

Criminal Law Update

Issue 10. 8th October 2007



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

IPP sentences

Many practitioners will be experiencing a strong sense of schadenfreude as the government lurches from one embarrassment to another over its ill thought out flagship piece of legislation the *Criminal Justice Act 2003*. This publication has previously drawn attention to the fact that government ministers did not seem to understand how the legislation was supposed to work (see July 2006 issue re John Reid and Vera Baird). This was followed by the abandonment of intermittent custody and custody plus without a ball being bowled. Most recently the government has been hit by two judgments in the High Court ***Wells v. Parole Board and SSJ; Walker v. SSHD* [2007] EWHC 1835 (Admin) [judgment](#)** and ***R (James) v. SSJ* [2007] EWHC 2027 (Admin) [judgment](#)** which featured GCN's Pete Weatherby in which IPP sentences have been held to amount to unlawful detention once the tariff period has expired in cases where the offender has not been permitted access to the courses needed to satisfy the Parole Board that he no longer poses an unacceptable risk to the public. It seems that the government did not anticipate that the lifer population would go through the roof once IPPs were in force. The sound of former Home Secretary and chief architect of the CJA 2003 David Blunkett railing against "idiot" judges for passing IPPs when the appropriate tariff period was very short will have struck many as being a bit rich. The former 'Sun' columnist was apparently unaware that nowhere in the relevant sections of the Act did the government think it necessary to indicate that for example a sentence of IPP should not be imposed unless the court considered that a minimum term of say five years was appropriate. Some such simple provision would have avoided most of the present problems. And most recently of all, the government finds itself having to appeal a judgment of the High Court that the Parole Board system (tasked amongst other things with deciding whether to release IPP sentenced prisoners) is insufficiently independent of the government to be lawful – ***R. (Brooke and others) v. Parole Board* [2007] EWHC 2036 (Admin). 07/09/2007 (CLW 07/34/57) [judgment](#)**. Nonetheless and in spite of these problems judges continue to pass such sentences so we have to be prepared to argue against them. There have been a number of recent developments.

Where a defendant is to receive a sentence of IPP for a number of serious specified offences and at the same time be sentenced for other non-serious offences the judge can impose specified minimum terms which reflect the whole of the offending behaviour including the non serious offences and make the extended sentences which are required for the non serious offences concurrent – ***R.v. Edwards* [2007] 1 Cr. App. R. (S.) 646; *R.v. Meade* [2007] 1 Cr. App. R. (S.) 762.**

The editor of Archbold has suggested that IPP sentencing should be conducted in a different way to normal sentencing in view of the gravity of the proceedings and the implications for defendants. In his commentary on ***R.v. Considine* (6.6.07) (CLW 07/24/28) [judgment](#)** and ***R.v. Boswell* 26.6.07 (07/27/7) [judgment](#)** he argues that just as confiscation proceedings have a separate procedure and hearing so the same should apply to IPP sentencing hearings. He suggests that probation officers should be expected to give oral evidence to justify a finding of dangerousness with the offender being entitled to rely on his own expert (probably a psychologist) in rebuttal. Many judges won't like this because it will involve delay and expense but these are serious

matters, especially given the problems IPP prisoners will experience in trying to get released (see above), and the decision to impose an indeterminate sentence should be carried out in an appropriate manner.

A judge is however entitled to reject the views of a defence expert but must give reasons – ***R.v. Rocha* 11.6.07 (CLW 07/26/11)** Some encouragement may be derived from the decision in ***R.v. Watty* [2007] 2 Cr. App. R. (S.) 280 [judgment](#)** where the CA suggested that Parliament cannot have intended IPPs to be considered appropriate if the minimum period was as short as 12 months, pointing out that the prison regime is not geared to handling prisoners with such short minimum periods.

The Sentencing Guidelines Council has recently produced a new guideline on IPP sentences and dangerous offenders. It sets out the statutory requirements for deciding whether such a sentence is appropriate and summarises guidance given by the CA and High Ct as to the application of those requirements. It is available from the SGC website (www.sentencing-guidelines.gov.uk) and it is essential that practitioners take a copy with them to court when dealing with IPP and extended sentences.

