Criminal Law Update

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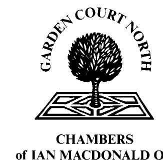

References to Criminal Law Week are abbreviated to CLW with the year, issue and paragraph number given. If a date is given this is the date of the judgment.

Swearing at police officers

It's the sort of case that has the editors of newspapers like the *Daily Telegraph* and *Daily Mail* spluttering with outrage into their breakfast cereal as a visit to their websites will confirm. In the case of *Harvey v. DPP* [2011] EWHC B1 (Admin) (17/11/2011) judgment Bean J allowed an appeal by Mr Harvey and quashed his conviction for an offence under s.5 POA 1986. Police officers had stopped him and others for a search for cannabis. On three occasions he swore at the officer before he was arrested. At trial neither of the police officers gave any evidence that they had been caused harassment alarm or distress. Nonetheless the magistrates concluded that since they were in the middle of a block of flats at the time they were guilty. On appeal Bean J held that the magistrates had not been entitled to convict in the absence of any evidence of harassment, alarm etc. Contrary to the way in which newspapers chose to report the case Bean J did not decide that swearing at police officers is now okay, even if this is the sort of language they probably hear almost every day. What he actually decided was that based on clear authority including Southard v. DPP [2006] EWHC 3449 (Admin) such words **could** amount to abusive words or behaviour but in order for H to be guilty of an offence under s.5 there needs also to be evidence that the words or behaviour caused or were likely to cause a person harassment, alarm or distress and since there was no evidence of this the offence was not made out. Far from threatening to undermine the very fabric of society that is no more than a simply statement of the law! Furthermore the judge held that since those who were gathered around the incident were more likely to be sympathetic to the defendants rather than the police they were not likely to be caused harassment etc either by the use of such language. As to those in the surrounding flats since there was no evidence that any of them had heard the language there was again no basis for saying they would have been affected. It should not however go unremarked that the applicant in this case was a young black man and since the frequent use against black people of stop and search powers remains a real issue at least for the black community, if the decision in this case makes officers think twice before picking on young black men as easy targets that will be no bad thing.

Arrest

Before making an arrest an officer must have, objectively, reasonable grounds for his belief that an arrest was necessary under the Police and Criminal Evidence Act 1984. Section 24 (4) PACE states:- *"But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question".* (our emphasis) He does not have to show that he has considered every alternative to arrest. This approach is however consistent with para 1.3 of Code G which states that the use of a power of arrest must be justified and consideration given as to whether objectives can be met by other, less intrusive means. In *Hayes v Chief Constable Merseyside Police* [2011] 2 Cr.App.R. 434, The Times August 19, 2011, (CLW 11/32/1), judgment the Court observed that the officer who gives no thought to alternatives to arrest could risk being found by a court to have, objectively, no reasonable grounds for his belief that arrest was necessary. This will be an interesting argument to run and even more interesting if it's successful.

Stop and search powers

In *Howarth v. Metropolitan Police Commissioner* [2011] EWHC 2818 QB (03.11.11) judgment the court was concerned with the lawfulness of a search of a person who was planning to attend a demonstration. The police had information that members of a group were likely to be in possession of articles that were capable of causing criminal damage. There was no intelligence that Howarth was himself in possession of such items. The Court held that the test of the lawfulness of a search under PACE 1984 section 1 is the same as the lawfulness of an arrest under s.24 of the Act – see Castorina v. CC of Surrey 10, June 1988, unreported, namely (a.) that the officer himself believe there were reasonable grounds; (b.) those grounds were objectively reasonable and (c.) that if (a.) and (b.) are established the discretion to arrest can only be challenged on "Wednesbury" grounds. The High Court held that the feature of "group searching" appeared to raise the third limb of the Castorina test, namely whether the officer's decision to search individuals, given his suspicions of the group, reasonably held, went beyond the boundaries of the discretion open to an officer in such circumstances. The HC upheld the lawfulness of the search of an individual

because he was part of a group in respect of which there were reasonable grounds to search.

