

# 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 2009, and these will be available free of charge on the *Blackstone's Criminal Practice* website at <<http://www.oup.com/blackstones/criminal>>. The updates are set out on a chapter-by-chapter basis, with links to the full text of available judgments and to relevant legislation. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

A version of the Criminal Procedure Rules including all recent amendments is available on the companion website <<http://www.oup.com/blackstones/criminal>>.

## CASE DIGEST—IN BRIEF

### CRIMINAL LAW—UNINCORPORATED BODIES

#### L and F

[2008] EWCA Crim 1970

This case concerned a prosecution under the Water Resources Act 1991 arising from an escape from a tank belonging to a members' golf club. The Environment Agency initiated a prosecution against two members of the club, selected because at the time of the escape the first was the club chairman and the second was both the club treasurer and also chairman of the 'special building committee' which oversaw the building work in question carried out by the contractors. The judgment of Hughes LJ includes lengthy consideration of the criminal liability of unincorporated associations

and concludes that it was possible for the prosecution to be brought against the club itself and that it was proper to do so, notwithstanding that a prosecution of individuals was also possible. In the circumstances, an acquittal of the individuals concerned was directed.

**See *Blackstone's Criminal Practice*: A5.18**

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**OFFENCES—POSSESSING FALSE INSTRUMENT****O**

[2008] All ER (D) 07 (Sep)

The accused had been found with a clearly false Spanish identity document. Her solicitors were contacted by an organisation set up to help women who had been trafficked into the UK for prostitution, suggesting that an outreach worker interview the defendant in order to assess whether she had been trafficked into the UK. No enquiries as to this were made and she had pleaded guilty before the Crown Court to an offence of possessing a false instrument with intent to use as her own, receiving a sentence of eight months' imprisonment. She appealed on the basis that: (i) the Crown, the court, and the defence lawyers had conducted the proceedings without having had regard for two protocols relating to the prosecution for immigration offences of defendants and/or young persons who might have been the victims of trafficking; (ii) she could have had a defence of duress available to her as a victim of trafficking, but that possibility had not been investigated; (iii) in the light of the fact that it had been submitted to the Crown Court that she was 17, the case should have proceeded (if at all) in the youth court; and (iv) her defence lawyers had taken no steps to investigate whether she had been a victim of trafficking.

The Court of Appeal quashed her conviction. The prosecution should have been aware of the protocols by virtue of the fact that they were contained in the Code for Crown Prosecutors. Defence lawyers had to be aware of the need to make enquiries in the face of credible material that a defendant might have been a victim of trafficking: 'it was to be hoped that the shameful circumstances of the instant case would not be repeated'.

See *Blackstone's Criminal Practice*: B6.26 and B22.29

**POLICE POWERS—STOP AND SEARCH****B v DPP**

[2008] EWHC 1655 (Admin)

A police officer in plain clothes who wishes to exercise his power to stop and search must ordinarily produce his warrant card before so doing, in accordance with PACE Code A, failing which the search becomes unlawful and the officer in question would not be acting in the execution of his duty.

See *Blackstone's Criminal Practice*: B2.29 and D1.4

**ASSETS RECOVERY—RESTRAINT ORDERS****Revenue and Customs Prosecutions****Office v Allad**

[2008] EWCA Crim 1741

Solicitors to whom a client has previously made a payment on account of their fees, and who are holding that payment in their client account, may appropriate that payment in satisfaction of fees incurred, even after a restraint order has been made pursuant to the Proceeds of Crime Act 2002, s. 41, restraining the client from disposing of his assets.

See *Blackstone's Criminal Practice*: D8.27

**PROCEDURE—FITNESS TO PLEAD****Norman**

[2008] EWCA Crim 1810

The court made a number of observations *per curiam* as to the issues that may arise where a trial of facts is required under the Criminal Procedure (Insanity) Act 1964, s. 4A:

- (i) Once it is clear that there is an issue, such cases need very careful case management to ensure that full information is provided to the court without the delay so evident in this case.
- (ii) When full information is available, the court will need carefully to consider whether to postpone the issue of trial of fitness to plead under s. 4(2), given the consequences that a finding of unfitness has for the defendant—see for example the judgment in *R v M (Edward)* [2001] EWCA Crim 2024 . . .
- (iii) If the court determines that the appellant is unfit to plead, then it is the court's duty under s. 4A(2) of the Criminal Procedure (Insanity) Act 1964 carefully to consider who is the best person to be appointed by the court to put the case for the defence. . . . The duty under s. 4A(2) is a duty personal to the court which must consider afresh the person who is to be appointed; it should not necessarily be the same person who has represented the defendant to date, as it is the responsibility of the court to be satisfied that the person appointed is the right person for this difficult task. . . . Given the responsibility that the Act places on the court, it would not be unusual if the judge needed a little time to consider who was the best person to be so appointed.

(iv) Under present legislation, this court cannot order a retrial . . . save in very limited circumstances. . . . Serious public concern could arise where this court considered a verdict unsafe and was compelled to enter an acquittal, but nothing further could be done. We would hope that Parliament might give consideration to this lacuna in the statutory provisions and consider granting this court power to order a re-trial of the issue as to whether the defendant did the act with which he is charged.

