Criminal Law Update

Issue 39. 30th May 2013

CHAMBERS of IAN MACDONALD QC

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.

The Crime and Courts Act 2013

The latest statute that directly affects criminal practice is the Crime and Courts Act 2013. As usual these days it is very long and many of its provisions are tucked away in Schedules as seems to be the current vogue, no doubt so as to prevent proper debate in Parliament. The Act is digested in CLW 13/17/6. We pick out only two provisions. Section 43 amends section 76 CJIA 2008 to introduce Grayling's populist "bash a burglar" provisions so that a householder will only not have a defence of self-defence if he uses "disproportionate force". Readers will recall that when these proposals were first mooted the universal view of numerous lawyers was that the current law was perfectly clear and this provision was entirely unnecessary. As we also know however this government doesn't seem very interested in listening to anything lawyers say. Section 46 of the C&CA 2013 amends s.41 of POCA 2002 so as to allow funds seized by the authorities from alleged criminals and subject to a restraint order to be used to fund that person's legal aid bill. The Bar has argued for the last decade or so that such funds belonging to wealthy alleged drug dealers should be used for that purpose. Since in addition, this is a provision that will save the legal aid fund millions each year (Mr Grayling please take note) this much at least is welcome. Again, in the usual manner, these provisions are not yet in force.

The Justice and Security Act 2013

This shameful Act introduces the controversial provisions for secret courts. The government introduced this Act after almost a decade of bad press and unhappy publicity about the extent of British collusion in the rendition and torture of terror suspects from Pakistan and Afghanistan during the US inspired "war on terror". The UK security agencies had lobbied the government for this measure to enable them to save face. The provisions do not apply to criminal proceedings but these moves are sufficiently grave as to merit mention in this publication. They allow a court to direct that a closed material procedure be used if satisfied that a party would be required to disclose sensitive material subject to a successful claim for PII. In this way the government will be able to produce secret documents for the judge's eyes only. So the country that gave birth to the common law, Magna Carta and the Bill of Rights 1688 (not to ignore the Court of Star Chamber and the prerogative courts of the Tudors and Stuarts) has finally abandoned any pretence to be a leading jurisdiction in supporting the rule of law and prefers to replace it with a grubby pragmatic solution that will allow the British government to wash its dirty laundry well out of the sight of prying eyes. A bad day for those who thought that British justice led the world. Into force on a date to be appointed. (CLW 13/17/11)

Legal Aid, Sentencing and Punishment of Offenders Act 2012

The first four Commencement Orders were digested in Issue 37 of this Update. The No 5 Commencement Order was of comparatively less relevance although it is included as part of the LASPO note set out at http://www.gcnchambers.co.uk/areas_of_specialisation/areas/criminal_defence/criminal_law_updates/a_quick_guide_to_laspo_2012_part_3_sentencing_and_the_punishment_of_offenders

but the **Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013 (S.I. 2013 No. 453)** does merit attention. From 1st April 2013 Schedules 1 to 3, 5 and 6 are brought into force and from 8th April 2013 in particular sections 132 (penalty notices for disorderly behaviour), and 133 to 138 (cautions and youth cautions), and Schedules 23 (penalty notices for disorderly behaviour).

Detention of 17 year olds

The disgraceful situation in which the police could treat 17 year olds as if they were adults for the purposes of the Codes of Practice under the Police and Criminal Evidence Act 1984 has been remedied at last – see ***R. (H.C. (a child, by his litigation friend C.C.)) v. Secretary of State for the Home Department*, [2013] EWHC 892 (Admin)** (CLW 13/18/1) (25/04/ 2013) D.C. The Secretary of State for Justice should be proud that legal aid was available to enable this challenge to the unlawful practice of his own department to be brought. Sadly, due to cuts also made by the Ministry of Justice it is doubtful if it will be in future.

Appeals against conviction – fresh evidence

The correct procedure to be adopted when the Court of Appeal has to deal with an appeal based on fresh evidence where the suggestion is that prosecution witnesses have retracted their evidence or made inconsistent statements was considered in the case of ***R.v. V (S)*** **[2013] EWCA Crim 159**, (CLW 13/14/2) (21/02/2013). The procedure adopted in *R. v. Conway*, 70 Cr.App.R. 4, C.A. (Archbold 2013 para. 7-210) is not to be regarded as binding authority on the way to proceed. The CA said that what procedure was appropriate was entirely case-specific. In the present case the CA considered that it was appropriate for the appellant to call his witnesses, to whom it was alleged the retractions had been made, first.

