Criminal Law Update

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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.

Witness anonymity orders

R.v. Donovan and Kafunda [2012] EWCA Crim 2749 (CLW 13/06/02) (18/12/2012) judgment. D and K appealed against their convictions for robbery and violent disorder. Each was identified from CCTV footage by a single witness each of whom had known the appellants for a number of years but without their faces being recognised. The two witnesses were granted anonymity under ss. 88 and 89 of the *Coroners and Justice Act* 2009 on the basis of asserted fear for their safety. The appellants argued that their convictions were unsafe because the anonymity orders had caused them irredeemable prejudice. The CA considered that the identification evidence did not provide overwhelming or compelling evidence of recognition or identification. A witness anonymity order was a measure of last resort and would not be upheld if it resulted in an unfair trial. In considering an application for such an order a judge was obliged under s. 89 (2) (d) to consider whether the evidence of the witness could be properly tested if the identity of the witness was not disclosed. Further under s. 89 (2) (e) (ii) the judge had to consider whether the witness had a motive to be dishonest in relation to the defendant. Here the evidence suggested that the decision to grant anonymity to the two witnesses deprived the jury of the opportunity to hear admissible and substantive evidence which was relevant to the question whether either or both of them might have been lying or might have had a motive to lie. There was material available that undermined the prosecution case and the judge's decision to garn the order was flawed. As a result the trial was unfair. The convictions were quashed and a re-trial ordered.

Previous convictions

The abolition of the old "year and a day rule" has created serious problems for those defendants who plead guilty to causing GBH with intent only to discover that some time later the victim of the assault then dies. The admission of having the intent to cause GBH is sufficient mens rea to make them guilty of murder and is admissible as proof of that fact under S.74 (3) PACE 1984. The defendant may deny the matters previously admitted although that is somewhat unrealistic given his earlier plea and the burden shifts to him to prove any matter previously proved against him was incorrect. The discretion under s. 78 of PACE 1984 to exclude evidence if it would result in serious unfairness cannot be used to exclude evidence of a previous plea of guilty – see *R.v. Clift; R.v. Harrison* [2013] 1 Cr. App. R. 225, [2012] EWCA Crim 2750 (CLW 13/2/1) (18/12/12) judgment. In a similar case in 2011 I applied to be allowed to withdraw the plea of guilty to GBH with intent on the basis that otherwise there would be a reverse burden on the accused who then in effect had the burden of proving he did not have the requisite intent. The judge refused but said he would direct the jury that the evidence of the guilty plea was simply part of the evidence and that it remained the case that the prosecution would have to prove guilt on the usual terms. Either way a defendant in such a position may well regard that position as effectively hopeless!

Evidence - Identification

Where an initial identification is made through Facebook photographs, the prosecution should ensure that there is material before the jury to enable them to assess in detail the circumstances in which the identification occurred. In the present case, the failure of the police and the prosecution to obtain the Facebook internet pages from which the complainant made his initial identification of the defendants (subsequent identifications being made at video identification parades) put the defendants at a real disadvantage. However since there was no bad faith but merely incompetence on the part of the Crown Prosecution Service and police, it was possible for the jury (who had a detailed account of how the initial identification occurred and knew that there were photographs from Facebook that they did not have), properly directed, to take account of the considerable disadvantage at which the defendants had been put and carefully to consider the reliability of the identification in those circumstances: *R. v. Alexander and McGill*, [2012] EWCA Crim 2768, 177 J.P. 73, C.A. (01/11/2012) The CA added that if, in future, identifications occur through Facebook, the police and the prosecutor must take steps to obtain, in as much detail as possible, evidence relating to the initial identification, including the images that were looked at and a statement in relation to what happened).

Character Evidence

Problems often arise where a defendant is not of totally good character and the question is what can be said to the jury about it. In many cases the best policy will be

openness with the jury. If your client's convictions are of a different nature and perhaps some time ago it may well be best to pay them in so you can then make the comment to the jury that not only has your client been open but that in any event the previous matters don't take the case against him any further forward. In *R.v. G* [2012] EWCA Crim 2033, [2013] Crim.L.R. 152 (CLW 13/3/1) (05/10/2012) judgment D was charged with five counts of rape of a child under 13. He has a previous caution for assault on his wife which the Crown did not intend to rely on. For some reason the judge thought this did disentitled D to a good character direction. The CA held that whilst the caution did him no credit is was not relevant to any issue in the trial and he was entitled to be treated as a man of effect previous good character. Further, since the outcome of the trial had depended upon an evaluation of the evidence of the complainant and the defendant respectively, the failure to give a modified character direction undermined the safety of the convictions.

