

# Criminal Law Update

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

As was pointed out in the [July](#) issue of this bulletin the government's appetite for continuous change in the field of criminal sentence seems to know no bounds. Little did we know when we all spent so many hours trying to understand the changes in the Criminal Justice Act 2003 that within 18 months of implementation significant parts of the Act would be discarded. To the still-birth of custody plus noted in the [last edition](#) of this Update is now to be added the early demise of intermittent custody, also known as "custody minus", after a short trial period. In addition the government has announced that judges will be given new powers to ensure that the custodial element of determinate sentences (s.244 of the CJA 2003 requires release after serving half of a determinate term over 12 months) and the minimum term to be served in respect of life sentences will be longer. This will presumably be included in the proposed bill which will form the 2007 Criminal Justice Act. Further developments will be reported in later editions.

## Crediting time spent on remand

The Court of Appeal has modified its earlier position as set out in *R. v. Oosthuizen* [2006] 1 Cr. App. R. (S.) 385 – see the [December 2005](#) edition of this Update. Where the judge fails to state that correct period of time served on remand which is to count towards the sentence the matter should still be remedied under s.155 PCC (S) Act 2000 if it is noticed before the expiry of the 28 day time limit for such corrections. If more than 28 days have elapsed the only remedy is an appeal to the CACD and if both parties agree that the period specified in the direction was wrong this should be stated in the application for leave to appeal – see *R. v. Norman and others* [2006] EWCA Crim 1792; Crim L.R. 1072 [2006] (CLW 06/29/33). [judgment](#)

## Sexual history evidence

In *R. v. V* [2006] EWCA Crim 1901 (CLW 06/31/02) [judgment](#) the CA has suggested that in addition to obtaining leave under s. 41 YJ&CEA 1999 it may also be necessary to establish admissibility under s.100 of the CJA 2003 (non-defendant's bad character) where it is to be suggested that the complainant has made a previous false complaint. If however there is a sufficient evidential basis for this suggestion, then such questioning is not about "sexual behaviour" for the purposes of the 1999 Act (*R. v. R.T.*; *R. v. M.H* [2002] 1 W.L.R. 632) and admissibility under s.100 (1) (a) and (b) would also be established. *R. v. Soroya* [2006] EWCA Crim 1884 (CLW 06/32/03) [judgment](#) is a useful example of the use of s.41(5) of YJ&CEA 1999 when the prosecution have lead evidence about previous sexual behaviour which happens to be untrue. There has also been an amendment to Part 36 of the Criminal Procedure Rules in respect of applications under s.41. These are available on the CLW website which is a good reason for having an on-line subscription. Those who don't can find them at [www.dca.gov.uk](http://www.dca.gov.uk)

The Sentencing Guidelines Council (SGC) has issued a definitive guideline on robbery which applies to all who fall to be sentenced after 1<sup>st</sup> August 2006 – see [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) Until the 2007 edition of Archbold is published it can be found at CLW 06/29/63. The guideline sets out three levels of seriousness of offences as well as various aggravating factors. Starting points for adults as well as young offenders are then set out with a disturbing lack of distinction between the two which draws strong criticism from the editor of CLW who is of course also the editor of Archbold.

The SGC has also updated the list of cases which are considered to constitute considered guidance for the benefit of the CA on appeals. The current list appears in the supplement to Archbold 2006 at K-500. The additional cases are set out at CLW 06/32/27.