Indictment

In ***R. v. Flack*** **[2013] EWCA Crim 115 C.A**., (CLW13/14/4) (16/01/2013) judgment the CA held that as section 9(3) of the *Theft Act* 1968 (*Archbold*, 2013, para. 21-108) provides for different maximum penalties for burglary according to whether or not the offence took place in a "dwelling", section 9 was properly to be regarded as creating two offences; If there is a live issue as to whether or not the building in question was a dwelling, this should therefore be resolved by a jury (the indictment containing two counts), not by way of a *Newton* hearing (*R. v. Newton*, 77 Cr.App.R. 13, C.A.) following a plea of guilty to a count alleging burglary of a dwelling. Where a guilty plea is entered to such a count that is the basis upon which the sentencing judge should proceed.

Jury problems

Although a Privy Council decision, the case **of *Taylor v. The Queen*** **[2013] W.L.R. 1144 P.C., [2013] UKPC 8**, (CLW 13/17/2) (14/03/2013) suggests that even the most senior judges are not really interested in claims that jurors may have contaminated their fellows. A juror was dismissed after it became apparent that she knew the defendant. The judge failed to enquire whether she had told any of her fellow jurors of her knowledge of the defendant. The PC was content to assume the jury would have faithfully followed the judge's direction to ignore anything the juror might have said. This idea, much beloved of the judiciary, that juries can be trusted to follow faithfully their directions has taken a battering from recent cases in which jurors have ignored equally clear directions about accessing the internet and social media. Of course the judges are scared of the consequences of facing the realities of life because it would probably lead to more successful appeals but their misplaced faith does them no credit.

Jury bias

On the second day of a trial for knowingly being concerned in an attempt to export prohibited or restricted goods contrary to section 68(2) of the Customs and Excise Management Act 1979, a juror informed the judge in a note that he was professionally involved in supervising similar transactions and that much of what he had already heard would have raised "definite red signals" if he had been dealing with the transactions. The juror indicated that he was worried this would affect his ability to view the evidence in an impartial manner and that he was likely to influence the views of his fellow jurors. The Court of Appeal held in ***R. v. Pouladian-Kari*** **[2013] EWCA Crim 158**, (CLW 13/11/5) (22/02/2013) judgment, that a fair minded and informed observer would have concluded that there was a real possibility of unconscious jury bias so that a fair trial was not possible (considering *Porter v. Magill*; *Weeks v. Magill* [2002] 2 A.C. 357, H.L.) The judge's explanation to the jury that the juror's professional knowledge of freight forwarding was no impediment to sitting on the jury, and that his knowledge and experience might be of benefit to their discussions, was an inadequate direction because it did not alert the jury to the caution they needed to exercise in relation to the juror's views; the direction that the case was to be tried on the evidence given in court alone was correct, but insufficient in the context of a full understanding of the contents of the note and the underlying possible risk of unconscious bias inherent within it.

Manslaughter – loss of control

The defence of loss of control introduced by the Coroners and Justice Act 2009 was considered in the case of ***R.v. Dawes; R.v. Hatter; R.v. Bowyer*** **[2013] EWCA Crim 322** (13/17/3) (26/03/2013) judgment. The judge is required to make a judgment as to whether sufficient evidence has been raised from which a jury could conclude that the defence might apply. If he does he must leave the defence to the jury. The other matter of note is that the court disapproved the decision in R.v. Johnson (Christopher Richard) [1989] 1 W.L.R. 740 (Archbold para. 19-59) in which the court rejected the submission that the mere fact that a defendant caused a reaction in others, which led him to lose self-control, should result in the issue of provocation being outside a jury's consideration. As a matter of statutory construction, the mere fact that in some general way the defendant was behaving badly and looking for and provoking trouble does not of itself lead to the disapplication

of section 55(3), (4) and (5) unless his actions were intended to provide him with the excuse or opportunity to use violence.

Evidence – confessions and admissions

Many a police officer coughed and choked on their cornflakes when they first read the Police & Criminal Evidence Act 1984 and the ghastly realisation settled on them that no longer would they be able to deny a suspect access to legal advice before they were interviewed. And ever since then police officers have tried to find ways around the protections afforded to suspects in PACE. In ***R. v. Plunkett and Plunkett*** **[2013] EWCA Crim 261, C.A.** (CLW13/14/1) (13/03/2013) judgment the device employed was a deliberately engineered 15 minute wait outside a police station in a police van which was, as you will probably have guessed by now, bugged. The Court of Appeal, colluding with the prosecution to ensure that incriminating remarks were not lost for evidential purposes, held that the police van was not a "private vehicle" to get around the problem otherwise posed by section 48 (1) of RIPA 2000 that the evidence would have been obtained by intrusive surveillance rather than directed surveillance (relevant to the level at which this surveillance had been authorised) and decided that even if there had been a breach of the 2000 Act there was no basis for excluding the evidence under s.78 PACE as, amongst other things, according to the CA there was no misrepresentation, entrapment or other conduct that could be characterised as misbehaviour; the police had simply afforded the opportunity to the defendants to talk together. Some readers may be dismayed and disappointed that the CA can be so blithe about clear breaches of RIPA (this was not what directed surveillance was intended for) and PACE (subverting the clear intention of Parliament that in such circumstances suspects would have the protection of the Codes of Practice) but unfortunately such a cavalier attitude has long be a feature of decisions of the CA on such issues.

