Criminal Law Update

Series 2, Issue 2 – May 2016

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“ Mark George Q.C. is a highly experienced defence trial advocate who is regularly instructed in all types of serious crime including murder and serious sexual assaults. He is also very experienced in appeal cases and inquests. He was instructed on behalf of 22 families in the Hillsborough Inquests which concluded in April 2016. ”

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References to Criminal Law Week are abbreviated to CLW with the year, issue and paragraph number given. If a date is given this is the date of the judgment.

Hearsay

The increasing use of the hearsay provisions in the *Criminal Justice Act* 2003 means that it has never been more important that practitioners ensure that when the prosecution seek to rely on hearsay evidence they are required to show that they have done all they reasonably can to get the witness to court. The case of *R. v. Jones (Kane)* [2015] EWCA Crim 1317, (CLW 16/10/1), (03/07/15) is a salutary reminder of what is required. D was alleged to have assaulted his partner. She did not attend the trial date having left the family home a few days earlier and after efforts by her to retract her statement. The judge allowed the prosecution application to adduce her witness statement as evidence. The application was based solely upon s.114 on the basis that it was in the interests of justice for the court to admit the evidence. Remarkably the judge was not invited and did not of his own volition consider s.116 of the Act which deals with witnesses who are unavailable. Neither did the judge hear any evidence from the police or the complainant’s family who had been in contact with her. No evidence was presented as to the present whereabouts of the complainant, the prospects of her attending court in the near future and the judge declined to issue a warrant for the arrest of the complainant so that she could be brought to court. The Court of Appeal acknowledged that there will often be good reason for admitting the evidence of a complainant in such a case so as to ensure that the case can proceed. However given the lack of effort on the part of the police or prosecution to present sufficient material to the judge, the CA held that the decision to admit the evidence under s.114 was flawed and as a consequence the appellant has been deprived of the opportunity to have his case put to the complainant as well as his right to a fair trial and the conviction was quashed.

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Alternative charges

Where there are two charges properly characterised as alternatives, with one alleging a simple or underlying offence and the other alleging a racially or religiously aggravated offence arising from the same facts, then as a matter of principle there should not be convictions on both charges. The Divisional Court followed *R. (Dyer) v. Watford Magistrates' Court*, [2013] EWHC 547 (Admin), and did not follow *D.P.P. v. Gane*, [1991] Crim LR 711. On an appeal the powers of the Crown Court under s.48 (2) of the Senior Courts Act 1981 are sufficiently wide to enable the Crown Court, where it quashes a summary conviction of an aggravated offence, to substitute a conviction for an alternative, underlying offence that has been adjourned by the magistrates' court as part of the decision appealed against. In order to avoid convicting for both the underlying and aggravated offence, the sensible course is to adjourn the trial of the underlying offence sine die. If the defendant wishes to plead guilty to the underlying offence but contest the aggravated one, that offer to plead should be noted, but the plea should not be taken: *Henderson v. Crown Prosecution Service* [2016] EWHC 464 (Admin) (CLW 16/13/1) (09/03/16)

Criminal Practice Direction

The *Criminal Practice Directions 2015*, handed down on September 29, 2015, by Lord Thomas C.J. have been amended with effect from April 4, 2016. These deal amongst others with intermediaries [Direction 3F] and the taking of notes including by electronic means by anyone in the public gallery [Direction 6D] so that the presumption is that a member of the public is entitled to do so unless there is good reason to believe this may interfere with the administration of justice. New provisions which may prove useful to defence advocates appear in directions 24B and 25A which allow defence counsel, if invited to do so by the court, to address the court or the jury for the purpose of identifying the issues in the case immediately following the Crown's opening speech. It is important to clarify that this provision does not create any right for the defence to make an opening speech at this stage. It has however long seemed to me that the defence can be put as a serious disadvantage right at the start of the trial by the current provisions on opening speeches. Whereas the Crown has an opportunity often over several hours or even days to present its case and outline the evidence to be called and the elements of the offences the Crown has to prove, the defence has no such right. The circumstances in which the defence has a right to make an opening speech often do not arise; if they do, a speech can only be made after the Crown has completed its case which may be many days and often weeks later and for good reason are rarely used. Usually, therefore the jury has to figure out what the defence case is, if they can, from the questions asked and the points made in cross-examination of the Crown's witnesses which is hardly an ideal way of explaining the defence case. Much better therefore to allow the defence advocate to explain to the jury, if they wish (which may not always be the case) and if the issues have not already been clarified by the Crown, so that the jury will better understand the point of the questions later asked of the witnesses. The practice direction also points out that, where the issues are fully identified at this stage, the judge has the opportunity to give the jury appropriate directions about the law that arises in the particular case at this early stage before the evidence is called.

