

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 4, July 2008

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>>.**

Blackstone's Criminal Practice is also updated each month on our website. **To access these updates for free, please visit <<http://www.oup.com/blackstones/criminal>>.** The updates are set out on a chapter-by-chapter basis, with links to the full text of available judgments and to relevant legislation. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

CASE DIGEST—IN BRIEF

GENERAL PRINCIPLES—DEFENCES

Ashley v Chief Constable of Sussex Police

[2008] UKHL 25

Although a mistaken belief may support a plea of self-defence in criminal proceedings, even where based on a stupid or unreasonable mistake, the position in civil proceedings is quite different. A defendant who has been acquitted in criminal proceedings may face civil proceedings to which he would have no effective defence. A defence based on non-existent facts that were honestly but unreasonably believed to exist must fail, even if the defendant (or his employee etc.) has already been tried for and acquitted of a criminal assault or homicide.

See *Blackstone's Criminal Practice*: A3.37

GENERAL PRINCIPLES—INFANCY

T [2008] EWCA Crim 815

This case confirms that, as far as children between the ages of 10 and 14 are concerned, the Crime and Disorder Act 1998, s. 34, has abolished the entire concept of a *doli incapax* defence (and not merely the presumption of it).

See *Blackstone's Criminal Practice*: A3.39

Contents

Case Digest—In Brief	1
Sentencing	4
Case Digest—In Detail	6
Legislation	9
Comment and Analysis	11
Publishing News	16

OFFENCES—CONSPIRACY TO DEFRAUD**Norris v Government of the USA** [2008] UKHL 16

In this extradition case, the House of Lords held that, prior to the commencement of the Enterprise Act 2002, a price-fixing 'cartel' agreement could not amount to conspiracy to defraud unless combined with other elements such as deliberate misrepresentation. A cartel agreement is now a statutory offence and would be prosecuted as such under s. 188 of the 2002 Act.

See *Blackstone's Criminal Practice*: A6.25

OFFENCES—IMMIGRATION**Asfaw** [2008] UKHL 31

The Court of Appeal's ruling in *Asfaw* [2006] EWCA Crim 707 has been reversed by the House of Lords. Their lordships ruled that the appellant, a refugee who had arrived in England directly from Ethiopia, en route to her intended destination in the USA, retained her entitlement to protection under Article 31 of the 1951 Convention and 1967 Protocol relating to the Status of Refugees when, in attempting to leave for America, she presented a false passport to the airline that was to carry her on the second leg of her journey. The Immigration and Asylum Act 1999, s. 31(3) is intended to give effect to the Convention and Protocol.

Once she had been acquitted on count one of the indictment against her (which charged an offence contrary to the Forgery and Counterfeiting Act 1981, s. 3), it was an abuse of process to proceed with the second count, under which she was charged with attempting to obtain services by falsely representing that she was authorised to use the passport, contrary to the Criminal Attempts Act 1981, s. 1(1). The s. 31 defence did not apply to this count, but it was based on exactly the same facts as the first count, to which the defence did apply.

See *Blackstone's Criminal Practice*: B23.6

**ROAD TRAFFIC OFFENCES—
DANGEROUS DRIVING****Stranney** [2007] EWCA Crim 2847

Where dangerous driving results in the malicious infliction of grievous bodily harm, contrary to the Offences Against the Person Act 1861, s. 20, there is no reason why the driver should not be charged with

and sentenced for the latter offence, as the Court of Appeal confirmed in this case, following *Bain* [2005] EWCA Crim 07. Where the vehicle was used as a weapon, even more serious charges are of course possible, including offences under the OAPA 1861, s. 18, or attempted murder. See also *A-G's Ref (No 19 of 2007)*, *Holroyd* [2007] EWCA Crim 1312.

See *Blackstone's Criminal Practice*: C3.38

PROCEDURE—SEARCH WARRANTS**Redknapp v Metropolitan Police Commissioner** [2008] EWHC 1177 (Admin)

The claimant was awarded damages after his home had been searched in a 'dawn raid' on the authority of a search warrant that was invalid because the conditions required by the Police and Criminal Evidence Act 1984, s. 8(1)(e) and (3), had not been identified. Latham LJ said:

The obtaining of a search warrant is never to be treated as a formality. It authorises the invasion of a person's home. All the material necessary to justify the grant of a warrant should be contained in the information provided on the form. If the magistrate or judge in the case of an application under [PACE 1984] section 9, does require any further information in order to satisfy himself that the warrant is justified, a note should be made of the additional information so that there is a proper record of the full basis upon which the warrant has been granted.

In this case, however, the application for the warrant did not identify which of the conditions in section 8(3) was being relied on; and the court was not prepared to infer that the magistrate must have been told. The warrant was accordingly unlawfully issued.

The claimants had also argued that a valid warrant could not be both a 'specific premises warrant' and an 'all premises warrant', but the court disagreed: there is no reason why one warrant cannot include both types.

See *Blackstone's Criminal Practice*: D1.82

**PROCEDURE—POLICE OFFICERS
AND OTHERS AS JURORS****Khan** [2008] EWCA Crim 531

Abdroikov [2007] UKHL 37 was applied in this case. The fact that a police officer sitting on the jury in one of the three conjoined cases had himself taken part in operations involving the same type of offence with which the defendant was charged (drug dealing) did

not of itself give rise to any appearance of bias on the part of the police officer. Most police officers were likely to have had experience of most of the common types of criminal offence. Nor, in the second case, could there be any possible objection to a member of the CPS sitting as a juror in a case which was being prosecuted not by the CPS but by the DTI. In the third case, a mere suspicion that a juror might, by reason of having been employed as a prison officer in a prison where the defendant was held on remand, have acquired knowledge of that defendant's bad character could not, of itself, lead an objective observer to conclude that the juror had an appearance of bias. Investigation had shown that the juror had no knowledge of the defendant.

