

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to the fourth edition of the *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.

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CASE DIGEST—IN BRIEF

OFFENCES—CAUSING OR ALLOWING THE DEATH OF A CHILD OR VULNERABLE ADULT

Mujuru and Stephens

[2007] EWCA Crim 1249

The Court of Appeal considered what is meant by the Domestic Violence, Crime and Victims Act 2004, s. 5(1)(c), when it refers to a 'significant risk of serious physical harm'. The trial judge had directed the jury in this case that a significant risk includes any risk that is not merely minimal. This was held to be a misdirection. The court held that (following *Brutus v Cozens* [1973] AC 854) the jury should have been directed merely to give the word its ordinary meaning. Moore-Bick LJ said (at [31]):

In our view there is nothing . . . to suggest that the word 'significant' as used in section 5(1) was intended to bear anything other than its ordinary meaning. It is an ordinary English word in common use and we do not think

that it is any less intelligible to the average member of a jury than the word 'insulting'. There may be room for disagreement in any given case about whether risk of serious physical harm to the deceased was or was not significant and, if it was, whether the defendant was or ought to have been aware of the fact, but the decision remains one of fact for the jury applying their collective understanding of the word 'significant'.

See *Blackstone's Criminal Practice*: B1.50

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OFFENCES—KIDNAPPING**Hendy–Freegard**

[2007] EWCA Crim 1236

The prosecution case was that the appellant, a confidence trickster, had defrauded his victims and exerted a malign influence over their lives; but a specific charge of kidnapping was based on the allegation that he had deceived his victims into making journeys that they would not have made had they known the truth. He had not accompanied them, however, and there was no evidence to suggest that they had been deprived of their liberty. His conviction for kidnapping was quashed, because there was nothing that could have been regarded as a 'taking and carrying away'. As Lord Phillips CJ pointed out at [57]:

. . . the bigamist who induces a woman to travel to the church for a wedding ceremony might be guilty not merely of bigamy but also of kidnapping. Such a submission transforms the offence of kidnapping in a manner that cannot be justified. . .

As to the need for a deprivation of liberty, this appears to have been overlooked in *Cort* [2004] QB 388, in which D tricked his 'victims' into riding in his car by deceiving them into thinking that their bus had broken down. Although not formally overruled, *Cort* is now a discredited authority.

See *Blackstone's Criminal Practice*: B2.63 and B2.67

OFFENCES—RAPE**Bree**

[2007] EWCA Crim 256

The Sexual Offences Act 2003, s. 74 (consent) was examined by the Court of Appeal here. The principal question concerned the effect of self-induced intoxication on a complainant's capacity to give effective consent to sexual intercourse. The story in this case is a familiar one: young man and young woman each have too much to drink, sexual intercourse takes place, and young woman later makes a complaint of rape which young man denies, claiming that she consented and enjoyed it. The first problem that arises in such cases is usually one not of definition but of evidence. As Judge P observed in *Bree* (at [36]) the principal difficulties faced by a jury are not legal:

They lie with infinite circumstances of human behaviour, usually taking place in private without independent evidence, and the consequent difficulties of proving this very serious offence.

In *Bree* however the definition of consent was also in issue. Judge P concluded that, just as a drunken intent remains an intent, so a drunken consent remains a consent:

If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious.

See *Blackstone's Criminal Practice*: B3.8

OFFENCES—ROBBERY**B and R v DPP**

[2007] EWHC 739 (Admin)

Where the prosecution allege that D committed a robbery involving a threat of force, it does not matter whether the victim is actually put in fear or not: it is D's intention that matters. The fact that V was not afraid does not mean that D did not seek to put him in fear.

See *Blackstone's Criminal Practice*: B4.52

ROAD TRAFFIC OFFENCES—ACCIDENT**Currie**

[2007] EWCA Crim 926

The concept of an 'accident' was considered at length by the Court of Appeal when D appealed against his conviction for dangerous driving on the basis that he had not been served within the 14-day time-limit with a notice of intended prosecution. The Crown, however, contended that D had been involved in an accident, and that accordingly no such notice was required to be given (Road Traffic Offenders Act 1988, s. 2(1)).

D had been stopped by police officers who suspect-

ed cannabis misuse. D attempted to drive off and, as one of the officers attempted to prevent him from doing so, the car lurched forward and she had to put her hands on the bonnet to save herself from being knocked over. D then escaped. D contended that there had been no accident for the purposes of s. 2(1).

The Court of Appeal held that, where there were disputed issues of fact to be determined in order to decide whether there had been an accident for the purposes of s. 2(1) of the Act, they had to be determined by the judge. The burden of proof is on the prosecution.

As to what is capable of being classified as an accident, the court cited the judgment of Bridge LJ in *Chief Constable of West Midlands Police v Billingham* [1979] RTR 446 in which he said that 'accident':

[Is] a word which has a perfectly well understood meaning in ordinary parlance, but that meaning is an elastic one according to the context in which the word is used.

In the context of the Road Traffic Offenders Act 1988, s. 2(1), the reason why notice of intended prosecution is not required where there has been an 'accident' is that D will in such cases be aware of what has happened and put on his guard. Accordingly, it does not matter whether what happened was truly 'accidental' or the result of deliberate misconduct by D or another.

See *Blackstone's Criminal Practice*: C1.1

PROCEDURE—AUTREFOIS PLEAS

K

[2007] EWCA Crim 971

The defendants were charged with various counts contrary to the Terrorism Act 2000, including conspiracy to provide property for the purposes of terrorism, knowing or intending that it would be used for the purposes of terrorism. An issue arose in this context as to whether a plea of double jeopardy could take account of deportation proceedings before a Special Immigration Appeals Commission (SIAC) and cases decided under the anti-terrorism statutory scheme. The court held that double jeopardy could be invoked only where both the previous and the current proceedings were criminal in

nature. Anything falling outside the limits of the double jeopardy principle, but which involves an alleged abuse of process, or unfairness, or oppression, may however be dealt under well established principles applicable to such matters.

