

# 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>>.

We will publish further Bulletins in January, April, and July 2010, and these will be available free of charge on the *Blackstone's Criminal Practice* website at <<http://www.oup.com/blackstones/criminal>>. Website updates are set out on a chapter-by-chapter basis, with links to the full text of available judgments and to relevant legislation. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

## CASE DIGEST—IN BRIEF

### OFFENCES—DIMINISHED RESPONSIBILITY

#### Khan

[2009] EWCA Crim 1569

Even where, on a charge of murder, there is uncontradicted medical evidence of a significant mental abnormality affecting the accused, the general rule is that the charge of murder should be left to the jury. Except where the prosecution concede the issue, only in very exceptional cases should a charge of murder be withdrawn from the jury on the basis of diminished responsibility. The trial judge would have to be satisfied that on the evidence (including the expert medical

evidence), no reasonable jury could fail to conclude that the accused had established the essential elements of the defence on a balance of probabilities.

See *Blackstone's Criminal Practice*: B1.15

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**ROAD TRAFFIC—EXCLUDING  
IMPROPERLY OBTAINED SPECIMENS****DPP v Wilson**

[2009] EWHC 1988 (Admin)

The decision in *Fox* [1986] AC 281 that a lawful arrest is not an essential prerequisite for lawfully requiring a specimen under the RTA 1988, was followed in this case. The courts will exclude evidential specimens where the procedure followed when taking them was even slightly irregular, but if that procedure was properly followed it does not then matter (as far as admissibility is concerned) that the defendant was not lawfully arrested, or indeed that he should never have been arrested at all.

See *Blackstone's Criminal Practice: C5.31*

**Coe**

[2009] EWCA Crim 1452

A further setback was suffered by the 'loophole defence industry' in *Coe*, where the defendant was convicted of an offence under the RTA 1988, s. 3A(1)(c) (causing death by careless driving and failing without reasonable excuse to provide a specimen for analysis). Following his involvement in a fatal road traffic accident, S was taken to hospital and a sample of his blood was taken for medical purposes. This was later acquired by the police, but S then declined to provide either breath or blood specimens for analysis pursuant to RTA 1988, s. 7. At the trial, the prosecution needed to establish (1) that S was guilty of careless driving (causation not being in dispute) and (2) that he had failed without reasonable excuse to provide a specimen for analysis. Evidence was given of the blood sample taken before the police arrived. This showed him to be more than two and a half times over the legal limit for alcohol and tended to support other evidence suggesting that S was guilty of careless driving and of wilful refusal to provide a specimen for analysis. Because it was not taken with his consent or divided in accordance with RTOA 1988, s. 15, the sample could not have been used to prove a 'driving offence connected with drink or drugs', such as that under s. 3A(1)(a), but as the Divisional Court rightly noted, the constraints imposed by s. 15 do not apply to 'refusal' offences such as that under RTA 1988, s. 3A(1)(c). Nor was there any unfairness in the procedure such as might justify

the exclusion of evidence under the PACE 1984, s. 78. The conviction was not unsafe.

See *Blackstone's Criminal Practice: C5.31*

**PROCEDURE—ABUSE OF PROCESS****Mattu**

[2009] EWCA Crim 1483

The Court of Appeal held that it is an abuse of the process of the court to prosecute in one Crown Court on a basis strikingly in conflict with the basis on which a plea of guilty had been accepted by the prosecution at another. In the instant case, a carefully prepared and detailed basis of plea was agreed between prosecution and defence, and approved by the court, first, for the purpose of giving an indication as to sentence and, second, for deciding upon sentence. Pill LJ said that the basis of plea:

... achieved a status which renders a prosecution attempt to go behind it in the blatant way contemplated here an abuse of process. . . . It would be fundamentally unfair to the respondent if the court were to permit the prosecution to act in that way. There will be cases, where, for example, fresh evidence emerges and circumstances change, in which it may be possible for the prosecution to circumvent a basis of plea they have agreed but what the prosecution attempted in this case is not acceptable.

See *Blackstone's Criminal Practice: D3.64*

**PROCEDURE—DISCLOSURE****HM Advocate v Murtagh**

[2009] UKPC 36

Although concerned with disclosure issues in a Scottish criminal trial, the pronouncements in the case on the balance between the duty of disclosure and the human rights of a witness that might be subject to the disclosure of a past conviction are of clear application in England and Wales. It was accepted that disclosure of a previous conviction of a victim or a witness may do harm to the reputation or standing of a witness which is out of proportion to any significance which the conviction may have for the relevant proceedings. It was remarked that a disclosure system which regularly and repeatedly failed to protect the rights of witnesses could have severe adverse consequences for the system of justice as a whole if it deterred witnesses from coming forward. While the accused's right to a fair trial must take precedence over any other person's right to

privacy and material whose disclosure is necessary for a fair trial must always be disclosed, equally, it is imperative that sensitive information whose disclosure is not required for a fair trial should be kept confidential.

See *Blackstone's Criminal Practice: D9.11*

## PROCEDURE—REQUIREMENT THAT AN INDICTMENT BE SIGNED

### Leeks

[2009] EWCA Crim 1612

*Clarke* [2008] 1 WLR 338 was considered in this case, in which the Court of Appeal quashed L's conviction and ordered a retrial on the basis that he had pleaded guilty to a count that had been improperly added to the original indictment without the requisite formal amendment. Although the circumstances were not identical to those in *Clarke*, the principle and approach had to be the same. L's guilty plea and subsequent conviction had all been founded on a nullity.

