

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.

Joint enterprise murder

In *R.v. A., B., C. and D* [2010] EWCA Crim 1622 (15/07/2010) [judgment](#) the Court of Appeal allowed an appeal in a case where the judge failed to direct the jury that the principal must commit the fatal act with an intent to kill or do GBH and further failed to direct the jury that in order for the secondary party to be guilty the jury had to be sure that someone (even if not clearly identified) had committed murder. As the commentary in CLW (10/29/12) says, there is nothing new in this case and the law as laid down in *R.v. Powell & English* [1999] 1 A.C.1 and *R.v. Rahman* [2009] A.C. 129 remains good law but together with the case of *R.v. Mendez* [2010] EWCA Crim 516 which was reviewed in the [last issue](#) of this Update and the case of *R.v. Gnango* [2010] EWCA Crim 1691 (CLW 10/33/9) (26/07/2010) [more](#) in which GCN's [Nina Grahame](#) appeared for the appellant this is the third time in four months that the Court of Appeal has been asked to review convictions in this troublesome area of the law where those who do not kill and may well not have any intention that murder should be committed are convicted of the same offence as the actual killer.

If the law on the liability of secondary parties in murder has already been stretched a long way (as Toulson LJ acknowledged in *Mendez*) the prosecution in *Gnango* wished to take it to another level altogether. The case involved a shoot-out in a car park in which a passer-by was killed. The Crown accepted that the only defendant in the dock was not the person who fired the fatal shot. In trying him on the basis of joint enterprise the Crown was faced with the difficult task of identifying the joint purpose of two persons who had diametrically opposed intentions, namely to kill or seriously injure the other when it could hardly be suggested that there was a joint enterprise to have themselves killed by the other! The Crown's solution was to allege a joint enterprise affray. This was firmly rejected by the CA and the appeal allowed on the basis that secondary liability depends on the parties acting in concert. However in comments at the end of the judgment the court effectively encouraged the prosecution to reconsider whether there could not have been a joint enterprise on the basis of an agreement between the gunmen not only to shoot at each other but also to be shot at! The Court has certified a point of law of general public importance and it may therefore be presumed that the Crown will seek leave to appeal from the Supreme Court so it remains to be seen whether we have heard the last of this saga.

Shaken baby cases

Anyone undertaking the defence of a person charged in a case involving shaken baby syndrome must be familiar with the guidance given by the CA in the case of *R.v. Henderson*; *R.v. Butler*; *R.v.*

Oyediran [2010] EWCA Crim 1269 (CLW 10/25/3) (17/06/2010) [judgment](#). The guidance deals with pre-trial case management, admissibility of expert evidence and the appropriate directions required to be given to the jury. In addition the report entitled "[Sudden unexpected death in infancy from the Royal College of Pathologists and the Royal College of Paediatrics and Child Health \(September 2004\)](#)" is required reading.

Bad character

It seems that some prosecutors still do not understand the circumstances in which prejudicial material can be legitimately used as evidence of bad character. *R.v. Eyidah* [2010] EWCA Crim 987 (CLW 10/22/2) (19/03/2010) was a case in which a civil servant was being tried for counter-signing fraudulent passport applications. The prosecution persuaded the judge to admit a mass of material relating to unpaid parking fines, county court judgments and arrears of rent etc on the basis that this proved that she knew the passport applications were false and this was evidence of "propensity". When confronted by this in the Court of Appeal prosecution counsel seems to have been surprised that some of the items had been admitted in evidence which is interesting considering that it was he who asked the judge to admit them in the first place. Not surprisingly the Court of Appeal expressed their dismay at the way this matter had been dealt with and quashed the conviction.

R.v. Chrysostomou [2010] EWCA Crim 1403 (CLW 10/30/4) (24/06/2010) [judgment](#) is an example, of the difficulties the courts still seem to be having with understanding the basis for admitting evidence of bad character. The CA held that whilst the defendant's evidence that the complainant was a Class A drug user was arguably an attack on her character within section 101 (1) (g) of the CJA 2003, the judge was wrong to allow evidence to be adduced that the defendant was himself a dealer in Class A drugs because the only point of that evidence was to blacken the name of the defendant. That is not only the whole point of evidence under s.101 (1) (g) but it also misses the real point. As the commentary in CLW points out the principled basis for ruling the evidence inadmissible is that since the allegation was an integral part of the defendant's explanation of his conduct at the material time and not an attack on the witness's credibility, it was wrong, because it would be unfair (s. 101 (3)), for the court to have admitted the evidence.

