

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to *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.

The Bulletin is available free of charge 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. 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

GENERAL PRINCIPLES—SELF-DEFENCE

Ashley and others v Chief Constable of Sussex Police

[2006] EWCA Civ 1085

The Court of Appeal (Civil Division) provides an interesting analysis of the differences between self-defence etc. when used as a defence to a criminal charge and self-defence when used as a defence in civil proceedings. The use of reasonable force in actual self-defence is clearly lawful, but in cases of mistaken self-defence an honest but unreasonable mistake may operate as a defence only in criminal proceedings. In civil proceedings, a mistaken view of the facts provides no defence in the absence of reasonable grounds for that mistake. The burden of proof also differs. In criminal proceedings, the burden of negating self-defence is on the prosecution; in civil proceedings, the burden is on the defendant to establish that he acted in reasonable self-defence.

In both criminal and civil proceedings, the type of action taken (or degree of force used) in self-defence must objectively be reasonable but, in judging what was reasonable, the court must in either case have regard to all the circumstances, including the fact that the action may have been taken in the heat of the moment (cf. Lord Morris's famous dictum in *Palmer v R* [1971] AC 814).

See *Blackstone's Criminal Practice*: A3.35

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GENERAL PRINCIPLES—INCITEMENT AND JURISDICTION**Tompkins**

(2006) *The Times*, 17 August 2006

The accused was charged with inciting the distribution of indecent photographs of children, the evidence being that he had subscribed to a child pornography net in Texas. A Crown Court judge stayed the indictment, holding that the court lacked jurisdiction over an offence of incitement where the person incited (the operator of the pornography net in this case) was abroad. The Court of Appeal allowed a prosecution appeal against the ruling, holding that the act of incitement was that of a person inciting another, abroad, to commit an offence which would have effect in England and Wales. Accordingly, as the incitement took the form of inciting the distribution of indecent images, which distribution would occur at least in part in the UK, the Crown Court had jurisdiction over it. See *Liangsiriprasert v United States* [1991] 2 AC 225, *Goldman* [2001] EWCA Crim 1684, *R (O) v Coventry JJ* [2004] All ER (D) 78 (Apr) and *Smith (Wallace Duncan) (No. 4)* [2004] EWCA Crim 631, all of which were considered by the Court.

See *Blackstone's Criminal Practice: A6.3 and A8.2*

OFFENCES—SEXUAL ASSAULT**Kumar**

[2006] EWCA Crim 1946

The question in issue arose from a breast examination carried out by the accused, a medical practitioner. The case concerns indecent assault but the principles apply equally to the offence of sexual assault under the SOA 2003, s. 3. The jury asked the question 'If breast examination is required what constitutes the offence?' The Court of Appeal was faced with an argument that the trial judge's direction should have included reference to *Court* [1989] AC 28 (where it was said that a doctor who gained sexual satisfaction from a necessary and properly conducted medical examination was not guilty of any offence). Their lordships indicated that it was not 'necessary to give the jury a direction about every theoretical possibility that may arise in a case, however remote that possibility may be,

where the defence have not raised it' where the Crown's case was throughout that the breast examination, albeit properly required, was conducted in an inappropriate manner and was used as a cloak for a sinister motive.

See *Blackstone's Criminal Practice, B3.20 and B3.28*

OFFENCES—TERRORISM CONTROL ORDERS AND THE ECHR**Secretary of State for the Home Department v JJ**

[2006] EWCA Civ 1141

Secretary of State for the Home Department v MB

[2006] EWCA Civ 1140

These appeals concerned control orders: In MB a non-derogating control order and in JJ a derogating control order.

In MB, the Court of Appeal (the Lord Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division) took the view that Sullivan J was in error in holding that the provisions for review by the court of the making of a non-derogating control order by the Secretary of State do not comply with the requirements of the ECHR Article 6. The case was remitted for the validity of the order to be reconsidered.

In JJ, Sullivan J had determined on a preliminary issue that the control orders in question were in breach of the ECHR, Article 5 (right to liberty and security). The Court agreed and supported the decision to quash the orders.

See *Blackstone's Criminal Practice, B10.145*

OFFENCES—DISPERSAL OF GROUPS**R (Singh) v Chief Constable of West Midlands Police**

[2006] EWCA Civ 1118

The Court of Appeal fully endorsed the ruling of the Divisional Court on the use of the powers under the Anti-social Behaviour Act 2003, s. 30, but the court did give indications of limits to the acceptance of such potentially dictatorial powers. The case

concerned the protests by Sikhs in Birmingham outside a theatre which was showing a play which they deemed to be grossly offensive to their religion. Hallett LJ accepted (at [45]) that an implied Parliamentary authorisation of conduct which might breach an individual's fundamental human rights had to be 'compellingly clear'. She went on to say (at [89–90]):

One or two particularly sensitive members of the public may be alarmed or distressed by conduct that would not or should not offend others. All of us who have the privilege of living in a free and democratic society must on occasions suffer some inconvenience caused by protests and protesters. Whether or not a group's behaviour on any particular occasion warrants a dispersal direction will depend on the circumstances. Police officers must act proportionately and sensibly . . . They cannot act on a whim. Both authorisations and dispersal directions must be properly justified on an objective basis. If used improperly or disproportionately they may be challenged. Articles 10 and 11 are there to protect the peaceful and lawful protest. The rights of the protester are not overridden. They remain protected under the law.