See *Blackstone's Criminal Practice: D11.2 et seq*

## PROCEDURE—EXTRADITION

### R (McKinnon) v Secretary of State for the Home Department

[2009] EWHC 2021 (Admin)

This is the widely publicized case relating to the extradition to the USA of an alleged hacker. In the most recent application for judicial review, Stanley Burnton LJ (1) stated that it was for the DPP, not the courts, to decide whether a person should be prosecuted in the UK or extradited for prosecution abroad, (2) rejected the contention that the claimant's Asperger's Syndrome was of sufficient severity to make extradition a breach of his rights under Article 3 of the ECHR (and thus justified the withdrawal of the warrant of extradition) and (3) stated that the extradition would not amount to a breach of the applicant's Article 8 rights.

See *Blackstone's Criminal Practice: D31*

### R (Bary) v Secretary of State for the Home Department

[2009] EWHC 2068 (Admin)

The claimants were accused by the Government of the

United States of America of participation in a conspiracy to murder United States citizens, United States diplomats, and other internationally protected persons which included the synchronized bombings of the United States embassies in Nairobi and Dar Es Salaam in 1998. The US Government sought their extradition. The primary focus of the applications was that extradition would amount to a breach of the ECHR, Article 3 (inhuman and degrading treatment or punishment) because the prison conditions in which the claimants are likely to be held in the USA would amount to such treatment or punishment and there is a breach of the Human Rights Act 1998, s. 6 if a public authority acts in a way which is incompatible with a Convention right. The contention was that the claimants would be subject to SAMs (special administrative measures) and would be held in a Supermax facility without any realistic prospect of the highly restrictive regimes being reviewed.

After considering the prison regimes which were likely to be applied to the claimants and the various assurances given by the US Government, Scott Baker LJ said (at [97]—[98]) that

Neither SAMs . . . or life without parole . . . cross the Article 3 threshold in the present case. Although near to the borderline, the prison conditions at ADX Florence, although very harsh, do not amount to inhuman or degrading treatment either on their own or in combination with SAMs and in the context of a whole life sentence. . . . Whether the high Article 3 threshold for inhuman or degrading treatment is crossed depends on the facts of the particular case. There is no common standard for what does or does not amount to inhuman or degrading treatment throughout the many different countries in the world. The importance of maintaining extradition in a case where the fugitive would not otherwise be tried is an important factor in identifying the threshold in the present case.

Had the claimants persuaded me that there was no prospect that they would ever enter the step down procedure whatever the circumstances then in my view the Article 3 threshold would be crossed. But that is not the case.

See *Blackstone's Criminal Practice: D31*

## EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION

### K

[2009] EWCA Crim 1640

Parties to ancillary relief proceedings conducted under the Family Proceedings Rules 1991 cannot invoke the privilege against self-incrimination in order to

withhold information from the court. But, in any subsequent criminal trial, use of admissions made under compulsion by the defendant in such proceedings would infringe his right to a fair trial under the ECHR, Article 6. Such evidence should therefore be excluded by using the PACE 1984, s. 78.

See *Blackstone's Criminal Practice*: F9.25

## EVIDENCE—UNAVAILABLE WITNESSES

### Nelson

[2009] EWCA Crim 1600

The Criminal Justice Act 2003, s. 116(2)(e), provides for the admissibility of a witness statement in cases where the witness in question does not give (or does not complete) his evidence 'through fear'. But in this murder case it appeared that fear of N was merely one factor in the witness's blunt refusal to testify when brought to court and put into the witness box. She had also become angry and resentful against the police following a long and stressful period on a witness protection scheme and had been brought to court under restraint.

The judge was not told, however, that the witness was also very anxious about her health because of 'distressing symptoms' that might have indicated cancer, or that she had booked a medical appointment which she was unable to keep because she was forced to attend the court. He concluded that fear had played a dominant role in her refusal and that it was in the interests of justice to admit her statement in evidence. There was a great deal of other evidence against N, who was duly convicted of murder.

The Court of Appeal considered that more should have been done to ascertain the witness's reasons for refusing to testify. A more careful and sympathetic enquiry should have revealed her health concerns and might have led the judge to deal differently with her. As it was, the fact that he was not told of those concerns was an irregularity that undermined his decision to admit her statement, but in the circumstances (and particularly in view of the other evidence incriminating N) it did not render the conviction unsafe.

See *Blackstone's Criminal Practice*: F16.8

## SENTENCING

### Inflicting Grievous Bodily Harm

**Pimm** [2009] All ER (D) 141 (Aug)

The 43-year-old offender went to a nightclub to seek revenge on the doorman, who had allegedly made advances to the offender's girlfriend. The offender headbutted the victim and continued his assault past the point when the victim might have retaliated. The victim suffered a partially severed tongue, broken teeth and required many stitches to the face. The incident had a profound effect on his life, resulting in his being out of work suffering from post traumatic stress disorder. The sentence of three years' imprisonment was deemed manifestly excessive. Notwithstanding the premeditation and degree of violence, and having regard to the sentencing guidelines, the highest category of sentence was reserved for particularly grave injury inflicted through premeditated assault with a weapon. It was difficult to categorize the injuries as particularly grave. A sentence of two years was substituted.

See *Blackstone's Criminal Practice*: B2.41

### Sexual Assault of a Child under 13

**Dent** [2009] All ER (D) 209 (Aug)

The offender had put his hand inside the 12-year-old victim's top and fondled her breast and, on another occasion, had put the victim on his knee and bounced her up and down and put his hand inside the waistband of her trousers. He pleaded guilty to an offence of sexual assault of a child under 13 after the start of the trial, but before the victim and her mother had to give evidence. In sentencing, the judge commented that there had been a breach of trust and that the offender had taken advantage of a vulnerable victim. The effect on the victim had been to confuse and disturb her. The total sentence was of 15 months' imprisonment. The Court of Appeal stated that the sentence was not manifestly excessive. Notwithstanding the fleeting and relatively minor nature of the assaults, it had to be remembered that the nature of the activity was only a starting point, and a very important consideration was the effect of the sexual conduct on the victim.

