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.

Legal Aid, Sentencing and Punishment of Offenders Act 2012 – Is it in force?

This Act received the Royal Assent on 1st May 2012. GCN's Sara Woodhouse Davie has produced a useful summary of the Act. Since then the government has begun the usual and ridiculous process of commencing different parts and different sections at different times so that already after only 4 Commencement Orders (and the CJA 2003 is currently up to commencement order No 30!) many practitioners have been left puzzled as to what is in force and what has yet to be brought into force. So here is the answer.

- **The No. 1 Commencement Order (SI 2012 No 1956)** brought into force from 1st September 2012 s.144 the offence of squatting in a residential building.

- **The No. 2 Commencement Order (SI 2012 No. 2412)** brought into force from 1st October 2012 ss. 45 (1) and (8) damages based agreements, ss. 55, 61, 62 and Schedules 7 and 8 all relating to costs, s.140 (no rehabilitation for certain immigration or nationality purposes) and related transitory provisions in s. 141 (7) to (9) and (12).

- **The No. 3 Commencement Order (SI 2012 No 2770)** brought into effect from 3rd December 2012 sections 142 (offences of threatening with article with blade or point or offensive weapon in public or on school premises), 143 (offence of causing serious injury by dangerous driving), 145 (scrap metal dealing: increase in penalties), 146 (offence of buying scrap metal for cash, *etc*.), and 147 (review of offence under s.146), Schedule 26 (knives and offensive weapons: minor and consequential amendments), except paragraph 19, and Schedule 27 (causing serious injury by dangerous driving: minor and consequential amendments). The amendments made by section 145 do not apply in relation to any offence committed before their commencement (art. 3).

So far so good and s.142 apart, not a lot to get too excited about. The real fun begins with the **No. 4 Commencement Order (SI 2012 No 2906)** which brought into effect also from 3rd December 2012, in Part 3 (sentencing and punishment of offenders), Chapters 1 to 6 (ss.63-131 (sentencing, bail, remands of children otherwise than on bail, release on licence *etc*., dangerous offenders, and prisoners, *etc*.))(Except ss.67(2)(a) and (5)(a), 76, 77, 78(3) (so far as it relates to alcohol abstinence and monitoring requirements), 85 to 88, 119 and 129), and Schedules 9 to 22 (ss.77 and 119 came into force on Royal Assent).

In particular s. 68 amends s.189 of the CJA 2003 to allow the court to pass a suspended sentence of not more than two years. The maximum period of suspension remains two years. A suspended sentence does not now have to be combined with a supervision period. Section 91 amends the law on remanding children otherwise than on bail (see also Sch 12), s.108 abolishes s.240 of the CJA 2003 so that entitlement to credit for time spent on remand is no longer dependent on a court direction, subject to the new s. 240ZA; s.123 abolishes sentences of IPP and EPP. S.122 introduces the new two-strike life sentences which are actually going to be quite rare at least for some considerable period of time due to the restricted circumstances in which they can apply. The new s.224A inserted into the CJA 2003 only applies if (i) D is aged over 18 and is convicted of a Sch 15B offence (Sch 15A is deleted from 3.12.12), (ii) but for this section the court would have imposed a sentence of at least 10 years, (iii) D had been previously convicted of a Sch 15B offence, (iv) for that offence D had either served a life sentence or IPP with a min term of 5 years or an extended or determinate sentence of at least 10 years. In line with numerous CA authorities to the effect that life imprisonment sentences are to be reserved for the very worst cases (see in particular R.v. Kehoe [2009] 1 Cr. App. R. (S.) 41) it is the clear intention of Parliament that in future the principle currency of sentences of imprisonment will be determinate sentences.
S.124 introduces the new extended sentences via a new s. 226A in the CJA 2003. The key change is that no extended sentence prisoners will be released before they have served at least two-thirds of their custodial term and some will not be entitled to release until they have served the full term of the custodial part unless released earlier by order of the Parole Board.