[T]here is no sweeping power to force individuals to stop protesting and move on. Significant anti-social behaviour must have already become a persistent problem in the locality or there would be no authorisation in place. And, it is only when the behaviour of a group of people moves beyond legitimate protest and into the realms of behaviour that causes actual or likely intimidation, harassment, alarm and distress that an officer can use an authorisation to direct them to disperse. The peaceful member of the group who behaves in this fashion may have his rights infringed, but it is only for a relatively short time and it is for the greater good, namely the protection of the rights of others.

On the facts in the instant case, the Court was entirely satisfied that the police had used their s. 30 powers properly.

See *Blackstone's Criminal Practice*, B11.129

PROCEDURE—MISCONDUCT BY A JUROR

Pink

[2006] EWCA Crim 2094

The dangers of the increasing pervasiveness of the Internet were apparent in this case, which concerned a charge of manslaughter and allegations about the medical treatment given to the victim, the accused's infant child. Latham LJ said (at [24]):

We have been referred quite rightly to the case of *Karakaya* [2005] EWCA Crim. 346 in which this court once again said that a jury trial must take place in circumstances where all the material considered by the jury is open both to the public (in the sense that it is said or read in court), but also available to both defence and prosecuting counsel so that they can ensure that they know and have an opportunity to comment upon anything which the jury takes into account. That is why it is commonplace for judges to remind jurors before the commencement of a trial not to talk about a case to anyone else on the basis that material might affect the juror's mind, and therefore ultimately the jury's verdict, which no one had had an opportunity to consider and determine whether it was accurate or otherwise. That . . ., this court has said, applies equally to searches on the Internet and for the same and obvious reasons. If there is in any case the slightest possibility that such a search has been made and may have affected the jury in a way which is adverse to the defendant, then this court is likely to conclude that the verdict is unsafe, although that would depend upon all the circumstances.

See *Blackstone's Criminal Practice*, D12.45

PROCEDURE—PREPARATORY HEARINGS

H (O)

[2006] EWCA Crim 1975

Gunawardena [1990] 2 All ER 477 was considered in this case. It was held that an application concerning disclosure was not one of the purposes of a preparatory hearing within the meaning of the CJA 1987, s. 7(1) and that the Court of Appeal accordingly had no jurisdiction to hear an appeal against a ruling on such an application by virtue of s. 9(11).

The court subsequently refused leave to appeal to the House of Lords, but certified that three questions of law of general public importance were involved in the decision, namely:

- (i) whether, for an appeal to lie to the Court of Appeal under the CJA 1987, s. 9(11) from an order or ruling the course of a preparatory hearing held under s. 7 of the Act, the order or ruling itself had to be for one of the purposes set out in s. 7;
- (ii) if so, whether an order or ruling in determination of an application for disclosure under the CPIA 1996, s. 8, fell within one of those purposes; and

(iii) in any event, whether an order or ruling in determination of an application for disclosure under s. 8 of the 1996 Act could be the subject of an application under the provisions of s. 9(11) of the 1987 Act.

See *Blackstone's Criminal Practice*, D13.24

EVIDENCE—PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES

V

[2006] EWCA Crim 1901

The right of the defence in a sex case to cross-examine a complainant as to allegedly false complaints made by that complainant on other occasions was considered once again by the Court

of Appeal. It was clear, said the Court, that any cross-examination genuinely directed towards establishing that the complainant had made a previous false complaint about a sexual matter falls outside the YJCEA 1999, s. 41 as long as it relates to the alleged lies rather than to the sexual behaviour itself. The defence must however have a proper evidential basis for making such an assertion (see *T; H* [2002] 1 All ER 683). The court emphasised that the CJA 2003, s. 100, must be considered, because such an allegation will necessarily amount to evidence of bad character. Cross-examination as to an allegedly false sexual allegation may however require a ruling in relation to s. 41 of the 1999 Act as well as leave under s. 100 of the 2003 Act.

See *Blackstone's Criminal Practice*, F7.12.

SENTENCING

Murder

Keane [2006] EWCA Crim 2109

The offender killed his friend and neighbour after a night's drinking, during which the deceased abused the offender's mother, angering the offender, and assaulted him. The offender's reaction far exceeded self-defence and caused fatal head injuries and numerous bruises, consistent with there having been a sustained and violent attack on the deceased. The offender had unsuccessfully attempted to revive the deceased. He pleaded guilty to murder. Medical reports indicated that the offender had begun to drink heavily in adolescence and had become dependent on alcohol. A brain scan showed that he had abnormalities consistent with multiple sclerosis. He also had mental health problems, suffered from depression and psychosis and claimed to hear voices. He had no relevant convictions. The appropriate minimum term in the trial judge's view was 12 years. The grounds of appeal were that the minimum term imposed was manifestly excessive because it failed to take into account the basis of plea and the mitigation and also that the judge had

not reduced the period to reflect time spent in custody. A minimum term of 10 years was substituted, less the period spent in custody prior to conviction—the case was described as an unusual one with many mitigating factors which had not been reflected in the sentence imposed.

Actual Bodily Harm

O'Grady 24 August 2006, CA

The 42-year-old offender argued with the victim, his girlfriend, over the Christmas dinner she had prepared. He punched her repeatedly in her face causing her to sustain injuries including multiple bruising and tenderness to face neck and elbow. He pleaded guilty. It was submitted that the sentence of two years' imprisonment was manifestly excessive. The appeal was allowed. It was said that the case involved a deliberate assault in circumstances where a custodial sentence had been inevitable but the sentence which was passed was longer than justified in the light of the offender's entitlement to a discount for his plea of guilty.

