

# 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. Further Bulletins will publish in April and July. **They can be downloaded free of charge from <<http://www.oup.com/blackstones/criminal>>.**

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## CASE DIGEST—IN BRIEF

### GENERAL PRINCIPLES—STRICT LIABILITY

**Deyami** [2007] EWCA Crim 2060

A 'human rights' challenge to the legitimacy of imposing strict liability in respect of offences involving prohibited weapons under the Firearms Act 1968, s. 5, was dismissed in this case. The decision is firmly in accordance with established law, but the judgment does include a useful discussion of authorities on strict liability.

See *Blackstone's Criminal Practice*: A4.1 and B12.51

### OFFENCES—RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES

**Babbs** [2007] EWCA Crim 2737

There was a scuffle between D and C in a fast food restaurant after D had told C, 'You fucking foreigners don't deserve to be here'. Several minutes later there was a further incident in which D head-butted C, who

had been served before him. D admitted assault but denied racial aggravation. At the close of the prosecution case, he submitted that there was no case to answer, because the words he had used were not spoken immediately before the assault so as to justify the conclusion that it was racially aggravated under the Crime and Disorder Act 1998, s. 28(1)(a).

The judge and Court of Appeal each rejected this argument. The incident was properly viewed as one in which D's racial hostility was present throughout.

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There was probably no need to rely on s. 28(1)(a), because this appears to have been a genuinely racist incident within s. 28(1)(b) (i.e. one in which D's conduct was actually motivated by racial hostility).

See *Blackstone's Criminal Practice*: B11.160

## OFFENCES—ESCAPE

**Montgomery** [2007] EWCA Crim 2157

An offender who is granted temporary release from prison, and fails to return, does not 'escape from custody' because he is not in custody at the time, nor under the direct or immediate control of any representative of authority.

See *Blackstone's Criminal Practice*: B14.64

## OFFENCES—FAILURE TO PRODUCE IMMIGRATION DOCUMENTS

**Mohammed (or Mohamed)** [2007] EWCA Crim 2332

In this case, *Thet v DPP* [2006] EWHC 2701 (Admin) was considered by the Court of Appeal. The court disagreed with Lord Phillips CJ's obiter observation in *Thet* that, by virtue of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s. 2(4)(e), an asylum seeker who has travelled on false documents appears always to have a valid defence to a charge under s. 2, even if he has deliberately destroyed those false documents or wilfully refuses to hand them over.

See *Blackstone's Criminal Practice*: B23.7

## PROCEDURE—LEGAL REPRESENTATION

**Ulcay** [2007] EWCA Crim 2379

The question arose as to whether by virtue of the Bar Council Rules, para. 701(b)(ii), or Law Society Rules, r. 2.01(b), counsel or solicitors appointed at short notice following the sudden withdrawal of a defendant's previous defence team could properly refuse to act unless given reasonable time in which to prepare.

The court opined that, under the cab rank principle, counsel must act even when appointed at the last minute. Nor was there any reason to distinguish between the professional position of the barrister and solicitor in that respect. Both owed a duty to the court, both should comply with it, and both had to 'soldier on', whatever the difficulties. It was not a good reason

for ceasing to act for a client that a solicitor disagreed with the decision of the court, even if he believed that the order had caused insuperable difficulties for him, or his client, in the preparation and conduct of the defence.

See *Blackstone's Criminal Practice*: D3.73

## PROCEDURE—UNFITNESS TO PLEAD

**Chal** [2007] EWCA Crim 2647

The Court of Appeal held that a trial of the facts, under the Criminal Procedure (Insanity) Act 1964, s. 4A, is governed by the same rules of criminal evidence as other criminal proceedings, notwithstanding that such proceedings cannot result in a finding of guilt or the imposition of punishment. It was accordingly possible for hearsay evidence (the statement of a witness who could not now be traced) to be admitted at a trial of the facts in accordance with the CJA 2003, s. 116.

See *Blackstone's Criminal Practice*: D12.9

## PROCEDURE—APPEALS AGAINST ADVERSE RULINGS

### B (prosecution application for permission to appeal under s 58 of the CJA 2003)

[2007] All ER (D) 46 (Nov)

One of the restrictions governing the prosecution's right to appeal against adverse rulings at trial is that no such right exists in relation to proceedings that were started prior to the commencement of the CJA 2003, ss. 57 and 58 (i.e. prior to 4 April 2005). The question that arose in this case was whether a retrial ordered by the Court of Appeal after that date and on the basis of a fresh indictment, represented wholly new proceedings, or whether the retrial followed on from the original proceedings in which D had been sent for trial before that date.

The Court of Appeal held that the retrial was for these purposes merely a continuation of the original proceedings. It followed that the court had no jurisdiction to hear any appeal against a ruling by the trial judge that was fatal to the prosecution case.

See *Blackstone's Criminal Practice*: D15.71

## PROCEDURE—CONDUCT OF THE TRIAL JUDGE

In *Cordingley* [2007] EWCA Crim 2174, the Court of Appeal allowed D's appeal against conviction on the basis of evidence concerning what Laws LJ described as 'rudeness and discourtesy of which the [trial] judge should be ashamed'. Laws LJ explained:

15. The safety of a conviction does not merely depend upon the strength of the evidence that the jury hears. It depends also on the observance of due process. In this case it seems to us inescapable that the effect of the judge's conduct must have been to inhibit the defendant in the course of his defence. He clearly felt that the judge was prejudiced against him, as [counsel's] recollection of his client's own words demonstrate. It may well be that what the judge had said in his presence (although in the absence of the jury) affected him so as to have adverse consequences for his credibility before the jury. But whether or not that is so, it is to be remembered that every defendant, and this is no more than elementary, is entitled to be tried fairly—that is courteously and with due regard for the presumption of innocence. This appellant was not tried fairly. There was a failure of due process by reason of the judge's conduct. For that reason the appeal against conviction is allowed.

