

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.

The Criminal Justice & Immigration Act 2008

In the [last issue](#) we drew attention to some of the changes heralded by the passage of this Act. ([link to new act](#)). Since then there have already appeared books on the Act and other commentators have already begun to digest the principle provisions. The Act is hard to follow because many of the important sections simply amend parts of the 2003 Act and until the next supplement to Archbold is produced containing the 2003 Act as amended practitioners will need to have a copy of the new Act as well as the old unless they have access to the Criminal Law Week on-line service where the 2003 as amended already appears along with a link to the CJ&Imm Act itself. As is usual with criminal legislation these days the Act is being implemented in stages which means (also as usual) that various parts of the Act may never in fact be implemented before some bright spark in the Home Office comes up with the latest new idea. With that in mind we draw attention at this stage only to those parts of the Act either already in force.

Section 26 of the Act was brought into force on **9th June 2008**. By this provision prisoners serving long term sentences (more than 4 years) under the CJA 1991 (i.e. imposed before 4.4.2005) will now automatically be released at the half-way point of their sentences rather than having to apply to the Parole Board. However it should come as no surprise that the legislation takes with one hand that which the other hand has just given and so the scheme does not apply to anyone convicted of an offence listed in Sch 15 CJA 2003 i.e. any serious violent or sexual offence. That must immediately remove the vast majority of prisoners who would otherwise be eligible! By my reckoning almost the only people who will benefit will be those who were sentenced to long terms for drug offences (usually importations) but as an example a drug importer who received a sentence of 21 years in say 2001 and who would otherwise have had to serve 14 years unless granted parole will now get out 3 ½ years earlier. Happy days.

Again however a further word of caution is required. [PSI 17/2008](#) the Prison Service Instruction which sets out the policy makes it clear that the scheme only applies to those long term prisoners who had not yet reached the halfway point (PED) of their sentence at 9.6.08. So for example a drug dealer sentenced to 12 years in April 2002 (PED April 2008) but not entitled to release until his NPD

at two-thirds (April 2010) has missed the cut and will have to take his chances with the Parole Board.

Many of the remaining provisions of the Act came into force on **14th July 2008**. Probably the most important and welcome are those relating to imprisonment for public protection (IPPs), detention for public protection and extended sentences. **Section 13** substitutes a new subsection (3) in s.225 so that even if the dangerousness provisions in s.229 are satisfied the judge still retains discretion whether to impose a sentence of IPP. Unless the case involves a serious violent or sexual offence listed in the new Sch 15A (far shorter than Sch 15 itself) a sentence of IPP cannot be imposed unless the notional minimum term would be at least two years (i.e. the minimum determinate sentence in the absence of IPP would have been at least 4 years). This will mean an end to farcically short minimum terms which have not been uncommon in the last three years. Changes made by s.15 of the new Act mean that an extended sentence becomes a direct alternative disposal to IPP or DPP. **Section 25** amends s.247 of the 2003 Act and means that in future extended sentence prisoners will automatically be released after serving half of their custodial term rather than at the behest of the Parole Board.

A full list of the sections coming into force on 14th July is set out in *Criminal Law Week* at 08/25/08 and the Ministry of Justice has produced a useful guide to the changes which can be found on the MoJ website at www.justice.gov.uk/docs/circular-criminal-justice-2008-01.pdf Changes have also been made to the SGC guide on the dangerous offender provisions. This can be downloaded from www.sentencing-guidelines.gov.uk

The anonymity of witnesses in criminal trials

The judgment of the House of Lords in **R.v. Davis [2008] UKHL 36 judgment** (CLW 08/24/3) that the granting of anonymity to witnesses in criminal trials was incompatible with the right of the defendant to a fair trial met with a rapid response from the government which has introduced a bill to put witness anonymity on a statutory footing – see the [Criminal Evidence \(Witness Anonymity\) Bill](#). The case of *Davis* revealed that the practice of promising witnesses anonymity had become far more common than most people realised and is a good illustration (worth bearing in mind as the issue of 42 days detention remains unresolved) that when the police are given a power to be used exceptionally its use tends rapidly to become the norm. Practitioners will recall the plaintiff cry of the Court of Appeal in *R. v. Hanson*; *R. v. Gilmore*

[2005] 2 Cr. App. R. 299 that bad character applications should also not be made as a matter of routine when we all know that that is precisely what happens in practice.