See *Blackstone's Criminal Practice*: D11.64

PROCEDURE—COURT OF APPEAL SENTENCING POWERS

Reynolds

[2007] EWCA Crim 538

It was held that, by virtue of the Criminal Appeal Act 1968, s. 11(3), the Court of Appeal cannot, when determining an appeal against sentence, impose a more severe sentence than the one originally imposed, even where the original sentence was less severe than that required by mandatory provisions of the Criminal Justice Act 2003. The lack of requisite severity does not make the sentence unlawful. An extended sentence, for example, passed when the judge ought to have imposed an indeterminate sentence, is not 'beyond' the powers of the court merely because it does not go far enough, and it remains a valid and effective sentence.

See *Blackstone's Criminal Practice*: D24.67

EVIDENCE—CORROBORATION

Dawes

[2007] EWCA Crim 1165

Makanjuola [1995] 1 WLR 1348 and *Hunter* [2002] EWCA (Crim) 2693 were considered in this case, where a former accomplice (Barbsy) testifying for the Crown failed to implicate one of the appellants (Smith) in his earlier statements but implicated him extensively in his evidence before the jury. In the absence of Barbsy's testimony Smith would have had no case to answer on two of the counts on which he was convicted, but no warning was given as to whether Barbsy's evidence should be viewed with special caution.

Applying the principles identified in *Makanjuola*, the Court of Appeal quashed these convictions as unsafe. Scott Baker LJ said (at [78]):

We think the judge should have given a warning. As Lord Taylor . . . said in *Makanjuola* . . . where a witness has been shown to be unreliable the judge may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints or to bear the defendant some grudge, a stronger warning may be thought appropriate.

See *Blackstone's Criminal Practice*: F5.5

EVIDENCE—EVIDENCE OF MISCONDUCT OR DISPOSITION ADDUCED BY A CO-ACCUSED

Musone

[2007] EWCA Crim 1237

The Court of Appeal confirmed that a judge ordinarily has no discretion to exclude evidence that satisfies the threshold for admissibility under the CJA 2003, s. 101(1)(e), but went on to consider possible sanctions for failure to give notice of intent to raise issues of bad character under that provision.

In this case, the appellant had sought on the 10th day of a joint murder trial to adduce evidence that his co-accused, Chaudry, had admitted committing another murder of which he had been acquitted 12 years previously. The trial judge ruled that the evidence of this confession was of substantial probative

value in relation to an important matter in issue between the appellant and Chaudry. If the jury accepted that Chaudry had confessed to committing that earlier murder then the judge was entitled to take the view that that was evidence which suggested that it was he who had committed the instant offence and not the appellant. It may also have suggested that Chaudry was someone who would lie in his own defence.

The Court concluded that a remedy had to be available in cases where an accused was guilty of a deliberate and prejudicial failure to comply with the requirements of the CrimPR. Moses LJ said:

59. In our view it is not possible to see how the overriding objective [in the Crim PR r. 1] can be achieved if a court has no power to prevent a deliberate manipulation of the rules by refusing to admit evidence which it is sought to adduce in deliberate breach of those rules.

... The more credible the evidence, the less likely it is that the judge will exclude it on grounds of a breach of a procedural requirement. But where, as in the instant case, the evidence is improbable, the judge is entitled to take that factor into account in deciding whether to exclude it, in circumstances where the rules have been deliberately breached.

See *Blackstone's Criminal Practice*: D12.6 and F12.25

SENTENCING

Conspiracy

Two recent cases have independently considered the imposition of discretionary life sentences in cases of conspiracy to commit murder.

McNee

(2007) *The Times*, 31 May 2007

The appellants were convicted of conspiracy to murder an innocent couple in revenge for a crime committed by their son. This murder was in fact committed by unknown gunmen, but the appellants were convicted of conspiracy, rather than as parties to the murder itself. The judge identified aggravating features as including the professional

organisation of a plan to trace and kill two innocent people; the cold-blooded premeditation; the use of firearms; and an underlying intention on the part of the appellants to assert criminal superiority over the area in question. In fixing the minimum terms, he had regard to the Criminal Justice Act 2003, sch. 21, although this was not directly applicable to offences of conspiracy dating from before commencement of that provision. He set minimum terms ranging from 25 to 35 years, which were upheld on appeal. The judge was not strictly obliged to have regard to sch. 21 in setting the tariff, but his decision to do so in this case was endorsed as wholly appropriate.

Barot

[2007] EWCA Crim 1119

The Court of Appeal provided guidance as to the sentencing of inchoate terrorist offences in which the object of a conspiracy or attempt was murder or in particular mass murder. The relevant sentencing regime in this case was that which applied prior to the commencement of the Criminal Justice Act 2003, but many of the court's observations are of more general application.

The court stated that in such cases an indeterminate or life sentence will ordinarily be appropriate, at least for those close to the centre of a conspiracy or attempt. Guidelines previously laid down related to an earlier period in which terrorist offenders (e.g. the provisional IRA) were generally less fanatical or ruthless than today's Islamist suicide bombers and their supporters. Indeterminate sentences may now be appropriate, because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger to the public.

Lord Phillips CJ gave substantial guidance on the major problem - determining the appropriate tariff, noting that terrorist mass murders will ordinarily attract a whole life tariff but saying (at [60] to [62]):

We consider that a life sentence with a minimum term of 40 years should, save in quite exceptional circumstances, represent the maximum sentence for a terrorist who sets out to achieve mass murder but is not successful in causing any physical harm. Such a sentence should be reserved for the terrorist who has been convicted, after trial, of a serious attempt to commit mass murder by a viable method. Where the offence is of conspiracy and the acts of the defendant fall short of an attempt, the sentence should be lower.

