

Criminal Law Update

Issue 18. 5th March 2009



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.

Garden Court North Chambers would like to congratulate Mark George on his appointment as Queen's Counsel.

Defence case statements

Those of you who tried reading the text of the *Criminal Justice & Immigration Act 2008* probably felt you deserved a pat on the back if you got as far as the amendments relating to IPP prisoners (ss.13-18) or the changes to the release provisions for long term prisoners (s.26) and it is a safe bet that pretty well everyone had fallen asleep long before they got anywhere near section 60. Which is a pity because section 60 contains important amendments to section 6 of the CPIA 1996 (contents of a defence statement – Archbold 2009 para 12-57a) and section 11 (faults in disclosure by accused – para. 12-62) which deals with adverse inferences.

Inserted into section 6A is a new sub-section (1) (ca) which states that a defence statement should “[set] out particular of the matters of fact on which he intends to rely for the purposes of his defence.” This is in addition to the usual parts about the nature of the accused's case, the matters on which he or she takes issue with the prosecution and the reasons why this should be the case. This provision came into force on November 3, 2008 – see the *Criminal Justice and Immigration Act 2008 (Commencement Order No3 and Transitional Provisions) Order 2008* (S.I. 2008 No 2712). Paragraph 3 of the SI which deals with transitional and saving provisions says:-

“The coming into force of section 60 of the 2008 Act is of no effect—

(a) in relation to offences into which a criminal investigation within the meaning of section 1(4) of the Criminal Procedure and Investigations Act 1996 (a), has begun, in England and Wales, before 4th April 2005 or, in Northern Ireland, before 15th July 2005: and

(b) in relation to a case to which Part 1 of the Criminal Procedure and Investigations Act 1996 applies by virtue of section 1(1) or (2) of that Act before 3rd November 2008.”

Paragraph (a.) is reasonably clear in that the investigation into the offence must have started after 15th July 2005 and (b.) appears to mean (and I am grateful for the assistance of James Richardson and Deborah Espada from *Criminal Law Week* for their views on this) that the new provisions apply to all cases which have been sent, committed or transferred to the Crown Court after 3rd November 2008.

Having established that the provisions will already be applying to many new cases the next question is what to do about it? On the face of it this provision requires the defence to tell the prosecution not only what the defence is but also all the facts they intend to adduce in support of the defence. My first instinct was to say that this goes too far and threatens to reverse the burden of proof and the fair trial provisions of Article 6 together with the presumption of innocent guaranteed by Article 6 (2) and could be challenged under section 3 of the *Human Rights Act 1998* as happened of course to the provisions in section 41 of the *Youth Justice & Criminal Evidence Act 1999* restricting cross-examination regarding sexual history – see *R.v. A (No.2)* [2002] 1 A.C. 45 HL but it may not be as easy as that. Perhaps the most obvious difficulty is that whereas in *R.v. A* the refusal to allow cross-examination went directly to the heart of the case, the same is unlikely to be the case with an adverse inference arising from an inadequate defence statement. It is unlikely, even if a defendant felt inclined to run the argument, that there could be a conviction which could clearly be shown to have been the result of the drawing of an adverse inference by the jury from the failure to “set out the particulars of the matters of fact to be relied on” which would be the first requirement for a potential challenge to the compatibility of the new provision.

All of which probably means that we should just consider how we actually deal with the provisions when drafting defence statements. The first thing to say is that solicitors would be ill advised to consider that the easiest way to comply is simply to send the CPS a copy, possibly slightly redacted of the defendant's proof. Before you laugh I have seen that happen before! The real question is how little can be said to avoid an adverse inference being drawn. To an important extent this will depend on the individual facts of each case and will depend on such matters as whether your client has given a full explanation in interview or on the other hand has said nothing (give or take a prepared statement), how articulate the defendant is etc. If there has been a full explanation given in interview there will probably be little by way of facts that the prosecution do not already know.

In some cases such as a self-defence in a GBH by glassing in a nightclub the answer to the first question, namely the nature of the

accused's defence would ordinarily involve a short narrative to explain the basis of the plea of self-defence which again might leave little else to reveal but there may be other cases, for example where the evidence is strong and perhaps the client has said little if anything in interview or the client's lack of intellectual capacity means that giving evidence is going to be a bit of a gamble anyway where this provision could present real difficulties.

It may also assist defendants who could face cross-examination on the contents of the defence statement and who are deemed by section 6E to be the effective authors of their defence statement if the document is drafted in an obviously legalistic way so that when the bemused client seeks to blame the choice of language or phraseology on his lawyers the jury may readily comprehend that he is not likely to use the sort of language in which it has been drafted. In any event the natural instinct to say as little as possible is probably the best guide to how to deal with this situation and after all there are a number of lawyers who think that juries are not very much interested in adverse inferences and that whilst they get lawyers and judges quite excited they don't have the same impact in the jury room. Views on how to deal with this are welcome and any good ideas will be mentioned in forthcoming issues.

