Criminal Law Update

Series 2, Issue 1 - December 2015

“ 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. Currently he is instructed on behalf of 22 families in the Hillsborough Inquests which are likely to end in March 2016. ”

Editor **Mark George QC**

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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.

Welcome Back

Being instructed back in the summer of 2013 on behalf of 22 families who lost loved ones in the Hillsborough Disaster was, for probably obvious reasons, a highlight of my career. One consequence however of the workload involved was that it was no longer possible to continue producing the former incarnation of this publication.

Now that the end of the Inquests appears to be in sight (the jury is likely to retire in late February 2016) and with the prospect that the workload will start easing soon it is time to re-launch the GCN Crime bulletin.

Abolition of the Criminal Courts Charge

When the *Criminal Justice and Courts Act 2015*, which included amendments to the *Prosecution of Offences Act 1985*, was enacted the commentary in Criminal Law Week stated “that the amendment of the 1985 Act to insert the provisions relating to the criminal courts charge represented a “transparent attempt to force more defendants to plead guilty”.

When the *Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations* 2015 (S.I. 2015 NO. 796) were made the same commentator

noted "What must rank as one of the most unworthy pieces of criminal legislation ever placed on the statute book has been compounded by these regulations."

Most criminal practitioners who have had experience of the charge in action will probably agree with the sentiments expressed. They are unlikely readily to forget that these spiteful and utterly futile provisions were made by the authority of one Chris Grayling MP who probably ranks as one of the very worst holders of the office of Lord Chancellor. It is a pleasure to be able to resume this new series of this publication by waving farewell to the CCC along with the hapless former L.C. (CLW 15/44/11)

Police Officers on Juries

Back in 2008 when the sight of a police officer on a jury was still relatively new the Court of Appeal decided in *R.v. Khan; R.v. Hanif* and others [2008] EWCA Crim 531; [2008] 2 Cr. App.R. 13 that in a criminal case it was possible to draw a distinction between a juror who was biased in favour of a witness and a juror who was biased in favour of one party. On this basis the Court held that even if a police officer juror might be said to be biased in favour of a brother officer giving evidence there was no basis for concluding that this meant he would be biased in favour of the prosecution. If there was any justification for drawing a distinction between bias towards a witness and bias towards a party in civil proceedings that always seemed to be an entirely spurious argument where a police officer, professionally dedicated to prosecuting crime, had to judge the challenged evidence of a fellow officer also dedicated to the same cause. Having lost in the Court of Appeal Mr Hanif took his case to the European Court which held [2012] 55 E.H.R.R. 16, (20 December 2011) that his article 6 right to a fair trial had been breached in the circumstances where there was a real dispute of fact between him and the police witnesses and a police officer had been seated on his jury. The CCRC then agreed to refer his case back to the Court of Appeal and in July 2014 his appeal was allowed. Because the prosecution elected to re-try Mr Hanif, publication of the judgment was prohibited until the re-trial had concluded. In the end Mr Hanif pleaded guilty so the prohibition has now been lifted and the case can be reported. It is hoped that it will appear on the excellent website www.bailii.com shortly.

On this occasion the Court of Appeal held that the distinction drawn by the Court of Appeal back in 2008 was the wrong test and that if the Court had applied the well-known test in *Porter v. Magill* [2001] UKHL 67; [2002] A.C. 357 of "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased", to the facts of this case the Court should have concluded that the fair minded and informed observer would conclude that there was a real possibility that the tribunal was biased – see *R. v. Hanif and Khan* [2014] EWCA Crim 1678 (31/07/14). The case was recently digested in *Criminal law Week* at 15/42/3 (31.07.14) but too late for the 2016 edition of Archbold although it is covered in the Archbold e-update for 24th November 2015. As a result the passage at 7-89 on p. 1182 of the main work which relies on the 2008 judgment of the Court of Appeal is now to be taken to be incorrect and should be ignored in favour of the test in *Porter v Magill* above. As has been said before however the object lesson of a case like this is, if you don't want a police officer on the jury make sure they don't get on in the first place.

