

Criminal Law Update

Issue 6. July 2006



References to *Criminal Law Week* are abbreviated to *CLW* with the year, issue and paragraph number given.

Where do government ministers go when important Bills affecting criminal justice are being debated in Parliament? It's obvious they can't be present or listening since they clearly have no idea about what has been going on.

First we had Vera Baird the junior minister for Constitutional Affairs making a complete idiot of herself by publicly criticising a Crown Court judge for what was an impeccable example of the sentencing process required when considering a life sentence under the CJA 2003 passed by a government of which she is member and for which she presumably voted.

Now we have the new Secretary of State at the Home Office John Reid deciding to rip up the rule book and re-write the law on serious sentencing. Has someone told Mr Reid that it is only 15 months since the new sentencing regime under the CJA was implemented in April last year?

For a number of years now criminal lawyers have been pleading that there should be an end to the torrent of new legislation on criminal justice and a period during which we can all get used to the fundamental changes that this legislation has brought about. You would have thought that after the CJA 2003 with its 339 sections and 38 schedules that there was not a whole lot left to say about criminal justice for next few years. But since the government's criminal justice policy is clearly being run from Wapping rather than Downing Street we are faced yet again with another round of legislation all of which is clearly intended to be more draconian than what has gone before. Like so many previous initiatives 'Custody Plus' (ss.181 and 182) will now never see the light of day. Reducing credit for guilty pleas should result in more cases going to trial as more defendants will prefer to take their chance with a jury. As for changing the rules about early release from indeterminate sentences, it merely reinforces the view that this government passes laws on a "suck it and see" basis when the (presumably) carefully considered structure to these sentences as set out in the CJA 2003 can be overturned so soon after implementation.

Anyway enough about the politics, what about the law as it is?

Reviews of sentence by the A-G

The principle offences under the Sexual Offences Act 2003 have been added to the list of offences which the A-G can refer to the CA where he considers the sentence to be unduly lenient. See Archbold para.7-367 and 3rd Supp.

Forms – Hearsay

There have been changes to a number of the forms required under the *Criminal Procedure Rules 2005* including the one for introducing hearsay under *CJA 2003*. The forms can all be downloaded from www.hmcourts-service.gov.uk follow the link to Forms and

Guidance and select "Criminal Procedure Rules" in the pull down box entitled "Work type"

Family Impact Statements

Manchester C.C. is one of the Crown Courts included in the pilot scheme which allows the family of the victim of a homicide offence to put a "family impact statement" before the court after conviction and before sentence. One of the more interesting features of the process is the fact that the question of "who" and "how" the statement is to be delivered is to be considered at the PCMH, which if memory serves me correctly is at a stage long before the guilt of a defendant has been established. The Protocol has not yet reached the Archbold Supp but see *Criminal Law Week* (hereafter *CLW*) 06/18/8.

Bad Character

The case of *R. v. Card* [2006] EWCA Crim 1079, *The Times*, May 24, 2006 (CLW 06/20/01) is very unsatisfactory as it seems that both the trial judge and the Court of Appeal got themselves into a real muddle. The issue was about stopping a case where the evidence of bad character is contaminated (CJA 2003 s.107) but it seems that the CA thought they were dealing with contamination of any evidence (here the question was possible collusion between a brother and sister) whereas s.107 is concerned only with contamination of evidence of bad character. Nonetheless the case may be of some value in particular as it suggests that when there is a real possibility of witness contamination, it would normally be sensible for the judge to postpone a decision on a prosecution application to adduce evidence of bad character until after the potentially contaminated evidence has been adduced at trial. See Archbold 3rd Supp para.13-105. [Judgment](#).

A further case *R. v. S (Andrew)* [2006] EWCA Crim 1303 (CLW 06/23/02) is a triumph for the author although only in a backhanded way. The defendant was a teacher of good character. He was charged with indecent assault on the complainant. An application to cross-examine her about various previous convictions for handling stolen goods, going equipped and burglary was rejected by the trial judge as being irrelevant to her credibility and quite rightly so according to the CA. However, the CA then said that since the defence case was that following agreed sexual favours for which the defendant had paid the complainant had made a demand for more money and when this was not forthcoming had threatened to cry "rape" and had made an attempt to grab a gold chain from around the defendant's neck, the judge should have allowed cross-examination because it was relevant to whether she had a propensity to behave in the way alleged by the defence, i.e. by behaving dishonestly towards other people's property. Good news for Mr S who got a re-trial but how a judge is supposed to direct a jury as to how they can use this evidence (i.e. relevant to whether she behaved as alleged (dishonestly) but irrelevant to her credibility) is anyone's guess.

