

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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

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CASE DIGEST—IN BRIEF

CRIMINAL LAW—DEFENCES

Burns

[2010] EWCA Crim 1023

D claimed to have used reasonable force to eject a trespasser from his property when dragging the complainant, a prostitute, from his car when she refused to leave it when asked. The Court of Appeal accepted that the use of such force by way of self-help might be lawful, as a last resort, where the person removed has no right to be in the vehicle. However, it was not convinced that such a case was truly comparable to that of a landowner removing a trespasser; but in any event that was not what had happened in this case. The complainant had got into the car at D's request and had allowed herself to be driven to a secluded spot some miles from where she was picked up, on the under-

standing that she would be driven back by D once they had finished the sexual act for which he had paid her. When D changed his mind about the sex, she was understandably reluctant to get out of the car and make her own way home. D could readily have regained exclusive possession of his car by driving her back to the starting point. There was accordingly no

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justification for his use of force to remove her, and his conviction for assault occasioning actual bodily harm was upheld.

See *Blackstone's Criminal Practice*: A3.31

OFFENCES—COLLECTING TERRORIST INFORMATION

AY

[2010] EWCA Crim 762

The Terrorism Act 2000, s. 58(3) and the ruling of the House of Lords in *G* [2009] 2 WLR 724 were considered by the Court of Appeal in this case. The prosecution argued that, since D's purpose in possessing the material in question did not have to be proved, for the purpose of establishing liability under s. 58, it should not be possible for the defence to re-introduce it via the concept of reasonable excuse under s. 58(3). But, as the Court of Appeal rightly noted, the argument involved a non sequitur. Hughes LJ said:

What section 58(3) does is to furnish a defendant with the opportunity to say that he had an explanation for possessing the material which he asks the jury to say was objectively a reasonable one. It necessarily focuses upon his reason for possessing the material. His reason for possessing it will in most if not all cases involve saying what he had it for, and thus what his purpose was in possessing it. . . . If he is a bomb disposal expert who says that he is intending to look at various forms of improvised explosive devices in order to instruct soldiers or civilians in how to neutralize them, and has the documents for that reason, he is . . . giving evidence of his purpose in possessing them.

See *Blackstone's Criminal Practice*: B10.77

OFFENCES—AFFRAY

Leeson v DPP

[2010] EWHC 994 (Admin)

The appellant was an alcoholic with psychiatric problems. She threatened her partner with a knife whilst he enjoyed a bath in their home. He was able to disarm her. Nobody else was present or likely to be present, given that the doors to the house were locked at the time, but for some reason the appellant was charged with and convicted of affray. *Sanchez* [1996] Crim LR 572 was applied and the Divisional Court allowed the appeal. Rafferty J said:

These exchanges were essentially private . . . the object of the [Public Order] Act is to address public order. The facts in a particular case require careful scrutiny before legal principle is applied. I find it difficult to see how this turbulence, . . . with no realistic possibility of a third party entering, was capable of proving a public order offence. At its highest, this was a focused, directed oral threat against one man. I do not need to descend into what I would describe as fanciful examples of a burglar finding his way to the bathroom and being put in fear to reach my conclusion.

See *Blackstone's Criminal Practice*: B11.40

OFFENCES—PERJURY

Cooper

[2010] EWCA Crim 979

The accused's conviction for perjury was quashed where the only evidence that his evidence at an earlier trial had been false came from business records compiled and presented by a single prosecution witness, T. Had the records in question been prepared independently of T, they might have corroborated his oral testimony, but as it was they could not do so. Lord Judge CJ explained:

Self-evidently the two areas of evidence are not independent of each other. Without reference to the records he prepared himself, Mr. Thomas cannot establish the dates: without Mr. Thomas the business records do not speak for themselves on the critical issue. In the ultimate analysis, Mr. Thomas is the single source of both, and the Crown's case against the appellant depended 'solely' on his evidence.

See *Blackstone's Criminal Practice*: B14.14

ROAD TRAFFIC— EVIDENTIAL SPECIMENS

Angel v Chief Constable of South Yorkshire

[2010] EWHC 883 (Admin)

The Road Traffic Act 1988, s. 7(3)(c), was considered by the Divisional Court in the context of D's appeal against his conviction for failing to provide a blood specimen. D's car had been stopped by police officers who then noticed a strong smell of cannabis and suspected that D's driving had been impaired by this. D then admitted having taken 'a bit' of cannabis. The police surgeon who examined D at the police station concluded that D's condition might indeed be due to drugs, basing this conclusion both on her examination

of D and on what the police had told her of what had happened when D was stopped. D was required to provide the specimen of blood on that basis. The question on appeal was whether the surgeon was entitled to take what the police told her into account, or whether she ought to have considered only D's condition at the time when he was examined.

Having considered and distinguished the case from *Cole v DPP* [1988] RTR 224, the court held that, as a matter of common sense, a doctor must be entitled to take into account all relevant information relating to the suspect's earlier condition. In some cases, the suspect's condition at the police station may alone be sufficient to enable the doctor to give the necessary advice, but the doctor is not limited to the finding of his own police station examination.

See *Blackstone's Criminal Practice: C5.7*

ROAD TRAFFIC—CHALLENGING SPECIMEN EVIDENCE

Rose v DPP

[2010] EWHC 462 (Admin)

Zafar v DPP [2005] RTR 220, *DPP v Teixeira* [2001] EWHC Admin 931, and *DPP v Memery* [2002] EWHC 1720 (Admin) were considered in this case. The Divisional Court rejected the appellant's argument that, because to give evidence of the presence of mouth alcohol no longer provided any defence following *Zafar*, it was unfair for a breath test to be carried out by a machine that might be failing to detect mouth alcohol and on that basis the court should conclude that such a machine was not 'approved'. Waller LJ said:

The fact that giving evidence of the possible presence of 'mouth alcohol' does not provide a defence since breath includes all that is exhaled does not in any way limit the giving of that evidence to support a case that the device is unreliable if there is other evidence which would support that case. There was of course no such evidence in this case. Indeed the evidence was overwhelming that the device had recorded accurately that the appellant was well in excess of the limit.