Sentence – Discretionary Life

Sentences of life imprisonment where this sentence is in the judge's discretion are rare nowadays. The Court of Appeal in R. v. Kehoe [2009] 1 Cr. App. R. (S.) 41 made it clear that such sentences are only appropriate where a number of criteria are fulfilled. These include when the dangerousness criteria are met, that a life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave. *R.v. D* [2012] EWCA Crim 2370, [2013] Crim. L.R.159 (CLW 13/3/4) (12/10/2012) is an example of a case that does fit the criteria. In 1982 D raped his grandmother but was acquitted. In 2002 he was arrested for the rape of his step-daughter, an offence to which he pleaded guilty and was sentenced to nine years imprisonment. A sample taken from him was matched to his grandmother who had subsequently died. In 2011 the CA quashed his acquittal and ordered a re-trial at which D pleaded guilty. He was sentenced to life with a minimum term of three and a half years. On appeal the CA held that the criteria laid down in R.v. Hodgson 52 Cr. App. R. 113, applicable to the 1982 offence namely (i.) that the offence was grave enough to require a very long sentence, (ii) that D was an unstable character likely to commit such offences in the future, (iii.) the offences he was likely to commit were likely to be especially injurious to others, were fulfilled. The aggravating features together with what the CA had said in Att.-Gen.'s References (Nos 73, 75 of 2010, and 03 of 2011) (R. v. Anigbugu and others) [2011] 2 Cr.App.R.(S.) 555(100), C.A. (CLW/11/13/6), all meant that it was impossible to argue that the case did not merit a sentence of life imprisonment and on the facts such a sentence was inevitable.

Sentence – Mandatory Life

If anyone doubted the staggering rise in the length of minimum terms since the 2003 CJA came into force the case of *R. v. Donnison* [2012] EWCA Crim 1241, [2013] 1 Cr.App.R.(S.) 216, C.A. (13/8/18) (22/05/2012) is a prime example. A mother killed two of her very young children by asphyxiation. She had lost another child to sudden infant death syndrome, suffered a miscarriage, been made redundant and split up with her husband the father of the children. The jury rejected her defence of diminished responsibility and she was convicted of murder. The minimum term was 32 years. As the editor of Criminal Law Week points out, prior to the 2003 Act it is unlikely the minimum term would have exceeded about 12 years.

Sentence – Life sentence and order under s.45A of the Mental Health Act 1983

The power under s. 45A of the MHA 1983 to order that a person sentenced to imprisonment should be removed to a hospital rather than a prison is not often used. The case of *R.v. Jenkin* [2012] EWCA Crim 2557, [2013] Crim.L.R. 246, C.A. (CLW 13/7/10) (06/11/2012) is therefore an interesting example of its use in practice. The power was inserted in the Act by the *Crime (Sentences) Act* 1997 and seems originally to have been intended for use in the case of those suffering from a personality disorder and therefore not usually suitable for detention in a hospital under ss.37 and 41 of the MHA as well as those persons who in the past had been treated as "technical lifers" as explained in *R.v. Beatty* [2006] EWCA Crim 2359, para. 23. In the present case D suffered from a delusional disorder which even if cured or significantly ameliorated would mean he remained a significant risk of serious risk of harm to the public. The judge imposed a life sentence after considering the criteria in the case of R.v. Kehoe (see above) together with the order under s.45A.

Sentence - Credit for guilty plea

In cases at the Crown Court, individual considerations aside, the first reasonable opportunity for the defendant to indicate (not necessarily enter) a plea of guilty is not the plea and case management hearing but either in the Magistrates' Court itself or in the Crown Court at the preliminary hearing or by way of a locally-approved scheme

for indicating plea through solicitors. Pleas at this stage will attract a reduction of one-third. Those made at PCMH are likely to attract a reduction of 25%. *R. v. Caley and others* [2012] EWCA Crim 2821; (CLW 13/4/2) (21/12/2012) judgment. What, if any, reduction for a guilty plea should survive an adverse *Newton* finding (R. v. Newton, 77 Cr.App.R. 13, C.A.) will depend on all the circumstances, including the extent of the issue determined, whether lay witnesses have to give evidence, and the extra public time and effort involved. Circumstances where a judge retains a degree of flexibility include (a) a case of murder where there is real necessity for advice on the availability of a defence, (b) where there has been poor legal advice, and (c) a case involving an exceptionally long and complex trial, where, unusually, some considerable benefits may ensue from a plea even at a late stage.