See *Blackstone's Criminal Practice*: D12.6

## PROCEDURE—CONDUCT OF THE TRIAL JUDGE

### Harirbafan (Arash)

[2008] EWCA Crim 1967

Cross-examination of defence witnesses by the judge was condemned in this case. The appellant was convicted of attempting to remove criminal property from the jurisdiction, knowing or suspecting that it represented in whole or in part the proceeds of criminal conduct. He was subsequently sentenced to three years' imprisonment. The prosecution case was strong but, having referred to *Matthews* (1984) 78 Cr App R 23 and *Sharp* (1998) 94 Cr App R 144, Toulson LJ said (at [3]):

Interruptions by a judge which are excessive or which demonstrate a lack or apparent lack of impartiality, by taking on the role of a prosecutor, may prejudice a fair trial and jeopardize the safety of a conviction in two particular ways, which may be cumulative. First, they may disrupt the process by which the defence advocate seeks to adduce evidence, whether by examination in chief or cross-examination, in such a way that the defendant is prejudiced by the jury being deprived of the opportunity of hearing that evidence given and challenged in an orderly and coherent way. Secondly, such interruptions, if they are excessive and take on the substance of cross-examination, may have the potential to poison the minds of the jury against the defendant, by causing the jury to perceive that the judge, who is supposedly an independent figure and likely to carry respect in the eyes of the jury, clearly thinks that the defendant is trying to fool the jury.

He concluded (at [33]):

We are driven to the view that the interventions of the Recorder, in the course of the evidence given for the defence, had both the ill-effects previously mentioned as potential vices of inappropriate judicial interventions. They prevented particularly the appellant's witnesses, particularly his sister, from being able to give a coherent explanation to the jury of the source of documents. Further, the nature and tone of the

interventions crossed by far the line between clarification and cross-examination. Cross-examination by a judge is unacceptable.

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

## CONFISCATION ORDERS

### Shabir

[2008] EWCA Crim 1809

Where the defendant's offences involve obtaining inflated fees or payments by deception, the entire amount obtained (which in this case was just under £180,000) represents the proceeds of his offending, even if (as in this case) the dishonestly inflated portion of that was much smaller. In this case it was calculated as just £464. To make matters worse, the defendant's case became, by statutory definition, one of a criminal lifestyle. The result was a confiscation order in the sum of £212,464.

The courts have consistently declined to construe the defendant's 'benefit' in this context as his net or retained profit (see for example *Smith* [2001] UKHL 68) with the result that confiscation orders have often appeared punitive rather than restitutionary, and sometimes unfairly so. Moreover, once the Crown decides to invoke the confiscation process, the making of an order is mandatory, and its amount cannot be moderated by judicial decision; but the courts do retain the power to stay an application where it is so oppressive as to constitute an abuse of process.

In some cases (particularly 'criminal lifestyle' ones) it may be proper to impose a confiscation order for a sum much greater than the proven gain from the offences of which the defendant has been convicted, but in this case the order was oppressive and it was clear that the prosecution had given no thought to the circumstances that made it so. The court concluded that:

On the very unusual and exceptional facts of this case, we are sure that if application had been made to the judge to stay the confiscation application for abuse of process his answer could only have been that such stay should be granted.

An order in the sum of £464 was accordingly substituted.

**EVIDENCE—PUBLIC INTEREST IMMUNITY****R (Binyan Mohamed) v Secretary of State for Foreign and Commonwealth Affairs**

[2008] EWHC 2048 (Admin)

This case involved an attempt to obtain information from the Government which shed light on the circumstances in which an alleged terrorist had been held for the purposes of a trial under 'Guantanamo Bay rules'. M claimed that he had been subjected to inhuman or degrading treatment and torture by or with the connivance of US agencies in other countries. The judgments touch upon a wide range of issues affecting disclosure, public interest immunity, the use of evidence obtained by torture, customary and international law and governmental duties and have a resonance stretching well beyond the foreign trial in question.

See *Blackstone's Criminal Practice*: A7.56, D9.26 and F9.6

**EVIDENCE—SUBMISSION OF NO CASE****Grant**

[2008] EWCA Crim 1890

On a charge of robbery the only evidence against the appellant was that his DNA had been recovered from a balaclava thought to have been used by the robber and recovered near the scene. But the balaclava bore traces of at least one other person's DNA, and the expert witnesses could not even be certain that any of the DNA actually recovered came from the robber.

In those circumstances it was held that the judge ought to have stopped the case at the close of the prosecution evidence. There was no way in which a jury could properly have been satisfied on that evidence that the appellant was the robber. It proved only that it might have been him. He had refused to answer questions when interviewed, which was no doubt suspicious, but he could not have a case to answer on that basis alone (see the Criminal Justice and Public Order Act 1994, s. 38).

See *Blackstone's Criminal Practice*: F19.6 and D15.53

**SENTENCING****Theft****Houghton** [2008] EWCA Crim 1948

Where theft was committed in breach of trust, the amount involved was only one consideration—culpability was much influenced by the level of trust placed on the offender. The offender had stolen £40,000 over a five-year period while working as the manager of a newsagent. The victim had been forced to make staff redundant and declare bankruptcy. Three years' imprisonment was not manifestly excessive where the offender had wantonly and callously abused trust over a long period of time, knowing that she was causing serious harm to her employer and fellow employees.

See *Blackstone's Criminal Practice*: B4.8

**Blackmail****McMurray** [2008] EWCA Crim 1915

Where a previous sexual assault by the victim on the offender had left the offender psychologically damaged, that fact could properly be taken into account when sentencing the offender for a blackmail threat which included a demand for £50,000. However, a custodial sentence was necessary as the offender had threatened serious violence over a period of time. The sentence of four years' imprisonment was reduced to 32 months.

See *Blackstone's Criminal Practice*: B5.38

**Recklessly Endangering Safety of Aircraft****Hussain** [2008] EWCA Crim 1559

Custodial sentences of six months were upheld where the two offenders (aged 19 and 21) persistently targeted a low flying police helicopter at night, dazzling the pilot with a bright green laser beam shone from the

ground. They each pleaded guilty to recklessly acting in a manner likely to endanger an aircraft.