The judge had found correctly that the victim had been confused as she knew that the man was in a relationship with her mother.

**See *Blackstone's Criminal Practice*: B3.59**

### Violent Disorder

**Haque and Nuth** [2009] EWCA Crim 1453

The offender, then aged 15, was part of a group of youths who attacked another youth and terrified the occupants of his home; indeed evidence pointed to his being a ringleader in a concerted campaign against the principal victim. He was sentenced to a 12-month detention and training order. The suggestion of counsel for the offender was that the judge failed adequately to take into account his age, his positive good character, the principal aim of youth sentencing *viz* to prevent re-offending, his personal unsettled circumstances, the absence of any suggestion he armed himself, the fact that he regretted what he had done and showed victim empathy, and that the risk of his re-offending was thought low. The Court of Appeal focused on the offender's previous good character:

In our judgment the key to disposition for this young man is his scholastic record and current intent. The judge was entitled to find that custody was appropriate and *Nuth* has now had a taste of the damage it can do. He is most anxious that a loss of liberty will impede his progress towards a profession. Given how often the courts are required to deal with youths who have little if any dedication to their own education and scant regard to their future, we are inclined to see *Nuth* as a welcome exception. We can only hope that the exceptional course we propose is one which he will honour.

**See *Blackstone's Criminal Practice*: B11.53**

### Possession of Firearm with Intent to Cause Fear of Violence

**Bent** [2009] All ER (D) 199 (Aug)

In a classic road rage incident, the offender raised a handgun to the windscreen causing the complainant to fear for his safety. The police came to the area and stopped the offender and found an air-pistol and cannabis under the driver's seat of his car. On pleading guilty to possessing a firearm with intent to cause fear or violence on the basis that he had not pointed the firearm at the complainant but had merely showed it

to him, the 20-year-old offender was sentenced to a total of 12 months' detention in a Young Offenders' Institution. The Court of Appeal ruled that, while an immediate custodial sentence was not wrong in principle, in mitigation, the air pistol was not a prohibited weapon and was not loaded; moreover it was not pointed at the complainant but merely held up at the windscreen. The offender was of previous good character, he was hard-working, and his job remained open for him. A sentence of four months' imprisonment in a Young Offenders Institution would be substituted for the one imposed.

**See *Blackstone's Criminal Practice*: B12.90 and B12.134**

### Confiscation: Information, Evidence and Proof

**Knaggs** [2009] EWCA Crim 1363

An offender who has pleaded guilty, without having contested the details of the prosecution's case either before the jury or by means of a *Newton* hearing, may still challenge the prosecution's evidence in confiscation proceedings.

**See *Blackstone's Criminal Practice*: E19.11**

### Confiscation: Determination of Benefit

**Nelson** [2009] EWCA Crim 1573

The Court of Appeal commended the publication by the CPS of a document entitled, 'Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings', the purpose of which is to achieve consistency of approach among prosecutors in England and Wales. The guidance follows *Morgan* and *Shabir*, and identifies a further scenario in which confiscation proceedings may amount to an abuse of process, namely where an offender has obtained paid employment by a false representation to his employer. The offender's wages may be his benefit (*Carter* [2006] EWCA Crim 416), but in some cases the link between the criminality and the receipt of payment from dishonestly obtained employment may be too remote, for example, where had the representation been corrected, the employment would have continued, or where after many years of otherwise lawful employment, a relatively minor previous conviction is discovered.

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

## CASE DIGEST—IN DETAIL

**RF** [2009] EWCA Crim 678

The background facts to this case are restricted and cannot yet be reported. However, the judgment on aspects of disclosure can be reported. The Court of Appeal noted the prosecution's general duty of disclosure, but added (at [36]—[39]):

However, it is self evident that where there may be material relevant in that sense overseas outside the European Union, the power of the Crown and the courts of England and Wales to obtain material is limited. Essentially, if informal requests for the material are declined, the powers are limited to what is set out in the Crime (International Co-operation) Act 2003 and in relevant international conventions, such as the Drugs Convention. There may be cases where a foreign entity will simply not make the material available, a foreign court will not compel production under a Letter of Request and steps under the relevant convention will not produce the documents. There may be other cases where the authorities of a foreign state, though willing to show material to officers acting on behalf of the United Kingdom, will not allow the material to be copied or otherwise made available and the courts of the foreign state will not order its provision.

There cannot, for these reasons, be any absolute obligation on the Crown to disclose relevant material held overseas outside the European Union by entities not subject to the jurisdiction of these courts; the position is quite different to the position where the information is held in the United Kingdom or by a person amenable to the jurisdiction of these courts. As Sir Igor Judge said in *R v Khyam* [2008] EWCA Crim 1612 at paragraph 37:

The prosecuting authorities in this jurisdiction simply cannot compel authorities in a foreign country to acknowledge, let alone comply with, our disclosure principles.

The obligation is one to take reasonable steps. Whether the Crown has complied with that obligation is for the courts to judge in each case on the provision of full information to the court. . . .

. . . It is, however, important that the position in such a case is clearly set out in writing so that the court and the defence know what the position is. The police and prosecuting authorities in the United Kingdom may not be able to complete the requisite lists, but it is their duty to record and explain the position and set out, insofar as they are permitted by the authorities of the foreign sovereign state, such information as they can and the steps they have taken. Where they are not permitted to disclose everything that they know, then that fact must be made clear on the documentation provided to the court so that the court can consider what to do.