Class A Drug Offences

Keenan [2006] EWCA Crim 1791

The 20-year-old offender, who was of previous good character, was found to be in possession of a number of small bags containing cocaine, two mobile phones and £274 in cash. The cocaine was of a low purity. He pleaded guilty to possessing a Class A drug with intent to supply and supplying cocaine on the basis that he owed £2,000 to a cocaine dealer and had been threatened with violence unless he worked off the debt by supplying cocaine on behalf of the dealer. A sentence of two and a half years' imprisonment on each count, to run concurrently, was deemed to be manifestly excessive in view of the fact that the offence had involved only low-level retailing. An appropriate sentence would have been 18 months' imprisonment on each count, to run concurrently.

Confiscation Orders

Jones [2006] EWCA Crim 2061

Under the Proceeds of Crime Act 2002, s. 10, certain assumptions must be made where the offender has a criminal lifestyle. But the court must not make a required assumption in relation to particular property or expenditure if, *inter alia*, there would be a serious risk of injustice if that assumption were made (s. 10(6)). In this case Latham LJ (at [14]) expressly endorsed the statement in the main work at E21.7 that the risk of injustice must arise from the operation of the assumptions in the calculation of benefit and not from eventual hardship in the making of a confiscation order.

McKinsley v CPS [2006] EWHC Civ 1092

Although decided under the Drug Trafficking Act 1994, s. 17, the principle outlined in this case will apply also to the Proceeds of Crime Act 2002, s. 23 (see E21.15). In an application for a certificate of inadequacy, the court is concerned only with the current state of the defendant's assets. It is not concerned with whether an error had been made as to the amount of the confiscation order. A defendant who considers that such an error was made has a statutory right of appeal. If the defendant is out of time, the Court of Appeal will consider the application to extend time and the leave application on

their merits. If there has been an appeal, the defendant may apply to the Criminal Cases Review Commission to refer the matter to the Court. The Administrative Court has no jurisdiction in certificate of inadequacy proceedings to go behind the basis of the confiscation order even if there was a manifest error or there is fresh material to be considered, and an attempt to get it to do so was an abuse of the process of the court. The same preclusive rule will apply under the 2002 Act in respect of applications to the Crown Court (*Gokal v Serious Fraud Office* [2001] EWCA Civ 368 followed).

Notification Requirements under the Sexual Offences Act 2003

Forbes v Secretary of State for the Home Department [2006] EWCA Civ 962

The Court of Appeal (Civil Division) rejected the appellant's contention that the SOA 2003, s. 81 and sch. 3 were incompatible with the ECHR, Article 8, insofar as they required an offender to submit to notification requirements even in cases involving offences under the Customs and Excise Management Act 1979, s 170 (in which no proof is required to show that the offender either knew or believed he was importing indecent material involving children). Giving the judgment of the court, Sir Igor Judge P cited with approval the decision of the High Court of Justice in Northern Ireland in *In the matter of an application by Kevin Gallagher for Judicial Review* [2003] NIQB 26, where Kerr J rejected a submission that the automatic imposition of the notification requirements of the SOA 1997 infringed the applicant's rights under Article 8. Kerr J said in that case:

'It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance . . . The automatic nature of the notification requirements is in my judgment a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime.'

CASE DIGEST—IN DETAIL

SL

[2006] EWCA Crim 1902

In this case the Court of Appeal held that it is neither an abuse of process nor unreasonable for the Crown to bring criminal proceedings against a parent for the death of a child where the family court, in care proceedings relating to another child of the family, has not attributed blame to one parent as against the other. A child, Ethan, was found dead in circumstances which precluded attribution of death to natural causes. In care proceedings relating to a surviving child, Jamie, Hedley J did not find that either the father or the mother was responsible for the death of the child. There was, however, evidence that pointed to the father as the parent responsible. The Crown brought proceedings against him and he was convicted of manslaughter. At trial before Beatson J, it was argued that it was an abuse of process for the criminal trial to take place or, in the alternative, unreasonable for such proceedings to be brought having regard to the decision in the care proceedings. The appellant argued that his conviction for manslaughter was inconsistent with the conclusion of Hedley J that he could not say, in the care proceedings, whether Ethan's death was homicide or, if it was, that it was the appellant, rather than his partner, who was responsible and that this inconsistency was an affront to public justice.

The Court of Appeal, following a careful review of the authorities, concluded that Beatson J had been correct to allow the prosecution to proceed. The decision in the care proceedings was not and could not be a final determination of the criminal proceedings. It could not give rise to double jeopardy or issue estoppel. Even had Hedley J invited the Crown to attend the care proceedings as an interested party and had said (as he did not) that he intended his decision finally to decide the outcome of all proceedings involving the appellant, such observations would not bind the criminal court. The Crown was entitled not to accept Hedley J's reservations as to whether Ethan's death was a homicide and, having reflected on Hedley J's judgment and the public interest test for prosecution, to

bring proceedings for manslaughter. The ultimate responsibility for bringing criminal proceedings lies with the Crown; its decision to do so could not amount to an affront to public justice. The Court did state however (at [64]) that the Crown may be required by the trial judge to provide an explanation of its decision to bring proceedings.

