

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 3, April 2009

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. They can be downloaded free of charge from <<http://www.oup.com/blackstones/criminal>>.

We will publish a further Bulletin in July 2009, and this will be available free of charge on the *Blackstone's Criminal Practice* website at <<http://www.oup.com/blackstones/criminal>>. The updates are set out on a chapter-by-chapter basis, with 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

CRIMINAL LAW—TRIAL WITHIN A REASONABLE PERIOD

Burns v Her Majesty's Advocate

[2008] UKPC 63

There is an inevitable risk that delays will arise where an alleged offender is initially arrested or charged in England and Wales and then prosecuted in Scotland or Northern Ireland (or vice versa). But this multiplicity of UK jurisdictions cannot be used as an excuse if the alleged offender is thereby deprived of his Convention right to a fair and public hearing within a reasonable time of the initial arrest, etc.

See *Blackstone's Criminal Practice*: A7.67

Contents

| | |
|-----------------------------|----|
| Case Digest—In Brief | 1 |
| Sentencing | 4 |
| Case Digest—In Detail | 6 |
| Legislation | 8 |
| Comment and Analysis | 10 |
| Publishing News | 15 |

OFFENCES—HUNTING WITH DOGS**DPP v Wright; R (Scott) v Taunton Deane Magistrates' Court**

[2009] EWHC 105 (Admin)

The Divisional Court held:

... the term 'hunts' a wild mammal with a dog, as used in section 1 of the Hunting Act 2004, does not include the mere searching for an unidentified wild mammal for the purpose of stalking or flushing it. That said, the question whether a person 'hunts' a wild mammal with a dog is heavily fact specific, and we do not attempt to define by reference to particular hypothetical factual circumstances when hunting takes place for the purpose of the 2004 Act and when it does not.

The Court also confirmed that the only burden of proof placed on the defence by the Hunting Act 2004, s. 1 and sch. 1 is evidential.

See *Blackstone's Criminal Practice*: B20.9 and B20.11

PROCEDURE—POWER TO STAY PROCEEDINGS**K**

[2008] EWCA Crim 3177

Decisions to stay or not stay prosecutions on grounds of delay are 'fact and witness sensitive':

Analysis on paper goes so far but cannot possibly make up for the inestimable advantage of experiencing how the witnesses explain themselves, the manner and extent to which they can be and are cross-examined and the extent to which the defence can deploy arguments beyond a simple denial. This court will obviously intervene if there is no material upon which a trial judge can reach a conclusion which he or she expresses; or if the decision is one to which no reasonable tribunal properly directed could have reached. But these are extreme cases and must be seen as such.

See *Blackstone's Criminal Practice*: D3.62

PROCEDURE—SANCTIONS FOR FAILURE IN DEFENCE DISCLOSURE**Essa**

[2009] EWCA Crim 43

The argument was made that the Criminal Procedure and Investigation Act 1996, s. 11(5) is incompatible with the defendant's right to a fair trial under Article 6 of the ECHR. Hughes LJ roundly rejected the suggestion. He said:

Certain it is that the right to silence is part of the right to a fair trial, as it is certain, even more importantly but distinctly, that the right not to incriminate oneself is. Those two rights are different. However, for the same reasons as section 34 is compatible with the European Convention, so is section 11(5) which entitles comment by the Crown on the absence of a defence statement. Contrary to any submission otherwise, the use which can be made of section 11(5) is not without judicial control. True it is that the Crown does not now need to make a preliminary application to the judge for leave to cross-examine upon the topic. That does not prevent the judge from interfering and stopping the cross-examination if it is unfair, still less does it avoid the necessity for the judge to decide, if such cross-examination has been embarked upon, the terms in which he directs the jury. If the cross-examination was unfair it is open to the judge to tell the jury to disregard it. In those circumstances, there is no doubt that section 11(5) is perfectly compatible with the Convention.

The Court also commented on the fact that the appellant had apparently been advised by his solicitors and counsel not to submit a defence statement in accordance with the CPIA 1996, s. 5(5). Hughes LJ said:

We are at a loss to understand how any lawyer can properly give that advice to any defendant in the face of section 5(5) of the Criminal Procedure and Investigation Act ... It is not open to those who advise defendants to pick and choose which statutory rules applicable to the conduct of criminal proceedings they obey and which they do not.

See *Blackstone's Criminal Practice*: D9.23

PROCEDURE—SELECTION OF A JURY**Jalil**

[2008] EWCA Crim 2910

Section 18 of the Juries Act 1974 was considered by the Court of Appeal in this case. It held that a jury ballot could still lawfully be held where two out of 14 potential jurors had been stood by. Standing by only put those two potential jurors to the back of the list: it did not mean they were ineligible. Having noted that under s. 12(3) of the Act 'the time for a challenge for cause to be made is after the ballot' the court added:

That does not, of course, mean that the oft-followed and convenient procedure of inviting the judge, where all parties agree, to rule in anticipation upon a possible challenge for cause is wrong, or ought not to be followed. It is not always appropriate, but if the judge agrees to do so, and rules for the defendant's prospective challenge, no doubt the potential juror in question will be excused there and then and will not go into the ballot. Equally, if the judge is against the defence submission, subsequent argument in this court that the jury

was in consequence not free of apparent bias is no doubt open to the defendant. In neither case is there any need to go through the rigmarole of renewed challenge and repeated ruling at the ballot stage. If objections are upheld, it is no doubt possible that the pool of jurors might be reduced to the point where a ballot is impossible. But that is not this case ...

See *Blackstone's Criminal Practice*: D13.15

PROCEDURE—RECEIPT OF EVIDENCE BY THE COURT OF APPEAL

Moyle

[2008] EWCA Crim 3059

Evidence of the appellant's mental illness was admitted on appeal in support of a defence of diminished responsibility, even though no such defence had been advanced at the trial. Pill LJ referred to *Neaven* [2007] 2 All ER 891 and said:

There is now strong medical evidence, which we accept, that the appellant was, at the time, ... suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing. All four doctors have expressly stated that the criteria in section 2 of the 1957 Act were satisfied. They also acknowledge that the appellant declined to cooperate with doctors at the time of trial ...