The Court of Appeal did, however, issue this general advice, which 'should receive attention without any delay':

It is essential that the trial judge should be aware at the stage of jury selection if any juror in waiting is or has been, a police officer or a member of the prosecuting authority, or is a serving prison officer. Those called for jury service should be required to record on the appropriate form whether they fall into any of these categories, so that this information can be conveyed to the judge. We invite all of these authorities and Her Majesty's Court Service to consider the implications of this judgment and to issue such directions as they consider appropriate.

See Blackstone's Criminal Practice: D13.24

PROCEDURE—VIDEO-RECORDED EVIDENCE-IN-CHIEF

R [2008] EWCA Crim 678

Apart from a pilot exercise at two Crown Court centres, the introduction of pre-recorded video testimony for adult complainants in sex cases was implemented only in respect of investigations commencing on or after 1 September 2007, and then only in respect of trials on indictment. The Court of Appeal was concerned in this case with video-recorded evidence of an adult rape complainant which was admitted by mistake at a trial in July 2004. It held that this administrative irregularity was not such as to affect the admissibility of the evidence (given that s. 27 of the Youth Justice and Criminal Evidence Act 1999 was itself 'in force'), nor did it prejudice the fairness of the trial.

The Youth Justice and Criminal Evidence Act 1999, s. 18(2), does not give the Secretary of State the power to implement legislation by specifying whether a particular court may use special measures or by with-

drawing the applicability of such provisions at a particular court. It was intended only to ensure the courts have the requisite information before considering whether to make a special measures direction.

See Blackstone's Criminal Practice: D14.113

PROCEDURE—WITNESS ANONYMITY

Davis [2008] UKHL 36

The ruling of the House of Lords in this case has called into question the increasingly common practice of granting anonymity to prosecution witnesses in cases where there may otherwise be fears for their safety. Their lordships have not gone so far as to rule that the practice is inevitably unfair or unlawful. On the contrary, it is recognised that in cases of clear necessity some departures from the principle of open justice are permissible; but where extensive anonymity is granted a conviction based 'solely or to a decisive extent upon the statements and testimony of anonymous witnesses' are likely to be inconsistent with the accused's right to a fair trial under the ECHR, Article 6. It must be a question of fact in any given case what, if any, measures would be compatible with a fair trial. Courts trying criminal cases must not be over-ready to resort to such measures.

The ruling clearly has implications for ongoing and future trials and perhaps for some recent convictions. It also seems likely that provisions dealing with the issue will be included in a forthcoming Government Bill.

See Blackstone's Criminal Practice: D14.118

PROCEDURE—APPEAL AGAINST CONVICTION

Brind [2008] EWCA Crim 934

The principles established in *Hart* [2007] 1 Cr App R 41 were here considered in the context of applications for permission to appeal against conviction. The Court of Appeal reminds practitioners that the forms relating to appeal have been amended. Form SJ now includes an opportunity for the single judge considering the matter to indicate whether in his view that application is without merit. Where that part of the form has been so completed by the single judge, an applicant who nevertheless persists must expect the court to order that time served shall not count.

See Blackstone's Criminal Practice: D25.12

EVIDENCE—STANDARD OF PROOF**Re B (Children)** [2008] UKHL 35

This case concerned care orders in family proceedings, but contains interesting observations on burdens and standards of proof, and particularly on the nature of the civil or 'balance of probabilities' test. The House of Lords rejects the concept of an 'enhanced civil burden' that varies according to the gravity of the issue involved. There are in other words only two standards of proof; but their lordships accept that in some civil proceedings (e.g. ASBO applications under the Crime and Disorder Act 1998, s. 1) the criminal standard of proof must be applied: cf. *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787.

See *Blackstone's Criminal Practice: D24.3 and F3.40*

EVIDENCE—BAD CHARACTER OF ACCUSED**D** [2008] EWCA Crim 1156

The Court of Appeal issued a much needed warning against the blurring of essential distinctions between

evidence of disposition (admissible under the Criminal Justice Act 2003, s. 101(1)(d), subject to the safeguards provided by ss. 101(3) and (4) and 103) and essential background evidence, which is admissible under s. 101(1)(c) and is not then subject to the same safeguards. In some previous cases, evidence of bad conduct that was most obviously relevant (if relevant at all) to the accused's disposition has been admitted as background evidence, but this is unsatisfactory and greater caution should be applied in future.

See *Blackstone's Criminal Practice: F12.20*

EVIDENCE—IDENTIFICATION BY EAR-PRINTS**Kempster (No. 2)** [2008] EWCA Crim 975

The difficulty of identifying an offender by means of ear-print evidence was noted by the Court of Appeal. Such evidence may be admissible, but very detailed and precise matching is required if a conviction is to be based on it.

See *Blackstone's Criminal Practice: F18.30*

SENTENCING**Magistrates' Courts Sentencing**

The Sentencing Guidelines Council has published new *Magistrates' Courts Sentencing Guidelines*. These have effect from 4 August 2008. The new guidelines also supersede part of the Consolidated Criminal Practice Direction covering mode of trial decisions. As well as providing guidelines for a wide range of offences (including motoring offences) regularly dealt with in magistrates' courts, the new guidelines include over 50 pages of explanatory material.

Knife Crime**Bleazard** [2008] EWCA Crim 1231

The Court of Appeal noted that the number of offences involving knife crime has recently escalated into epidemic proportions. Where a person is found to be carrying a knife or offensive weapon without a rea-

sonable excuse, he should be brought before the courts and prosecuted. Even if the defendant has done no more than carry a weapon, the courts must bear in mind the harm which might foreseeably have been caused. Carrying a knife or offensive weapon is a serious offence which must be treated with the seriousness which it deserves.