The Court of Appeal distinguished this case from *Voice* [2008] EWCA Crim 953, in which a custodial sentence for the same offence had been quashed on appeal. The dazzling of the helicopter pilot in *Voice* had been negligent and transitory, whereas the behaviour of the offenders in this case had been prolonged and deliberate, and had involved a laser device which the defendants had no legitimate reason to be using.

(Note: The prosecution appears to have been brought under the Air Navigation Order 2005 (SI 2005 No 1970), art. 73, although this is not expressly referred to in the transcript.)

### Causing Death by Dangerous Driving

**Rosevere** [2008] All ER (D) 127 (Aug)

The severity of current sentencing policy in respect of motorists who kill is illustrated by this case, in which a 61-year-old driver received a sentence of 30 months' imprisonment after pleading guilty on a charge of causing death by dangerous driving. He ran over a drunken woman who was lying in the carriageway of a poorly lit road, dressed in dark clothing. He did not stop, later claiming that he was suffering from a migraine and had not realised what he had hit, but he had been convicted of causing death by reckless driving in 1990 after hitting a deaf pedestrian who stepped into his path.

The trial judge did not regard this earlier case as a relevant sentencing consideration, saying, 'This is not a case involving excessive speed or of inherently bad driving over any great distance, nor are there any other aggravating features present', but the Court of Appeal disagreed, opining that in view of that earlier conviction the sentence was if anything too lenient.

**See Blackstone's Criminal Practice: C3.17**

### Reduction in Sentence for Guilty Plea

**Hayes** [2008] EWCA Crim 1998

The offender was given credit for pleading guilty on the day of the trial to a very serious charge of arson. He received a 25% discount as a result. The issue on appeal arose from the fact that his counsel indicated at the PCMH that his indication of a plea of not guilty to the offence for which he was convicted, namely an offence of arson being reckless as to whether life was

endangered (the second count on the indictment), was merely a technical plea as part of his denial of the first count on the indictment, namely arson with intent to endanger life. It was accepted that, while on the face of the record, his was a late change of plea, in such circumstances he should be given credit for the indication at the PCMH and a 33% discount was substituted.

**See Blackstone's Criminal Practice: E1.6**

### Concurrent and Consecutive Custodial Sentences

**Hills** [2008] EWCA Crim 1871

H fell to be sentenced for a serious assault on a prison officer committed while he was within the minimum term of an indeterminate sentence he was serving at the time. The judge concluded that this was a case in respect of which a concurrent sentence was inappropriate, and ordered that the three-year sentence he was imposing for the assault should not commence until the end of the minimum term (which was in February 2010).

Upholding this sentence, the Court of Appeal said:

In our view, there is no reason in principle why the court should not impose a sentence structured in the way that this sentence was. Section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 declares that:

'A sentence imposed, or other order made, by the Crown Court . . . shall take effect at the beginning of the day on which it was imposed, unless the court otherwise directs'.

That seems to us to give to the court the power to direct that a sentence should or could commence at a different date. The sentencing regime which has been created in particular by the Criminal Justice Act 2003 provides for clear dates upon which minimum terms will come to an end which enable a court to identify with precision the date upon which otherwise an offender could be considered for release on parole. That being the case, there is in our judgment no practical reason why an order should not be made which requires the offender to commence to serve an additional period after the minimum period before he can be considered for parole. The old authorities to the contrary effect are no longer relevant now that minimum terms are clearly identified.

**See Blackstone's Criminal Practice: E2.11**

### Sexual Offences Prevention Orders

**Hammond** [2008] EWCA Crim 1358

When imposing a Sexual Offences Prevention Order under the Sexual Offences Act 2003 at the same time

as imposing a notification requirement under Sch 3 of that Act, a court or judge should ensure that the terms of the Sexual Offences Prevention Order are consistent with the duration of the notification requirements.

Excessively wide terms must also be avoided. In *Hammond* the original order, although designed to prevent the defendant from accessing child pornography, would have prevented him from accessing any online material not connected with his work or education. As

the Court of Appeal observed, this would *inter alia* prevent him from accessing the internet to order a train ticket or to book a holiday. The court substituted a term by which, 'he is not to download any photographs or pseudo photographs of any person under the age of 18'.

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

## CASE DIGEST—IN DETAIL

### Luffman [2008] EWCA Crim 1379

The appellants paid C to murder L's husband, S, and provided C with a sawn-off shotgun and cartridges with which to commit the offence. C killed S using the weapon provided and was duly convicted of his murder. The jury at C's trial predictably rejected his story that he 'never intended to carry out the killing', but was forced to do so in self-defence, when S resisted C's attempt to rob him.

C then became the principal prosecution witness against the appellants, but persisted in his story that he had never intended to commit the murder he had been hired to commit. That part of his story was not challenged by the appellants in cross-examination. Instead, they seized upon it to support their own defences, and contended:

- (i) they had not 'counselled' the offence because C had never formed the intention to murder the deceased in accordance with their wishes;
- (ii) there was no causal connection between their solicitation of C and the offence which had in fact been committed;
- (iii) C had acted outside the scope of his authority and had attempted to commit robbery without their knowledge or authorization; and
- (iv) the circumstances of the killing had been outside their contemplation.

