



ICLR

# THE CRIMINAL LAW UPDATE

AUTUMN 2016

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# **THE CRIMINAL LAW UPDATE**

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# INTRODUCTION

The very fact that criminal cases account for around a quarter of ICLR's annual coverage is testament to the fact that English criminal law is in a continual state of development and adjustment in the courts. For criminal practitioners, this means continual effort must be applied to keeping track of the ever-changing rules and points of procedure that crop up in practice.

The sheer volume of material that is of potential relevance keeps on growing and the challenge is to find a way of sorting the relevant from the ephemeral. With that in mind, the purpose of this humble volume is to collect together the most significant criminal cases decided from 1 January to 31 July 2016 in one place and to draw out their essential facts and decisions on the law.

This volume has been compiled by repurposing the WLR Daily Case Summaries of law-changing cases published by ICLR free of charge over the first half of the year. Each of the 54 case summaries in this volume act as a sort of "first draft" law report headnote, setting out the core facts and holdings on the law in each case. Where necessary, the summaries alert the reader to instances in which earlier authority and legislation have played a material role in the decision of the court.

The ICLR Criminal Update came into being at the beginning of 2016 as a modest attempt to make a free to access digest of important cases available to criminal practitioners who have spent far too long battling through successive assaults on legal aid. This edition of the update builds on that earlier effort by providing far richer analysis of the selected cases and more references to the underlying transcripts and law reports.

A wide range of criminal subject matter is covered in this update. As one might expect, adjectival updates outnumber their substantive counterparts. Over the past year, ICLR has pursued an initiative to expand its coverage of criminal cases by giving more airtime to cases that traditionally would have fell below the strict threshold of reportability. As a consequence of that initiative, cases dealing with issues of sentencing and points of practice now play a greater role in ICLR's repertoire.

The decision in early 2016 to expand The Weekly Law Reports by creating a fourth, virtual volume has been instrumental to ICLR's increase in criminal coverage. Signified by the citation [2016] 4 WLR, the new virtual volume has enabled us to provide deeper and wider coverage cases of interest to criminal practitioners. Cases reported in the new volume are available via WestlawUK, LexisLibrary and ICLR Online along with The Law Reports and volumes 1 to 3 of The Weekly Law Reports.

A further update to this volume will be published at the beginning of 2017. In the meantime, I hope you find this update of use in practice or in study.

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14 September 2016

# CHILDREN/OFFENCES BY

R v M (D)  
[2016] WLR (D) 392, CA

20 Jul 2016

*Crime — Children, offences by — Children between ages of 10 and 14 — Defendant charged with offences of indecent assault against half-sister — Crown applying to adduce evidence of defendant's sexual behaviour towards complainant occurring when defendant aged under 14 — Whether presumption of doli incapax applying to issue of admissibility — Criminal Justice Act 2003 (c 44), s 101(1)*

The defendant was charged with three offences of indecent assault, allegedly committed against his younger half-sister, J, when he was aged between 14 and 16 and J was aged between 10 and 12 years old. In addition to the evidence of J the prosecution relied on bad character evidence of two unindicted incidents of sexual misconduct by the defendant when he was under 14 years old. The first incident was said to have occurred when J was about seven and the second when she was nine. In his ruling allowing the evidence to be admitted on the basis that the nature of the acts towards the same complainant was capable of establishing a propensity to commit offences of the type with which he was charged, the recorder observed that the charges had been specifically framed to take into account the defendant's fourteenth birthday, that being the first date of the indictment; the reason for that was that the presumption of doli incapax would have been available to him prior to that date. The recorder concluded that he did not have to consider doli incapax as a defence but could have regard to it when considering whether the admission of the bad character evidence would have such an adverse effect on the fairness of proceedings that it ought not to be admitted. He concluded that the evidence would not have such an effect. In relation to count 1 J gave evidence that she was not sure whether the defendant might have been under 14 at the time of the offence. The recorder therefore directed the jury in relation to that count that if they were sure that the incident happened but that it might have occurred before the defendant was 14 they had to be satisfied that he knew his actions were not merely naughty or mischievous but that they were seriously wrong. The defendant was convicted of all three counts. He appealed against conviction on the grounds that the evidence of the two unindicted incidents should not have been admitted and that the judge had misdirected the jury on count 1.

*Held*, appeal allowed on count 1 but dismissed in relation to counts 2 and 3. (1) Although not every judge would have admitted the bad character evidence, the recorder could not properly be criticised for the approach he adopted. But for the age of the defendant at the time, there could be little serious argument that evidence of the two incidents was potentially admissible. The defendant's age at the time did not call for a different approach based on the doli incapax presumption which had no direct application where the defendant was not facing a criminal charge in relation to those two incidents (paras 19, 21).

