

# BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to *Blackstone's Criminal Practice Bulletin*. The Bulletin is a quarterly newsletter designed to alert practitioners to key developments in criminal law and sentencing, and to place these changes in the context of the main work. **They can be downloaded free of charge from <<http://www.oup.com/blackstones/criminal>>.**

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## CASE DIGEST—IN BRIEF

### CRIMINAL LAW—WITHDRAWAL

#### Mitchell

[2008] EWCA Crim 2552

*O'Flaherty* [2004] 2 Cr App R 315 was applied in this case, in upholding a conviction for murder. The Court of Appeal took the view that there was ample evidence on which to find that the accused had played the leading role in starting the serious violence and, by her continued presence, had clearly not withdrawn from it. Although there was a short lull in the violence whilst some of those involved went for weapons, whether there was one enterprise or two was not the central issue and was in any event addressed by considering the scope of the enterprise she had joined and deciding whether that enterprise had come to an end by the time of the fatal acts.

The Court of Appeal also made some pointed observa-

tions about the complexity of the current law on joint venture and the lengths to which it requires trial judges to go in summing up. Thomas LJ said:

The Law Commission has in its reports on *Homicide* (2006) and *Participating in Crime* (2007) set out proposals for reform of the law; this is currently being considered by Ministers. Pending any change which it is to be hoped would set out clear and simple principles easy for a jury to apply, we venture

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to suggest that consideration should be given to giving directions in much simpler form and that the higher courts should approve a simpler approach. The concept of joint enterprise is in the ultimate analysis based on a concept that should in most cases be susceptible to explanation to a jury in short order without a judge being justifiably concerned that, unless the law is explained in detail the higher courts will overturn the verdict.

See *Blackstone's Criminal Practice*: A5.14

## CRIMINAL LAW—BURDEN OF PROOF AND HUMAN RIGHTS

### Grayson v UK

[2008] The Times, 2 October 2008

The European Court of Human Rights rejected the contention of each applicant that, in confiscation proceedings brought under the Drug Trafficking Act 1994, the fact that the legal burden of proof was on the defendant to show that he did not have 'realisable assets' equivalent to the 'benefit figure', was in breach of Article 6 of the ECHR and Article 1 of Protocol No. 1. The Court held (at [49]) that it was not incompatible with 'the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation'. Whether there is a distinction to be drawn between cases in which property has been shown to have been 'received' by a defendant (Drug Trafficking Offences Act 1986 and the Drug Trafficking Act 1994) and cases in which the defendant 'obtained property' (CJA 1988 and PCA 2002) remains to be seen.

See *Blackstone's Criminal Practice*: A7.71 and E19.3

## OFFENCES—CHILD CRUELTY

### D

[2008] EWCA Crim 2360

It was confirmed by the Court of Appeal that the adverb 'wilfully' must indeed bear the same meaning wherever it is used in the Children and Young Persons Act 1933, s. 1. The Court could 'see no good reason for supposing that Parliament intended its meaning to vary according to which verb it governs'. *Sheppard* [1981] AC 394 and *W (Emma)* [2006] EWCA Crim 2723 were considered.

See *Blackstone's Criminal Practice*: B2.123

## OFFENCES—RAPE

### Doody

[2008] EWCA Crim 2394

The Court of Appeal considered the extent of permissible judicial comment as to why a complainant might not make an immediate complaint. The accused had been convicted of six rapes of his partner. In respect of the most serious allegation, the victim had not reported it to police officers who attended her home on the same evening that it had taken place. When summing-up, the trial judge gave a lengthy description of a number of reasons why an immediate complaint might not be made. The Court observed that a judge is entitled to make comments as to the way evidence is to be approached. That is particularly so in an area where there is a danger that a jury might come to an unjustified conclusion without an appropriate warning. Such comment is to ensure fairness to the complainant. But such comment must be uncontroversial. The fact that the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint is sufficiently well known to justify a comment to that effect.

See *Blackstone's Criminal Practice*: B3.21

## OFFENCES—TRADE MARKS ACT 1994

### Boulter

[2008] EWCA Crim 2375

The accused argued that the pirated DVDs, CDs and counterfeit goods found in his possession were of such poor quality that no one could think that their trade origins were those of the trade mark owners. Accordingly, it was argued, the use of false trade marks was unlikely to jeopardise the guarantee of origin which constituted the essential function of the rights owned by the trade mark owners. *Johnstone* [2003] 1 WLR 1736 and the civil case of *Arsenal Football Club plc v Reed* [2003] 3 All ER 865 were considered. The argument was (not surprisingly) rejected. As the court explained:

In the present case, it is not and could not seriously be suggested that the use of the EMI logo or other logos was anything other than a replication of those badges as signs of origin registered by the proprietors. It had no other rational purpose. Whether the reproductions were poor and whether they were actually likely to deceive is in our judgment neither here nor there.

See *Blackstone's Criminal Practice*: B6.94

**OFFENCES—ILLEGAL ENTRY AND DECEPTION****Hasan**

[2008] All ER (D) 116 (Nov)

Having considered *Makuwa* [2006] EWCA Crim 175 and *Asfaw* [2008] 2 WLR 1178 the Court of Appeal held that the phrase 'as soon as was reasonably practicable', when used in the Immigration and Asylum Act 1999 s. 31(1)(c), does not mean 'at the earliest possible moment'. Where an aircraft carrying a refugee who is using false documents lands briefly in some other safe country, that does not necessarily preclude him from seeking asylum when his flight eventually reaches the UK.

The court held it to be clear from *Makuwa* that once there is credible evidence that the accused is a refugee the burden of proof is on the prosecution to prove the contrary; but in relation to the other matters which must be established under s. 31(1) the burden of proof is on the defendant. The usual standard of proof for defendants then applies. It was meanwhile considered clear from *Asfaw* that ss. 31(1) and (2) must be construed generously in accordance with the 1951 Refugee Convention.