A key argument underlying the first two contentions was that secondary liability for counselling or procuring an offence requires a causal link to be established between the acts of the alleged secondary parties and the commission of the offence in question. But, as the Court of Appeal rightly noted, the authorities suggest

that a causal link is necessary only where the prosecution rely on 'procuring'. On a charge of 'counselling' (or indeed of aiding or abetting), it is no defence to argue that the principal offender would have committed the offence without any help or encouragement. See *Bryce* [2004] 2 Cr App R 592.

Even if a causal link was needed, there was ample evidence to suggest that such a link did exist. The jury at C's trial had rejected his plea of self-defence and he had killed S with the gun and ammunition provided by the appellants.

The court also rejected the contention that C's actions (and in particular his attempt to rob S) took him outside the scope of any authority given by the appellants. Even if C killed S because his plan to rob S went wrong, his actions 'were not so fundamentally different from those foreseen by the appellants as to sever any causal connection between the appellants' act and the commission of the offence.' See *Calhaem* [1985] QB 808.

See *Blackstone's Criminal Practice*: A5.1

### Bonellie [2008] EWCA Crim 1417

### Bieber [2008] EWCA Crim 1601

The Criminal Justice Act 2003, sch. 21, para. 5(2)(e) was considered in *Bonellie*, where the appellants (aged 17, 16 and 22 respectively) tormented, humiliated and beat their victim, who had a serious psychiatric disorder and had misguidedly believed them to be his friends. They punched, head-butted, kicked and stamped on him until he died, egging each other on to further violence. It does not, however, appear that there was any intent to kill.

In sentencing them, the trial judge held that the case fell within sch. 21, para. 5(1) and 5(2)(e), this being a murder where the seriousness of the offence was particularly high and involved sadistic conduct and an extremely vulnerable victim. He accordingly determined that the starting point for the adult appellant was 30 years' imprisonment.

The Court of Appeal disagreed. Lord Phillips CJ noted that sadism is defined in the Oxford English Dictionary as, 'Enthusiasm for inflicting pain, suffering or humiliation on others' and continued:

Sadly, it is often the case that those who attack others derive pleasure from so doing. Many a person kicking someone else on the ground derives such pleasure. A person, too, may gain pleasure from baiting a vulnerable individual, or showing off to his friends. That is not enough, in our view, to bring the case within subs (e). That subsection contemplates a significantly greater degree of awareness of pleasure in the infliction of pain, suffering or humiliation, perverted though the pleasure we have described may be.

It followed that, while this was a very bad case of gratuitous gang violence directed at a vulnerable individual, the starting point for the adult offender should have been 15 years, rather than 30.

When certain aggravating features were taken into account, the minimum term was set at 19 years, with terms of 15 and 13 years for his teenage accomplices.

Schedule 21 also came under scrutiny in *Bieber*, in which the appellant had been sentenced to a 'whole life' tariff for the murder of a police officer and the attempted murder of two others. The trial judge concluded that the circumstances of the killing, in which an already injured and disabled officer was shot a second time through the head as he lay helpless on the ground, merited a whole life tariff. He said:

You had already disabled him and he was defenceless, you could have escaped then, but you chose to wait and fire a second shot at point blank range . . .

On appeal, it was contended (1) that the circumstances of the killing did not justify a whole life tariff on the basis of sch. 21; and (2) that whole life tariffs infringe the ECHR, Article 3 on the basis that they amount to 'inhuman or degrading treatment or punishment.'

The second of these grounds clearly raised an issue of great importance and was addressed first. It had previously been raised without success in *Secretary of State ex parte Hindley* [2001] 1 AC 410, but appeared to have been given some support by the ruling of the ECHR Grand Chamber in *Kafkaris v Cyprus* (Application no.

21906/04, Feb 2008) in which it was suggested by some judges and expressly stated by others that:

The imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with Article 3 . . .

The Strasbourg Court nevertheless concluded that:

Matters relating to early release policies including the manner of their implementation fall within the power member States have in the sphere of criminal justice and penal policy. . . . There is not yet a clear and commonly accepted standard amongst the member States . . . concerning life sentences and, in particular, their review and method of adjustment.

In the view of the Court of Appeal, a whole life tariff, imposed to reflect the appropriate punishment and deterrence for a very serious offence does not conflict with Article 3. Mindful however of the fact that irreducible life sentences may one day be condemned in Strasbourg, the Court of Appeal went on to consider whether a 'whole life tariff' is in practice irreducible, and concluded that it is not. The Secretary of State has a limited power to release a life prisoner under the Crimes (Sentences) Act 1997, s. 30 (e.g., where the life prisoner has become old, incapacitated and terminally ill). If that power is not exercised when the circumstances appear to warrant it, it may then (but only then) be open to a prisoner to contend that his rights under Article 3 have been infringed.

On the particular facts of this case, the Court of Appeal concluded that it was one that fell into the 30-year band (albeit with several aggravating circumstances) rather than the whole life band. A minimum term of 37 years was substituted.

**See *Blackstone's Criminal Practice*: E3.2**

### **R (Corner House Research) v Director of the Serious Fraud Office** [2008] UKHL 60

The House of Lords considered the legality of a decision by the Director of the SFO not to prosecute an alleged case of extraterritorial corruption in connection with the securing of a major arms contract with Saudi Arabia (the Al Yamamah contract). Bribes had allegedly been paid by BAE Systems plc. The House held that the Director had acted lawfully in taking account of threats made by the Saudi Government that, if the investigation was continued, Saudi Arabia would withdraw from the existing bilateral counter-terrorism co-operation arrangements with the UK.