See *Blackstone's Criminal Practice: D25.23*

## EVIDENCE—PROTECTION OF COMPLAINANTS

**Cartwright** [2007] EWCA Crim 2581

Sexual offences committed before 1 May 2004 remain governed by the old law, but in respect of trials for such offences conducted on or after that date, the Youth Justice and Criminal Evidence Act 1999, s. 41, as amended by the 2003 Act, no longer purports to apply to such trials. Given a literal interpretation, amendments made to that Act by the 2003 Act (without any transitional provision) now leave s. 41 applicable only to those sexual offences that are currently in force.

The Court of Appeal rejected this strictly literal interpretation. If adopted, it would clearly have had consequences not intended or foreseen by Parliament and would have given rise to absurdities, 'not simply in some sense of generalised dismay, but within the legislative context itself'. On the basis of the more flexible and purposive interpretation adopted by the court, s. 41 thus remains applicable to any prosecutions brought under the old law.

See *Blackstone's Criminal Practice: F7.16*.

## EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION

**Khan** [2007] EWCA Crim 2331

D pleaded guilty to conspiracy in a case involving the alleged funding of terrorist activity. In his plea he accepted the truth of the prosecution's allegations made against him and took no issue with the prosecution on any issue of fact relevant to sentencing. His co-defendant, S, pleaded not guilty, and D gave evidence in support of his case, claiming that S was not implicated in the conspiracy, but under both examination-in-chief and cross-examination he attempted to assert a privilege against self-incrimination relating to possible proceedings against him in the USA.

Where his claim to privilege concerned matters going beyond those to which he had already pleaded guilty, the trial judge allowed it (even though it had previously been held that the privilege is not available in respect of possible incrimination under foreign law: see *Re Atherton* [1912] 2 KB 251; *Re Westinghouse Electric Corporation Contract* [1978] AC 547 per Lord Diplock at 636; *Brannigan v Davison* [1997] AC 238); but in respect of other matters that were plainly already covered by his plea of guilty he was warned that refusal to answer would involve a contempt of court. When he persisted in his claim, he was held to be in contempt and summarily sentenced to a further 12 months' imprisonment.

As to the matters already covered by the guilty plea, the Court of Appeal largely agreed with the trial judge. Moses LJ explained:

It must be emphasised that the privilege is designed to provide protection in relation to questions which might incriminate. If the danger of incrimination has already arisen and is independent of any questions which a person is required to answer, it is not possible to see why that person should be entitled to any protection at all. If his position is made no worse by answering a question, then there can be no basis for him to invoke the privilege.

This does not mean that a witness who has made an informal admission prior to the trial (eg to police officers) is barred from asserting privilege if questioned on the same matter in court.

See *Blackstone's Criminal Practice: F9.22*

## SENTENCING

**Manslaughter in Course of Commission of Another Offence****A-G's Ref (Nos 38, 39 and 40 of 2007); Campbell** [2007] EWCA Crim 1692

The Court of Appeal held that a sentence of three and a half years' detention imposed on a 20-year-old offender for manslaughter during the course of a three-man robbery in the elderly victim's home was unduly lenient, despite the offender's lack of previous convictions. Although this was a case of 'single punch' manslaughter, the circumstances in which it had been committed took it out of the usual sentencing range for such offences. The court held that the appropriate starting point for an offender in those circumstances, and with no previous convictions after a trial, should be in the region of eight to nine years; but having regard to offender's age, and to double jeopardy, a sentence of five years' detention to be served concurrently with a similar sentence for robbery was deemed appropriate.

**Rape of a Child****A-G's Refs (Nos 74 and 83 of 2007)** (2007) *The Times*, 16 November 2007

The extent to which it may be appropriate to mitigate sentences for child rape in cases where the child in question appeared to be older than 13 and ostensibly consented was considered in this case. The court reiterated its earlier ruling in *Corran* [2005] EWCA Crim 192 that a mistake as to age may in such cases amount to mitigation. Paragraphs six to nine of the judgment in *Corran* remain valuable, general guidance. Nevertheless, the older the offender, the less relevant a mistake as to age, even if reasonably held, would be.

Given that the guideline sentence for the less serious offence under the SOA 2003, s. 9, indicates a starting point of four years, original sentences of two years imposed on adult men for child rape were held to be unduly lenient. Sentences of six years would have been appropriate after trial, but in light of their guilty pleas sentences of four years were substituted.

**Offences relating to Identity Documents etc****Zenasni** [2007] EWCA Crim 2165

In cases brought under the Identity Cards Act 2006, s. 25, sentencers must have regard to the substantial difference between the maximum penalties that may be imposed for offences under s. 25(1) on the one hand and those that may be imposed for offences under s. 25(5) on the other.

It does not follow, however, that sentences for offences under s. 25(1) must invariably be set at a higher level than anything imposed under s. 25(5). Even simple possession will usually justify an immediate custodial sentence, despite a plea of guilty. Proof of a 'requisite intention' under s. 25(1) is likely to make the offence more serious, but it might not always do so. Moreover, even where such intent is not an essential element of the offence charged, proof of any purpose for which D possessed a false identity document must, in principle, remain material for sentencing purposes.

**Perverting the Course of Justice****Hall** [2007] EWCA Crim 2037

Although the starting point for virtually any offence involving an attempt to pervert the course of justice is one of imprisonment, such offences vary considerably in gravity, and an immediate sentence of imprisonment need not be imposed in every case. Where an offender is a person of good character, and his offence was not at the higher end of the spectrum (e.g. giving a false account of vehicle theft in an attempt to deny responsibility for a minor road traffic accident), it may be possible for the court to mark the seriousness of the offence by imposing a suspended sentence.