**See Blackstone's Criminal Practice: B22.6**

**PROCEDURE—OPEN JUSTICE****Re Times Newspapers Ltd**

[2008] EWCA Crim 2396

Latham LJ (at [12]) said that 'It is clearly an important aspect of open justice that defendants' names should be made public ... But there is no doubt that a court may, in appropriate circumstances, order that the identity of a defendant can be protected from publicity by withholding his or her name'. His lordship went on to note that the Contempt of Court Act 1981, s. 11, does not, of itself, give any such power. His lordship observed (at [16]) that, at common law, there is 'no authority for the proposition that anonymity can be ordered for any purpose which is not connected to, or does not have an effect on, the administration of justice, or is not provided for in any statutory exception'. It followed that, in order for the court to be entitled to make any order for anonymity, it must be satisfied either 'that the administration of justice would be seriously affected' were anonymity not to be granted, or that there is a 'real and

immediate' risk to the life of any of the accused were anonymity to be refused (at [17]).

**See Blackstone's Criminal Practice: D3.78**

**PROCEDURE—BAIL CONDITIONS****R (Gangar) v Leicester Crown Court**

[2008] All ER (D) 112 (Oct)

The accused had been sentenced to five months' imprisonment for breach of a bail condition. Before the Divisional Court, it was common ground that the Bail Act 1976 does not empower a court to punish a person for breach of a bail condition, still less to impose a custodial sentence for such a breach. The sentence passed was therefore unlawful and would be quashed.

**See Blackstone's Criminal Practice: D7.78**

**PROCEDURE—REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION****Rowe**

[2008] EWCA Crim 2712

The conflict between *R (Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission* [2007] 1 Cr App R 395 and *Cottrell* [2007] 1 WLR 3262 was noted once again in this case, where Judge CJ emphasised that it is not open to the CCRC to choose between these two authorities when deciding whether to refer a case to the Court of Appeal. In this context *Cottrell* is authoritative and must be followed.

**See Blackstone's Criminal Practice: D27.1**

**EVIDENCE—HEARSAY****West Midlands Probation Board v French**

[2008] EWHC 2631 (Admin)

It was held that, where a prisoner had been released on licence, the licence or notice (which set out the terms and conditions of release and which was signed by the prisoner and the prison governor) was hearsay in consequence of the Criminal Justice Act 2003, s. 115(3), the purpose of the maker being to cause the prisoner and others to believe the statements in the licence and to act accordingly.

The court went on to hold that the licence was an admissible document despite being hearsay, but with

respect it is doubtful whether it was hearsay at all. The purpose of the licence or notice was to set out the terms on which the prisoner was to be set at liberty. On that basis it provided original and not hearsay evidence of those terms. As the court said (at [32]) the notice had been produced to prove three things:

- (i) that a Licence had been granted to French . . . ;
- (ii) that the Licence contained conditions, as set out in the Licence, which included the condition that he must keep appointments with the probation service as arranged; and
- (iii) that French had counter-signed the Licence, thereby acknowledging that he had been given it and that the requirements had been explained to him.

Even if one were to view the notice as a mere memorandum of the terms of release, rather than as the formal source of those terms, the presence of the prisoner's undisputed signature on the document could not be regarded as anything other than original evidence of the fact he had been given it and had signed it.

**See *Blackstone's Criminal Practice*: F15.12**

## SENTENCING

### Sexual Assault

**Larcombe** [2008] EWCA Crim 2310

The Court of Appeal gave some helpful reminders and explanation as to the way in which the SGC Guideline is to be used when dealing with sexual offences. The Court sentencing emphasised that the tables in the Guideline are not to be considered in isolation and sentencers will be misled if they do not take into account the principles and explanation which apply to them.

**See *Blackstone's Criminal Practice*: B3.33**

### Cartel Offences

**Whittle** [2008] EWCA Crim 2560

This was the first reported case involving offences under the Enterprise Act 2002, s.188, by which it is an offence for an individual dishonestly to agree with one or more persons to make or implement, or to cause to be made or implemented, arrangements between two or more undertakings that are anti-competitive within the UK. By s. 190, the maximum penalty is imprisonment for five years or a fine or both.

The sentences imposed in this case were influenced by special circumstances and are not to be treated as guidelines, but on a more general level the court noted the following factors as likely to be relevant to any sentence passed for such an offence:

- the gravity and nature of the offence;
- the duration of the offence;
- the degree of culpability of the offender in implementing the cartel agreement;
- the degree of culpability of the offender in enforcing the cartel agreement;
- whether the offender's conduct was contrary to guidelines laid down in a company compliance manual;
- mitigating factors: e.g. any co-operation the offender may have provided in respect of the enquiry; whether or not the offender was compelled to participate in the cartel under duress; whether the offence was a first offence; and any personal circumstances which the courts may regard as a factor suggesting leniency.

### Perverting the Course of Justice

Three recent cases have examined sentencing issues in connection with such offences.

#### **Cameron** [2008] EWCA Crim 2493

The Court of Appeal quashed a 12-month custodial sentence imposed on a 20-year-old student of previous good character for attempting to influence (but not intimidate) a juror by asking a friend to send the juror a text message proclaiming the defendant's innocence. She had been naïve and had not initially realised the seriousness of her actions. After hearing the trial judge warn the jury against such approaches she had, in vain, attempted to prevent the text being sent and it had not in the end disrupted the trial. She was remorseful and had pleaded guilty at the first opportunity. The Court observed that a custodial sentence was inevitable, but given the exceptional circumstances it could have been shorter. A sentence of four months' detention was substituted, with the warning that it was 'not to be regarded as providing any sort of sentencing guideline'.