Witness anonymity

The important decision of the CA in ***R. v. Davis (Iain); R.v. Ellis and others* [2006] EWCA Crim 1155** (CLW 06/20/04) is now summarised in Archbold 2006 3rd Supp at para. 8-69. *R. v. Ellis* was the shooting by the Burger Boy Crew in Birmingham at New Year 2003 in which two young women were shot dead. [Judgment.](#)

Sentencing in cases under the Sexual Offences Act 2003

The Sentencing Guidelines Council is due to issue a definitive guideline after the consultation period ends on 31st July. Watch this space.

Credit for guilty pleas

In the light of the review announced by John Reid (see above) there are likely to be judges who will feel free to ignore the Sentencing Guidelines Council's Guidelines on "Reduction in Sentence for a Guilty Plea" despite the strictures of a five judge CA in ***A-G's Ref (Nos 14 and 15 of 2006) (R.v. French and Webster)* [2006] EWCA Crim 1335** (CLW 06/23/10). The CA said that judges cannot ignore the guideline by refusing a proper discount because of the strength of the case and could not withhold the full one-third discount on the ground that the discount would be disproportionate. [Judgment.](#)

Referrals by the CCRC

The CA has issued guidance as to the timetable for cases which have been referred back to the CA by the CCRC with a threat of wasted costs in the event of material breaches of the requirements—see ***R.v. Siddall and Brooke* [2006] EWCA Crim 1353** (CLW 06/25/01). [Judgment.](#)

Bail hearings

The CA has said in ***R. (Malik) v. C.C.C. and the CPS* [2006] EWHC 1539 (Admin)** (CLW 06/25/03) that Article 6 of the European Convention may arguably apply to bail applications and that these should ordinarily be heard in public. The reasons however why the hearing may have to be in chambers seems likely to mean in practice that most applications are in fact in chambers. [Judgment.](#)

Defence statements

The Criminal Justice Act 2003 (Commencement No.13 and Transitional Provisions) Order 2006 (S.I. 2006 No. 1835) brings into effect on 24th July 2006 s.33 (1) (defence disclosure) (by inserting s.5 (5C) of the CPIA 1996 as well as various sections 44 to 48 relating to non-jury trials where there is evidence of jury tampering. S. 33 (1) has only been partially activated since, when fully in force, it will also activate provisions for the service of defence statements on a co-accused. It appears however that s.5 (5C) has been brought into force at this stage to deal with a problem that some ingenious barrister noticed about the position regarding service of defence statements. He had noted that it was s. 5(9) of the CPIA 1996 that formed the basis of the requirement that a defence statement must be served within 14 days from the date of primary

disclosure. However subsection 9 had been repealed by paras. 20 and 23 of Schedule 36 of the CJA 2003 and section 33 (1) which contained the new power had not been brought into force. This meant that there was no "relevant period" for the service of a defence statement and accordingly no power for the judge or prosecution to comment on any apparent late service. The provision in the Commencement Order closes that gap by reintroducing the requirement to serve a defence statement within the relevant period as defined in s.12 CPIA. Some may be tempted to say that such obtuse arguments only go to show that counsel should get out more but others may feel a small degree of pleasure that the government have had to act further simply to plug a leak in this ridiculously complicated Act brought into force in dribs and drabs.

Hearsay

For an interesting case on the admissibility of documentary and multiple hearsay under ss. 114, 117 and 121 of the CJA 2003 see ***Maher v. D.P.P., 170 J.P.441 D.C. [2006] EWHC 1271 (Admin)* (12/05/2006)** (CLW 06/28/02). [Judgment.](#)

Dangerous Offenders

The relevant date that determines whether an offender should be dealt with under ss. 225/227 or 226/228 is the date on which he was convicted of the offence and the approach of the court in *R.v. Ghafoor* [2003] 1 Cr. App. R. (S.) 428 is inappropriate: ***R.v. Robson* [2006] EWCA Crim 1414** (CLW 06/28/08). [Judgment.](#)

Life sentences and IPP

In ***R.v. O'Brien, R.v. Harris, R.v. Moss and R.v. Llewellyn* [2006] EWCA Crim 1741 (14/07/2006)** (CLW 06/28/09) the CA said that it was undesirable, though not unlawful to impose consecutive indeterminate sentences or order an indeterminate sentence to be served consecutively to another period of imprisonment (applying *R.v. Lang and others* [2005] EWCA Crim 2864) because of the difficulty in calculating when such a prisoner should be released or eligible for parole. An indeterminate sentence should begin on the day it is imposed. If a judge had legitimate grounds for seeking to ensure that an offender already subject to a prison sentence serves longer than he would otherwise, he should increase the notional determinate sentence before halving it in order to reach the minimum term. [Judgment.](#)

Crediting time on remand – CJA 2003 s. 240

As you know when sentencing under the CJA 2003 the judge must make an order under s.240 if time on remand is to count towards sentence. The CA has recently given guidance on how this works in practice in the case of ***R.v. Norman and others* [2006] EWCA Crim 1792 (20/07/2006)**. [Judgment.](#)

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