The Court went on to address the desirability of avoiding problems arising from contemporaneous civil and criminal proceedings in respect of the same matter. The Court states (at [73]):

'We emphasise however, that because procedural and evidential difficulties can arise when there are in existence parallel care proceedings in respect of a child and criminal proceedings against a person connected with that child in respect of a serious offence against the child (or any person connected with the child), it is essential that there should be close liaison between the local Social Services Authority conducting the care proceedings and the Crown Prosecution Service. Wherever possible, linked criminal and care directions hearings should take place as the cases progress.'

See *Blackstone's Criminal Practice*, D2.64

R (B) v Stafford Combined Court

[2006] EWHC 1645 (Admin)

The Divisional Court found it 'quite unacceptable' that a vulnerable 14-year-old schoolgirl (TB), who was a prosecution witness in the impending trial, was brought to court at short notice, without representation or support, to be faced personally with an apparent choice between agreeing to the disclosure of her psychiatric records or delaying a trial which was bound to cause her concern and stress. She was known to have attempted suicide and was the victim of alleged sexual abuse. Medical records, in particular psychiatric records, are confidential between the medical practitioner and the patient, who undoubtedly has a right of privacy under the ECHR, Article 8.

By the Criminal Procedure (Attendance of Witnesses) Act 1965, s. 2(7) (see D13.44), an application for a witness summons has to be made in accordance with the CrimPR. Rule 28 stipulates the form

and content of the application and provides that a copy of it and the supporting affidavit should be served on the person to whom it is directed at the same time as it is served on the court officer. The person to whom it is directed may indicate if he wishes to make representations at a hearing. If he does so, the court has to fix a hearing. The original application in the present case requested a summons directed to the relevant NHS Trust to produce TB's medical records. The Divisional Court noted that this revealed a defect in the existing rules. May LJ said:

'Surprisingly the Rules do not require service of an application . . . on the very person whose confidence would be broken by their production—not least in the present case their production to a defendant who was alleged to have abused TB sexually.'

Nevertheless, CrimPR, r. 1 provides that the overriding objective is that criminal cases are dealt with justly. This includes respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case. By r. 1.3, the court must further the overriding objective when it exercises any power given to it by legislation, including the rules, and when it applies any practice direction or interprets any rule or practice direction. May LJ concluded (at [25]):

'Procedural fairness in the light of Article 8 undoubtedly required . . . that TB should have been given notice of the application for the witness summons, and given the opportunity to make representations before the order was made. Since the rules did not require this of the person applying for the summons, the requirement was on the court as a public authority, not on W, the defendant. TB was not given due notice or that opportunity, so the interference with her rights was not capable of being necessary within Article 8(2). Her rights were infringed and the court acted unlawfully in a way which was incompatible with her Convention Rights.'

The reform of r. 28 is currently under consideration by the Rules Committee. In the court's view, the proposals currently put forward might not be adequate to ensure the future protection of claimants such as TB, and may need reconsideration.

See *Blackstone's Criminal Practice*, D8.43

Tinsley

[2006] EWCA Crim 2006

By the PACE 1984, s. 74(1), the fact that a person other than the accused has been convicted of an offence by a UK court is admissible for the purpose of proving, where this is relevant to any issue in the proceedings, that he committed that offence. A statement made by a person who has since died (including an admission of criminal liability) may meanwhile be admissible under the CJA 2003, ss. 114 and 116, to prove any fact which he could have proved through oral testimony (although, in contrast to s. 74, there is no presumption that such a statement is true). These provisions do not, however, determine *when* such evidence is relevant in the first place, and it is clear from *Tinsley* that the concept of relevance must still be applied quite strictly.

The appellant in *Tinsley* was charged with sexual offences against his niece, who had also complained of similar abuse allegedly committed by her grandfather and step-grandfather. Her grandfather died shortly after admitting his guilt to the police. Her step-grandfather pleaded guilty to indecent assault. The fact that the complainant had already been twice vindicated must significantly have boosted her credibility in the eyes of a jury, but relevance to a collateral issue such as witness credibility is something distinct from relevance to an issue in the proceedings. The Court of Appeal accordingly ruled that none of this collateral evidence was admissible. Latham LJ said (at [12]–[13]):

The general principle is that for evidence to be admissible as relevant, it must be logically probative (or disprobative) of a fact in issue between the parties. The question is therefore, what was it that the Crown intended to prove by putting this material before the jury? . . . There was no suggestion that the appellant was involved together with either the grandfather or the step-grandfather . . . It follows that the only purpose for which the material could have been put before the jury was to establish that because she had told the truth in relation to [them], the jury could be satisfied that she was telling the truth in relation to the complainant. But the mere fact that the complainant has told the truth on other occasions, even if in the same context, cannot be logically probative of the facts that she alleges in relation to the appellant. Whilst it is tempting to say that it is relevant in the sense that the complainant's credit was 'in issue' that, in our judgment, cannot open the door to evidence being called simply in order to support the argument that the witness is a credible

witness. It is, in effect, a form of 'oath helping', which has never been permissible as a ground for admitting evidence.

The Court did not rule out the possibility that the evidence might have been admissible as explanatory evidence under s. 100 of the 2003 Act but, since no application for leave to admit under that section had been made at trial, it was not prepared to deal with the issue.