Saudi officials also threatened to withdraw co-operation from the UK in relation to its strategic objectives in the Middle East and end the negotiations then in

train for the procurement of Typhoon aircraft, but economic or commercial considerations could not properly be taken into account without putting the UK in breach of its obligations under the OECD Convention on bribery, to which it was a party. Upholding the Director's decision, which was based on the threat to bilateral counter-terrorism co-operation, Lordingham (with whose opinion the other Law Lords agreed) concluded:

The Director was confronted by an ugly and obviously unwelcome threat. He had to decide what, if anything, he should do. He did not surrender his discretionary power of decision to any third party, although he did consult the most expert source available to him in the person of the Ambassador and he did, as he was entitled if not bound to do, consult the Attorney General who, however, properly left the decision to him. The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para. 73, per Lord Hoffmann).

In the opinion of the House, 'the Director's decision was one he was lawfully entitled to make. It may indeed be doubted whether a responsible decision-maker could, on the facts before the Director, have decided otherwise.'

**See *Blackstone's Criminal Practice*: D2.18**

#### **B, W, S, H and W** [2008] EWCA Crim 1997

The case concerned allegations of serious sexual abuse over a period of 40 years. Eight of the ten defendants were arraigned and pleaded not guilty. Two other defendants were found unfit to plead. The judge determined at a preparatory hearing that it would be 'entirely wrong' for a single jury to decide both the guilt or innocence of the fit defendants and whether the unfit ones had done the acts alleged. The prosecution appealed against this ruling.

On appeal the court referred to an article by Baird and Wade entitled 'The Criminal Procedure (Insanity and Fitness to Plead) Act 1991 and the Juries Act 1974: Irreconcilable problems?' [1999] Crim LR 656 which

argued that the Juries Act 1974, s. 11, ordinarily prohibits a jury from trying for more than one issue and that a joint trial of fit and unfit defendants would be 'overwhelmingly inequitable' especially where cut-throat defences are run. The Court of Appeal disagreed. After considering the historical origins of the Juries Act 1974, s. 11, Toulson LJ said (at [24]):

When a jury is empanelled to decide whether allegations contained in an indictment are proved by the evidence presented to the jury, that is the relevant issue for the purposes of section 11(4). What may properly be contained in the indictment is governed by other legislation and case law, so there is no irreconcilable conflict. Where a jury has been empanelled to decide whether a person is guilty of a charge in the indictment, that necessarily includes finding whether he committed the actus reus. If during the course of a trial of co-defendants one becomes unfit, the trial of the issue of his guilt comes to an end, but the proceedings continue in order for the jury to determine as a fact for the purposes of section 4A of the Criminal Procedure (Insanity) Act whether he committed the actus reus. The proceedings continue for that purpose on the indictment, for that document identifies the alleged acts and, as already noted, if at the end of the trial the jury is not satisfied that he committed the act or acts alleged, the defendant is to be acquitted on the relevant count or counts. It is a more limited issue than that which the jury was originally empanelled to decide, but it is an ordinary rule of pleading that the greater includes the less, see *Biles v Caesar* [1957] 1 WLR 156. (By contrast, section 11(5)(b) and (c) made special provision for cases where the matter subsequently determined by the jury was outwith the scope of that which it was originally empanelled to decide.) The same principle must in our judgment apply if the unfitness occurs before the commencement of proceedings before a jury.

The interests of the fit and unfit defendants, and those of witnesses and the public must be balanced in every case. The Court did not accept that it is invariably unjust to determine the two issues together. The purpose of such a hearing is to try to arrive as nearly as possible at the same result as if there had been a full trial, the dual objectives being that, if it could not have been proven after a full trial that the person in question did the acts alleged, he should be acquitted, but, if it could be proven, he should be eligible to be detained under the protectionary powers.

**See *Blackstone's Criminal Practice*: D12.9 and D13.65**

## LEGISLATION

**Sexual Offences (Northern Ireland) Order 2008 (SI 2008/1769)****Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (SI 2008/1779)**

When brought fully into force, the 'Consequential Amendments' Order will amend some legislation applicable to England and Wales, notably the Sexual Offences Act 2003, although the practical impact of the amendments is largely confined to Northern Ireland itself, where some provisions of the 2003 Act will cease to apply (being replaced by corresponding but not identical provisions of the main Order).

**Criminal Procedure (Amendment) Rules 2008 (SI 2008 No. 2076)**

These Rules amend and add new provisions to the Criminal Procedure Rules 2005, including the following:

- new rules in Part 2 (understanding and applying the Rules) make transitional provision and explain when the new rules in Parts 7 and 63 will apply and Part 2 is further amended to include a new rule about representatives and 'supporting adults' to clarify which representatives can act in criminal proceedings;
- Part 4 (service of documents) is amended to clarify the operation of r. 4.4 (service by leaving or posting a document) and to avoid confusion in respect of service on a company registered in Scotland or in Northern Ireland;
- a new Part 7 (starting a prosecution in a magistrates' court), in substitution for the existing Part 7 (commencing proceedings in a magistrates' court);
- Part 37 (summary trial) is amended to include three rules transferred from Part 7;
- Part 55 (road traffic penalties) is amended to include the provision which was r. 7.6 (statutory declaration under section 72 and 73 of the Road Traffic Offenders Act 1988), which has been transferred, with minor revision, on the revision and simplification of Part 7;
- a new Part 63 (appeal to the Crown Court) revises and simplifies the rules so that they correspond broadly with the other appeal rules which have recently been revised and simplified;

- Part 65 (appeal to the Court of Appeal: general rules) is amended to reflect recent legislation and to enhance the notes;
- Part 66 (appeal to the Court of Appeal against ruling at preparatory hearing) is amended to reflect the amendment to s. 31 of the Criminal Appeal Act 1968 effected by s. 47 of, and para. 11 of sch. 8 to, the Criminal Justice and Immigration Act 2008;
- Part 68 (appeal to the Court of Appeal about conviction or sentence) is amended to make provision for rights of appeal to the Court of Appeal (i) against wasted costs orders and third party costs orders, and (ii) against a serious crime prevention order where a case is certified fit for appeal.