#### **McKenning** [2008] EWCA Crim 2301

In contrast to *Cameron*, the Court of Appeal in this case fully endorsed the sentence of two years' imprisonment imposed on a woman aged 22 who had accused an innocent man of rape. Her victim had been arrested and detained for over 27 hours. He had been on bail for a further three months and had been assaulted by her boyfriend. The court noted the impact on him and added that the allegation 'involves more than the individual victim. Every false allegation of rape increases the plight of those women who have been victims of this dreadful crime. It makes the offence harder to prove and, rightly concerned to avoid the conviction of an innocent man, a jury may find itself unable to be sufficiently sure to return a guilty verdict'.

#### **Sheehan-Dinler** [2008] EWCA Crim 1341

The Court of Appeal quashed a suspended sentence imposed on a disqualified motorcyclist who had repeatedly breached his disqualification whilst 'taking every step he could to ensure that he was not identified'. This included disguising his own appearance and constructing false identities to disguise his ownership of six different motorcycles. The court observed that:

Where a person is convicted of perverting the course of justice it will be only the most exceptional of cases that does not result in an immediate sentence of imprisonment. In the

present case, bearing in mind all the matters underlying the offences, and taking into account the pleas of guilty, we consider that the offender could not have expected less than 18 months' immediate imprisonment, subject to personal mitigation.

After allowing for personal mitigation, a sentence of six months' immediate imprisonment was substituted, in addition to 12 months' disqualification from driving.

**See *Blackstone's Criminal Practice*: B14.29**

### Contempt

#### **A-G v ITV Central Ltd** [2008] EWHC 1984 (Admin)

A fine of £25,000 was imposed against a broadcaster who revealed the antecedent history of a defendant awaiting trial for murder, resulting in an aborted trial.

**See *Blackstone's Criminal Practice*: B14.89**

### Mandatory Life Sentences

#### **Height** [2008] EWCA Crim 2500

A person who arranged and paid for his wife to be murdered should receive the same starting point as the person carrying out the killing. A judge was entitled to make a 'broad overall' judgment as to criminality. The principles laid down in *Height* were applied in *Herbert* [2008] EWCA Crim 2501 (judgment which was delivered by the court later the same day), a high-profile case involving defendants convicted of killing a young girl and inflicting GBH on her boyfriend which was widely reported at the time.

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

### Imprisonment or Detention for Public Protection

#### **Stannard** [2008] EWCA Crim 2789

Certain observations made by Rose LJ in *Lang* [2006] 1 WLR 2509 were considered and explained in this case, which concerned the sentencing of 'dangerous' offenders for offences committed both before and after 4 April 2005, when the Criminal Justice Act 2003, s. 225, was brought into force. Giving the judgment of the court, Lord Judge CJ condemned as incorrect the widely adopted practice of disregarding s. 225 and its related provisions in cases where offences committed before 4 April 2005 were more serious than those committed on or after that date. It may be appropriate to impose no separate penalty in respect of lesser

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offences committed before that date, but nothing that was said in *Lang* suggested that the statutory provisions relating to the post 4 April 2005 offences should or could be disapplied.

See *Blackstone's Criminal Practice: E4.5*

### Confiscation Orders

**Waller** [2008] EWCA Crim 2037

The issue in this case was whether a confiscation order should have included (as the value of D's benefit

from his criminal conduct) the value of the tobacco 'smuggled' as well as the evaded duty. The Court of Appeal answered that question in the affirmative, noting that neither in *Bakewell* [2006] EWCA Crim 2 nor *Homer* [2006] EWCA Crim 1559 (where the duty evaded was identified as the benefit that had accrued in those cases) 'was there any discussion about claims based on the value of the goods supplied as well as the duty evaded'.

See *Blackstone's Criminal Practice: E19.14*

## CASE DIGEST—IN DETAIL

**M (M)** [2008] EWCA Crim 1901

The Court of Appeal held that the Crown Court has jurisdiction to deal with contempt in the form of a breach of a restraint order imposed under the Proceeds of Crime Act 2002. Such cases fall within the Supreme Court Act 1981, s. 45(4) and are comparable to the jurisdiction exercised by judges of the High Court in civil cases when faced with breaches of freezing orders (formerly known as Mareva injunctions). The court rejected arguments that references to 'contempt' in s. 45(4) could only mean criminal contempt or that there was any particular significance in the fact that the Criminal Procedure Rules contain no specific rules to cover such cases. Prior to the introduction of those rules, there were many aspects of Crown Court work which were not dealt with under the old Crown Court Rules.

The Court also rejected the argument that cases involving breaches of restraint orders are unsuitable for determination by the summary procedure in the Crown Court. After considering and distinguishing *Balogh v St Albans Crown Court* [1975] QB 73 (where the judge had effectively been the prosecutor) and *DPP v Channel 4 Television Co* [1993] 2 All ER 517 at p. 520E (where there had arguably been an issue as to civil liberties of general importance) the court noted that the proceedings in this case had been instituted by the CPS and concluded:

We can see no reason why the contempt proceedings should not be tried by a single judge in the court whose restraint order the defendant is said to have breached, just as would occur in the case of a freezing injunction.

See *Blackstone's Criminal Practice: B14.75 and B14.76*

**Lavery** [2008] EWCA Crim 2499

In this case, the Court of Appeal was faced with two main questions:

First, how should the court approach offences to be taken into consideration that reveal offending of a substantially more serious nature than the offence or offences for which the defendant stands to be sentenced? Secondly, is the court entitled to take account of offences to be taken into consideration when assessing whether there is a significant risk to members of the public occasioned by the commission by the defendant of further specified offences under sections 225 and 226?

As to the first question, the court's answer was that:

There is no reason in principle why an offence to be taken into consideration and which is of a more serious nature than the index offence or offences should not result in a higher sentence than would otherwise have been the case, as the sentence will reflect the defendant's overall criminality.