The Court also followed *Murphy v DPP* [2006] EWHC 1753 (Admin) in rejecting the argument that the police could be required to produce evidence of roadside test results from hand-held breath analysis machines.

See *Blackstone's Criminal Practice: C5.30*

PROCEDURE—BAIL

Allen v United Kingdom (App. No. 18837/06)

[2010] ECHR 420

The CrimPR, r. 19.17(4), may need to be reconsidered following the decision in this case, in which the European Court of Human Rights ruled that a Crown Court judge's refusal to allow the applicant to attend the hearing of a prosecution appeal against a decision to grant her bail amounted to a breach of her rights under the ECHR, Article 5(4). The Court held that such appeals could be distinguished from cases concerning applicants' appeals against a refusal of bail because, except for the prosecution's decision to appeal, the applicant would already have been entitled to her liberty. The relevant domestic law qualified a prosecution appeal against bail as a re-hearing of the application for bail, thereby entitling the judge hearing the appeal to remand the accused in custody or to grant bail. It followed that the applicant should have been afforded the same guarantees at the prosecution's appeal as at first instance.

See *Blackstone's Criminal Practice: D7.67*

PROCEDURE—APPEALS ON TERMINATING RULINGS

Prosecution Appeal; F

[2009] EWCA Crim 1639

The Court of Appeal held that, although as a matter of good practice an application for leave to appeal against a terminating ruling should ordinarily be made to the judge in question, the CJA 2003, s. 57, gives both the judge and the Court of Appeal power to give leave to appeal. Neither the statute nor the CrimPR requires that leave be sought from the judge before the Court of Appeal is approached for leave.

See *Blackstone's Criminal Practice: D15.74*

EVIDENCE—HEARSAY

Seton

[2010] EWCA Crim 450

S was charged with murder but alleged that the real murderer was a convicted offender, P, who was already serving a life sentence for another offence. When interviewed, P refused to answer any questions, and it was

clear that he would refuse to co-operate if called as a witness, but in prison recordings of telephone calls made by P to members of his family he appeared to express genuine outrage at being implicated in a murder he knew nothing about. The issue was whether the trial judge had been right to allow those recordings to be played to the jury in the interests of justice, pursuant to the CJA 2003, s. 114(1)(d). It was submitted that some attempt should have been made to compel P to testify.

The Court of Appeal, applying Z [2009] EWCA Crim 201, declined to interfere. The trial judge had carefully considered all the factors to which he was directed under s. 114(2) and there was nothing to suggest that his decision was wholly unreasonable or marred by legal error. P could not in reality be subject to any effective compulsion, and might in any event have been entitled to claim privilege, so calling him to testify would have been a futile exercise.

See Blackstone's Criminal Practice: F16.20

EVIDENCE—INFERENCES FROM SILENCE

Adetoro v UK

[2010] ECHR 60946834/06

The European Court reiterated the fact that the right to silence is not absolute and that inferences may in appropriate cases be drawn from its exercise. In this case, the trial judge had omitted to warn the jury that no inferences could be drawn unless they were satisfied that the reason for D's silence was that he had no answer to the questions asked or none that would stand up to cross-examination. The Court of Appeal had accepted that, in omitting this warning, the judge's direction to the jury was deficient, but this did not necessarily mean D's trial was unfair. It was for the European Court to assess whether, on the facts of the instant case and in light of all the relevant circumstances, the error was crucial. In this case, given the rest of the evidence against him, it was not.

See Blackstone's Criminal Practice: F19.4

SENTENCING

Gross Negligence Manslaughter

Holtom [2010] EWCA Crim 934

The Court of Appeal again emphasized the fact that, as Parliament has clearly attached enormous importance to the unintended but fatal consequences of an offender's actions in death by driving cases, similar weight must be given to cases involving manslaughter by gross negligence, thus partly correcting a sentencing imbalance. D, who operated a landscape gardening business, was aged 60 and of previous good character. He employed brothers, one of whom was an under-aged and untrained teenage boy, to do dangerous work that included demolishing a wall. They lacked basic safety equipment such as helmets and boots. D, who was working nearby on the same site, failed to come over to help even when told that the wall was collapsing. The boy was killed when the wall fell on top of him. A helmet would not have saved him. D pleaded guilty to manslaughter by omission and a sentence of three years' imprisonment was upheld.

See Blackstone's Criminal Practice: B1.45

Assault by Penetration

A-G's Ref (No 120 of 2009); Wright

[2010] EWCA Crim 576

A community order imposed on a 25-year-old offender for digitally penetrating the vagina of a young woman who was drunk and asleep after a party was quashed by the Court of Appeal, which substituted a sentence of 18 months' immediate imprisonment. The judge had made allowance for a guilty plea and for the fact that both parties had been much the worse for drink; but in the view of the Court of Appeal, when, for any reason, a person was too ill or unfit to consent to sexual familiarity of any kind, that person would not be consenting. It could not be emphasized too strongly that, in such circumstances, the person had to be left alone. Exploitation of his or her vulnerability was an aggravating, not mitigating, feature of the offence.

See Blackstone's Criminal Practice: B3.26

Burglary

A-G's Refs (Nos. 103, 104 and 105 of 2009); Denley
[2010] All ER (D) 89 (Apr)

Two of the offenders, who each had criminal records, pleaded guilty at the door of the court to the aggravated burglary of premises used for cultivating cannabis and were sentenced to two years' imprisonment. A third offender, C, received a sentence of 18 months. They and two other men had forced their way into the premises at night, disguised and armed with iron bars. An illegal immigrant who had been tending the plants was struck with an iron bar in the course of the burglary. The sentences were referred to the Court of Appeal, which increased them to four and a half and three years respectively. Whilst the victim had himself been conducting illegal activity, the Court opined that, where young men with previous convictions choose to arm and disguise themselves and raid premises in a gang of five, the victim was not only the immediate victim but also part of the public at large.

