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BLACKSTONE'S

CRIMINAL PRACTICE BULLETIN

Issue 1. October 2005

Welcome to the first edition of *Blackstone's Criminal Practice Bulletin.* The Bulletin is a quarterly newsletter designed to alert practitioners to key developments in criminal law and sentencing, and to place these changes in the context of the main work. *Blackstone's Criminal Practice 2006* is up to date to 31 July 2005, and this Bulletin covers developments to 31 August 2005.

We will publish further Bulletins in January, April and July 2006, these subsequent editions of *Blackstone's Criminal Practice Bulletin* will be available free of charge to registered users on the *Blackstone's Criminal Practice* website at www.oup.co.uk/law/practitioner/cws/. This website also offers monthly updates to the main work, set out on a chapter-by-chapter basis, as well as links to the full text of available judgments and to relevant legislation. We encourage you to visit the site and see what is available on it. We are confident that you will wish to return to it on a regular basis. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

CASE DIGEST—IN BRIEF

OFFENCES—MANSLAUGHTER BY GROSS NEGLIGENCE

Yaqoob

[2005] EWCA Crim 1269

In a prosecution for manslaughter by gross negligence, arising in the instant case from the failure of a partner/manager to inspect the tyres of a minibus involved in a fatal accident, it was entirely open to the jury to find that there was a duty to inspect and maintain the vehicle beyond the standard required for a MOT test, council inspections and other duties imposed by regulation. It was well within the competence of a jury to assess that duty without any expert evidence; these were not technical issues beyond their competence and they did not need expert help.

See *Blackstone's Criminal Practice*: B1.39

OFFENCES—PERVERTING THE COURSE OF JUSTICE

Iaquaniello

[2005] EWCA Crim 2029

On a prosecution for perverting the course of justice, the Crown must prove in relation to the act charged that it tended and was intended to pervert the course of justice. The prosecution need not be

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more specific than that: it is not necessary to prove that a particular act would pervert the course of criminal rather than civil justice. The acts in the instant case were allegedly committed either to support a civil claim against the Metropolitan Police Commissioner or to provoke significant police investigations.

See *Blackstone's Criminal Practice*: B14.31

OFFENCES—CORRUPTION

Singh v The State

[2005] UKPC 35

In this case, which concerned actions in Trinidad and Tobago, the Privy Council considered corruption legislation that is similar to that in England and Wales. The issue was whether a person who instigates a transaction with another, which he purports to that other is intended corruptly to influence a public officer (in this instance a magistrate), can be guilty of doing an act that the legislation forbids—i.e. to corrupt public officers in soliciting or receiving money for the express purpose of bribing them—even though the person instigating the transaction does not intend in fact to bribe the public officer. It was held that it is not necessary to prove that any member, officer or servant of a public body was in fact aware of what was going on when the improper offer was made or the bribe was passed, provided that the apparent purpose of the transaction was to affect the conduct of such a person corruptly: *Smith* [1960] 2 QB 423 was followed and *Harrington* (CACD No 00/1780/X2, 28 September 2000 (unreported)) was approved.

See *Blackstone's Criminal Practice*: B15.7

ROAD TRAFFIC OFFENCES—MOTOR MANSLAUGHTER: DISQUALIFICATION PERIOD

Yaqoob

[2005] EWCA Crim 1269

(See the note relating to **B1.39** as to gross negligence manslaughter and the duty to inspect vehicles.) The Court of Appeal considered it inappropriate for the person responsible for inspections to be disqualified from driving for a longer period than the driver involved in the fatal crash.

See *Blackstone's Criminal Practice*: C3.3, C8.5

ROAD TRAFFIC OFFENCES—DISQUALIFICATION PERIOD

Chivers

17 August 2005, CA

The defendant was involved in a series of serious road rage incidents, culminating in driving his car at an off-duty police officer. He pleaded guilty to one count of criminal damage, one of affray and one of dangerous driving. He was sentenced to a total of 12 months' imprisonment, and was disqualified from driving for a period of five years, and until an extended re-test had been taken. The appeal was limited to the length of disqualification, particularly on the basis that the length of the disqualification would impact on the defendant's employment prospects on his release from custody.

The appeal was allowed. It was an important principle that a disqualification from driving should not, except in the more serious cases, be so severe that it would interfere with a defendant's rehabilitation.

See *Blackstone's Criminal Practice*: C8.5

PROCEDURE—REPORTING RESTRICTIONS—IDENTIFICATION

A Local Authority v PD

[2005] EWHC 1832 (Fam)

This case involved a call for an accused in a particularly grisly murder case to be identified only by initials, based on the effect on the child of the accused (who, it was accepted, would be identified once the accused was named). Sir Mark Potter P stated:

> The burden of proving the case for grant of an injunction always lies upon the applicant. In the special case of an injunction *contra mundum*, and in particular one which restrains the press from exercising its right unrestrainedly to report criminal proceedings, the burden is a heavy one. The necessity is to show unusual and exceptional circumstances.