A defendant should not however be invited to have an offence taken into consideration where it is more serious than the offences to which he pleads guilty and is likely to attract a higher penalty (CPS Code of Practice). As Judge CJ noted:

It will be open to a judge to refuse to take an offence into consideration if he forms the view that to do so would be to distort the sentencing exercise and to lead to an unjust result and that the public interest requires that the offence be charged. But it may be extremely difficult for a judge to decline to take offences into consideration when a defendant wants to wipe the slate clean. That underlines the importance of the prosecution following the relevant Code of Practice.

See *Blackstone's Criminal Practice: D19.52*

**Morgan; Bygrave** [2008] EWCA Crim 1323

The effect on a potential confiscation order of an offender paying or offering to pay compensation to his victim or victims, without waiting to be sued for it in civil proceedings was considered in this case. *Morgan* concerned the position in cases still governed by the Criminal Justice Act 1988; *Bygrave* concerned the position where the Proceeds of Crime Act 2002 applies. Neither piece of legislation appears to make any allowance for such payment. As Hughes LJ explained (at [15] to [16]):

If the defendant waits to be sued by the victim and the victim sues or indicates an intention to do so, section 71(1C) CJA 1988, or section 6(6) POCA 2002 as the case may be, creates a discretion in the court whether to make a confiscation order or not. It does not follow that the court will not make a confiscation order. At least if there appear to be benefits obtained from criminal conduct which go beyond the loss caused to the suing loser, it ought ordinarily to make an order. There may be other reasons why an order should be made in a particular case. But it would not necessarily be improper, if there were no benefit to the offender beyond the loss which will be recovered by civil action, for the judge to decline to make a confiscation order. And if an order is made in such a case, the Judge is not bound to make it for the full amount of benefit obtained, up to the defendant's realisable assets, but instead can make it for such sum as he thinks fit or just: see section 71(1C)(c) CJA 1988 or section 7(3) POCA 2002, as the case may be. Thus the order can be made for the amount of any excess benefit obtained by the defendant beyond that which is being removed by the loser's civil action, or by a compensation order made to relieve the loser from having to go through with that civil action. In that way the defendant can be made to disgorge all criminal benefit obtained, up to the amount of his assets, but need not be required to pay more than he has obtained.

If, however, instead of waiting to be sued, the defendant repays the loser before he comes to court, or indicates that he stands ready to repay immediately, there will probably be no actual or intended civil action by the loser. In that event, section 71(1C) CJA 1988, or section 6(6) POCA 2002, will not apply. That will mean two things. First, the making of a confiscation order is mandatory once the Crown asks for it. Second, the order which must be made can only be for the full sum of benefit obtained, up to the amount of the defendant's realisable/available assets. If the only benefit the defendant has obtained is the amount which he has repaid to the loser, this has the inevitable consequence that there must be a confiscation orders for the same sum again, so long as the defendant has assets to meet it. That means he pays up to double the benefit he has obtained from crime. And if there is excess benefit obtained beyond the sum due to the identified loser, there is no power in the court to tailor the confiscation order to that excess; rather the order must be for the whole benefit obtained.

The Court accepted that the law was indeed anomalous in this respect, and that it would be wrong to discourage offenders from making prompt and full restitution to their victims (see also *Farquhar* [2008] EWCA Crim 806), but held that injustice could be avoided without doing violence to the terms of the legislation.

There is an individual decision to be made by the Crown in each case whether to ask the court to apply the confiscation process. Similarly, it is open to the Crown to discontinue the confiscation proceedings at any stage. The court retains the jurisdiction to stay an application for confiscation, as any other criminal process, where it amounts to an abuse of the court's process. In the present context, that power exists where it would be oppressive to seek confiscation. See *Mahmood* [2005] EWCA Crim 2168 and *Hockey* [2007] EWCA Crim 1577. This may be appropriate where demonstrably (i) the defendant's crimes are limited to offences causing loss to one or more identifiable loser(s), (ii) his benefit is limited to those crimes, (iii) the loser has neither brought nor intends any civil proceedings to recover the loss, but (iv) the defendant either has repaid the loser, or stands ready, willing and able immediately to repay him the full amount of the loss. It does not follow that a confiscation order is always unfair or oppressive just because it may result in the offender paying out more than his actual profit or share of the profit.

In cases where no payment has yet been made, justice may best be achieved by making a confiscation order coupled with an order under the Proceeds of Crime Act 2000, s. 13(6) for the offender's victims to be paid their compensation out of that order. In *Bygrave* that was the solution adopted by the Court of Appeal.

**See *Blackstone's Criminal Practice*: E19.7 and E19.29**

**Allen** [2008] EWCA Crim 2535

The appellant was convicted on strong evidence (including DNA tests performed on a hydatiform mole resulting from a faulty conception) of the repeated rape of his stepdaughter when she was aged between 11 and 15. Pre-sentence reports indicated that he would pose a continued risk to female children living in the same household. He was sentenced to 15 years' imprisonment and a sexual offences prevention order (SOPO) was imposed by which he was:

Firstly, not to reside in any household with a child under the age of 18 years of age. Secondly, not to be alone with or not to have any contact with any child under the age of 18 years,

except in the presence of that child's parents or guardian who must be aware of your sexual conviction, save in the course of normal situations where contact is contingent upon normally daily activities; and thirdly, not to engage in the work, employment or other such activity with a child or young person who you responsibly believe to be under the age of 18 years, either on a professional or voluntary basis or to apply [for] any such work, employment or any such activity.

The Court of Appeal accepted the need for a SOPO. The criteria for the assessment of dangerousness pursuant to s. 229 of the Criminal Justice Act 2003 were not the same as the test for imposing a SOPO. The former required that there was a 'serious risk of harm to the public', whilst in the case of the latter, there was a lesser but mandatory requirement of 'necessity' for the purpose of protecting the public from serious harm. A general risk to young females was properly to be marked by the imposition of a SOPO and it was 'necessary' for that purpose.