We have already explained why those who are party to a terrorist conspiracy to commit murder are likely to satisfy the criteria for an indeterminate sentence, although each case must be considered on its own facts. The length of the minimum term to be served where such a sentence is imposed will depend upon the facts of the particular conspiracy and the defendant's involvement in it. Where the court is satisfied that the conspiracy was likely to lead to an attempt and the attempt was likely to succeed it may be right to draw little difference between a conspiracy and an attempt. Where, however, the court is unable to be certain that the conspiracy would have been put into practice, or would have led to a successful attempt to murder, the sentence should be significantly lower than for an attempt.

Corruption**A-G's Ref (No. 1 of 2007); Hardy**

[2007] EWCA Crim 760

The Court of Appeal emphasised that, where police officers and other officials with access to databases containing information regarding members of the public abuse their position and do so for profit, then not only must a deterrent prison sentence follow but it must be a severe one. Accessing information on a police computer involves deliberation and it must be made clear to such officers that, if they commit such offences, they face severe punishment, even in the face of substantial personal mitigation.

Murder: Detention at Her Majesty's Pleasure**A-G's Refs (Nos. 143 and 144 of 2006), Brown**

[2007] EWCA Crim 1245

The Court of Appeal provided guidance as to the problems of sentencing that may arise where two or more defendants are convicted of a jointly committed murder, but some were slightly above and some slightly below the age of 18 at the time.

The first offender in this case, who was aged around 17 and 5 months at the time of the murder, was sentenced to detention during Her Majesty's pleasure, with a minimum term of 17 years, the judge having taken a starting point (as required by law) of 12 years. The second offender, who was aged 18 years and 7 months at the time of the murder, was sentenced to custody for life with a minimum term of 21 years, the judge having taken a starting point of 30 years.

The court held that the disparity in the length of the minimum terms imposed could not be justified, despite the different starting points. The small disparity in the offenders' ages could not properly be reflected by more than one year's difference. The minimum term specified in respect of the younger of the offenders was accordingly increased to 20 years.

Assessment of Dangerousness: Consecutive Sentences

The difficulties inflicted on the courts by the complexities of the Criminal Justice Act 2003 in respect of dangerous offenders have been reconsidered yet again in *C* [2007] EWCA Crim 680. In *C* consideration was also given to the preceding regime as introduced by the Crime and Disorder Act 1998, s. 58 and restated in the Powers of Criminal Courts (Sentencing) Act 2000, s. 86. The judgment in *C* cannot easily be summarised, but the court did offer (at [19]) some general guidance as to the practice to be adopted in dealing with consecutive and concurrent sentences on dangerous offenders.

Confiscation Orders: Determination of the Recoverable Amount

May [2005] 1 WLR 2902 was applied in *Green* [2007] EWCA Crim 1248, in the context of a case brought under the Drugs Trafficking Act 1994; but the Court of Appeal certified a point of law of general public importance for possible consideration by the House of Lords, namely, whether, where any payment or other reward in connection with drug trafficking was received jointly by two or more persons acting as principals to a drug trafficking offence as defined in s. 1(3) of the 1994 Act, the value of each person's proceeds of drug trafficking within the meaning of s. 4(1)(b) of that Act includes the whole of the value of such payment or reward.

CASE DIGEST—IN DETAIL

CPS v P

[2007] EWHC 946 (Admin)

The Divisional Court caused some excitement by considering whether, despite the abolition by the Crime and Disorder Act 1998, s. 34, of the presumption of *doli incapax* in the case of children aged between 10 and 14, it remains open to the defence to prove that a particular child was in fact *doli incapax*: i.e. that even if he acted with the mens rea required for the offence he did not appreciate the criminality or serious wrongfulness of his behaviour.

The view adopted in *Blackstone's Criminal Practice* is that the defence was wholly abolished by s. 34, and it is pointed out that the government rejected a proposed amendment that would expressly have preserved the defence without the presumption.

In *CPS v P*, however, Smith LJ considered that there are conflicting indications as to what was Parliament's intent, and her provisional conclusion (*obiter*, and not fully supported by Gross J) was that the basic defence remains intact. She said (at [46] to [47]):

It appears to me that the effect of s. 34 is to abolish the presumption that a child is *doli incapax* but not the

defence itself. Although I accept that there may not in the past have been any clear recognition that the defence existed separately from the presumption by which it was applied, it seems to me that the defence must be capable of existing without being attached to the presumption. The two are distinct concepts. The defence is 'I did not know that this act was seriously wrong'. The practical problems arose because this was presumed to apply in every case of a child of 10 but under 14 and extraneous evidence had to be called to rebut the presumption. If the presumption is removed, I would have thought that there remains a perfectly workable defence. I stress that in making these observations, I am drawing attention to the potential strength of the argument and the need for this issue to be authoritatively determined, after full argument, in a case in which it is properly raised.

One objection to the continued existence of the rule is that incapacity of this kind is not dependent on age. A handicapped 17-year-old may have less understanding of right and wrong than a less handicapped 12-year-old. But as Smith LJ conceded at [48], there may be other ways of dealing with such cases:

There is a large measure of overlap between the issues of 'sufficient understanding of right from wrong', 'fitness to plead', 'ability to participate effectively in a trial' and 'the fairness of the trial'. For that reason, my observations about the availability of the defence of *doli incapax* may

have but little impact on the conduct of cases in future. A child who, due to immaturity or lack of understanding, does not know that what is alleged against him is seriously wrong may well also, for the same reasons, be unable to participate effectively in a trial.