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It was not considered that the circumstances of the instant case were sufficient to justify a restriction on free reporting.

See *Blackstone's Criminal Practice*: D2.52

PROCEDURE—INDICTMENT—DUPLICITY

Iaquaniello

[2005] EWCA 2029

The defendant, who was at the time a serving police officer, complained of acts of harassment. These were investigated but no culprit was identified. The defendant then committed a series of acts the purpose of which allegedly was either to support a civil claim against the Metropolitan Police Commissioner or to provoke significant police investigations. The defendant was charged on a multi-count indictment in respect of these incidents but ultimately convicted on count 1 alleging that she did an act or series of acts that had a tendency to corrupt the course of public justice. In this count ten acts were then set out in which the defendant alleged harassment of some sort.

The Court rejected an argument that the count was void for duplicity. The issue for the court is whether as a matter of form (not of evidence) the count charged the defendant with committing two or more separate offences. The reference in the statement of offence to doing an act or acts tended and intended to pervert the course of public justice was not duplicitous. Where a plurality of acts is alleged the indictment does not become bad for duplicity by particularising them as an act or series of acts. The fact that the act can be evidenced by a series of acts renders it unobjectionable that ten specific acts are then particularised. The count was not duplicitous.

See *Blackstone's Criminal Practice*: D10.16

PROCEDURE—EXPERTS—FRESH EVIDENCE

Yaqoob

[2005] EWCA Crim 1269

This appeal included argument that fresh evidence should be heard from an expert. On the application to hear fresh evidence, Thomas LJ took the opportunity to emphasise good practice where expert evidence is required, and stated that one sanction for bad practice in such a case is to remove the chance of a second bite at the cherry.

See *Blackstone's Criminal Practice*: D13.13, D25.17

EVIDENCE—BAD CHARACTER—STATUTORY GATEWAYS

Highton

[2005] EWCA Crim 1985, (2005) The Times, 9 August 2005

This case dealt with the question of whether material admitted under the new bad character provisions of the CJA 2003 was limited in its use by virtue of the basis on which it was admitted.

Highton is fully discussed under Comment and Analysis on p. 11.

See *Blackstone's Criminal Practice*: F12.4

EVIDENCE—GOOD CHARACTER

Singh v The State

[2005] UKPC 35

The Privy Council stressed the need to give a good character direction that deals with the issues of both credibility and propensity. Good character goes primarily to credibility, especially in a case in which the question of credibility goes to the very heart of the matter that the jury must decide. Here, the issue was one of credibility as between the defendant, a lawyer of hitherto unblemished good character, and a prosecution witness of whom the same could not be said. Lord Bingham of Cornhill commented

> It may be that the jury would incline to regard a practising lawyer as a man of probity whose word was prima facie worthy of belief. But the belief of lawyers in their own probity is not universally shared, and there are those who believe them to be capable of almost any chicanery or sharp practice.

A failure to give a credibility direction will not necessarily render a conviction unsafe in every case. The matter needs to be reviewed in the light of all the facts of the case, but here, where the issue was one of credibility, it could not be said that the

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jury would inevitably have convicted had a proper direction been given: *Aziz* [1996] AC 41 was followed.

See *Blackstone's Criminal Practice*: F13.3, F13.4

EVIDENCE—HEARSAY—PREVIOUS CONVICTIONS

Humphris

[2005] EWCA Crim 2030, 169 JP 441

Humphris illustrates the difficulties that may be encountered in adapting to the new statutory regimes governing hearsay and evidence of bad character. The prosecution sought to adduce evidence of the defendant's criminal record and of his *modus operandi* as a sex offender, pursuant to s. 101(1)(d) of the Criminal Justice Act 2003. It was open to the prosecution to prove such matters, but on appeal the chosen method of proof (a statement compiled by a police officer from information stored on police computer records and tendered under s. 117 of the Act) was held to be an improper method of proving the *modus operandi*. Statements should, it seems, have been obtained directly from the complainants in those earlier cases. The court suggested that if the procedural guidance provided in *Hanson* [2005] EWCA Crim 824 had been followed, some of the difficulties would have been avoided.

See *Blackstone's Criminal Practice*: F16.11

EVIDENCE—HEARSAY—COMMENCEMENT

H

21 July 2005, CA

The provisions in the Criminal Justice Act 2003, part 11, chapter 2 (hearsay evidence) apply to all cases where the trial takes place after the commencement date (4 April 2005), even if there has been a preparatory hearing prior to that date.

See *Blackstone's Criminal Practice*: F15, F16

SENTENCING

Importation of Controlled Drugs

Twumasi 24 August 2005, CA

The offender was convicted of importing Class A drugs to the value of £92,000. In the light of his previous good character and the fact that he had been injured in the line of duty while serving in Iraq, six and a half years' imprisonment was adequate on a guilty plea.