Hearsay and the European Convention

When the *Human Rights Act 1998* came into force in 2000 many of us were foolish enough to believe that it might have a profound impact on practice in the criminal courts and were disappointed when it soon became clear that the Court of Appeal was not so keen on the ECHR as we might have wished. At almost every opportunity the Court was at pains to remind us all that English law had been well acquainted with the concept of a fair trial over hundreds of years thank you very much and certainly didn't need to be reminded of its importance by some foreign court. So that was alright then and seemingly meant that it could be business as usual in the English criminal courts with little if any regard being paid to Article 6 of the Convention. So the decision in ***Al-Khawaja v. United Kingdom; Tahery v. United Kingdom*, reported, January 20, 2009, E.C.H.R. [judgment](#)** (CLW 09/03/1) is welcome at least as much for the impact it may have in the future as for the decision in the case itself.

Contrary to the view expressed by the CA in a series of cases over the years the ECHR has restated its view that the provisions of Art 6 (3) are not merely illustrative of the factors to be considered in deciding whether a trial has been fair but are express guarantees and are the minimum rights to be accorded rather than being sufficient in themselves to guarantee that the trial has been fair. Indeed even if these minimums rights have been respected the

court is still under a duty to consider whether the trial as a whole has been fair.

In particular, this decision, which distinguished and criticised the Court of Appeal decision in *R.v. Sellick and another* [2005] 2 Cr. App. R. 211, would appear to have given a new lease of life to the much ignored decision in *Luca v. Italy*, 36 E.H.R.R. 807 E.C.H.R. The decision in that case was always fairly clear, that the admission of untested statements which were the sole or decisive evidence against a defendant could not be reconciled with the right under Art 6 (3) (d) to have witnesses cross-examined, but this case seems simply to have been ignored by judges and largely also by counsel in this country. This case will not necessarily affect many cases where hearsay evidence is sought to be adduced but in cases where the evidence is "decisive" it seems that English courts will have to reappraise their approach to the impact of the ECHR and its application to fair trials in this country.

The decision of the Ct of Appeal in ***R.v. Z* [2009] EWCA Crim 20 [judgment](#)** (CLW 09/07/3) is a welcome brake on the improper use by prosecutors of the hearsay provisions. The evidence of a witness who had previously complained of historic sexual abuse but who did not wish to give evidence and evidence from the deceased wife of the defendant that he had raped her many years before had been allowed in by the trial judge under section 114 (1) (d). In quashing the convictions the Ct said that cases would be rare in which such evidence should be admitted when the witness was able, though reluctant to give evidence and was not in fear. The court went on to say that applications made under s.114 (1) (d) should be approached with caution and that this was a case in which the safeguards in s.116 had been circumvented. They also criticised the judge for characterising the prosecution's application as being "conventional" and "straightforward" and for failing properly to identify the grounds on which he said the evidence was admissible. As the court quashed the convictions it did not go on to consider submissions on the application of Art 6 of the ECHR but in the light of the decision in *Al-Khawaja* it is submitted that if judges start from the basic principle that hearsay evidence is essentially unfair and its admission needs proper justification there is less chance that errors such as occurred in this case will be replicated.

Hopeless appeals and loss of time directions

Well they can't say they haven't been warned. For years the Ct of Appeal has issued judgments threatening to order time served before an appeal is disposed of not to count towards the sentence in cases where there is no merit in the appeal and for years the CA has done nothing to implement such threats. Finally it has acted. In ***R.v. Jerry Fortean*** (23/03/2009) the appellant had renewed an

application for leave to appeal after the single judge had refused leave. F was not legally represented at the hearing. The application was refused as being wholly devoid of merit and six weeks of the time served was ordered not to count towards the sentence. The case is a salutary reminder that those who ignore advice that either there are no grounds for appeal or who persist in an application after the single judge has refused leave and counsel has given negative advice, run the risk not only of having their application refused but also of losing some of the time already served. The support of counsel on a renewed application is no guarantee that the court will not order a loss of time but as the court recognised that it is "a relevant factor" the facts would have to be pretty extreme before the court made such an order where the application was supported by counsel.

The Safeguarding Vulnerable Groups Act 2006

Whatever else this government is remembered for the clarity of its criminal legislation will not be one. Vast numbers of new offences have been created often contained in lengthy schedules to already overloaded Acts which usually give the reader no idea from the title that it contains provisions relevant to the criminal law at all. Sometimes parts of Acts are passed and then left to gather dust on the shelf and when brought into force (in this case over two years after the Act became law) it is invariably by a commencement order which is only issued after the provision has come into force! One such is the *Safeguarding Vulnerable Groups Act 2006*. Only one provision in this Act relates to the criminal law and was safely kept out of sight, tucked away in para. 25 of Schedule 3 of the Act. This requires a court before which a person is convicted of an offence specified for the purposes of para 24 (but of course not actually contained in para 24) to inform that person that he will be included (automatically) in either a children's barred list or an adult barred list which basically prevents that person from working with children or adults. To find the offences which are so specified you need to go to the *Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009* (S.I.2009 No 37.) This is a lengthy document containing four paragraphs in a schedule with a totally bewildering list of offences which are specified. They include many (but not all) of the offences under the Sexual Offences Acts of 1956 and 2003 when a child is involved as well as offences of murder (but not attempted murder) and kidnapping, burglary with intent and supplying drugs to a child but not section 18 wounding. A helpful summary of the offences specified, designed to clear this government engendered fog can be found at CLW 09/04/12.

Mark George
5th March 2009

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