Evidence

The thorny issue of the circumstances in which the evidence of the wife of an accused can be used in criminal proceedings was revisited in **R.v. L (Evidence of wife) (07/05/2008)** (CLW 08/19/4). Although the transcript is not yet available the issue appears to have been made more complicated by the hearsay provisions of the CJA 2003 which potentially make it rather easier to adduce the evidence of a reluctant witness such as this.

R.v. Arshid Khan [2008] EWCA Crim 1112 (Lawtel 27/05/2008) is a reminder of the circumstances in which it is permissible for the jury to receive new evidence AFTER they have retired to consider their verdicts. In this case the defence had made further enquires about telephone evidence which had been adduced earlier and found it to be incorrect. At the request of the defence the judge then gave the jury further directions about this evidence and that factor seems to have weighed heavily with the CA in deciding that D had not been prejudiced by the admission of this further evidence. See Archbold para.4 - 417 for the general law on this topic.

Confiscation

The judgment of the CA in **R.v. Morgan: R. v. Bygrave [2008] EWCA Crim 1323** (20/06/2008) [judgment](#) would appear to be worth reading. The CA held that there is a "limited type of case" in which it could amount to an abuse of process for the Crown to pursue a confiscation order because the effect would be oppressive since it would punish twice over a defendant who had already made substantial repayments to the victim. However I am less optimistic than the editor of CLW (see his commentary at 08/25/35) that this will make any real difference in practice where I suspect that finding an example of this "limited type of case" may prove to be somewhere between very difficult and impossible.

Mens rea in joint enterprise murder

As it has been a few years now since the decision of the HL in *R.v. Powell; R.v. English* [1999] 1 A.C. 1 and the CA in *R. Uddin* [1999] 1 Cr. App. R. 319 it is about time we all reminded ourselves of the principles involved when a number of assailants attack a victim with fatal consequences. The HL in **R.v. Rahman and others [2008] UKHL 45** [judgment](#) upheld the convictions of appellants on the basis that it was sufficient that they foresaw what the principal associate might do and they did not have to foresee what he

specifically intended to do. The intention of the principal party was not relevant to (a.) whether the killing was within the scope of the joint enterprise, or (b.) whether the principal's act was fundamentally different from the act or acts which the secondary party foresaw as part of the joint enterprise. Lord Bingham said that he preferred the directions given by the trial judge to the series of questions posed by the CA and which are set out in Archbold at para. 19-32. It might be better for judges to use the formula set out by His Lordship at para. 68 of his speech, which is helpfully summarised in the commentary to this case at CLW 08/26/6.

Capacity to consent in sexual cases

Those involved in cases under s.30 of the *Sexual Offences Act 2003* would do well to read the case of **R.v. C. [2008] EWCA Crim 1155** (23/05/2008) (CLW 08/22/5) for guidance. The CA held that the effect of mental disorder would have to be severe before the person was unable to choose whether to submit to sexual activity.

Sentencing Guidelines for Magistrates' Court

There is no escape from the long arm of the SGC even in the Magistrates' Court and a revised guideline on offences for which sentence is frequently imposed in Mags' Courts when dealing with adult offenders comes into force in respect of all cases appearing for allocation (mode of trial) or for sentence on or after August 4, 2008. These also apply in the Crown Court when dealing with appeals and when sentencing for summary only offences. These are digested at CLW 08/19/19 and the full text (approx. 200 pages) is available at

www.sentencing-guidelines.gov.uk/guidelines/council/final.html

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