So that's what is in force but as always there are transitional provisions to bear in mind as well. The coming into force of sections 65, 71, 72 and 81 is of no effect in relation to an

offence committed before December 3, 2012: art. 3(1). 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, the offence is to be treated as having been committed on the last of those days: art. 3(2). The coming into force of sections 67(1) to (6), 69(1) and (2), and 84(1) to (3) is of no effect in relation to a failure to comply with a requirement of a relevant order (*i.e.* a community order, a suspended sentence order, a youth rehabilitation order, a service community order, or an overseas community order) where the failure took place before that date: art. 4(1) and (3). Where a failure to comply is found to have taken place over a period of two or more days, or at some time during a period of two or more days, the failure is to be treated as having taken place on the last of those days: art. 4(2). The coming into force of section 66(5) and 83(5) is of no effect in relation to a community order or a youth rehabilitation order respectively that was made before that date: art. 5.

The coming into force of section 123 and Schedule 22, paras 3, 4, 6 to 8 and 10, is of no effect in relation to a person convicted before that date: art. 6. This means that IPP remains available for anyone convicted before 3rd December 2012 whereas the new two-strike sentences are only available where the offence is committed after that date. Chapter 3 of Part 3 (ss.91-107) (other than Sched. 12, paras 1-5, 9, 13-16, 18, 19, 22, 26, 27, 30 and 32, and s.105 to the extent that it relates to those paras) is of no effect in relation to proceedings in which a child is subject to a remand that commenced before that date, and that is a remand to prison by virtue of the *Criminal Justice Act* 1948, s.27(1), to local authority accommodation by virtue of the *Children and Young Persons Act* 1969, s.23(1) or (1A), or to prison by virtue of the 1969 Act, s.23(1), as modified by the *Crime and Disorder Act* 1998, s.98: art. 7.

Garden Court North Chambers is running a seminar on LASPO 2012 in Sheffield on 10th January 2013 and also other dates / locations through early 2013. More details at the end of this update.

Sentence - Whole Life tariffs

Readers will be interested to note that the challenge to the lawfulness of whole life tariffs in *R.v. Oakes; R.v. Restive; R.v. Roberts; R.v. Simmons; R.v. Stapleton* [2012] EWCA Crim 2435 (CLW 12/43/6) (21/11/2012) judgment was heard before a five judge Court of Appeal chock full of criminal experience just a week ahead of the Grand Chamber hearing in Vinter v. UK on 28th November where the same issue is before the European Court. As happened in R.v. Horncastle over the issue of hearsay evidence this was as clear a signal as one could wish for that the UK courts are telling the European Court it had better back off and leave the UK to make its own sentencing rules.

The CA noted from its analysis of various Strasbourg authorities that a whole life order was not considered a breach of the Article 3 prohibition on "inhuman or degrading treatment or punishment" (although in the Vinter case itself the Chamber decision was only 4-3 to uphold whole life sentences). The CA also observed that whole life sentences were to be reserved for the few exceptionally serious cases where just punishment and retribution requires such an order. Noting that such orders would be very rare the CA upheld only one of the four whole life orders (offence of murder) and substituted minimum terms in three cases (one murder and two of rape).

GCN's Pete Weatherby QC appeared for Mr Vinter before the Grand Chamber. Judgment is currently awaited.

Sentence – Confiscation Orders

The much anticipated decision in *R.v. Waya* [2012] UKSC 51; (CLW12/42/5) (14/11/2012) judgment seems finally to herald the possibility of confiscation orders that are proportionate and which more accurately reflect the illicit gains made by an offender as opposed to the previous Alice in Wonderland approach where the last thing that seemed important to the courts was any sense of reality.