The Rules take effect on 6 October 2008.

The detailed changes of special interest are particularised below:

- (a) r. 2.5 provides as follows:
- (1) Under these Rules, unless the context makes it clear that something different is meant, anything that a party may or must do may be done—
    - (a) by a legal representative on that party's behalf;
    - (b) by a person with the corporation's written authority, where that party is a corporation;
    - (c) with the help of a parent, guardian or other suitable supporting adult where that party is a defendant—
      - (i) who is under 18, or
      - (ii) whose understanding of what the case involves is limited.
  - (2) Anyone with a prosecutor's authority to do so may, on that prosecutor's behalf—
    - (a) serve on the magistrates' court officer, or present to a magistrates' court, an information under s. 1 of the Magistrates' Courts Act 1980; or
    - (b) issue a written charge and requisition under s. 29 of the Criminal Justice Act 2003.
- (b) The new Part 7 does not include any provision equivalent to the former r. 7.3 (information or written charge to be for one offence only); r. 7.3 (effectively replacing the former r. 7.2) provides as follows:
- (1) An allegation of an offence in an information or charge must contain—
    - (a) a statement of the offence that—
      - (i) describes the offence in ordinary language, and

- (ii) identifies any legislation that creates it; and
- (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.
- (2) More than one incident of the commission of the offence may be included in the allegation if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.
- (c) under the new part 63, the procedure on abandonment of appeal is altered, the requirement for a notice of abandonment to be given 'not later than the third day before the day fixed for hearing the appeal' will no longer apply and r. 78.1 is amended so as to omit r. 78.1(3) and the subsequent reference to it, with the effect that the Crown Court has a discretion to award costs in an appeal from a magistrates' court in all cases (even where a timely notice of abandonment has been served).

A version of the CrimPR including all these and earlier amendments is available on the companion website <<http://www.oup.com/blackstones/criminal>>.

**Crime (International Co-operation) Act 2003  
(Designation of Participating Countries)  
(England, Wales and Northern Ireland) Order  
2008 (SI 2008 No. 2156)**

This Order designates the United States of America as a participating country under s. 51(2)(b) of the 2003 Act for the purpose of ss. 32, 35, 43, 44 and 45 of that Act; those provisions enable customer information orders and account monitoring orders to be requested by a designated country and for requests for such orders to be made to the designated country.

**Civil Procedure (Amendment) Rules 2008  
(SI 2008 No. 2178)**

The amendments made by these Rules include amendments to Part 65 removing the provisions relating to drinking banning orders. The Explanatory Note indicates that this is because the relevant provisions of the Violent Crime Reduction Act 2006 (see E21.2) have not been implemented and the Explanatory Memorandum states that such implementation 'has been delayed indefinitely'.

## COMMENT AND ANALYSIS

**Criminal Evidence (Witness Anonymity) Act 2008**

The Criminal Evidence (Witness Anonymity) Act 2008 represents Parliament's swift reaction to the decision of the House of Lords in *Davis* [2008] UKHL 36. Until the House of Lords overturned the decision of the Court of Appeal in *Davis* [2006] 1 WLR 3130, it had been possible for a court to take measures to ensure witnesses remained anonymous.

The House of Lords in *Davis* [2008] UKHL 36 made it clear that there is no common-law power to permit the prosecution to call a witness whose identity has not been revealed to the accused, because it would be unfair for an accused to be tried on the basis of evidence from witnesses whose identity he did not know. It was the right of an accused to be confronted by his accuser. This was made clear, for example, by Lord Bingham (at [34]).

Section 1(2) of the new Act abolishes the common-law rules relating to 'the power of a court to make an order for the securing that the identity of a witness in criminal proceedings is withheld from the defendant'. However, given that the Act imbues a trial judge with discretion, and sets out a number of criteria that are to be applied in the exercise of that discretion, the observations of both the Court of Appeal and the House of Lords remain relevant.

The Act received Royal Assent on 22 July 2008 and applies to any trial that is either ongoing at or which starts after that date (s. 9(1)). The key provisions of the new Act are set out at D14.118 of the 2009 edition of *Blackstone's Criminal Practice*.

**Witness Anonymity Orders**

Section 2 of the Act permits a court to grant various measures to protect the identity of a witness. These measures form part of a 'witness anonymity order'. Such an order is designed to withhold the witness' identity from the accused, but not the judge or jury (s. 2(4)).

The measures envisaged, which all relate to the protection of the identity of a witness, are listed in s. 2(2). However, that list should not be taken as exclusive. Section 2(3) makes clear that 'subsection (2) does not

affect the generality of subsection (1)', which permits any measure that will protect a witness' identity. This leaves scope, for example, for new technology to be developed in the future.

An order can be made at the request of either the prosecution or the defence (s. 3), although the level of disclosure required differs between them. The prosecution must reveal only the identity of the witness to the court (s. 3(2)), whereas the defence must reveal his identity to both the court and prosecution (s. 3(3)). Section 3(4) makes clear that the disclosure necessary for the making of an application does not include any disclosure which would reveal the identity of the witness. This does not, however, undermine the previous common-law requirement that there should be disclosure of material relevant to the creditworthiness of the witness.

