

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.

Identity Cards Act 2006 prosecutions and victims of trafficking

The case of **R v O** (The Times, 2 October 2008) [2/9/2008 CLW 08/36/2] tackled the question of whether a person should be prosecuted with offences under the Identity Cards Act 2006 (use of false identity documents etc.) when they may be victims of trafficking. Consideration should also be given as to whether a prosecution should be discontinued on evidential grounds where there is clear evidence that a credible defence of duress could be sustained. Andy Fitzpatrick has considered the problem identified in this case in more detail in [an article available on the GCN website](#).

Witness anonymity

Advocates faced with an application under the *Criminal Evidence (Witness Anonymity) Act 2008* will find that the Act is now in the 2009 edition of Archbold at paras. 8-71 and following, along with the amended Practice Direction (CLW 08/34/5) at para. 8-71n.

Evidence - Hearsay

In the case of **Ali and Hussain [2008] EWCA Crim 146**; 172 J.P. 516, C.A. (09/07/2008) (CLW 08/39/1) the CA made obiter comments to the effect that in determining an application to admit hearsay 'in the interests of justice' (section 114(1)(d) CJA 2003) judges should not take into account matters heard in the absence of the defendant and his advisors at a PII hearing. Such an approach would be unfair and in breach of Article 6 ECHR; hearings on admissibility should be conducted on the basis that the material and arguments deployed both for and against admissibility should be available to both parties.

Police - Power of Arrest

The power of arrest without warrant under section 41 of the Terrorism Act 2000 requires that the arresting officer must have reasonable grounds for suspecting that the person concerned is a terrorist; this is an objective requirement. It was decided unanimously by the House of Lords in *O'Hara v Chief Constable of*

the Royal Ulster Constabulary [1997] AC 286 in relation to equivalent provisions in the Prevention of Terrorism (Temporary Provisions) Act 1984 that an order by a superior officer to an arresting officer was not sufficient to afford the arresting officer reasonable suspicion; the only relevant matters were those in the mind of the arresting officer at the time of the arrest. In the instant case the officer was not entitled to infer that his superiors must have had reasonable grounds for suspicion before directing him to make an arrest and the victim's connections with a terrorist suspect were insufficient grounds to afford such a suspicion: **Commissioner of Police of the Metropolis v Raissi [2008] EWCA Civ 1237** [judgment](#)

Search warrant

Police applied under Schedule 1 of PACE for a warrant to search the premises of a firm of solicitors on the basis that service of notice of an application for a production order may seriously prejudice their investigation (para 14(d)), in that when the solicitors' clients who were the subject of the investigation were alerted to the application for a production order they would act quickly to ensure that any incriminating material held by the solicitors was returned to them and moreover would be alerted to the possibility of police searches at their business and residential premises, giving them the opportunity to dispose of incriminating evidence. The warrant was granted at Preston Crown Court. On an application for judicial review the Divisional Court quashed the warrant, holding that there was no rational basis for the grant of the warrant since the solicitors were bound by paragraph 11 of schedule 1 not to 'conceal, destroy, alter or dispose of the material' to which the application related, and 'dispose of' would include returning material to their clients: **R (Faisaltext Ltd and others) v Preston Crown Court and another** *The Times*, December 5 2008; [2008] EWHC 2832 (Admin) [judgment](#).

Juries - Bias

The appellant's convictions for offences of sexual abuse against his daughter were safe where one of the jurors was a serving police officer working on a unit investigating allegations of child abuse. The appellant was also a police officer and part of the defence case involved criticism of the way the police conducted interviews with the complainant. The CA held that the fact that a police officer is a juror does not of itself give rise to an appearance of bias but there may be an appearance of bias in certain situations, for example where a police officer juror has some connection to an officer whose evidence is in dispute. In this case the evidence of the police

officer was not in dispute and the court said that the criticism of her conduct of the interviews was on an issue of 'comparatively narrow significance'. The court was of the view that it could not be said that by virtue of the juror's occupation there was an inherent risk that she would assume that the complainant's allegations were truthful: **R v G.C.** [2008] Crim. L. R. 984; [2008] EWCA Crim 1033. Practitioners are referred to the commentary in Criminal Law Week (CLW/08/43/1) and in the Criminal Law Review for discussion of the decision but it is worthy of note that the defence criticism of the officer's conduct of the interview, characterised by the CA as an issue of 'comparatively narrow significance', was that she had prompted the complainant in relation to her evidence about the most serious charge on the indictment!