## Bad character

Since the last update there have been a number of decisions in this area. In *R. v. Adenusi* [2006] EWCA Crim 1059 (CLW 06/33/03) [judgment](#) the CA confirmed that evidence of offences committed *after* the offence for which the defendant is being tried, may establish propensity under s. 101 CJA 2003. In *R. v. Lawson* [2006] EWCA Crim 2572 (CLW 06/34/10) the CA pointed out that however reprehensible it might be for counsel for a co-accused to introduce evidence of bad character without seeking leave under s.101 (1) (e) the judge had a discretion to admit the evidence. The commentary to the case of *R. v. Atkinson* [2006] EWCA Crim 1424 (CLW 06/37/02) is worth reading. It is a useful reminder that propensity is only one reason for admitting bad character under s. 101 (1) (d) and s. 103. Evidence which does not establish propensity under s.103 (1) (a) or (b) may nonetheless be admissible to prove knowledge (in this case of the fact of drugs being concealed within the engine compartment of a car) if that is "an important matter in issue between the defendant and the prosecution". To the same effect see also *R. v. Beverley* [2006] EWCA Crim 1287; [2006] Crim LR 1064; (04/05/2006) (CLW 06/44/04). Whilst on its facts a potentially useful case the same caution as expressed above in respect of Atkinson should be applied. In *R. v. Kordasinski* [The Times, 16 November 2006](#) the CA held that foreign convictions are admissible under the CJA 2003. The transcript is not yet available but the decision is heavily criticised in the commentary (CLW 06/42/02) not least of all for the fact that the CA rejected the argument based on the view of Professor JR Spencer QC in his recent book *Evidence of Bad Character* (2006) to the effect that the rule in *Hollington v. Hewthorn & Co.Ltd.* [1943] 1 K.B. 587 CA as to the limited relevance of a previous conviction had survived in relation to foreign convictions.

## Legal professional privilege

*R. v. Loizou* [2006] EWCA Crim 1719 (14/07/2006) (CLW 06/34/14) [judgment](#) is a useful reminder of the pitfalls awaiting the unsuspecting who have not answered questions in interview. *R. v. Bowden* [1999] 2 Cr. App. R. 176. is authority for the proposition that a defendant who simply states that he had not answered questions in interview on the advice of his solicitor does not waive privilege but

that if the defendant goes further and adds the reasons for that advice he will be taken to have waived privilege. This situation is to be contrasted however with a situation where the defendant has to reveal what he had said to his solicitor (or someone else) in order to rebut an allegation of recent fabrication of his defence. This does not amount to a waiver of privilege – see *Condron & Condron* [1997] 1 Cr. App. R. 185 at 197; *R.v. Wishart* [2005] EWCA Crim 1337. It was also pointed out in *Loizou* that *Bowden* is not authority for the proposition that further disclosure was always required once there has been a waiver of privilege. The extent to which the defendant could be required to disclose further details of the legal advice would be a question of fairness and would depend on whether a lack of further details would be capable of creating a misleading impression before the jury.

## Sentencing

**Historic cases of buggery** – Despite the short lapse of time since the CA in *R.v. A and W* [2001] 2 Cr. App. R. 275 decided that *R.v. Willis* 60 Cr App. R. 146 was still the starting point for sentences in historic offences of buggery, the CA has now decided that sentences in such cases should be determined as if they were cases of rape in accordance with the guidelines in *R.v. Milberry* and others [2003] 2 Cr App R (S.) 142. This despite the fact that before 1994 buggery was a very different offence to rape and in particular consent was not an issue.

For an example of a finding of “exceptional circumstances” permitting the court to avoid a minimum sentence of 5 years imprisonment for **firearms offences** see *R.v. Harrison* [2006] 2 Cr. App. R. (S.) 352.

**Maximum sentence** – two different approaches to this issue are illustrated by the case of *R.v. Butt (Sohail)* [2006] 2 Cr. App. R. (S.) 364 and *R.v. Pinto and others* [2006] 2 Cr. App. R. (S.) 579. In the former, a case of dangerous driving (max 2 years) the CA said that judges “should not use their imagination to conjure worst possible cases”. However in *Pinto and others*, a case of child cruelty (max 10 years) the CA said the maximum should be passed only in the most truly exceptional cases “which are so serious that it is difficult to imagine a yet more serious example of the offence”. The principle should surely be the same whatever the maximum but it is easy to conclude that the court will be more likely to uphold a maximum sentence where this is comparatively low. The CA may give more guidance on this issue next year when it hears the appeal of three animal rights activists who received sentences of 12 years after guilty pleas to conspiracy to blackmail (max 14 years) where the judge had indicated that after a trial he would have imposed the maximum sentence.