As in *Neaven*, the appellant's decisions at the time of trial were affected by the illness itself; the sense of attack on his personal integrity leading to an unwillingness to disclose the extent of his health problems and the fear of being returned to hospital. There can be no suggestion that the appellant was holding back on a defence of diminished responsibility for tactical reasons connected with his trial.

See *Blackstone's Criminal Practice*: D26.20

PROCEDURE—PUBLIC FUNDING IN CRIMINAL PROCEEDINGS

Lord Chancellor v Rees

[2008] EWHC 3168 (QB)

This case examines 'questions of very significant public importance' in relation to the manner in which Determining Officers should assess criminal lawyers' fees on an *ex post facto* assessment and in particular whether and, if so, to what extent it is appropriate for reference to be made to the general market in criminal lawyers' fees as a cross-check that the fee proposed is not out of kilter with market forces.

See *Blackstone's Criminal Practice*: D30.2

PROCEDURE—EXTRADITION APPEALS

Mucelli v Government of Albania

[2009] UKHL 2

The House of Lords considered the time-limits imposed by the Extradition Act 2003 on persons facing extradition who seek to appeal against the order of the District Judge. It was held that such an appellant must not only file his appeal notice but serve it on the respondent within the specified period of seven days (in Part 1 cases) or 14 days (in cases governed by Part 2 of the Act).

See *Blackstone's Criminal Practice*: D31.11

EVIDENCE—RELEVANCE

Hasan

[2008] EWCA Crim 2909

This case emphasises the principle that an accused ought not to be prevented from adducing relevant and otherwise admissible evidence merely because it may cause difficulties for his co-defendants. In *Hasan* the appellant, who was alleged to have taken part in a gang-related murder, claimed that he was not a member of the gang in question (although he was at the scene) and in support of this contention he sought to adduce evidence to show that a series of phone calls had been made between gang members prior to the killing but that these had not involved or included him. His co-defendants objected to this and the trial judge excluded the evidence on the basis that its admission would 'run the real risk of opening a Pandora's box to which there is no effective finite end'. He did, however, permit counsel to establish from a police officer that there was no information disclosing any association between the appellant and the co-defendants, other than that one was a friend.

Quashing the appellant's conviction, the Court of Appeal ruled:

In our view [the excluded evidence] was clearly relevant. If the admission of the evidence ran the risk of opening a Pandora's box, then it did not thereby become inadmissible. If there was such a risk then the solution lay in the prosecution making an admission, e.g. an admission to the effect that the appellant was not a member of the North London Somalis. What could not happen was that the appellant was denied the right to call important evidence in his favour.

See *Blackstone's Criminal Practice*: F1.7

EVIDENCE—VIDEO IDENTIFICATION AND IDENTIFICATION FROM CCTV IMAGES**Chaney**

[2009] EWCA Crim 21

The guidance provided by the Court of Appeal in *Smith* [2008] EWCA Crim 1342 was noted and approved in this case. The Court noted that, following this judgment, guidance has now been issued to police officers as to the procedure to be followed when the

CCTV or other photographic evidence is submitted to officers in the hope that they may be able to identify a person shown in them.

The guidance is along the lines given by the Court in *Smith*. It assumes (as does *Blackstone's Criminal Practice*) that PACE Code D is not directly applicable in such cases, an assumption which the court in *Chaney* considered to be 'well-founded and consistent with the judgment of this Court in *Smith*'.

See *Blackstone's Criminal Practice*: F18.10

SENTENCING**Burglary**

Saw [2009] EWCA Crim 1

The Court of Appeal re-examined the sentencing guidelines for domestic burglary issued almost exactly six years earlier in *McInerney* [2003] EWCA Crim 3003 and issued fresh guidance on the starting points for sentences in cases of domestic burglary by adults.

The guidance is issued 'pending definitive guidance on the subject of domestic burglary which may be issued by the Sentencing Guidelines Council'.

Note that the definitive guidance recently issued by the SGC deals only with non-domestic burglary.

See *Blackstone's Criminal Practice*: B4.58

Terrorism

In *Jalil* [2008] EWCA Crim 2910, [2008] All ER (D) 51 (Dec) the appellants had been convicted of involvement in a major terrorist conspiracy involving plans to load stretch limousines with propane gas cylinders and explosives and detonate them in the underground car parks beneath suitable buildings, plans to detonate a 'dirty' radioactive bomb and plans to hijack a petrol tanker for use to ram a building. The court repeated the observation previously made in *Barot* [2007] EWCA Crim 1119, a case involving the principal architect of the proposed offences, that the bracket of sentences postulated in *Martin* [1999] 1 Cr App R (S)

477 should no longer be regarded as valid in the most serious kind of terrorist conspiracies in which murder was the primary object.

See *Blackstone's Criminal Practice*: B10.207

Personal Mitigation

A-G's Ref (No. 70 of 2008) [2009] EWCA Crim 100

The Court of Appeal considered whether the (advanced) age of the offender and/or the age of the offence could ever represent significant mitigation in the context of sexual offences against children. It was argued before the Court of Appeal that they could not. But the court disagreed. Lord Judge CJ said:

Inherent in this application is what we perceive to be the danger that the sentencing process should be approached as if it involves compartmentalization. In many cases of serious sexual assault it is true that too much weight should not be given to the age of the offender or indeed the age of the offences, particularly if the offender has deliberately pressurized his victims into silence. But these matters do not cease to be factors which may form part of available mitigation. They are not always of 'comparatively little weight'. Nothing is always of little weight. Everything must depend on the individual circumstances of the specific case and the sentencing decision which the judge has to make in relation to the defendant who is standing before him in the dock. And in these applications our concern is with the eventual sentence, and whether it is properly to be described, in the round, as unduly lenient.

