

Criminal Law Update

8th May 2006



There have been a number of important developments since the last update. References to Criminal Law Week are abbreviated to CLW with the year, issue and paragraph number given.

Bad character

There has been only one further significant case reported since the [last update](#). Confusingly it is variously reported as *R.v. Edwards*; *R.v. Rowlands* but also as *R.v. Smith (David)*. This is because as with earlier decisions the CA heard a number of cases raising points under the CJA 2003 in the same hearing. The reference is [2005] EWCA Crim 3244 and the date of judgment is 21/12/2005. (CLW 06/01/2).

As to matters of general application there are some useful pointers from the case. As to applications by a co-accused to cross-examine about previous convictions the Court emphasised that the judge is not bound to admit the evidence. Section 104 (1) is not exhaustive of the scope of s. 101 (e) since all it does is to limit evidence relevant to a defendant's propensity to be untruthful. The CA noted that the judge's discretion to exclude under s. 101 (3) and (4) does not apply to application under s. 101 (1) (e) but pointed out that "the judge still had to be satisfied that the evidence had substantial probative value before it was admissible through the s. 101 (e) gateway." Elsewhere in the judgement the CA reiterated that the discretion to exclude under s.78 PACE 1984 applies to such applications. In many cases it is hard to see what s. 78 can add to s. 101(3) not least because the wording of s. 101 (3) is actually stronger than s. 78 ("must not admit" as opposed to "may refuse to allow") but it may be that s.78 does have a role to play in application by a co-accused where s. 101 (3) cannot be relied on. This may prevent reference to previous convictions which in fact have little or no relevance to an issue in the case (as appears to have happened in *R.v. Edwards*; *R.v. Rowlands* paras 28 to 30).

The case of *Smith (David)* itself is a salutary warning about the extent to which evidence of allegations which have not been tried can nevertheless be admitted under the CJA. The judge stayed historic counts of rape and indecent assault on the grounds that there had been an abuse of process in bringing those counts against the defendant because the police had previously written to the defendant in unequivocal terms stating that no further action would be taken against him in respect thereof. However the judge then invited the prosecution to apply to admit the evidence on which those counts were based under the CJA 2003. Not surprisingly the prosecution made the application and even less surprisingly the judge agreed to admit the evidence! On appeal the CA could find no fault with the judge's approach. They relied on the House of Lords case of *R. v. Z* [2000] 2 Cr. App. R. 281 in which evidence of allegations of rape of which the defendant had been acquitted after trial was admitted in order to prove D's guilt on another allegation of rape. The CA could see no difference in principle between evidence on which a defendant had previously been acquitted and evidence relating to allegations that had never been tried (para.78). The rule is that prima facie, all evidence that

is relevant to the question whether the accused is guilty or innocent of the offence charged is admissible.

The final point of note is the doubt expressed about what was said in *R. v. Bovell*; *R.v. Dowds* [2005] 2 Cr. App. R. 401 about the admissibility of "mere allegations" of previous misconduct. However the context of this observation is important. What was said in Bovell was said about an allegation which had been quickly withdrawn by the complainant and related to an application to cross-examine a non-defendant under s. 100. The application in Smith was to cross-examine a defendant under s. 101 and that was different according to the CA. It would therefore be unwise to imagine that the view of the CA in Smith could be cited as a reason for distinguishing what was said in Bovell about "mere allegations" if the application relates to a non-defendant.

Hearsay

The first cases have now been reported. In *R.v. Xhabri*, *The Times*, January 10, 2006 [2005] EWCA Crim 3135 (CLW 06/02/1) the CA held that the admission of hearsay evidence pursuant to s. 114 CJA 2003 was not incompatible with Art. 6 (3) (d) of the European Convention (right to examine witnesses) since Art 6 (3) (d) is not an absolute right. In any event the court has a discretion to exclude evidence where its admission would lead to an unfair trial.

In *R.v. Taylor*, *The Times*, 7 February, 2006 [2006] EWCA Crim 260 (CLW 06/06/5) the CA held that when the court is considering whether it is in the interests of justice to admit hearsay evidence under s. 114 (1) (d) although the court must have regard to the nine factors set out in s. 114 (2) it is not necessary for the court to reach a conclusion on each of the factors. What is required is that the court should exercise its judgment in the light of those particular factors and any others that appeared relevant to the decision.

In *R.v. Singh*, *The Times*, March 8, 2006 [2006] EWCA Crim 660 (CLW 06/10/2) the CA rejected a defence argument about the admissibility of unintentional implied assertions based on the opinion of Professor Stephen Uglow in [2005] 5 Archbold News 6 that the CJA had failed to reverse the decision of the House of Lords in *R.v. Kearley* [1992] 2 A.C. 228. In *Kearley* the HL decided that evidence about calls made to a phone after the police had seized it from a suspected drug dealer were hearsay and inadmissible for the purpose of trying to prove that D was a drug dealer. It is no great surprise that the courts should take this early opportunity to show the purpose for which the hearsay rules have been relaxed, namely to increase the number of convictions, has succeeded at least to this extent. In future, such evidence as in *Kearley* would be admissible, not as evidence of the opinion of the callers, but as direct evidence from which an inference could be drawn that drug dealing was indeed being carried out at the premises. A jury could then use that evidence in deciding whether it had also been proved that D who was in possession of the drugs also had an intent to supply them.