The Act also makes provision for the discharge or variation of any witness anonymity order at the behest of any party to the proceedings or at its own initiative (s. 6). It appears to be contemplated that there should have been a change in circumstances before such a variation should take place (s. 6(2)(a)).

**Conditions for the Making of a Witness Anonymity Order**

Such an anonymity order can only be granted on certain conditions which are set out in s. 4. In reality, these conditions mirror the considerations identified by Judge P. in the Court of Appeal in *Davis* [2006] 1 WLR 3130 at [59]:

The potential disadvantages to the defendant require the court to examine the application for witness anonymity with scrupulous care, to ensure that is necessary and that the witness is indeed in genuine and justified fear of serious consequences if his true identity became known . . . It is in any event elementary that the court should be alert to potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling, and ensure that necessary and appropriate precautions are taken to ensure that the trial itself will be fair.

In short, these measures address:

- (i) the necessity of the measures (Condition A), both by reference to the safety of the individual and the public interest in encouraging such witnesses to co-operate with the police;

- (ii) the fact that the trial can still be fair to the accused (Condition B); and
- (iii) the fact that the measures are in the interests of justice (Condition C).

The references in s. 4 to the fairness of the trial to the accused are clearly designed to make witness anonymity orders accord with Article 6 of the European Convention on Human Rights. It was the view of the House of Lords that the right of an accused to know the identity of his accuser was fundamental. On that basis it has been suggested that an order granting anonymity to a witness who gives sole or decisive evidence against an accused can never be fair. However, that suggestion has to be tempered by the considerations which Parliament identified as relevant to the assessment of the s. 4 conditions, which are set out in s. 5(2), and which follow in large part the observations of Lord Carswell in the House of Lords (at [59]).

The considerations include the right of an accused to confront his accuser and the question of whether the witness provides the sole or decisive evidence against the accused, the importance of both of which was so heavily emphasised by the House of Lords. Additionally, the court is required to consider the creditworthiness of the witness both in assessing if the witness is credible (s. 5(2)(e)) and whether the accused would be better able to challenge the credibility of the witness if he knew who it was (s. 5(2)(b) and (d)).

#### Effect of the Act on Earlier Proceedings

The Act addresses those cases which proceeded in accordance with the procedure approved by the Court of Appeal in *Davis* [2006] 1 WLR 3130. In summary:

- (a) if the proceedings are ongoing, on the basis of an anonymity order made before the House of Lords decision, the court is required to consider the matter again under the provisions of the Act (s. 10);
- (b) where an accused has been convicted following a trial at which witnesses gave evidence anonymously under the previous common-law procedure, no conviction is to be rendered unsafe for that reason alone (s. 11(2)).

#### Measures Short of Anonymity

One of the considerations in s. 5(2) is whether measures short of anonymity are actually sufficient. A number of common-law measures which are designed to protect the identity of a witness from the public, as opposed to the accused, remain available. These include:

- (a) measures to ensure the name of the complainant was not to be published, such as the use of pseudonyms, which were permitted in *Socialist Worker, ex parte Attorney General* [1975] 1 QB 645 (approved by Lord Bingham in *Davis* at [11]);
- (b) the screening of a witness from the public, permitted in *X, Y and Z* (1990) 91 Cr App R 36 and *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393 (approved by Lord Bingham at [13] and [19], Lord Carswell at [54] and Lord Mance at [70]). Lord Bingham observed, moreover, that the identity of the witnesses was not withheld from the accused in *R (D) v Camberwell Green Youth Court*, and there was therefore no objection to screening of those witnesses from the dock.

It follows that measures that protect the identity of a witness from the public, such as the use of screens and pseudonyms, and the screening of a witness from the dock are measures short of full anonymity that remain available at common law. It is only where these measures are inadequate that recourse should be had to a Witness Anonymity Order.

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#### Sentencing Guidelines Update

There has been much activity in the field of sentencing guidelines over the summer months. This note provides a summary of the changes, and also examines proposals for reform in the way in which future guidelines will be produced.

The new edition of *Blackstone's Criminal Practice* covers the Sentencing Guidelines Council's *Magistrates' Court Sentencing Guidelines*, implemented with effect from 4 August 2008. These were the first set of magistrates' courts guidelines to be issued under the auspices of the SGC, and so the first set to carry the statutory duty placed upon the courts by s. 172 of the Criminal Justice Act 2003 to 'have regard' to the guidelines, and to give reasons if choosing to depart from them.

Prior to the guidelines coming into force, there was a good deal of press interest in the guideline for sentencing adult offenders convicted of possessing a bladed article or offensive weapon, given the current high level of concern about violent crimes involving knives. The Court of Appeal in *Povey* [2008] EWCA Crim 1261 (see **B12.138**) revisited the guideline case of *Celaire* [2003] 1 Cr App R (S) 118 and recommended that the relevant (but at that time unimplemented)

magistrates' courts guideline for such offences should be applied in a strict manner because of the current concerns about the prevalence of such offences.

- In *level 1 cases*, where the offender has a weapon or bladed article, but *not* in 'dangerous circumstances', and the weapon or article is *not* used to threaten or cause fear, applying Povey if the weapon is a knife the starting point for a first time offender pleading not guilty is 12 weeks custody, and for a weapon other than a knife it is a high level community sentence.
- In *level 2 cases*, where the weapon *is* in the possession of the offender in 'dangerous circumstances' but is *not* used to threaten or cause fear, applying Povey if the weapon is a knife the starting point is committal to the Crown Court, and for a weapon other than a knife it is a custodial sentence of six weeks.
- In *level 3 cases* where the weapon *is* possessed in 'dangerous circumstances' and *is* used to threaten or cause fear the starting point (irrespective of the nature of the weapon) is committal to the Crown Court.