Nevertheless, the SOPO imposed was unnecessarily wide. There was no need for it to limit his contact with male children or (in the circumstances of this particular case) with his own natural children. The terms of the SOPO would be varied accordingly.

**See *Blackstone's Criminal Practice*: E21.12**

### **R (Saunders) v Independent Police Complaints Commission [2008] EWHC 2372 (Admin)**

*Bass* [1953] 1 QB 681 and *Skinner* (1994) 99 Cr App R 212 were considered in this case, where one of the issues was whether the Independent Police Complaints Commission (IPCC) should have issued directions to prevent any conferring or collaboration between police officers who had been involved in a fatal shooting incident, particularly in connection with production of the officers' initial accounts. It was

submitted that this failure constituted a violation of the ECHR, Article 2, in respect of the right to an adequate investigation into the death of any person at the hands of 'state agents'. Underhill J noted the real dangers of both collusion and innocent contamination inherent in such collaboration, but continued:

It does not follow from the acknowledgment of the risks inherent in the practice of permitting officers to confer, and in particular to collaborate in writing up their notes, that there should be a general prohibition on the practice; and in any event the latter practice has, as I have shown, the endorsement of the Court of Appeal. A ban on 'mere' conferring not only would be difficult to enforce in practice but would in many cases have serious operational disadvantages: prompt exchange of information between officers in the immediate aftermath of an incident is often essential. That objection might not apply to collaboration in the production of notes; but, as already observed, there are advantages as well as disadvantages in officers pooling their recollections, and the theoretically optimal practice of their doing so only after they have produced an uncontaminated first account may be both cumbersome in practice and of limited real value (particularly in a case where there has already been a degree of conferring in the immediate aftermath of the incident).

The latest ACPO guidance reminds officers to include in their notes only their own recollection of events and requires officers to state with some specificity when notes had been written up together.

There may be an argument for applying tighter restrictions to cases involving (for example) fatal shootings by officers, and in some cases failure to prevent it might undermine the fairness of a subsequent investigation, but Underhill J was not prepared to say in this case that the mere fact that there had been collaboration in the production of witness statements meant that a breach of Article 2 had been established.

**See *Blackstone's Criminal Practice*: F6.13**

## LEGISLATION

**Counter-Terrorism Act 2008**

This Act received Royal Assent on 26 November 2008. Most of the Act is to be brought into force by order but Parts 5 and 6 are in force from 27 November. The Act consists of eight parts as follows:

- Part 1 (ss. 1 to 21) deals with powers to gather and share information;
- Part 2 (ss. 22 to 27) deals with detention and questioning of suspects;
- Part 3 (ss. 28 to 39) deals with prosecution and punishment of terrorist offences;
- Part 4 (ss. 40 to 61) deals with notification requirements;
- Part 5 (s. 62 – in force) covers terrorist financing and money laundering;
- Part 6 (ss. 63 to 73 – in force) deals with financial restrictions proceedings;
- Part 7 (ss. 74 to 91) includes an amendment to the definition of terrorism, the creation of a new offence concerning information about members of the armed forces and various amendments to the legislation on control orders;
- Part 8 (ss. 92 to 102) makes supplementary provision.

**Health and Safety (Offences) Act 2008**

This Act revises the mode of trial and maximum penalties applicable to certain offences relating to health and safety. It received Royal Assent on 16 October 2008 and will come into force on 16 January 2009. It has no retrospective effect.

**Employment Act 2008**

This Act contains provisions (in s. 15) by which offences under the Employment Agencies Act 1973 will become triable either way and subject to potentially unlimited fines. The revised mode of trial and penalties will come into effect on 6 April 2009.

**Human Fertilisation and Embryology Act 2008**

This Act is not yet in force. It amends the Human Fertilisation and Embryology Act 1990 and the Surrogacy Arrangements Act 1985. It makes provision

about the persons who in certain circumstances are to be treated in law as the parents of a child. It includes provisions (in s. 29) amending existing offences under s. 41 of the 1990 Act.

**Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2008 (SI 2008 No. 2430)**

These Regulations amend the principal regulations of 2004 in order to provide for recovery of defence costs in all Crown Court cases, save where the defendant: (a) appears in the Crown Court having been committed for sentence, or (b) is in receipt of a passporting benefit (guarantee credit, income support, income-based job seekers allowance or income-related employment and support allowance), or (c) has none of the following (i) capital over £3,000, (ii) equity in his principal residence exceeding £100,000, (iii) a gross annual income of over £22,235, or (d) is under 18 years of age. A judge has discretion not to make an order if satisfied that (a) it would not be reasonable to make such an order, on the basis of the information and evidence available; or (b) the payment of an RDCO would, owing to the exceptional circumstances of the case, involve undue financial hardship.

**Costs in Criminal Cases (General) (Amendment) Regulations 2008 (SI 2008 No. 2448)**

These Regulations amend the principal Regulations 1986 (SI 1986 No. 1335) so as to make minor amendments in order to achieve consistency in the regulations on costs unnecessarily incurred, wasted costs orders and third party costs orders, and update references to legal aid (regs. 3 to 5 and 9); transfer responsibility for determining most costs payable out of central funds in criminal proceedings in magistrates' courts from justices' clerks to the National Taxing Team of Her Majesty's Courts Service (regs. 6, 7, 8 and 10); update legislative references to proceedings for breaches of requirements of sentences or orders (reg. 11); and provide for the payment of allowances to intermediaries (regs. 6 and 12 to 16).