D had obtained a 60% mortgage of £465,000 by making false statements about his assets. He later remortgaged the property and redeemed the first mortgage. Following his conviction for obtaining money transfers by deception the judge made a confiscation order in the sum of £1.54 million. On appeal to the CA this was reduced to £1.11m, calculated as 60% of the market value of the flat.

In the Supreme Court Lord Phillips acknowledged that Article 1 of the First Protocol to the ECHR required that the deprivation of property as a penalty had to be proportionate to the legitimate aim, namely to deprive criminals of the pecuniary proceeds of their crimes. A judge could not make an order he believed to be disproportionate. There was a significant difference between lifestyle cases and those that were not. In a lifestyle case an order for more than the net proceeds of crime was unlikely to be disproportionate. In a non-lifestyle case where the offender had restored the proceeds of crime, it would be disproportionate to make a confiscation order since that would not satisfy the statutory purpose and would amount to an additional financial penalty. R v Rose [2008] EWCA Crim 239 disapproved.

In the present case the money that had been leant because of the fraud had been fully repaid. W had benefitted from the increase in the property's value and a proportionate confiscation order would reflect the benefit he had gained by the increase in value attributable to the loan. However the original mortgage advance of £465,000 remained in the beneficial ownership of the lender until completion when it passed directly to the vendor; it never passed into W's possession. Accordingly, W had only acquired an equity of redemption corresponding in value to his untainted down-payment of £310,000. The effect of section 84 (2) (a) and (b) of POCA 2002 was that a limited interest in an item of property was itself property which counted as benefit for the purposes of POCA. W held a limited interest in the flat. The value of this chose in action was 60% of the open market value of the property from time to time less the whole of the mortgage liability which was assessed in this case as £392,400.

Juries

Juries have received a fair bit of attention recently. In *R.v. F* [2012] EWCA Crim 1864 (20/07/2012) the jury sent the judge a note which indicated that they were split as to their verdicts. The judge proceeded to give lengthy directions including a further review of substantial parts of the evidence. The CA noted that the jury hadn't asked for a review of the evidence; their note was really asking the judge what they should do given the fact that they were split. The CA said that the judge should simply have asked the jury to continue to try to reach unanimous verdicts. He could then have enquired whether he could assist regarding the law or the evidence and could have directed them as to majority verdicts. The result of what he did however was to deliver a second summing-up that was unbalanced in favour of the prosecution rendering the guilty verdicts unsafe.

A protocol has been issued by the President of the QBD, Sir John Thomas dealing with jury irregularities – see CLW 12/43/23. As the editor of Criminal Law Week (also ed of Archbold) points out however there is no authority for a judge to issue such a protocol which raises an issue as to validity of the document. As he points out the fact that most of what the protocol contains is not contentious is not the point. He also points out that in some parts the protocol is misleading (if the judge is satisfied that jury tampering has occurred the alternatives are not limited to either continuing without a jury or ordering a re-trail without a jury; the judge can simply order a re-trial with a new jury in the ordinary way) if not simply wrong (the suggestion as to the role of the CA in deciding whether information relating to a possible offence should be disclosed to the police with a view to its investigation).

The full text can be found at :
http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/jury_irregularities_ptotocol.pdf

The Attorney-General has issued updated guidelines on jury checks, with effect from 27th November 2012. See CLW 12/44/13. The current version can be found in Archbold 2013, Appendix A-283. The full text can be found at : http://www.attorneygeneral.gov.uk/Publications/Documents/Jury%20Vetting%20Guidelines%20-%20Final.pdf