**Class A Drugs Offences****A-G's Ref (No. 92 of 2007), Harding** [2007] EWCA Crim 2634

There may be circumstances in which a judge may have regard to rehabilitation when choosing between the different sentencing options even when dealing with cases involving the supply of Class A drugs. In this case, D pleaded guilty to, *inter alia*, conspiracy to supply Class A drugs, offering to supply Class A drugs, and possession of Class A drugs with intention to

supply. He was a heroin addict who supported his addiction by using 'runners' to supply small quantities of drugs on the street. He had a long criminal record and had served custodial sentences. He impressed the judge with his determination to address his drug addiction, and had the benefit of positive probation reports. The judge observed that the prisons were full and that, whilst an immediate custodial sentence would be justified, he would instead give D a chance to undertake rehabilitation. He therefore imposed a sentence of 12-months' imprisonment, suspended for two years, together with a 12-month drugs rehabilitation requirement. The Court of Appeal described this sentence as very lenient, but not unduly so, and declined to interfere.

Contrast however *A-G's Ref (No 68 of 2007)*, *Hawkes*, a case arising from the same police operation and heard by the Court of Appeal at the same time. Here, D was more heavily involved in dealing and had encouraged people to shoplift to pay for their habit. He was found to be in possession of two prohibited weapons, including a stun-gun; and was also in possession of money, drugs paraphernalia, and several mobile phones. A sophisticated CCTV system was installed in his home. Here, D's total period of imprisonment was doubled to four years—in part by making sentences imposed for the weapons offences consecutive to those imposed in respect of the drug dealing.

### Reduction in Sentence for Assistance by Offender

**P; Blackburn** [2007] EWCA Crim 2290

This case provides important guidance on the operation of the new SOCPA 2005 provisions relating to reduction of sentence to reflect assistance given to the authorities by an offender.

### Minimum Custodial Sentences for Firearms Offences

**Bowler** [2007] EWCA Crim 2068

The Court of Appeal considered whether exceptional circumstances existed in which the imposition of a mandatory minimum term of five years' imprisonment might be considered a disproportionate and arbitrary response to the danger presented by the appellant's unlawful possession of prohibited weapons (self-loading pistols) together with more ammunition than his firearms licence authorised him to possess.

Something more than personal mitigation was required, but in this case there were unusual features, including the appellant's claim (in his written guilty plea) that the guns had been dumped on him and that he had locked them away with a view to handing them in to the police in the event of a future firearms amnesty. A sentence of two years' imprisonment (including an allowance for his guilty plea) was substituted.

## CASE DIGEST—IN DETAIL

### Abdroikov

[2007] UKHL 37

The Court of Appeal's ruling in *Abdroikov* [2005] 1 WLR 3538, [2005] EWCA Crim 1986 was here reversed in part by the House of Lords. In two of the three conjoined appeals, the Lords reached a different conclusion. An appeal was allowed where the foreman of the jury (who had fully declared his position at the very start) was a lawyer employed by the local CPS. As Lord Bingham explained:

Justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor.

An appeal was also allowed in the second case, where there was a crucial dispute on the evidence between the appellant and a police sergeant, and one of the jurors was a police officer who shared the same local service background as the sergeant. In this context:

the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions.

Only in the first of the three cases, which unlike the others did not turn on a contest between the evidence of the police and that of the appellant, was the pres-

ence of a police officer on the jury considered harmless, and even then Lord Bingham reached that conclusion with some unease. Agreeing with Lord Bingham's conclusions, Baroness Hale added (at [46]):

There is no attack upon the legislation itself. Such an attack could only be mounted through the Human Rights Act 1998. It is not suggested that allowing police officers or solicitors employed by the Crown Prosecution Service to serve on juries is in itself incompatible with the right of an accused person, under Article 6(1) of the European Convention on Human Rights, to a fair trial before an independent and impartial tribunal. It is accepted that there are situations in which these newly qualified jurors will meet the tests of impartiality. . . . Equally, it is accepted that the fact that there are such situations does not mean that they will always do so. The fact that Parliament has said that they are eligible to serve does not mean that Parliament intended that they should do so in any case to which they were summoned. All the indications are that Parliament appreciated that there were some cases in which they should not serve. There is no indication that Parliament intended to abrogate the common law and Convention rules upon what constitutes a fair trial.

See *Blackstone's Criminal Practice: D13.24 and D13.54*

### Silcock and others

[2007] EWCA Crim 2176

Turner J's famous (or notorious) 'plums and duff' dictum in *Shippey* [1988] Crim LR 767 was considered once again here. The victim (P) had intervened in a quarrel between Stansfield and his girlfriend Forrester. He injured Forrester and was then beaten by Stansfield, who knocked him to the ground. In an incident shortly afterwards, P was then allegedly attacked by Stansfield, Silcock and Johnson, knocked to the ground and kicked in the head and body. He died as a result of a single blow to the head which damaged his vertebral artery, causing a brain haemorrhage.

Silcock, Stansfield and Johnson were all charged with murder, on the basis of this second incident, but made a submission of no case on the basis that there was evidence to suggest that the fatal injury might have been inflicted in the first incident, in which case P was already dead when his body was kicked and punched in the second incident. The nature of the fatal injury was such that he would have died within seconds of it being inflicted. This eliminated the possibility that P was alive but already fatally injured at the start of the second incident.

To discharge their evidential burden the prosecution needed credible evidence that was capable of proving P was alive at the start of the second incident, and they

had some in the form of the evidence of a passer-by, D, who saw the second incident begin and testified that nobody was lying on the ground at that time. In other words, P must have been standing when the appellants attacked him. Other witnesses seemed far less sure, but if D was a credible witness (and it seems that he was) that did not matter as far as the submission of no case was concerned, and the Court of Appeal was satisfied that the trial judge had been right to reject the submission. Hooper LJ said:

32. It was submitted that the judge had wrongly applied *Galbraith* and had failed to apply *Shippey* [1988] Crim LR 767. As to *Shippey*, it has been made clear on more than one occasion that *Shippey* establishes no principle of law: see *Pryer and others* [2004] EWCA Crim 1163.

