

Criminal Law Update

Issue 19. 22nd May 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.

Doli incapax

In case anyone was in any doubt about the survival of the defence of doli incapax simply because s.34 of the Crime and Disorder Act 1998 states that "the rebuttable presumption of criminal law that child aged 10 or over is incapable of committing an offence is hereby abolished" the House of Lords has concluded that whilst the words of s.34 are ambiguous Parliament clearly intended to abolish not just the presumption of doli incapax but also the defence as well – [R.v. T](#) [2009] UKHL 20 (CLW 09/16/2).

Newton hearings

Experience suggests that the greatest care should be exercised before a defendant decides to take on the prosecution in a Newton hearing. Were statistics available they would be likely to show that the overwhelming number of Newton hearings end in disaster for the defendant. Many would conclude that giving up his or her right to a trial, being disbelieved by the judge and then losing any credit for a guilty plea did not represent a very satisfactory outcome. However the Court of Appeal in [R.v. Elicin and Moore](#) [2009] 1 Cr. App. R. (S.) 561 (CLW 09/16/4) has confirmed that this may indeed be the result where there is an overwhelming case against the defendant and the defendant is then found to have lied in the course of the Newton hearing. The moral is that if you are going to put in a basis of plea you had better get it agreed or it is usually not worth bothering with.

Hearsay

[R.v. Athwal and ors](#) [2009] EWCA Crim 789 is a good illustration of the difficulties courts still get into over the rules of evidence in general and the changes to the hearsay rule introduced by the CJA 2003 in particular. B and her son (S) were charged with the murder of S's wife (W). At the trial B's daughter in law (D) gave evidence that B had admitted to her that W had been murdered. After D had been cross-examined the Crown successfully applied to re-examine D and to call other witnesses in order to rebut an allegation of recent fabrication. On appeal the Ct of Appeal pointed out that this case should not have been determined by reference to the common law rules on recent fabrication but by reference to the hearsay regime set out in s.114 of the CJA 2003. The Court pointed out that the old common law rules had been abolished save as expressly preserved by s. 118 of the Act and said that the 2003 Act now provide "a comprehensive code" on the admissibility of hearsay evidence in criminal proceedings. The court also pointed out that in s.120 (2) there is no reference to "recent" when fabrication is being alleged. However the Law Commission which had studied this proviso had not intended a wholesale departure

from the previous practice. "Recent" is apparently 'an elastic description' which should not be extended to the exclusion of a previous consistent statement where there was a rational basis for its use as a tool for deciding where the truth lay. More proof that the general rule about hearsay is now "if the judge wants it admitted in evidence, it will be."

Handcuff applications

Given the regularity with which applications are made for the defendant to appear in court in handcuffs and the equal regularity with which judges say that it's okay because its only a short hearing and there is no jury present, the guidance of the Court of Appeal in the case of [R.v. Horden](#) [2009] EWCA Crim 388 (CLW 09/14/3) is welcome and provides advocates with some ammunition to oppose such applications. In this case the defendant was in fact handcuffed during his trial which is unusual and the Court of Appeal said that this should not have happened without "sufficient reason" meaning usually, that there was a real risk of violence or escape and even then it should be avoided by taking alternative measures if possible. The Court said that the situation was less acute if the hearing was not in front of a jury but even then physical restraint was only permissible when necessary. Merely because the contractors who had delivered the prisoner to the court had ticked a box on the prisoner escort form to indicate that they had been given information by the prison that there was *some* risk of escape was not enough and the judge should have asked for more information before granting the application.

Juries

The case of [R.v. Hambleton](#) [2009] EWCA Crim 13 (CLW 09/10/5) is the latest reminder that great care should be taken when jurors are stood down because of their knowledge of a defendant. In this case it only emerged after the trial that a juror who was stood down because she knew the co-accused, but remained at the same court centre and served on another jury had made a disparaging remark about him which was heard by one juror and was then relayed to another. Quite what was said by who to who was never clear but the CA concluded that in any event the well informed and fair minded observer would conclude that something had gone seriously wrong with the administration of justice and therefore the conviction was unsafe. Bearing in mind that a juror who is stood down in such circumstances is likely, as happened here, to remain in the same building with the jurors who were sworn in it is vital that judges warn a juror who is stood down in such circumstances that they must not speak to other jurors about the case or their knowledge of any of those involved and if the judge fails to do so the defence advocate should be quick to make the point to the judge.