See *Blackstone's Criminal Practice*: E1.13

Mandatory Life Sentences

A-G's Ref (No 24 of 2008); Sanchez [2008] EWCA Crim 2936

Height [2008] EWCA Crim 2500 was applied in this case, in which the trial judge wrongly declined to adopt the statutory 15-year starting point for the minimum term on the basis that the defendant's role in the murder had been a secondary one. In substituting a minimum term of 10 years, the Court of Appeal also issued a warning as to the duties of prosecuting counsel when involved in such cases:

There is now clear guidance to prosecutors as to the assistance to which a judge is entitled in a case. The judge made clear his intended course. Counsel for the Crown should have drawn to his attention the specific provisions of the 2003 Act. If counsel for the Crown had done this, the judge would have approached the matter, we have no doubt, in accordance with the statutory provisions and would not have imposed the specified term that he did ... The course of events in this case is also a poignant reminder of the absolute necessity of counsel for the Crown discharging their duty in this respect and the wholly unnecessary distress this has caused to the family of the victim.

See *Blackstone's Criminal Practice*: E3.5

Confiscation Orders: Temporary Benefit

Alpress [2009] EWCA Crim 8

Alpress answers a question which the House of Lords in *May* [2008] 2 WLR 1131 had tantalizingly left open at the end of its survey of the 'broad principles to be followed' by those called upon to exercise the jurisdiction to make confiscation orders. Their lordships had stated that:

Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. *It may be otherwise with money launderers.* (emphasis added)

A five-judge court in *Alpress* held that money launderers who are mere couriers or custodians should not be

treated differently in that respect after all. Toulson LJ compared money launderers with supermarket till operators:

Nobody would ordinarily think of the till operator benefiting from that sum of money or of the money being under the till operator's power of disposition or control ... The money *in specie* would be the shop's money from the moment that the till operator took it from the customer. It may be that the till operator would have physical power to dispose of the money elsewhere; it may be that he or she could put it in their pocket undetected, but that is no different from the physical power of any bailee to use the property for a different purpose from that of the bailment.

... It is difficult to see why the nature of a custodian's interest in money should be different merely because the custodian knows or suspects that it is tainted by crime. If a criminal asks D, for a reward, to deliver stolen property to a professional receiver and to collect an envelope containing the price which the receiver has agreed to pay, and D does so, we do not see why as a matter of general principle D should be regarded as having an interest in the money which he collects (any more than in the property which he delivers to the receiver) simply because he knows or suspects that the property was stolen, or simply because if D had instead spent the money in a shop the shop keeper would have obtained a good title to it ...

The court also restated some of the general principles previously identified in *Sivaraman* [2008] EWCA Crim 1736.

See *Blackstone's Criminal Practice*: E19.15

Deportation

Grant v United Kingdom (App. No. 10606/07) [2009] All ER (D) 82 (Jan)

The European Court of Human Rights examined the relationship between the Secretary of State's power to order deportation and the individual's right to private and family life under Article 8 of the ECHR.

See *Blackstone's Criminal Practice*: E20.1

CASE DIGEST—IN DETAIL

Khan [2009] EWCA Crim 2

The scope of the offence of allowing the death of a child or vulnerable adult (under the DVCVA 2004, s. 5(1)) was examined by the Court of Appeal in this case. S, a young woman from Pakistan, was brought to England in order to marry K, who treated her with brutal violence on a number of occasions before murdering her by beating her to death. Four other adult members of the same household who were alleged to have had frequent contact with S were charged and convicted under s. 5. The prosecution case was that K had been beating S throughout the three weeks before her death and that it must have been apparent to each defendant that she was being subjected to serious violence. One ground of appeal concerned the alleged failure to direct the jury that it was necessary for membership of the household and frequency of contact to coincide with the facts or circumstances which would give rise to criminal liability, including the defendant's awareness of a significant risk of serious physical harm, and foresight of the circumstances in which the fatal beating occurred. The court rejected that argument. Lord Judge CJ said (at [30]):

The question whether contact between the defendant and the victim was frequent or not is free-standing. Although 'member of the same household' is defined in section 5(6), there is no further definition of 'frequent contact'. The reason is clear. None is needed. Unless the contact was frequent, the prosecution would fail ... The submission by the appellants seeks to import into the words 'frequent contact' the criteria found in section 5(1)(d). They are irrelevant to the determination of the simple question of fact whether the individual appellant's contact with [S] was or was not frequent for the purposes of identifying him or her as a potential defendant.

Lord Judge added some more general comments (at [32] and [33]) as to the application of s. 5:

Section 5(1)(d)(i) and (iii) defines the subjective elements which must be established by the prosecution. It applies when the defendant was aware of the risk of serious physical harm and foresaw the occurrence of the unlawful act or course of conduct which resulted in death. It applies, however, when the defendant was unaware of the risk, but ought to have been aware of it, and when he did not foresee, but ought to have foreseen the occurrence of the act. The objective therefore is to bring within the ambit of the offence, not only those who are actually aware of the risk and foresaw the unlawful act, but those who chose to close their eyes to a risk

of which they ought to have been aware, and which they ought to have foreseen.

These apparently broad routes to criminal liability are narrowed by the requirement that, even if the necessary level of awareness and foresight are established, the defendant cannot be convicted unless *he or she* failed to take the steps which could reasonably have been expected. In our judgment, this pre-condition requires close analysis of the defendant's personal position. We note the concern ... that abused women, for example, may be prosecuted for allowing their violent partners to kill their child. However, section 5(1)(d)(ii) makes clear that the protective steps which could have been expected of the defendant depend on what reasonably have been expected of him or her. In the present case, for example, if either of the female appellants had herself been subjected by [K], to serious violence of the kind which engulfed [S], the jury might have concluded that it would not have been reasonable to expect her to take any protective steps, or that any protective steps she might have taken, even if relatively minor, and although in the end unsuccessful to save the deceased, were reasonable in the circumstances.

A further ground of appeal arose from the fact that the fatal attack on S occurred in the garage at night, when the appellants were asleep, and involved a degree of violence that was markedly more extreme than anything inflicted on her in the house itself during the previous three weeks. Lord Judge CJ said (at [39]):

The act or conduct resulting in death must occur in circumstances *of the kind* which were foreseen or ought to have been foreseen by the defendants. They need not be *identical*. The violence to which [S] was subjected on the night she was killed was of the same kind but it was violence of an even more extreme degree than the violence to which her husband had subjected her on earlier occasions. The place where the fatal attack took place was irrelevant.