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DNA evidence

In *R. v. C (FN)* [2015] EWCA Crim 1732, (CLW 15/43/1) (04/11/15) the Court of Appeal held that a DNA profile obtained from the complainant's trousers against which it was alleged the defendant had masturbated whilst on the London Underground was sufficient to raise a case to answer where the evidence was that the chance that the DNA had originated from a person other than the defendant was in the order of one in a billion. There was a distinction to be drawn on the authorities between such a case and a case such as *R.v Lashley* [2000] EWCA Crim 88, in which the DNA was found on an item left at the scene of a crime in circumstances where participation in an offence was merely one of a number of possible explanations for the presence of the DNA.

Confiscation and Compensation

Where a court wishes to impose both a confiscation order together with a compensation order it was important to bear in mind the following principles,
(i) the court is empowered to make both orders; (ii) it should be alert to any risk of double-counting, and to the risk of making a disproportionate confiscation order; (iii) ordinarily, it should not make a compensation and confiscation order representing the full amount of benefit where there has been actual restitution to the victim(s) prior to the confiscation hearing (*R. v. Waya* [2013] 1 A.C. 294, S.C., and *R. v. Jawad* [2013] 1 W.L.R. 3861, C.A.); (iv) where a defendant asserts that restitution will be made after the hearing, the court should scrutinise carefully and critically the supporting evidence and arguments; (v) if it remains uncertain whether the victims will be repaid under the compensation order, then a confiscation order including that amount will not ordinarily be disproportionate (*Jawad*); (vi) mathematical certainty of restitution is not, however, required; the court should decide practically and realistically whether restitution is assured; (vii) future restitution is capable of being properly assessed as assured, depending on the circumstances, notwithstanding that it will not be immediate, or almost immediate, at the time of the confiscation hearing; and (viii) while a defendant who is truly intent on making full restitution ordinarily should have arranged this prior to the confiscation hearing, there may be cases where that is impossible; if the court then has firm, evidence-based grounds for believing that restitution may still be forthcoming, albeit it cannot be taken as "assured" at the time of the hearing, it has a discretion to adjourn for further inquiry: *R. v. Davenport*, [2015] EWCA Crim 1731, (CLW 15/43/2) (3.11.15), C.A.

Sentencing

Two members of GCN's crime team have recently been successful in the Court of Appeal. Nina Grahame appeared In *R v Garvey*, (unreported 17/11/15) in an expedited appeal against sentence in which the Court of Appeal granted leave and reduced the Appellant's sentence of imprisonment to one of 2 years imprisonment. The 72 year old Appellant had pleaded guilty at the earliest opportunity to production of cannabis. He was a Director of the company that owned a disused industrial premises in Manchester where a sophisticated cannabis "factory" was discovered containing hundreds of plants. Sentenced as playing a "significant even leading role" in the enterprise, the sentencing hearing was delayed for over 2 years by developments in the case not caused by this Appellant. He and his close family all suffered from a number of serious physical and mental health problems, with significant deterioration

being reported during the lengthy proceedings. The CA acceded to submissions that these serious and deteriorating health problems in the context of the delays warranted "a significant reduction from the starting point that would usually apply to someone not suffering in that way"

Clare Ashcroft appeared in *R v Marvell*, (unreported 10/12/15) in an appeal against sentence in which the Court of Appeal reduced the Appellant's 16 year Extended Sentence of Imprisonment to a determinate sentence of imprisonment of 12 years. The Appellant, who was 27 years old at the time of the offence, had pleaded guilty to Robbery and Possession of an Imitation Firearm in relation to an armed robbery at a social club. The Court agreed with submissions that the original sentencing judge had taken too high a starting point for sentence and had little basis for concluding that the Appellant was dangerous and required an extended sentence. The Court also agreed that too little credit had been given for the Appellant's guilty plea which, while it was entered on the date identified for trial, had been made as soon as the evidence against him had been received. In contrast to his co-defendants, the evidence against the Appellant comprised telephone evidence which was not served until much later on in proceedings.

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 (Sarah Wright, Annmarie Nightingale, Nicola Carroll or Calum Hamilton) on 0161 817 6377.

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