Legal professional privilege

Practitioners may be surprised to learn that according to the House of Lords in [In re McE \(Appellant\) \(Northern Ireland\) and others](#) [2009] UKHL 15 (CLW 09/10/6) conversations in prisons and police stations between a detainee and his solicitor and which are usually protected by legal professional privilege under common law, or between a detainee and his solicitor that are taking place in private in the exercise of a statutory right e.g. under s.58 (1) of PACE 1984 or para.7 of Sch 8 to the Terrorism Act 2000 may be subject to covert surveillance under Part II of RIPA 2000. The good news however is that the HL held that "directed surveillance" of the lawyer and client under s. 28 of RIPA 2000 would violate the Art. 8 right to privacy as not being proportionate. In an obiter observation Lord Hope expressed the view that basic rules of fairness "strongly indicated" that intelligence obtained as a result of covert surveillance would not be permitted to be relied upon by the prosecution. Whether that view would be maintained in a case where the prosecution did wish to rely on evidence obtained by overhearing a detainee saying something alleged to be incriminating to his solicitor especially in for example a terrorism case may be open to doubt.

Terrorism

Readers may recall the recent case of the [Austrian tourist who was prevented by police from taking photos of London buses](#) apparently because the police now think this activity is illegal presumably because terrorists are keen to get their hands on photos of buses in order to plan terrorist attacks – don't they know that tourist kiosks sell postcards showing London Buses? It wasn't clear under what provision the police thought they had been given the power to harass tourists in this way and it's hard to know because it could be under any one of a number of provisions. One candidate might be section 58 of the Terrorism Act 2000 which makes it an offence to "collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism".

Dim-witted PC Plod may find it hard to distinguish a tourist taking a snap for the folks back home from a terrorist who apparently needs a photo of a London bus before being able to decide whether it presents a suitable target but those who supervise police officers might like to consider the words of the House of Lords [R.v.G; R.v. J](#) [2009] UKHL 13 (CLW 09/09/3): "Parliament cannot have intended to criminalise the possession of information of a kind which is useful to people for all sorts of everyday purposes and which many members of the public regularly obtain or use, simply because the information could be useful to someone who was preparing an act of terrorism." (para.42) "To fall within the section (s.58) the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism." (para.43). That would appear to be little more than common sense and if understood by police officers, they may avoid upsetting the entire population of tourists in our big cities this summer.

In the case of *R.v.G; R.v. J* the House had to grapple with the problems raised by sections 57 and 58 of the Terrorism Act 2000

which has already been considered by the higher courts on a number of previous occasions including *R.v. K* [2008] EWCA Crim 185 and *R.v. Zafar and others* [2008] EWCA Crim 184. The Lords made it clear that the elements of the two offences are completely different. Section 58 requires the Crown to prove that (a.) the defendant had control of a record which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism; (b) he knew he had the record; (c) he knew the kind of information which it contained. If those elements were established, the defendant would fall to be convicted unless he established a defence of reasonable excuse under s.58(3). In s.57(1), in contrast to s.58(1), the circumstances of the defendant's possession of the article formed one of the crucial elements of the offence. The Crown did not need to prove what the defendant's purpose was in possessing the article; it merely had to satisfy the court or jury, beyond reasonable doubt, that the circumstances gave rise to a reasonable suspicion that his possession was for a terrorist purpose. The defendant was then given a defence under s.57(2). There was nothing in s.58(1) which required the Crown to show that the defendant had a terrorist purpose for doing what he did. Unless it amounted to a reasonable excuse under s.58(3), his purpose in doing what he did was irrelevant. The decision of the CA in *R v Zafar (Aitzaz)* [2008] EWCA Crim 184 was doubted. Section 58(1) contained all the elements which the Crown must prove, irrespective of whether the defendant raised a defence under s.58(3). (5) The Court of Appeal in *R. v K* had erred in its interpretation of s.58(3). "Evidence cannot be led with the aim of showing that a document, such as a timetable, containing everyday information, should be treated as falling within section 58(1). That evidence will be relevant to a charge under section 57(1), but not to a charge under section 58(1)." Since terrorism cases are no longer the sole preserve of London based practitioners this case provides a useful guide to understanding the law in this arena.

Defence statements

In *R. v. Essa* [2009] EWCA Crim 43 (CLW 09/17/3) the defendant was accused of robbery. He did not put in a defence case statement and his defence at trial was a denial of any involvement. The CA got pretty upset when told that not only had the solicitor advised that no defence statement should be served but so too had counsel. In the course of the judgement the court said, "We should, we think, briefly say that we are at a loss to understand how any lawyer can properly give that advice to any defendant in the face of section 5(5) of the Criminal Procedure and Investigation Act. Whatever may be the primary purposes of the statute, its requirement is that the accused give a defence statement to the court and the prosecutor. In the present case it could hardly have been simpler." And then this gem; "It is not open to those who advise defendants to pick and choose which statutory rules applicable to the conduct of criminal proceedings they obey and which they do not." That brought a smile to my face as I considered how long it must be since any of the judges had appeared for an accused in the Crown Court and that they have no idea what it is like dealing with some of the clients that we have to represent on a daily basis. Anyway, on pain of an adverse inference, you have been warned.

Mark George Q.C., 22nd May 2009