*R v H* [2010] EWCA Crim 312, CA applied.

(2) The recorder's direction to the jury in relation to count 1 was deficient in one material respect. The presumption of incapacity to commit a crime could only be rebutted by the prosecution by clear positive evidence, not consisting merely of the evidence of the commission of the acts amounting to the offence itself but that the defendant knew that his acts were seriously wrong as distinct from mere naughtiness or childish mischief. The recorder gave the first part of the required direction but not the second part—a direction that the evidence to prove the defendant's guilty knowledge had to extend beyond the evidence of the act or acts amounting to the offence itself. Accordingly, the conviction on count 1 would be quashed (paras 27, 31, 32).

*C (A Minor) v Director of Public Prosecutions* [1996] AC 1, HL(E) applied.

# CONSPIRACY/COMPANY

R v A Ltd

[2016] WLR (D) 459, CA

29 Jul 2016

*Crime — Conspiracy — Company — Company charged with conspiracy to corrupt — Prosecution seeking to rely on director's diary entries as probative of company's guilt — Director out of jurisdiction and not charged — Whether evidence admissible — Whether to be excluded on ground of unfairness when director not also charged*

The defendants, A Ltd, a United Kingdom company, X, who was chairman and chief executive of the company, and Y, who managed an Indian subsidiary, were charged with conspiracy to corrupt. BK was also a director but he was not a defendant because he was a Swiss national currently in Switzerland and, as was his right under Swiss law, he had refused extradition and had declined to assist not only the prosecution but also the defence. The prosecution case was that the company, via its directing minds X and BK, had paid bribes, disguised as legitimate payments to “consultants”, in order to secure transport contracts and that Y had been involved in arranging some of the “consultancy agreements”. At the start of the trial the company objected to the admission in evidence of BK’s diary entries. The judge ruled that the diary entries were not business records and their only relevance could be in relation to BK’s state of mind at a particular time; that an entry in a document that merely went to the state of mind of an absent co-conspirator was inadmissible; and that, since the diary entries were not acts or declarations in furtherance of the conspiracy, they were not admissible against the company to prove the company’s guilt. The Crown applied under section 58 of the Criminal Justice Act 2003 for leave to appeal that ruling. On the appeal the company contended that, in any event, it was unfair for the company to have to address allegations of its criminality when its controlling mind, whose behaviour was relied upon as proving its guilt, was not also charged with crime and had been unwilling to assist in the preparation of its defence and that, therefore, evidence relating to BK should be ruled inadmissible pursuant to section 78 of the Police and Criminal Evidence Act 1984.

*Held*, appeal allowed. Although the judge was right in holding that a director and a corporation comprised separate legal personalities and if only one mind was involved they could not conspire together, there was no question in the instant situation of only one human mind being implicated and, as against the company, the evidence of the directing minds was admissible as direct evidence against the company. It was clear that the judge had confused or elided two quite separate concepts, namely (a) the “identification principle” whereby a corporate body was deemed to act and acquire knowledge through those individuals who could be identified as its directing mind and will, and (b) the “three pronged test”, whereby acts and declarations made by one co-conspirator in the absence of another were admissible if (i) they were made by a conspirator, (ii) they were reasonably open to the interpretation that they were made in furtherance of the alleged agreement, and (iii) there was some further evidence beyond the document or utterance itself to prove that the other person was a party to the agreement. The only relevant principle or test to be applied as between BK and the company was the identification principle. Thus, in so far as the diary entries of BK were probative of his guilty state of mind at the relevant time, they were relevant and admissible also to prove the guilt of the company, since BK was a directing mind and will of the company. The three pronged test had no application in relation to the direct evidence against the company; it was only relevant as between the co-conspirators. Further, since a corporation could only operate through its directing mind or minds and their knowledge was, and had to remain, the knowledge of the corporation, the presence or otherwise of BK at the trial was irrelevant. Accordingly, the judge’s ruling in relation to the diary entries was wrong.

# CONSPIRACY/COMPANY

## R v Bala

[2016] EWCA Crim 560; [2016] WLR (D) 253, CA

10 May 2016

*Crime — Conspiracy — Spouse — Two defendants charged with conspiring together to facilitate breach of immigration law — Defendants in polygamous marriage contracted in Nigeria — Marriage valid in Nigeria but void in England and Wales if either party domiciled here at time of marriage — Whether defendants “spouses” — Matrimonial Causes Act 1973 (c 18), s 11(d) — Criminal Law Act 1977 (c 45), ss 1(1), 2(2) (as amended by Civil Partnership Act 2004 (c 33), s 261(1), Sch 27, para 56)*