The situation now is much more grave than it was when *Celaire* [2003] 1 Cr App R (S) 160 was decided. Accordingly, the guidance in that case should be applied with the current grave situation in mind; and the Magistrates' Courts Sentencing Guidelines as to bladed articles and offensive weapons should normally be applied at the most severe end of the appropriate range of sentences.

See *Blackstone's Criminal Practice: B12.121*

Contempt: Misbehaviour in Court

Baker [2008] EWCA Crim 334

The Court of Appeal upheld a one year sentence for contempt of court imposed on a defendant who, in order to manipulate the jury, had wilfully interrupted the trial judge's summing-up after having been warned following an earlier outburst. The sentence was to run consecutively to that imposed following his conviction for drug trafficking offences. The court observed that judges must protect the trial process from such abuses. The system of criminal justice would quickly break down if it were thought that no action would be taken for manipulative or determined conduct of that sort.

See *Blackstone's Criminal Practice*: B14.85

Perverting the Course of Justice

C-J [2007] EWCA Crim 2551

In this case the Court of Appeal pointed out that false complaints of rape can do enormous damage and must be treated as a serious matter. A caution or reprimand cannot ordinarily be a suitable response to such a serious offence. Sir Igor Judge P said (at [26]):

A false allegation can have dreadful consequences, obviously and immediately for an innocent man who has not perpetrated the crime. But also, and this is not to be overlooked, because every occasion of a proved false allegation has an insidious effect in public confidence in the truth of genuine complaints, sometimes allowing doubt to creep in where none should in truth exist. There cannot be very many cases . . . where the offence of attempting to pervert the course of justice, on the basis of a false allegation of rape, certainly one which is set out in detailed formal form statement or pursued to the door of the court, should not be prosecuted for what it is. It is only in the rarest of cases that a police caution sufficiently addresses either the criminality of a false allegation of serious sexual crime or (and this is no less important) the possibility of the need for appropriate treatment which will address the problems which have led the complainant to fabricate the allegations she has made.

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

Breach of ASBO

On 23 May 2008, the Sentencing Guidelines Council issued draft guidelines for consultation on the sentence to be imposed for breach of an ASBO. The draft includes both a general guideline and the guideline as it will appear in the SGC *Magistrates' Courts Sentencing Guidelines*.

See *Blackstone's Criminal Practice*: D24.14

Murder: Section 21 Principles

Davis [2008] All ER (D) 284 (Apr)

The standard of proof to be applied when deciding whether to increase the normal 15-year starting point for a life sentence under sch. 21 to the Criminal Justice Act 2003 is the criminal standard. A judge must be sure that the relevant aggravating features were present before so doing. Evidence suggesting, for example, that a murder may well have been sexually motivated is not enough.

See *Blackstone's Criminal Practice*: E4.2

Football Banning Orders

DPP v Beaumont [2008] EWHC 523 (Admin)

The Divisional Court rejected the argument put forward in this case that an offence committed by football supporters on a train when returning from watching a Premier League fixture could be 'related to a football match' only if proven to have been committed within one hour of the end of that match. A one-hour limit does apply for certain purposes under the Football Spectators Act 1999, notably where it is alleged that things were done during 'a period relevant to a football match' (see s. 1(8)) but this limit has no application to whether the offence in question was related to such a match. The court expressly agreed with counsel's submission that:

To treat the two expressions 'period relevant to a football match' and 'offence related to football matches' as having the same meaning would be to create a redundancy and would be plainly a mistaken interpretation of the provision.

See *Blackstone's Criminal Practice*: E23.3

Financial Reporting Orders

Adams [2008] EWCA Crim 914

The Court of Appeal held that financial reporting orders form part of the sentence of the court and may be appealed against in accordance with the Criminal Appeal Act 1968. They are not however 'penalties' for the purposes of the ECHR, Article 7, which *inter alia* bars the retroactive imposition of higher penalties than those in force when the offence was committed. They are preventative measures which enable the courts to keep control over those in respect of whom there is a risk that they might indulge in criminal activity.

See *Blackstone's Criminal Practice*: E23.15

CASE DIGEST—IN DETAIL

G [2008] UKHL 37

The House of Lords were asked to consider two human rights issues that arose from the conviction of a 15-year-old boy for the rape of a child of 12 in circumstances where there was no evidence to disprove his assertion (on a plea of guilty) that the girl in question had willingly 'consented' and that he had reasonably believed her to be 15.

The first issue was whether the imposition of strict liability as to the complainant's age infringed the ECHR, Article 6(1) and/or 6(2). Not surprisingly, their lordships unanimously held that it did not. The implications of a different answer to that question would have been profound.

The second issue was whether, in the circumstances, a prosecution and conviction for child rape, rather than for a lesser offence under the Sexual Offences Act 2003, s. 13, was a disproportionate interference with the appellant's rights under Article 8. Their lordships were divided on this. Lords Hope and Carswell (dissenting) held that Article 8 was indeed infringed. But Lord Hoffman was contemptuous of the argument that Article 8 was even engaged. He said:

If the prosecution has been unduly heavy handed, that may be unfair and unjust, but not an infringement of human rights. It is a matter for the ordinary system of criminal justice. It would be remarkable if Article 8 gave Strasbourg jurisdiction over sentencing for all offences which happen to have been committed at home. This case is another example of the regrettable tendency to try to convert the whole system of justice into questions of human rights.

Baroness Hale and Lord Mance did not go that far, but agreed with Lord Hoffman that there was no breach of Article 8 in this case. As Baroness Hale explained, G's age was obviously relevant to his relative blameworthiness but this was fully reflected in the conditional discharge which the Court of Appeal substituted for the detention and training order originally imposed.

