

# 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.

It is one of the ironies of criminal practice that at the same time as practitioners are constantly being bombarded with ever increasing regulation of the trial process to the extent that it sometimes feels as if the Criminal Procedure Rules require at least one form to be filled in before each question can be asked in cross-examination the approach of the appellate courts to breaches of procedure appears to be that it doesn't really matter if the rules weren't followed as long as no was caused actual prejudice as a result. Hence the fairly extraordinary decision of the CA in *R.v.Ashton; R.v.Draz; R.v. O'Reilly* [2006] 2 Cr. App. R. 231 which included the proposition that proceedings which should have been on indictment were not invalid because there was in fact no indictment! This decision could only be reached by ignoring a previous decision of the CA in *R.v. Morais* 87 Cr. App. R. 9.

Happily the House of Lords have had an opportunity to consider this unsatisfactory position and seem less sanguine than the CACD about ignoring the rules. The HL in *R.v.Clarke; R.v.McDaid* [2008] UKHL 8 [judgment](#) (CLW 08/06/02) has held that it is a matter of vital importance to the validity of proceedings on indictment that the indictment itself is not valid until it is signed and without a validated indictment the proceedings are indeed a nullity. From now on it is incumbent on the court to ensure that there is a valid indictment and that means that it has been properly signed. Practitioners alert to this problem may choose not to make such an enquiry at the outset of the trial because then any defect can be remedied but may instead prefer to wait until the jury have retired to ask the court clerk or associate to check the position. You never know. See *Archbold para. 1-196 and 1-232*.

## Imprisonment for Public Protection

The man who was responsible for the CJA 2003, David Blunkett MP, continues to blame the judges rather than himself for the fine mess that has been created by the IPP regime. In the same week when the CA (*Sect of State for Justice v. Walker; SSJ v. James* [2008] EWCA Civ 30 [more](#)) delivered a damning judgment upholding the decision of the Admin Court that the Sect of State acted unlawfully by failing to provide the courses that IPP prisoners needed to complete in order to seek to satisfy the Parole Board that they are no longer dangerous the former Home Secretary and Sun columnist fired off a letter to the *Guardian* (8<sup>th</sup> February) in which he complained that the IPP mess was all the fault of the judges. According to Blunkett "Parliament presumed such sentences would apply to heinous crimes" and had left it to the judges to "design and operate the new sentencing programme". Pity then that he allowed the Act to be passed with no indication in the dangerousness provisions (sections 225 to 229) that such sentences were to be reserved for "heinous crimes" and indeed making such sentences almost inevitable for someone convicted of a serious offence (max. sentence over 10 years) if they had a previous conviction some years before for relatively minor offences such as affray and ABH. The latest illustration of the absurdity of the IPP regime is to be found in *R.v. Terrell* [2007] EWCA Crim 3079 [judgment](#) (CLW 08/03/07) where a man who had pleaded guilty to four offences of making indecent photos

of a child with 36 offences TIC'd was sentenced to an IPP with a minimum term of 5 months. The CACD decided that the judge should not have felt obliged to pass an IPP because the dangerousness provisions were not satisfied and substituted instead a determinate sentence of 10 months imprisonment. In future and in an attempt to avoid such absurd results practitioners may feel free to quote Blunkett's views on the subject to the judge in a case where an IPP may be an option.

## Other Sentencing

In the case of *R.v. Xiong Xu and others* [2007] EWCA Crim 3129 [judgment](#) (CLW 08/02/07) the CA gave guidance on appropriate starting points (before credit for guilty plea/personal mitigation) for those involved in the large scale commercial production/cultivation of cannabis. The CA referred to the hierarchical structure of such operations and indicated a range of starting points depending on the level of involvement of the defendant, from 3 years for 'gardeners' to 6-7 years and beyond for 'organisers'.

## Goodyear Indications

The CA in *R.v. Seddon* [2007] EWCA Crim 3022 (CLW 08/01/10) confirmed that the dangerousness provisions of the CJA 2003 are mandatory and their operation cannot be affected by a *Goodyear* indication; if the statutory criteria are met an indeterminate sentence must be passed notwithstanding any prior indication that there would be a determinate sentence. Practitioners are referred to the guidance set out in *R v Kulah* [2007] Crim LR 907.

## Money Laundering

The decision of the CA in *R.v. N.W., S.W., R.C. and C.C.* [2008] EWCA Crim 2 [judgment](#) (CLW 08/07/04) is a welcome confirmation that however draconian the POCA 2002 in intended to be, the Crown on a prosecution under sections 327 or 328 must prove what type of criminal conduct has generated the benefit which the alleged criminal property represents. The CA pointed out that it would be "anomalous, not to say bizarre" if the Crown were not required to identify the class of crime involved in a criminal case when this is precisely what would have to be proved in civil proceedings for enforcement. This was a reserved judgment and is to be contrasted with the ex tempore judgement given on 22/11/2007 in *R.v. Craig* [2007] EWCA Crim 2913 (CLW 08/07/05) where a different division of the CA appear to have reached an opposing view of the burden on the prosecution under sections 327 and 329. As the appeal was allowed on another ground what the CA said about this in *Craig* is obiter. For further reasons why the decision in N.W. and others is to be preferred see the commentary at CLW 08/07/05.

## Terrorism Offences

Since the George Bush inspired "war on terror" (no end currently in sight) was declared in the aftermath of 9/11 there have been numerous

prosecutions under section 57 of the Terrorism Act 2000 (Archbold 2008 para.25-96). In the first successful appeal against such convictions (*R.v. Zafar, Butt, Iqbal, Raja and Malik [2008] EWCA Crim 184 judgment*) (CLW 08/07/07) the CA has allowed the appeals of five young Muslim men who had downloaded and so "possessed" radical and extremist material because it held that the prosecution must prove a direct connection between the article possessed and the act of terrorism. Although the CPS have indicated that they are considering an appeal to the House of Lords it looks likely that in future cases involving documents rather than physical implements such as bomb making equipment will be prosecuted under section 58 rather than s.57.

