting sentence appeals advocates should again be prepared to justify the citation of any authority. Where the Sentencing Guidelines Council has issued a definitive guideline, cases which pre-date it will rarely be of assistance, and the same applies to cases which post date the guideline but make no reference to it. If the case is reported in the Criminal Appeal Reports (Sentencing) that reference should be used. The rules in relation to the copying of authorities for conviction appeals are equally applicable here.

See II.17 and II.19 in Practice Direction (Criminal Proceedings: Consolidated) [2002] 1 WLR 2870.

Diminished responsibility

R. v. Stewart (James), [2009] EWCA Crim 593, The Times, July 20, 2009, C.A (CLW 09/28/6) (26/03/2009) [judgment](#). More guidance from the CA – this time of a more substantive nature – in relation to the appropriate directions to the jury in a murder case where diminished responsibility is raised and the only abnormality of the mind relied upon arises from an alcohol dependency syndrome which has not inflicted discernible brain damage.

In summing up, after first dealing with the ordinary principles relating to voluntary intoxication and then outlining the ingredients of the defence, the trial judge should direct the jury in the following structured way. Firstly, they should decide whether the defendant was suffering from an abnormality of the mind at the time of the killing, having due regard to the fact that this does not necessarily follow from the fact that he suffers from an alcohol dependency syndrome. If they decide that the defendant has established the necessary abnormality of the mind they should consider whether it was caused by disease or illness. If so, the jury should be directed in conventional terms to consider whether the defendant's mental responsibility was thereby substantially impaired. They should be assisted with the concept of substantial impairment and might properly reflect on the difference between a failure to resist impulse and an inability to resist consequent upon an abnormality of the mind. They should consider all evidence, including medical evidence, and likely issues include (a) the extent and seriousness of the defendant's dependency, if any, on alcohol, (b) the extent to which his ability to control his drinking or to choose whether to drink or not, was reduced, (c) whether he was capable of abstinence from alcohol, and, if so, (d) for how long, and (e) whether he was choosing for some particular reason, such as a birthday celebration, to decide to get drunk, or to drink even more than usual.

Hearsay and the European Convention

The tension that exists between the hearsay provisions of the CJA 2003 and the fair trial guarantees continued in Art 6 of the ECHR is set to continue for some time yet. Not only has the UK government asked that the decision of the chamber in ***Al-Khawaja v. U.K.* [2009] ECHR 26766/05, January 20, 2009; [2009] Crim.L.R. 352; (CLW09/03/1)** (Issue 18 of this Update) [judgment](#) be referred to

the Grand Chamber but the decision of a five judge Court of Appeal in ***R.v. Horncastle; R.v. Blackmore* [2009] EWCA Crim 964 (CLW 09/20/2) [judgment](#)** appears to be completely at odds with the decision of the ECtHR. In *Al-Khawaja* the ECtHR ruled that admitting hearsay evidence which is the "sole or decisive evidence against a defendant" is a contravention of Art 6 (1) (right to a fair trial) and Art 6 (3) (d) (the right to cross-examine witnesses). The Court of Appeal begs to differ and considers that the safeguards contained in the CJA (particularly s.125) are sufficient to counter-balance the difficulties of an accused faced with such evidence. It is however interesting to note that in its conclusion the CA held that "where the hearsay evidence is *demonstrably reliable*, or its *reliability can properly be tested and assessed*, the rights of the defence are respected, there are in the language of the ECtHR sufficient counterbalancing measures, and the trial is fair." [para.79 emphasis added]. As the editor of *Criminal Law Week* points out in his commentary the test set out above involves a "significant tightening of approach" by the CA from its stance in previous cases and it is to this test, that appears to add substantial weight to the other considerations in s.114 (2) and 116 of the CJA, that defence advocates should look for support for an argument against the admissibility of hearsay evidence in a case of this sort.

***R. v. Leonard* [2009] EWCA Crim 1251; 173 J.P. 366, C.A.(CLW 09/29/2) (28/04/2009) [judgment](#)** is an obiter and, if you agree with the authors of CLW, erroneous decision on hearsay arising from unattributed text messages put before a jury in a drug supply case. The text messages, found on a mobile phone in the defendant's possession, appeared to be comments, both positive and negative, about the quality of drugs previously supplied to the authors.