The Divisional Court went on to consider fitness to plead and surrounding issues. While the case in question involved a child defendant and it is clear that issues of this kind arise most frequently in the youth courts, many of the same principles will clearly apply *mutatis mutandis* to summary trials in which an adult defendant's intellectual capacity is in doubt. Having considered *R (P) v Barking Magistrates Court* [2002] EWHC 734 (Admin), *R (TP) v West London Youth Court* [2005] EWHC 2583 and *SC v UK* [2004] 40 EHRR 10, Smith LJ offered the following general guidance:

51. . . . There can be no doubt that, notwithstanding the fact that the youth court is a creature of statute (like any other magistrates' court) it has an inherent jurisdiction to stay proceedings as an abuse of process at any stage. The jurisdiction is limited to matters directly affecting the fairness of the trial of the particular defendant concerned and does not extend to the wider supervisory jurisdiction for upholding the rule of law, which is vested in the High Court: see *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42. However, although the jurisdiction exists, I think that it will be in only exceptional cases that it should be exercised, on the ground of one or more of the capacity issues, before any evidence is heard.

52. Medical evidence such as was put before [the district judge in this case] will rarely provide the whole answer to the question of whether the child ought to be tried for a criminal offence. This is an issue which the court has to decide, not the doctors, although of course the medical evidence may be of great importance. But, the medical evidence must almost always be set in the context of other evidence relating to the child, which may well bear upon the issues of his understanding, mental capacity and ability to participate effectively in a trial. . .

53. Accordingly, it is my view that, in most cases, the medical evidence should be considered as part of the evidence in the case and not as the sole evidence on a free-standing application. . .

54. As was pointed out in the *West London* case, the court has a duty to keep under continuing review the question of whether the criminal trial ought to continue. If at any stage the court concludes that the child is unable to participate effectively in the trial, it may decide to call a halt. . .

55. If the court decides that it should call a halt to the criminal trial on the ground that the child cannot take an

effective part in the proceedings, it should then consider whether to switch to a consideration of whether the child has done the acts alleged (the fact-finding process), under the procedure referred to in the *Barking* case. It is clear since *Re H* (see above) that the fact that a child cannot take an effective part in the fact-finding process does not infringe his Article 6 rights. That process is part of the protective jurisdiction contemplated by the [Mental Health Act] 1983 and the child's Article 6 rights are not even engaged.

56. The decision as to whether or not to switch to fact-finding is one for the discretion of the court.

58. [It was] submitted that there will be a small residuum of cases in which it is clear, before any evidence is called, that the defendant will not be able to participate effectively in a trial. In those circumstances it would be right to stay the proceedings at the outset. I would accept that if the child is so severely impaired that he clearly cannot participate in the trial and if it is clear that there would be no point in finding the facts with a view to making an order under the MHA 1983, there would seem to be little purpose in proceeding. But if there does remain a defence of *doli incapax* the selfsame reports which reveal incapacity to take part in the trial might well also contain evidence on which to base that defence. Ought not the defendant to have the chance of an acquittal rather than a stay?

The Court also referred to the principles laid down in the CDA 1998, s. 37(1) and related provisions.

See Blackstone's Criminal Practice: A3.38 and D19.39

Jones

[2007] EWCA Crim 1118

One aspect of this case establishes that an offence under the Sexual Offences Act 2003, s. 8, can be committed by a person who, with the requisite intention, makes a statement which in specific terms directly incites a child or children under the age of 13 to engage in sexual activity. It is not necessary to identify any specific person to whom the statement is addressed. It is however necessary for the incitement to be communicated to at least one such child. If this cannot be proved (as where the incitement is addressed to a police officer who purports to be under that age) an appropriate charge may be one of attempt to commit an s. 8 offence (applying *Shivpuri* [1987] AC 1).

Issues concerning entrapment were also examined, particularly *Looseley* [2001] 1 WLR 2060. In *Jones* the police had become aware that someone was leaving graffiti messages on trains, seeking to entice

children for sexual purposes. A journalist and later a police officer responded to the messages, a meeting was arranged and the appellant was arrested when he turned up at the meeting place. He was convicted inter alia of attempting to commit an offence under s. 8. The Court of Appeal ruled that the police had not instigated the offence. Thomas LJ said (at [23]):

It is clear, in our view, from the appellant's conduct in relation to the journalist, that he was looking for opportunities to incite a child to penetrative sexual activity; the incitement in those communications went beyond what was stated in the graffiti and included a specific incitement to penetrative sexual activity. The police officer's conduct in relation to the appellant followed on from those events. Far from instigating the offence, the police officer's conduct provided only the opportunity for the appellant to attempt to commit a similar offence and provide the evidence necessary for a conviction. The police officer's response to the invitation in the graffiti by pretending to be a child was a necessary pretence to that end; the pretence did not go beyond providing the necessary opportunity for the appellant to attempt to commit the offence by inciting a person whom he believed to be under the age of 13 to engage in penetrative sex. The police officer's replies thereafter to the text messages were entirely acceptable in a covert operation of this kind, as otherwise the nature of her actions would have increased the suspicions of the appellant. It was the appellant who, after he had been told of the person's age, continued and went on to incite penetrative sexual activity on more than one occasion on the days that followed.

See *Blackstone's Criminal Practice*: B3.56 and F2.18

Tirnaveanu

[2007] EWCA Crim 1239

Welcome guidance is offered in this case as to the difference between evidence of bad character within the meaning of the CJA 2003, s. 98, and evidence of misconduct that 'has to do with the alleged facts of the offence with which the defendant is charged'.

D was convicted of a number of immigration offences relating to the making, of a false French identification card and several offences involving a Romanian immigrant, including the forgery of a passport for her. He denied all responsibility for this and argued that some other person (the offender) had been impersonating him.

The police searched D's properties and discovered documents relating to other Romanians, whom the prosecution contended were illegal immigrants. The prosecution were permitted to call, in connection with those documents, evidence from the immigrants and evidence from immigration officers in relation to such immigrants. It was alleged that D had been acting as a lawyer and dealing with many such illegal immigrants.

It was contended on his behalf that the judge was wrong to admit the evidence and, having admitted it, had failed to give proper directions to the jury.