**Life Sentences and IPP** - Further guidance as to the correct approach to the issue of future dangerousness under s.229 was given by the CA in *R.v. Johnson*; *R.v. Hamilton*; *R.v. Lawton*; **Att-Gen's Reference (No 64 of 2006)** (*R.v. Jones*); *R.v. Gordon* [2006] EWCA Crim 2486 [The Times, November 2, 2006](#) (CLW 06/39/05). The Court also pointed out that reference to other cases which appear to be similar is not usually helpful. Where inadequate information has been provided by the prosecution the Court put the onus on the defence to give further details of any apparently relevant previous convictions. This is in sharp contrast to the views of the CA expressed in *R.v. Bryan and Bryan* [2006] Crim L.R. 942 (CLW 06/36/24) that it is the duty of the prosecution to provide the

fullest information in relation to an offender's previous convictions failing which the judge should consider adjourning sentence rather than going ahead and possibly altering the sentence under the slip rule. Care needs to be taken when reading judgements of even the most experienced judge (the judgement here was given by Sir Igor Judge, President of the QBD). At para 6 of the judgement he states that “it is a prerequisite to the sentence that the offender has been convicted of a specified offence”. With respect that is wrong. Both s. 225 and 226 only apply where the offender has been convicted of a “serious offence” (i.e. the max sentence is over 10 years). It is true that in assessing dangerousness under s.229 the offender has to have been convicted of a specified offence as set out in Schedule 15 (violent or sexual offences) but this is merely the trigger for the assessment of dangerousness itself. The problem of imposing **consecutive extended sentences** under s. 227 or 228 of the CJA 2003 was considered in the case of *R.v. Brown* [2006] EWCA Crim 1996 (18/07/2006) (CLW 06/41/18). The CA concluded that whilst not unlawful, such sentences were undesirable since it would make the calculation of release dates (s.247 by the parole board or s.244 automatic release at halfway) very difficult. The similar problem in respect of Life and IPP sentences was considered in *R.v. O'Brien and others* [2006] EWCA Crim 1741 in the [last edition](#) of this Update.

## Immigration and Criminal Law

The criminal law continues to make inroads into the immigration arena. In *R. v Asfaw* [2006] EWCA Crim 707; [2006] Crim.L.R. 906 (21/03/2006) (CLW 06/36/01) the CA held that there will be strong grounds for arguing that there has been an abuse of process if an asylum seeker is charged with an offence under the Theft Act 1978 as a means of depriving the defendant of the defence provided by s. 31 of the *Immigration and Asylum Act 1999*. The commentary to this case is also worth reading. In *R.v. Thet v. D.P.P.* [2006] EWHC 2701 (Admin) [The Times, November 1, 2006](#) (CLW 06/40/09) the High Court held that the document required to be produced for the purposes of s. 2 of the *Asylum and Immigration (Treatment of Claimants etc.) Act 2004* is a genuine document. The Court held that a natural reading of s.2 lead to the conclusion that a defendant who was able to put forward a reasonable excuse for not being in possession of a genuine document referred to in s. 2(1) was entitled to rely on the defence contained in s. 2 (6) (b). Since the District judge had found as a fact that T, as a former political prisoner, had been unable to obtain a genuine passport in Burma, he should, have acquitted T.

Finally the annual Criminal Justice Act has been dressed up in the catchy title of the **Violent Crime Reduction Act 2006**. Passed on 8<sup>th</sup> November 2006 none of its provisions are yet in force. Of particular note however minimum sentences of five years have been extended to cover all the serious offences in ss 16 to 20 of the Firearms Act 1968, maximum sentences for carrying knives under s. 139 CJA 1988 are doubled to 4 years and the loophole created by the Sexual Offences Act 2003 where it was not possible to prove whether the offence was committed after the SOA 2003 came into force or was committed under the old law has been closed by s.55. See *R.v. Newbon* [2005] 4 Archbold News 6 and *R.v. A* (Prosecutor's Appeal) [2006] 1 Cr. App. R. covered in the [July 2005](#) and [May 2006](#) editions of this Update.

Mark George  
4<sup>th</sup> December 2006