*Pryer* was another case in which Hooper LJ gave the judgment of the court as to the circumstances in which a plea of no case should be accepted. He said:

28. It has been the experience of at least two members of this Court that *Shippey* is often cited by counsel at the close of the prosecution's case. What counsel often do, and what in our view counsel have done in this case, is to convert *Shippey* from what it actually is, namely a decision on the facts, into a decision on the law. [Counsel] seek to find in *Shippey*, as many counsel have done before them, some principle of the law called 'the plums and duff principle'.

28. What is a trial judge being asked to do when a submission of no case is made either at the close of the prosecution case, or, as sometimes happens, after all the evidence in the case has been given? He has a task to perform which is stated simply and clearly in *Galbraith*:

'Could a reasonable jury properly directed properly be sure of the defendant's guilt on the charge which he faces.'

29. Although the test is a very simple one, it is often difficult to answer the question. Help may sometimes be found in the case of *Shippey* in resolving that question, provided it is remembered that *Shippey* is no more than another case on the facts. *Galbraith* gives significant assistance to judges when being asked to resolve that question when the reliability of witnesses is in issue.

With respect, there is surely a reason for the frequent use of *Shippey* in this way. There is in other words a principle involved here, and it is one that can be understood without regard to the particular facts of *Shippey* itself. It is little more than a gloss on *Galbraith*, but if so it may still be a useful gloss. As Keene LJ said in *Broadhead* [2006] EWCA Crim 1705:

Turner J's celebrated words in [*Shippey*] embody a valid and important point, . . . The judge's task in considering such a submission at the end of the prosecution's case is to assess the prosecution's evidence as a whole. He has to take into account the weaknesses of the evidence as well as such

strengths as there are. He needs to look at the evidence at that stage in the trial in the round.

What one must beware of is a misuse of the principle (if we may call it that). A good witness's testimony will not usually be nullified merely because certain other witnesses are poor or incredible; and a jury might sometimes have reason to believe one part of a witness's testimony without necessarily believing another part. In *Silcock*, the evidence of witness D was clear and was not invalidated by the confused or uncertain testimony of other witnesses. But in other cases, the poor quality of a biased witness's account may be accentuated by the fact that it conflicts with the testimony of other, impartial, witnesses, and this may mean that no reasonable jury could ever rely on it: see for example *Shire* [2001] EWCA Crim 2800.

**See Blackstone's Criminal Practice: D15.16**

#### Hudson

[2007] EWCA Crim 2083

D appealed against his convictions for the murder of his sister-in-law, V, and related offences, including one count (count 4 on his indictment) of conspiring with other members of his family to pervert the course of justice by falsely assuming sole responsibility for that killing in a confession made to his aunt and her husband, in which he claimed to have been provoked into killing her in a single moment of madness. The prosecution proved that V had in fact died as a result of a long series of brutal and sadistic assaults in which several members of the family were implicated. It followed that in almost all its details, save perhaps for those relating to the subsequent disposal of the body, D's confession was false. The prosecution nevertheless argued that there was some vestige or 'substratum' of

truth within the confession, on the basis of which a jury might be permitted to convict him of the murder.

D had offered himself as a scapegoat for the rest of his family. In so doing, it seems likely that he was giving in to family pressure, and in particular to pressure exerted by D's violent, domineering and manipulative parents, who took him to his aunt and her husband so that he could make the confession. At the very least, he acted with the encouragement and connivance of his parents, who were themselves found guilty of V's murder and of the count 4 conspiracy. The ability of D's parents to secure 'confessions' within the family was demonstrated by the discovery of a videotape in which V was herself forced to confess that she was a liar, prostitute and thief who had tried to kill her own children. D's mother could be heard on the recording, prompting V on certain issues.

Hughes J's ruling at the trial was that, although D had evidently been taken to his aunt's house 'with the clear intention that he should make the confession', there was no evidence of what anyone had said to him, 'except such as can be implied from his apparent willingness to shoulder the blame on his own'. He accordingly ruled the confession to be admissible. This ruling was endorsed by the Court of Appeal.

With respect, however, it is difficult to understand how anyone could conclude, 'beyond reasonable doubt' (as s. 76(2)(b) requires) that *nothing* was said or done that might have induced an unreliable confession from D. The best we can say is that we do not know what exactly was said or done. If nothing of that kind was said or done, where then was the evidence of conspiracy?

**See Blackstone's Criminal Practice: F17.12**

## LEGISLATION

**Serious Crime Act 2007**

This Act received the Royal Assent on 30 October 2007. When brought into force, part 1 of the Act will enable the making of 'Serious Crime Prevention Orders'. These new civil orders are intended to protect the public by preventing, restricting or disrupting involvement in serious crime. Orders will be made by the High Court (on application), or by the Crown Court upon conviction, and breach of such an order will be a criminal offence. Provision is made for appeals and for variation or discharge of orders.

Part 2 deals with encouraging or assisting crime. It will in due course abolish the common-law offence of incitement and in its place create new offences of intentionally encouraging or assisting crime and encouraging or assisting crime believing that an offence, or one or more offences, will be committed.

Part 3, chapter 1 makes provision for the prevention of fraud. Chapter 2 amends the Proceeds of Crime Act 2002 and supporting legislation. Chapter 3 will extend certain investigatory powers of Revenue and Customs officers to former Inland Revenue matters and will also extend existing police powers to stop and search for dangerous instruments and offensive weapons without reasonable suspicion.

**UK Borders Act 2007**

This Act (not yet in force) also received the Royal Assent on 30 October 2007. It deals primarily with immigration and asylum issues, but also creates (in s. 22) a new criminal offence of assaulting an immigration officer and extends powers under chapter 3 of part 5 of the Proceeds of Crime Act 2002 (recovery of cash) so that they can be exercised by immigration officers. Provision is made for the forfeiture and disposal of detained property and there are amendments to the ambit of certain offences under the Immigration Act 1971 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Section 32, when brought into force, will ordinarily require the automatic deportation of foreign criminals who have been sentenced to imprisonment for a period of 12 months or more, or who have been sentenced

to any term of imprisonment for an offence specified by the Secretary of State under the Nationality, Immigration and Asylum Act 2002, s. 72(4)(a).