On appeal, it was accepted that the evidence in question was evidence of misconduct, but the Crown argued that it was not subject to the bad character provisions of the 2003 Act because 'had to do with the alleged facts of the offence with which the defendant is charged'. See *Machado* [2006] EWCA Crim 1804, and *McIntosh* [2006] EWCA Crim 193. The court rejected this argument. Thomas LJ said:

It seems to us that the exclusion must be related to evidence where there is some nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seek to adduce.

On the other hand, if one of the gateways under s. 101 is satisfied and the evidence is admitted (e.g. as important explanatory evidence or as evidence of disposition), it no longer matters whether that evidence might alternatively have been admissible without reference to those provisions. In this case, the additional evidence was clearly admissible under s. 101(1)(d), as it was relevant to an important matter in issue between D and the prosecution – namely whether it was he who had committed the offences and not some other person.

It is true that evidence which is admissible under s. 101(1)(d) is subject to possible exclusion under s. 101(3), whereas that would not be true of evidence which is exempt from the CJA provisions altogether; but any prosecution evidence, whether it falls under the CJA 2003 or not, is subject to the courts' residual discretion to exclude under the PACE 1984, s. 78(1): see *Highton* [2005] 1 WLR 3472 at [44].

LEGISLATION

**Drugs Act 2005 (Commencement No. 5)
Order 2007 (SI 2007 No. 562)**

This Order brought *inter alia* the following provisions of the Act fully into force on 1 April 2007:

- s. 10 (follow-up assessment);
- s. 11 (requirements under sections 9 and 10: supplemental);
- s. 13 (arrangements for follow-up assessment); and
- s. 14 (attendance at follow-up assessment);
- s. 15 (disclosure of information about assessments);
- s. 16 (samples submitted for further analysis); and
- s. 17 (relationship with Bail Act 1976 etc).

**Domestic Violence, Crime and Victims Act 2004
(SI 2004 No. 602)**

This Order brings into force, on 1 April 2007, s. 14 of the Act (surcharge payable on conviction) and sch 10, paras. 9 to 11, 30, 49 to 53 and 63 and sch. 12, para. 7 to the Act (amendments and transitional provision relating to surcharges).

**Criminal Justice and Public Order Act 1994
(Commencement No. 14)
Order 2007 (SI 2007 No. 621)**

This Order brings s. 165 of the Act into force on 6 April 2007. New ss. 107A and 198A are inserted in the Copyright, Designs and Patents Act 1988 by s. 165; the new sections provide for enforcement action under ss. 107 and 198 of the 1988 Act to become the responsibility of local weights and measures officers.

**Criminal Procedure (Amendment) Rules 2007
(SI 2007 No. 699)**

These Rules, which came into force on 2 April 2007, make the following changes to the Criminal Procedure Rules 2005 and other instruments:

- a new Part 4 (service of documents) is added in

substitution for the existing Part 4, which consolidates, revises and simplifies the rules about the service of documents in criminal cases;

- a new Part 14 (indictments) is added in substitution for the existing Part 14, which revises and simplifies the rules about the service, form and content of indictments;
- a new Part 28 (witness summonses, warrants and orders) is added in substitution for the existing Part 28;
- the rules contained in the Indictment Rules 1971 are revoked (they are superseded by the new rules in Part 14);
- Part 19 (custody and bail) is amended to allow for applications under s. 47(1E) of the Police and Criminal Evidence Act 1984 to vary bail conditions before charge, and to remove some inconsistencies;
- Part 31 (restriction on cross-examination by a defendant acting in person) is amended so that the rules in that Part apply in magistrates' courts as well as in the Crown Court;
- the Glossary is extended to include explanations of the expressions 'requisition' and 'written charge'.

**Police and Justice Act 2006 (Commencement
No. 2, Transitional and Saving Provisions)
Order 2007 (SI 2007 No. 709)**

This Order brought *inter alia* the following provisions of the Act into force:

- (a) on 31 March 2007, s. 4 (police authorities as best value authorities);
- (b) on 1 April 2007:
 - (i) s. 1 and sch. 1 except para. 30(3) (national policing improvement agency)
 - (ii) s. 6 and sch. 4 (consultation with the Association of Police Authorities and the Association of Chief Police Officers);
 - (iii) s. 7(2) (standard powers and duties of community support officers);
 - (iv) s. 8 (powers of community support officers to deal with truants);
 - (v) s. 10 and sch. 6 (police bail);

- (vi) s. 12 (power to stop and search at aerodromes);
 - (vii) s. 15 and sch. 7 (accreditation and powers of weights and measures inspectors);
 - (viii) s. 16 (power to apply accreditation provisions);
 - (ix) part 4 (i.e. ss. 28 to 33), which is concerned with inspectorates of various aspects of the criminal justice system;
 - (x) s. 45 (attendance by accused at certain preliminary hearings) to the extent not already in force and s. 46 (live link bail) in the local justice area of Lambeth and Southwark;
- (c) on 6 April 2007:
- (i) s. 26 (anti-social behaviour injunctions);
 - (ii) s. 27 and sch. 10 (injunctions in local authority proceedings and arrest and remand).

Violent Crime Reduction Act 2006

(Commencement No. 2)

Order 2007 (SI 2007 No. 858)

This Order brought *inter alia* the following provisions of the Act into force:

- (a) on 6 April 2007:
- (i) ss. 23 and 24 (persistently selling alcohol to children);
 - (ii) s. 26 (designated public places);
 - (iii) ss. 28 and 29 (dangerous weapons);
 - (iv) s. 30 (minimum sentences for certain firearms offences);
 - (v) s. 31(3) (prohibition on sale and transfer of air weapons except by registered dealers) for certain specified purposes only;
 - (vi) s. 35 (restriction on sale and purchase of primers);
 - (vii) s. 49 and sch. 1 (consequential amendments relating to minimum sentences);
 - (viii) s. 50(1), (2) and (5) and s. 50(3) and (4)(a) and (b) for certain purposes (supplemental provisions for Part 2);
 - (ix) ss. 52 and 53 and sch. 3 (football);
 - (x) s. 62 (offering or agreeing to re-programme a mobile phone);
 - (xi) related repeals in sch. 5;
- (a) on 31 May 2007:
- (i) ss. 45 and 46 (power to search school pupils and further education students for weapons)

- as they extend to England;
- (ii) s. 48 (amendment of police powers to search schools etc. for weapons);
- (iii) s. 58 (which inserts a new power of entry and search of a relevant offender's home address in the Sexual Offences Act 2003).