The decision in *R.v. M (A.)* [2012] 1 Cr. App. R. 55 (CA); [2012] EWCA Crim 2056 (CLW 12/45/2) (24/07/2012) judgment is a useful reminder of the correct procedure to be followed when discharging a jury near the start of a trial and swearing a new one. In this case when it became apparent that one juror needed to be discharged the judge discharged the whole jury but then included the remaining 11 jurors in the new jury without them being subject to a new ballot and added one further juror. The CA pointed out that this amounted to pre-selection of the jury in contravention of s.11 of the Juries Act 1974 (Archbold 2012, para 4-292) although because defence counsel had not objected at the time or shortly thereafter, s.18 of the Act precluded the irregularity from being raised on appeal. The CA did express the view that it is unsatisfactory to continue a trial with only eleven jurors when such a problem arises near the start of the trial and that a new jury of twelve should be selected. The Court does then go on to suggest that since the first eleven jurors were selected in a ballot, albeit in the first trial that this is really little more than a technicality. Such an attitude is all too common in the CA these days and seems to run entirely counter to the demand that criminal advocates are supposed to take full notice of the extensive Criminal Procedure Rules that now apply in criminal trails – either procedure does matter or it doesn't and you can't jury pick and choose which bits to follow and which to ignore. The correct answer to the particular problem encountered in this case which is not at all uncommon, and which happens to accord with s.11, is very simple. The judge should discharge the whole jury but then add the remaining jurors to the new panel from whom the new jury should be selected in the usual way. Inevitably although one or two of the original jury may not be selected second time round the vast majority will and they will then all have been selected as s.11 requires by ballot.

Risk of Sexual Harm Order

The High Court has confirmed, after reviewing a large number of authorities that although proceedings for a SHO under s.123 (4) (a) of the *Sexual Offences Act* 2003 are civil, the standard of proof required is the criminal standard

– see *Commissioner of Police of the Metropolis v. Ebanks* [2012] EWHC 2368 (Admin) (CLW 12/43/9) (04/07/2012).

Committal for Sentence

The case of *R.v. Bateman; R.v. Doyle* [2012] EWCA Crim 2158 (27/11/2012) judgment is a useful reminder of the duty on advocates in the Crown Court to make sure that they know under what provision a case has been committed for sentence and the importance of ensuring any penalty subsequently imposed in the CC is lawful. The two cases involved the same point. In both D had been committed to the CC for sentence following further offences committed in breach of a CC suspended sentence. The breaches were committed to the CC under para. 11(2) of Sch 12 of the CJA 2003 (Archbold 2013 para. 5-573). The new offences were committed under s. 6 (2) of PCCA 2000 (Archbold para. 5-33). In both cases the CC then imposed sentences far in excess of that permitted by s.6 (by 20 months in B's case and by 12 months in D's case). The CA pointed out that, in contrast to committals under s.3, if a case is committed under s.6 the powers of the CC on sentence are restricted by s.7 to the powers of the Magistrates' Court. The CA held that the reference in s.7 (2) to a suspended sentence must be to one imposed in the Magistrates' Court rather than a CC one since those should be committed under para. 11 (2) of Sch 12 of the CJA 2003. The case of *R.v. Morgan* [2012] EWCA Crim 1939 (CLW 12/41/7) (24/08/2012) which came to the contrary conclusion was held to be wrong on this point and that case, in which the CA got itself into an unholy mess, is best ignored. In D's case, if his further offence (cannabis production) had been committed under s. 3 rather than s.6 sentencing in the CC would have been at large but because the committal had been under s.6 the CC's sentencing powers were restricted to those available in the Magistrates' Court.

As this is the last issue of the Criminal Law Update for this year we wish all our readers a very happy Christmas and New Year.

Mark George Q.C.
18th December 2012

GCN Criminal Law Seminar

LASPO Update

A comprehensive update on all the changes now in force under LASPO 2012 Part 3 (Sentencing and the punishment of offenders)

10th January 2013
4.30pm – 7.15pm
2.5 CPD (SRA)
Quaker Meeting House, Sheffield

Presented by: Mark George QC, Andy Fitzpatrick and Matthew Stanbury

£25.00 + VAT (group discounts available)

For more details and a booking form please contact hray@gcnchambers.co.uk

To register your contact details to receive details of other January and February 2013 dates and locations for the LASPO Update seminar, please click HERE

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