**Violent Crime Reduction Act 2006  
(Commencement No. 4) Order 2007  
(SI 2007 No. 2518)**

This Order brings into force, on 1 October 2007, s. 41 of the Act (increase of maximum sentence for possessing an imitation firearm) and related provisions. The effect is to make an offence under the Firearms Act 1968, s. 19 in relation to an imitation firearm triable either way and to increase the maximum penalty on conviction on indictment to 12 months or a fine or both.

See *Blackstone's Criminal Practice*: B12.2 and B12.84

**Violent Crime Reduction Act 2006  
(Realistic Imitation Firearms) Regulations 2007  
(SI 2007 No. 2606)**

These Regulations make provision in connection with the realistic imitation firearms provisions of the VCRA Act 2006 (ss. 36 to 38 and sch. 2, paras. 4 to 6).

See *Blackstone's Criminal Practice*: B12.17

**Mental Health Act 2007  
(Commencement No. 3) Order 2007  
(SI 2007 No. 2798)**

This Order brings into force various sections of the Act on 1 October 2007, 1 December 2007 and 1 January 2008. Of interest to criminal practitioners is the implementation of the amendments made by s 40 of the Act (restriction orders) to *inter alia* the Mental Health Act 1983, ss. 41 and 42, and the increase in penalty effected by s. 42 of the Act (from two years to five years) in respect of the offence under the Mental Health Act 1983, s. 127 (ill-treatment and wilful neglect of patients).

See *Blackstone's Criminal Practice*: E24.4

**Criminal Justice Act 2003  
(Commencement No. 17) Order 2007  
(SI 2007 No. 2874)**

This Order brings the following provisions of the Act into force on 1 October 2007:

- sch. 2, para 3 insofar as it inserts a new s. 37B(8) into the PACE 1984;
- sch. 36, paras. 6, 10 and 15, which make complementary amendments in relation to, respectively, the Criminal Law Act 1977, s. 39, the Prosecution of Offences Act 1985, s. 15 and the Proceeds of Crime Act 2002, s. 85.

Subsection (8) of 37B (consultation with the DPP) provides that, where a person is to be charged in accordance with that section, he is to be charged when he is in police detention (after returning to police detention to answer bail or otherwise) or in accordance with the CJA 2003, s. 29.

*See Blackstone's Criminal Practice: D2.2, D3.43, and D5.2*

**Criminal Defence Service (General) (No. 2)  
(Amendment No. 2) Regulations 2007  
(SI 2007 No. 2936)**

These Regulations amend the principal Regulations of 2001 and include the following changes:

- they provide that where a magistrates' court sends a defendant for trial at the Crown Court under s. 51 of the Crime and Disorder Act 1998, the proceedings in the magistrates' court are preliminary to the proceedings in the Crown Court, so that no representation order is required for the proceedings in the magistrates' court (reg. 3);
- they provide for applications for representation orders for appeals to the Crown Court, where a representation order has been made in respect of the proceedings in the magistrates' court, and for applications for representation orders for re-trials (reg. 4);
- they provide for applications for representation orders in the High Court (reg. 5);
- they permit representation by a QC or by more than one advocate in exceptional extradition cases in magistrates' courts and update a reference to the legislation on extradition (reg. 6);

- they provide expressly that a representation order for proceedings in the Crown Court, including orders which extend to that Court from a magistrates' court such as committals for sentence, covers representation by a junior advocate (reg. 7).

*See Blackstone's Criminal Practice: D30.3, D30.4, and D30.5*

**Criminal Defence Service (Financial Eligibility)  
Amendment No. 2) Regulations 2007  
(SI 2007 No. 2937)**

These Regulations amend the principal Regulations of 2006 (SI 2006 No. 2492) so as to provide that all individuals who are under 18 are to be treated as financially eligible for a representation order not just those in full-time education. They also confer on the authority which reviews decisions on financial eligibility an additional power, to quash the decision, and enable the individual, where the authority exercises this power, to re-apply for a representation order.

*See Blackstone's Criminal Practice: D30.3*

**Immigration, Asylum and Nationality Act 2006  
(Commencement No. 7) Order 2007  
(SI 2007 No. 3138)**

This Order brings provisions of the Act into force on 5 November 2007 and 31 December 2007.

The provisions brought into force on 5 November for the purposes of making relevant orders include the following: ss. 15 (penalty for employment of adult subject to immigration control), 16 (objection to penalty under s. 15), 31 (provision of information to immigration officers), 32 (passenger and crew information: police powers), 36 (duty to share information), 37 (information sharing: code of practice) and 38 (disclosure for security purposes).

The provisions brought into force on 31 December include ss. 34 (offence: failure to provide information), 35 (power of Revenue and Customs to obtain information) and 39 (disclosure to law enforcement agencies).

*See Blackstone's Criminal Practice: B23.45*

### Finance Act 2007 (Sections 82 to 84 and Schedule 23) (Commencement) Order 2007 (SI 2007 No. 3166)

This Order *inter alia* brings into force, on 8 November 2007, ss. 82 (criminal investigations: powers of Revenue and Customs), 83 (Northern Ireland investigations); and 84 (sections 82 and 83: supplementary) of the Act, other than s. 84(4) (which applies only to Scotland and is brought into force on 1 December).

See *Blackstone's Criminal Practice*: D1.1

### Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 (SI 2007 No. 3175)

This Order revokes and replaces the Police and Criminal Evidence Act 1984 (Applications to Customs and Excise) Order 1985 (SI 1985 No. 1800). The principal difference from the 1985 Order (as amended) is that the new provision in the Finance Act 2007, s. 82 is taken into account.