See Blackstone's Criminal Practice: B4.59

Proceeds of Criminal Conduct: Concealment etc

Greaves [2010] EWCA Crim 709

The Court of Appeal examined the authorities and ruled that offences contrary to the POCA 2002, ss. 327 to 329, are separate, 'free-standing' offences separate from the offences from which the criminal property derives. Where the offender responsible for the primary crime is not the offender guilty of the POCA offence, the position is relatively straightforward but, when they are one and the same, if the conduct involved in the POCA offence adds nothing to the culpability of the conduct involved in the primary offence, there should be no additional penalty. Where conduct involved in a POCA offence does add to the culpability of the conduct involved in the primary offence, an additional penalty is appropriate (see *Brown* [2007] 1 Cr App R (S) 77 and *Linegar* [2009] EWCA Crim 648). If the primary offence has a maximum sentence which seems to the court to be too low and the conduct constituting the POCA offence does not add to the culpability of the conduct involved in the primary offence, that does not justify a consecutive sen-

tence on the latter. Where the conduct involved in the POCA offence does add to the culpability of the conduct involved in the primary offence, the maximum sentence permitted on the primary offence may be relevant to the sentence on the POCA offence because the seriousness of the primary offence reflects on the seriousness of the laundering. But it does not as a matter of principle provide a limit. If the POCA offence merits it, the sentence for it may add to that for the primary offence bringing it above the maximum for the latter, and it may if appropriate itself exceed the maximum on the latter.

See Blackstone's Criminal Practice: B21.7

Imprisonment for Public Protection

Gore [2010] EWCA Crim 369

A court has jurisdiction to impose a sentence of imprisonment for public protection in cases where the offender's 'possession' of a firearm or imitation firearm in the course of a previous offence occurred by way of joint possession in the course of a joint enterprise robbery, where the offender himself did not have physical possession of the weapon. It must however be established or admitted that he was a party to the robbery which, to his knowledge, had involved a firearm or imitation firearm by one or more of those involved in the robbery.

See Blackstone's Criminal Practice: E4.4

Confiscation Order: Appeals

Kirman [2010] EWCA Crim 614

K pleaded guilty to possession of 99 kilos of cannabis resin worth nearly £75,000, but only on the basis that he was minding it for others and had not realised exactly what it was. This was accepted when K was sentenced.

In subsequent confiscation proceedings, the prosecution nevertheless obtained a confiscation order reflecting the full value of the drugs found in his possession. K had a criminal lifestyle, but could show that most of his property (all but some worth £10,500) was acquired legitimately. On counsel's advice he then consented to the imposition of a confiscation order in the sum of just under £85,000.

On appeal, K sought to have the confiscation order varied on the basis that he had been badly advised by counsel and that previously undisclosed information relating to other offenders now proved that his denial of any proprietary interest in the cannabis was true. The first basis of the appeal was rejected (following *Hirani* [2008] EWCA 1463) but the appeal was allowed on the second basis and a sum of £10,500 substituted.

The Court nevertheless recognised (at [7]-[10]) that the acceptance by the Crown of a plea of guilty tendered on a particular basis does not of itself mean that in subsequent confiscation proceedings the issue cannot be reconsidered.

See *Blackstone's Criminal Practice*: E19.35

CASE DIGEST—IN DETAIL

M [2009] EWCA Crim 2615

Sherras v De Rutzen [1895] 1 QB 918; *Sweet v Parsley* [1970] AC 132; *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1; *B (a minor) v DPP* [2000] 1 All ER 833; and *K* [2002] 1 AC 642 were all considered in this case.

The issue which arose was whether the offence of bringing a prohibited article into a prison (contrary to the Prison Act 1952, s. 40C(1)) was an offence of strict or absolute liability, or whether it required the prosecution to prove *mens rea*. At a preparatory hearing, the judge ruled that the offence was not one of strict liability. The prosecution appealed, but the Court of Appeal agreed with the judge. Rix LJ said:

The default position is that, despite the absence of any express language, there is a presumption, founded in constitutional principle, that *mens rea* is an essential ingredient of the offence. Only a compelling case for implying the exclusion of such an ingredient as a matter of necessity will suffice. Therefore the absence of express language, even in the presence of express language elsewhere in the statute, is not enough to rebut the presumption unless the circumstances as a whole compel such a conclusion.

Sections 40A to 40C of the 1952 Act had been inserted by the Offender Management Act 2007 and most of the conduct proscribed in those provisions was inherently incapable of being committed accidentally or inadvertently. The obvious inference was that Parliament had intended each of the new offences to require *mens rea* in the usual way.

The presumption of *mens rea* is sometimes quite easily displaced in the case of regulatory offences (e.g. in respect of health and safety) that are not generally perceived as being 'truly criminal', but as Rix LJ pointed out:

The offences with which sections 40A, B and C are concerned have nothing in common with the typical health and safety provisions which may be matters of absolute liability in the context of the regulation of business activities. It therefore matters not that it could be argued that absolute liability might be an extra spur to vigilance on the part of prison visitors. It seems to us to be impossible to argue that the bringing or throwing into prison of a List A article (controlled drugs, explosives, firearms etc) with the statute's potential ten year penalty is not truly criminal. If that is so in relation to section 40B(1)(a), the same must be so also in relation to the identical language in section 40C(1)(a).

See *Blackstone's Criminal Practice*: A4.2

Mendez [2010] EWCA Crim 516

The authorities and principles relating to murder and joint enterprise have been examined once again by the Court of Appeal. The Court held that, where the common purpose between D and P was merely to cause serious harm, D could not be a secondary party to murder committed by P if the direct cause of the deceased's death was a deliberate act by P of a kind unforeseen by D; and likely to be altogether more life-threatening than any acts of the kind intended or foreseen by D. Toulson LJ said:

47. It would not be just that D should be found guilty of the murder of V by P, if P's act was of a different kind from, and much more dangerous than, the sort of acts which D intended or foresaw as part of the joint enterprise.