See Blackstone's Criminal Practice: B1.63

R (B) v DPP [2009] EWHC 106 (Admin)

The Administrative Court condemned a decision by the CPS to offer no evidence at a prosecution for wounding with intent to do GBH on the basis that the complainant suffered from a mental illness that might affect his recollection. Counsel had formed the view that a medical report precluded him from putting the

complainant before the jury as a reliable witness in the absence of any other evidence to confirm his identification of the defendant as his attacker, even though there was no doubt that he had indeed been the victim of an attack in which part of his ear had been bitten off.

The court held that this decision was flawed in law, and amounted to a violation of the ECHR, Article 3. Toulson LJ said:

In the present case, if the prosecutor had applied the merits based approach and asked himself whether he thought that it was more likely than not, or at least as likely as not, that FB's identification of HR as the ear biter was the result of an hallucination, I cannot see how merely on the strength of Dr C's report he could have answered that question in the affirmative ...

The reasoning process for concluding that FB could not be placed before the jury as a credible witness was irrational in the true sense of the term. It did not follow from Dr C's report that the jury could not properly be invited to regard FB as a true witness when he described the assault which he undoubtedly suffered. The conclusion that he could not be put forward as a credible witness, despite the apparent factual credibility of his account, suggests either a misreading of Dr C's report ... or an unfounded stereotyping of FB as someone who was not to be regarded as credible on any matter because of his history of mental problems.

The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB could be put before the jury as a credible witness, was to add insult to injury. It was a humiliation for him and understandably caused him to feel that he was being treated as a second class citizen. Looking at the proceedings as a whole, far from them serving the State's positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim's sense of vulnerability and of being beyond the protection of the law.

The court awarded FB compensation of £8,000. The decision not to prosecute could not be reversed because HR was acquitted when the Crown offered no evidence against him.

See *Blackstone's Criminal Practice*: D3.51

A [2008] EWCA Crim 2908

The 'new and compelling evidence' which is required by the CJA 2003, s. 78(1) in relation to the offence that is to be re-tried need not necessarily relate directly to the incident giving rise to the alleged offence, but may take the form of bad character evidence admissible under the CJA 2003, s. 101.

In *A*, the respondent was tried but acquitted in 2004 on two charges of indecent assault and one charge of

rape. The complainant in each case was a girl, SN, aged 15. After seeing an article about his acquittal in a local newspaper, his first wife contacted the police and told them that long before the trial he had been arrested for indecent assaults on three children when working at a school. An extensive police investigation followed and in due course the respondent faced a further 17 counts involving several different complainants, and it was largely on that basis that it was sought to re-open the SN case in respect of the alleged rape. Her complaints, which may have seemed unconvincing when tried in isolation, could now be seen as forming part of a series of complaints. Indeed, they occurred approximately half way through the lengthy history of the respondent's alleged misconduct with children, as he moved around the country. Lord Judge CJ said:

[SN's] evidence at trial was set against that of a man who put himself forward as someone of good character, who had worked with hundreds or thousands of children, inviting the disingenuous inference that she stood alone in making complaints against him.

SN is no longer a single complainant alleging sexual abuse, but one of eight complainants whose evidence would be cross-admissible and relevant to the allegation of rape. She takes her chronological place in the middle of a series of independent groups of complainants from different locations spanning a period of some 14 years of the respondent's working life. We acknowledge that, apart from one complaint of buggery, SN makes the most serious complaint against him, and record that, whatever the respondent may have admitted in relation to at least some of the other complaints in his letters to the police, he has continued to deny this particular allegation. However the simple reality is that the second trial of this allegation will take place in a markedly different evidential context from the first. On the basis of the large amount of material we have briefly summarized in this judgment, a conviction is highly probable and the interests of justice will best be served by quashing the acquittal and ordering a re-trial.

See *Blackstone's Criminal Practice*: D12.34

Chargot Ltd [2008] UKHL 73

This was a case under the Health and Safety at Work etc Act 1974, s. 37. It touched upon both the liability of individual corporate officers and the incidence of the legal burden of proof.

On the first topic, Lord Hope (with whom the other Lords agreed) said:

No fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance or neglect. In some cases, as where the officer's place of activity was remote from the work place or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done there, very little more may be needed ... the question, in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate ... procedures were in place.

On the legal burden in light of the Human Rights Act 1998, *Lambert* [2002] 2 AC 545, *Johnstone* [2003] 1 WLR 1736, *Sheldrake v DPP* [2005] 1 AC 264 and *Davies v Health and Safety Executive (2002) The Times* 27 December 2002 were considered. Under s. 40 of the 1974 Act, once the prosecution has proved that there was a real risk of injury arising from conditions in the workplace, the burden is on the employers to prove that they had done all that was reasonably practicable to protect against that risk. Lord Hope (with whom the other Lords agreed) considered whether the imposition of this burden was compatible with Article 6 of the ECHR:

Section 40 imposes a reverse burden of proof on the employer. In *Sheldrake v DPP* Lord Bingham of Cornhill said that the justifiability of any infringement of the presumption of any innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case. In para 30 he drew attention to the difference between the subject matter in *R v Lambert* on the one hand, where it was held that the imposition of a legal burden on the defendant undermined the presumption of innocence, and *R v Johnstone* on the other, where it was held that there were compelling reasons why there should be a legal burden. In the former case, where section 28 of the Misuse of Drugs Act 1971 was in issue, a defendant might be entirely ignorant of what he was carrying. In the latter, offences under section 92 of the Trade Marks Act 1994 are committed by dealers, traders and market operators who could reasonably be expected to exercise some care about the provenance of goods in which they deal. It seems to me that the situation in which the reverse burden imposed by section 40 arises is analogous to that in *R v Johnstone*. Sections 2 and 3 impose duties on employers who may reasonably be expected to accept the general principles on which those sections are based and to have the means of fulfilling that responsibility.