**Police and Justice Act 2006 (Commencement No. 9) Order 2008 (SI 2008 No. 2503)**

This Order brings into force on 1 October 2008 ss. 35 to 38 of the Act (computer misuse) together with associated amendments and repeals, including repeal of ss. 11, 12, 14, 16 and 17 of the Computer Misuse Act 1990.

**Serious Crime Act 2007 (Commencement No. 3) Order 2008 (SI 2008 No. 2504)**

This Order brings the following provisions of the Act into force on 1 October 2008:

- (a) ss. 46 to 67 (i.e. part 2 —encouraging and assisting crime) together with schs. 3 (listed offences), 4 (extra-territoriality), 5 (amendments relating to service law), and 6 (minor and consequential amendments);
- (b) s. 68(1) to (7) (disclosure of information to prevent fraud);
- (c) ss. 69 and 70 (offence for certain further disclosures of information and penalty for that offence);
- (d) s. 71(3) and (6) (code of practice for disclosure of information to prevent fraud);
- (e) s. 72 (data protection rules);
- (f) associated transitional and transitory provisions and savings and associated repeals.

**Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Code A) Order 2008 (SI 2008 No. 2638)**

This Order provides for revisions of the Code to come into force on 27 October 2008. In certain police force areas, where a person in a public place is requested to account for themselves under Code A, para. 4.12, the recording requirements are amended. Under the amended provisions, the officer must provide a receipt of the encounter, but need only record information on the person's self-defined ethnicity.

**Criminal Justice and Immigration Act 2008 (Commencement No. 3 and Transitional Provisions) Order 2008 (SI 2008 No. 2712)**

*Inter alia*, this Order brings the following provisions into force on 3 November 2008:

- s. 21(1) and (3) to (7) (credit for period of remand on bail: terms of imprisonment and detention);

- s. 22 (credit for period of remand on bail: other cases);
- s. 23 (credit for period of remand on bail: transitional provisions);
- s. 33(1), (3), (5) and (6) (removal under Criminal Justice Act 1991);
- s. 34(1), (3), (4)(a), (5), (6), (8) and (9) (removal under Criminal Justice Act 2003), save insofar as s. 341(6) provides that the CJA 2003, s. 260(3A) ceases to have effect;
- s. 41 (disclosure of information for enforcing fines);
- s. 51 (bail conditions: electronic monitoring);
- s. 60 (contents of an accused's defence statement);
- s. 129 (inspection of police authorities);
- sch. 6 (credit for period of remand on bail: transitional provisions);
- sch. 11 (electronic monitoring of persons released on bail subject to conditions).

**Police and Justice Act 2006 (Commencement No. 10) Order 2008 (SI 2008 No. 2785)**

This Order brings into force on 14 November 2008 the following provisions of the Act:

- (a) s. 45 (attendance by accused at certain preliminary or sentencing hearings) to the extent not already in force and s. 46 (live link bail) in 28 local justice areas in London and the local justice areas of Central Kent, East Kent and North Kent;
- (b) sch. 14, paras. 47 and 49 to 51 (amendments to the Railways and Transport Safety Act 2003).

**Criminal Justice and Immigration Act 2008 (Commencement No. 4 and Saving Provision) Order 2008 (SI 2008 No. 2993)**

*Inter alia*, this Order brings the following provisions into force:

- (a) on 1 December 2008, s. 118 and sch. 20 (closure orders);
- (b) on 26 January 2009, ss. 63 to 68 (extreme pornography) and 71 (publication of obscene articles) and sch. 14 (special protection for providers of information society services).

**Consolidated Criminal Practice Direction**

The 21st amendment to the Consolidated Criminal Practice Direction deals with the procedure for

applications under the Criminal Evidence (Witness Anonymity) Act 2008 and creates new paras. I.15.1 to I.15.24 to cover that procedure.

### New SGC Guidelines

The Sentencing Guidelines Council has issued two new sentencing guidelines.

The first relates to *Theft and Burglary in a building other than a dwelling* (December 2008), which applies to offenders aged over 18 falling to be sentenced for theft, or for that particular form of burglary, on or after 5 January 2009. The guidelines cover (i) theft in breach of trust (thereby superseding the former Court of Appeal guidelines in *Barrick* (1985) 81 Cr App R 78 and *Clark* [1998] 2 Cr App R 137: see **B4.8**) (ii) theft

in a dwelling, (ii) theft from the person and (v) theft from a shop (superseding *Page* [2005] 2 Cr App R (S) 221: see **B4.6**), as well as (vi) burglary in a building other than a dwelling. House burglary offences remain subject to the well known guidelines issued by the Court of Appeal in *McInerney* [2002] EWCA 3003 and these sentences are not affected by the new SGC guidelines.

The second guideline deals with sentencing for *Breach of an Anti-Social Behaviour Order* (December 2008). Again, it is applicable to offenders falling to be sentenced for such a breach, on or after 5 January 2009. This document provides separate guidelines applicable to adults and to young offenders.

The full text of these guidelines can be found at <<http://www.sentencing-guidelines.gov.uk>>.

## COMMENT AND ANALYSIS

### Procedural Irregularities and Destroyed CCTV Evidence in Drink-driving Cases

In *Morris v DPP* [2008] EWHC 2788 (Admin), the appellant was arrested on suspicion of driving under the influence of alcohol. He provided a specimen of blood that showed him to be over the legal limit and he was then charged with an excess alcohol offence under the Road Traffic Act 1988, s. 5(1)(a). There does not appear to have been any dispute as to the accuracy of the blood analysis or as to whether he was indeed guilty of the offence. It ought therefore to have been a straightforward case. But the law relating to drink driving offences and procedure continues to provide a fertile ground for practitioners of 'loophole defences'. In *Morris* the selected defence ultimately failed, but only after a long fight involving an appeal to the Crown Court and a further appeal to the Administrative Court. Moreover, it failed only on the evidence, and in other circumstances such a defence may still succeed.

