

# Criminal Law Update

Issue 25. 26th May 2010



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.

## Notification of defence witnesses

Readers of this Update will be well aware that we frequently criticised the record of the last government for its endless cascade of new laws and regulations many of which seemed to be designed to make life more difficult for those accused of crime and likely to result in higher conviction rates regardless of whether this included miscarriages of justice. It was entirely in keeping with that government's rotten record that one of its last acts should be to bring into force from 1<sup>st</sup> May 2010 **section 34 of the Criminal Justice Act 2003** which had lain dormant for some seven years and which itself introduces a **new section 6C into the Criminal Procedure and Investigations Act 1996**. See the *Criminal Justice Act 2003 (Commencement Order No.24 and Transitional Provisions) Order 2010 (S.I 2010 No. 1183)*. (CLW 10/14/15) Section 6C compels a defendant to give a notice (n.b. not part of defence case statement) giving the details of the defence witnesses she may call. Supposedly this should be done within 14 days of primary disclosure. In the last issue we poured scorn on this proposal for its lack of realism amongst other things. It is questionable whether such a proposal is compatible with the fact that the burden of proof is (still) on the prosecution to prove its case since the court will be able to draw an adverse inference and the jury will be able to add any failure to give proper notice into the scales in deciding the guilt of an accused. Furthermore the police have the right, though they cannot compel co-operation, to interview such witnesses. It says much for the general concern that police officers would be likely to abuse this power that the government felt the need to issue a code of practice, as was provided by s.40 of the 2003 Act which inserts a **new s.21A into the 1996 Act**, to cover such interviews. A number of problems can easily be envisaged with this proposal. The witness is entitled to have a solicitor to advise him and to attend the interview although the CoP pointedly states that this does not mean that the LSC is obliged to pay a solicitor to do so! There are obvious difficulties if the defendant's own solicitor tries to advise the witness as there would be likely to be a conflict of interest in so doing. Given that the government did not make provision for paying a solicitor for her trouble in attending such interviews (and there is no prospect now of money being found for that purpose) my view is that any such witness would be perfectly entitled to decline to be interviewed in the basis that she would be foolish to agree without having a solicitor and the state will not provide her with one. This seems likely to cause no end of trouble with arguments in court about what if any impact all this may have on the trial although perhaps the one saving grace in all of this is that police resources are already stretched and likely to be even more so after the anticipated round of government impose cuts in spending and it is likely that in many cases the police will not even bother to enquire about such interviews. That may not be so in serious cases however where there is potential for a lot of trouble to be caused by these daft and authoritarian provisions. Detailed and useful advice was given by Anthony Edwards in the Law Society Gazette for 6<sup>th</sup> May 2010 and

available on line at [www.lawgazette.co.uk](http://www.lawgazette.co.uk). Finding the Code of Practice is an ordeal in itself. It might have been thought to be a good idea to add a link to the on-line *SI 2010 No 1223 The Criminal Procedure and Investigations Act (Code of Practice for Interviews of Witnesses Notified by Accused) Order 2010* (CLW 10/14/18) but that would have spoiled the fun! Instead try a Google search for "code of practice for interviews with defence witnesses" and follow the link to [wikicrimeline.co.uk](http://wikicrimeline.co.uk)

## Search Warrants

More good news on search warrants. Some principles appear to be emerging from recent cases (see [Update Issue 24](#) on 25.3.10, *R (Bhatti) and others v Croydon Magistrates' Court; Commissioner of Police for the Metropolis, and the SSHD* [2010] EWHC 522 (Admin) 03.2.10). This is to ensure that correct procedure is followed in any application for a warrant and that such applications are not simply granted on the nod. This includes the following:-

1. The officer applying for the warrant should be an officer directly involved in the investigation so as to be able to give the magistrates the full picture;
2. The reasons for the grant of a search warrant must be recorded at the time the warrant is issued so as to safeguard against unlawful interference with a person's premises;
3. When applying for a warrant under PACE 1984 Section 8, officers must give full disclosure of any earlier searches so the court can consider whether if there had been a previous search, is it likely there would still be evidence of substantial value and relevance on the premises? Equally, if there been co-operation from the defendant in the previous search, would the purposes of the search be prejudiced with advance warning? See *R v Crown Court at Lewes ex p Hill*, 93 Cr App R 60 DC;
4. Where the scope of a warrant was limited to a flat in a block of flats, seizure of a car in a car park was unlawful as it was "not on the premises" and the car park was not therefore within the scope of the warrant, [R \(Wood\) v North Avon Magistrates' Court](#), 174 JP 157, DC [2010] EWHC 3614 (Admin.) (CLW 10/14/1) (10/11/2009).

## Indictments

An indictment should be drafted so as to reflect the alleged criminality in any case and any unnecessary count or counts which lead to duplication should be omitted. In a case where two appellants had pleaded guilty to rape and attempt rape and a third was convicted of aiding and abetting rape and false imprisonment, the count of false imprisonment was unnecessary, *R v N. D. and L.* [2010] EWCA Crim 941; The Times May 11<sup>th</sup> 2010, C.A. (CLW 10/18/3) (22/04/2010).

