

Criminal Law Update

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

“Special measures” for certain defendants

Until recently special measures directions under the Youth Justice and Criminal Evidence Act 1999 applied only to prosecution witnesses and defence witnesses other than defendants. The [Police and Justice Act 2006 \(c.48\)](#) will allow defendants under 18 or vulnerable adult defendants to apply for permission to give evidence over a live link. Section 47 of the Act (In force from January 15, 2007) inserts new sections 33A to 33C in the YJ&CEA. Police and Justice Act 2006 (Commencement No.1, Transitional and Saving Provisions) Order 2006 (S.I. 2006 No.3364). The Act is digested in CLW 06/43/12. Unfortunately it has yet to appear in Archbold.

The popular fad for producing sentencing guidelines to cover an increasing list of offences continues with The Sentencing Guidelines Council's guideline on domestic violence (CLW 06/45/23). The guidance includes a passage on the relevance to the sentence of the wishes of the victim.

Life sentences and IPPs

R.v. Pluck [2007] 1 Cr. App. R. (S.) 43 is a useful reminder that the assessment of future risk is essentially fact dependent and that judges are not bound by assessments in court reports of any kind.

Evidence of Bad Character – Criminal Justice Act 2003

Since the editor of CLW is also the editor of Archbold criminal practitioners would be foolish to disregard his arguments on issues such as admissibility. For some time he has been pointing out that the CA seems to have a problem understanding the relevance of bad character evidence and has taken too restrictive a view of when such evidence may be admissible – see the commentary to *R.v. Atkinson* (CLW 06/37/02) and *R.v. Beverley* (CLW 06/44/4). So when the CA in **R.v. Isichei [2006] EWCA Crim 1815** (CLW 07/01/03) ruled that bad character evidence was admissible to support the accuracy of the victim's identification of the defendant as a potential dealer in cocaine the decision was greeted as exemplifying “the correct use of section 101 (1)(d)”.

By contrast, the CA in **R.v. Chopra [2006] EWCA Crim 2133** (CLW 07/02/04) did not fair so well. The issue for the CA was to interpret the meaning of section 112 (2) of the CJA 2003. Their decision was that when a defendant faces several counts on the same indictment the evidence on one count is bad character evidence so far as the other counts are concerned and accordingly is only admissible if it passes through one of the gateways in section 101 (1). Where the CA was criticised in the commentary in CLW was for eliding the issue of propensity with another issue, namely whether an offence had taken place at all. The bad character evidence was relevant to this issue. If the jury were satisfied by the evidence on the other counts that three

women do not make similar allegations unless they are true, that would be an end to the case without “propensity” ever raising its head. It would only be if, for some reason, the evidence did not have this effect on the jury that propensity would become relevant. Providing the jury decided the defendant was guilty of one of the allegations then the jury could use the propensity (the finding of guilt on one count) in relation to the other counts. In this way evidence of propensity, whilst not being sufficient without other evidence of guilt to allow the jury to convict can be used to eliminate doubt in respect of the other counts.

In **R.v. Eastlake (2007) (8/2/07)** (Lawtel 09/02/2007) the trial judge appears to have applied the law of bad character in a way which should commend itself to the editor of Archbold since he ruled that the evidence was admissible as it was capable of assisting the jury on the issue of whether the accused had committed the offence by supporting the identification of the accused as the perpetrators as well as establishing propensity. The CA upheld the judge's reasoning and the convictions

The issue of giving a false impression in interview (s.101 (1) (f)) arose in the case of **R.v. Ullah [2006] EWCA Crim 2003 judgment** where the CA said the sensible course was for the prosecution to apply to admit bad character evidence before the interview was adduced. Another way of trying to avoid this difficulty would be by editing the interview. Whether the prosecution is prepared to allow this will probably depend on whether it was little more than a slip of the tongue (e.g. an assertion of good character which overlooked one old conviction) or whether it is more fundamental to the issues in the case.

The way in which evidence of bad character is adduced was considered in **R.v. S. (2007) (8/2/2007)** (Lawtel 09/02/2007). The prosecution had prepared a summary of evidence given by the defendant at an earlier trial at which he had been convicted as well as a summary of his interviews in that case as evidence of propensity. The trial judge admitted the document as hearsay evidence under s.114 (1) as being “in the interests of justice”. The CA approved of this course whilst pointing out that a judge had to consider the difficulties this created for the defence in answering the summary as set out in s. 114 (2) (h) and (i).

Trial of specimen counts without a jury

One of the problems created by the torrent of criminal legislation of recent years is the need to think up different titles rather than the rather mundane “Criminal Justice Act” of whatever year. One consequence however is that important provisions directly affecting the administration of criminal justice get hidden away in innocuous sounding titles which a busy criminal practitioner could easily miss. No doubt that is one reason why you are reading this update. One such Act is the [Domestic Violence, Crime and Victims Act 2004](#). If you ever read the Act when it was passed you may have forgotten that it includes pernicious provisions to curtail the right to jury trial in some very serious cases. Sections 17 to 21 (Archbold 2007 para. 4-267h) (into force on January 8, 2007) provide for trial by jury of sample counts only with the effect that if the jury convict the remaining counts can then be tried by a judge alone. No prizes for guessing the likely outcome of a trial conducted under such circumstances. Cases to which these provisions could apply include sex cases involving multiple

counts (a particular feature of historic allegations) as well as numerous other offences. One of the criteria for making an order for such a trial is that the judge considers it would be "in the interests of justice" to do so. It will be interesting to see how the judiciary react to such a blatant attack on the jury system. (CLW 07/01/57)