See *Blackstone's Criminal Practice: D9.9*

**CII** [2009] EWCA Crim B1

This was a ruling as to whether, on the facts of the case, the judge could lawfully rule that although he had conducted a preparatory hearing he should not be the trial judge. The Court of Appeal ruled that he did indeed have such a power and was able to distinguish *Southwark Crown Court, ex parte Commissioners for Customs & Excise* [1993] 1 WLR 764. The Vice President went on to comment on the development of case management powers in cases which did not qualify for a preparatory hearing, remarking that 'for all practical purposes, the court now has exactly the same powers of management in a non-preparatory hearing case as it has in one where a direction for a preparatory hearing is given'. He stated (at [23]—[24]):

We should add that this case illustrates the complications introduced where the preparatory hearing regime is invoked. It is emphatically not the case that most heavy fraud or similar cases will nowadays call for a preparatory hearing. Virtually the only reason for directing such a hearing nowadays is if the judge is going to have to give a ruling which ought to be the subject of an interlocutory appeal. Such rulings are few and far between and do not extend to most rulings of law. An interlocutory appeal can be a most beneficial process in a few, very limited, circumstances. If a discrete point of law arises, its resolution in this court can if necessary be accomplished within a very short time-frame and this can avoid the risk of many weeks of wasted trial time. On the other hand, many points of law decided in the Crown Court turn out to be fact sensitive and to appear differently, or for that matter to go away, by the time the evidence has been heard. Making a decision on one part of a case only and on necessarily hypothetical facts is normally very undesirable; whereas a ruling in the Crown Court can be varied from time to time if the case proceeds differently from what was expected, a ruling of this court cannot normally be treated similarly. An interlocutory appeal is apt to cause serious disruption to a carefully planned trial timetable, which may involve multiple defendants and their lawyers and large numbers of witnesses. If the timetable of one case is disrupted, it very often has a knock-on effect on the timetables of others. Moreover, if the tendency of an interlocutory appeal to have this consequence is to be minimised, it is essential for this court to give it priority over other waiting appeals. This is not only potentially unfair to those who are in custody following conviction; it is also impossible unless interlocutory appeals are very exceptional. The present case did, as we have indicated, present a good example of a justified interlocutory appeal. The point was discrete, novel, certain to arise rather than hypothetical or contingent, involved no factual dispute and needed authoritatively to be determined lest the trial proceed on what might

turn out to be a false footing, with consequent risk of the necessity of re-trial. By contrast, rulings where the judge has applied well understood principles to the case will not be suitable for interlocutory appeal even if they may properly be described as questions of law; rulings upon severance are amongst those likely to fall into this category. Nor will those where the ruling is to any extent provisional or dependent upon the way the evidence emerges. It is important to remember that the decision to declare a preparatory hearing is for the judge alone; it cannot be made by agreement between the parties. Nor is it a reason for making an order for a preparatory hearing that one or other party would like the opportunity of testing some ruling by way of interlocutory appeal, unless the point is one of the few which is genuinely suitable for such procedure.

We summarise what ought to be the practice in this kind of situation. Reference should henceforth be made to this practice rather than to any formula employed in *R v Southwark Crown Court*.

- i) Given the co-extensive powers of case management outside the preparatory hearing regime, courts ought to be very cautious about directing a preparatory hearing under section 29 CPIA or section 7 CJA 1987; in particular, the desire of one party to test a ruling by interlocutory appeal is not a good enough reason for doing so, unless the point is one of the few which is genuinely suitable for that procedure . . . and there is a real prospect of such appeal being both capable of resolution in the absence of evidence and avoiding significant wastage of time at the trial.
- ii) A decision that a judge who has conducted a preparatory hearing should not conduct the trial is one which must be made by the judge concerned. It must not be made administratively, for example by the listing officer.
- iii) Such a decision must be made only after a hearing at which all parties have had the opportunity to make representations.
- iv) The ordinary rule is that the judge who has had conduct of the preparatory hearing should also conduct the trial.
- v) That rule may not be departed from without compelling reason.
- vi) Before departing from it, the judge, if not himself the court's resident judge, ought to consult that judge, and all judges should consult one of the circuit's presiding judges; they will of course respect any directions or advice given.
- vii) Active steps must be taken in the planning of court business and judicial commitments to avoid wherever possible the necessity for a judge to find himself having to consider leaving any complex case between case management/preparatory hearing and trial; if, unusually, that necessity should arise in a preparatory hearing case (as it did here) the question to be resolved is not a matter of law but of judgment for the judge; this court could

interfere only if his decision were one which no reasonable judge could arrive at.

**See *Blackstone's Criminal Practice*: D14.46 and D14.51**

#### **Meachen** [2009] EWCA Crim 1701

This case concerned an application for the admission of fresh evidence under the Criminal Appeal Act 1968, s. 23. The section gives the Court of Appeal a discretion, if they think it necessary and expedient in the interests of justice, to receive evidence which was not adduced in the proceedings from which the appeal lies. The unusual nature of this application was that the evidence which it was sought to introduce was expert evidence. While the Court accepted that expert evidence was covered by s. 23, it also stated that the reference in s. 23(2)(d) to a reasonable explanation for the failure to adduce the evidence before the jury in the original proceedings applies more aptly to factual evidence of which a party is unaware, or could not adduce, than to expert evidence. This is because expert witnesses, although varying in standing and experience, are interchangeable in a way in which factual witnesses are not and the defence would be expected to call a substitute expert if its preferred expert was unavailable. The Court quoted Lord Bingham in *Jones* [1997] 1 Cr App R 86 on the dangers of subverting the trial process if an appeal could be based on an expert case which, if sound, could and should have been advanced before the jury.

Giving the judgment of the Court, Sir Anthony May, P, said (at [23]):

Just as it would subvert the trial process if a defendant, convicted at trial, were to be generally free to mount on appeal an expert case which, if sound, could and should have been advanced before the jury, so it would subvert the trial process, and in substance add nothing, if the defendant were generally free to mount on appeal the same expert case as was advanced at trial with a different and additional expert. The [Criminal Case Review Commission's] idea that it is appropriate to revisit on an appeal an issue upon which experts disagreed at trial, but which the jury by their verdict resolved, with the aid of a third expert is, in our judgment, erroneous. If it were regarded as necessary to bolster an expert opinion by that of a second supporting expert, that should be done at trial, although in this context we are bound to say that a case of this kind is not made intrinsically more persuasive because two experts express the same opinion. We do not encourage parties to expect that public money should be spent on duplicating experts.