## Hearsay evidence

The case of [R.v. Seton \[2010\] EWCA Crim 450](#) (CLW 10/18/2) (12/03/2009) appears to be a very good example of all that is wrong with the hearsay provisions, the pernicious influence on the administration of justice of such laws and the potential for serious miscarriages of justice. S was charged with murder. His defence was that another man, P was responsible. The police interviewed P but he made no comment. Thereafter P made a phone call to his wife from prison in which he denied being responsible in emphatic terms. P made it abundantly clear that he had no intention of attending the trial as a witness. As P was a Category A prisoner he would have known that such calls would be recorded. At trial the prosecution sought to adduce the evidence of the denial made in the phone call. Since P was clearly identifiable, was alive and well and his whereabouts well known to the police there was no basis for adducing the evidence under s. 116. So the prosecution applied under s. 114 (1) (d) (interests of justice) to adduce the evidence. Quite how prosecution counsel, the trial judge or the Court of Appeal can have really believed that this evidence satisfied S.114 (2) (a), (c.) or (e.) is hard to understand. The trial judge described the evidence as being "extremely strong probative evidence". The Court of Appeal batted away all objections by saying that since the judge had considered all the factors set out s. 116 (2) as he was required to do by the case of [R.v. Z \[2009\] 1 Cr. App. R. 500](#) and had made no legal error there was no basis for overruling the judge's decision. The Court also pointed out that the case against the appellant was very strong. But just consider for a moment what would have happened if P had given evidence at court. He would obviously have denied the offence. In cross-examination the first question would probably have been along the lines of "well you were hardly going to admit it on the phone from prison when you knew the call was being recorded were you?" What would have been the evidential weight of a denial then? It would have been worthless. So how does worthless evidence get transformed into "extremely strong probative value" merely because the maker of the denial refuses to come to court?

## The liability of secondary parties in murder

The current law on the liability of secondary parties in murder was set out in the case of [R.v. Powell; R.v. English \[1999\] 1 A.C.1](#). In the subsequent case of [R.v. Uddin \[1999\] 1 Cr. App. R. 319](#) and [R.v. Rahman \[2009\] A.C. 129](#) those principles were reaffirmed with guidance given as to how juries should be directed. Still the law in this difficult area where usually only one person has administered the fatal blow but a number of others are involved in the general assault appears to be giving rise to real problems in the courtroom. In [R.v. Mendez \[2010\] EWCA Crim 516](#) (CLW 10/14/2) (22/03/2010) the trial judge expressed his frustration that the law remains hard to interpret. The Court of Appeal however reaffirmed the previous principles. The court stated that a jury can only be expected to form a broad-brush judgment about the sort of level of violence and associated risk of injury which they can safely conclude that the defendant must have intended or foreseen and that they must consider whether the principal's unforeseen act (if such it was) was of a nature likely to be altogether more life-threatening than acts of the nature which the accessory intended or foresaw.

## Defence statements

The case of [R.v Omar \[2009\] EWCA Crim 2291](#) (CLW 10/19/3) is a cautionary tale of the consequences of poor case preparation and the failure to serve a defence statement where one should be. The appellant, aged 16 at the time was convicted of rape of a 15 year old girl. She claimed she did not know her assailant. After conviction and a failed attempt at an appeal the case was submitted to the CCRC. Amongst other things their investigations revealed that the girl had in fact stored a phone number being used by the appellant at the time in her own phone. It became clear then that the girl had lied in saying the rape had been carried out by a stranger. By the time the Court of Appeal heard the reference by the CCRC the appellant had served over three years in detention for a crime he did not commit. The Court pointed out that if a defence statement had been served the police would have been alerted to the need to investigate the complainant's phone which would have revealed the truth about the background to the case.

## Bail

Where the prosecution announce their intention to appeal a decision from the Magistrates' Court on a grant of bail, the defendant should have been allowed to be present at the Crown Court hearing. This refusal was in breach of Article 5(4) ECHR (person deprived of liberty entitled to take proceedings by which lawfulness of detention shall be determined speedily by a court). Where there is a second level of jurisdiction, ie the Crown Court in this case, detainees must have the same guarantees on appeal as at first instance; she had not been given the same guarantees by refusing her request to be present. She was deprived of her liberty as soon as the Prosecution announced its intention to appeal. Given that pre-trial detention was likely to be lengthy, the gravity of the charges and the fundamental importance of the right to liberty, fairness required that her request to be present at the appeal should be granted. It will be interesting to see how many people exercise their right to be present at such appeals and what excuses might be given for them not being produced. [Allen v. United Kingdom](#), European Court of Human Rights, unreported, March 30, 2010 Lawtel (CLW 10/19/4)

## Sentencing – totality

The principle of totality of sentence does not apply to a sentence in default of payment of a confiscation order which is designed to put pressure on a convicted person to pay the amount ordered. Where therefore a sentence of 28 years was appropriate for a sophisticated substantive offence of importation of huge amounts of cocaine (although reduced to 25 years due to evidence of ill-health of appellant) it would be inappropriate to reduce the sentence of 10 years in default of the payment of the amount ordered to be confiscated – [R.v. Price \[2009\] EWCA Crim 2918](#) (CLW 10/18/8) (14/12/2009).