Bad Character – CJA 2003

Two further decisions illustrate the correct approach to the admission of evidence of bad character. In ***R.v. Tirnaveanu* [2007] EWCA Crim 1239 (24/5/07) [judgment](#)**, a people trafficking case, the possession by the defendant of documents relating to other illegal immigrants and his dealings with them was relevant, not to establish a propensity to commit such offences but because his possession of the documents was highly relevant to proving that it was T who committed the offences and not someone else posing as him.

In ***R.v. Campbell* [2007] EWCA Crim 1472 (CLW 07/26/1) [judgment](#)** the CA dealt with the issue of a propensity to untruthfulness. The Court held that whether a defendant has a propensity for being untruthful would not normally be capable of being described as "an important matter in issue" unless telling lies was an element of the offence in question and in any event, a propensity to be untruthful would not, of itself go very far to establish that the defendant was guilty of the offence charged. The commentary at CLW 07/26/01 points out that in ***R.v. Hanson; R.v. Gilmore* [2005] 2 Cr. App. R. 299** the CA explained that few previous convictions will be relevant to this issue except perhaps offences such as obtaining by deception and perjury.

One problem that frequently arises is in deciding in what circumstances a bad character application has to be made at all before a certain line of cross-examination can be followed. In ***R.v. Hall-Chung* (CLW 07/31/2)** the CA held that evidence that a witness had taken an overdose was not bad character evidence under ss.98 and 112 and accordingly an application under s.100 was not required before the witness could be asked about it.

The decision of the CA in ***R. v. Musone* [2007] EWCA Crim 1237 (CLW 07/21/3) [judgment](#)** may cause difficulties in cases involving cut-throat defences. Despite the apparently deliberate absence in the Act of any exclusionary power in such cases (s. 101 (3) cannot apply) and the acceptance that s.78 PACE 1984 only applies to prosecution evidence the Court concluded that there was a power implicit in Part

35 of the Criminal Procedure Rules 2005 to exclude evidence which a co-defendant seeks to adduce in deliberate manipulation of those rules (failure to give notice leading to an ambush). In contrast to the Civil Procedure Rules which are permitted to modify the rules of evidence in civil cases because the Civil Procedure Act 1997 makes such provision, there is no such power in the Cr. PRs which are procedural rules only. In criminal cases the rule is that relevant evidence is admissible and it seems extraordinary that the CA could even contemplate holding that the "over-riding objective" in the Cr. PRs can be used to exclude otherwise admissible evidence. The idea that the Cr. PRs do permit such an outcome duly receives the full hair-dryer treatment from the editor of Archbold!

Hearsay – CJA 2003

A record in the police national computer that a person had used a particular alias may be proved under CJA 2003 s. 117 (business and other documents) – see **Wellington v. D.P.P.** 01/05/2007 [2007] EWHC 1061 (Admin) (CLW 07/34/8) [judgment](#)

Jury composition

The presence on juries of people who work in the criminal justice system continues to concern the higher courts. In **R.v. Pintori**, [2007] EWCA Crim 1700, 13.07.2007 (CLW 07/28/01) [judgment](#) the CA held that there was a real possibility that a juror who knew and worked with police officers giving evidence was biased. The Court considered **R. v. Abdroikov** [2006] 1 Cr. App. R. 1, [2005] 1 W.L.R. 3538 (CA). The judgment of the House of Lords in that case is currently pending. The CA has just given leave in the case of **R. v. Hanif; R.v. Khan (Bakish)** in which the author appears. In that case (possession of 6 kilos of heroin with intent to supply) a police dog handler who became the foreman of the jury informed the judge that he knew one of the police officers slightly but omitted to say that he (and his dog) had been involved in a number of police drug raids in the months before this police operation. The hearing is likely to take place in late 2007.