See *Blackstone's Criminal Practice*: B17.11 and B20.104

Importation of Controlled Drugs

Fontes [2005] EWCA Crim 2103

The offender was found guilty of being knowingly concerned in the importation of cocaine to the value of £109,000. He claimed to have been paid £5,000 to bring in the drugs. He was aged 75 and in poor health. In the light of his age and health, seven and a half years' was deemed manifestly excessive and five years was substituted.

See *Blackstone's Criminal Practice*: B17.11 and B20.104

Anti-social Behaviour

Tripp 17 August 2005, CA

The offender was convicted of breach of an anti-social behaviour order, which had been imposed shortly before the incident in question. He had a long record of public order offences and his behaviour would no doubt, absent the ASBO, have been charged as drunk and disorderly. He had been sentenced to 12 months' imprisonment. The Court of Appeal indicated that there was nothing wrong in principle with a custodial term being imposed for the breach where the conduct might not have attracted a sentence of such length were the court to have sentenced for that offence only. The sentence was, however, reduced to one of nine months.

See *Blackstone's Criminal Practice*: D23

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Forged Passport: Recommendation for Deportation

Benabbas
[2005] EWCA Crim 2113

The offender had pleaded guilty to a single count of using a false instrument, namely a stolen and forged French passport, contrary to the Forgery and Counterfeiting Act 1981. On 4 April 2005 he was sentenced to seven months' imprisonment: the judge also recommended him for deportation. He appealed only against the recommendation for deportation. The passport had been stolen as part of a bulk theft of unissued French passports in an armed robbery in Marseille on 22 July 2003. One of these passports was fraudulently completed in the name of the appellant. On 3 December 2004 the appellant, having come to this country, attempted to use that passport, among other documents, to support his application for a permanent National Insurance number.

The case includes a lengthy discussion of the relevant authorities and consideration of the proposition that the sentencing judge should have confined himself to matters personal to the offender rather than being influenced by the threat to the immigration system, which the offence represented. The Court of Appeal had no doubt that the judge was right to say that the appellant's use of a forged passport undermined the good order of society and constituted the appellant a threat and that his continued presence would be a detriment to this country.

See *Blackstone's Criminal Practice*: B6.47, B23.1, E22.2

Manslaughter

Attorney-General's Reference (No. 57 of 2005);
R v Sheargold
3 August 2005, CA

The offender had offered a late plea to the charge of manslaughter on the basis that he had punched the deceased once in the neck. There was medical evidence to support the contention that a relatively light blow might have caused the injury leading to death. The deceased was the boyfriend of the offender's ex-girlfriend and the offender had persistently caused her trouble.

He was sentenced to two years' imprisonment. The Court of Appeal thought that sentence too lenient and that the Attorney-General was right to refer the case. The appropriate sentence following a late guilty plea was in the region of three to four years' imprisonment. However, allowing for double jeopardy and the offender's youth (he was aged 22), the interests of justice did not require the court to increase the sentence.

See *Blackstone's Criminal Practice*: B1.33

Wounding with Intent, Reference by the Attorney-General

Attorney-General's Reference (No. 55 of 2005); R v L
9 August 2005

The offender, who was aged 17, had bitten off his friend's ear in a drunken spat and, when his friend attempted to push him away, had bitten his finger so severely that it had required substantial stitching. He had considerable personal mitigation but was already subject to a supervision order for an offence of causing grievous bodily harm. In the light of very positive reports, which indicated that further help may be beneficial, the judge imposed a community rehabilitation order for three years with the condition that the offender had to attend an anger management course, a community punishment order of 80 hours, and a curfew order for four months. After sentence, the offender failed fully to comply with the sentence imposed, and proceedings against him for breach of the order were commenced but the sentence was referred by the Attorney-General before breach proceedings were heard.

This case surely represents the zenith (or nadir) of the Court of Appeal's refusal to interfere with sentences on referral. The Court took the view that the sentence was within the range permissible to an experienced judge and that, once it was established that the sentence was not unduly lenient, non-compliance with the orders could not be taken into account. The Court indicated that a custodial sentence of four or five years might have been the norm.

See *Blackstone's Criminal Practice*: B2.42, D26.4

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CASE DIGEST—IN DETAIL

Abdroikov

[2005] EWCA Crim 1986, (2005) The Times, 18 August 2005

Challenge to the polls—Exclusion of juror—Composition of jury as ground of appeal

In three cases the Court of Appeal considered whether the fact that a member of the jury was connected to the criminal justice system was a valid ground of complaint against the composition of the jury. In two cases a serving police officer had been on the jury and in the third case a solicitor employed by the CPS had served on the jury.

The Court of Appeal held as follows:

(a) it is not a valid reason for exclusion that the involvement of such persons in the criminal justice system meant that they would know more about its workings than would normal citizens and, in particular, might be in a position to draw inferences that other jury members would not be able to draw;

(b) it is not a valid reason for exclusion that such persons might try to dominate the jury since other jurors would be unlikely to submit to such domination;

(c) it cannot be assumed in the abstract that such jurors might not approach the case with the same open-mindedness as someone unconnected with the legal system.