Evidence – Low Template Number DNA

The question of the reliability of Low Template DNA has concerned the courts for a number of years and so long as the courts continue to admit evidence at the threshold of viability it will continue to cause problems. The danger that a jury will be blinded by the science is obvious. These cases involve microscopic amounts of DNA and therefore run an increased risk of error in the analysis of the results. In *R.v. Dlugosz; R.v. Pickering; R v. MDS* [2013] EWCA Crim 2 (CLW13/15/2) (30/01/2013) judgment the Court of Appeal was faced with three such cases in which none of the experts had been able to give a random match probability as to the likelihood of the result being obtained if the offender had not contributed to the mixed DNA profile. Nor did any of the experts feel able to give evidence using the sliding scale of expressions used in other areas of expert evidence. The CA held that the absence of reliable statistical evaluation did not mean that an expert could not give an evaluative opinion provided there was a sufficiently reliable scientific basis for the evidence to be admitted. The inability to use the hierarchy of evaluative opinions might indicate a lack of proper basis for expressing such an opinion but no more than that. Provided it is made clear to the jury the very limited basis upon which an evaluation can be made without a statistical database, a jury can be assisted in considering the evidence by an expression of an evaluative opinion by the experts.

Sentencing – manslaughter

Few offences can vary so greatly on their facts as manslaughter and given the seemingly inexorable rise in levels of sentencing pursuant to the hike in sentences for murder in the light of Schedule 21 of the Criminal Justice Act 2003, to which offences such as manslaughter are inevitably linked, the decision in ***R. v. Duckworth*** **[2013] 1 Cr.App.R. (S.) 454, C.A. [2012] EWCA Crim 1712**; (CLW 13/15/22) (12/07/2012) may be worth noting. It was dealt with as a true "one-punch" manslaughter case, as to which see *R. v. Furby* [2006] 2 Cr.App.R.(S.) 64, C.A., *Att.-Gen.'s Reference (No. 64 of 2008) (R. v. Wyatt)* [2009] 2 Cr.App.R.(S.) 424, C.A., and *Att.-Gen.'s Reference (No. 60 of 2009) (R. v. Appleby and others)* [2010] 2 Cr.App.R.(S.) 311(46), C.A. The offence was aggravated in that it involved gratuitous violence in the street against a wholly innocent victim as well as the previous convictions of the offender. This was therefore a particularly serious case of its kind, even though the court had to proceed on the basis that the consequences were unintended. Nonetheless the 13 year extended sentence (8yrs imprisonment plus 5 years extended licence) was too long and the custodial term would be reduced to 6 years.

Sentencing – manslaughter by reasons of loss of control

When sentencing for manslaughter by reason of loss of control under Coroners and Justice Act 2009, s.54 (Archbold, 2013, § 19-55)), the guideline of the Sentencing Guidelines Council on manslaughter by reason of provocation (see Archbold Appendix K-73) provides useful

assistance. However it is important to remember that the court must take account of (i) the existence of a higher and different threshold for loss of control manslaughter, resulting from the need for there to be a qualifying trigger, than that which existed at common law for manslaughter by reason of provocation, and (ii) the greater significance given to loss of life in manslaughter cases (since the enactment of the minimum term provisions for cases of murder in Schedule 21 to the Criminal Justice Act 2003; ***R. v. Wood (Arron)*** **[2013] Crim.L.R. 433, C.A. [2012] EWCA Crim 3139** (CLW13/15/23) (17/12/2012).

Mark George Q.C.
May 2013

Save UK Justice resources:

Links to briefing papers and consultation responses
Round-up of GCN action including published "Transforming Legal Aid" consultation responses from:
Mark George QC
Pete Weatherby QC
Andy Fitzpatrick
Nina Grahame
.

Informal Advice

If you are struggling with a problematic point of criminal law or procedure please bear in mind that barristers at GCN are always available to give informal advice on such matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale or Nicola Carroll) on 0161 236 1840.

Brigid Baillie
Mark Barlow
Sarah Daley
Jared Ficklin
Andy Fitzpatrick
Mark George QC
Nina Grahame
Ian Macdonald QC
Mary McKeone
Matthew Stanbury
Kate Stone
Pete Weatherby QC
Sara Woodhouse Davie

Mark George QC is also a regular contributor to **The Justice Gap** – click here to read some of his latest blogs