See *Blackstone's Criminal Practice*: B3.38

May [2008] UKHL 28

The House of Lords has confirmed that, where D jointly with others is found to have obtained a benefit from his offending, he should ordinarily have a confiscation order made against him for the total amount found to have been unlawfully obtained, provided he

has realisable assets equal to or in excess of that amount. See also *Green* [2008] UKHL 30 and *Crown Prosecution Service v Jennings* [2008] ULHL 29.

Porter [1990] 1 WLR 1260 is not authority that the court has power to apportion liability between parties jointly liable, a procedure which would be contrary to principle and unauthorised by statute.

On the other hand, the House of Lords in *May* approved the approach of the Court of Appeal in *Olubitan* [2003] EWCA Crim 2940 in which D had been convicted of conspiracy to defraud. At the confiscation hearing he was found to have benefited to the extent of £123,000 and an order was made in the smaller sum of £88,000. The evidence, however, showed that he had joined the conspiracy on the day that police action brought it to an end by interception of a dummy consignment, arranged to trap the conspirators. It was therefore 'rightly held' on appeal that on these facts D had obtained nothing from his participation in the conspiracy.

These cases all concerned orders made under provisions of the Drug Trafficking Act 1994 and the Criminal Justice Act 1988 that are no longer in force, but the Appellate Committee in *May* offered this guidance on the operation of the equivalent provisions in the Proceeds of Crime Act 2002:

- (1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.
- (2) The court should proceed by asking: (i) Has D benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit D has so obtained? (iii) What sum is recoverable from D? Where issues of criminal lifestyle arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.

- (3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.
- (4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.
- (5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.
- (6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers.

See Blackstone's Criminal Practice: E21.14

L [2008] EWCA Crim 973

L was charged with raping his adult daughter, V, in 2007 and with a course of sexual abuse of his daughter that allegedly started when she was just 11 years old. L's wife, W, made a statement to the police after the alleged rape which, if true, was highly damaging to L's defence, but declined to testify against him on that charge on the basis that she was not compellable under the Police and Criminal Evidence Act 1984, s. 80. A

'nice point' arose on appeal as to whether she could have been compelled to testify on the basis that her evidence of that incident was also of some relevance to the other counts, relating to when V was aged under 16, but this was never decided.

At the trial, the judge instead allowed hearsay evidence to be given of what W had said in her statement to the police, on the basis that this was admissible in the interests of justice under the Criminal Justice Act 2003, s. 114(1)(d). L appealed on the basis that this ought not to have been allowed.

On appeal, it was held that L's conviction would not have been unsafe even if the evidence had been wrongly admitted, but *obiter* that on the facts of the case the judge's decision had been justified. The court opined that police are not obliged to remind a suspect's spouse of the possibility that she might not be a compellable witness before questioning her, but in some cases this might be desirable in order to show that she was willing to make a statement anyway. If she does refuse to testify and is not compellable, the PACE 1984, s. 80 does not preclude the use of an earlier statement, but whether it is right to admit it 'must depend upon the facts of the individual case'.

L is surely not the last word on this issue. Section 80 may be an improvement on the common-law doctrine of non-compellability, but it draws some arbitrary distinctions. D's spouse can be compelled to testify where he is charged with kissing a girl of 15, but not where he is charged with raping and murdering a girl of 16, or indeed a woman of 61. Why not? There is much to be said for treating spouses the same as siblings, parents or close friends: i.e. as compellable witnesses.

See Blackstone's Criminal Practice: F4.14 and F16.20

Flynn [2008] EWCA Crim 970

In *Flynn* police officers who interviewed the appellants on suspicion of conspiracy to commit robbery claimed to have recognised their voices from a covert recording of the actual offenders, but expert witnesses who analysed the recordings were far less positive, and could not make out some of the words. There was no evidence that the officers had any talent for recognising voices or that they had received any training in auditory analysis. Nor could they claim long-term familiarity with the appellants' voices. To make matters worse, there were various defects or weaknesses in the procedures adopted by those officers and at least one serious inconsistency in their evidence. In the

circumstances, the Court of Appeal held that it was unfair for their voice identification evidence to be admitted.

A further problem was that the trial judge had instructed the jury not to attempt to compare the voices heard on the covert recording with the voices of the appellants whom they had heard giving evidence at the trial. The Court considered this to be wrong. In *Chenia* [2003] 2 Cr App R 83 the court had said:

. . . on the particular facts of this case, where the jury were unassisted by expert evidence, they should have been warned that they should not compare one voice with another by comparing the characteristics of each because of the dangers of doing so.

But the facts of *Chenia* differed from those in *Flynn* and the jury in *Flynn* did have assistance. A retrial was ordered.

The court in *Flynn* also made a number of general observations as to the difficulties and dangers of voice identification (especially by non-expert evidence) and the different kinds of expert voice analysis that may be used. The idea that officers who become familiar with a particular voice through conducting comparisons can be classed as 'experts ad hoc' was disapproved.

Such persons, said Gage LJ, 'cannot in our view properly be referred to as experts'.

On the other hand, the court considered it 'neither possible nor desirable' to follow the Northern Ireland Court of Criminal Appeal in *O'Doherty* [2003] 1 Cr App R 77 by ruling expert auditory analysis inadmissible unless supported by acoustic analysis. Cf *Robb* [1991] 93 Cr App R 161. Gage LJ concluded:

63. The increasing use sought to be made of lay listener evidence from police officers must, in our opinion, be treated with great caution and great care. In our view where the prosecution seek to rely on such evidence it is desirable that an expert should be instructed to give an independent opinion on the validity of such evidence. In addition, . . . great care should be taken by police officers to record the procedures taken by them which form the basis for their evidence. Whether the evidence is sufficiently probative to be admitted will depend very much on the facts of each case.

64. It goes without saying that in all cases in which the prosecution rely on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases.