A fair-minded and informed observer would not conclude that a juror was biased merely because his occupation was one that meant he was involved in some capacity or other in the administration of justice.

A juror who had special knowledge of a case ought to draw such knowledge to the attention of the judge. Further guidance has been provided for those involved in the administration of justice to avoid them being summoned to appear at courts where the likelihood of their being well known to those conducting the trial was undesirably high. If a situation did arise where a juror knew those taking part in the proceedings then the judge should determine, in his discretion, whether that individual should remain part of the jury.

If, despite all this, a member of the jury had knowledge that made it undesirable for him to sit, the usual test for bias applies to determine whether the requirements of fairness have been met (see *Porter v Magill* [2002] 2 AC 357 at p. 494).

See *Blackstone's Criminal Practice*: D12.11, D12.14, D12.17

Attorney-General's (No. 3 of 2004)

[2005] EWCA Crim 1882, (2005) 149 SJ 893

Accessories — Scope of joint venture —Joint enterprise —Manslaughter

This case provides an interesting decision on liability for manslaughter and the scope of joint enterprise. H was re-arraigned, on a re-trial, on indictment for manslaughter. The Crown proposed to put the case on the footing that H, the accessory, sent K and C to R to apply pressure on him through terror, that H knew that K and C would have a loaded firearm with them, and knew that in order to maximise the pressure on R the firearm might be deliberately discharged near R. It was further agreed that the judge had to decide the issue on the basis that H did not intend physically to kill or injure R nor had he foreseen the possibility of physical injury or death to R. It was apparently thought that not to make this assumption would be inconsistent with the defendant's acquittal for murder.

The defence argument, which succeeded on arraignment, was that the assumed facts were not such as to found a conviction for manslaughter. The Attorney-General referred the following questions to the Court:

1. Where a secondary party to a joint enterprise contemplates that the carrying out of the joint enterprise will involve the commission of an act intended to frighten the victim (for example by the discharge of a firearm) and the principal carries out the act with an intention to kill or cause serious bodily harm thus causing the death of the victim, does the variation in the intent of the participants at the time the act is done preclude the act from being part of the joint enterprise or may a jury nevertheless convict the secondary party of manslaughter?

2. Where the Court of Appeal quashes the conviction

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and orders the retrial of a person who was originally convicted of manslaughter on an indictment for murder, may the prosecution present its case at the retrial on the basis of facts which, if correct, would establish guilt of manslaughter as a lesser included offence of murder?'

The Court of Appeal on hearing the reference agreed with the defence argument.

The answer to H's liability depended on the scope of the joint enterprise. The assumed facts were thoroughly artificial but, on the basis of them, it could not be said that H foresaw that the gun would be fired in circumstances in which H knew or foresaw that harm to R might occur. Here, K's act in firing the gun so as to kill R or cause him grievous bodily harm was of a fundamentally different character from any act contemplated by H. On the assumed facts, what K did was fundamentally different from what H foresaw might occur. Had H been party to a common design to cause some harm to R then he, having authorised the firing of the gun, albeit to frighten, would have been liable for manslaughter because he would have realised that the party, in this case K, might intentionally cause some harm to the victim, R.

But here, on the assumed facts, H did not foresee the possibility of any harm to R let alone intentional harm.

This case contains a very full discussion of the authorities. The Court notes that the law is clearly laid down in *Powell* [1997] 3 WLR 959 and *English* 52 Cr. App. R. 119 and earlier authorities which are inconsistent with that judgment are no longer good law.

See *Blackstone's Criminal Practice*: A5.5, B1.36

Harris

[2005] EWCA Crim 1980

Expert evidence—Medical evidence—Non-accidental injury—Child abuse

The elaborate judgment in this case is intended to furnish the profession with as complete an account as possible of the various scientific opinions concerning the causes of Non-Accidental Head Injuries. That aspect of it is too complicated to be summarised here.

The judgment is valuable as listing the obligations of an expert witness. The factors set out should, the Court concludes, assist in bringing developments in scientific thinking before the Court, even though these developments remain at the stage of a hypothesis (see [271]). The true status of the expert's evidence must be frankly indicated to the Court (*Clarke* [1995] 2 Cr. App. R. 425 and *The Ikerian Reefer* [1993] 2 Lloyds Rep 68).

It would seem that the approval accorded to *Frye v United States* 293 F 1013 (1923) at **F10.5** of the main work may need to be reconsidered.

Giving the judgment in the case, Gage LJ made the following observations of general interest:

269. Whether or not there has been a failure by the criminal justice system to control and manage expert evidence we are reluctant to give any new gu-idance on expert evidence arising from the facts of these cases. It may, however, be helpful to re-iterate current guidance.