The CA held that the messages should not have gone before the jury as they were inadmissible hearsay. They amounted to 'statements' under section 115(2) CJA 2003 since it appeared that one of the purposes of the messages had been to cause the recipient to believe the 'matter stated' therein or to act on the basis that it was as stated. Accordingly the messages were inadmissible as evidence of the matter stated unless they could be brought within one of the exceptions in section 114(1)(a)-(d). It was agreed that none of these subsections was applicable.

However, as the CLW commentary suggests, there were surely two statements contained within the messages. Firstly, that drugs had been supplied by the person to whom the messages were sent and secondly a comment on the quality of those drugs. The latter was a statement within section 115(2) since the maker clearly wanted the recipient to believe and/or act on the basis that his assessment of the quality of the drugs was true. Had this been the issue at trial the statement would have been hearsay. However, the issue was whether the defendant was a supplier of drugs. The proposition that a purpose of the author of the text messages was to make the recipient believe that he was a drug dealer or act on the basis that he was a drug dealer is not logical or tenable. If that was not the purpose of the message then the evidence was not hearsay for the purposes of Chapter 2 of the CJA 2003.

Confiscation

The guidance issues to prosecutors on 28th May 2009 as to when it is appropriate to institute confiscation proceedings is summarised at Archbold 3rd Supp. Para. 5-547. Its application was considered in **R.v. N; R.v.P; R.v. Paulet, unreported July 28, 2009 (CLW 09/30/9) [judgment](#)** in which case the CA held that the trial judge had been wrong to refuse to make a confiscation order in the sum of £14,000 in the case of a handler of stolen goods who had had the property in his possession for five days before it was recovered virtually undamaged. In the view of the judges in the CA making such an order did not amount to imposing a fine, which the House of Lords in *R.v. May* [2008] 1 A.C. 1028 had said was inappropriate, although given the circumstances it is hard to see why anyone else should be in any doubt that that was precisely what it was.

For a rather different approach in the case of a man who loaded 2,000 kgs of tobacco onto a lorry in return for a payment of £100 knowing that the goods were to be imported without the payment of duty see *RCPO v. Mitchell* [2009] Crim. L.R. 469 (CLW 09/19/15) judgment. No doubt to the defendant's considerable relief the judge rejected the prosecution application for a benefit figure of £304,000 (the value of the goods plus the duty evaded) and held that in fact his benefit was the sum he had received, namely £100.

A further example of the capacity for obvious unfairness in the operation of the confiscation provisions is illustrated by the case of **R.v. Islam [2009] UKHL 30, (CLW 09/22/5) (10/06/2009) [judgment](#)** in which the HL held that the black market value of drugs seized by the authorities can be taken into account when assessing the "recoverable amount" under s. 7 of POCA 2002 but that it should be left out account when assessing the "available amount" under s. 9 of the Act. Whilst this would not prejudice an impecunious defendant, the same cannot be said of a defendant who has other assets which could then be taken off him to satisfy the recoverable amount figure which is said, on a wholly artificial basis, to be his benefit.

Police Officers on Juries

The decision of the CA in **R.v. Yemoh and others [2009] EWCA Crim 930 (CLW 09/26/2) (22/05/09) [judgment](#)** is another reminder that appealing a conviction on the basis that there was a police officer on the jury is likely to be a forlorn task. Since the decision in *R.v. Khan and others* [2008] 2 Cr App R 161, it is clear that the CA has no interest in overturning such convictions. This puts the onus squarely on the advocate at trial. If the case involves disputed police evidence it is incumbent on the advocate to make an application to the judge to exclude serving police officers from the jury before it is sworn. Submissions in this respect will obviously depend on the facts of the case but there is plenty of material in the House of Lords case of *R.v. Abdroikof*; *R.v. Green*; *R.v. Williamson* [2007] 1 W.L.R. 2679 to support such submissions and even in *R.v. Khan and others* the CA recognised that it is better if the risk of unfairness is addressed at the start of the trial – see para 131. Tactically it would probably be worth trying to get the agreement of the prosecutor, who will not want to risk having a

guilty verdict overturned on appeal, however unlikely that may be, and in many instances will probably agree that police officers should be excluded.

Guideline on sentences for attempted murder

The SGC has issued a guideline in such cases based on defendants aged over 18 who are first time offenders, convicted after trial and who are sentenced after July 27 this year. The full text is available from the SGC website at www.sentencing-guidelines.gov.uk/guidelines/council/final.html but a useful summary appears at CLW 09/27/32. There are no great surprises here. In *R.v. Ford* [2006] 1 Cr. App. R. (S.) 204 the CA said that since sentences for murder were likely to increase substantially as a result of the application of the provisions of Sch 21 of the CJA 2003 so sentences for attempts would have to rise as well as indeed they have. The general rule of thumb is that the sentence for an attempt to kill should mean the defendant serving about half the minimum term that would have been imposed in the event that the attempted had succeeded. If therefore the minimum term would have been 15 years for the completed offence the appropriate sentence for an attempt would also be 15 years given that the defendant would be released after serving half that sentence. Useful guidance in such cases also appears in the very last para in Archbold, 33-138.

