

# Criminal Law Update

Issue 21. 29<sup>th</sup> October 2009



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.

## Hearsay

Whilst the facts in [R.v. Sadiq and Hussain](#) [2009] EWCA Crim 712 (CLW 09/34/4) (16/01/2009) are fairly extreme (the victim who was paralysed and incapable of facial expression refused to give evidence at a re-trial having given evidence at the first trial by means of pointing to letters on an alphabet board) the case is a reminder that the expression “the interests of justice” in s.114 (1) (d) of the CJA 2003 applies to the prosecution as much as the defence. It was held that it was appropriate to admit the evidence given by the witness at the first trial including cross-examination in circumstances where the jury would have got little assistance from observing the demeanour of the witness and the overall prejudice to the defendant was slight bearing in mind that this was far from being the only evidence against the defendant.

## Bad Character

The importance of the judge giving the jury adequate assistance as to what use they could make of evidence of bad character was emphasised in [R.v. Lefayette](#) [2009] Crim. L.R.809; [2008] EWCA Crim 3238 (CLW 09/38/2) (18/12/08). The defendant, no doubt anticipating an application by the prosecution to admit his previous convictions, took the initiative and gave evidence about them in his evidence in chief. Section 101 requires a distinction to be made between using previous convictions as evidence of propensity and evidence that affects credibility. Where the judge considers that some of the evidence would have been admissible under section 101(1)(d) as being relevant to the issue of whether or not the defendant had a propensity to behave in the way alleged, then he should have directed the jury that it was for them to decide whether the alleged propensity had been proved to their satisfaction, and to decide the extent to which the alleged propensity, if established, assisted them in drawing a conclusion as to the guilt of the defendant. If, however, the judge considered that the evidence was not capable of establishing the alleged propensity but that, in the absence of a warning, the jury might use it as evidence of propensity, he should also have directing them that they must not consider the evidence of any previous incidents as evidence that the defendant acted in the way alleged in the indictment.

## Retrial for serious offence

On an application to the Court of Appeal under s.76 of the CJA 2003 for an acquittal to be quashed it was not enough that the fresh evidence *may* be reliable, the test under s.78 (3) (a) is whether it *is* reliable. In [R.v. B \(J\)](#) [2009] Crim L.R. 736; [2009] EWCA Crim 1036 (CLW/09/34/7) (14/05/09) the evidence was from a co-accused with a powerful self-interest to serve and what the court said was “characterised by present implausibility and past fluent lying” which doesn’t sound much like a ringing endorsement of its reliability..

## Evidence – facial mapping

A facial mapping expert was entitled to give evidence of his conclusions as to the significance of his findings and to use expressions such as “lends powerful support” but it should be made clear that this does not mean that there is some sort of measurable scale in respect of such evidence and that they are no more than expressions of subjective opinion. In particular, it should be made clear to the jury that the evidence is not based on a statistical database which allows comparison between the incidence of the features of the suspect as compared with the population at large – [R.v. Atkins](#) [2009] EWCA Crim 1876 (CLW 09/36/2).

## Sentence

Firearms – where a minimum term of 5 years is imposed in respect of a firearms offence the judge still needs to consider the totality principle in assessing the appropriate consecutive sentence to be imposed for an offence of possessing a class A drug with intent to supply – [R.v Raza](#) [2009] EWCA Crim 1413 (CLW 09/34/12) (24.06.2009)

The Court of Appeal has indicated that the guidelines on sentencing in firearms cases set out in [R.v. Avis](#) and others [1998] 1 Cr. App. R. (S.) 420 need to be supplemented in respect the more serious cases than were considered in that case. The court has also signalled another hike in sentences for very serious firearms offences in [R.v. Salim; R.v. Ali; R.v.Akhtar; R.v. Wilkinson; Att-Gen's Reference \(No 43 of 2009\) \(R.v. Bennett\)](#) [2009] EWCA Crim 1925 (CLW 09/36/5) (06/10/2009) stating that the gravity of gun crime cannot be exaggerated and that deterrent and punitive sentences are required.

Accordingly a sentence shorter than the statutory minimum of five years under s. 51A Firearms Act 1968 should only be imposed in truly exceptional circumstances. Where the level of criminality exceeds that considered in R.v. Avis and others and where an intent to endanger life has been proved (e.g. s.16 offences) indeterminate sentences as well as lengthy determinate ones will need to be considered.

In the same case the Court of Appeal stated that whilst discretionary life sentences should be reserved for cases of the utmost gravity – see R.v. Stephens [2007] EWCA Crim 3021; R.v. Kehoe [2009] 1 Cr. App. R. (S.) 41, such sentences should be considered in cases where the seriousness is such that a life sentence would have “a denunciatory value, reflective of public abhorrence of the offence, and where the notional determinate sentence would be “very long, measured in very many years”. In an appropriate case a sentence of IPP, even with the same minimum term, will be considered unduly lenient if a life sentence should have been imposed – *R.v. Bennett (A-G’s Ref No 43 of 2009)* above.

## Life sentences and IPP

The decision in *R.v. Kiely* [2009] 2 Cr. App. R. (S.) 726; (CLW 09/ 35/16) (19/03/2009) is a reminder that now that there are two indeterminate sentences available to the court (IPPs and discretionary life sentences) life sentences should be reserved for those cases where the culpability of the offender was particularly high or the offence itself was particularly grave. In many cases involving what are properly described as “very serious offences” and where the criteria for dangerousness were met, it would suffice for the purpose of protecting the public, to impose a sentence of IPP.

Sentencing guidelines – a third update of the magistrates’ court sentencing guidelines has been issued effective from 26<sup>th</sup> October 2009 (CLW 09/37/22). The full text is available at [www.sentencing-guidelines.gov.uk/guidelines/council/final.html](http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html)

A guideline on the sentencing of fraud offences under the Fraud Act 2006 has also been issued. The full text is available at the same internet address as above but is comprehensively summarised in CLW at 09/37/23.

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29<sup>th</sup> October 2009

## Garden Court North Chambers 5-day prison law course 30th November - 4th December 09

### Overview

A 5-day course aimed at practitioners both new to this area of work and those with experience. The course is practical and informative and concentrates on key areas of prison law practice but also provides a general knowledge of the whole subject. It aims to give delegates a solid and comprehensive foundation for best practice when representing prisoners and to provide the training through which practitioners can build or develop a thriving prison law practice.

### Speakers

Course facilitator [Pete Weatherby](#).

Members of Garden Court North Chambers prison law team will lead parts of the course. Other guest speakers will cover Risk / Treatment of Sexual Offenders (Dr Ruth Mann, Senior Prison Service Psychologist), lifers (Elkan Abrahamson, Jackson & Canter), types of prisoner and different treatment (Louise Curtis, Equality and Human Rights Commission) and funding for Prison law (Mike Pemberton, Stephensons).

### Fee

£750.00 (+ VAT) per delegate for the 5 day course including lunch and refreshments.

### CPD Accreditation

30 CPD hours. Garden Court North Chambers are accredited by the Solicitors Regulation Authority as authorised CPD providers of Prison Law. All delegates completing the course will receive a Certificate of Completion.

### Booking information

Please contact [Paula Morris](#) on 0161 236 1840 to request a detailed course outline and a booking form.  
[www.gcnchambers.co.uk](http://www.gcnchambers.co.uk)