**See *Blackstone's Criminal Practice*: D26.16 and F10.25**

## LEGISLATION

**Political Parties and Elections Act 2009**

This Act makes provision in connection with the Electoral Commission; political donations; loans and related transactions; and political expenditure. It also amends the law relating to elections and electoral registration. Amendments to the Political Parties, Elections and Referendums Act 2000 include some relating to offences and defences under that Act (offences involving impermissible and non-resident donors and declarations as to the sources of party donations).

**Criminal Procedure (Amendment) Rules 2009 (SI 2009 No. 2087)**

These Rules amend and add new provisions to the Criminal Procedure Rules 2005. The changes, which generally have effect from 5 October 2009, include the following:

- a new r 3.8(4) provides that 'In order to prepare for the trial, the court must take every reasonable step to encourage and to facilitate the attendance of witnesses when they are needed';
- r. 4.7(1) and (3) are substituted so as to make specific provision for the service of an application for the court to punish for contempt of court;
- a new part 5 combines the provisions on forms from the former part 5 and the provisions on court records from the former part 6, so the former rr. 6.1 to 6.4 become rr. 5.4 to 5.7;
- a new part 6 deals with investigation orders under the Terrorism Act 2000 and the Proceeds of Crime Act 2002; the new part 6 includes provisions formerly contained in part 62 (Proceeds of Crime Act 2002 – rules applicable to investigations) but greatly amplifies those rules;
- r. 14.1(3)(a) is amended so that the reference to 'sign and date the draft which then becomes an indictment;' is substituted by 'sign, and add the date of receipt on, the indictment;' thus removing the implication that a signature is required on a draft indictment for it to become an indictment (see *Clarke* [2008] 1 WLR 338 and D11.2);
- new rr. 19.26 and 19.27 deal with grant of bail subject to electronic monitoring requirements and grant of bail subject to accommodation or support requirements;
- a new part 22 (disclosure — rr. 22.1 to 22.9), effectively replaces parts 22 and 23 (disclosure by the prosecution and disclosure by the defence, respectively - for which there were formerly no rules), 25 (application for public interest immunity and specific disclosure) and 26 (confidential material) with greatly simplified rules; part 24 (disclosure of expert evidence) is also omitted and partially replaced but is also partially replaced within the new part 33 (see below);
- part 27 (witness statements) is substituted with new simplified rules which are set out in full below;
- part 33 (expert evidence) is substituted and now includes r. 33.4, which provides for the service of an expert's report, and r. 33.9, which provides a power for the court to vary the requirements in part 33;
- a new r. 59.6 is inserted in part 59 (Proceeds of Crime Act 2002 — rules applicable only to restraint proceedings) which makes provision for an application to punish for contempt;
- part 62 (Proceeds of Crime Act 2002 — rules applicable to investigations) is replaced with a new part 62 which deals with contempt of court;
- r. 65.6(3) is substituted so that the Court of Appeal has a discretion as to whether to determine an appeal against an order restricting public access to a trial with or without a hearing but requires that its decision on such an appeal must be announced at a hearing in public;
- a new part 76 (costs — rr. 76.1 to 76.14), effectively replaces parts 76 and 77 (representations orders and recovery of defence costs orders, respectively — for which there were formerly no rules) and 78 (costs orders against the parties); the new rules cover all kinds of applications for costs orders in criminal proceedings.

**Part 27 Witness Statements****When this Part applies**

27.1.—(1) This Part applies where a party wants to introduce a written statement in evidence under section 9 of the Criminal Justice Act 1967.

**Content of written statement**

27.2. The statement must contain—

- (a) at the beginning—
  - (i) the witness' name, and

- (ii) the witness' age, if under 18;
- (b) a declaration by the witness that—
  - (i) it is true to the best of the witness' knowledge and belief, and
  - (ii) the witness knows that if it is introduced in evidence, then it would be an offence wilfully to have stated in it anything that the witness knew to be false or did not believe to be true;
- (c) if the witness cannot read the statement, a signed declaration by someone else that that person read it to the witness; and
- (d) the witness' signature.

#### Reference to exhibit

27.3. Where the statement refers to a document or object as an exhibit—

- (a) the statement must contain such a description of that exhibit as to identify it clearly; and
- (b) the exhibit must be labelled or marked correspondingly, and the label or mark signed by the maker of the statement.

#### Written statement in evidence

27.4.—(1) A party who wants to introduce in evidence a written statement must—

- (a) before the hearing at which that party wants to do so, serve a copy of the statement on—
    - (i) the court officer, and
    - (ii) each other party; and
  - (b) at or before that hearing, serve the statement itself on the court officer.
- (2) If that party relies on only part of the statement, that party must mark the copy in such a way as to make that clear.
- (3) A prosecutor must serve on a defendant, with the copy of the statement, a notice—
- (a) of the right within 7 days of service to object to the introduction of the statement in evidence

instead of the witness giving evidence in person; and

- (b) that if the defendant does not object in time, the court—
  - (i) can nonetheless require the witness to give evidence in person, but
  - (ii) may decide not to do so.
- (4) The court may exercise its power to require the witness to give evidence in person—
  - (a) on application by any party; or
  - (b) on its own initiative.
- (5) A party entitled to receive a copy of a statement may waive that entitlement by so informing—
  - (a) the party who would have served it; and
  - (b) the court.