Procedure

The Criminal Procedure Rules have been amended in respect of both hearsay and bad character. They are in the Criminal Procedure (Amendment) Rules 2006 and the SI is 2006 No.353. See CLW 06/08/44. In respect of hearsay Part 34 has been amended so that an application under that part is only required in some (as opposed to all) situations where it is proposed to adduce hearsay. In respect of bad character Part 35 has been amended. The important change is that in respect of applications to adduce the bad character of non-defendants we now have 14 days from the service of the previous convictions of the witness or the service of the s. 3 letter and secondly in relation to an application to oppose the admission of the evidence of a defendant we now have 14 days (as opposed to 7) from the date of receipt of an application to adduce the evidence in which to object. Thus far however the CA has not been bothered about applying the strict letter of the law in respect of time limits and it is in any event highly arguable that it would breach a defendant's Art. 6 right to a fair trial to refuse to allow a defence application that otherwise had merit simply because it was out of time. The relevant rules (unamended) can be found in Archbold 2006 at para. 11-52 for hearsay and 13-112 bad character although those who have retained the 3rd Supplement to the 2005 Archbold will find them altogether in Appendix L -178 and L-187.

Disclosure

The Divisional Court has confirmed that time runs for the purpose of serving a defence statement from the service of the s. 3 letter and not from the date when a schedule of unused is subsequently served. However a defence statement which is served late is still a statement served under s. 5 or s. 6 of CPIA 1996 so as to entitle an accused to apply for further disclosure under s.8 of the Act – see *DPP v. Wood*; *DPP v. McGillicuddy* [2006] EWHC 32 (Admin).

A protocol on the control and management of unused material in the Crown Court has been issued. It is available on the court service website at www.hmcourt-service.gov.uk and is digested at CLW 06/08/51 with an excellent note from the editor. It is unclear what the status of a protocol is although it may be wise to assume that it is in the nature of a practice direction from the CA since it has the CA coat of arms at the head. Neither is it clear whether anyone will take any notice of it but in case a judge at a forthcoming PCMH raises the issue, you have been warned. If anyone does take notice of the protocol it contains various warnings about non-compliance with the strict letter of the CPIA. It appears to be part of a renewed attempt to prevent what some prosecutors and judges regard as over-generous disclosure to the defence. Those who routinely find that attempts to obtain disclosure in perfectly ordinary cases are simply ignored will feel a sense of frustration that perceived problems with cases involving shed loads of unused material are again being used as an excuse to cut back on disclosure in all cases. On the other hand the protocol and the new A-G's guidelines issued in 2005 (Archbold 2006 2nd Supp A-242) do provide ammunition for the defence as well. If we are keen to get disclosure and have filed a reasonably detailed defence statement we should be prepared to be aggressive in the pursuit of that to which we are entitled.

Codes of Practice

Belated attention is drawn to the fact that the Codes of Practice A to F under PACE 1984 have been amended and re-issued and there is a new Code G on powers of arrest. See Appendix A to Archbold 2006. Many of the changes to the other Codes will be more relevant to solicitors at police stations although they may be relevant to applications to exclude evidence.

ASBOs

This topic was featured in the [last update](#). Since then it appears that the CA may be on the retreat from its previous criticisms of the ASBO regime. In *R.v. Stevens* [2006] EWCA Crim 255 (02/02/2006) the Court said that whilst judges should take account of what the maximum sentence is for a substantive offence this does not limit the sentence that can be imposed for a breach of the ASBO itself and that the sentence should be commensurate with the seriousness of the breach. The CA did however reiterate that ASBOs should not be used as a means of getting round a maximum sentence which is thought to be too low. For a devastating but entirely accurate critique of the law on ASBOs it would be difficult to do better than the commentary by James Richardson, the editor of CLW at 06/07/4.

Evidence

Those who do cases where young witnesses may be involved might like to note the case of *R.v. Powell* [2006] EWCA Crim 3 (13/01/2006). The CA deprecated the delay in making a video of a child's evidence and then in bringing the case to trial. The principle evidence came from a child who was 3 ½ at the date of the offence. There was a delay of 9 weeks in video interviewing the child about the offence and the trial did not begin until 9 months after the offence. At trial the witness was unable to answer questions in cross-examination in any coherent way because of the lapse of time. The CA said that whilst the judge was right to rule before the witness gave evidence that she was competent to do so, she should have revisited this issue after the witness had given evidence and if she had the only conclusion she could have reached was that the child was incompetent as a witness and the case should have stopped.

Sexual Offences

In the [July 2005 update](#) we drew attention to a problem with sex cases where the prosecution cannot prove which side of the commencement date (1.5.04) a sexual offence was committed (see *R.v. Newbon* [2005] 4 Archbold News 6, Stoke-on-Trent C.C. (CLW 05/22/12)). In *R.v. A (Prosecutor's appeal)*, *The Times*, January 5, 2006 CA (15/12/2005) the CA held that if the Crown could not prove whether an indecent assault had been committed before or after 1st May 2004 then even if there were two counts, one alleging an offence under the Sexual offences Act 1956 and the other alleging an offence under the 2003 Act, there would have to be acquittals on both counts. See the commentary at CLW 06/01/7 for a suggested solution for prosecutors.

Mark George, 8th May 2006