See *Blackstone's Criminal Practice: A5.17 and F3.13*

LEGISLATION

Misuse of Drugs Act 1971 (Amendment) Order (SI 2008 No. 3130)

This Order re-classifies cannabis, cannabis resin, cannabinol and its derivatives from Class C drugs to Class B drugs with effect from 26 January 2009. In addition, any substance which is an ester or ether of cannabinol or of a cannabinol derivative is so re-classified.

Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Code A) (No. 2) Order 2008 (SI 2008 No. 3146)

This Order brings into operation on 1 January 2009 a revision of paragraph 4 of Code A. It also brings into operation the clarification in paragraphs 2.2 and 2.3 of Code A regarding reasonable suspicion not being based on single factors alone. Paragraphs 4.10A and 4.10B of PACE Code A are also amended to clarify the

position on providing receipts for stops and searches. The revision of paragraph 4 (recording requirements including recording of encounters not governed by statutory powers), together with the consequential deletion of Annexes D and E, will mean that constables will no longer be required to record all encounters not governed by statutory powers. Constables will need to record only information on the ethnicity of a person who is the subject of such an encounter. A receipt will also be made available to the person.

Road Safety Act 2006 (Commencement No. 5) Order 2008 (SI 2008 No. 3164)

This Order brings into force the following provisions of the Act:

- on 5 January 2009, s. 3 (graduated fixed penalties), s. 11 (financial penalty deposits) and sch. 4 (prohibition on driving: immobilisation, removal and disposal of vehicles), s. 12 (prohibition on driving:

immobilisation, removal and disposal of vehicles) and sch. 7, para. 1 (repeal of the DVCVA 2004, s. 16(2));

- on 31 March 2009, s. 4 (graduated fixed penalty points), s. 5 and sch. 1 (giving of fixed penalty points by vehicle examiners), s. 6 (goods vehicle operator licensing), s. 7 (public passenger vehicle operator licensing) and sch. 7, para. 2 (repeals relating to fixed penalty notices by vehicle examiners);
- on 1 April 2009, s. 8 (driving record), s. 9 (unlicensed and foreign drivers) and sch. 2 (endorsement: unlicensed and foreign drivers) and sch. 7, para. 3 (repeals relating to the endorsement of unlicensed and foreign drivers).

Criminal Justice and Immigration Act 2008 (Commencement No. 5) Order 2008 (SI 2008 No. 3260)

This Order brings into force the following provisions of the Act:

- on 19 December 2008, s. 49 and sch. 10 (protection for spent cautions under Rehabilitation of Offenders Act 1974), s. 50 (criminal conviction certificates and criminal record certificates) and sch. 27, paras. 19 and 20 (consequential amendments of the 1974 Act);
- on 1 January 2009, but in relation to English NHS premises only, s. 119(4) (offence of causing nuisance or disturbance on NHS premises), s. 120(5) and (6) (power to remove person causing nuisance or disturbance) and s. 121(1) to (3), (5) and (6) (guidance on the power to remove etc.).

Criminal Procedure (Amendment No. 2) Rules 2008 (SI 2008 No. 3269)

These Rules amend the CrimPR with effect from 6 April 2009 *inter alia* as follows:

- Part 19 is amended to give legislative effect to the well established court practice of requiring prosecutors (with the police) to investigate the suitability of an address proposed as a condition of residence when a defendant is released on bail. The prosecutor is placed under an obligation to assist the court and a defendant who may be released under such a condition is required to co-operate with the prosecutor in providing the court with such assistance. The requirement to give notice of an intention to apply

for variation of bail conditions (which already applies in the Crown Court) is extended to magistrates' courts.

- Part 21 is substituted - the new part 21 (initial details of prosecution case) revises and simplifies the rules about the early provision of details of the prosecution case. The new part 21 applies from 6 April unless the court otherwise directs; if it does so direct, the old part 21 continues to apply (rr. 2.1(12) and 21.1).
- A new part 37 (trial and sentence in a magistrates' court) is to apply in substitution for the existing part 37 (summary trial) and part 38 (trial of children and young persons). It consolidates, revises and simplifies the rules about procedure at trial in magistrates' courts, including youth courts.
- Part 44 (breach, revocation and amendment of community and other orders in a magistrates' court) substitutes for the existing part 44 (sentencing children and young persons). The rules about trial and sentence procedure in magistrates' courts now are all contained in the new part 37, so the new part 44 rules deal only with the procedures relating to community and other orders to which some of the old part 38 and part 44 rules applied.

A consolidated version of the rules is available on the *Blackstone's Criminal Practice Companion Website* at <<http://www.oup.com/uk/blackstones/criminal>>

Counter-Terrorism Act 2008 (Commencement No. 1) Order 2008 (SI 2008 No. 3296)

This Order brings ss. 19 to 21 of and sch. 1 to the Act into force on 24 December 2008. These provisions deal with disclosure of information and the intelligence services.

Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2009 (SI 2009 No. 83)

This Order amends the principal Order of 2002 (SI 2002 No. 1837) and revokes the (Amendment) Order of 2005 (SI 2005 No. 581) (and the (Amendment) Order of 2008 (SI 2008 No. 3297), which never came into force). It provides a new list of offences (as sch. 1 to the 2002 Order) attracting a fixed penalty of £80 for persons aged 16 or over and £40 for persons aged under 16 and a further list of offences (as sch. 2 to the 2002 Order) attracting a fixed penalty of £50 for persons aged 16 or over and £30 for persons under 16.

Safeguarding Vulnerable Groups Act 2006 (Commencement No. 3) Order 2009 (SI 2009 No. 39)

This Order brings into force, on 20 January 2009, provisions of the Act relating to the maintenance of a children's barred list and an adults' barred list and the process by which a person may be included in, or removed from, either list. Among the provisions brought into force is sch. 3, para. 25, which requires a court which has convicted a person of an offence of a specified kind or made an order of a specified kind to inform the person before the court that he will be included in the children's barred list or the adult's barred list (as applicable). Inclusion on such a list is an automatic consequence of a relevant conviction or the making of a relevant order not an order of the court *per se*.