See *Blackstone's Criminal Practice*: F18.29

LEGISLATION

Criminal Justice and Immigration Act 2008

The Act received Royal Assent on 8 May 2008. The Act includes very wide-ranging changes to the law on sentencing and the treatment of offenders and creates a number of new criminal offences. A substantial number of the provisions of the Act are now in force. In addition to the standard provisions, the following provisions are in force from the date of Royal Assent:

- (a) s. 53 and sch. 13, which amends the Criminal Justice Act 2003, sch. 3 (although none of the provisions of sch. 3 so amended are themselves in force), together with related repeals and a related minor amendment;
- (b) s. 77 (power for Secretary of State to alter the penalty for unlawfully obtaining etc. personal data);
- (c) s. 128 (financial assistance under the Police Act 1996);
- (d) ss. 138(1) to (4) and 139 (industrial action by prison officers);
- (e) paras. 6(3) and 12 to 16 of sch. 16 and the related repeals (which amend the Public Order Act 1986, ss. 29B, 29H, 29I, 29K and 29L and insert a new s. 29JA (which covers the protection of freedom of expression in relation to sexual orientation));
- (f) paras. 35 to 39 of sch. 26 (which amend the Youth Justice and Criminal Evidence Act 1999, ss. 35 and 62 so as to extend the protection provided to cover superseded enactments and offences and offences under specified provisions of the Sexual Offences Act 1956).

By s. 153(2), the following provisions came into force two months after Royal Assent (i.e. on 8 July 2008):

- (a) s. 62 (repeal of requirement to undertake annual review of the Criminal Justice (Terrorism and Conspiracy) Act 1998);
- (b) s. 69 (indecent photographs of children: England and Wales) and sch. 26, para. 24 (amending a long-standing error in the Criminal Justice Act 1988, s. 160);
- (c) s. 70 and sch. 26, para. 25 (affecting Northern Ireland);
- (d) s. 79 and related repeals (abolition of common-law offences of blasphemy and blasphemous libel);
- (e) paras. 2 to 7 of sch. 15 (which amend the Sexual Offences Act 2003, ss. 27, 29, 64 and 65 to take account of adoption and amend the Adoption Act

1976, s. 47(1) to include a reference to ss. 64 and 65 of the 2003 Act).

The Criminal Justice and Immigration Act 2008 (Commencement No. 1 and Transitional Provisions) Order 2008 (SI 2008 No. 1466) brought s. 26 of the Act (release of long-term prisoners under the Criminal Justice Act 1991) into force on 9 June 2008 except insofar as it inserts s. 33(1C) and (1D) into the 1991 Act. Associated provisions in schs. 26 and 27 are also brought into force on that date.

The Criminal Justice and Immigration Act 2008 (Commencement No. 2 and Transitional and Saving Provisions) Order 2008 (SI 2008 No. 1586) brought a large number of provisions into force on 14 July and one minor provision into force on 15 July. A number of these provisions are dealt with in Comment and Analysis (below) but the implemented provisions also include the following:

- s. 20 (consecutive terms);
- s. 24 (early release);
- s. 27 (prisoners liable to removal from the UK);
- s. 28 (release of fine defaulters and contemnors);
- ss. 29 to 32 (release of prisoners after recall and review), but subject to exceptions;
- s. 40 (attendance centre requirement for fine defaulter);
- ss. 42 and 43 (power to dismiss certain appeals following references by the CCRC);
- ss. 44 and 45 (determination of prosecution appeals);
- s. 46(1) and (3) (review of sentence on reference by A-G);
- s. 47 and sch. 8 (appeals in criminal cases);
- s. 52 and sch. 12 (bail for summary offences and certain other offences to be tried summarily);
- s. 54 (trial or sentencing in absence of accused in magistrates' courts);
- s. 55 (extension of powers of non-legal staff);
- s. 56 (provisional grant of right to representation);
- s. 57 (disclosure of information to enable assessment of financial eligibility);
- s. 58 (Criminal Defence Service: pilot schemes);
- s. 59 (SFO's pre-investigation powers in relation to bribery and corruption: foreign officers etc.);
- s. 72 (offences committed outside the UK);
- s. 73 and sch. 15 (sexual offences: grooming and adoption) to the extent not already in force;

- s. 76 (reasonable force for purposes of self-defence etc.);
- s. 93 (delivery of prisoner to place abroad for purposes of transfer out of the United Kingdom);
- s. 141 (sexual offences prevention orders);
- s. 142 (notification requirements).

The Assets Recovery Agency (Abolition) Order 2008 (SI 2008 No. 575)

This Order provides that, with effect on 1 April 2008, the Agency shall be abolished and that the various statutory responsibilities of its Director shall end.

Serious Crime Act 2007 (Commencement No. 2 and Transitional and Transitory Provisions and Savings) Order 2008 (SI 2008 No. 755)

This Order brings into force all the provisions of the Act relating to the abolition of the Assets Recovery Agency and the transfer of its functions to SOCA and the National Policing Improvement Agency, insofar as they are not already in force, on 1 April 2008.

It also brings into force ss. 1 to 43 of the Act (bar ss. 24(9) and (10) and 40(4)) and schs. 1 and 2 (bar sch. 2, paras. 4 and 18) which relate to serious crime prevention orders. Such orders may be made, subject to transitional provisions, from 6 April 2008.

The following further provisions of the 2007 Act are brought into force on 6 April:

- s. 73 and sch. 7 (data matching) so far as not already in force;
- ss. 75(1) to (3), 76(1) to (3) and 78 to 84, sch. 10, paras. 1 (in part), 2 to 13 and 24 to 28, and sch. 11 (all of which relate to asset recovery and proceeds of crime);
- s. 87 (serious violence: powers to stop and search).

Police and Justice Act 2006 (Commencement No. 8) Order 2008 (SI 2008 No. 790)

This Order brings into force, on 1 April 2008, *inter alia* s. 39 of the Act and sch. 11, which relate to the forfeiture of indecent photographs of children.