48. This is not a difficult idea to grasp and it is capable of being explained to a jury shortly and simply. It does not call for expert evidence or minute calibration. In a case of spontaneous or semi-spontaneous group violence, typically fuelled by alcohol, it is highly unlikely that the participants will have thought carefully about the exact level of violence and associated injury which they intend to cause or foresee may be caused. All that a jury can in most cases be expected to do is form a broad brush judgment about the sort of level

of violence and associated risk of injury which they can safely conclude that the defendant must have intended or foreseen. They then have to consider as a matter of common sense whether P's unforeseen act (if such it was) was of a nature likely to be altogether more life-threatening than acts of the nature which D foresaw or intended. It is a question of degree, but juries are used to dealing with questions of degree. There are bound to be border line cases, but if the jury are left in real doubt they must acquit. The shorter and simpler the general direction, the better. The judge will no doubt point out to the jury the factors relied on by the defence and by the prosecution for arguing that P's act should, or should not, be considered in a 'different league' from what D intended or foresaw (to use the homely expression of the trial judge in *Rahman*, which the House of Lords approved). Those are matters of fact for the jury to weigh.

The case is of interest as an exposition of the existing law, and also insofar as it lends judicial weight (at [17]) to the view stated in *Smith and Hogan's Criminal Law*, 12th edition (OUP, 2008) that joint enterprise is not a distinct form of criminal complicity:

The only peculiarity of joint enterprise cases is that, once a common purpose to commit the offence in question is proved, there is no need to look for further evidence of assisting and encouraging. The act of combining to commit the offence satisfies these requirements of aiding and abetting. Frequently it will be acts of encouragement which provide the evidence of the common purpose. It is simply necessary to apply the ordinary principles of secondary liability to the joint enterprise.

See *Blackstone's Criminal Practice: A5.5*

Prosecution Appeal;

Rea [2010] EWCA Crim 924

The issue was one of defence access to allegedly indecent images of children (some of which were not, according to D, images of children at all) found on his computer. The defence lawyers wished to examine and discuss these images in D's presence so that they could advise him appropriately, but the CPS was reluctant to allow any such access, other than under close police supervision, and refused to comply with the judge's order that they should make copies of all 240 images to be prepared for the use of the judge, with the defence to be shown identical copies, subject to appropriate undertakings as to the safe custody and control of the images. The CPS put forward the objection (which in the view of the Court of Appeal was 'completely unrealistic') that compliance with this order might put employees of the CPS or police in jeopardy of prosecution.

Faced with this response, the judge proposed to stay

the proceedings. The Court of Appeal backed the trial judge. Lord Judge CJ concluded his judgment with some general observations:

20. The principle that the defendant is entitled to private and confidential discussions with his legal advisers, unsupervised and unobserved by police officers or representatives of the CPS, is too elementary to require citation of authority. In the context of the issue which arises in this case, at such a conference the defendant and his lawyers need access to the material relied on by the Crown. Without such access, first, the defendant's lawyers cannot give him and he cannot receive clear and unequivocal advice about his position, and second, proper preparations for the forthcoming trial in which the very material in question provides the entire basis for the prosecution case cannot be made.

21. Arrangements to provide defence lawyers with the relevant material for the sole purpose of discharging their professional responsibilities to their client, and the acceptance by them of access to such material for this purpose, cannot, in any circumstances, be regarded as criminal. This elementary principle is acknowledged within the relevant legislation. Both the Protection of Children Act 1978 and the Criminal Justice Act 1988 provide defences for solicitors and counsel who for these purposes are in possession of what would otherwise be prohibited material. So, too, does the Sexual Offences (Protected Material) Act enacted in 1997, but not yet in force. The same defences would be available for the jury at any trial. So far as the legal advisers are concerned, it is normal to invite undertakings in relation to the retention and control of such material, which are readily given, and, as far as we know, have never yet been broken.

22. Lawyers and jurors alike must be trusted to act in good faith, unless and until there is some reason to suggest that they are deficient in any respect. They are provided with the material for a very limited and strictly defined purpose. Possession and use outside these limited purposes is unlawful, and would put them in peril of prosecution. Thus, at the risk of stating the obvious, no further hard copies or digital copies beyond those necessarily required for the purpose of the conference (or indeed a trial) should be made. All the material must be returned to the custody of the Crown Prosecution Service when the relevant trial has concluded.

23. The reality is that there have been many prosecutions for possession of prohibited material involving children, and largely, and effectively, all the necessary arrangements for the preparation for trial and privileged communications have been made, . . . There may be occasions when even if the defendant is remanded in custody, it will be necessary for the material to be provided in the form of a CD for use in a laptop for a confidential discussion between the defendant and his lawyers in prison. However, if the defendant is remanded in custody, the necessary arrangements may also be made at a nominated police station or at the court itself. If so, appropriate bail orders, subject to strict conditions, may be made. With the technology currently available, and its sensible deployment, it should be possible for lawyers to have access

to the material using the technology, without hard copies being made, and without any risk that there might be some accidental or inadvertent, let alone deliberate destruction of the material on which the prosecution relies. . . .

24. We do not intend to be prescriptive. The processes should ensure that when issues like the present arise, or where, for example, in the event of a guilty plea, there is a dispute about the nature and gravity of the material, it should be made available for examination in circumstances of confidentiality between the defendant and his lawyers, and at the same time, for all those properly involved to understand that although this limited possession is protected, if the Crown's case that the material is indecent for the purposes of the protected legislation were correct, any circulation or continued possession beyond the strictly limited purposes for which it is made available would be criminal.