See *Blackstone's Criminal Practice*, F1.9 and F15.1.

Loizou

[2006] EWCA Crim 1719

Under the Criminal Justice and Public Order Act 1994, s. 34(1), adverse inferences may be drawn from a fact subsequently relied on in defence only where the fact is one which, in the circumstances existing at the time, the accused could reasonably have been expected to mention. A substantial body of case law has been built up in relation to s. 34(1), with the problem of what use, if any, to make of a failure to advance facts following legal advice to remain silent being paramount. *Bowden* [1999] 1 WLR 823 was followed and *Hoare* [2004] EWCA Crim 784 was considered in *Loizou*.

The appellant, who had been arrested with others in connection with an alleged money laundering operation, declined to answer questions during her interviews by customs officers (immediately following her arrest and when she attended a police station several weeks later); but at trial her defence was that she was a mere interpreter who had known nothing of the criminal activities of the persons she had been arrested with. When giving evidence-in-chief, she explained that she had 'gone no comment' in accordance with her solicitor's advice and that he had advised her that what was alleged 'did not amount to a criminal charge'.

The prosecution then cross-examined her as to why she had not given her account to the officers when interviewed. She replied that her solicitor had advised her not to say anything because there was no connection which would enable her to be charged with money laundering. Prosecution counsel then

asked whether she had told her solicitor any of the account she had given in evidence and, following argument, the trial judge ruled that she had waived her legal professional privilege in the course of her evidence-in-chief, and that the prosecution were accordingly entitled to ask her about the basis of her solicitor's advice, and whether she had told him of all the facts on which she now purported to rely. She replied that she had not.

In his speech to the jury, prosecuting counsel suggested that the appellant had recently fabricated her account, and the judge later directed the jury that it was open to them to draw adverse inferences against her, in accordance with s. 34.

On appeal, it was submitted that the judge had erred in ruling that the appellant had waived her legal professional privilege during her evidence. The Court of Appeal was referred to its earlier decision in *Wishart* [2005] EWCA Crim 1337, from which two main principles could be discerned, namely,

- [1] a defendant who merely gives evidence that he made no comment on the advice of his solicitor does not thereby waive his privilege (see *Beckles* [2004] EWCA Crim 2766 at [43]); and
- [2] a defendant (or his solicitor if called) who gives evidence of what was said to the solicitor in response to a prosecution allegation of recent fabrication does not thereby waive privilege.

Hooper LJ, giving the judgment of the court in *Loizou*, held that on the facts the case could be distinguished from *Wishart*, but not from *Bowden*. At [84] he said:

'There is a distinction between having to reveal what was said to a solicitor to rebut an allegation of recent fabrication and *volunteering* information about the legal advice over and above stating that the refusal to answer questions was as a result of receiving such advice. In the former scenario the reason privilege has not been waived is there is no way of dealing with the allegation other than by revealing what was said. In the latter scenario, while the effect may be to enable an allegation of recent fabrication to be made, this is the consequence of the voluntary provision by or on behalf of the defendant of information which because of its partial nature is misleading.'

See *Blackstone's Criminal Practice*, F9.20, F9.21 and F19.8

LEGISLATION

Serious Organised Crime and Police Act 2005 (Appeals under Section 74) Order 2006 (SI 2006 No. 2135)

Parts 2 and 3 of this Order make provision corresponding to provision in the Criminal Appeal Act 1968, with modifications, for the purposes of appeals in England and Wales under the SOCPA 2005, s. 74(8). Chapter 2 of part 2 of the 2005 Act makes provision for adjustments of sentence in return for the giving by offenders of assistance to prosecutors and those investigating offences. Section 74 provides for the review of sentences and s. 74(8) allows the offender or a specified prosecutor to appeal to the Court of Appeal against a decision of the Crown Court on an application for review of a sentence under s. 74. Part 2 of the Order relates to appeals to the Court of Appeal in relation to England and Wales and part 3 allows, and makes provision in relation to, appeals to the House of Lords from the Court of Appeal in relation to England and Wales. Article 4 makes provision for the powers of the Court of Appeal on appeal. If the Court of Appeal determine to allow the appeal and if they think fit, they can vary the sentence imposed by the Crown Court.

See *Blackstone's Criminal Practice*, E1.7

Drugs Act 2005 (Commencement No. 4) Order 2006 (SI 2006 No. 2136)

This Order brings s. 20 of the Act into force on 1 October 2006. Section 20 inserts new sections into the Crime and Disorder Act 1998. Section 1G of the 1998 creates the power to make intervention orders and s. 1H supplements that power. Intervention orders are orders which may be made at the same time as a court makes an ASBO in respect of a person aged over 18, following a report and consultation with prescribed persons. An intervention order requires the defendant to comply with requirements and directions. Intervention orders are declared to be designed to address anti-social behaviour stemming from drug use by providing

forms of activities and treatment to ease the defendant's drug dependency.

See *Blackstone's Criminal Practice*, D23

Crime and Disorder Act 1998 (Relevant Authorities and Relevant Persons) Order 2006 (SI 2006 No. 2137)

This Order specifies the Environment Agency and Transport for London as 'relevant authorities' for the purposes of the Crime and Disorder Act 1998, ss. 1, 1B, 1CA and 1E. A relevant authority is a body which (after consultation with the local authority and the police) can apply to a magistrates' court for an anti-social behaviour order or (as an adjunct to other proceedings) to a county court for a similar order. Where a person has acted in an anti-social manner on or in relation to land in respect of which the Environment Agency has a statutory function, it may apply for the purpose of protecting persons who are (or are likely to be) on or in the vicinity of such land. Transport for London's powers are limited to action relating to its land or vehicles or those of a subsidiary operator.

