

Criminal Law Update

Issue 16. 18th September



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.

The Criminal Evidence (Witness Anonymity) Act 2008

The Government's response to the decision of the House of Lords in *R. v. Davis* [2008] UKHL 36 [judgment](#) was swift and, as might have been expected, it ignored all the pleas of various commentators that it might be a good idea to pause for breath and proper consideration before ploughing ahead with what on any view is contentious legislation. The HL judgment was given on 18th June. The Act became law on 21st July, which must be some kind of record. The Act which also came into force on the same day has been digested at CLW 08/29/33. The Act is due to cease to have effect on 31st December 2009, courtesy of something called a "sunset clause" although the period of darkness that follows any normal sunset can be postponed for up to 12 months and in any event the government already have its replacement lined up in the [Law Reform \(Victims and Witnesses\) Bill](#).

Like most powers given to the prosecution (bad character, hearsay, special measures) these new powers will no doubt be sought in almost all serious cases with less than full consideration of the real merits of the claim. After all, once the police have promised witnesses that they will be given anonymity are we really meant to believe that prosecutors will turn around and tell the police that actually what they told their witnesses is not quite correct and that they will after all not be given anonymity? The Attorney-General has issued guidelines on the prosecutor's role in applications for Witness Anonymity Orders (CLW 08/29/55) which can be found on the A-G's website www.attorneygeneral.gov.uk but, if anything more than lip service is to be paid to the right of an accused to know the identity of their accusers it will be up to defence solicitors and advocates to try to ensure that a proper distinction is made between those cases which really merit such applications from those that are merely convenient to the police and prosecution.

Bad Character

There is an obvious danger that prosecutors will try to argue the admissibility of bad character evidence under section 101(1)(c) as 'important explanatory evidence' since it is easy to argue that almost any prejudicial evidence could be admitted through that gateway. The CA's decision in *R v Davis* [2008] EWCA Crim 1156; 172 JP 358 (CLW 08/28/1) [judgment](#) is therefore important. Firstly,

the Court said that once admitted pursuant to gateway (c) evidence should not readily be used for a purpose such as propensity, which requires additional safeguards or a different test for admission (thus modifying the judgment in *Campbell* [2007] 1 WLR 2798). The test for admission as 'important explanatory evidence' should therefore be applied with caution where there is potential for the jury to use the evidence as evidence of propensity. Moreover, section 78 PACE may require the exclusion of such evidence where it is really evidence of propensity which would not pass the test for admission as such.

In *R v Freeman, R v Crawford* [2008] EWCA Crim 1863 (CLW 08/32/2) [judgment](#) the CA considered the various authorities on the question of cross-admissibility of bad character evidence relating to two or more counts in the same indictment. The Court noted firstly that evidence of one count may be admissible in relation to another where the similarity of the evidence is such that it may be probative in relation to another count because it makes it more likely that the offence was committed (see *R v Chopra* [2007] 1 Cr. App. R. 225) or that the particular defendant committed the offence (see *R v Wallace* [2008] 1 WLR 572). Therefore evidence may be admissible pursuant to section 101(1) (d) whether or not propensity has been established. The Court also rejected the suggestion (from *R v S* [2008] EWCA Crim 54) that in such cases the jury should always first determine whether they were sure of the defendant's guilt in relation to one of the counts before going on to use that evidence in relation to other counts. Whilst juries must be reminded to consider each count separately, they are entitled, when determining guilt in respect of a count, to have regard to evidence relating to another count, as long as it is relevant and admissible.

Voice Recognition Evidence

The appeals in the case of *R v Flynn and St John* [2008] 2 Cr. App. R. 266 [judgment](#) related to voice recognition evidence and specifically to the admissibility of evidence of voice recognition by police officers involved in the investigation. Having heard evidence from an independent forensic consultant, the CA set out its conclusions from the expert evidence.

Voice recognition is less reliable than visual identification, and 'lay listener identification', which relies on the familiarity of the witness with the person whose voice he purports to identify, is less reliable than evidence from experts using acoustic, spectrographic and sophisticated auditory techniques. The ability of a lay listener to identify a voice is subject to a number of variables, including the quality of the recording, the gap in time between hearing the known voice and the disputed voice, the listener's ability generally to

recognise voices, the nature and duration of the speech to be identified and the familiarity of the listener with the known voice. The research shows that even confident identification of a known voice by a lay listener may be wrong.

The CA made it clear that its judgment should not be read as casting doubt on the admissibility of true expert evidence in this area. However, the key to admissibility of 'lay listener' identification is the degree of familiarity with the expert's voice. 'Lay listener' evidence from police officers should be treated with caution and where the prosecution seek to rely on such evidence an expert report should be obtained giving an opinion on the validity of the evidence. Furthermore police officers should record the procedures which form the basis of their evidence. Whether such evidence will be admissible is dependent on the facts of the case. (In the cases under consideration the CA quashed the appellants' convictions on the basis that the evidence ought to have been excluded pursuant to section 78 PACE.)

Passing sentences consecutively to indeterminate sentences

In *R.v. Hills; R.v. Pomfret; R.v. Davies* [2008] EWCA Crim 1871 (CLW 08/31/8) [judgment](#) the Court of Appeal gave further guidance on the difficult area of sentencing those already the subject of an indeterminate sentence. Mr Hills was serving a sentence of detention for public protection with a minimum term of 4 years. During his first year in custody he committed an offence of ABH and three of common assault. The judge sentenced him to a term of three years which he ordered to run consecutively to the minimum term. On appeal the CA held that the judge's approach was consistent with the terms of s.154 PCC(S)A 2000 and that since it is possible to pinpoint the precise day on which a minimum term under the CJA 2003 will expire there was nothing wrong in ordering a further term of detention before parole could be considered to begin on the day the minimum term expired. Mr Davies was sentenced to IPP with a minimum term of 4½ years in 2007 for serious sexual offences. Whilst he was serving further allegations of similar offences were made by another complainant. Mr D pleaded guilty. The judge decided that the appropriate determinate sentence would have been 10 years and wished to make the new sentence consecutive to the current one. He therefore passed a sentence of life imprisonment with a minimum term of 9 years (being the balance of the original minimum term (4yrs) and half of the period of 10 years) applying the case of *R. v. O'Brien* [2007] 1 Cr. App. R. (S.) 442 (Archbold 5-307a). The CA approved the judge's approach. Mr Pomfret was a post-tariff lifer who then committed a serious assault on a prison officer. He received a sentence of IPP with a minimum term of six years. The appeal related only to the length of the minimum term and did not raise any issue of principle.

Confiscation Orders

Hot on the heels of the case of *R.v.Morgan; R.v. Bygrave* [2008] EWCA Crim 1323 (see [issue 15 of this bulletin](#)) comes further evidence that the Court of Appeal are capable of spotting the occasional case in which a confiscation order which is totally out of proportion to the offence has been made. In *R.v. Shabir* [2008] EWCA Crim 1809 (CLW 08/33/9) [judgment](#) the judge made a confiscation order in the sum of over £212,000 in the case of a pharmacist who had made false claims for the value of prescriptions allegedly dispensed. Since the Crown's case was that the amount he unlawfully obtained was £464 there may be few who would quibble with the suggestion that the confiscation order was a bit on the high side. The Court said that the decision to seek a confiscation order required an individual exercise of judgment in each case and the Court retained a discretion to stay the proceedings as an abuse of process in an appropriate case. Here the confiscation order was quashed and an appropriate compensation order was made instead.

Kate Stone and Mark George 15th September 2008