GCN crime seminar:
"Police powers of search and arrest"
January 2012 (date tbc), Manchester, 1.5 CPD

Jared Ficklin of GCN has appeared recently in a case concerning the same issues relating to fox hunt monitors. Speaking at our twilight seminar, Jared and other members of the GCN crime team will consider PACE1 and the apparent extension of police powers to stop and search, and the caselaw on "necessity" of arrest (Richardson v Chief Constable of West Midlands Police [2011] EWHC 773 (QB), which is now the same test for stop and search.

To register your interest in this seminar please email hray@gcnchambers.co.uk with your details.

Abuse of Process

Suspects have often relied upon what appear to be representations/promises made to them and, because of that, have had a legitimate expectation as to a particular outcome, e.g. police stating they would administer a caution if admissions were made in interview. Proceeding where there had been a reliance , to his detriment, on such a representation could amount to an abuse of process. In *R v Killick* [2011] EWCA Crim 1608, (CLW 11/41/1) (29/06/2011) judgment, the defendant was informed he would not be prosecuted and it was later confirmed by the police in an email to the defendant's solicitors that the matter would be discontinued. Four lawyers and a Q.C. had advised against prosecution when a senior CPS advisor then reviewed the case, this review taking place after the complainant instituted judicial review proceedings. A decision was then taken to prosecute and the email could not be relied upon as it was sent to the solicitors, not the defendant, who would have, it was assumed, advised that the complainant could challenge the decision not to prosecute. Despite the decision to prosecute coming 4 years after the initial arrest and 2 years after the email to solicitors it did not amount to an abuse of process and the delay in allowing the case to proceed was not an affront to justice. Solicitors have long known that a promise from the police to caution a suspect cannot be relied upon. It seems that when the CPS say they will not prosecute it cannot be relied upon either, meaning a case can hang over a client for years.

Bad Character Directions

In *R v Williams* [2010] EWCA Crim 2552, (CLW 11/36/4) (23/09/2011) judgment, the conviction was quashed as the jury had not been properly directed as to the purpose of the bad character evidence and there was a real possibility that this error had an influence on the outcome of the case. Here, the evidence had been admitted under Section 101(1) (g) of the Criminal Justice Act 2003 (attack on another person's character) and the judge must give strong and clear directions to the jury that this evidence goes to the issue of the defendant's credibility and not to the issue of propensity. Although the issue is now well established that clear directions as to the permissible use of bad character evidence must be given, it is perhaps unrealistic to expect a jury to separate propensity from untruthfulness.

Hearsay

Lazy prosecutors beware! If a complainant withdraws her complaint and no effort is made to try to get her to court the hearsay provisions do not make her witness statement or the transcript of a 999 call admissible. Section 116 (2) (d) (not s.116 (1) (d) as the judgment wrongly suggests) only applies where reasonable efforts have been made to get the witness to court failing which a judge should not use s.114 (1) (d) to get the prosecution out of a hole they have created for themselves. The Crown did not rely on fear on the part of the complainant (s.116 (2) (e)) since there was no evidence of fear. The judge had also failed to consider properly s. 114 (2) (c) (the importance of the evidence in the case). It would be very rare for hearsay to be allowed where reasonable steps to get the witness to court had not been taken. *R.v. Tindle* [2011] EWCA Crim 2341, (CLW 11/43/4) (20/10/2011).

Errant jurors

Another example of problems with juries. A juror's fiancé sat in the public gallery during a trial including during parts of the case conducted in the absence of the jury. Helpfully he sent her texts including some about what had happen in the jury's absence. The juror admitted receiving texts in the jury room and discussing their contents with fellow jurors. At least one other juror seemed to be aware of some of their contents. When questioned the other jurors denied having been told anything. Since however the fair-minded, independent and informed observer would have concluded that there was a real risk that the jury had received information from an extraneous source that they could not put out of their minds, the judge should have discharge the jury. *R.v. Mears and others* [2011] EWCA Crim 2651,

(CLW 11/43/3) (10/11/2011) judgment. Presumably we should all now ask the judge to check that no one in the public gallery knows any of the jurors and if they do would they please mind not sending their loved ones texts during the case!