270. As to expert evidence generally, the evidential rules as to admissibility are clear (see for example *R v Bonython* [1984] 38 SASR 45 and *R v Clarke* (RL) [1995] 2 Cr App R 425 (facial mapping)). We see no reason for special rules where medical experts are involved. There is no single test which can provide a threshold for admissibility in all cases. As *Clarke* demonstrates, developments in scientific thinking and techniques should not be kept from the court. Further, in our judgment, developments in scientific thinking should not be kept from the court, simply because they remain at the stage of a hypothesis. Obviously, it is of the first importance that the true status of the expert's evidence is frankly indicated to the court.

271. It may be helpful for judges, practitioners and experts to be reminded of the obligations of an expert witness summarised by Cresswell J in *The Ikerian Reefer* [1993] 2 Lloyds Rep. 68 at p. 81. Cresswell J pointed out amongst other factors the following, which we summarise as follows:

(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.

(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

(4) An expert should make it clear when a particular question or issue falls outside his expertise.

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(5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.

(6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court.

272. Wall J, as he then was, sitting in the Family Division also gave helpful guidance for experts giving evidence involving children (see *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181). Wall J pointed out that there will be cases in which there is a genuine disagreement on a scientific or medical issue, or where it is necessary for a party to advance a particular hypothesis to explain a given set of facts. He added (see p. 192):

'Where that occurs, the jury will have to resolve the issue which is raised. Two points must be made. In my view, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and placed before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum.'

We have substituted the word jury for judge in the above passage.

273. In our judgment the guidance given by both Cresswell J and Wall J are very relevant to criminal proceedings and should be kept well in mind by both prosecution and defence. The new Criminal Procedure Rules provide wide powers of case management to the Court. Rule 24 and paragraph 15 of the Plea and Case Management form make provision for experts to consult together and, if possible, agree points of agreement or disagreement with a summary of reasons. In cases involving allegations of child abuse the judge should be prepared to give directions in respect of expert evidence taking into account the guidance to which we have just referred. If this guidance is borne in mind and the directions made are clear and adhered to, it ought to be possible to narrow the areas of dispute before trial and limit the volume of expert evidence which the jury will have to consider.

274. We see nothing new in the above observations.

See *Blackstone's Criminal Practice*: F10.3 to F10.15

Grant

[2005] EWCA Crim 2018

Abandonment of appeal

In this case the applicant applied for an order that his Notice of Abandonment of Appeal be treated as a nullity. It is established that the only ground for setting aside an abandonment is nullity (*Medway* [1976] QB 779). Where a Notice of Abandonment is filed by the applicant's solicitor, the only question for the Court is whether the mind of the applicant went with the act of the applicant in lodging the form.

Here, the applicant intimated to his solicitors that he wished to abandon his appeal against sentence. The solicitors wrote to the Registrar who advised them that a formal notice of abandonment was required. The solicitors wrote to the applicant to say that unless they heard from him to the contrary within 7 days they would lodge the Notice with the Registrar. Not having heard from the applicant, they lodged the Notice. The solicitors' letters had, however, been delayed because the applicant changed prisons. The applicant, too late, informed his solicitors that he wished to proceed with his appeal.

The Court treats the relevant issue as whether the mind of the applicant went with the act of the solicitor in lodging the form. This is a question of fact. At all times the applicant knew of his letter to his solicitors and what the effect of his instructions would be unless they were countermanded. All that the applicant lost from the delay in correspondence was the chance to change his mind, but his mind went with the instructions to abandon and the Court lacked jurisdiction to set aside his Notice of Abandonment.

The Court further remarked, however, that the applicant need feel no sense of injustice. His criminal record was such that any application for leave to appeal against sentence was doomed to failure.

See *Blackstone's Criminal Practice*: D25.25

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Judicial Studies Board Direction

Hearsay

The Judicial Studies Board has provided a new specimen direction relating to hearsay evidence. It is set out below:

Hearsay Evidence under the CJA 2003

1) Of the different categories of hearsay evidence referred to in sections 114 to 118 of the 2003 Act, the following direction does not relate to the following:

- Trade, business or professional documents, unless they fall within section 117(4) and (5).
- Public documents.
- Evidence of reputation and family tradition.
- Confessions (as to which see Direction 25).
- Admissions by agents.
- Common enterprise (as to which see Direction 11.2).
- Expert evidence.

2) Section 119 of the Act is dealt with in Directions 28 and 29, and section 120 in Direction 31.

3) The following direction will need to be suitably adapted in a case involving multiple hearsay.

1. The general rule in the courts is that evidence is given orally from the witness box, or by the reading of agreed statements or admissions. However, the law allows evidence to be given in other ways. In this case you have heard evidence from X [by the reading of X's statement] [by Y's telling you what X said to him] even though X did not come to court and his evidence is not agreed.

2. [If the reasons for admitting the hearsay evidence are before the jury, summarise them briefly.]