See *Blackstone's Criminal Practice*: D1.1

## COMMENT AND ANALYSIS

### Sentencing Guidelines Update

The purpose of this note is to update readers about a batch of new material on sentencing emanating from the Sentencing Guidelines Council and the Sentencing Advisory Panel.

Most recently, the Sentencing Guidelines Council issued its latest Definitive Guideline, on *failure to surrender to bail*. The guideline is applicable to the sentencing of offenders convicted of failing to surrender who are sentenced on or after 10 December 2007. In his foreword, Lord Phillips CJ, chairman of the Council, points out that Bail Act offences are committed in significant numbers each year and are a major cause of disruption, delay and unnecessary cost for the criminal justice system. A rigorous and consistent response to this offence is needed, he says, which may in turn help to discourage future offending. Where it is not possible to dispose of the original offence, sentencing for an associated Bail Act offence should normally be undertaken separately, and carried out as soon as appropriate in light of all the circumstances of the case. The sentence for the Bail Act offence must be commensurate with the seriousness of that offence and must take into account both the reason why the offender failed to surrender and the degree of harm intended or caused by the non-attendance. 'Harm' here includes not just that which has been caused to individual victims and witnesses, but also the consequential effect on police and court resources and the wider impact on public confidence.

The guidelines are expressed in terms of starting points and ranges, and apply to offenders aged 18 and over who have pleaded not guilty to the Bail Act offence.

The maximum penalties are 12 months in the Crown Court and three months in a magistrates' court. The starting point for 'surrenders late on the day but case proceeds as planned' is a fine. The starting point for 'negligent or non-deliberate failure to attend causing delay and/or interference with the administration of justice' is a fine (range fine to community order (medium)). The starting point for 'deliberate failure to attend causing delay and/or interference with the administration of justice' is 14 days in custody, but with a wide range (community order (medium) up to 40 weeks in custody) to allow for the interplay between relevant aggravating and mitigating features and the particular circumstances of the case. There are helpful sections within the document on procedural matters, such as when to sentence for the Bail Act offence, whether the Bail Act offence sentence should be concurrent or consecutive, and on conducting the trial in the absence of the defendant.

Secondly, on 15 November 2007 the Sentencing Advisory Panel issued a *consultation paper on sentencing for corporate manslaughter*. The consultation follows closely upon the passing of the Corporate Manslaughter and Homicide Act 2007, which is due to come into force on 6 April 2008 (see the October 2007 issue of this Newsletter for a commentary on the Act). It is clearly envisaged that sentencing guidelines will be available to the courts as soon as possible after commencement. The new offence is designed to secure, in a wider range of situations than under existing law, a conviction for a criminal offence that properly reflects the seriousness of the worst instances of management failure causing death. It is designed to complement, rather than to replace, the existing health and safety

offences, for which organisations may still be prosecuted as an alternative to, or in addition to, the new offence. The Panel is consulting on sentencing both for corporate manslaughter and breaches of health and safety law that result in death, in order to promote consistency and to produce guidelines that properly reflect the seriousness of the offending involved. The paper undertakes a careful analysis of harm and culpability involved in these offences, and proposes a range of aggravating and mitigating factors likely to be encountered. The sanctions available for the offence are a fine (on which the Panel makes detailed proposals), and the new measures of a publicity order and a remedial order, as well as the court's general power to order the offender to pay compensation. *Responses to this paper are requested by 7 February 2008.*

Thirdly, on 21 September, the Sentencing Guidelines Council published an addendum to the Compendium of Court of Appeal Guidelines. This relates to *the dangerous offender provisions* and brings together key judgements, setting them in the context of the statutory provisions. The document, which does not purport to be a sentencing guideline, is instead described as a 'Guide for Sentencers and Practitioners'. It runs to 50 pages of text and also contains two flow charts, one relating to adults and one to youths, to help to ensure that the proper stages are followed in the decision-making process. It is a very helpful practical summary of these complex and controversial provisions. As well as dealing with the sentencing decision, the document covers venue for trial (in relation to youths), and the limited circumstances in which (according to the decision in *Kulah* [2007] EWA Crim 1701) it is appropriate to give a *Goodyear* sentencing indication where a defendant is charged with a specified offence. Part Ten of the Guide is particularly helpful, explaining the considerations which apply when sentencing a qualifying offender for more than one offence, or where the offender is serving an existing custodial sentence, whether released on licence or not. It is anticipated that the guide will require updating to incorporate future developments. When necessary, updated versions will be released which are likely to consist of new pages rather than a complete re-issue. One can only hope that, with the assistance to sentencers which is now available, less recourse will need to be had to Part Eleven of the Guide, which deals with mechanisms for correcting sentencing mistakes (and see *Reynolds* [2007] EWCA Crim 538).

On 16 August the Sentencing Advisory Panel issued consultation papers on *sentencing for breach of an*

*anti-social behaviour order and sentencing for fraud offences*. The consultation periods for these papers have closed and the Panel will begin to frame its advice for consideration by the Council.

Finally, a reminder that at the end of June 2007 the Sentencing Guidelines Council published a consultation guideline on the sentencing of *adult offenders for assault and other offences against the person* together with a guideline on *assault on children and cruelty to a child*. The Panel's advice to the Council was published on the same day. Both of these topics will be of considerable practical importance to sentencers. The Council is now conducting its much more limited second consultation.

It should be pointed out that, while non-final documents contain a wealth of useful information for sentencers and for advocates, the statutory duty upon the courts in the CJA 2003, s.172(1)(b) to 'have regard' to the guidelines issued by the Council relates only to Definitive Guidelines. The duty does not apply to preparatory papers of the Council or to Panel papers: see *Doidge* (2005) *The Times*, 10 March 2005 and E1.2 generally.