See *Blackstone's Criminal Practice*, D23.4

Crime and Disorder Act 1998 (Intervention Orders) Order 2006 (SI 2006 No. 2138)

This Order prescribes the persons to be consulted before applying for an intervention order, namely the National Health Service Trust, Primary Care Trust, National Health Service Foundation Trust or, where it is not itself the applicant for the associated ASBO, local authority concerned with the provision of appropriate activities within the area in which it appears that the defendant resides or will reside (art. 2). Article 3 prescribes the person responsible for the provision or supervision of 'appropriate activities' (namely a trust or authority referred to in art. 2 which provides or supervises, or arranges for the provision or supervision of, such activities). Article 4 prescribes those activities and

who constitutes an 'appropriately qualified person' to compile a report for the purposes of such an application.

**Rehabilitation of Offenders Act 1974
(Exceptions) (Amendment) (England and
Wales) Order 2006 (SI 2006 No. 2143)**

This Order has *inter alia* the effect of creating new exceptions to the Act's restrictions on questions and employment issues in relation to public contract tendering under European Community law and in relation to the suitability of a person to undertake certain activities as a football steward. It also adds new categories to the list of professions, offices, employments, work and occupations which are excepted from the provisions of the Act; in particular 'home inspectors' are added to the list. Article 9 adds certain new proceedings in which spent convictions may be used—those before the Parole Board, under the Criminal Injuries Compensation Act 1995, s. 7D, under the Proceeds of Crime Act 2002 and in relation to the refusal to approve a person to be a football steward.

**Police and Criminal Evidence Act 1984
(Codes of Practice) (Revisions to Code A)
Order 2006 (SI 2006 No. 2165)**

This Order brings into operation, on 31 August 2006, a revision of para. 4 of Code A (exercise of statutory powers of stop and search and requirements to record public encounters). The revision pertains to the recording requirements and enables constables of the British Transport Police operating from certain specified locations to provide an electronic receipt rather than a full record when they undertake a stop or a stop and search. A full record will be made available to the person at a later time. In consequence of the revision, the applicable Notes for Guidance are revised and a new Annex D (use of an electronic receipt as an interim record of a stop or stop and search) is inserted.

See *Blackstone's Criminal Practice*, D1.6 and appendix 2

**Misuse of Drugs (Amendment No. 3)
Regulations 2006 (SI 2006 No. 2178)**

These Regulations amend the Misuse of Drugs Regulations 2001 to correct defects in the amendments made by the Misuse of Drugs (Amendment No. 2) Regulations 2006 (SI 2006 No. 1450). The (Amendment No. 2) Regulations omitted to exclude veterinary prescriptions from the additional requirements it imposed; the (Amendment No. 3) Regulations correct that omission.

See *Blackstone's Criminal Practice*, B20.22

**Serious Organised Crime and Police Act 2005
(Commencement No. 9 and Amendment)
Order 2006 (SI 2006 No. 2182)**

This Order brings s. 163(2) of the SOCPA 2005 into force on 25 September 2006 to a limited extent. The effect is to bring into force, in England and Wales, provisions inserted into the Police Act 1997 which make the British Transport Police a relevant police force for the purpose of obtaining information to be disclosed in an enhanced criminal record certificate under Part V of the 1997 Act. The Order also re-numbers the Serious Organised Crime and Police Act 2005 (Commencement) (No. 7) Order 2006 (SI 2006 No. 1871) as (No. 8), to take account of the previous Serious Organised Crime and Police Act 2005 (Commencement No. 7) Order 2006 (SI 2006 No. 381).

Home Office Circular 25/2006

This Circular provides detailed advice about the procedures that will be followed when courts decide that an adult defendant should be subject to electronic monitoring, or 'tagging' whilst on bail. Tagging is available as a condition of bail in support of a curfew condition. It states 'The intention of the Home Secretary in making tagging more available is that it should be used as an alternative to remand in custody.' Its implementation date is 1 September 2006.

See *Blackstone's Criminal Practice*, D6.44

COMMENT AND ANALYSIS

What is an Imitation Firearm (and When)?

Many (but by no means all) of the provisions of the Firearms Act 1968 apply to imitation firearms as they do to the real thing. But, although the definition of a firearm is relatively precise, difficulties may still arise when one attempts to define an imitation firearm, as can be seen from the recent decision of the Divisional Court in *K v DPP* [2006] EWHC 2183 (Admin).

Pipes, toys, bottles, hands and fingers

Some things are clear. It has long been recognised that an imitation firearm need not be a realistic replica of a real weapon. A cheap plastic toy, a bottle or a length of piping can, under certain circumstances (e.g., when pointed from under a coat) 'have the appearance of a firearm', so as to fall within the definition provided by the Firearms Act 1968, s. 57 (*Morris* (1984) 79 Cr App Rep 104). Such an object may have been constructed, adapted or altered so as to resemble a firearm (as in *Morris*) but in *Williams* [2006] EWCA Crim 1650 the Court of Appeal held that this is not essential.