3. It is for you to decide what weight, if any, you attach to X's evidence, but it does have certain limitations which I must draw to your attention.

a. You have not had the opportunity of seeing and hearing X in the witness box, and sometimes when you do see and hear a witness you get a much clearer idea of whether his evidence is honest and accurate.

b. X's evidence has not been tested under cross-examination, and you have not had the opportunity of seeing how his evidence survived this form of challenge.

4. [Refer to any particular matters canvassed during the trial which might further affect the jury's view of X's evidence: for example, its probative value, its importance, the circumstances in which X made his statement, X's reliability and Y's reliability.]

See *Blackstone's Criminal Practice*: F15, F16

LEGISLATION

Licensing Act 2003 (Commencement No. 6) Order 2005 (SI 2005 No. 2090)

This Order brings into force, on 7 August 2005, ss. 34 to 40, 42 to 46 (except s. 43(4)) and ss. 84 to 86 and sch. 5, paras. 1, 4, 5, 6, 9, 10(b) and 12 (insofar as those paragraphs relate to the implemented sections). The implemented provisions relate to the variation and transfer of premises licences, the variation of club premises certificates and to appeals in respect of such matters. The various sections of this Act that are mentioned in the main work are not affected by this Order.

Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 (Supplementary Provisions) Order 2005 (SI 2005 No. 2122)

This Order provides, for the avoidance of doubt, that para. 23(1) of sch. 2 to the Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 ('transitional arrangements for recall after release') is to be read so that the reference to a prisoner who falls to be released under the Criminal Justice Act 1991 includes a prisoner who was released before 4 April 2005 and the words 'after 4 April 2005' are to be read only as indicating the date from which para.

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23(1)(a) and (b) take effect. The effect of para. 23(1) is that a prisoner released on licence under the Criminal Justice Act 1991 can have his licence revoked and be recalled to prison by the Secretary of State under the Criminal Justice Act 2003, s. 254.

An up-to-date summary of the provisions of the 2003 Act that have been brought into force may be found on the companion website.

The Drugs Act 2005 (Commencement No. 2) Order 2005 (SI 2005 No. 2223)

This Order brings into force, on 1 September 2005, the following provisions of the Act:

(a) in sch. 1 (amendments), paras. 6 and 7; and

(b) in sch. 2 (repeals), the entry relating to the CJPA 2001, s. 38.

Section 38 of the CJPA 2001 (which is repealed by the Drugs Act 2005, sch. 1, para. 6 and sch. 2), amended s. 8 of the Misuse of Drugs Act 1971 so as to create an offence of permitting the use of a controlled drug on premises but was in fact never brought into force. The amendment made by sch. 1, para. 7 of the 2005 Act is material in that it amends the Anti-social Behaviour Act 2003, s. 1; it inserts a new s. 1(7A): 'For the purposes of subsection (6)(a) a constable may enter any premises to which this section applies, using reasonable force if necessary.'

The only other provision of the Act in force, other than the formal sections, is s. 21 (inclusion of mushrooms containing psilocin etc. as Class A drugs), which was brought into force on 18 July 2005 by SI 2005 No. 1650 (see B20.5).

The Licensing Act 2003 (Personal licence: relevant offences) (Amendment) Order 2005 (SI 2005 No. 2366)

This Order amends the list of offences that are treated as relevant offences for the purposes of an application for a personal licence under part 6 of the Licensing Act 2003 with effect from 23 September 2005. Following the repeal of the PCC(S)A 2000, s. 161(2) and (3), this Order amends para. 18 of sch. 4 to the 2003 Act, which defines a sexual offence, by substituting for the reference to the definition of a 'sexual offence' in s. 161(2) of the 2000 Act, a reference to part 2 of sch. 15 to the CJA 2003, although the offence under the SOA 1967, s. 4 (procuring others to commit homosexual acts) is omitted and the offences under the SOA 1956, ss. 8 and 18 (intercourse with a defective and fraudulent abduction of an heiress) are added. It also defines violent offence, substituting for the reference to the definition of a 'violent offence' in s. 161(3) of the 2000 Act a definition that replicates it.

The Collection of Fines (Pilot Schemes) (Amendment No. 3) Order 2005 (SI 2005 No. 2410)

This Order amends the Collection of Fines (Pilot Schemes) (Amendment) Order 2004 (SI 2004 No. 175), with effect from 26 September 2005, so as to extend the operation of the pilot schemes to additional local justice areas.

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COMMENT AND ANALYSIS

Bad Character Admissibility: A Gateway to a Narrow Path or an Open Field?

In *Highton and others* [2005] EWCA Crim 1985 the Court of Appeal has added further guidance as to the interpretation of the 'bad character' provisions in the Criminal Justice Act 2003. It was necessary to determine whether evidence of a defendant's bad character, which is admissible under s. 101(1)(g) of that Act (i.e. in a 'tit-for-tat' response to the defendant's attack on the character of another person), can then be relied upon as evidence of the defendant's criminal propensity or whether (as was the case with the old 'tit-for-tat' rule under the Criminal Evidence Act 1898, s. 1(f)(ii)) it must be considered relevant only to the defendant's credibility as a witness.