## Bad Character evidence

In *R v McNeill [2007] EWCA Crim 2927 judgment* (CLW 08/03/01) the CA found that the exception in section 98(a) CJA 2003 which excludes from the definition of bad character evidence of misconduct which 'has to do with the alleged facts of the offence with which the defendant is charged', was wide enough to permit, where the appellant was charged with threats to kill her neighbour, evidence from a housing officer that two days after the incident she became distraught and threatened to go home and burn down her neighbour's flat, saying "they'll come out in body bags", as this was admissible because it had to do with the alleged facts of the offence and was not 'bad character' evidence within section 98(a).

The case of *R.v. Bullen [2008] EWCA Crim 4 judgment* (CLW 08/04/02) is a good illustration of the limits to which propensity can be said to be relevant. D had pleaded guilty to manslaughter and the only issue at trial was whether he had the specific intent to murder or do really serious bodily harm to the deceased. The CA held that his previous convictions for violence were not relevant to this issue and that the Crown's application under s. 101 (1)(d) and s.103 was misconceived. Even if a propensity to violence was relevant at all (which was doubtful) the CA pointed out that under s. 101 (1)(d) the bad character evidence had to be relevant to an "important matter in issue" and in this case propensity to violence was not an important issue.

## Hearsay evidence

Whilst the PACE codes of practice themselves are admissible in all civil and criminal proceedings by virtue of section 67(11) PACE, that section does not render admissible something which would otherwise be hearsay simply because it was said during processes conducted in compliance with the relevant code. A comment made by a witness at an identification parade was not admissible under section 114(1)(a) CJA 2003 ("...a statement not made in oral evidence in the proceedings is admissible if...(a) any provision of this Chapter or any other statutory provision makes it admissible") simply because the identification procedure was conducted in accordance with Code D: *R.v. Lynch [2007] EWCA Crim 3035 judgment* (CLW 08/02/03).

In *R.v. Y [2008] EWCA Crim 10 judgment* (CLW 08/05/02) the CA, in allowing an interlocutory appeal by the Crown, held that section 114 (1)(d) of the CJA 2003 was available for all types of hearsay and on the application of any party to a criminal trial. The extent to which the courts seem prepared to go in this regard is illustrated by the fact that what the prosecution wanted to adduce was an out of court admission by a former co-accused (he had pleaded guilty and was not to be called

to give evidence) which directly implicated D and if that wasn't bad enough the Crown proposed to adduce this evidence from a statement of a girlfriend of the co-accused (again not to be called) who said that this is what her boyfriend had told her! Whilst the CA emphasised the care that judge's must take when considering applications under s.114 (1)(d) to ensure that it really is "in the interests of justice" to admit the evidence the Court held that the application should be considered by the trial judge on its merits. See also *R.v. McLean [2007] EWCA Crim 219* (CLW 08/07/03) which was considered in Y where it was said that the case was not to be taken as authority for the routine admission of the evidence of interviews of co-accused.

## Trial in absence of accused

Two recent cases have considered the principles relevant to the decision whether to try a defendant in his absence. The DC held in *R (Morsby) v Tower Bridge Magistrates' Court, [2007] EWHC 2706 (Admin)* (31/10/07) (CLW 08/03/04) that the principles approved by the HL in *Jones (Anthony) [2003] 1 AC 1* apply equally to proceedings in a magistrates' court and to a magistrates' court's decision whether to rescind a conviction in absence under section 142(1) MCA 1980. The test to be applied is whether a re-hearing is in the interests of justice.

In *R.v.Amrouchi [2007] EWCA Crim 3019 judgment* (CLW 08/03/03) the defendant's conviction was unsafe where the trial judge had proceeded to try him in his absence when he refused to be taken to court from custody. The judge purported to rely on the principles in *Jones* (above) but the CA found that he had taken the wrong approach and that the defendant should have been given a specific warning in relation to the consequences of his refusal to attend court.

## PACE Codes of Practice

In *R v Devani [2008] 1 Cr App R 65(4)* (CLW 08/01/02) the CA considered a judge's refusal to exclude evidence which had been obtained by prison support officers and a prison officer questioning a solicitor without first administering a caution. Whilst prison support officers are not persons 'charged with the duty of investigating offences' within section 67(9) of PACE, prison officers are such persons, and they are therefore directly subject to the provisions of the PACE codes of practice. Accordingly the trial judge should have found that the prison officer had breached Code C by failing to caution the solicitor.

## Delay

It now appears settled law that discontinuation of the proceedings is not the only remedy where there has been unreasonable delay in the conduct of a prosecution violating the right to determination of a criminal charge within a reasonable time as guaranteed by Article 6 of the European Convention on Human Rights. Where a fair trial remained possible and there was no other compelling reason for holding that a trial would be unfair the breach could be cured by expedition in the conduct of the remainder of the proceedings plus an appropriate reduction in sentence or compensation, provided that the breach was publicly acknowledged and addressed. *Spiers (Procurator Fiscal) v Ruddy, P.C. UKPC D2, The Times December 31, 2007 following A-G's Reference (No. 2 of 2001) [2004] 2 A.C. 72 HL* rather than *H.M. Advocate v. R. and another [2004] 1 A.C. 462 P.C.*

Kate Stone and Mark George 27<sup>th</sup> February 2008