Verdict

Where an indictment contains alternative charges the judge should not take a verdict on a less serious count until finality has been reached in respect of the most serious count. Finality may mean a not guilty verdict or may consist of a decision to discharge the jury in relation to that charge because there is no realistic prospect of agreement. If a verdict is prematurely returned in relation to a lesser count it is liable to be quashed on appeal if the jury subsequently convict of the more serious charge. In the appellant's case his conviction for attempted murder was safe notwithstanding the fact that the jury had returned a verdict of guilty of wounding with intent before reaching a decision on attempted murder: **R v McEvilly** [2008] Crim. L.R. 968; [2008] EWCA Crim 1162.

Recovery of Defence Costs Orders

One of the effects of the changes in the regulations relating to RDCOs is that such orders can now be made in respect of appeals against sentence (but not committals for sentence) in the Crown Court. See *Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2008 (S.I. 2008 No. 2430)* (CLW 08/34/28) now set out in Archbold 2009 at para. 6-269.

Unfitness to plead

The combined effect of section 4(A) of the *Criminal Procedure (Insanity Act) Act 1964* (Archbold para.4-168) and s. 11(4) of the *Juries Act 1974* (ibid 4-233) is that the same jury can determine the issue of unfitness in respect of one defendant whilst continuing to try the other defendant(s) in the normal way – see **R. v. B and others**, *The Times*, October 8, 2008 (CLW 08/36/4).

Sentencing

Dangerous Offenders In Att.-Gen.'s Reference (No 55 of 2008) and other appeals [2008] EWCA Crim 2790; *The Times* December 4 2008, [judgment](#) the CA considered the amendments made by the Criminal Justice and Immigration Act 2008 to the dangerous offender provisions at Chapter 5 of Part 12 of the CJA 2003. The amended regime applies to all defendants sentenced after 14th July 2008. In the course of the judgment the Court made the following general points: (i) the statutory presumption of dangerousness has now disappeared and the courts can now make judgments on the issue 'untrammelled by artificial constraints'; (ii) the sentence of IPP is concerned with *future* risk and public protection; (iii) the CJA 2008 has brought in further conditions (beyond the finding of dangerousness) which must be met before an IPP can be imposed, namely that either the defendant must have a previous conviction for one of the very serious offences at Schedule 15A of the 2008 Act (condition 3A) or the notional minimum term must be at least 2 years (condition 3B) (or both); (iv) where the defendant has been convicted of more than one offence, condition 3B may be established notwithstanding the absence of an individual offence for which a four year term would be appropriate; (v) the court should have in mind all the alternative and cumulative methods of providing the necessary public protection against the risk posed by the offender. If an extended sentence, together with, if required, the support of other orders, can achieve appropriate public protection against the risk posed by the individual offender, the extended sentence rather than IPP should be ordered.

Sex offender notification requirements

Following his conviction for sexual assault the appellant was sentenced to a community order with an unpaid work requirement of 220 hours to be completed in a 12 month period. Such a sentence was 'a community sentence of at least 12 months' within Schedule 3 to the Sexual Offences Act 2003 so that the appellant was subject to the notification requirements of that Act. The CA held that the length of a community order must be capable of being determined on the day it is made and therefore the period specified under section 177(5) CJA 2003 is the relevant period for the purposes of Schedule 3 of the SOA 2003, however long it in fact takes the offender to complete the requirements of the order: **R v Davison** [2008] EWCA Crim 2795; *The Times*, December 5 2008.

Confiscation Orders

For two cases illustrating different approaches by the CA compare **R.v. Sivaraman** [2008] EWCA Crim 1736 (CLW 08/34/19) [judgment](#) and **R.v. Waller** [2008] EWCA Crim 2037 (CLW 08/35/30) .