Indictments

The case of R *v Joseph Alexander Smith* [2013] EWCA Crim 11 (CLW13/11/4) (15/01/2013) should provide a salutary lesson to any advocate who has a disgruntled client: - make sure you don't get the same train home! The victim was a barrister who had represented Smith in proceedings in which he had lost the custody of his son. Her evidence was that Smith had threatened to kill her. The incident took place shortly after the case at a nearby train station. Smith admitted that he had been intimidating and aggressive towards his barrister but denied threatening her. He was charged with threatening to kill under the Offences against the Person Act 1861 s.16 (count 1). He was committed for trial at the Crown Court. Shortly before trial the prosecution amended the indictment by adding as an alternative to the s.16 count a count of affray contrary to s.3 (1) of the 1986 Act (count 2). The indictment was further amended to include a charge under s.4 (1) of the 1986 Act (count 3). Smith pleaded guilty to that count. The prosecution proceeded on count 1 only and nothing was said regarding count 2. Smith was found not guilty on count 1. Smith appealed against his conviction submitting that his conviction was unlawful as an offence under s.4 of the 1986 Act was a summary offence which could not be added to an indictment under the Criminal Justice Act 1988 s.40; therefore count 3 had been added to the indictment improperly and without jurisdiction. The CA held that there was no doubt that the s.4 offence was not properly added to the indictment. Section 40(3) of the 1988 Act listed the summary offences that could be added to an indictment in the Crown Court and s.4 of the 1986 Act was not included. Smith should not have been asked to give a plea in relation to count 3. He should have been asked to plead again in relation to count 2, at which point he could have pleaded not guilty to count 2 but guilty to count 3. The issue was whether the error was merely a procedural failure or was an excess of jurisdiction which rendered Smith's plea invalid and his sentence a nullity, The court had to proceed from the understanding that by s.7(3) of the 1986 Act Smith could plead guilty to the s.4 offence while pleading not guilty to affray in count 2. Smith gave his plea in answer to count 3, which was invalid, rather than in answer to count 2. However, no prejudice was suffered as he was pleading guilty to the lesser offence. The question was whether Parliament intended that the plea of guilty under the Criminal Law Act 1967 s.6(1) should be treated as a nullity merely because it was taken in answer to a question about count 3, which had been improperly added to the indictment, rather than about count 2, Parliament could not have so intended. Smith had wished to plead guilty, and thought he was pleading guilty, to the alternative count to affray. The overriding question was the fairness of proceedings; no unfair prejudice had arisen. There was no misunderstanding; any problem was as to form not substance. Count 3 was improperly added and Smith's plea should be treated as a plea in relation to count 2. The appeal was dismissed.

It was only a few years ago that the senior courts took a very different approach to the validity of indictments. In R.v. Clarke; R.v. McDaid [2008] 2 Cr. App. R. 18 the Supreme Court considered the quaint old theory that trial on indictment meant there had to be a valid indictment and an indictment was only valid when signed. To the criticism that this was being over-technical Lord Bingham said

> "it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place"

Such sentiments now seem very out of place in a world where judges are little more than trial managers anxious to ensure the trail proceeds speedily to a conviction and despite the proliferation of Criminal Procedure Rules the Court of Appeal remains very willing to ignore all formality in order to uphold a conviction. All the more curious when the CA could have exercised its power under s. 3A Criminal Appeal Act 1968 and achieved the same result on a principled basis.

Spent Convictions

A requirement to disclose *all* convictions and cautions to employers was unlawful and neither the provisions of Part V of the *Police Act* 1997 nor the provisions of the *Rehabilitation of Offenders Act 1974 (Exceptions) Order* 1975 (S.I. 1975 No. 1023) are compatible with Article 8 of the European Convention on Human Rights (right to respect for private and family life (*Archbold*, 2013, § 16-101)). The

CA so held in *R. (T.) v. Chief Constable of Greater Manchester and others*; *R. (J.B.) v. Secretary of State for the Home Department*; *R. (A.W.) v. Secretary of State for Justice*, (CLW13/05/07), (29/01/2013), C.A. (Civ. Div.) (reversing *R. (T.) v. Chief Constable of Greater Manchester Police, Secretary of State for the Home Department and Secretary of State for Justice (interested party)* [2012] 2 Cr.App.R. 16(3), Q.B. However a declaration of incompatibility in respect of the 1997 Act and a finding that the 1975 Order was ultra vires would be suspended pending an appeal to the Supreme Court.

Conditional Cautions

A new code is due to come into force on the day (anticipated to be April 8, 2013) after the *Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order* 2013 (not yet published) comes into force. Section 2 concerns decision making. It re-states the five legislative requirements that must be met before a conditional caution may be given, and the grounds for giving a conditional caution, the conditions that can be attached, the selection of conditions, time limits for completing conditions, conditions with a financial element, and the need to consider the views of others. It is worth pointing out that one of the five conditions is that there must be sufficient evidence to charge the offender with an offence. This should be obvious but there is at least anecdotal evidence that this seems regularly to be ignored by the police who see cautions as a way of clearing up offences when they don't actually have sufficient evidence to charge. The new code reflects amendments to Part 3 of the 2003 Act by the *Legal Aid, Sentencing and Punishment of Offenders Act* 2012. In particular, these (i) permit authorised persons (a constable, an investigating officer or a person authorised by a relevant prosecutor) to give a conditional caution to a person aged 18 or over and to set and vary conditions without reference to a relevant prosecutor. For the full text of the code, visit http://www.official-documents.gov.uk/document/other/9780108512162/9780108512162.pdf.

Mark George Q.C.
Andrew Fitzpatrick
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LASPO Resources

Click here for a link to our "Quick guide to LASPO 2012 Part 3 (Sentencing and Punishment of Offenders) document.

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.

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Andy Fitzpatrick
Mark George QC
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Ian Macdonald QC
Mary McKeone
Matthew Stanbury
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Mark George QC is also a regular contributor to **The Justice Gap** – click here to read some of his latest blogs