#### Magistrates' Courts (Violent Offender Orders) Rules 2009 (SI 2009 No. 2197)

These Rules prescribe the application form which must be used when applying for a violent offender order or an interim violent offender order under the Criminal Justice and Immigration Act 2008.

The Rules also prescribe the form which must be used when making a violent offender order or an interim violent offender order and provide that an application to vary, discharge or renew a violent offender order or to vary or discharge an interim violent offender order must be made in writing, specifying the reason for the application.

The Rules also provide that if the defendant wishes to serve a notice on the applicant under s. 99(7) of the 2008 Act (which is a notice denying that an act done outside England and Wales would have constituted a specified offence if it had been done in England and Wales), the defendant must do so no later than three days before the hearing date for the application under s. 100.

## COMMENT AND ANALYSIS

**Mental disorder and the capacity to agree to touching**

In the important case of *Cooper* [2009] 1 WLR 1786, sub nom C [2009] UKHL 42, the House of Lords clarified the ambit of the phrases 'capacity to choose' and 'unable to communicate' in the Sexual Offences Act 2003, ss. 30 to 33.

The complainant in respect of an allegation of an offence contrary to s. 30 was a 28-year-old woman suffering from schizo-affective disorder. The nature of schizo-affective disorder is that its effects may come and go. On the day of the incident in question she was plainly in a distressed and agitated state. Her behaviour had been such that a consultant psychiatrist had recommended her compulsory admission to hospital. She ran out of an interview with the consultant and when the accused later met her, he offered her help. She went with him to his friend's home, her mobile phone and bicycle were sold and she was given crack. When she was in the bathroom, the accused came in and asked her for a 'blow job'. Her evidence was that she was afraid and panicky and was saying to herself that 'these crack heads . . . they do worse to you'. She did not want to die so she just stayed and took it all. She made a '999' call after the incident and was later found in a distressed state wandering the streets. She was taken to the hostel in which she had been living and two days later was examined by a consultant psychiatrist. Having considered all the relevant circumstances, the evidence given by a consultant psychiatrist at trial was that she would not have had the ability to consent to sexual contact at the time of the alleged offences. The defendant was convicted, but the Court of Appeal quashed that conviction in a judgment reported as C [2009] 1 Cr App R 15.

Allowing the appeal and restoring the conviction, the House of Lords held that the Court of Appeal had unduly limited the scope of s. 30(1) in holding that a lack of capacity to choose cannot be person or situation specific and in holding that an irrational fear that prevents the exercise of choice cannot be equated with a lack of capacity to choose. Moreover, the Court of Appeal had been wrong in holding that to fall within s. 30(2)(b) a complainant must be physically unable to communicate by reason of her mental disorder.

In a speech with which the other Law Lords agreed, Baroness Hale observed that it was not necessary to decide whether the reasoning of Munby J in the family law case *X City Council v MB, NB, and MAB* [2006] EWHC 168 (Fam.), which was said by Baroness Hale to have unduly influenced the Court of Appeal, was correct. The 2003 Act made the position clear. Under s. 30(2)(a), a person is unable to refuse if she lacks the capacity to choose whether to agree to the touching whether because she lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done '*or for any other reason*'. Provided that the inability to refuse is, under s. 30(2)(c) '*because of or for a reason related to a mental disorder*', and the other ingredients of the offence are proved, the perpetrator is guilty. Baroness Hale said that the words '*for any other reason*' are plainly capable of encompassing a wide range of circumstances in which a person's mental disorder may rob them of the ability to make an autonomous choice, even though they may have sufficient understanding of the information relevant to making it. These could include the kind of compulsion which drives a person with anorexia to refuse food or the phobia (or irrational fear) which drives a person to refuse a life-saving injection.

Moreover, the House of Lords held that the capacity to choose can be situation or person specific. The 2003 Act refers to '*the*' touching and is therefore concerned with the specific act of touching. Once it is accepted that choice is an exercise of free will and that the mental disorder may rob the person of such free will, a mentally disordered person may be quite capable of refusing touching in one situation rather than another. Whilst the complainant in the instant case was unable to refuse in the vulnerable and terrifying circumstances in which the accused had placed her, she might well have been able to refuse a person who had not placed her in a situation of that nature. One does not consent to sex in general but consents to this act of sex with this person at this time and place. Such an approach is in keeping with the concept of autonomy in matters of private life guaranteed by Article 8 of the ECHR.

Finally, the House of Lords was clear that there is no justification for limiting the requisite inability to communicate to physical inability, as the Court of Appeal

had done. Baroness Hale observed that, in the 2003 Act, Parliament envisaged an inability to communicate which was the result of, or associated with, a disorder of the mind. Such inability to communicate must cover the situation where a person has such profound learning difficulty that they have never acquired the gift of speech and so it is impossible to discover whether or not they can understand or make a choice.

The narrow interpretation of ss. 30 to 33 by the Court of Appeal left prosecutors in a position where they might have preferred the option of proceeding under ss. 1 to 4. With the decision of the House of Lords, the broader interpretation of ss. 30 to 33 will ensure that the accused's mental element will be easier to prove (See Baroness Hale at [32]). However, there will be cases where a person with a mental disorder either did not have the capacity to agree or may have had the capacity to agree, but, nevertheless, did not freely agree within the meaning of s. 74. In such a case, the prosecution may prefer the option of charging under ss. 1 to 4 with ss. 30 to 33 being pleaded in the alternative.