Copies of all the documents referred to above can be obtained from the website:  
<<http://www.sentencing-guidelines.gov.uk>>

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### Free Will and Causation: the *Kennedy* Saga Concluded

The House of Lords in *Kennedy* [2007] UKHL 38, [2007] 3 WLR 612 has reversed the Court of Appeal's controversial ruling in *Kennedy (No 2)* [2005] 1 WLR 2059 and in so doing appears at last to have resolved a highly confusing saga that has muddied the waters of causation for a decade. This welcome decision has largely returned the law on causation to its original and proper state, whilst at the same time clarifying the scope of the offence under the OAPA 1861, s. 23. Two other troublesome Court of Appeal rulings (*Rogers* [2003] 1 WLR 1374 and *Finlay* [2003] EWCA Crim 3868) were overruled.

In contrast, the equally controversial ruling of the House of Lords in *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 has survived intact, even though it too stands accused of violating

fundamental principles governing causation and criminal liability. Its scope has however been clarified, and it can no longer be interpreted as laying down any general rules governing causation in criminal law.

### The trial and the first appeal

In 1997, the appellant was convicted of unlawfully killing a fellow drug user, Marco Bosque, who died by inhaling his own vomit after injecting himself with a heroin mixture that the appellant had prepared for him. Had the appellant injected Bosque with the heroin, his conviction would not have been remarkable. Such conduct would clearly have amounted to manslaughter by a deliberate, criminal and dangerous act. The criminal act would have been the unlawful administration of a noxious substance, contrary to the OAPA 1961, s. 23, and it is well established (following *Cato* [1976] 1 WLR 110) that Bosque's consent to that act would have been invalid.

As it was, the appellant unlawfully supplied the prepared syringe containing heroin, but that act alone could not have harmed anyone. The only dangerous act was the act of self-administration, which was performed by Bosque himself. Nor was there any evidence that the heroin injection had been wrongly mixed, measured or prepared. Had that been the case, a charge of manslaughter by gross negligence might perhaps have been appropriate. Bosque freely chose to act as he did, and the appellant merely gave him what he asked for. The obvious conclusion was that Bosque accidentally killed himself: a case of death by misadventure. See *Dalby* [1982] 1 All ER 916.

At the trial, however, the jury were asked to decide whether the appellant prepared the heroin for immediate injection; whether this act was one which all reasonable and sober persons would inevitably realise was bound to subject Bosque to the risk of some harm, and whether, if so, it was a significant cause of death. The jury convicted the appellant of manslaughter, and the Court of Appeal ([1999] Crim LR 65) upheld this conviction, purporting to distinguish *Dalby* on the basis that the appellant had not merely supplied the drug (as in *Dalby*), but had actually prepared the fatal syringe. Furthermore, the Court was willing to uphold the conviction on the basis that the appellant encouraged Bosque's 'unlawful' and dangerous act of self-injection, thus becoming jointly responsible for it. Waller LJ said:

The injection of the heroin into himself by Bosque was itself an unlawful act, and if the appellant assisted in and wilfully

encouraged that unlawful conduct, he would himself be acting unlawfully . . . On the facts alleged by the Crown . . . he wilfully encouraged Bosque to inject himself unlawfully. . . .

The problem with this reasoning is that the initial premise is false. If A encourages B to inject C with heroin and C dies, B then has unlawfully killed C and A is a secondary party to that killing, so both can be convicted of manslaughter; but one cannot be a secondary party to accidental self-killing, because there is no such offence.

### *Dias and Rogers*

An opportunity to reconsider the position arose in *Dias* [2001] EWCA Crim 2986, where, faced with broadly similar facts, Keene LJ immediately recognised basic errors in *Kennedy*. He said:

It is not easy to see on what basis the court [in *Kennedy*] concluded that the act of self-injection was unlawful, because . . . there is no offence under the Misuse of Drugs Act 1971, or other statute, or at common law, of injecting oneself with a prohibited drug . . .

The supply of heroin was undoubtedly unlawful, but the difficulty about relying on it as a basis for manslaughter would have been one of causation. The deceased was an adult and able to decide for himself whether or not to inject the heroin.

The court in *Dias* was in no position to overrule *Kennedy*, but its judgment undermined the authority of the earlier case, and one might have expected normal service to be resumed at that point. It was not. Instead, the Court of Appeal continued to muddy the waters of causation: first in *Rogers* and then again in *Finlay*.

*Rogers* provides a variation on the usual theme, because the appellant did not merely prepare the drug, but also applied a tourniquet to his companion's arm to 'bring up the vein' as the latter self-injected, with fatal results. According to the Court of Appeal, this meant that he did not merely provide assistance or encouragement: he was a joint perpetrator of the fatal act, and it was immaterial that the deceased might not have been committing any offence. Rose LJ said:

A person who actively participates in the injection process commits the *actus reus* and can have no answer to an offence under section 23 or a charge of manslaughter if death results.

This interpretation raised problems of its own, if only because it required the drawing of fine and obscure distinctions between acts of participation and acts of mere assistance. *Finlay*, decided later that year, went much further.

*Finlay and Empress*

In *Finlay*, the prosecution failed in their attempt to prove that the appellant had actually injected the deceased with the heroin that killed her; but they secured a conviction on an alternative count, in which it was alleged that he had caused or contributed to her death merely by preparing the fatal syringe. The court relied here on *Empress*: a much criticised decision which had hitherto been regarded as an authority on causation only in the particular context of pollution control legislation. The House of Lords held in *Empress* that the defendant company could properly be said to have 'caused' the pollution of a watercourse by storing diesel fuel nearby in such a way that it was possible for someone to open a tap or valve in the night and drain the fuel into the watercourse. If one were looking to apportion blame for the pollution, it was perhaps not unreasonable, given the lax security on the site, to lay much of that blame at the company's own door. Had the charge been one of failing to take reasonable measures to prevent pollution, the conviction would indeed have been justified; but on any conventional application of the principles of causation, the pollution was caused by, and only by, the act of the unknown saboteur or vandal.