When Manslaughter verdict is an alternative to murder

The decision in R.v. Mendez [2011] 1 Cr. App. R. 109, [2010] EWCA 516 and the line of authorities referred to therein should not be taken to mean that manslaughter is not available as an alternative verdict to murder. In *R. v. Carpenter* [2011] EWCA Crim 2568 (11/11/2011) judgment, D knew that her son had taken a knife to a pre-arranged fight. The Crown alleged a joint enterprise in which D had participated by holding back members of the rival family to prevent them intervening in the fight. The CA held that a manslaughter verdict had been open to the jury if D had not intended or foreseen that the knife would be used with intent to kill or do GBH. Mendez and the line of cases going back to R.v. Powell; R.v. English [1998] 1 Cr. App. R. 261 was meant to apply to those cases in which D was not aware that another person had a weapon (or at least did not foresee it's use) until it was used so that they are either guilty of murder (if they at least realised that D might use a weapon with intent to cause at least GBH) or are not guilty of anything. It is in such cases, rather than those like the present where the accused knew her son had the knife, in which there is no room for a manslaughter verdict.

Theft and robbery

In *R. v. Vinall and another* [2011] EWCA Crim 6252 (16/11/2011) judgment three youths confronted two young men who were riding bicycles. One of the young men was punched and fell off his bike. He ran away. One of the youths was seen riding the bike but shortly thereafter the bike was left at a bus shelter about 50 yards from where it had first been taken. The youths had by then left the scene. Two of the youths were prosecuted for robbery and assault by beating contrary to s.39 CJA 1988. The prosecution case appears to have suffered some damage during the trial and the robbery count only just made it past a half time submission. However the real problem arose from the summing-up. Given the state of the evidence the judge directed the jury that they could treat the initial taking and later abandonment of the bike as an appropriation and that they could conclude that when leaving the bike at the bus stop, showing no regard for the rights of the owner, the defendants did intend permanently to deprive the owner of it for the purposes of s.6 of the Theft Act 1968. As the Court of Appeal pointed out [para.12] the problem with this direction was that the appropriation, dishonesty and intention permanently to deprive must coincide. If the charge had been theft the judge's directions might have been adequate, at last on one view of the evidence, but since this was robbery and the violence or threat of violence must be used "before or at the time of" the theft [section 8], the robbery convictions could not be upheld because the only violence had been used at the time the bike was initially taken. The prosecution appears to have over-reached itself and should, have settled for a prosecution either for theft or the summary offence under s. 12 (5) of the Act.

Young persons in the Crown Court

Where a child or young person had been committed for trial to the Crown Court under Magistrates' Court Act 1980 s.6 as he was jointly charged with an adult, the CC had no power to remit the juvenile to the Youth Court for trial where the adult subsequently pleaded guilty – *R (W, a minor) v. Leeds Crown Court* – [2011] EWHC 2326 (Admin), (CLW 11/43/7) (28/07/2011) judgment.

Imprisonment for Public Protection

In *R.v. Johnson* [2011] EWCA Crim 2189, (CLW 11/34/26) (08/09/2011) the CA quashed a sentence of IPP with a minimum term of 18 months where D pleaded guilty to a street robbery which involved punching and kicking V whilst on the ground. D had not been the prime mover, any premeditation had been very short and the harm caused, whilst unpleasant, was not the most serious. 3 years imprisonment substituted. Sounds like a bit of a result!

Restraining order on acquittal

The serious nature of such orders was emphasised by the CA in *R.v. K* [2011] EWCA Crim 1843, (CLW 11/34/27) (26/07/2011) and the appropriate procedures to be followed are set out in the judgment. The judge should consider adjourning the hearing to enable the parties to give a notice complying with rule 50.4 of the Crim Proc Rules 2010 identifying the evidence they intend to rely on. It is important that a judge bears in mind the fundamental principle underlying Part 50 of the Rules, namely that an person faced with the possible imposition of a restraining order should be given proper notice of what is sought and the evidential basis of the application and additionally should be given a proper opportunity to address the evidence and make informed representations as to the appropriateness of such an order.