**Tim Moloney**, Barrister, Took's Chambers  
**His Honour Judge Peter Rook, QC**

## Dangerous Driving by Police Officers

### *Milton v DPP*

In *Milton v DPP* [2007] 4 All ER 1026, it was held that the training and experience of a police traffic officer was a relevant consideration when determining whether a given piece of driving (such as speeding at 150 mph) was 'dangerous' within the meaning of the RTA 1988, s. 2A. This provides that a person drives dangerously if:

- (a) the way he drives falls far below what would be expected of a competent and careful driver, and
- (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous

In *Milton*, Smith LJ referred specifically to s. 2A(3), by which:

... in determining ... what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

He then concluded:

The fact that the driver is a Grade 1 advanced police driver is a circumstance to which regard must be had, pursuant to s. 2A(3). The weight to be attached to such a circumstance is entirely a matter for the fact finder. In the instant case, the fact finder might conclude that the driving was thoroughly dangerous regardless of the skill of the individual driver. On the other hand, he might conclude that, whereas for a driver of ordinary skill, such driving would have been dangerous, for a man of exceptional skill it was not. Such a thought process does not offend against the requirement that the test for dangerous driving is objective. It simply refines the objective test by reference to existing circumstances.

### *Bannister*

*Milton* seemed to have settled the law on this issue, but has now been overruled in *Bannister* [2009] EWCA Crim 1571, in which the Court of Appeal held that the special skill of a police driver is irrelevant when considering whether he has been guilty of dangerous driving. As in *Milton*, this case concerned allegedly dangerous high speed driving by a highly trained road traffic officer, although in this case the officer lost control of his patrol car in heavy rain and crashed. Giving the judgment of the court, Thomas LJ said:

If the special skill of the driver is taken into account in assessing whether the driving is dangerous, then it must follow inevitably that the standard being applied is that of the driver with special skills and not that of the competent and careful driver, because the standard of the competent and careful driver is being modified ...

The decisions of this court on taking into account matters such as knowledge of circumstances such as drunkenness or susceptibility to hypoglycaemic attacks are based on a different premise. Such matters do not go to the standard of the competent and careful driver, but are facts relating to the condition of the driver which are as relevant as the driver's knowledge of the unroadworthiness of a car or the conditions of the weather or the road. Those facts can be taken into account without in any way departing from the test of the competent and careful driver – an objective test to be applied by the jury or other decision maker. In contradistinction to that, taking into account the special skill of a driver would be to substitute the test of the ordinary competent and careful driver set out in the statute and in effect to re-write the test Parliament clearly laid down.

... It therefore follows that the special skill (or indeed lack of skill) of a driver is an irrelevant circumstance when considering whether the driving is dangerous.

This must now be considered to represent the law, but does it make any sense?

### Training, Experience and Common Sense

Driving which is reckless or seriously incompetent and thereby endangers other road users etc, must be dangerous within the meaning of s. 2A, even if the driver concerned is highly trained. That cannot be disputed and *Bannister* may indeed be an example of such driving. But it seems irrational to ignore the skill, training and experience (or inexperience) of a driver when determining whether his driving is (even objectively) dangerous.

The court in *Bannister* purports to distinguish such considerations from those such as knowledge of susceptibility to hypoglycaemic attacks, but they are scarcely distinguishable. They are all circumstances that may help to indicate, to the driver himself or to a hypothetical 'competent and careful driver' observing his actions, whether his driving is likely to result in an accident or not. They are all (at least outside a courtroom) relevant to the issue of dangerousness, in the same way that road and traffic conditions are relevant.

Take for example a case in which a police officer is charged with dangerous driving in the course of a high speed pursuit. If *Milton* is wrong and *Bannister* is right, the court should not allow the jury even to know whether the defendant has been trained in high speed pursuit driving, because this would be an 'irrelevant' consideration. The same test should apply whether he is a Grade 1 advanced driver of 20 years' experience or a young constable who has only recently been cleared to drive police vehicles at all. But that flies in the face of common sense. A 'competent and careful' officer would surely not attempt to pursue another vehicle at high speed unless he has been trained to do so.

Equally, a trained police pursuit driver following a stolen vehicle at high speed may be driving quite safely (given his training and experience) even though the driver of the stolen vehicle might be considered to be driving dangerously on account of that same speed.

Nor is there any reason why such considerations should not apply to civilian drivers, although they are less likely to be decisive in any given case. In *Milton*, Smith LJ doubted that his ruling would have much relevance to a typical dangerous driving case:

It seems to me that there will not be [many] cases in which the driver's personal skill or lack of it will be capable of making a difference to the objective assessment of the dangerousness of the driving in question. It will, in my view, only be the extremes of 'special skill' and 'almost complete lack of experience' that will be such as could affect the mind of the decision maker. The mere fact that a driver has driven for 30 years

without an accident will not be relevant; nor will evidence that a driver does not drive frequently. If, where the circumstance is such as could properly affect the mind of the decision maker, for better or worse, then so be it. Section 2A(3) appears to me to require that regard should be had to such circumstances.

That seemed, at the time, to be an unduly restrictive view of the relevance of experience. Compared to *Bannister*, however, it now seems positively enlightened.

The test set by s. 2A is indeed objective, but that should not require the courts (or the hypothetical competent and careful driver in s. 2A(1)(b)) to be blind to any of the particular circumstances of the case. *Bannister* is in that respect an unfortunate and misguided ruling. One hopes it is not the Court of Appeal's last word on the issue.

**Michael Hirst**, LLB, LLM  
Professor of Criminal Justice  
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### Lenient, but not Unduly Lenient

In two recent references by the Attorney-General under s. 36 of the Criminal Justice Act 1988, the Court of Appeal has concluded that, although the sentence imposed by the trial judge was, on the face of it, lenient, in all the circumstances and in light of later developments, the sentences should not be increased.

