

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 (LCN) DNA revisited

In the run-up to the hearing of the appeal of [R.v.David Reed; R.v. Terence Reed; R.v Garmson](#) [2009] EWCA Crim 2698 (CLW 10/01/1) (21/12/2009) it appeared that this was going to be an opportunity for a full blooded battle of the experts over the validity of LCN DNA. This has been a controversial matter at least since *R.v. Hoey*, the Omagh bombing trial in December 2007 and was covered in an article in this publication in January 2008 – see Issue 12. In the event the issue melted away before the hearing and the appeal focused on more narrow issues. Most of what the court had to say therefore was obiter, as it was not essential to the decision on the merits of the appeal, but nonetheless the observations of the Court are likely to be followed in any subsequent case. Despite these last minute developments in the case the court did however take the opportunity to state that future attacks on DNA evidence will only be allowed in very narrow circumstances and also gave a very damaging assessment of the credentials of Prof Allan Jamieson who has been the leading proponent of the argument that LCN DNA was based on unreliable science.

The upshot of the case is that DNA evidence based on amounts of DNA over 200 picograms (that's one fifth of a nanogram, which itself is a billionth of a gram!) can be assumed to be reliable and that a challenge to the validity of the method of analysing low template DNA by the LCN process should no longer be permitted at trial where the quantity of DNA analysed is above the stochastic threshold of 100 to 200 picograms in the absence of new scientific evidence (para. 74 (iii)). If the amount of DNA is between 100 and 200 picograms there is an accepted danger of unreliable results and as such this remains a valid area of challenge (para. 74 (v)). If such a challenge is to be mounted the Court expects the provisions of part 33 (3) of the Crim Proc Rules (Archbold 10-63d) to be followed (paras 129 to 132).

The focus of the appeal in the end was the evidence about transfer of DNA and the various explanations that had been given by the prosecution's expert (para 77, 87 and particularly 89 (i)). The appellants argued (para 91) that this went beyond what was proper for an expert witness. At para 120 the Court held that there was nothing wrong with an expert giving some evaluation of each of the possibilities of the circumstances of transfer, indeed that this was essential. The Court did however conclude (para 127) that the expert witness went too far when she expressed an opinion that the appellants were handling the knives when they broke. This was not one of the possibilities which could properly be enumerated, as there was no reliable scientific basis for her to be able to express a view on the use the appellants made of the knives as opposed to the circumstances of transfer of their DNA. Her opinion on this had

no underlying scientific basis and therefore went beyond the scope of the evidence an expert could be permitted to give.

At para 115 the Court pointed out significant caveats to DNA evidence which it is important the jury should be made aware of. First that that the nature of the original starting material is unknown; that the time at which the DNA was transferred cannot be inferred; and that the opportunity for secondary transfer is increased in comparison to standard DNA profiling. Secondly that when DNA profiles match as a result of LCN DNA profiling, the significance of the match should be reported on the probability that the two DNA profiles match only. As the results were obtained from LCN it is inappropriate to comment upon the cellular material from which the DNA arose or the activity by which the DNA was transferred.

In this publication in January 2008 I suggested that in the wake of his evidence in *Hoey* Prof Jamieson was likely to be very busy. It seems that that has been the case until now (para. 110). Whether that remain the case in the future may be in some doubt in the light of the observations of the CA. At para. 106 the Court observed "His experience in the interpretation of DNA profiles is limited. He took a one day training course in the use of the relevant software and had no training in interpretation. He bases much of his knowledge of DNA and the analysis of Low Template DNA on papers and discussion with other scientists; he does not conduct laboratory research." At para 107 the Court states "his expertise on the interpretation of DNA profiles is limited, without any relevant first hand laboratory or research experience". In para 110 the Court concluded "Whilst it is impossible to understand how he had sufficient expertise to be able to give evidence in *R v Hoey*, let alone to assist in the attack made in that case on the LCN process, he has given evidence in so many Low Template DNA cases since then on the strength of the observations in *R v Hoey* that he has acquired a degree of experience from these cases, his discussion with others and his reading of papers. We retain clear reservations about the extent of his expertise in relation to DNA profiles".

Evidence - Joint enterprise murder

Where the principal committed an unlawful killing with the requisite intent for murder, a secondary party would be liable for murder on the basis of his foresight of what a principal might do, rather than his foresight of the intention with which the principal's act might be performed – see [R.v. Starfield Badza](#) [2009] EWCA Crim 1363 (15/12/2009) applying *R.v. Rahman* (Islamur) [2009] 1 A.C. 129 – see Archbold para. 19-26.

Evidence – Hearsay

In December the Supreme Court handed down judgment in [R v Horncastle and others](#) [2009] UKSC 14 (CLW 09/45/3) (9/12/09). The case concerned the status of hearsay evidence in criminal cases following the decision of the European Court of Human Rights in *Al-Khawaja v. U.K.*; *Tahery v. U.K.*, 49 E.H.R.R. 1(1) that where a conviction is based 'solely or to a decisive degree' on

statements made by a person whom the defendant has not had the opportunity to cross examine Article 6 ECHR will be breached.