There was always an element of artificiality under the old 'tit-for-tat' rule. If courts or juries could be trusted to accept in such cases that the defendant's bad character or criminal record was relevant only to his credibility as a witness, there could be no real objection to juries being told, routinely, about the criminal record of any defendant who chose to testify. It is precisely because courts and juries cannot be trusted to do any such thing that such evidence was otherwise kept from them under the old law. Nor was this always an indictment of the jury's powers of logical reasoning. On the contrary, the most intelligent of jurors could be expected to struggle when directed (for example) that the defendant's previous convictions for burglary should be considered relevant only to his credibility as a witness and not (perish the thought!) to any possible propensity to commit burglaries. The more intelligent the jurors the more absurd and irrational such a direction must have appeared.

In a number of places the Criminal Justice Act 2003 has expressly abrogated artificial rules under which certain items of evidence were formerly considered admissible only for limited purposes of this kind. The previous consistent or inconsistent statement of a witness, for example, need no longer be considered relevant only for the purpose of supporting or undermining the credibility of the witness concerned. Once admissible, such a statement may now be relied upon (if believed) as evidence of what really happened (s. 120(4) and (5)). But can evidence admitted under s. 101(1)(g) be used with similar freedom?

In *Highton* the Court of Appeal ruled that it can be. Giving the judgment of the court, Lord Woolf CJ noted that the obvious 'gateway' for evidence of criminal propensity is s. 101(1)(d), which must be read in conjunction with s. 103. An argument could thus be constructed to the effect that propensity evidence should be admitted (if at all) only via the s. 101(d) gateway; but the Court rejected that argument. Lord Woolf said (at [9]–[10]):

> In our view, . . . the force of this argument is diminished for a number of reasons. First, s.103(1) prefaces s.103 (1)(a) and (b) with the word 'include'. This indicates that the matters in issue may extend beyond the two areas mentioned in this sub-section. More importantly, while this argument can be advanced in relation to s.101(d), it can also be advanced in respect of the other parts of subsection (1), in particular in relation to s.101(1)(a) and (b). In addition, s.101(1) itself states that it is dealing with the question of admissibility and makes no reference to the effect that admissible evidence as to bad character is to have. We also consider that the width of the definition in s. 98 of what is evidence as to bad character suggests that, wherever such evidence is admitted, it can be admitted for any purpose for which it is relevant in the case in which it is being admitted.
>
> We therefore conclude that a distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted. It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged.

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A further matter considered (if only obiter) in *Highton* was the relationship between the power of the court under s. 101(3) to exclude otherwise admissible bad character evidence in order to prevent injustice and the long-established power of a court under the Police and Criminal Evidence Act 1984, s. 78 to exclude evidence on which the prosecution proposes to rely where it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The former provision protects only against unfairness arising out of the admission of bad character evidence under s. 101(1)(d) or (g), but the scope of the Police and Criminal Evidence Act 1984, s. 78 is limited only by its inapplicability to defence evidence (even where such evidence is damaging to a co-defendant). Lord Woolf said (at [13]–[14]):

> The application of s. 78 does not call directly for decision in this case. We, therefore, do not propose to express any concluded view as to the relevance of s. 78. However, it is right that we should say that, without having heard full argument, our inclination is to say that s. 78 provides an additional protection to a defendant. In light of this preliminary view as to the effect of s. 78 of PACE, judges may consider that it is a sensible precaution, when making rulings as to the use of evidence of bad character, to apply the provisions of s. 78 and exclude evidence where it would be appropriate to do so under s. 78, pending a definitive ruling to the contrary. Adopting this course will avoid any risk of injustice to the defendant.
>
> In addition, as s. 78 serves a very similar purpose to Article 6 of the European Convention on Human Rights, following the course we have recommended should avoid any risk of the court failing to comply with Article 6. To apply s. 78 should also be consistent with the result to which the court would come if it complied with its obligation under s. 3 of the Human Rights Act 1998 to construe sections 101 and 103 of the 2003 Act in accordance with the Convention.

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Guideline Matters

The Court of Appeal in *Lee Oosthuizen* [2005] EWCA Crim 1978 stressed the importance of Sentencing Guidelines Council guidelines. The first three SGC guidelines were published in December 2004, and more will follow in due course. Section 172(1)(a) of the Criminal Justice 2003 states that: 'Every court in sentencing an offender must have regard to any guidelines which are relevant to the offender's case.' The Court noted that none of the three SGC guidelines had been present in the mind of the judge or the advocates in the case. The Court expressed sympathy for that omission, having regard to 'the plethora of ways in which the principles of criminal justice have been changed by Parliament in the 2003 Act.'