Counter-Terrorism Act 2008 (Commencement No. 2) Order 2009 (SI 2009 No. 58)

This Order brings the following provisions of the Act into force on 16 February 2009:

- s. 29 (consent to prosecution of offence committed outside UK);
- s. 74 (inquiries: intercept evidence);
- s. 75 (amendment of definition of 'terrorism' etc.);

- s. 76 (offences relating to information about members of armed forces etc), together with sch. 8 (offences relating to information about members of armed forces etc: supplementary provisions);
- s. 77 (terrorist property: disclosure of information about possible offences);
- ss. 78 to 81 (control orders);
- s. 82 (pre-charge detention: minor amendments);
- ss. 83 and 84 (forfeiture of terrorist cash);
- related repeals in sch. 9.

Criminal Justice and Immigration Act 2008 (Commencement No. 6 and Transitional Provisions) Order 2009 (SI 2009 No. 140)

This Order brings the following provisions of the Act into force on 1 February 2009:

- s. 48 (1)(a) (the giving of youth conditional cautions) and sch. 9, paras. 1, 3 and 4 but para 3 is in force only to the extent that it inserts ss. 66G and 66H of the Crime and Disorder Act 1998;
- s. 123 (review of anti-social behaviour orders etc.);
- s. 124 (individual support orders);
- sch. 27, paras. 33 and 34 (transitory, transitional and saving provisions).

COMMENT AND ANALYSIS

Fearful Witnesses—The impact of the decisions in *Mayers* and *Al-Khawaja*

It has long been recognised that there is the potential for conflict between the right of an accused to a fair and public trial in which he may examine the witnesses against him (Article 6 of the ECHR), and the rights of those witnesses, such as the right to life (Article 2). Such conflict arises where the court is seeking to protect the safety of a witness, whilst affording the accused the right to challenge their evidence. This conflict is illustrated by the decision of the Court of Appeal in *Mayers* [2008] EWCA Crim 1418 in relation to anonymous witnesses and the decision of the European Court of Human Rights in *Al-Khawaja and Tahery v UK* [2009] ECHR 110, in relation to the reading of witness statements.

Anonymity: Context

In *Davis* [2006] 1 WLR 3130, the Court of Appeal held that measures could be taken to afford witnesses anonymity. Three of the appellants in *Mayers* were challenging anonymity orders which had been granted on the basis of that decision. However, in *Davis* [2008] 3 WLR 125 the House of Lords concluded that there is no common-law power to permit the prosecution to call a witness whose identity has not been revealed to the accused. This decision raised important questions not only as to the measures of protection which the court could grant to witnesses in future proceedings, but also as to the safety of convictions where anonymous witnesses had been called.

The Criminal Evidence (Witness Anonymity) Act 2008 addressed future proceedings through a new procedure for the making of witness anonymity orders. Completed cases in which anonymous witnesses had

been called were addressed by s. 11(2). Pursuant to this, a conviction was not to be rendered unsafe solely because an anonymity order had been made. Rather, an assessment was necessary of whether the anonymity order would have been granted under the provisions of the 2008 Act.

Those appellants in *Mayers* who had been convicted before the coming into force of the Act engaged s.11(2). The remaining appellants were seeking to challenge anonymity orders made under the 2008 Act by way of interlocutory appeal. It is of note that in C [2008] EWCA Crim 3228 the Court of Appeal has now stressed that anonymity orders should not be made the subject of such interlocutory appeals.

The Approach in *Mayers*: Procedural Issues

The Court's starting point (expressed at [5]-[7]) was that Parliament had not sought to remove the general right of the accused to know the identity of his accuser. Rather:

The Act must be taken to reflect Parliament's view of how best to address the countervailing interests which arise in every criminal trial, those of the defendant, the witnesses and victims, as well as the public interest in a fair trial process which protects the interests of both ...

That balance was well illustrated by the rejection of the argument that anonymity should be granted only where witness relocation was not an option. Such relocation would only be an option in 'the rarest of circumstances' (at [9]).

The Court described anonymity (at [8]) as 'the special measure of last practicable resort'. This opinion, according with the balance of rights that Parliament was seeking to achieve, is at odds with the statistical picture provided to Parliament by the former DPP. He indicated that between July and December 2007 the police had sought anonymity orders for 346 witnesses and applications had actually been made by the prosecution in 135 of those 346 cases, of which 129 applications were granted.

The Court in *Mayers* placed great reliance on the burden placed on both the prosecution and the court to ensure both that an anonymity order is the only realistic option, and that such an order will not result in unfairness to the accused. In this regard, the prosecution's disclosure obligations in relation to an anonymous witness must 'go much further than the ordinary duties of disclosure' (at [10]), and must be 'complete' and 'full and frank' (at [12]). Moreover, if the court has

any reservations as to the sufficiency of the prosecution's disclosure, it should refuse that application (at [10]).

The court is required to monitor the effect of any anonymity order on the fairness of the proceedings. This may involve a review of any order at the close of the prosecution case and at the close of the evidence (at [13]). This is particularly important where the court's initial assessment of anonymity was informed by limited detail of the defence case. In this context, the court emphasised that 'the defence statement provides the benchmark against which the disclosure process must be examined' (at [21]).

The monitoring of fairness continues after the conclusion of proceedings at first instance. At the appellant stage, the court should: 'stand back and make its own objective assessment whether the trial was fair, even if, at the time when the judge made the order, it was reasonable and appropriate' (at [14]).

The Approach in *Mayers*: the Criteria

Under s. 4 of the 2008 Act, an anonymity order can be granted only on the satisfaction of three pre-conditions. It was stressed that these pre-conditions are both distinct and mandatory (at [17]).

In reality, the starting point will almost always be the assessment of the interests of justice (condition C) (at [26]). Applying condition A, the consideration is of the necessity of the measure. The oral evidence of the witness must be important, and the threat to his safety must be real — reluctance to give evidence is insufficient (at [26]-[27]). That said, the threat to the witness need not come from the accused (at [29]). A different form of necessity, which the Court recognised was equally valid, was the protection of witnesses such as undercover officers and agents of the Security Services. Anonymity orders for such witnesses were found to be wholly appropriate, unless peculiar circumstances of the particular case mitigated to the contrary (at [30]-[35]).