It should be noted that the SGC's definitive guideline on *Overarching Principles: Seriousness* (2004) at para 1.38 allows for the temporary increase in sentencing levels in response to issues of local or national prevalence, but then states that once the concern is over, sentencing should return to its earlier norm. The sentencing guidelines website <<http://www.sentencing-guidelines.gov.uk>> indicates that further notification will be given when courts should revert to the approach in the guideline as published. In case it may be thought that increasing guideline sentences in this way might infringe Article 7 of the ECHR, the Court of Appeal rejected just such an argument in *Bao* [2007] EWCA Crim 2781. Lord Justice Latham said that sentencing tariffs changed from time to time, but so long as the sentencing regime or maximum sentence had not changed, a judge was obliged to follow the most recent sentencing guidelines even if they had been handed down after the offence, or after the offender's conviction or plea of guilty.

The SGC published a definitive guideline on Causing Death by Driving in July 2008. These guidelines are effective from 4 August, and are also covered in the new edition of *Blackstone*. A fourth update to the Guideline Judgements Case Compendium has also been published, containing summaries and guidance from 14 additional cases including *Povey* (above). Readers will know that the sentencing provisions on

dangerous offenders were amended by the Criminal Justice and Immigration Act 2008, with effect from July 2008. For treatment of the amended provisions see E4. The SGC's *Guide for Sentencers and Practitioners* on this topic has also been updated and can be downloaded from the sentencing guidelines website. Although not a guideline as such, the document provides a clear and helpful summary of the new arrangements. A new Annex to the Guide reproduces ss. 224–229 in their amended form, together with the new sch. 15A. Similar information can also be found in the June newsletter distributed by the Judicial Studies Board to all full-time and part-time members of the judiciary sitting in criminal cases. See <<http://www.jsboard.co.uk>>.

The Sentencing Advisory Panel issued a Consultation Paper in July on *Overarching Principles of Sentencing*. Responses can be submitted until the closing date of 28 October 2008. The paper covers a wide range of issues including seriousness, effectiveness, alternatives to custody, and equality and human rights issues in sentencing. The Panel would be pleased to receive comments on any or all of the topics covered.

Finally, it seems that in future the way in which sentencing guidelines are produced and disseminated to the courts is set to change. In December 2007 Lord Carter's Review of Prisons, *Securing the Future* proposed a large prison building programme, including the construction of new Titan prisons to cope with the projected increase in the prison population to just short of 100,000 by 2014. Carter also said that consideration should be given to the development of a structured sentencing framework, perhaps along the lines of the American 'grid' systems, to achieve a closer fit between sentencing outcomes and available prison capacity. A working group, chaired by Lord Justice Gage, was set up to assess this idea. Following a consultation carried out in the spring, the Sentencing Commission Working Group Report, *Sentencing Guidelines in England and Wales: An Evolutionary Approach*, was published in July. The Gage Committee firmly rejected any move towards an American-style grid system of guidelines. It did, however, recognise shortcomings in current arrangements in England and Wales. The Committee proposed that the Panel and the Council should be amalgamated into a single body, an 'enhanced SGC'. The SGC would have additional responsibilities, which would include the production and overview of a more robust system for gathering data on sentencing by the courts, and the regular publication of projections of the future impact of changes

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to sentencing guidelines on prison and probation capacity. Coincidentally, a far-reaching report of the Scottish Prisons Commission, *Scotland's Choice*, which was also published in July proposes, among many other changes, the setting up of a National Sentencing

Council in Scotland 'to develop clear sentencing guidelines that can be applied nationwide'.

**Martin Wasik**

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

## PUBLISHING NEWS

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

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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.

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

Mainwork price: £225 (including first year of updating)

Service price: £165 (approximately two updates per year)

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

## FIRST UPDATING RELEASE PUBLISHING NOVEMBER 2008

**Fraud: Criminal Law and Procedure**Edited by: **Clare Montgomery QC** and **David Ormerod**

This definitive new work provides a comprehensive analysis of the investigation and prosecution of fraud offences in England and Wales. The discussion involves a critical analysis of the law, by reference to the policies, principles, and practicalities of the criminal investigation and trial. Release 1 (publishing November 2008) updates the work to cover the latest legislative and case law developments concerning the investigation, trial preparation, and trial of, fraud cases, and fraud offences. Key new developments covered include: *Norris v Government of the USA* [2008] UKHL 16; appeal on *I v GG* [2008] UKHL 17; the SFO's new civil law functions under the Serious Crime Act 2007; *Clarke* [2008] UKHL 8 relative to *R v Ashton and Others* [2006] EWCA Crim 794; the latest

changes to the Criminal Procedure Rules; the latest changes to the Sentencing Guidelines; the Criminal Evidence (Witness Anonymity) Act 2008; new *Serious Crime Prevention Orders*; *Corner House Research & Campaign Against Arms Trade v Serious Fraud Office* [2008] EWHC 714 (Admin); *R v Raphael & Johnson* [2008] EWCA Crim 1014. There is also expanded coverage of the admissibility of hearsay, cartel offences, and revenue and customs offences. The Appendices have also been updated, and Part 1 of the Serious Crime Act 2007 is now included as the new Appendix 36.

1,800 pages, 978-0-19-923530-8, Looseleaf

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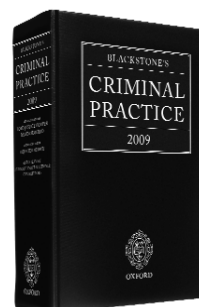
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