The House of Lords in *Bentham* [2005] UKHL 18 nevertheless emphasised that there is no offence of merely pretending to possess a firearm. Those offences under the Firearms Act 1968 that extend to imitation firearms require the possession (or in some cases the use or attempted use) of such objects and these must, it seems, be objects that exist independently of the offender himself. His own hand or finger, concealed under clothing, cannot be such an object, even if he says, 'I have a gun'. As far as possession offences are concerned, the ruling in *Bentham* clearly puts this beyond argument. Lord Bingham said:

One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it.

Strictly speaking, however, *Bentham* deals only with this narrow issue. It applies only to offences involving possession and does not address those offences (e.g., under s. 17 of the Act) which involve making

use or attempted use of an imitation firearm. Arguably, therefore, it may still be possible to commit a s 17 offence by making use of one's own hand or finger in such a way as to imitate a firearm. It would be a brave lawyer who tried to distinguish *Bentham* on that basis, however.

The relevant time and circumstances

Subject to the rule that one cannot possess one's own body parts, the question whether a given object 'has the appearance of a firearm' is treated as one of fact for the jury. Nothing that was said in *Bentham* casts doubt on *Morris* (above) in which the Court of Appeal held that the time at which the offending object must have the appearance of a firearm is the time of the alleged offence. Dunn LJ said:

The Court is not . . . concerned with whether or not the thing looked like a firearm at some other time. In considering whether or not the thing looked like a firearm at [the time of the alleged offence], the jury are entitled to have regard to the evidence of any witnesses who actually saw the thing at that time, together with their own observations of the thing itself, if they have seen it . . .

In practice, the circumstances of the offence may also be relevant. If, for example, the victim feels something pressing into his back, and is told that it is a gun, it ought not to matter very much that anyone viewing the object in question would have been able to see that it was merely a piece of copper pipe. The victim could not view it. It would appear to *him* that the object was a gun. This was recognised in *Williams*, but in view of what had been said in *Bentham*, the Court of Appeal doubtless felt obliged not to treat the pretence as decisive. Moses LJ said:

We do not rule out as being irrelevant the words used or other pretence adopted by a defendant to demonstrate to the victim that he is indeed carrying a firearm as being inadmissible. They may, in certain circumstances, be admissible to lend force to the proposition that the thing itself did have the appearance of a firearm. But caution must be exercised and a jury must be warned that it is not the words used or actions of the appellant in pretending that he has a firearm that they must focus upon, but rather on what appearance the thing he is carrying actually had at the material time. That is the crucial question.

K v Director of Public Prosecutions

A different issue arose in *K v DPP*. Here, an assault was committed by the appellant, who pointed a plastic 'BB gun' at the complainant and threatened to shoot him in the face. This gun was essentially a plastic toy that fired plastic pellets at a much lower velocity than any air gun, but most such toys are modelled on real firearms and could under some circumstances be mistaken for one. Clearly a BB gun, or any other realistic toy gun, could in some circumstances become an imitation firearm. In *K v DPP*, however, everyone involved in the incident knew perfectly well that it was a BB gun and not a real weapon. The incident arose because the complainant was attempting to enforce a rule prohibiting the possession of BB guns in the hostel at which the appellant resided, and the appellant had objected to giving his up.

The question for the court was whether a firearms offence (in this case an offence of using an imitation firearm with intent to cause fear of violence, contrary to s. 16A) could be committed when there was no attempt or intent to imitate a firearm and no real possibility of mistake or confusion on the part of the victim or of any bystander. Its answer was that the justices who tried the case were entitled to examine the toy in court and conclude (as a matter of fact) that in appearance it resembled a real gun. Once they had so concluded, conviction was inevitable. The character of the object could not change merely because everyone knew at the time what it really was. That was merely something to be taken into account when sentencing.

With respect, the answer to this question must surely have been different, had the court adopted a modern, purposive construction of the legislation. The clear purpose of the law governing misuse of imitation firearms is to prevent criminals intimidating victims, police officers or bystanders by pretending that these are real weapons. As Lord Bingham noted in *Bentham*:

'While an imitation firearm lacks the capacity of a real, loaded firearm to kill or injure, it has much the same capacity to frighten and enforce compliance, not least because many imitations are almost indistinguishable from the real thing and those threatened have little opportunity or inclination to examine the nature of the weapon

used: see *R v Avis and others* [1998] 1 Cr App R 420, 423...'

Purposive construction of the legislation relating to imitation firearms had a notoriously 'bad press' in *Bentham*, but this was because the Court of Appeal's purposive approach in that case stretched the concept of possession to breaking point. For this it was roundly criticised by academic commentators such as Professor Spencer ('Is that a gun in your pocket or are you purposively constructive?' [2004] CLJ 543) and then reversed by the House of Lords. The rules of statutory construction, said Lord Bingham:

'... have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain. Purposive construction cannot be relied on to create an offence which Parliament has not created.'

This cannot be denied, but it need not have precluded the adoption of a purposive construction in respect of issues where some ambiguity does exist; and in *K v DPP* there was room for different interpretations. The appearance of the relevant object at the time of the offence is what matters, but since it did not 'appear' to anyone in *K v DPP* that the appellant had a real firearm it could be argued that the toy gun did not have any such appearance at that time. Nor, for the purposes of s. 16A, did the appellant intend by means of its appearance, to cause fear of violence. To put it another way, the fact that the object in question superficially resembled a firearm was, for all practical purposes, irrelevant at that time. If instead the appellant had brandished a toy catapult, or threatened to hit the complainant with a plastic cricket bat, his conduct would essentially have been similar, and no less threatening.