Where a 14 year old offender was convicted of attempted murder with a firearm and both the PSR and a psychologist's report concluded that the criteria for dangerousness were not met, the court should have taken account of the Youth Justice Board guidance that an indeterminate sentence was unnecessary save in cases of grave risk and since there had been insufficient material before the court to justify the rejection of the opinions in the two reports, a sentence of DPP with a minimum term of 6 years was quashed and replaced by a sentence of 12 years detention under s.91 PCC(S)A 2000. **R.v.J.W. [2009] 2 Cr. App. R. (S.) 623 (CLW 09/33/7)**

Deduction of credit for guilty plea following change of account in PSR

Defendants who give an explanation for the offence to the author of a PSR, often different from the account given to their own solicitors, never help their cause but at least they should not lose the maximum credit for an early guilty plea provided they abandon it and do not persist in it before sentence is passed – see **R.v. Robinson [2009] 2 Cr. App. R. (S.) 532 (CLW 09/33/10) (09/02/2009)**

Capacity to consent in sexual cases

The House of Lords in **R v C [2009] UKHL 42 (CLW 09/29/6)** [judgment](#) has reversed the decision of the CA [2009] 1 Cr. App. R. 211 (CLW 08/22/5/) and held (i.) that an irrational fear that prevents the exercise of choice for the purposes of an offence under s. 30 SOA 2003 may be equated with a lack of capacity to choose and (ii.) it is not necessary that the complainant should be physically unable to communicate by reason of her mental disorder. If in the circumstances she was unable to communicate her inability to choose, even though she was not incapable of physical communication, that would be sufficient.

Sex offender notification requirements

In **R. (J.F.) v. Secretary of State for the Home Department; R. (A.T.) v. Same, [2009] EWCA Civ 792; unreported, July, 23, 2009, C.A. (Civ. Div.)** [judgment](#) the CA upheld the decision of the Divisional Court that the indefinite sex offender notification requirements for relevant offenders under the Sexual Offences Act 2003 are incompatible with Article 8 of the European Convention on Human Rights because the statutory regime currently provides no mechanism for review of whether the requirements continue to serve a legitimate purpose. The case for incompatibility was even stronger for young offenders than for adults.

It is to be assumed that the judgment will result in an amendment to the statutory scheme to provide the right to a review. In the light of his submissions about the resource implications of such a procedure it is likely that the Secretary of State will ask Parliament to define the circumstances in which review can be sought as narrowly as possible. He may be assisted by the comments made by the CA at the end of its judgment that 'having regard to the sensitivity of the subject-matter, Parliament might decide to set the bar very high and make it difficult to attempt a review and even more difficult to achieve a successful review'.

See the comments of Pete Weatherby of GCN (who appeared on behalf of AT) at:
http://www.gcnchambers.co.uk/gcn/news/right_to_review_reviewed

Indictments

Tucked away in the Coroners and Justice Bill is a provision which will reverse the requirement, clearly endorsed by the HL in *R.v. Clarke*; *R.v. McDavid* [2008] UKHL 8 that in order for proceedings on indictment to be valid, there had to be a signed indictment. The problems that such a provision is likely to create is well illustrated by the case of **R.v. Leeks [2009] EWCA Crim 1612 (06/07/2009)** [judgment](#) in which, in a one defendant and one count case, the prosecution made a complete pig's ear of intending to make an application to add a further count but never in the event making any such application. The result was that the defendant pleaded guilty to an offence that had in fact never been added to the indictment. To their credit the CA consider that this was a serious failure of procedure rather than an administrative oversight and ruled that the

guilty plea was a nullity. To politicians who are only interested in keeping to a minimum the time and money expended between arrest and sentence of imprisonment this was no doubt an unsatisfactory result but it is worth recalling the words of Lord Bingham in *R.v. Clarke* "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place." [para.17]. See also **R.v. Downer, The Times, August 26, 2009 C.A. (CLW 09/33/1) (06/07/09)** [article](#) for a further example of why it is always a good idea for advocates to keep in mind the actual terms of the indictment

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