In *A-G's Ref (No. 45 of 2009) (Barratt)* [2009] EWCA Crim 1759, the 22-year-old offender had a poor record, involving the commission of violence in public in and around his home town of Hereford. He had breached ASBOs and community sentences, and had served two custodial sentences of four months and 12 months in the past. In April 2008, while under the influence of drink and drugs, he got into an argument with some younger youths and head-butted a 15-year-old in the face, breaking his nose. In September 2008, while on bail for that matter, the offender was part of a group which, after heavy drinking and being refused entry to a public house, started a fight with a group of Polish men. The offender's group shouted racial abuse, and the offender assaulted three of that group, by punching, biting and kicking. To all these offences the offender pleaded guilty. The judge considered a pre-sentence report written by a probation officer who knew the offender well. The offender and his girlfriend had recently become parents of the offender's first child, and the probation officer had detected a change in attitude and a determination to stop offending. The

judge said that the 'easy course' would be to send the offender to prison for these offences but, in light of the report, decided instead to defer sentence for six months, subject to requirements of supervision, unpaid work and a condition that he not enter any public house in Hereford, to see whether the change would actually take place. The Attorney-General referred that order of deferral to the Court of Appeal. In the Court of Appeal, Lord Justice Hughes said that the deferral was 'conspicuously lenient', that the judge had taken a 'clear risk' in proceeding as he did, and the Court could not really see what had been the basis for the judge's optimism. There was now, however, a fresh report prepared for the Court, which indicated that the offender's compliance with the order had been exemplary. His progress was variously described as 'excellent' and 'enthusiastic'. The Court concluded that although the original order was lenient, as things now stood in light of the offender's efforts and progress, it would clearly be contrary to the public interest to undo it.

In *A-G's Ref (No. 50 of 2009) (Haslam)* [2009] EWCA Crim 1729, the application related to a offender aged 40, of previous good character, who pleaded guilty to an offence of causing grievous bodily harm with intent. The offence arose out of a violent incident in the beer garden of a public house, where the offender had been with his girlfriend. They were approached by a 20-year-old man, who was very drunk and using offensive language. He was persistent and would not leave the offender's party alone. He went away and then returned, with more abusive language and then raised his arm at the offender, who punched him once in the body. The victim fell backwards over a table. The

offender then went to him and struck him a number of blows with his fist, until the girlfriend pulled him away. The whole series of events was captured on CCTV. The victim suffered serious injuries, a basal skull fracture with extensive bleeding inside the skull. He was detained in hospital for nine days. In due course he had to have an operation to deal with a bone in his ear which had become dislodged, causing some hearing loss. It was unclear whether these injuries had been caused by falling over the table and striking his head on the ground or by the subsequent assault. In all the circumstances the judge imposed a sentence of 12 months' imprisonment, suspended for two years, with an unpaid work requirement. The Court of Appeal considered the SGC's *Guideline on Assault etc*, and said that the starting point for an offence such as this was a custodial sentence of about two years. Lord Judge CJ, however, said that 'We must be careful about guidelines.' His lordship in fact then went on to consider para. 7 of that SGC guideline, which is concerned with general issues of culpability and harm. The Guideline says that where there is an imbalance between culpability and harm 'the harm has to be judged in the light of the culpability of the offender'. His lordship concluded that in this case there had been a serious injury, but a relatively low level of intent. The Court considered that this case 'is at the lowest end of the scale for such an offence'. In the circumstances, then, although the sentence was lenient (as the judge himself conceded at the time) it was not unduly lenient, and the Court decided not to interfere with it.

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

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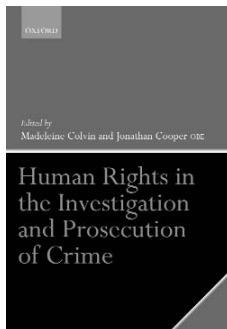
Issue 1, October 2009

### PUBLISHING NEWS

#### AVAILABLE OCTOBER 2009

#### Human Rights in the Investigation and Prosecution of Crime

Edited by **Madeleine Colvin**, Human Rights Consultant, and  
**Jonathan Cooper OBE**, Barrister, Doughty Street Chambers



This book provides extensive coverage of all recent developments in the criminal justice and human rights field, giving a detailed and practical analysis of the impact of UK human rights law on the investigation and prosecution of crime. It deals systematically with the various stages of investigation, arrest and detention in police custody, court procedure, evidence, sentencing, and appeals. It also provides a comprehensive, in-depth examination of the Regulation of Investigatory Powers Act (RIPA), looking in detail at the relationship between human rights and police investigatory and surveillance powers.

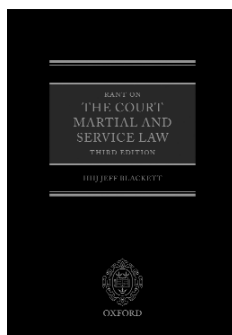
640 pages, 978-0-19-921441-9, Paperback, £55.00

**October 2009**

#### AVAILABLE DECEMBER 2009

#### Rant on the Court Martial and Service Law

**Jeff Blackett**, Judge Advocate General of the Armed Forces and a Senior Circuit Judge



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368 pages, 978-0-19-953468-5, Hardback, £125.00

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- The SFO's newly issued guidance to the corporate sector;
- The Parliamentary Joint Committee's published report in response to the Draft Bribery Bill in late July 2009;
- Latest cases including *R v Fazal* [2009] WLR(D) 175 and *Peacock* [2009] EWCA Crim 766 .

c.1,800 pages, 978-0-19-923530-8, Looseleaf  
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- *R v Terrance Daniel Agombar* [2009] EWCA Crim 903;
- *Shah v HSBC Bank (UK) Ltd* [2009] 1 Lloyd's Rep 328;
- *King v Director of Serious Fraud Office* [2009] UKHL 17;
- *R (on the application of George Taylor) v City of Westminster Magistrates Court* (1) Legal Services Commission (2) Revenue and Customs Prosecution Office [2009] EWHC 1498 (Admin).

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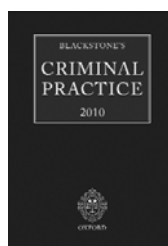
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