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

Taylor [2010] EWCA Crim 830

The Criminal Evidence (Witness Anonymity) Act 2008, s. 11 (which remains in force notwithstanding the repeal of most of the 2008 Act by the CAJA 2009), was examined as it affects 'pre-commencement' cases. The Court of Appeal held (at [38]):

. . . there are essentially two questions. . . . First, was the anonymity order one which could have been made if the Act had been in force? That question, in our judgment, must be answered by reference to the position at the date of the decision to make the order. The second question is: was the result

of the order that the defendant did not receive a fair trial? That question must be answered retrospectively, taking into account what subsequently occurred during the trial itself, as in *Mayers*. We accept [counsel's] submission that s. 11(2)(b) requires the Court of Appeal to decide whether it considers that the defendant in fact received a fair trial. In applying that provision, the Court of Appeal is not exercising a review of the judge's decision to make an anonymity order, although his reasons for making the order are highly relevant to the decision required to be made by the Court of Appeal.

The Court added:

In a case in which an anonymity order is made on the basis that it is necessary 'in order to protect the safety of the witness or another person or to prevent any serious damage to property', and there is no evidence that that Condition is not, or is no longer, satisfied, it is difficult to conceive of circumstances in which the Court could properly revoke an anonymity order after the witness has testified. To do so would be to expose the witness to the very danger that the order was intended to avoid, and it would be grossly unfair and improper to expose him or her to that danger after he or she had been told that he or she would be protected by the order. It is evident that an application for revocation of an anonymity order in circumstances such as the present, if successful, would lead to the abandonment of the trial. It follows that in such a case it must be shown that the continuance in force of the anonymity order is inconsistent with a fair trial. That was not shown in this case.

See *Blackstone's Criminal Practice*: D14.20

LEGISLATION

Crime and Security Act 2010

This wide-ranging Act will, when brought fully into force, amend the law relating to police powers of stop and search; the taking, retention, destruction and use of evidential material; the protection of victims of domestic violence; the issue of injunctions in respect of gang-related violence; the making of anti-social behaviour orders; the private security industry; the possession and use of electronic communications devices in prison; the use of air weapons by minors; the compensation of victims of overseas terrorism (already in force); the sale and supply of alcohol; and powers of search and seizure in relation to persons subject to control orders.

Violent Crime Reduction Act 2006 (Commencement No. 8) Order 2010 (SI 2010 No. 469)

This Order brings ss. 6 to 8 of the Act (drinking banning orders on conviction) and 9 to 14 (interim orders, appeals etc) into force in specified local justice areas from 1 April 2010.

Regulation of Investigatory Powers (Communications Data) Order 2010 (SI 2010 No. 480)

This Order consolidates the provisions contained in Regulation of Investigatory Powers (Communications Data) Order 2003 (SI 2003 No. 3172) in its amended form and incorporates a series of original minor amendments.

Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (SI 2010 No. 521)

This Order consolidates the provisions contained in Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 (SI 2003 No. 3171) in its amended form and incorporates a series of original minor amendments.

UK Borders Act 2007 (Commencement No. 6) Order 2010 (SI 2010 No. 606)

This Order brings s. 24 of the Act (seizure of cash) into force on 1 April 2010.

Criminal Justice and Immigration Act 2008 (Commencement No. 14) Order 2010 (SI 2010 No. 712)

This Order *inter alia* brings into force on 23 March 2010, s. 74 and sch. 16 (hatred on the grounds of sexual orientation) and associated minor amendments and repeals.

Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816)

This Order brings the following provisions of the Act into force on 6 April 2010:

- ss. 62 to 68 and sch. 13 (prohibited images of children);
- s. 69 (indecent pseudo-photographs of children: marriage etc);
- s. 70 (genocide, crimes against humanity and war crimes);
- s. 71 (slavery, servitude and forced or compulsory labour);
- ss. 74 to 83 and 85 (anonymity in investigations) in England Wales only;
- s. 84 (anonymity in investigations: application to armed forces);
- s. 113 (powers in respect of offenders who assist investigations and prosecutions);
- s. 118 and sch. 15 (Sentencing Council for England and Wales), so far as it is not already in force;
- ss. 119 to 136 (remaining provisions regarding Sentencing Council for England and Wales);

- s. 146 (retention of knives surrendered or seized: England and Wales);
- s. 147 (retention of knives surrendered or seized: Northern Ireland);
- ss. 155 to 172 (criminal memoirs etc) and sch. 19 (exploitation proceeds investigations);
- s. 173 (assessment notices), so far as it is not already in force;
- s. 175 (further amendments of the Data Protection Act 1998), so far as it relates to sch. 20, paras. 5 to 14 (amendments other than those relating to data controllers' registration);
- related minor and consequential amendments, repeals and transitional provisions; and
- in specified local justice areas, the repeals relating to the Police and Criminal Evidence Act 1984 and the Crime and Disorder Act 1998, s. 57C, in sch. 23, part 3.

The Order also brings the following provisions into force on 4 October 2010:

- s. 52 (persons suffering from diminished responsibility: England and Wales);
- ss. 54 and 55 (partial defence to murder: loss of control) for England and Wales;
- s. 56(1) (abolition of common law defence of provocation) for England and Wales;
- s. 56(2)(a) (repeal relating to abolition of common law defence of provocation);
- s. 57 (infanticide: England and Wales); and
- related amendments (sch. 21, para. 52) and repeals.

Extradition Act 2003 (Amendment to Designations) Order 2010 (SI 2010 No. 861)

This Order adds Libya to the list of countries designated for the purposes of Part 2 of the Extradition Act 2003.

Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Codes E and F) Order 2010 (SI 2010 No. 1108)

This Order brings revised Codes E and F into force on 1 May 2010. The revisions to the Codes permit recording by secure digital network as an alternative to removable media format (audio tape).