Serious Organised Crime and Police Act 2005

(Designated Sites under Section 128)

Order 2007 (SI 2007 No. 930)

This Order designates 16 further sites for the purposes of s. 128 (summary offence of entering or being on any designated site as a trespasser). SI 2007 No. 930 amends it by adding a new map of one prohibited area (Chequers).

Criminal Justice Act 2003 (Surcharge) (No. 2)

Order 2007 (SI 2007 No. 1079)

This Order (which replaces SI 2007 No. 707, which never had effect) specifies the cases in which a court's general duty, under the Criminal Justice Act 2003, s. 161A, to order the payment of a surcharge when dealing with an offender is not to apply. The effect of the Order is that a surcharge is payable only where an offender is ordered to pay a fine. The Order also specifies the amount of the surcharge as £15.

Firearms (Sentencing) (Transitory Provisions)

Order 2007 (SI 2007 No. 1324)

Section 51A of the Firearms Act 1968 provides for minimum sentences to be imposed for certain offences under that Act. Section 51A provides that an offender aged 18 or over when convicted of a qualifying offence for which a sentence of imprisonment is imposed will receive a minimum term of five years. This Order modifies s. 51A pending the repeal of the sentence of detention in a young offender institution for offenders aged 18 to 20 at the time of conviction. The modifications apply the five-year minimum term for a qualifying offence to offenders aged 21 or over sentenced to imprisonment and to 18 to 20 year olds sentenced to detention in a young offender institution.

Serious Organised Crime and Police Act 2005 (Amendment of Section 76(3)) Order 2007 (SI 2007 No. 1392)

This Order amends s. 76 of the 2005 Act so as to add more than 20 offences to the list of offences in respect of which a financial reporting order may be made. The added offences include conspiracy to defraud, false accounting, money laundering offences, drug trafficking offences, offences related to terrorist funding, tax evasion offences and offences of corruption.

Attorney-General's Guidelines

The Attorney-General has issued an amendment to his guideline on the acceptance of pleas. A new para. C.6 applies and may be found at:

<http://www.attorneygeneral.gov.uk/attachments/AGO%20Guidelines%20on%20Pleas&ProsecutorRole.doc>

COMMENT AND ANALYSIS

Statements by Defendants under the Criminal Justice Act 2003

Following the alleged commission of an offence by D, E and F, D makes a statement that incriminates E, who is not present and has no opportunity to deny it. This statement may perhaps be adverse to D's own case (in which case it will rank as a confession at any trial in which he is a defendant) and it may also exculpate F, either because it expressly or impliedly excludes his involvement, or because it furnishes him with a possible defence, such as duress. What is the evidential status of such a statement? Is it admissible against E? Is it admissible on behalf of F?

Prior to commencement of the hearsay provisions of the CJA 2003, D's statement could not be evidence against any co-defendant, other than for the limited purposes recognised in *Hayter* [2005] UKHL 6; but as long as D and F were co-defendants, a 'voluntary' confession by D (and perhaps even an 'involuntary' one) could be relied upon by F, even if the prosecution were unable or unwilling to adduce it as part of their own case (*Myers* [1998] AC 124). If D was dead, seriously ill, or in hiding, etc, it was possible for his written or recorded statement to be admitted as documentary hearsay under the CJA 1988, ss. 23 or 24(4), but these provisions could not be used to bypass restrictions on the admissibility of a defendant's confession.

Under the CJA 2003, however, the possibilities have yet to be fully explored. Recent cases, notably *Finch* [2007] EWCA Crim 36 and *Mclean* [2007] EWCA Crim 219, have touched on some of the possible complications, and if the Court of Appeal's interpretation in *Mclean* is correct the impact of the CJA 2003 in this area may be much greater than some of us once supposed.

Confessions as Hearsay

At the heart of the problem lies the largely undefined relationship between the 'hearsay' provisions of the CJA 2003 and the 'confessions' provisions of PACE 1984. The CJA has made at least one important amendment to that part of PACE, by inserting s. 76A (which allows a defendant to rely on the confession of a co-defendant only where he can prove that the confession was not obtained by oppression, etc); but does the Act change anything else?

It does not do so expressly, and according to Lord Rodger in *Hayter* [2005] UKHL 6 there is no indication that Parliament intended any such changes. Indeed, any surviving *common law* rules relating to the admissibility of confessions or mixed statements are expressly preserved by s. 118(1). Section 114(-1)(d) does however appear capable of substantial overlap with the older legislation. Confession evidence is hearsay, and s. 114(1)(d) allows a court to admit otherwise inadmissible hearsay where the interests of justice so require. Could this provision

be invoked to secure the admission of an otherwise inadmissible confession, or to permit a statement by D to be used in evidence against his co-defendant? The CJA 1988, ss. 23 and 24, which were repealed and supplanted by the 2003 Act, each included provisions expressly precluding any possible interference with the rules governing confessions; but the new s. 114(1)(d) does not. Moreover, Parliament was told that the new discretion to admit hearsay would be available to the prosecution as well as the defence (see R. Munday, 'The Judicial Discretion to Admit Hearsay Evidence'). The question is whether confessions or other statements by defendants must be seen as a special case.