In *R.v. Brewster and Cromwell* [2010] EWCA Crim 1194 (CLW 10/30/3) (27/05/2010) [judgment](#) the CA reviewed the basis for admitting the evidence of a non-defendant under s. 100 of the CJA 2003. In quashing a conviction where the defence had not been allowed to cross-examine the complainant in a kidnapping case about her previous convictions including for manslaughter which were said to be relevant to the issues raised in the defence case, the CA pointed out that the words "substantive probative value" in s. 100 (1) (b) did not require the applicant to establish that the bad character relied on amounted to proof of a lack of credibility of the

witness when credibility was an issue of substantial importance, or that the convictions demonstrated a tendency towards untruthfulness. The question was whether the evidence of the previous convictions or bad behaviour was sufficiently persuasive to be worthy of consideration by the jury on the issue of the creditworthiness of the witness.

In *R.v. Braithwaite* [2010] EWCA Crim 1082 (CLW 10/25/1) (25/05/2010) [judgment](#) the CA said that whilst cross-examination of witnesses as to previous convictions, cautions and penalty notices was acceptable the same could not be said of the contents of CRIS reports which were hearsay in any event and in the absence of any substantiation were lacking in probative value.

From August 15, 2010 section 144 and Schedule 17 of the Coroners & Justice Act 2009 are in force with amendments to section 103 of the CJA 2003. The effect is to allow foreign convictions to be used in applications to adduce evidence of bad character. (CLW 10/28/10).

Hearsay

The case of *R.v. E.D.* [2010] EWCA Crim 1213 (CLW10/24/9) (28/05/2010) [judgment](#) is a useful reminder that the hearsay provisions of the CJA 2003 are not meant to be used as a measure of convenience where a prosecution witness doesn't really want to come to court but isn't in fear or otherwise within s.116.

The case of *Chrysostomou* (above) also concluded that since text messages in the defendant's phone which suggested he was a drug dealer were not relied on to prove, as fact, any matters stated in them they were not within s.115 (3) (a) and since they were being relied on as evidence of an "implied assertion" they were outside the statutory code laid down in the CJA 2003 and were potentially admissible.

Legal professional privilege

The principles of law and the relevant authorities involved in this important topic have been reviewed in the case of *R.v. Seaton* [2010] EWCA Crim 1980 (CLW 10/33/4) (13/08/2010) [judgment](#).

Indictments

Given that we now live in an age when trial on indictment does not require there to be a signed indictment at all it is comforting to know that the CA will still insist on a measure of formality in such cases. In *R.v. Miller* [2010] EWCA Crim 809 (CLW 10/22/3) (25/03/2010) the Court stated that where it is alleged that a burglary has been committed in relation to a dwelling, it is necessary to specify this in the indictment because s. 9 (3) of the Theft Act 1968 creates two separate and distinct offences dependent on whether the burglary took place in a dwelling or not and this is important in relation to sentence, especially s.111 PCC(S)A 2000 (minimum term for third domestic burglary).

Sentence calculation

Congratulations are due to GCN's [Pete Weatherby](#) for finally managing to get the judges to agree with him that the previous system whereby the length of HDC (curfew) available to a prisoner depended on which of two or more consecutive sentences of more and less than 12 months was passed first was indefensible. The sorry saga of *Noone v. The Governor of HMP Drake Hall and the Secretary of State for Justice* began in the High Court in January 2008 [2008] EWHC 207 Admin although the issue was first raised in *R (Highton) v Gov of HMYOI Lancaster Farms* [2007] EWHC 1085 (Admin) (17/04/2007), which was relied upon by the SoS in *Noone*. Despite getting the High Court to agree the SoS's policy was bonkers the Court ruled that the method of calculating entitlement to early release was correct. Then in the Court of Appeal the SoS won 3-0 [2008] EWCA Civ 1097. The [speeches of the justices of the Supreme Court](#) in which Pete won 5-0 are worth reading for the furious anger expressed at the lunacy of the policy that stated that entitlement to HDC did depend on which of the sentences was passed first and at the impenetrable language in which sentence calculation is expressed. For those who fear to tread where prison law is engaged the simple point that emerges from the decision of the Supreme Court is that multiple sentences of whatever length should be aggregated, the prisoner will generally serve half of the sentence before automatic release and he/she will be eligible to the same HDC as would apply to a single sentence of the same length. Simple really, just a pity it took 2 ½ years to get there, and hundreds of prisoners were not considered for HDC early release when they should have been! [more](#)

Imprisonment for Public Protection

In *R.v. Smith* [2010] EWCA Crim 246 (CLW 10/27/9) (27/01/2010) the CA said there was nothing wrong with a court imposing a sentence of IPP on a defendant who was already serving a life sentence from which he had been released on licence and later recalled. However the Court certified a point of law of general public importance and the Supreme Court has given leave to appeal so this issue will be resolved at some later date.