Direction 26K appears to give official sanction to the judge giving the jury the directions on the law in writing, something that an increasing number of judges have been doing for some time as they come to appreciate that a 20 to 30 minute "law lecture" for jurors during a summing-up is not really the best way of helping

the jury understand some complex points of law. It is also suggests that the summing-up should now take place in two parts with the directions on law being dealt with before closing speeches and the summary of the facts and issues taking place after speeches.

Bad character – application by co-accused s.101 (1) (e)

This trial for murder involved a "cut-throat" defence. One defendant sought to admit evidence of the co-accused's bad character in reliance on section 101(1)(e) *Criminal Justice Act* 2003 on the grounds that it had substantial probative value in relation to an important matter in issue between the two defendants. This was said to be that his co-defendant had a propensity to commit offences of the type with which they were jointly charged. The CA held that judges faced with this sort of application should not longer refer to or rely upon common law decisions such as that in *R. v. Randall* [2004] 1 W.L.R. 56, H.L. and should simply rely on the terms of the 2003 Act. On this approach the judge is required to decide whether the evidence is substantially probative of the propensity alleged, whether that propensity is substantially probative of the fact in issue and whether the matter in issue is a matter of substantial importance in the context of the case as a whole - s.112(1). The CA said that it is particularly important that the test set out in the 2003 Act is the test solely applied for admissibility as, unlike the position between the prosecution and a defendant, the court has no discretion to refuse the admission of the evidence where the statutory conditions for admissibility are met: *R. v. Platt (David)* [2016] 1 Cr.App.R. 324(22), C.A.; [2016] EWCA Crim 4 (CLW16/15/1) (15/01/2016).

Reporting restrictions

The recent trial of two girls aged 14 and 15 for the murder of Angela Wrightson illustrates the perils the internet poses for the continuation of jury trials if we wish to ensure that such trails are fair and that juries are not contaminated by online comment by all and sundry whilst the trial is in full swing.

By the end of the second day of the trial it was apparent that numerous adverse comments had been posted about the defendants by members of the public on the Facebook link to the local newspaper's reporting of the opening. These comments were variously described as "vile" and containing threats to the defendants. It is a safe bet that most if not all of them were posted by those who had not been in court during the trial up to that point. Similar links to sites like Facebook had been set up by a number of other media organisations.

The judge then made an order under s. 45 (4) of the Senior Courts Act 1981 ordering that the links to Facebook and other social media websites be removed along with any comment that had already been posted. A re-trial at a different court centre was ordered. When the press objected to the judge's order he agreed to discharge that one but instead made an order under s. 4 (2) of the Contempt of Court Act 1981 prohibiting any reporting of the trial at all until its conclusion. Various media organisations appealed that order and the case was heard under the title of *ex parte British Broadcasting Corporation and eight other media organisations; Regina v F, D* [2016] EWCA Crim 12 (CLW 16/15/2) (11/02/2016). In the event when the Court of Appeal rejected the media organisations objections to the order under s.4 (2) those organisations decided that it would be better to

accept a s.45 order rather than be prevented from any reporting of the trial at all.

The lesson here for both defence advocates and prosecutors concerned to preserve the integrity of the trial process is that steps need to be taken before a high profile trial begins to prevent members of the public, usually in complete ignorance of the facts of the case from spewing out venomous comments that are bound to be highly prejudicial. The law is clear enough. Comments on the evidence during a trial and before the jury has reached its verdicts are not allowed if they are likely to be potentially prejudicial to a fair trial. Many newspapers and other media organisations do not allow comments to be posted immediately below the articles about a trial on their own websites. In such cases the correct approach is for the court to make an order under s.45 similar to the final order agreed in F and D [above] requiring the media

a.) to disable the ability for users to post comments on their respective websites of any report of the trial published on those websites;

b.) remove any comments posted on their Facebook pages on any report of the criminal trial published by the appellants.

Mark George QC
May 2016

Please bear in mind that barristers at GCN are always available to give informal advice on any criminal defence matters, including appeals and miscarriages of justice. In the first instance please contact the clerks on 0161 817 6377.

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GCN recently launched a new **Appeals and Miscarriages of Justice Team** which provides comprehensive and specialist advice and advocacy to anyone challenging unsafe convictions and seeking justice following a successful appeal. Our miscarriage of justice work is often high profile and recent work includes: Hillsborough; Orgreave; the ongoing miscarriage of justice compensation test case (Victor Nealon); a number of **Joint Enterprise** appeals following the Supreme Court decision in *Jogee*. Recent appellate work includes lead challenges to IPP sentences imposed between 2005 and 2008; CCRC referral in "police officer on jury" case; out of time appeals against unlawful extended sentences; acquittal in Operation Pallial (historic allegations) and murder conviction quashed following appeal and re-trial.