Violent Crime Reduction Act 2006 (Commencement No. 5) Order 2008 (SI 2008 No. 791)

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

... on 1 April 2008, s. 43(4) (sale etc. of knives and other weapons), insofar as it inserts new subsections (11D) and (11E) into the Criminal Justice Act 1988, s. 141; on 6 April 2008, ss. 43 (insofar as not already in force) and 59 (limitation period for anti-social behaviour orders).

Serious Crime Act 2007 (Amendment of the Proceeds of Crime Act 2002) Order 2008 (SI 2008 No. 949)

This Order amends s. 280 of the Proceeds of Crime Act 2002 in light of the abolition of the Assets Recovery Agency.

Criminal Justice Act 1988 (Offensive Weapons) (Amendment) Order 2008 (SI 2008 No. 973)

This Order adds a samurai sword to the list of weapons contained in the principal Order. A samurai sword is a sword with a curved blade of 50 cms or more in length.

Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No. 1277)

These Regulations implement Directive 2005/29/EC concerning unfair business-to-consumer commercial practices together with Article 6.2 of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. They introduce a new regime covering many aspects of consumer offences. They prohibit unfair commercial practices and create offences. They also deal with enforcement.

The new regulations largely replace the Trade Descriptions Act 1968 and repeal its principal provisions. Other repeals effected by the Regulations include the Fraudulent Mediums Act 1951, the Mock Auctions Act 1961, the Weights and Measures Act 1985, s. 29 (false representations as to quantity), the Consumer Credit Act 1974, s. 46 (false or misleading credit or hire advertisements) and the Control of Misleading Advertising Regulations 1988 (SI 1988/915).

Business Protection from Misleading Marketing Regulations 2008 (SI 2008 No. 1276)

These Regulations implement Directive 2006/114/EC concerning misleading and comparative advertising. *Inter alia* the maximum penalty for misleading advertising is two years' imprisonment.

Criminal Justice Act 2003 (Commencement No. 21) Order 2008 (SI 2008 No. 1424)

This Order brings ss. 29(1) to (3), (5) and (6) and 30 (new method of instituting proceedings) into force on 9 June 2008 for criminal proceedings instituted by public prosecutors in magistrates' courts sitting in specified areas of Cheshire.

See *Blackstone's Criminal Practice: D5.2*

The Criminal Justice and Immigration Act 2008 (Transitory Provisions) Order 2008 (SI 2008 No. 1587)

This Order makes transitory modifications which are needed until such time as the sentences of detention in a young offender institution and of custody for life for offenders aged at least 18 but under 21 are repealed by the Criminal Justice and Court Services Act 2000, s. 61. It also makes modifications which are needed until such time as the House of Lords becomes the Supreme Court.

COMMENT AND ANALYSIS

Criminal Justice and Immigration Act 2008—Sentencing Provisions

The Criminal Justice and Immigration Act 2008 makes many changes to existing sentencing law. The first wave of these came into force on 14 July, by virtue of the Criminal Justice and Immigration Act 2008 (Commencement No. 2 and Saving Provisions) Order. Regard also needs to be had to the Criminal Justice and Immigration Act (Transitory Provisions) Order 2008. The purpose of this note is to summarise the most important of the provisions which are already in force. Space does not permit a detailed examination. More extensive coverage will be provided in the supplements to this work, and in the 2009 edition of the main work. All the following provisions of the Act came into force on 14 July 2008:

Sections 13 to 18 (dangerous offender sentencing provisions)

There are far-reaching changes to the provisions on sentencing dangerous offenders. The scheme is amended to provide a greater degree of judicial flexibility over the use of these sentences, and the statutory assumption of dangerousness in the Criminal Justice Act 2003, s. 229(3) is repealed.

For offenders aged over 18, the threshold test of whether 'there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences' remains, but it is not in itself enough to trigger a sentence of imprisonment for public protection (an IPP) or an extended sentence. In the case of an IPP, if the offender has been convicted of a serious offence specified in sch. 15 and has been assessed as dangerous, provided that a life sentence is not available and appropriate, the court may impose a sentence of imprisonment (or detention in a young offender institution) *only if* at the time of the offence, either the offender has a previous conviction for an offence listed in sch. 15A (a new schedule inserted by sch. 5 to the 2008 Act) or if the notional determinate sentence would be at least four years (equating to a minimum term under the PCC(S)A 2000, s. 82A of two years). An extended sentence can be imposed on an offender aged over 18 only if the offender is convicted of an offence specified in sch. 15 (whether a serious specified offence or not) and has been assessed as dangerous, *only if* at the time of the offence, either the offender has a previous conviction for an offence listed in sch. 15A or where the appropriate custodial term for the extended sentence would be at least four years.

For offenders under 18, if the offender has been convicted of an offence listed in sch. 15 (whether a serious specified offence or not), and has been assessed as dangerous, provided that a life sentence is not available and appropriate, the court may impose a sentence of detention under s. 91 for public protection only if the notional determinate sentence would have been at least four years (equating to a minimum term under the PCC(S)A 2000, s. 82A of two years). An extended sentence may only be passed on an offender under 18 if the custodial term of the extended sentence is at least four years.

It should be noted that the amended scheme applies to *all offenders falling to be sentenced on or after 14 July 2008* irrespective of the date of conviction, provided of course that the offence was committed on or after 4 April 2005, when the dangerous offender provisions came into force. The changes are not retrospective so there will be no impact on prisoners who are already serving a public protection sentence. It is thought that Article 7 will not be engaged since the scheme is more generous than it was before.

Section 25 (release on licence: extended sentences)

In a further change to the dangerous offender sentencing arrangements, release on licence from an extended sentence (whatever the age of the offender) will be at the half-way point of the custodial term. The Parole Board will cease to have involvement in determining the date of early release for such prisoners.