The Supreme Court gave a ringing endorsement of the Court of Appeal's decision, holding that that the rigid application of a 'sole and decisive' test would create serious practical difficulties for the courts and that the provisions of the CJA 2003 and the Criminal Evidence (Witness Anonymity) Act 2008, if properly applied, strike a proper balance between safeguarding the right of the defendant to a fair trial and the interests of victims and the wider community in ensuring that defendants do not escape prosecution or conviction simply because the maker of an apparently reliable statement against them dies, refuses to give evidence through fear or cannot give evidence for some other substantial reason.

The UK government asked for the case of *Al-Khawaja* to be referred to the Grand Chamber of the European Court of Human Rights but the request was deferred pending the decision of the Supreme Court in *Horncastle*. The Grand Chamber is now likely to consider the case and therefore there remains the possibility that it will uphold the 'sole and decisive' rule.

Evidence - Bad Character

The confusion which can still arise as a result of an application to adduce evidence of bad character is illustrated by the case of [R v O., 173 JP 616, \[2009\] EWCA Crim 2235](#) (CLW 09/46/1) (5/10/09) .

The case concerned a youth charged with various offences of violence against two different people two days apart. He was convicted at trial of one count of unlawful wounding and one count of wounding with intent. Both offences involved the use of a sharp implement, in the first a pair of scissors and in the second a Stanley knife. His defence at trial had been that the complainants had been the aggressors and had colluded together to support the case against him.

In the course of the trial the prosecution applied to adduce evidence of the defendant's recent previous conviction for possession of a bladed article, namely a Stanley knife, via sections 101(1)(d) and 101(1)(g) of the CJA 2003. They alleged that the defendant had made an attack on the character of the complainants (gateway (g)) and that the conviction demonstrated a propensity to misuse bladed articles (gateway (d)). The trial judge allowed the evidence to be admitted under gateway (g) but made no decision about propensity.

However, in her directions to the jury the judge gave a gateway (g) direction (i.e. that it was right that they should hear about the defendant's character when he had accused others of lying) but also told them that it was for them to decide whether they accepted that the conviction established a propensity on the part of the defendant to commit offences of the type charged. It does not appear that she directed the jury as to how they might go about using the evidence if they considered that it did establish such a propensity.

The CA upheld the conviction and held that the judge was entitled to rule that the evidence was admissible pursuant to gateway (g). However, it also drew attention to the fact that gateway (d) relates

to any important matter in issue between the prosecution and defence, propensity being merely an example of such a matter. In this case the important matter in issue was who started the violence and who picked up the weapon, and the bad character evidence was clearly relevant to those issues. Unfortunately the court failed to address the judge's errors in leaving propensity to the jury in circumstances where she had not ruled upon it and failing to give the jury any direction on the use of evidence of propensity.

See the Criminal Law Week commentary (CLW 09/46/01) for criticism of the CA's failure to separate out the issues in respect of which the evidence was relevant and admissible and to set out the appropriate directions upon each issue.

Sentencing

Firearms

As the Lord Chief Justice observed in [R.v. Ralphs \[2009\] EWCA Crim 2555](#) (3/12/2009) "the effect of complicated legislation is that on conviction on indictment offences [of possessing firearms and ammunition] contrary to section 5(1) and 5(1A) of the Firearms Act 1968, as amended, are subject to a statutory maximum sentence of 10 years' imprisonment." Courtesy of section 51A such cases are also subject to minimum terms of detention or imprisonment of five years for those aged 18 and over. As the Court observed this does not leave much room for "case specific flexibility" (para. 26) especially when a defendant pleads guilty and is entitled to a discount. The Attorney-General argued that sentences of 6 years on a plea were unduly lenient and suggested that the way the court could help the Crown to get round this government imposed straitjacket was to pass consecutive sentences despite the fact that on the facts of the case this was as obvious a case for concurrent sentences as could be wished for. The Court declined that invitation stating that the principle of totality was involved. This did not stop the Court however from agreeing that the sentence was unduly lenient and increased it to eight years. Two observations come to mind. One is, what incentive is there for someone accused of similar offences not to take their chance in a trial knowing that the difference in sentence will be a matter of months? The other is that it probably won't be long before which ever government is in power later this year introduces measures to increase sentences for these offences.