The defence at the heart of the appellant's case was one that has grown up around the RTA 1988, s. 7(7), by which:

A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution.

According to the police, this warning was duly given. According to the appellant it was not. CCTV footage from cameras (and a single microphone) covering the custody suite and 'charging area' in the police station might perhaps have provided conclusive proof one way or the other, but the footage was recorded onto video tape which in accordance with standard practice was kept only for three months. Thereafter, it was destroyed, nobody having thought at the time that it might be important to preserve it. The appellant accordingly combined his s. 7(7) argument with a submission that it was an abuse of process to continue with the case following the destruction of potentially crucial evidence.

### The Need for a Section 7(7) Warning

One might suppose that a defence based on failure to warn under s. 7(7) would be viable only where a defendant is charged with failing to provide a specimen for analysis. There might perhaps be some injustice in the conviction of a defendant for something that he was not warned was an offence - although in most other circumstances ignorance of the law is no defence. In *Morris*, however, the appellant *did* provide a specimen for analysis, whether on the basis of a s. 7(7) warning or out of the goodness of his heart. Why then should it have mattered whether he was

warned or not? If a defendant is clearly willing to co-operate by providing the required specimen(s) it would seem quite unnecessary to introduce an element of duress into the procedure by threatening him with prosecution should he fail to do so.

The courts, however, are clear about the need for such a threat and about the consequences of its omission. In case after case it has been held that a specimen obtained without a s. 7(7) warning is inadmissible and that the absence of such a warning leads inexorably to acquittal. See for example *Murray v DPP* [1993] RTR 209 and *DPP v Jackson* [1999] AC 406. That was not challenged in *Morris* and given the weight of precedent behind it any such challenge would have been bound to fail. But there is no statutory basis for any such rule either under the RTA itself or under related legislation. We shall return to that submission shortly.

#### Lost CCTV Evidence and Abuse of Process

*Morris* is not the first case in which potentially valuable recorded evidence has been lost or destroyed. Clearly there must be some circumstances in which it would indeed be an abuse of process to continue with a prosecution after the loss or destruction of evidence that might have contradicted the prosecution case or supported that of the defence. See *Lang* [1999] EWCA Crim 986. But an abuse of process argument had failed in *Roberts v DPP* [2008] EWHC 643 (Admin) on facts that were essentially similar to those of *Morris*. Indeed the abuse of process argument was if anything stronger in *Roberts* because the appellant in that case had been charged with failing to provide a specimen and had put the CPS on notice that he wanted the CCTV images retained. Unfortunately, the CPS were slow in passing this request to the police, and when eventually they did so the tapes had already been erased. In *Morris* the lost evidence could never have proved D's innocence: it might at best have facilitated the running of a loophole defence that lacked any moral basis. The court was right to reject the abuse of process argument.

#### Loophole Arguments Reconsidered

In some circumstances, road traffic legislation expressly requires the exclusion of improperly obtained specimens. By the Road Traffic Offenders Act 1988, s. 15(4) (as amended):

A specimen of blood shall be disregarded unless-

- (a) it was taken from the accused with his consent and either-

- (i) in a police station by a medical practitioner or a registered health care professional; or
- (ii) elsewhere by a medical practitioner; or

- (b) it was taken from the accused by a medical practitioner under section 7A of the Road Traffic Act 1988 and the accused subsequently gave his permission for a laboratory test of the specimen.

But this, surely, is the exception to prove the rule. If all improperly obtained specimens were inadmissible, there would be no need for any specific provisions of the kind found in s. 15(4); and nowhere in the road traffic legislation is there any provision requiring the exclusion of evidence obtained in breach of RTA s. 7(7).

Nor is this a mere oversight. One of the principal aims of the amendments made to the RTA 1972 by the Transport Act 1981 (and subsequently incorporated into the 1988 legislation) was the abrogation of the widely condemned 'rule in *Scott v Baker*', under which any procedural irregularity in excess alcohol cases led inevitably to the failure of the prosecution case. The courts failed to appreciate the full extent of this reform and have continued to regard procedural requirements as sacred where evidential specimens are concerned. This misunderstanding began with a loose dictum by Goff LJ in *Howard v Hallett* [1984] RTR 353. In the course of a ruling that was otherwise sound he said:

It would . . . be a most extraordinary consequence if, where the Act . . . lays down a careful and statutory procedure for requiring a suspected motorist to provide specimens of breath and for analysing them and presenting them before a court, it is possible to disregard that procedure altogether. I cannot believe that that was the intention of the legislature.

With respect, nobody would suggest that specified procedures 'may be disregarded altogether', but only that procedural breaches in drink-driving cases should be subject to the same kind of judicial assessment as would be conducted in other criminal cases. The general rule (outside drink-driving cases) is that irregularities which have no adverse effect on the fairness of the proceedings may safely be overlooked, whilst those that do have some impact must be evaluated under the Police and Criminal Evidence Act 1984, s. 78(1), and the interests of the defendant balanced against those of the prosecution and society. See for example *Walsh* (1989) 91 Cr App R 161; *A-G's Ref (No. 3 of 1999)* [2001] 1 All ER 577. There is surely no good reason for treating drink-driving prosecutions any differently.

### A Way Forward

A case such as *Morris* may eventually come before the House of Lords and their Lordships may then see the error of their ways. But this is too much to expect. Another solution may exist. The Department of Transport is conducting a major 'road safety compliance consultation' in which one of the avowed intentions is to improve the effectiveness of drink-driving laws. In my submission, a crackdown on loophole defences would be a simple and cost-free addition to any other measures that might be adopted. Existing legislation should be amended so that:

Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall not be inadmissible by reason only of any procedural defect or irregularity in the obtaining of that specimen, but a court may refuse to allow such evidence to be admitted if it appears that, having regard to all the circumstances, the admission of that evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Such a provision (based in part on the Police and Criminal Evidence Act 1984, s. 78) would bring drink-driving cases into line with other prosecutions in which improperly obtained evidence is involved; and that must be a good thing.