Section 10 (restriction on imposing community sentences)

A new s. 148(5) is inserted into the CJA 2003. This makes it clear (if indeed there had been any doubt) that, although an offender is eligible for a community order (by virtue of the offence being 'serious enough' to justify it), the court is not thereby required to impose such an order. The court may, for example, impose a fine in an appropriate case.

Section 11(1) (restriction on power to make a community order)

A new s. 150A is inserted into the CJA 2003. This restricts the power of a court to make a community

order by limiting it to (a) cases where the offence is punishable with imprisonment, or (b) any other case where s. 151 confers power to make such an order. Section 151 is not in force so, in practice, the effect is to exclude offences punishable with imprisonment. This change brings back an earlier distinction in the law (e.g. a community punishment order was restricted to imprisonable offences while the community rehabilitation order was not) which had disappeared with the CJA 2003. This change is unlikely to make much impact on the overall use of community orders.

Section 12 (pre-sentence reports)

The CJA 2003 changed the definition of a pre-sentence report so as to permit such a report in certain circumstances to be given orally, rather than in writing. Section 148 of the 2003 Act is now amended by the insertion of subsections (1A) and (1B) so that, in a case where the offender is aged under 18, the court must obtain and consider a pre-sentence report which is in writing before reaching a decision that a custodial sentence should be imposed on the offender.

Section 38 (imposition of unpaid work requirement for breach of community order)

Where there has been a breach of a community order, whether in magistrates' courts or in the Crown Court, sch. 8 to the CJA 2003 provides powers for the breach court, including the power to amend the terms of the original order 'so as to impose more onerous requirements'. This includes the possibility of extending the duration of an existing requirement, but not the duration of the order as a whole. Section 38 of the 2008 Act amends sch. 8 to make it clear that the court has power, in the case of an order which did not have an unpaid work requirement, to make such a requirement. In this context the minimum number of hours which may be specified is 20.

Martin Wasik CBE

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

Interpreting the Sexual Offences Act

The Sexual Offences Act 2003 created several new offences. These have been in force for just over four years, but some have only recently been examined by the Court of Appeal. Three examples are considered here.

Arranging or Facilitating Commission of a Child Sex Offence

The offence created by s. 14(1) of the SOA 2003 was examined in *Robson* [2008] EWCA Crim 619. R was the client of a prostitute. He asked her whether she knew of any prostitutes aged 12 or 13. She replied that she did not, but he persisted and sent her text messages, asking whether she had, 'got the 12 year old sorted yet?' She eventually reported the matter to the police. The question was whether R's acts could amount to a s. 14 offence or, if not, an attempt to commit that offence.

As the court noted, s. 14(1) is a preparatory offence, and may be easier to establish than a charge of attempting to commit one of the 'ulterior' offences under ss. 9 to 13, because it does not require any act that is 'more than merely preparatory' to one of those offences. Nor does it require any third party involvement. Moses LJ said:

A defendant may take steps by way of a plan with the criminal objective identified in the section without involving anyone else and the mere fact that no-one else is involved would not necessarily mean that no arrangement was made.

In *Geddes* [1996] Crim LR 894, G was spotted in the toilet block of a school, carrying a rucksack containing a knife, adhesive tape and rope. His purpose, it seems, was to abduct a child for sexual purposes; but he could not properly be convicted of attempting to do so, because his conduct amounted only to 'preparation'. Applying s. 14(1) to that scenario, however, it could be argued that his preparations amounted to 'arrangements' facilitating the commission of the ulterior offence. As the court acknowledged in *Geddes*:

[G] had made preparations, had equipped himself, had got ready, had put himself in a position to commit the offence...

In *Robson* however, R had asked the prostitute to make the arrangements for him, and since she had not done so, he could hardly be said to have succeeded in 'arranging or facilitating' any ulterior offence. Although the court did not exclude the possibility that R could be convicted of the 'full' s. 14 offence, it is submitted that he had, at most, attempted to commit it.

Whether he had got beyond the stage of 'mere preparation' for the purposes of the Criminal Attempts Act 1981, s. 1, would be a question for the jury, but it was wrong for the judge to withdraw that issue from the jury. As Moses LJ explained:

Once [R's] request had been accepted then something had been arranged and he could properly be said to have arranged something the doing of which would involve the commission of... sexual activity with a child. The judge erred in regarding the request as an act preparatory to an attempt. On the contrary, it was the final thing he needed to do before the full [s. 14] offence was committed.

Voyeurism

The new offences of 'voyeurism' created by s. 67 of the Act have proved surprisingly problematic. *Hamilton* [2008] QB 224 (examined in the October 2007 Bulletin) demonstrates that voyeuristic conduct may not necessarily amount to voyeurism under s. 67. The problem was that H's 'victims' were not engaged in any 'private act' (within the meaning of s. 68(1)) when he pointed his hidden camera up their skirts.

This would not, one might suppose, be a problem where hidden cameras are smuggled into communal showers or changing rooms, but *Bassett* [2008] EWCA Crim 1174 demonstrates that s. 67 may not necessarily be infringed even then. The male chest, even when exposed in a changing booth, shower, or other private place, is not directly protected by s. 67. Covertly video-recording a man wearing swimming trunks may amount to a s. 67 offence only if he is 'doing a private act'; and he cannot be said to be doing a private act merely because he is bare-chested in a public changing room, shower or sauna. In contrast, a woman's breasts are protected in such a place, even if covered by underwear such as a vest or bra (but not if covered by a bikini top, or exposed in a public place).