## Imprisonment for public protection – setting the minimum term

In the case of [R.v. Delucca; R.v.Murray; R.v. Stubbings \[2010\] EWCA Crim 710](#) (CLW 10/18/14) (31/03/2010) the Court of Appeal dealt with how the minimum term of an indeterminate sentence should be calculated where there is more than one offence some of which are themselves not specified offences which attract a possible sentence of IPP. Following the decision in *R.v. O'Brien and others* [2007] 1 Cr. App. R. (S.) the Court said that when assessing the length of the minimum term of an indeterminate sentence the judge should have regard to the totality of the sentences it would have passed for all the offences before it. Where there are a number of different offences being considered it is irrelevant that the notional determinate sentence, which takes into account all the offences, exceeds the statutory maximum for the specified offence which attracts the sentence of IPP. This approach remains the correct one even after the changes implemented by the Criminal Justice and Immigration Act 2008 whereby the notional minimum term before an IPP can be imposed is two years. Neither does it matter that some of the offences taken into account in assessing the totality of the offending occurred before April 4, 2005 so long as the offence which attracts the IPP sentence did occur after that date.

## CJA 2003 Schedule 15A – robbery whilst in possession of firearm

The words of para.10 of Schedule 15A of the CJA 2003 “an offence of robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of the Firearms Act 1968” are wide enough to embrace joint possession in the course of a robbery even if the offender had not had actual possession of a firearm, providing it is proved or admitted that the offender was a party to the robbery which to his knowledge involved the possession of a firearm by one of those involved. See [R.v. Gore \[2010\] EWCA Crim 369](#) (CLW 10/18/15) (01/03/2010).

## Sentencing Young Offenders – Rape of a child under 13

Sentencing young offenders convicted of sexual offences has always given the courts problems in attempting to balance the welfare of the child (the offender) and the protection of the public. Compare and contrast the following cases.

1. A 14 year old boy, no previous convictions, with a learning disability, anally raped his five year old sister on two or three occasions; made her suck his penis; inserted his finger into the anus of a 7 year old boy; masturbated the 7 year old boy; inserted his finger into the anus of that boy's 4 year old sister. He pleaded guilty at the first opportunity. A total sentence of 8 years detention was reduced to 6 years on appeal. *R v J* [2010] 1 Cr App R (S) 580, C.A. (CLW 10/17/19) (10/09/2009).

2. A 14 year old boy, no previous convictions, engaged in sexual activity with his 8 year old cousin. He placed his penis in his cousin's mouth; attempted, unsuccessfully, to insert his penis into his cousin's anus; persuaded the cousin to masturbate him to ejaculation; touch his anus and lick his penis. Whilst, on the facts, not as serious as the above, a three year supervision order was substituted for a two year detention and training order. The judge stated that “it was not in the interests of his welfare that he be given a custodial sentence”. *R v C* [2010] 1 Cr App R (S) 616 (CLW 10/17/20) C.A. 29/09/2009).

In the second case it would appear that the interests of the child were paramount whilst in the first case it appears that protection of the public was paramount.

## Sex Offender Notification Requirements

A person who is subject to indefinite notification requirements under Part Two of the Sexual Offences Act 2003 is entitled to a review as to whether such notification requirements continue to serve a legitimate purpose. The absence of any review was held to be a disproportionate interference with Article 8 ECHR (respect for private and family life).

The downside is that it is open to the legislature to impose an appropriately high threshold for review. We will wait and see what this appropriately high threshold is and whether anyone can cross it. See [R. \(F.\) v Secretary of State for Justice; R.\(Thompson\) v Secretary of State for the Home Department](#) [2010] 2 W.L.R. 992; [2010] UKSC 17 (CLW 10/15/10). Pete Weatherby of GCN appeared for one of the respondents in this case. See link to story on [www.gcnchambers.co.uk](http://www.gcnchambers.co.uk)

## Coroners and Justice Act 2009

Important changes to the law of diminished responsibility and the law of provocation are made by this Act. We discussed these provisions back in Issue 22 in December 2009 but in brief Section 2 (1) of the Homicide Act 1957 is replaced to provide a revised definition of diminished responsibility and Section 3 of the 1957 Act is repealed and the law of provocation substantially amended. The most significant changes are that the loss of control does not have to be sudden and that sexual infidelity is no longer to be regarded as a basis for a defence of provocation. *The C&JA 2009 (Commencement No 4, Transitional and Savings Provisions) Order 2010* (S.I. 2010 No 816) (CLW 10/12/8) bring these changes into force on 4<sup>th</sup> October this year so make a note in your diary.

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