**Misuse of Drugs (Designation) (Amendment)
(England, Wales and Scotland) Order 2010
(SI 2010 No. 1143)**

This Order amends the principal Regulations of 2001 (SI 2001 No. 3997) insert 4-methylmethcathinone (commonly referred to as mephedrone) and other cathinone derivatives into part 1 of the schedule to the Order.

**Misuse of Drugs (Amendment) (England, Wales
and Scotland) Regulations 2010 (SI 2010
No. 1144)**

These Regulations amend the principal Regulations of 2001 (SI 2001 No. 3998) so as to insert 4-methylmethcathinone (commonly referred to as mephedrone) and other cathinone derivatives into Schedule 1.

**Safeguarding Vulnerable Groups Act 2006
(Controlled Activity and Miscellaneous Provi-
sions) Regulations 2010 (SI 2010 No. 1146)**

These Regulations make provision relating to controlled activity and to the criteria prescribed for the purposes of barred lists. They include an amendment to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009 No. 37).

**Criminal Justice Act 2003 (Commencement
No. 24 and Transitional Provisions) Order 2010
(SI 2010 No. 1183)**

This Order brings into force:

- on 26 April 2010, ss. 51, 52, 53, 54 and 56 insofar as not already in force (live links and related provisions); and
- on 1 May 2010, ss. 34 (notification of intention to call defence witnesses) and 39 (faults in defence disclosure) insofar as it substitutes s. 11(4) to (7) in the CPIA 1996.

**Criminal Defence Service (Representation
Orders: Appeals etc.) Regulations 2010
(SI 2010 No. 1186)**

These Regulations amend the principal Regulations of 2006 (SI 2006 No. 2494) by substituting reg. 4, so as

to provide that, in magistrates' courts' cases the individual may make a renewed application to the authority responsible for granting representation orders in magistrates' courts, after which there is an appeal to the court.

**Al-Qaida and Taliban (Asset-Freezing)
Regulations 2010 (SI 2010 No. 1197)**

These Regulations make provision relating to the enforcement of Council Regulation (EC) No. 881/2002 of 27 May 2002 for restrictive measures directed at certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban. The measures include the freezing of funds, financial assets and economic resources of such persons and ensuring that any funds, financial assets and economic resources are not made available to them.

**Misuse of Drugs Act 1971 (Amendment) Order
2010 (SI 2010 No. 1207)**

This Order amends the Act by adding 4-methylmethcathinone (commonly referred to as mephedrone) and certain other cathinone derivatives into part 2 of sch. 2 (Class B drugs).

**Criminal Procedure and Investigations Act
1996 (Code of Practice for Interviews of Wit-
nesses Notified by Accused) Order 2010
(SI 2010 No. 1223)**

This Order appoints 1 May 2010 as the day on which the Code of Practice for such interviews takes effect.

Consolidated Criminal Practice Direction

The Court of Appeal has issued Amendment No. 24 to the Consolidated Criminal Practice Direction (Criminal Proceedings: Witness Anonymity Orders (2); Forms) [2010] All ER (D) 06 (Apr). The main changes relate to the procedure on applications for witness anonymity orders.

COMMENT AND ANALYSIS

The Sentencing Council for England and Wales

The Coroners and Justice Act 2009, Part 4 (ss. 118 to 136), and Sch. 15 creates a new Sentencing Council for England and Wales and abolishes the Sentencing Guidelines Council ('the SGC') and the Sentencing Advisory Panel. Part 4 came into force on 6 April 2010 (Coroners and Justice Act 2009 (Commencement No. 4: Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816)). The new website is at <<http://www.sentencing-council.org.uk>>

Section 120 requires the Council to prepare 'sentencing guidelines', which may be 'general in nature or limited to a particular offence, particular category of offence, or particular category of offender' (s. 120(2)). The Council *must* prepare guidelines as to (a) reduction in sentences for guilty pleas and (b) the application as to any rule of law as to the totality of sentences, and *may* prepare sentencing guidelines about any other matter (s. 120(3) and (4)). While there is, of course, a revised SGC Guideline in place from July 2007 on the subject of reduction for guilty plea, there is no existing SGC Guideline on 'totality'. The use of the word 'must' in this context suggests that producing a guideline on totality will be high on the agenda for the new Council.

When exercising its functions, the Council must, by s. 120(11), have regard to (a) the sentences imposed by courts in England and Wales for offences, (b) the need to promote consistency in sentencing, (c) the impact of sentencing decisions on victims of offences, (d) the need to promote public confidence in the criminal justice system, (e) the cost of different sentences and their relative effectiveness in preventing re-offending, and (f) the results of the monitoring carried out under s. 128.

By s. 121, the sentencing guidelines should normally specify the 'offence range' appropriate for a court to impose on an offender convicted of a particular offence and, if the guidelines describe different categories of case, specify for each category a 'category range' within the offence range. The guidelines should also specify the 'starting point' in the offence range or the 'starting point' for each category range. The guidelines should also list any aggravating and mitigating factors which the Council considers are relevant. Section 121 puts into statutory form the established

working practices of the SGC and, with respect, it is hard to see what can usefully be achieved by legislating in this degree of detail. One of the strengths of the guideline system under the SGC was its flexibility to create guidelines of different types to suit different topics and circumstances. There is a separate duty on the Council to create 'allocation guidelines' under s. 122.

Section 125(1) is of particular interest to judges, and much judicial concern has been expressed about it. The subsection states that:

Every court (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.