Section 5 identifies considerations to which the court should have regard in assessing whether those conditions are met. In *Mayers* it was emphasised that the list was not exhaustive, and that no one consideration outweighed the others (at [19]). Relevant factors include what support there was for the evidence of a potentially anonymous witness (though such support is not a pre-requisite), the credibility of that evidence, and the nature of the defence case. The court underlined the

importance of a case-by-case assessment of applications, as there will inevitably be a difference between an application for an independent and credible member of the public and for a criminal associate of the accused (at [22]).

This equal balancing of the s. 5 considerations is significant because the list includes both the right of an accused to confront his accuser (s. 5(2)(a)) and whether the evidence given by the witness might be the sole or decisive evidence implicating the defendant (s. 5(2)(c)). In the House of Lords in *Davis*, the focus of consideration was cases where the anonymous evidence was the sole or decisive evidence. However, it is now clear (from *Mayers* at [23]) that neither this aspect of the accused's rights, nor the status of the evidence is necessarily determinative of an application.

In reality, anonymity is less likely to be granted to an unsupported witness, but this will be determined on the facts of the particular case, rather than through a prohibition of principle. Equally, the Court of Appeal recognised that there would be cases where the support for one anonymous witness might be provided by another anonymous witness. In such circumstances, the court should be alive to the nature of any link between those witnesses (at [25]).

Al-Khawaja

The matter in issue in the decision of the European Court of Human Rights in *Al-Khawaja and Tahery* was not oral testimony of anonymous witnesses but evidence that was adduced in writing, without the opportunity for oral challenge. In the case of *Al-Khawaja* the author of the statement had since died, and the evidence was admitted under s. 23 of the CJA 1998, which has since been replaced by s. 116 of the CJA 2003; in the case of *Tahery* the witness was too fearful to attend, and the evidence was admitted pursuant to s. 116(2)(e) of the CJA 2003. The evidence represented the decisive evidence against the accused in each case.

The Strasbourg Court had previously concluded in *Luca v Italy* (2001) 36 EHRR 807 that it was incompatible with the ECHR, Article 6 for an accused to be

convicted solely or decisively on evidence which he could not examine. However, the Court of Appeal had since considered this decision in *Sellick* [2005] EWCA Crim 651 and concluded such incompatibility did not arise where the witness in question was kept away by fear.

The Strasbourg Court identified the principle to be applied, as set out in Article 6(3)(d), was that 'the accused had to be given a proper and adequate opportunity to challenge and question a witness against him' (at [34]). The inability of an accused to make such challenge, for whatever reason, represented a breach of the article (at [36]). It is of note, however, that this conclusion did not represent a complete rejection of the approach in *Sellick*. The Court recognised that a special situation might arise where the witness had been intimidated into non-attendance by the accused. However, 'in the absence of such special circumstances, the Court doubts whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant.' (at [37]).

It has been suggested elsewhere that this decision has a bearing on anonymous witnesses. However, the crucial difference between read evidence and anonymous evidence is that in the former situation, the accused cannot challenge the witness at all. This distinction was recognised by the European Court (at [37]):

While it is true that the Court has often examined whether the procedures followed in the domestic courts were such as to counterbalance the difficulties caused to the defence, this has been principally in cases of anonymous witnesses whose evidence has not been regarded as decisive and who have been subjected to an examination in some form or other.

It follows, therefore, that *Al-Khawaja* represents a useful analysis of the interaction of Article 6 to decisive evidence against an accused and his opportunity to challenge it. But, as was stressed in *Mayers*, the status of such evidence is only one consideration relevant to anonymity applications. It is certainly not the sole or decisive one.

Duncan Atkinson
6 King's Bench Walk

Problems with the Hearsay Rule

The CJA 2003 was supposed to simplify, clarify and rationalize the rule against hearsay, just as it was supposed to simplify, clarify and rationalize the rules governing evidence of bad character. But it seems that one set of complexities has been exchanged for another, and the new complexities include many that the courts have yet to understand or master.

The new statutory definition of hearsay is a case in point. It was meant to clarify the law, but appears only to have caused confusion. In *West Midlands Probation Board v French* [2008] EWHC 2631 (Admin), F was charged with breaching the terms of the licence on which he had been released from an earlier prison sentence and, in order to prove those terms (and prove that they had been shown to and agreed upon by F), the Board adduced a photocopy of the licence itself, which recited the terms and bore the signatures of F and of the prison governor.

The Board, the trial court and the High Court all assumed or concluded that this document was hearsay, if used to prove those matters, and that its admissibility was subject to the constraints of the CJA and the notice requirements of the CrimPR, part 34. But why? It would surely not have occurred to anyone to treat such a document as hearsay at common law. Nor would any civil court suggest that a signed contract (or a photocopy thereof) constitutes hearsay evidence of its own terms, and yet the licence in *French* resembled a signed contract in many respects. Something here appears to have gone wrong.

The CJA 2003, s. 114, provides that a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if, at least one of the conditions in paras (a) to (d) of that section is satisfied. By s. 115(1), a statement is defined as 'any representation of fact or opinion made by a person by whatever means' and by s. 115(3) a 'matter stated' is one to which the rules governing hearsay apply:

if and only if the purpose, or one of the purposes, of the person making the statement appears to the court to have been –

- (a) to cause another person to believe the matter, or
- (b) to cause another person to act, or a machine to operate, on the basis that the matter is as stated.

But hearsay is essentially second-hand evidence and when s. 114 refers to statements being 'evidence of any matter stated' it must surely mean 'evidence of the *truth* of any matter stated'. In *French* the terms of the licence were the original source and basis of F's

obligations. Moreover, his signature on the licence document was the clearest possible evidence that he had seen and agreed to those terms. There was no way in which the hearsay rule could properly have inhibited the prosecution from relying on the signature to prove that he had seen and signed the document.