Finch

In *Finch*, F and R were in a car that was stopped by the police. A loaded gun was found in the car. When interviewed under caution, R confessed, adding that F was not involved. This confession would ordinarily have been admissible on F's behalf under PACE, s. 76A, even if the prosecution chose not to use it; but R pleaded guilty, thereby ceasing to be F's co-defendant. His statement became third-party hearsay, rather than a confession within the meaning of s. 76A. As for the guilty plea, this was of no help to F, because the prosecution case was that both men were guilty.

F's counsel was left with two possible options: she could call R as a compellable defence witness and, should he prove obstructive, seek leave to cross-examine him as a hostile witness (in which case R's confession might be put to him as a previous inconsistent statement) or she could decline to call him and seek to have the statement admitted under s. 114(1)(d).

Given indications that R would not be a helpful witness, counsel elected not to call him, but was unable to persuade the judge or Court of Appeal that this was an appropriate case for invoking s. 114(1)(d). Section 114(2), which lists factors to be taken into account in such cases, offered her little help. In particular, reliability could not be tested, and of course R was available to give evidence, if required.

Interesting though it is, *Finch* ultimately turned on the fact that R was no longer F's co-defendant. The potential impact of s. 114 on statements by defendants was not directly explored until *Mclean*.

Mclean

Mclean concerned a statement made by D1 whilst on remand in connection with a serious offence. The statement was not a confession (and could not be admissible under s. 76 or s. 76A of PACE) but instead placed the blame on D2. A third defendant (D3) sought to rely on this statement by invoking s. 114(1)(d) and D1 supported the application. D2 naturally objected.

The trial judge accepted D2's objection, ruling that such evidence fell beyond the ambit of s. 114(1)(d). This was understandable. The Law Commission, on whose report the hearsay provisions of the CJA were based, had said:

A hearsay admission is still evidence only against the person who made it, and a jury must be warned accordingly. A number of our respondents thought it extremely important that this principle be retained, and we agree." (Law Com 245 at 8.96)

More recently, the Court of Appeal in *Williams* [2006] EWCA Crim 3300 had criticised a trial judge's summing up on the specific basis that:

He did not warn the jury that what one defendant had said in interview could not be used against another. He did not explain why that was so in the customary fashion, namely because it was hearsay evidence. The co-defendant had not heard what the one defendant had said about him and had not had the opportunity to dispute it. . . .

Where there are three defendants, each of whom had said things in interview about his own role and also about the roles of the others, it was, in our view, vital that the judge should make it clear that anything accusatory that one defendant said about another defendant was not evidence against that other defendant.

In *Mclean*, however, the Court of Appeal held that the CJA had changed the ground rules. Hughes LJ said (at [20] to [21]):

The conventional direction . . . that has historically been given to juries [is] that what defendant A says to the police is evidence only when considering his case and is to be ignored when considering the case of defendants B, C or D. The reason why that has always been the direction given is that what A says to the police is hearsay so far as B, C or D are concerned. Until the passage of the Criminal Justice Act 2003 it was, almost invariably, inadmissible hearsay; hence the direction. The 2003 Act makes hearsay admissible in some circumstances. In the context of this case it makes it admissible if, but only if, the judge concludes that it is in the interests of justice that it should be

admitted. It follows without question that if it is admitted there can be no possibility of what we have described as the conventional direction any longer being given. If hearsay evidence is admitted in the interests of justice the jury is by law entitled to consider it, to determine its weight and to make up its mind whether it can or cannot rely upon it. It would be a plain nonsense to suggest that such hearsay evidence could be admissible, yet still the jury should be directed that it was not evidence except in the case of the maker. . .

Is Mclean Correct?

There is much to be said for abandoning rules that require judges to give nonsensical directions to juries. But is the Court of Appeal right to hold that s. 114(1)(d) applies to evidence of this kind?

The House of Lords in *Hayter* and the Court of Appeal in *Williams* each appear to have assumed that statements by defendants are a special case and that the rules of admissibility here remain unaffected. Mclean overlooks or ignores those authorities, and may be open to attack on that basis; but it could be argued that the implications of s. 114(1)(d) had not previously been thought through. The arguments for admitting hearsay statements where the 'interests of justice' so require do not suddenly disappear merely because the statement in question happens to be a confession or because the maker is a co-defendant. Conflicting interests may come into play (notably, in the case of an improperly obtained confession, those of the defendant who confessed), but cases can be envisaged in which the interests of those incriminated must yield to those of any defendants whose cases would be assisted by admitting the evidence. In particular, the flexibility provided by the *Mclean* approach might enable the courts to avoid potential conflicts between s. 76A and the ECHR, Article 6 (see David Ormerod's commentary on *Finch* at [2007] Crim LR 482).

And why stop there? Suppose that D's confession is inadmissible under s. 76(2)(b), because things were said or done that might ordinarily have been considered prejudicial to its reliability. In our case, however, reliability was confirmed when the stolen property was discovered exactly where D confessed to hiding it. The prosecution now submit that the interests of justice would best be served if the jury were allowed to hear the confession and link it to the

discovery, even though PACE, s. 76(2) and (5), would otherwise forbid it. That submission may seem heretical, but the prosecution could 'tick many of the boxes' listed as relevant considerations in s. 114(2). The interests of justice are wider than those of the defendant.

We must await further developments. The full implications of s. 114(1)(d) in this context may take us some time to absorb.

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Guidelines on Sexual Offences

The Sentencing Guidelines Council has issued a Definitive Guideline on Sexual Offences, applicable to offenders sentenced on or after May 14, 2007. This is a very substantial piece of work, by far the largest which the Council, assisted by the Sentencing Advisory Panel, has undertaken so far. The complexity of the task is reflected in the time which has elapsed since work on this topic was begun by the Panel, the original intention being that the Guidelines would be available to courts as soon as the Act came into force. In the intervening 3-year period the Court of Appeal has filled the breach by providing guidance on a number of key issues, especially in *A-G's Ref (No 104 of 2004)(Garvey)* [2005] 1 Cr App R (S) 666 and *Corran* [2005] 2 Cr App R (S) 453. The Guidelines themselves are divided into seven Parts.