Section 125(3) further provides that the duty imposed under s. 125(1) includes in all cases a duty to impose on the offender 'in accordance with the offence-specific guidelines a sentence which is within the offence range', and 'where the offence-specific guidelines describe categories of case . . . a duty to decide which of the categories most resembles [the offender's] case in order to identify the sentencing starting point in the offence range', but nothing in s. 125 imposes a separate duty to impose a sentence which is within the category range. On the face of it the requirement that 'every court *must* . . . follow any sentencing guidelines' (emphasis added) is a tighter requirement than the pre-existing obligation on the court under the CJA 2003, s. 172(1)(a) to 'have regard to' the guidelines. It is submitted, however, that there is more flexibility here for sentencing courts than may at first appear. By s. 125(4), the duty to identify a category does not apply in a case where the court is of the opinion that none of the categories in the guideline sufficiently resembles the offender's case. Then, the duty to follow the guidelines is applicable to the whole of the 'offence range' but not to the 'category range'. The whole 'offence range' is of course typically very wide, so arguably this requirement is less prescriptive than before. Finally, the court may choose not to follow the guidelines if to do so would be 'contrary to the interests of justice'. This may turn out to be quite a flexible test. No doubt the Court of Appeal will give guidance on these matters over the coming weeks, but the whole

tenor of the Court's interpretation of sentencing guidelines up to this point has been to stress their flexibility, and the power of the judge to depart from them in an appropriate case, having giving reasons for doing so. It is submitted, however, that given the new wording it will become increasingly problematic for sentencers simply not to refer to the relevant guidelines in their sentencing remarks or not to explain how the guidelines have impinged on their choice of sentence.

The Commencement Order, by art. 7, makes it clear that pre-existing sentencing guidelines issued by the SGC or sentencing guidelines issued by the Court of Appeal which have not been superseded and which were in effect before 6 April 2010 are to be treated as guidelines issued by the new Sentencing Council. Although there was some suggestion in the media that the SGC Guidelines would no longer apply after 6 April, or would have to be substantially re-written by the new Sentencing Council, it is clear from the Order that this is not the case. Part 4 of sch. 22 to the Coroners and Justice Act 2009 contains further provisions about the Sentencing Council. In particular, para. 27(1) states that 'Nothing in section 125 or 126 [duty of the court to 'follow' guidelines] has effect in relation to the sentencing of persons for offences committed before the commencement of the section in question', and, by para. 27(2), where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it must be taken for the purposes of para. 27(1) to have been committed on the last of those days.

Sections 127 to 132 specify other functions of the Council. Section 127 requires the Council to publish a 'resource assessment' in respect of guidelines, which will assess the likely effect of guidelines on (a) the resources required for the provision of prison places, (b) the resources required for probation provision, and (c) the resources required for the provision of youth justice services. Section 128 requires the Council to monitor the operation and effect of its sentencing guidelines including, interestingly enough, the frequency with which courts depart from the guidelines. Section 129 requires the Council to publish statistics relating to sentencing practice across all local justice areas and across all Crown Court locations, and to promote greater awareness of matters relating to sentencing including information as to their relative cost and effectiveness. Finally, s. 132 requires the Council to assess the likely impact on prison places and probation resources of government policy proposals or legislative proposals. Any one of these tasks is substantial; taken

together they amount to an enormous information-gathering and data processing exercise. It will surely take a long time before the Council has a sufficient knowledge base about existing sentencing patterns to be able to make reliable predictions about the effect of further legislative changes.

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The Bribery Act 2010

Background

One of the last measures to be enacted at the end of the last Parliament was the Bribery Act 2010. When brought into force, it will abrogate or repeal most (but not quite all) of the existing law on bribery and corruption and substitute what the Ministry of Justice proclaims to be 'a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad'.

The old law was indeed in need of reform. The common law offence of bribery remained in force, but most prosecutions were brought under the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906. The 1889 Act applied only to the bribery of public officials, whereas the 1906 Act applied to the bribery of agents in either the public or private sphere, but not to the bribery of those (such as police officers or councillors in local government) who are not 'agents' as defined in s. 1 of that Act. The boundaries between the two Acts were often unclear. In *Natji* [2002] 1 WLR 2337, for example, N corruptly promised money to a civil servant at the Home Office, but his conviction for an offence under the 1889 Act was quashed because the Home Office was not a 'public body' for the purposes of that Act. N ought instead to have been prosecuted under the 1906 Act.

There was also some concern as to the adequacy of the existing law when faced with cases involving the bribery of foreign public officials by persons representing UK interests (particularly corporate business interests) abroad. Such concerns (fanned by a number of high-profile scandals) had in part been met by ss. 108 and 109 of the Anti-terrorism, Crime and Security Act 2001, which were enacted 'to demonstrate the UK's

commitment to join forces with the international community in the fight against corruption', but English law still did not apply to things done abroad on behalf of British companies by their foreign subsidiaries or by individuals who were not themselves nationals of the UK.

The Law Commission addressed these and other concerns in their report, *Reforming Bribery* (LC 313) in 2008, and the Draft Bribery Bill appended to that Report became (with some amendments) the basis for the 2010 Act.

Commencement and Transitional Provisions

The Act will come into force on such date or dates as may be prescribed. When the necessary repeals take effect, they will be subject to transitional provisions by which acts of bribery committed wholly or partly before commencement will still be subject to the old law.

The new offences will have no retrospective effect, but some overlap between the old and new law remains possible. If for example P offers a bribe to R (a public official) before the appointed date, but R agrees to receive it only on or after that date, R may then be charged with the new offence of 'being bribed' (contrary to s. 2 of the new Act); whereas P may be charged under the old law with offering that bribe, and R might also face charges under the old law if there is evidence that he 'corruptly solicited' the bribe before commencement (contrary to the Public Bodies Corrupt Practices Act 1889, s. 1). If however the promised bribe is eventually given and received after commencement, there should be no difficulty in prosecuting both parties under the new Act, without resort to transitional provisions.

New General Offences of Bribery and Being Bribed

The main or 'general' offences can be divided into that of bribing another person (contrary to s. 1) and that of being bribed (contrary to s. 2). These are separate offences because one can (for example) offer or request a bribe without the prior knowledge or agreement of the person who is intended to receive or provide it. The offences are supplemented by s. 6, which creates a discrete offence of bribing a foreign public official, and by s. 7, under which a commercial organization may incur criminal liability if a person who performs services for it (such as an agent or employee) commits bribery on its behalf and it cannot prove that it had

adopted appropriate procedures to prevent such misconduct.