One must hope that the ruling in *French* was merely a hiccup and that later cases will properly distinguish between hearsay and original evidence. But even if they do so, problems will continue to arise where the prosecution seek to rely substantially on the statements of absent or deceased witnesses whose evidence the defence have had no real opportunity to challenge. The CJA 2003 makes the admission of such evidence easier than it was before; but in *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 110 the European Court of Human Rights has re-asserted the view that reliance on such evidence will ordinarily infringe the accused's right to a fair trial, at least where that evidence is decisive to the outcome of one or more of the charges against him:

Whatever the reason for the defendant's inability to examine a witness, whether absence, anonymity or both, the starting point for the Court's assessment of whether there is a breach of Article 6(1) and (3)(d) is set out in *Lucà v Italy* (2003) 36 EHRR 807 ...

If the defendant has been given an adequate and proper opportunity to challenge the depositions either when made or at a later stage, their admission in evidence will not in itself contravene Article 6. The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.

The Court of Appeal in *Al-Khawaja* [2006] 1 WLR 1078 had previously ruled that D's right to a fair trial was not infringed where two of his patients complained of indecent assaults allegedly committed on them in the course of hypnotherapy and the statement of one of them (referred to as 'ST') was admitted in evidence following her suicide. Two other women gave supporting evidence and there was no suggestion of collusion. Given that D was able to attack ST's statement on grounds of inconsistency with other evidence and by employing expert evidence in relation to the altered mental state brought about by hypnosis, and given that the trial judge had warned the jury of the risks of acting on untested hearsay, the Court of Appeal held that D's rights under Article 6 of the ECHR were not infringed; but according to the Strasbourg Court

this was not enough to compensate for the difficulties that the admission of this evidence created for the defence:

While it was certainly open to the defence to attempt to challenge the credibility of ST, it is difficult to see on what basis they could have done so, particularly as her account corresponded in large part with that of the other complainant, with whom the trial judge found that there was no evidence of collusion. The absence of collusion may be a factor in domestic law in favour of admissibility but in the present case it cannot be regarded as a counterbalancing factor for the purposes of Article 6(1) read with Article 6(3)(d). The absence of collusion does not alter the Court's conclusion that the content of the statement, once admitted, was evidence on count one that the applicant could not effectively challenge. As to the judge's warning to the jury, this was found by the Court of Appeal to be deficient. Even if it were not so, the Court is not persuaded that any more appropriate

direction could effectively counterbalance the effect of an untested statement which was the only evidence against the applicant.

The Strasbourg Court was however prepared to distinguish cases such as *Sellick* [2005] EWCA Crim 651, in which witnesses are absent because they have been intimidated by the defendant or by persons acting on his behalf. In such cases, or in a case such as *Sadiq* [2009] All ER (D) 93 (Jan) (in which the witness in question had been cross-examined at a previous trial at which the jury failed to agree), it seems that a prosecution case may still be based on hearsay, without thereby depriving the accused of a fair trial.

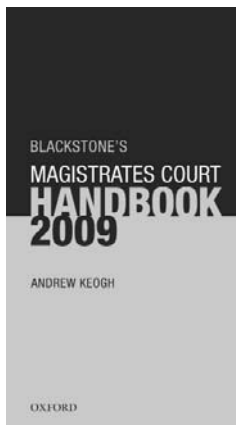
Michael Hirst, LLB, LLM
Professor of Criminal Justice
Leicester De Montfort Law School

Issue 3, April 2009

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

PUBLISHING NEWS

AVAILABLE NOW



Blackstone's Magistrates' Court Handbook 2009

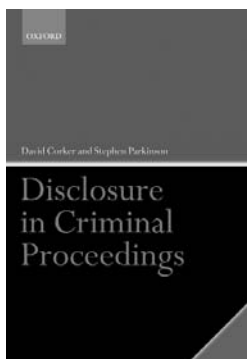
Andrew Keogh, Solicitor

This book provides the magistrates' criminal court advocate with key procedural, evidential, offence and sentencing information. Concentrating on those offences most likely to be experienced at court by an advocate servicing legal aid work, it includes major summary and either-way offences. It also contains detailed coverage of the increasingly complex sentencing regime including the new Magistrates' Court Sentencing Guidelines, and considers the impact of the Criminal Justice and Immigration Act 2008. Presented in a portable and easy-to-use format, the layout facilitates quick reading and decision making.

448 pages, 978-0-19-954484-4, Flexicover, £39.95

Feb 2009

AVAILABLE NOW



Disclosure in Criminal Proceedings

David Corker, Partner, Corker Binings Solicitors

Stephen Parkinson, Head of Criminal Department,
Kingsley Napley

Disclosure issues affect every stage of the criminal investigation and subsequent proceedings, yet this book is the only comprehensive and in-depth volume on the subject. It provides the practitioner with a detailed analysis, following chronologically the progress of a case from the outset of an investigation until its conclusion, addressing the obligations and responsibilities of each of the parties as they arise.

456 pages, 978-0-19-921134-0, Paperback, £55.00

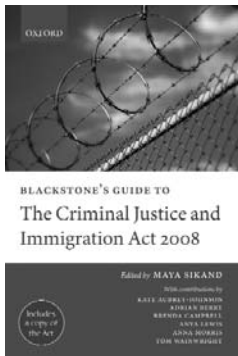
Jan 2009

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 3, April 2009

PUBLISHING NEWS

AVAILABLE NOW



Blackstone's Guide to the Criminal Justice and Immigration Act 2008

Edited by **Maya Sikand**, Barrister, Garden Court Chambers

The Criminal Justice and Immigration Act received Royal Assent in May 2008 and contains a wide-ranging set of provisions intended to radically reform the criminal justice system. This new *Blackstone's Guide* combines the full text of the Act with expert narrative from a team of practitioners at Garden Court Chambers. It provides detailed and practical commentary on the effect of the legislation in a straightforward layout, enabling ease of use as a reference source.

456 pages, 978-0-19-955382-2, Paperback, £39.95

Jan 2009

Blackstone's Criminal Practice Bulletin

Published by Oxford University Press, Great Clarendon Street, Oxford OX2 6DP
Customer services: (01536) 741 727, law.uk@oup.com
Printed by: Ashford Colour Press Ltd, Gosport, Hampshire

OXFORD
UNIVERSITY PRESS