In three recent cases sentences of IPP for making indecent photographs of children have been overturned. In *R.v. Sackman* [2010] 2 Cr. App. R. (S.) 380; [2010] EWCA Crim 19 (CLW 10/26/19) (14/01/2010) a determinate sentence plus SOPO was substituted. Similar sentences were substituted in *R.v. Howe*; *R.v. Duncan* [2010] Crim L.R. 653; [2009] EWCA Crim 2707 (CLW 10/29/14) (03/12/2009) and in *R.v. Waller* [2010] Crim L.R. 655; [2010] EWCA Crim 728 (CLW 10/29/13) (09/03/2010). Whilst the Court in the last case said that it was not saying that IPP would never be appropriate in a child pornography case, the test of future dangerousness is likely to be hard to satisfy in many such cases.

Life Sentences v. IPP

Two recent cases confirm the fact, previously noted in [Issue 21 \(October 2009\)](#) that sentences of IPP have effectively replaced life

sentences save for very grave offences. In **R.v. Knight** [2010] 2 Cr. App. R. (S.) 541 (CLW 10/32/24) (11/02/2010) the appellant had a large number of previous convictions including for robbery and wounding with intent. He had taken part in a series of professionally planned commercial robberies in which large sums of money were stolen. Life sentence with minimum term of 7 years quashed and IPP (same minimum term) substituted. The court referred to R.v. Kehoe [2009] 1 Cr. App. R. (S.) 41 as authority for the proposition that life imprisonment should be reserved for cases in which the culpability of the offenders was particularly high or the offence itself was particularly grave. In **R.v. McDonald** [2010] 2 Cr. App. R. 450 (CLW 10/32/25) (29/01/2010) the appellant had significant previous convictions including for possession of sawn-off shotguns. He was convicted of robbery of a public house, wounding with intent and possession of a firearm and received a life sentence with a minimum term of 12 years. This sentence was quashed and IPP substituted with the same minimum term. The court commented that serious as the case was the facts were not so grave as to justify a sentence of life imprisonment.

Use of the internet by jurors

Given the ease with which information can be obtained by jurors by a simple internet search the LCJ Lord Judge and V-P Hughes LJ have said that judges must now specifically direct juries in forceful terms not to indulge in any such research at the outset of the case – see **R.v. Thompson and others** [2010] EWCA Crim 1623 (CLW 10/29/5) (14/07/2010) [judgment](#). Amusingly the editor of CLW and of Archbold suggests in his commentary on the case that there is about as much chance of this having the desired effect as there was of King Canute being able to turn back the waves!

Trial on indictment without a jury

Since the power in s.44 of the CJA 2003 to conduct a trial by judge alone represents such a radical departure from previous practice, the reaffirmation in **R.v. J., S. and M** [2010] EWCA Crim 1755 (CLW 10/29/9) (23/07/2010) [judgment](#) that this must remain a decision of last resort is to be welcomed. The court stated that except in extreme cases, where the necessary protective measures would constitute an unreasonable intrusion into the lives of the jurors, juries must be expected to perform their duties “with their customary determination to do justice”.

Criminal Procedure Rules

Busy practitioners will be thrilled to learn that the Criminal Procedure (Amendment) Rules 2010 (S.I. 2010 No. 1921) (into force October 4, 2010) effect a series of amendments to the Crim Proc Rules 2010 which themselves have only recently come into force. The best way to try to keep up to date with such matters is via the brilliant [CLW website](#), available to those who subscribe to CLW online. In the meantime you can get the gist of what is included at CLW 10/29/20.

Inconsistent verdicts

Useful guidance on this topic was given in the case of **R.v Dhillon** [2010] EWCA Crim 1577 [judgment](#) in which the appeal was allowed

Goodyear Indications

Practitioners should be aware of the decision in the case of **R. v. Newman** [2010] EWCA Crim 1566 (CLW 10/30/9) (25/06/2010) which makes clear that indications in cases where an indeterminate sentence such as IPP is a possibility, which the judge then realises was incorrect in the light of SGC guidelines and material in the PSR are NOT binding on the judge. Providing the judge gives the defendant the opportunity to vacate his guilty plea the public interest in an appropriate sentence trumps any disappointment on the part of a defendant.

Case Management in the Magistrates' Court

A new form has been approved for use in preparation for trials in magistrates' courts under rule 3.11 (1) of the Crim Proc Rules 2010 and comes into effect from October 4, 2010. It is digested at CLW 10/32/36.

Death by dangerous driving

Where following a collision between two vehicles the actual cause of death was a further collision with a third vehicle, whose driver was also killed the jury should have been directed that if they were sure that the defendant drove dangerously and that his driving was more than a slight or trifling link to the death then he would have caused it only if they were sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur – see **R.v. Girdler** [2009] EWCA Crim 2666 (CLW 10/33/6) (15/12/2009) [judgment](#).

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