According to *Finlay*, however, the independent act of a victim or third party is not something which necessarily breaks the chain of causation as a matter of law, but is merely a factor for the jury to bear in mind when reaching a verdict on the facts. In this case the jury was entitled to view the chain of causation as intact. How this could be squared with *Latif* [1996] 1 WLR 104 was not really explained.

*Kennedy (No 2)*

Eventually, *Kennedy* itself was referred back to the Court of Appeal. In a judgment that largely rejected the *Empress/Finlay* approach, but stretched the *Rogers* 'joint participation' approach still further, the court held that a person who prepares the heroin and one who injects it (into himself or another) may each be jointly and actively engaged 'as a team' in the act of administration. It would be for the jury to decide whether this was in fact the case. Lord Woolf CJ said:

To convict, the jury had to be satisfied that, when the heroin was handed to the deceased 'for immediate injection', he and the deceased were both engaged in the one activity of administering the heroin. These were not necessarily to be regarded as two separate activities; and the question that remains is whether the jury were satisfied that this was the situation. . . .

The point in this case is that the appellant and the deceased were carrying out a 'combined operation' for which they were jointly responsible.

If manslaughter convictions could be upheld in *Kennedy* or *Rogers*, how then could a defendant who actively assists in a suicide avoid liability for murder? Lord Woolf's unconvincing explanation was that:

Parliament, by enacting the Suicide Act 1961, must be taken to have provided a statutory code for offences, in situations involving an individual deliberately taking his own life. In view of s.2 of the 1961 Act, it would be an abuse to prosecute someone assisting another to commit suicide for murder. Furthermore, in practice, it would not happen.

With respect, if the statutory code implicitly excludes a charge of murder in such circumstances, it equally excludes a charge of manslaughter. It would thus have been a defence for the appellant in *Kennedy* to show that Bosque's death was a suicide in which he had knowingly assisted. An accidental death would (on this reasoning) amount to unlawful homicide, whereas a deliberate one would amount only to a lesser offence under s. 2. That cannot be right.

**The decision of the House of Lords**

In 'Drug Suppliers as Manslaughterers' [2005] Crim LR 819, David Ormerod and Rudi Forston accurately predicted that the House of Lords would have four main options when they heard this appeal. One would involve applying reasoning derived from *Empress* and *Finlay*. Another would involve endorsing the 'joint participation' approach, used in the court below. A third would involve straining the concept of 'administering' in such a way as to include the supply of drugs for immediate self-administration. But Ormerod and Forston favoured the fourth option: a 'reassertion of orthodoxy' in respect of causation, coupled with clarification (but not distortion) of the s. 23 offence. This, by and large, is what the House of Lords has delivered.

The Crown conceded (and the House agreed) that a manslaughter conviction could be upheld only if it could be said that the appellant 'administered' the heroin to Bosque within the meaning of the OAPA, s. 23. No attempt was made to argue that he had instead 'caused it to be taken' by Bosque, who knew exactly what it was and freely chose to inject himself.

The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him . . .

Nor did their lordships accept that the appellant

(or indeed the appellant in *Rogers*) 'jointly administered' the injection:

There is, clearly, a difficult borderline between contributory acts which may properly be regarded as administering a noxious thing and acts which may not. But the crucial question is not whether the defendant facilitated or contributed to administration of the noxious thing, but whether he went further and administered it. What matters . . . is whether the injection itself was the result of a voluntary and informed decision by the person injecting himself. In *R v Rogers*, as in the present case, it was. That case was, therefore, wrongly decided. . . .

After considering the reasoning adopted in the court below, they added:

It is possible to imagine factual scenarios in which two people could properly be regarded as acting together to administer an injection. But nothing of the kind was the case here. . . . The appellant did not administer the drug.

As for *Empress*:

The House was not in that decision purporting to lay down general rules governing causation in criminal law. It was construing, with reference to the facts of the case before it, a statutory provision imposing strict criminal liability on those who cause pollution of controlled waters.

In *Finlay*, the court accordingly erred when applying *Empress* in the very different context of s. 23 and manslaughter. The many critics of *Empress* will regret that it has survived at all, but its potential to cause mischief has at least been curtailed.

### Manslaughter by supplying drugs?

Is it ever appropriate to prosecute the supplier for manslaughter if a dangerous drug proves lethal when self-administered? Where the deceased was a fully informed and responsible adult, the answer given in *Kennedy* is 'never'. But their lordships do not rule out the possibility that liability may arise in other cases.

Take for example *Khan* [1998] Crim LR 830, in which the appellants supplied a 15-year-old girl with heroin on which she accidentally overdosed, and then left her to die. Convictions for gross negligence manslaughter

(based on their failure to help her) were quashed, because the trial judge did not direct the jury to decide whether a duty of care was owed in such circumstances, and also failed to rule as to whether the facts could support such a conclusion. He refused to leave constructive manslaughter to the jury, because the deceased had freely chosen to take the heroin; but in the case of a child it must sometimes be possible to distinguish *Kennedy* and argue that the child was incapable of free and informed judgment. Had the deceased in *Khan* been a few years younger, that argument would surely have been irresistible.

There may also be cases in which the defendant and the deceased really 'act together' in the administration of the fatal dose, as where one pierces the vein and holds the syringe steady while the other presses to inject the contents.

### Identifying the unlawful act

The Appellate Committee concludes its report with a plea for clarity in the identification of the base offence:

Much of the difficulty and doubt which have dogged the present question has flowed from a failure, at the outset, to identify the unlawful act on which the manslaughter count is founded. It matters little whether the act is identified by a separate count or counts under section 23, or by particularisation of the manslaughter count itself. But it would focus attention on the correct question, and promote accurate analysis of the real issues, if those who formulate, defend and rule on serious charges of this kind were obliged to consider how exactly, in law, the accusation is put.

The point is well made. In the past, similar criticism has occasionally been levelled at the House of Lords itself. To take an old but well known example, what was the base offence underlying the manslaughter convictions in *DPP v Newbury* [1977] AC 500? We were never told.

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