General Principles

Part 1 is concerned with General Principles. While it will be tempting for the practitioner to turn straight to the pages of the Guidelines which deal with the particular offence in the case in hand, Part 1 contains important material which sets the remainder in context. Para 1.3 stresses the flexibility inherent within the structure of sentencing guidelines generally, and the Sexual Offences Guidelines in particular. There is an important section about the reduced culpability of many young offenders. Some offences in the 2003 Act carry lower maximum penalties if committed by an offender aged under 18 but, apart from these examples, para 1.17 stresses that 'youth and immaturity must always be potential mitigating factors' unless

the offence is 'particularly serious'. Attention is drawn in Part 1 and throughout the Guidelines to the application of the dangerous offender provisions, and to key ancillary orders. The court should always consider whether it would be appropriate to make a sexual offences prevention order (SOPO) or an order disqualifying the offender from working with children. If the court makes a community order for a sexual offence it should always consider imposing a requirement to attend a special treatment programme. It is recognised, however, that the length of such programmes means that they are often not available for offenders given community orders of less than three years (para 1.31.1). Pages 15-18 of the guidelines contain important material about the use and application of the guidelines. This explains the meaning of key terms in the guidelines (including sentencing ranges and starting points), and sets out a structured decision-making process. The CJA 2003 changed the structure of custodial sentences of 12 months and over. The sentencing ranges and starting points in these Guidelines take account of the changes, and accordingly the SGC's suggested transitional adjustment (the 15% provision) does not apply here.

Non-Consensual Offences

Part 2 covers the key non-consensual offences. The Guidelines use the starting point of 5 years for the rape of a victim aged 16 or over with no aggravating or mitigating factors (derived from *Millberry* [2003] 2 Cr App R (S) 142) as the baseline from which all other sentences are calculated. There are higher starting points of 8 years and 15 years where specified aggravating features are present. The starting points are higher where the victim is aged between 13 and 16, or is under 13. All individual offence guidelines are set out in the same convenient manner, with a summary of key principles and factors on a left-hand page and the guideline ranges and starting points on a right-hand page. Sometimes, as with the rape offence, additional mitigating and aggravating factors require a third page. 'Additional' indicates that for each offence the generic sentencing aggravating and mitigating potentially apply. These were originally set out in the *Overarching Principles: Seriousness* Guideline and are reprinted in the Sexual Offences Guideline at pp.9-10. Other commonly charged offences dealt with in Part 2 are assault by

penetration (section 6 of the Act, or section 13 where the victim was under 13) and sexual assault (section 3 of the Act, or section 7 where the victim was under 13). Part 2 also deals with offences of causing or inciting sexual activity (there are three such offences in the Act), the two offences of engaging in sexual activity in the presence of a child / person with mental disorder impeding choice, and the two offences of causing a child / person with a mental disorder impeding choice to watch a sexual act.

Vulnerable Victims

Part 3A covers offences involving children as victims. There are three groups – child sex offences, familial child sex offences, and abuse of a position of trust. Part 3B deals with offences involving vulnerable adults as victims. Part 4 deals with the preparatory offences in the 2003 Act – sexual grooming, committing another offence with intent, trespass with intent, and administering a substance with intent. The guidelines for sexual grooming, which was of course a new offence introduced in section 15 of the Act, indicate that where the intent of the offender is to commit an assault by penetration or rape, the starting point for an offender aged 18 or over where the victim was under 13 is 4 years imprisonment, with a sentencing range of 3-7 years, but if the intention was to coerce the child into sexual activity the starting point is 2 years with a sentencing range of 1-4 years. Additional aggravating features (which can take a case above the starting point, and in an extreme case, above the range) include a background of intimidation or coercion, the use of drugs, alcohol, or other substance to facilitate the offence, where the offender is aware that he is suffering from a sexually transmitted infection, and the abduction or detention of the child.

Other Offences

Part 5 deals with a range of other offences in the 2003 Act. One such offence, in section 64 of the Act, is sex with an adult relative, where a community order is the recommended starting point unless there is evidence of long-term grooming which took place when the person groomed was under 18. Another is voyeurism, where the basic offence attracts a recommended community penalty starting point, but with custody appropriate when there are aggravating factors such as recording of activity

and circulating of pictures. These guidelines seem consistent with a batch of recent appellate decisions on the offence (see **B3.254**). Part 6 deals with exploitation offences, which include indecent photographs of children and abuse of children through prostitution and pornography, exploitation of prostitution, and trafficking. It is important for practitioners to note that there has been some adjustment to the 5 Levels of seriousness of different kinds of images originally set out in *Oliver* [2003] 2 Cr App R (S) 463 (see **B3.275**). In particular, all acts falling within the definitions of rape and assault by penetration, which carry the maximum penalty of life imprisonment, are now to be classified as level 4. The aggravating and mitigating factors set out in *Oliver* remain valid, however, and are reprinted in the Guidelines. Part 7 of the Guidelines is concerned with the six offences which carry a lower maximum

penalty when committed by an offender aged under 18.

The Sentencing Guideline Council has published two Consultation Guidelines during June, one on *Assaults and Other Offences Against the Person* and one on *Assaults on Children and Cruelty to a Child*. It is also expected that the Definitive revised version of the Guideline on Reduction of Sentence for a Guilty Plea will be published in July. For further information on all guideline matters see www.sentencing-guidelines.gov.uk

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BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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PUBLISHING NEWS

RECENTLY PUBLISHED—OUT APRIL 2007

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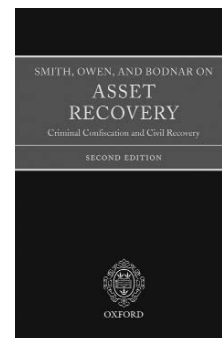
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