Amending the Indictment

R.v. Thompson [2011] EWCA Crim 102, (CLW 11/38/1) (03/02/2011) judgment is a reminder that these days (for many years prior to R.v. Osieh [1996] 1W.L.R. 1260 the position precisely the opposite) an indictment can be amended to add a count based on evidence which was never considered by the justices as it was contained only in a notice of additional evidence.

Witnesses in court before giving evidence

Whilst s. 78 PACE 1984 could be invoked to exclude the evidence of a prosecution witness who had been sitting in court before giving their evidence at provision cannot apply to a defence witness since s. 78 only applies to prosecution evidence – *R. v. Carty* [2011] EWCA Crim 2087, (CLW 11/39/5) (28/07/2011) judgment.

Suspended sentences

The fact that an offence has been committed during the operational period of a suspended sentence was **not** an aggravating factor which justified an increase in the length of sentence where the suspended sentence was activated. That fact was recognised by the implementation of the suspended sentence. Where the judge indicated that he was adding six months to the otherwise appropriate sentence for the subsequent offence the CA held that this was inappropriate, particularly where the suspended sentence was being activated in full. *R.v. Levesconte* [2011] EWCA Crim 2754, (24/11/2011) judgment.

Determinate Sentences following a life sentence

Following R. v. Hills and others [2009] 1 Cr. App. R. (S.) 441, CA, the Court of Appeal has held that there is nothing wrong in imposing a determinate sentence to be served at a time commencing at the end of a minimum term specified under s. 269 and Schedule 21 of the CJA 2003 (mandatory life sentence) - see *R.v. Taylor* [2011] EWCA Crim 2236, (CLW 11/41/7) (14/07/2011). Whilst serving a life sentence for murder T was convicted of several assaults on prison officers. The CA held that the power to order a consecutive sentence under s. 154 of the PCC(S) Act 2000 is restricted only by s.265 of the CJA 2003 which only applies to those who have been released from their sentences. Furthermore s.28 (7) of the Crime (Sentences) Act 1997 contemplates the imposition of a determinate sentence on a prisoner who is serving a life sentence, which has the effect of extending by one-half of the determinate sentence the period before which the prisoner's release may be considered by the Parole Board after the expiry of the minimum term he has previously been ordered to serve under the life sentence.

Sentencing – manslaughter

The decision in *Att-Gen's Reference (No.8 of 2011) (R. v. Ronald Edwards)* [2011] EWCA Crim 1461, (CLW 11/34/24) (16/06/2011) judgment is confirmation that sentences for manslaughter by provocation are on the rise. The Court overturned as unduly lenient a sentence of five years imprisonment and increased the sentence to 7½ years, bearing in mind his offer to plead guilty to manslaughter before his trial for murder, saying that after trial the sentence could not have been below ten years. The court pointed out that the guideline of the Sentencing Guidelines Council on this offence did not reflect the impact on sentences for murder of Schedule 21 of the CJA 2003 and since that had had the effect of substantially increasing sentences for murder there had to be a corresponding increase in sentences for manslaughter.

Sentencing for historic sexual offences

In *R.v.H; R.v.F; R.v. W; R v. Walker; R.v. Dan; R.v. Robertson; R.v. P* [2011] EWCA Crim 2753 (24/11/2011) judgment the CA gave guidance on the appropriate sentences in respect of cases of sexual assault where the prosecutions take place many years after the events. The CA held that no special provisions applied in such cases. Following R.v. Milberry [2002] EWCA Crim 2891 the court identified a number of relevant principles, including (a.) generally sentence should be in accordance with the regime applicable at the date of sentence (b.) if D was convicted of an offence his sentence was limited to the maximum sentence then available. It was however unrealistic to try to work out what the appropriate sentence would have been if sentence had been imposed shortly after the incident happened; (c.) an allowance for the passage of time might be appropriate, (d.) careful judgment of the harm done to the victim and the extent of D's criminality was critical to the sentencing decision, (e.) events since the offence could either aggravate or mitigate the offence, (f.) an early admission by D would be greatly to D's credit.