Goodyear indications

The perils of Goodyear indications are graphically illustrated in **Att.-Gen.'s Reference (No. 48 of 2006) (R. v. Farrow)** [2007] 1 Cr. App. R. (S.) 558 where the A-G successfully challenged as unduly lenient a sentence passed after a Goodyear indication despite the failure of prosecution counsel to remind the judge of the possibility of such a referral.

These perils are multiplied in cases involving the dangerous offender provisions (CJA 2003 sections 225-228). The indication will inevitably be given before the risk assessment is carried out and must be subject to that assessment. If the defendant is found to be dangerous the court will not be prevented from imposing IPP or an extended sentence and the indication will only relate to the notional determinate sentence of IPP or the appropriate custodial term of an extended sentence under ss. 227/228. The judge who gave the indication should, wherever possible, also assess the dangerousness of the defendant. **R.v. Kulah** [2007] EWCA Crim 1701, 13/07/2007. [judgment](#)

Revised Guideline on guilty pleas

After various complaints by judges and some national newspapers keen to peddle the idea that all judges are a soft touch The Sentencing Guidelines Council has issued a revised guideline on reductions in

sentence for guilty pleas which applies to all sentences on or after 23 July 2007. Quite how much of a change these will make in practice remains to be seen. The "maximum discount" now becomes a "recommended discount" which should allow judges more leeway than they felt they had before. However, if judges really do allow a 20% reduction even where the prosecution case can properly be described as "overwhelming" the impact of the changes may be less than the previous rhetoric had suggested. Judges who are keen to crack trials know that there has to be some real incentive to persuade reluctant defendants to plead guilty and offering 10% off for a plea at the door of the court is only likely to result in more defendants taking their chance with the jury.

Legal professional privilege

A reminder of the need for silence as to the reasons for advising a 'no comment' interview can be found in **R.v. Hall-Chung** (see above) The Court referred to **R.v. Bowden** [1999] 2 Cr. App. R. 176 and **R. v. Wishart** [2005] EWCA Crim. 1337. This is fairly basic stuff and police station clerks should be well aware of the perils of waiving privilege. However the CA said that judges should not assume the prosecution would be entitled to take advantage wherever a waiver occurred and the judge had to consider whether it was fair to the defendant bearing in mind that the privilege is that of the defendant and not his solicitor.

New procedures

Criminal Procedure (Amendment No. 2) Rules 2007 (S.I. 2007 No. 2317) came into force on 1.10.07 and relate mainly to appeals to the Ct of Appeal although there is apparently little of substance in the changes! In the present age of form filling solicitors should note that new forms have been substituted in Annex D to the *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 W.L.R. 2870 in respect of various types of appeal including a revised form NG (form of notice and grounds of appeal or application for permission to appeal against conviction or sentence) – see *Consolidated Criminal Practice Direction (Amendment No. 16) (Forms for use in appeals to the Court of Appeal (Criminal Division))* 11/09/2007 (CLW 07/34/7) One matter relating to the Crown Court that deserves a mention is the procedure where an application is to be made to vacate a guilty plea. Naturally such an application has to be in writing.

Trial in the absence of the accused

It has become a regular occurrence for judges to warn defendants that if they fail to turn up for their trial they risk being tried in their absence. This presents advocates with difficult ethical as well as practical problems. Helpful guidance as to what defence counsel can and should do was given in **R.v. K (John)** [2007] EWCA Crim 1339, 13.6.2007 (CLW 07/25/7) [judgment](#)

Finally, it would be inappropriate if this publication did not note that HHJ Keen who sits at Sheffield Crown Court has recently been described by Lord Justice Laws as behaving in a manner which "betray[ed] a rudeness and discourtesy of which the judge should be ashamed" during a trial over which he presided. The case is called **R.v. Cordingley** [2007] EWCA Crim 2174. Those who have experienced this judge in action may wonder whether even the admonition will cause the judge to modify his behaviour but we can at least enjoy the moment.

Mark George – 8th October 2007