Causing death by dangerous driving / careless driving when under the influence

In **R.v. Richardson and others [2006] EWCA Crim 3186**, [judgment](#) (18/12/2006) (CLW 07/01/16 and 17) the CA has given guidance on the impact of the increase in sentences resulting from section 285 of the CJA 2003 and has revised the sentence levels set out in **R.v. Cooksley and others [2003] 2 Cr. App. R. 18** – see Archbold 2007 para. 32-7. Whilst there will still be exceptional cases in which short or even non-custodial sentences will be appropriate, otherwise the effect will be that sentences at all levels of seriousness will increase.

Hearsay Evidence – CJA 2003

The case of **Isichei** (above) is also cited at CLW 07/01/06 on the issue of whether a hearsay statement which also supported the evidence of identification was admissible "in the interests of justice" under section 114 (1) (d) of the Criminal Justice Act 2003 or under the common law rules preserved by s.118 (1) of the Act.

Detention and Training Orders

As to the correct approach to reducing a sentence to take account of time spent in custody on remand (PCC (S.) A 2000 s. 101(8)) see **R.v. Eagles [2007] Crim. L.R.94**, **[2006] EWCA Crim 2368** (CLW 07/01/21).

The Duty of counsel

The duty on defence counsel (as well as prosecutors) to ascertain and be able to assist the judge with reference to sentencing powers and any legal restrictions was emphasised by the CA in **R.v. Cain and others, The Times, December 26, 2006 [2006] EWCA Crim 3233**, (05/12/2006) (CLW 07/01/27).

Drugs

Methylamphetamine has been reclassified as a Class A rather than Class B drug from January 18, 2007 by the [Misuse of Drugs Act 1971 \(Amendment\) Order 2006 \(S.I. 2006 No. 3331\)](#).

Delay

The correct approach in cases involving historic allegations (here child cruelty from 25 years ago) was considered in **R. v. Robson and others [2006] EWCA Crim 2754** (CLW 07/02/06) [judgment](#). The CA said that the judge should scrutinise the evidence for him or herself in order to see whether it was safe to leave the case to the jury, following **R.v. Smolenski [2004] 2 Cr. App. R. 661** and that it was not sufficient for the judge to leave the case to the jury on the basis that they could resolve the discrepancies and differences in the evidence themselves.

It is hard to avoid the conclusion that in such cases the approach the judge is required to use is more stringent than the usual Galbraith test for submissions of no case to answer, not that the CA is likely to admit it.

Expert's reports

I hesitate to sound too enthusiastic when referring to amendments to the Criminal Procedure Rules 2005 because it sounds like the sort of stuff only an anorak would know about but the new [Part 33](#) is important. It relates to expert's reports served after November 6, 2006 and sets out requirements that must appear in the report. The new Part 33 appears in the First Supp. to Archbold 2007 at para.10-63.

Appeals (Loss of Time)

The latest attempt by the Court of Appeal to get tough with what are regarded as frivolous appeals can be found in **R.v. Hart; R.v. George The Times, February 16 2007 [2006] EWCA Crim 3239** (CLW 07/02/03) [judgment](#). The Court stated that the mere fact that counsel had advised positively and drafted grounds of appeal would not prevent an order for loss of time in an appropriate case. In practice, if this ever happens it is only likely to be on a renewed application for leave by an unrepresented applicant, but clients should be advised about the wisdom of renewing an application when counsel has advised against that step.

Adducing interview of a co-accused

The difficulty of trying to adduce the interview of a co-accused who has pleaded guilty was emphasised in **R. v. Finch, The Times, January 22, 2007 (15/01/2007) [2007] EWCA Crim 36** (CLW 07/04/03). The CA held that the judge was correct to refuse to allow the interview, in which the maker sought to exonerate the defendant, to be put in when the co-accused declined to give evidence. Section 76A of PACE which was inserted by section 128 CJA 2003 did not apply where the person being interviewed had pleaded guilty. Neither was the interview admissible as hearsay under s. 114 (1) (d) "in the interests of justice" since his refusal to give evidence raised questions as to his credibility.

On the other hand out-of-court assertions by a co-accused in a case involving cut-throat defences fall to be considered under s. 114 (1) and the list of factors in s.114 (2) will have to be considered – **R. v. X (Unnamed Defendants) 2007** (10/01/2007) Lawtel 05/02/2007

Crediting time on remand

The CA has given important guidance in respect of credit for time spent on remand in the case of **R.v. Gordon and others [2007] EWCA Crim 165** [judgment](#). The judgment addresses a host of problems relating to offences committed either side of April 4, 2005, the extent to which the power to order a return to custody under s.116 of the PCC (S) A 2000 remains available despite its apparent repeal and the manner in which problems in calculating the true number of days to be credited under s. 240 of the CJA 2003 can be dealt with by the Crown Court after the sentence has been imposed in an attempt to avoid unnecessary appeals. The judgment is available on Casetrack but is likely to induce a severe headache in all but the most robust of readers.

Mark George, 19th February 2007