The general offences apply equally to bribery in the public sector and to bribery in connection with a business, trade employment or professional services, thus eliminating many of the problematic distinctions that bedevilled the old law. The new concept of bribery involves the offer, promise or provision (or request, agreement to receive or acceptance) of a financial or other advantage for the purpose of inducing or rewarding the 'improper performance' of a 'relevant function or activity' (i.e. one that is reasonably expected to be performed in good faith, or impartially, or one that is performed by a person in a position of trust). Most of these terms are extensively defined in ss. 3 to 5, but it would be for a court or jury to decide what amounts to a 'financial or other advantage' in any given case.

The new law will have an extensive extraterritorial and cross-frontier ambit (see s. 12) and will apply to individuals in the public service of the Crown as to other individuals (s. 16), but there is a specific defence under s. 13 that will apply in respect of conduct necessary for the proper exercise of any function of one of the intelligence services, or for the proper exercise of any function of the armed forces when engaged on active service.

A bribe within the meaning of s. 1 or s. 2 need not be offered or paid to (or taken or requested by) a person who actually performs a 'relevant function or activity': it may for example be offered to the spouse of such a person or to some other party, and such a person may equally be guilty of an offence if he takes or requests such a bribe, but the law will bite only in cases where there is an intention to induce or reward improper performance by some person who *does* perform a relevant function or activity. If for example A performs some such function or activity and B (his spouse) seeks or receives some payment or advantage from C in return for her promise to introduce C to A, offences under the 2010 Act may be committed by B and/or C, but only if they intend that A will be induced to act 'improperly' in the performance of his duties.

The concept of 'improper performance' places some limitation on what might otherwise be alarmingly broad offences. 'Corporate hospitality' for example, has become a significant feature of modern business practice. Those who provide it clearly hope to influence those to whom it is provided, but the Government's view was that such hospitality does not ordinarily involve inducements to behave improperly.

There may however be circumstances in which the sheer scale of the hospitality is such as to suggest the opposite, and in other cases the acceptance of any such 'hospitality' (e.g., by a judge) may in itself amount to improper conduct.

Bribery of Foreign Public Officials

An illicit payment or offer of payments to a foreign official, by or on behalf of a UK company or firm, may well fall within the s. 1 offence of bribery discussed above, and may do so even where the offer or payment, etc., is both made and accepted abroad. One might therefore question the need for a further offence dealing specifically with such conduct; but the Government took the view that the provision of a discrete offence would make it easier for the UK to comply with its obligations under the OECD Convention on *Combating Bribery of Foreign Public Officials in International Business Transactions*, and s. 6 duly creates such an offence. It adopts the terminology of the Convention, rather than that of ss 1 to 5, and in some respects the offence it creates is stricter than the s. 1 offence. There need be no intent to induce or reward *improper* conduct. An attempt to influence a foreign public official (directly or indirectly) through the offer or gift of a financial or other advantage will be lawful under s. 6 only where the latter is 'permitted or required by the written law applicable to [him] to be influenced ... by the offer, promise or gift'.

The advice of the Law Commission (at para 5.76) was that one can almost always rely on a simple rule of thumb in order to stay on the right side of the law: 'Do not intentionally give advantages to foreign public officials, to gain or retain business, without a legal justification.' That is all very well, but in some countries 'facilitation payments' are routinely expected if officials are to perform the very functions that might legitimately be expected of them. In such circumstances, a prosecution for bribery brought under s. 1 might result in acquittal on the basis that a facilitation payment is designed to encourage the proper performance of a duty, rather than an 'improper' one, but on the same facts a prosecution brought under s. 6 might well succeed. The Law Commission's view (LC 313 at para 5.108 to 5.111) was that no formal exception should

be made for such cases, but that the 'sensible use of the discretion not to prosecute' should be relied upon instead, at least where small sums are paid to secure the performance of routine tasks.

Failure of Commercial Organizations to Prevent Bribery

The fourth and last of the new offences created by the Act is that of failure to prevent bribery (contrary to s. 7). Only a 'relevant organization' incorporated or formed under UK law or that carries on a business there can be guilty of this offence. An officer or director of a company can be charged and convicted under ss. 1, 2 or 6 of the Act if his company commits one of those offences with his 'consent or connivance' (see s. 14(1)) but that is not the case as far as s. 7 is concerned.

Some person acting for or on behalf of the relevant organization must intentionally commit an offence under one at least of ss. 1, 2 or 6 (or an act that *would* have amounted to such an offence, had it been committed within the jurisdiction or by someone with a 'close connection with the UK'); but as far as the organization itself is concerned, the offence is one of strict liability. No negligence or *mens rea* on its part need be proved. There is however a due diligence defence that the defendant organisation may prove in order to escape liability, namely that it 'had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct'.

By s. 9 of the Act, the Secretary of State must publish guidance on the procedures that such organisations can be expected to put in place in order to avoid the risk of prosecution under s. 7. Such guidance must no doubt be published before s. 7 is brought into force; and as with all offences under the Act, no prosecution may be instituted in England and Wales except by or with the consent of the DPP, the Director of the Serious Fraud Office, or the Director of Revenue and Customs Prosecutions (see s. 10(1)).

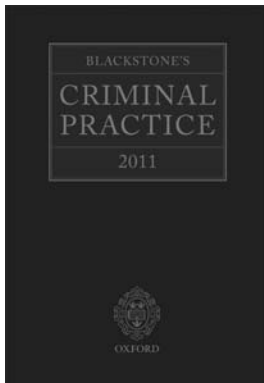
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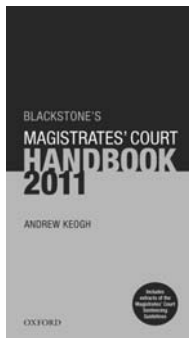
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