Sentencing Guidelines – Burglary

The Sentencing Council has now published definitive guidelines on burglary which will apply to all offenders aged 18 or over sentenced on or after 16.01.2012 regardless of

the date of the offence. The guidelines are available to download at www.sentencingcouncil.org.uk. (CLW 11/37/16) The guidelines mirror the steps to be followed in the guidelines on assault and other offences against the person. The old assault guidelines were perhaps somewhat restrictive and the new ones perhaps overly complicated. The burglary guidelines suffer from the same complications. There are 9 steps to be followed, in order, to arrive at the appropriate guideline point. Step one is to consider factors, from a non-exhaustive list, indicating greater and lesser harm and higher and lower culpability. Once harm and culpability are established that will lead to the offence category, e.g. category 1 greater harm and higher culpability. A list of aggravating and mitigating factors will lead to further adjustment upwards or downwards. We will wait and see if these guidelines help to clarify or confuse the sentencing process.

A fifth update to the magistrates' courts sentencing guidelines has been issued which applies to all offenders aged over 18 who are sentenced on or after 16th January 2012 for offences of domestic and non-domestic burglary. See www.sentencingcouncil.org.uk (CLW 11/37/17)

Sexual Offences Prevention Orders

There are often lengthy discussions over which terms should and should not be part of a SOPO with the prosecution sometimes requesting unworkable or unreasonable terms. The case of *R v Smith* [2011] EWCA 1772, (CLW 11/41/8) (19/07/2011) judgment gives guidance as to what a SOPO should, and should not, contain. (a.) A SOPO must be necessary and proportionate and its terms sufficiently clear in order that the offender and those who deal with him know exactly what is prohibited; (b.) An order is not needed if it duplicates or interferes with another regime to which the offender is subject, e.g. sex offender notification regime; prohibition on working with children; licence conditions; (c.) An indeterminate sentence will not usually require an order whereas an order may be necessary in the case of any other custodial sentence as it can be extended beyond the term of any licence or suspension period; (d.) An order can extend beyond the duration of notification requirements and vice versa but, unless there was some unusual feature, it would be wrong to include a term which amounted in effect to an extension of the notification requirement; (e.) An order must not contain a blanket prohibition on computer use or internet access, nor should offenders be required to notify the police if they have a computer or other device capable of accessing the internet. Restricting computer use to job search, education, purchases, study, work, lawful recreation, which is often a favourite or prosecutors, is also disproportionate. What is more likely to be effective is a prohibition which has the effect of requiring the preservation of a readable internet history, together with a submission to inspect on request, but there is no need for the police to be given powers of entry beyond the statutory powers they already have. Where there is a risk of social networking sites or chatrooms for grooming, a term may be included to prevent communication with persons known or believed to be under 16 or to prohibit the use of such sites. (f.) If contact with children needs to be restricted, it should state under 16, not under 18 and should recognise there will be incidental contact as occurs in everyday life. If an offender has been convicted of viewing child pornography, prohibitions should not be extended just in case he commits a different type of offence. If an offender has children there should not be a blanket prohibition on contact with children and any order should be subject to an order made in family proceedings. (g.) There must be a draft written order served on the court and offender not less than 2 days before the sentence hearing and not at the sentence hearing. As it is rare to receive a draft order before a sentence hearing, it may require an adjournment so that proper consideration can be given to the terms and not just rushed through, as is the usual case, at the sentence hearing.

As this is the last Update for 2011 we wish all our readers a happy Christmas and New Year.

Brigid Baillie and Mark George Q.C.
1st December 2011

Informal Advice

If you are struggling with a problematic point of criminal law or procedure please bear in mind that barristers at GCN are always available to give informal advice on such matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale or Nicola Carroll) on 0161 236 1840.

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