Before the enactment of the relevant provisions of the Criminal Justice Act 2003 sentencing guidelines were issued by the Court of Appeal, latterly with the assistance of the Sentencing Advisory Panel. Guidelines such as those on rape (*Millberry* [2003] 1 Cr App R(S) 396), causing death by dangerous driving (*Cooksley* [2003] 2 Cr App R(S) 275), child pornography offences (*Oliver* [2003] 1 Cr App R 463) and handling stolen goods (*Webbe* [2002] 1 Cr App R(S) 82) have all come through this route in recent years. Guidelines are now issued by the SGC, with the continuing assistance of the Panel (for the details of these arrangements see the website referred to at the end of this note). Sentencing guidelines have always had a standing, apart from run-of-the-mill appellate decisions on sentencing matters. There is a clear responsibility on counsel to alert sentencers to the existence of a guideline judgment that might otherwise be overlooked (see *Panayioutou* (1989) 11 Cr App R(S) 535, a sentiment repeated in many later cases). On the other hand, the Court of Appeal has deprecated the citation of non-guideline cases that deal merely with the facts of a particular case (see *Lyon* (2005) The Times, 19 May 2005).

The SGC guidelines have a similar standing to those of the Court of Appeal. It is certainly not open to a sentencer to disregard what the SGC says. Sentencers must 'have regard' to guidelines. As was pointed out by Lord Woolf CJ in *Last* [2005] EWCA Crim 106, however, 'The fact that every court must have regard to the relevant guideline does not mean that it has to be followed.' Or, as it was put by Judge LJ in *Peters* [2005] EWCA Crim 605, 'Guidelines, whether resulting from cases decided in this Court, or produced by the Sentencing Guidelines Council,

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are guidelines: no more no less.' The advice of the Sentencing Advisory Panel, whether tendered to the SGC or, under the old regime, to the Court of Appeal, has always been provisional rather than authoritative, and care must be taken if the Panel's advice is referred to before a sentencer or on appeal. This point was stressed in *Doidge* (2005) The Times, 10 March 2005. The same caution applies to draft guidelines published by the SGC: they are not final documents.

In *Oosthuizen*, the sentencing judge at Guildford Crown Court had made observations about the perceived prevalence of offences of street robbery in the locality, and mentioned this as, in part, justifying the sentence of two years' detention in a young offender institution for a handbag snatch committed in the middle of the day from a middle-aged woman. He also stated that the reduction in sentence to reflect the plea of guilty was less than it might have been because the defendant had been caught 'red-handed'. The victim had given chase, and the offender was quickly apprehended by an off-duty police officer. The Court of Appeal referred to the SGC Guideline on *Overarching Principles: Seriousness*, in which the Council had stated that, in the interests of encouraging consistent sentencing practice across the country, sentencers should have 'supporting evidence from an external source (for example, the local Criminal Justice Board) to justify claims that a particular crime is prevalent in their area' and be satisfied that there is a compelling need to treat the offence more seriously in their area than elsewhere.

It is worth noting that a differently constituted Court of Appeal in *Stockdale, Flynn and Tankard* (June 16, 2005) had taken a different line on this. Laws LJ commented that 'we entertain very great difficulty in accepting that in a case of this kind a local judge is not entitled to go on his local knowledge' and 'we seriously question this approach commented on by the Council'.

Of course it has long been the case that individual judges (or benches of magistrates, for that matter) have pursued local deterrent sentencing policies. If consistency in sentencing means anything, however, it must surely require the removal of deliberate disparity, except in cases where the local conditions are clearly distinctive, and can be shown to be so. As the SGC explains in its guideline, a differential local sentencing policy may be pursued once the evidence base for it is clearly established, but that sentencing levels should return to normal once the immediate crisis is past. In the context of street robbery, the well-known case of *Attorney-General's Reference (Nos. 4 and 7 of 2002) (Lobban)* [2002] 2 Cr App R(S) 345 provides sentencing guidance (though it is not, strictly speaking, a sentencing guideline since it was issued without the advice of the Panel). It was intended by the Lord Chief Justice to be a firm re-statement of existing sentencing practice and is of general application.

As far as the discount for plea is concerned, the SGC Guideline on *Reduction in Sentence for a Guilty Plea* amends earlier practice in a number of ways. Given that the purpose of allowing credit for a plea is to encourage those who are guilty to plead at the earliest opportunity, the guideline states that there is no reason why credit should be withheld or reduced purely on the basis that the defendant was caught red-handed. The normal sliding scale (up to a maximum reduction of one-third where the plea comes at the first reasonable opportunity) should still apply. Remorse is a separate matter from pleading guilty, and there may be relevant personal mitigation to indicate a lower sentence.

All sentencing guideline judgments are now conveniently collected together in a compendium published by the SGC. This volume has been distributed to judges, and is available on the SGC/SAP website: www.sentencing-guidelines.gov.uk

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Professor of Criminal Justice, Keele University
Chairman, Sentencing Advisory Panel

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