Appeals

The *Guide to Proceedings in the Court of Appeal (Criminal Division)* which is essential reading for all those taking a criminal case to the Court of Appeal has been re-issued and can be found in the supplement to the 2009 edition of Archbold at Appendix J.

Applications for 2 advocate orders in the Crown Court

Following the well publicised ruling of Judge Collier Q.C. at Leeds Crown Court in *R. v. Various Defendants* October 9, 2008 (CLW 08/38/2) it seems that part of the new "deal" offered by the government and LSC to try to get advocates to sign up for VHCCs will be that it will now be harder to obtain orders for two advocates than in the past. It will be necessary for the Instructed Advocates to provide, in addition to the usual criteria relating to pages of evidence, complexity etc. required by Reg 14 (Archbold para. 6-166), details of how the work is intended to be divided up between the advocates and why such extra work should be done by an advocate at all as opposed to a litigator. Additionally and in keeping with the current fad for ensuring that every application before a court is made on a prescribed form such an application must be on a Form 5138 available on line from www.courts-service.gov.uk Stand by for more refusals of applications for two advocates.

Delay in making an allegation of rape

The latest attempt by the government to try to bump up the stubbornly resistant rape conviction figures saw none other than the Solicitor-General Vera Baird Q.C. ride into battle to answer an appeal on the grounds that the judge went too far in his comments on delay in making an allegation of rape – see *R.v. Doody [2008] EWCA Crim 2394* (24/10/2008) In her submissions the S-G submitted that the judge should have gone even further than he did citing in support, amongst other things, legislation from New South Wales. The result was a score draw. The appeal was rejected but the Court still said that the judge had gone too far in his comments and could not be expected to put before the jury theories which had not been supported by evidence. Of course it would be very non PC to suggest that those interested in trying to increase the number of convictions might look for solutions nearer to home and ask themselves whether such things as video interviews are actually part of the problem rather than the solution. Lengthy interviews with police officers endlessly repeating what the witness has already said and peppering the dialogue with phrases such a "you're doing ever so well sweetheart" may not impress a jury as much as a witness appearing in court as she would if the allegation was of a different sort. Another matter that would bear further

consideration is the apparent lack of any quality control over such evidence. Since no one in the prosecution team dares to challenge an allegation of sexual assault these days it is not until the complainant is cross-examined at court that the evidence is tested in anyway and the result is that all sorts of cases get to court where the quality of the evidence is so poor that it would be a great surprise if the jury did convict. But since for the moment the emphasis remains on the physical comfort of the complainant, sitting on a comfy sofa and giving evidence in an atmosphere far removed from the realities of the courtroom it is less of a surprise to advocates on both sides that conviction rates remain as low as they are.

Sentencing Guidelines

A *Guideline on breach of an anti-social behaviour order* has been issued by the Sentencing Guidelines Council (CLW 08/46/37) and can also be found at :

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

There is also a *Guideline on theft and burglary other than a dwelling* (CLW 08/46/38) available from the same website

Mark George, Kate Stone and Andy Fitzpatrick
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CONFERENCE

The Challenges of Historic Allegations of Past Sexual Abuse.

16th February 2009
Manchester, 5.5 CPD, £180 + VAT

This conference for criminal practitioners will address the challenges faced by both Care Home and domestic cases of historic sexual abuse and question whether the law can satisfy the expectations of victims and the public, whilst protecting those who have been falsely accused.

The speaker line-up includes **Lord Justice Hooper**, **Claire Curtis-Thomas MP**, **Prof Martin Conway** (expert on young / false memory), **John Weeden CB** (CCRC), **John Holt** (CPS Manchester), **Jim Gamble QPM** (on behalf of ACPO) and **Bob Woffinden** (freelance journalist).

Mark Newby (Jordans LLP) and **Mark Barlow** (GCN), who have together been responsible for most of the major historical care home appeals over the last 5 years, will round off the conference by providing a perspective on the issues that arise in defending historic abuse cases along with practical suggestions to assist lawyers with both funding and the approach to preparing the case for trial or appeal.

> [Conference programme and booking form](#)