Another issue raised in *Bassett* concerns the 'expectation of privacy'. Public changing rooms and showers do not provide total privacy. Under what circumstances might one user of such facilities commit an offence in respect of another? The court's view was that:

... [users] must expect to be observed unclothed, for some at least of the time, by other people who are also using the changing rooms. ... No offence ... is committed if that kind of observation takes place, even if the observer derives sexual gratification from what he or she sees. There is ... no reasonable expectation of privacy from casual observation by other changing room users. ... This does not mean that those in the showers do not have a reasonable

expectation of privacy from being spied upon by someone outside who has drilled a hole in the wall for the purpose.

. . . In many cases the question of whether there is or is not a reasonable expectation of privacy will be closely related to the nature of the observing. . . . It is the nature of the observation rather than the purpose of the observation which may be relevant to the expectation of privacy. . . . The presence of sexual gratification in the observer does not ipso facto mean that the observation is one from which there is a reasonable expectation of privacy.

It cannot, in other words, be a crime for D merely to gain sexual pleasure from the casual sight of other naked or half naked persons using such facilities; but if D deliberately lurks or lingers for the purpose of observing other users without their consent he may surely cross the borderline into criminal voyeurism, assuming those he observes are doing 'private acts' within the meaning of s. 68. In such a case, D's purpose would affect the very nature of his observation.

Causing a Person to Engage in Sexual Activity without Consent

The concept of 'deception as to the nature or purpose of the relevant act' (which creates a conclusive presumption of non-consent under s. 76(2)(a) of the Act) was considered in the context of an offence under s. 4 in *Devonald* [2008] EWCA Crim 527.

D was angered by V, his daughter's former boyfriend, and took revenge by contacting V online and pretending to be a young woman ('Cassey') who wanted to see him masturbate for her in front of a webcam. V did so. D was convicted under s. 4 of causing V to engage in sexual activity without consent, on the basis that his consent was vitiated by the deception.

In the context of offences under ss. 1 to 3, deception as to the 'nature or purpose' of the relevant act clearly means deception as to the purpose of the defendant in doing that act, or as to the nature of the act that he commits. In relation to offences under s. 4, it is tempting to suppose that 'the relevant act' must be the

sexual activity that the complainant is 'caused' to engage in, but s. 77 expressly provides that the 'relevant act' is that of the defendant in causing this activity. In *Devonald*, no reference was made to s. 77, but Leveson LJ said:

The learned judge ruled that it was open to the jury to conclude that the complainant was deceived as to the purpose of the act of masturbation. We agree. . . . It is difficult to see how the jury could have concluded otherwise than that the complainant was deceived into believing that he was indulging in sexual acts with, and for the sexual gratification of, a 20-year-old girl with whom he was having an on line relationship. That is why he agreed to masturbate over the sex cam. In fact, he was doing so for the father of his ex girlfriend, who was anxious to teach him a lesson, doubtless by later embarrassing him or exposing what he had done.

There is an element of ambiguity in this passage, but it eventually focuses on the right question. V's own purpose in masturbating was not what mattered, nor was there any confusion as to the nature of his act. The key to the offence was D's purpose in causing him to do so. V thought 'Cassey's' purpose was voyeuristic sexual pleasure; but 'Cassey' was D, whose real purpose was to humiliate him.

What then if D deceives V as to his gender, but is truthful as to the purpose of his request? A homosexual man might for example adopt the 'online identity' of a young woman in order to persuade a heterosexual man to masturbate online for him. Such a case would be difficult to call. Arguably, D still attempts to deceive V as to the *nature* of his request (because it is not heterosexual) but that could not apply to a middle-aged defendant who adopts a younger online persona without practising any deception as to his gender or sexual orientation. Such a deception could not of itself give rise to an offence under s. 4.

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

Issue 4, July 2008

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 4, July 2008

PUBLISHING NEWS

AVAILABLE NOW

Blackstone's Guide to the Serious Organised Crime Act 2007

Rudi Fortson, Barrister, 25 Bedford Row, Visiting Professor of Law, Queen Mary University, London

This new Blackstone's Guide provides an expert, comprehensive guide to the Serious Crime Act 2007, together with the full text of the legislation.

640 pages, 978-0-19-954304-5, Paperback, £34.99
April 2008

AVAILABLE JULY 2008

A Practical Approach to Criminal Procedure Twelfth Edition

John Sprack, Barrister, Formerly Reader, Inns of Court School of Law

Now in its twelfth edition, this book provides a complete guide to the criminal process in England and

Wales. Thoroughly updated to include recent amendments to the Criminal Procedural Rules; new Sentencing Guidelines; and the 'dangerousness' provisions of the Criminal Justice Act 2003.

640 pages, 978-0-19-953539-2, Paperback, £39.95
July 2008

SECOND UPDATING RELEASE PUBLISHING SEPTEMBER 2008

Smith, Owen and Bodnar on Asset Recovery

Criminal Confiscation, and Civil Recovery

Edited by: **Ian Smith, Tim Owen QC,**
and **Andrew Bodnar**

This definitive looseleaf work provides clear and concise guidance and analysis on the law and practice of criminal confiscation and civil recovery, together with all relevant materials. The second Updating Release publishing in September 2008 fully updates the work in relation to the abolition of the Assets Recovery Agency and its absorption in the Serious

Organized Crime Agency, as recently brought into force by the Serious Crime Act 2007, together with all the recent groundbreaking criminal confiscation cases including: *R v May*, [2008] UKHL 28, [2008] 2 WLR 1131; *Jennings v CPS* [2008] UKHL 29, [2008] 2 WLR 1148; and *R v Green* [2008] UKHL 30, [2008] 2 WLR 1151.

c. 2100 pages, Looseleaf
Mainwork price: £195 (including first year of updating)
Service price: £145 (approximately two updates per year)
Published March 2007, updated approximately twice a year.

Blackstone's Criminal Practice Bulletin

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

OXFORD
UNIVERSITY PRESS