Unlawful Act Manslaughter

When the CJA 2003 heralded substantial increases in sentences for murder it was only a matter of time before sentences for other offences of homicide were also increased. So the SGC guideline on manslaughter by reason of provocation in 2005 (Archbold Supp K-71) suggested a significant increase in such sentences. The SGC guideline on attempted murder (Archbold Supp K-221) confirmed the substantial increase in sentences for such offences laid down in *R.v. Ford* [2006] 1 Cr. App. R. (S.) 204. Then in *R.v. Wood* [2009] EWCA Crim 651 a five judge court presided over by the Lord Chief Justice the CA said that sentences in diminished responsibility manslaughter cases should bear much closer relationship to sentences for murder than had been the case in the past. No great surprise then to find that in [R.v. Appleby and](#)

[others \(Att-Gen's Reference No 60 of 2009\) \[2009\] EWCA Crim 2693](#) (CLW 10/01/3) another five judge court presided over by LCJ the took the opportunity to reconsider the approach to sentencing in cases of involuntary manslaughter – see Archbold para. 19-116b. The LCJ described “the manslaughter cases with which we are concerned involved gratuitous, unprovoked violence in the streets of the kind which seriously discourages law-abiding citizens from walking their streets, particularly at night, and gives the city and town centres over to the kind of drunken yobbery with which we have become familiar, and a worried perception among decent citizens that it is not safe to walk the streets at night.”(para.12). The conclusion of the court was “that crimes which result in death should be treated more seriously, not so as to equate the sentencing in unlawful act manslaughter with the sentence levels suggested in schedule 21 of the 2003 Act, but so as to ensure that the increased focus on the fact that a victim has died in consequence of an unlawful act of violence, even where the conviction is for manslaughter, should, in accordance with the legislative intention, be given greater weight.”

Consecutive sentences and HDC

In [Round and Dunn v R \[2009\] EWCA Crim 2667](#) (CLW 10/01/5) (16/12/2009) the Court addressed another area of confusion – this time the labyrinthine sentencing framework occasioned by the co-existence of the sentencing regimes of the 1991 and 2003 Criminal Justice Acts –. Mr Round had been sentenced on the same occasion to two terms of imprisonment, one of less than 12 months and one of 12 months or more. He argued that he had been disadvantaged because the judge had passed the longer sentence first, which meant that he was eligible for release on home detention curfew (HDC) later than he would have been if the judge had passed the shorter sentence first.

Applicable to his case was the decision of the Court of Appeal (Civil Division) in *R. (Noone) v. Governor of Drake Hall Prison and another* [2009] 1 W.L.R. 1321 – i.e. that the effect of paragraph 14 of Schedule 2 to the Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 (S.I. 2005 No. 950), is that sentences of imprisonment under 12 months are still subject to the release regime of the Criminal Justice Act 1991. Therefore where an offender is sentenced to consecutive sentences of imprisonment with one term being for less than 12 months and one term being for 12 months or more, different release regimes apply to the two sentences, meaning that the eligibility date for release on HDC would vary according to which sentence was served first.

Mr Round appealed to the CACD and invited the Court to reverse the order in which his sentences are to be served to ensure that he is eligible for HDC at the earliest possible time. However, the Court dismissed Mr Round's appeal, holding that it was inappropriate for a sentencing judge to consider early release possibilities when calculating sentences or framing the manner or order in which they are expressed to be imposed.

As noted in the commentary to the case in Criminal Law Week 10/01/05 the decision in *Noone* is to be considered by the Supreme Court. The outcome of the case may have a significant impact on prisoners in this type of situation, particularly if the Court adopts the

solution proposed by the authors of CLW, namely for release purposes to treat the various sentences as a single term governed by the Criminal Justice Act 1991 (CLW/10/01/05). GCN's Pete Weatherby appeared for Mr Dunn.

A policeman's lot is not a happy one

Who'd be a policeman? First there was the incident in which some bobbies in Oxfordshire used their riot shields as makeshift toboggans during the recent snowy weather and got a telling off from their Superintendent. Personally I think that's a much better use for riot shields than the more usual idea of shoving them in the faces of trade unionists or G20 and other protestors. Then to make things worse the usually copper friendly courts have got a bit tetchy recently as well. There have been two important new decisions in relation to police powers of stop and search and entry to premises without warrant. In *Syed v. D.P.P.* Lawtel 15/01/2010 (13/1/2010) the Divisional Court held that the right to enter premises by force without a warrant did not extend to a case where the police had “concern for the welfare of someone within the premises”. The power of entry only applied where the police apprehended that something serious was otherwise likely to occur or had occurred on the premises. In [Gillan and Quinton v. United Kingdom, The Times, January 15, 2010](#) (CLW 10/02/1) the European Court of Human Rights held that there had been breaches of Arts 5 and 8 where police officers had purported to exercise power under ss.44 and 45 of the Terrorism Act 2000. During the period of the search the applicants were entirely deprived of any freedom of movement and were obliged to remain where they were and to submit to the search failing which they were liable to arrest, detention at a police station and criminal charge. This element of coercion was indicative of a deprivation of liberty contrary to Art 5 of the ECHR. The use of coercive powers to require an individual to submit to a detailed search of her person, clothing and personal belongings without notice or choice amounted to a clear interference with her right to respect for family life and was a breach of Art.8. Whilst the powers had a basis in domestic law (The 2000 Act and Code A of PACE) they were neither sufficiently circumscribed nor subject to adequate legal safeguards to offer the individual sufficient protection against arbitrary interference (neither judicial review nor an action or damages would be likely to provide an adequate remedy) and accordingly the powers conferred by s.44 and 45 were not “in accordance with the law” and there had been a breach of Art 8.

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