The ruling of the House of Lords in *Bentham* was doubtless correct on its facts, but it appears to have discouraged the courts from taking account of the purpose behind the legislation and has encouraged, instead, a slavishly literal approach to the definition of an imitation firearm. This is to be regretted. The charge brought under s. 16A was wholly inappropriate on the facts of *K v DPP*, in which a charge of common assault would surely have sufficed.

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The Suspended Sentence under the CJA 2003

The suspended sentence in the CJA 2003 (available in respect of offences committed on or after April 4, 2005) is a quite different measure from the version which existed under the previous law (and which is now only available for offences committed before that date). The differences are not always recognised, and the purpose of this note is to summarise and highlight the changes. Please note that for full details the terms of the relevant sections of the CJA 2003 should be consulted and read alongside the guidelines set out in Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (2004), section 2, part 2 (hereafter 'SGC'):

Old Version

- Was available for sentences of imprisonment;
- Was available for offenders aged 21 and over;
- Was available where the sentence to be suspended was for a term not exceeding two years;
- The custodial term could be suspended for an operational period of not less than one year and not more than two years;
- Could be imposed in 'exceptional circumstances' only;
- No supervision or other requirements could be imposed during the operational period, save for a suspended sentence supervision order;
- Breach arose where the offender committed an offence punishable with imprisonment during the operational period

New Version

- Available for sentences of imprisonment or detention in a young offender institution—see Note 1;
- Available for offenders aged 18 and over;
- Available where the sentence to be suspended is for a term of at least 14 days but not more than one year (or not more than six months in a magistrates' court)—see Note 2;
- The custodial term can be suspended for an operational period of between six months and two years. For guidance on the relationship between the length of the custodial term and the length of the operational period see *SGC*, para 2.2.13;

- There is no 'exceptional circumstances' restriction;
- One or more of a wide range of requirements is available for imposition during the supervision period. The supervision period may be shorter than the operational period. The same full set of requirements which may be inserted into a community order (see CJA 2003, s.190) is also available here;
- At least one requirement must always be imposed. If two or more are imposed they must be compatible with one another. Regard must be had to the detailed provisions relating to each of the requirements;
- Generally speaking, requirements imposed as part of a suspended sentence should be less onerous than those imposed as part of a community order: *SGC*, para 2.2.14;
- The court may provide for the periodic review of the order by the court (CJA 2003, ss.191–2);
- Breach arises where the offender commits any offence within the operational period or fails to comply with the terms of any requirement (CJA 2003, s.193 and schedule 12);
- If the offender is in breach of the suspended sentence, the court should normally activate the suspended sentence (in whole or in part), and should normally order it to run consecutively to any new sentence imposed for the later offence. The extent to which requirements have been complied with will be relevant to that decision (*SGC*: para 2.2.17);
- If activation in whole or in part would in all the circumstances be unjust, the court may instead amend the order, by making the requirements more onerous, or by extending the supervision or operational period (if there is room to do so). Reasons should be given for not activating;
- Where the offender has spent a period of time in custody on remand before the suspended sentence was imposed, any adjustment to the length of custodial term to reflect that period should not be taken into account by the court at the time of imposing the suspended sentence, but by the court which deals with any subsequent breach of the suspended sentence. This is clear from the CJA 2003, s.240(7)), and is a change from the earlier law under the CJA 1967, s.67,

where the sentencer imposing the suspended sentence was required to make that adjustment: see Practice Direction (Crime: Suspended Sentence) [1970] 1 WLR 259 and *Williams* (1989) 11 Cr App R (S) 152.

Common Principles

- A suspended sentence should only be imposed where the seriousness of the offence(s) is such that a sentence of immediate custody is justified (ie under the CJA 2003, s.152(2) that 'neither a fine alone nor a community sentence can be justified').
- All the statutory requirements for imposing a custodial sentence must be satisfied before a suspended sentence is imposed.
- The court should fix the length of the custodial term before deciding whether to suspend it (*SGC*, para 2.2.12).

- The sentence may be suspended having regard to the effect of personal mitigation, the impact of a timely guilty plea, or other relevant matters.
- The court should explain the effect of the order to the offender in ordinary language.

Note 1—the sentence of detention in a young offender institution will be abolished when the Criminal Justice and Court Services Act 2000, s.61 is brought into force, but no date has been set for that change

Note 2—CJA 2003, s.189 (which refers to a term of imprisonment of at least 28 weeks but not more than 51 weeks) needs to be read in the light of transitional provisions in SI 2005 No 643.

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Issue 1, October 2006

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

PUBLISHING NEWS

NEW—OUT FEBRUARY 2007

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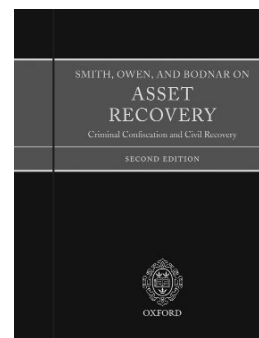
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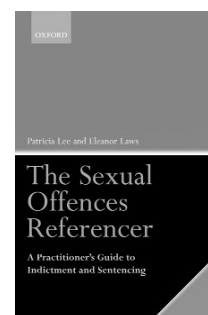
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