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Professor of Criminal Justice  
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### Guidance on the Dangerous Offender Provisions

In two important recent decisions the Court of Appeal has provided further valuable guidance on the dangerous offender provisions, which continue to cause problems for trial judges and to generate a considerable number of appeals.

The first of these decisions is *Stannard* [2008] EWCA 2789, in which the Court clarified a number of issues in relation to sentencing an offender for several offences, some of which were committed prior to 4 April 2005 (when the original dangerous offender provisions came into force) and some of which were committed after that date. The judgement is particularly concerned with cases where the conduct encompassed within the pre-4 April offences was of greater gravity than that contained within the post 4 April offences. The Court of Appeal in *Stannard* deprecated the practice (which, according to counsel,

was common) that in such a case the sentencing court would not apply the provisions of the Criminal Justice Act 2003. That approach was declared by the Court of Appeal to be 'unsound', and in any case in which a specified offence or serious specified offence has been committed after the relevant date the judge must apply the 2003 Act provisions, taking account of all available information, which of course includes the pre 4 April offences. This statement of the Court of Appeal is consistent with the law as set out in the main work at E4.1. The Court then went on to say that, where the judge concludes that the offender poses the requisite risk to the public, as set out in s. 225(1)(b), and imposes a sentence of imprisonment for public protection or an extended sentence, the earlier offences should be dealt with by imposing concurrent determinate sentences rather than by imposing no separate penalty since, according to Lord Judge CJ, 'an order for no separate penalty will tend to convey to the victim that the court did not properly address the impact of the crimes'. The Court of Appeal went on to re-emphasise the point that where an indeterminate sentence is imposed on one or more counts the totality of the offending may properly be reflected in the assessment of the notional term. This principle is applicable where the indeterminate sentence is imprisonment for public protection (see also *O'Brien* [2006] EWCA Crim 1741 and *O'Halloran* [2006] EWCA Crim 3148) or an extended sentence (*C* [2007] EWCA Crim 680). This is also consistent with the law as set out in the main work at E4.11.

*Stannard* made only passing references to the significant amendments made to the dangerous offender provisions by the Criminal Justice and Immigration Act 2008, which have effect from 14 July 2008. The important case of *A-G's Ref (No. 55 of 2008) (C and Others)* [2008] EWCA Crim 2790 does, however, do so. In this case the Court of Appeal considered nine otherwise unrelated appeals arising under these provisions, in all of which cases the sentence had been imposed after the relevant amendments had come into force. Judge CJ begins by pointing out that the amended scheme applies whenever an offender is sentenced after 14 July for whatever reason, such as the demands of the court, the illness of witnesses, the length of any trial, or where sentence is delayed because the offender has absented himself. Next, his lordship stressed the 'most striking feature' of the amendments, which is the repeal of the 'prescriptive and unhelpful statutory assumption' formerly to be found in s. 229(3). Nonetheless, the sentence of

imprisonment for public protection remains (as originally stated in *Johnson* [2007] 1 Cr App R (S) 112) a sentence which, although punitive in its effect, 'is concerned with future risks and public protection' rather than representing punishment for past offending. His lordship went on to consider the revised conditions for imposing a sentence of imprisonment for public protection, set out in s. 225(3A) and (3B). It was noted that the list of offences specified in sch. 15A is much shorter than the original list of 'specified offences' in sch. 15. Where, however, the offender at the time the offence was committed had been convicted of an offence listed in sch. 15A, the sentence of imprisonment for public protection becomes available irrespective of the seriousness of the latest offence. The condition set out in s. 225(3B) requires that the notional sentence should be at least four years. Lord Judge CJ stressed that a court should not reach such a figure unless it was justified by the seriousness of the offence. If the offender has been convicted of more than one offence then the issue was whether the totality of the offending was appropriately met by a notional sentence of that magnitude (while disregarding any credit which would normally be due for time

spent on remand). Accordingly, 'condition 3B may be established notwithstanding the absence of an individual offence for which a four-year term would be appropriate'.

In deciding whether a sentence of imprisonment for public protection should be passed, the court should first consider the suitability of other available means of providing public protection from the offender, including a determinate sentence (perhaps with a sexual offences prevention order) or an extended sentence. If an appropriate overall sentencing package short of imprisonment for public protection can be found, then imprisonment for public protection should not be imposed. See further the observations of the Court of Appeal in *Terrell* [2008] 2 All ER 1065, considered at E21.12) on the use of the sexual offences prevention order, comments which are now even more relevant following the amendments made by the Criminal Justice and Immigration Act 2008.

**Martin Wasik**

CBE Barrister, Recorder of the Crown Court  
Professor of Criminal Justice, Keele University

## PUBLISHING NEWS

AVAILABLE JANUARY 2009

### **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

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

**January 2009**

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**Andrew Keogh**, Solicitor

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**February 2009**

## BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 2, January 2009

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Sentencing Guidelines; the Criminal Evidence (Witness Anonymity) Act 2008; new Serious Crime Prevention Orders; *Corner House Research & Campaign Against Arms Trade v Serious Fraud Office* [2008] EWHC 714 (Admin); *R v Raphael & Johnson* [2008] EWCA Crim 1014. There is also expanded coverage of the admissibility of hearsay, cartel offences, and revenue and customs offences. The Appendices have also been updated.

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key changes include; revision and restructure of the money laundering chapter I.3; substantial expansion to the Precedents section in both Binders I and II; and updating and expansion of the Appendices in both binders.

c. 2,100 pages, 978-0-19-929898-3

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**Published April 2007, updated approximately twice a year**

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