The two defendants and two co-accuseds were charged with, among other things, conspiring together and with others to facilitate the breach of immigration law, contrary to section 1(1) of the Criminal Law Act 1977. At the close of the prosecution case the judge found that there was no case to answer as far as the two co-accuseds were concerned and that no one else, apart from the two defendants, could have been involved in the alleged conspiracy. The defendants contended that, by virtue of section 2(2)(a) of the 1977, Act they could not be guilty of conspiring with each other since they were spouses for the purposes of that provision. They had contracted a polygamous marriage in Nigeria which, although valid under the laws of that country, would be void in England and Wales pursuant to section 11(d) of the Matrimonial Causes Act 1973 if either party was at the time of the marriage domiciled in England and Wales. The judge held that the marriage was void under English law, finding that there was evidence that the first defendant had been domiciled in England and Wales at the relevant time, and that therefore the defendants could not avail themselves of section 2(2)(a). The defendants were convicted.

On the defendants’ appeals against conviction—

*Held*, appeals dismissed. The reference to “spouse” in section 2(2)(a) of the Criminal Law Act 1977 was to be taken as a reference to a husband or wife under a marriage recognised under English law. The statutory language permitted no deviation from its provisions to extend to those who were not at the relevant time in the legal relationship of husband and wife. Accordingly, if the defendants’ marriage was void under English law they could not rely on section 2(2)(a). In the particular circumstances of the case and of the trial as it unfolded the judge had been entitled not to leave the issue of the first defendant’s domicile to the jury. There was ample evidence that the first defendant had, by the relevant time, become domiciled in the United Kingdom (paras 51–55, 57–62).

*R v Khan (Junaid)* (1987) 84 Cr App R 44, CA, *R v Pearce* [2002] 1 WLR 1553, CA and *R v Suski* [2016] 4 WLR 48, CA considered.

*Per curiam*. “Spouse” in section 2(2)(a) of the 1977 Act includes a spouse under a polygamous marriage which is valid under the law of the place of its celebration and which is not regarded as void under English law under section 11(d) of the Matrimonial Causes Act 1973 (paras 76, 78).



# CONSPIRACY/HANDLING STOLEN PROPERTY

R v Suski

[2016] EWCA Crim 24; [2016] 4 WLR 48; [2016] 2 Cr App R 3; [2016] WLR (D) 43, CA

22 Jan 2016

*Crime — Conspiracy — Conspiracy to handle stolen goods — Other conspirator woman with whom defendant lived in a relationship akin to marriage — Whether such relationship entitling defendant to benefit of exception applying to spouses — Criminal Law Act 1977s 2(2) (as amended by Civil Partnership Act 2004, s 261(1) and Sch 27, para 56)*

In April 2013 police searched the home of the defendant and JL, a woman with whom he lived, where they found a large number of stolen goods in the form of cosmetic products of a well known manufacture, worth about £430,000, which they had been trading in for commercial gain. The defendant was convicted of conspiracy to handle stolen goods and conspiracy to transfer and convert criminal property. On an application for leave to appeal against conviction, the defendant argued that, although he and JL were not married, they had lived together in a relationship akin to marriage, so that he should have been acquitted of those offences by virtue of being in effect a “spouse” entitled to the benefit of section 2(2) of the Criminal Law Act 1977, because if the defendant and JL had either been married or civil partners, neither could have been guilty of conspiring with the other. And, if the defendant was not entitled to rely upon the section as a defence to the charges of conspiracy levelled against him and his partner, he would suffer an impermissible infringement of his rights to respect for his private and family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Further, there would be an infringement of the defendant’s rights under article 14 when read together in the context of article 8 which was said to arise because spouses and civil partners had the benefit of the defence, but, as partners of the opposite sex, the defendant and his co-accused were not entitled to enter into such a partnership.

On the defendant’s application for leave to appeal against conviction—

*Held*, refusing the application, that it was clear that the defendant was not entitled to the benefit of section 2(2) of the 1977 Act as presently drawn simply because of its express terms; it employed ordinary English words and referred to “spouse” or “civil partner”. Those were well understood words, referring to persons who were either married or had entered into a formal civil partnership. Parliament had extended the benefit of section 2 beyond spouses to civil partners and, insofar as the right to respect to private life was engaged in this context in the present case, the boundary drawn here would satisfy the requirements of article 8(2) of the Convention in an area where principles of human rights law would afford to the state a significant margin of appreciation. It was recognised that the criminal law had to be objective and certain and that bright line rules were sometimes required for that purpose, whereas that might not be the case in some of the other areas in which relationships between men and women and between same sex partners have had to be considered. The arguments as to justification of an interference with Article 8 rights in the Rent Act cases were significantly different from those arising in the context of the criminal law. It was for Parliament to decide what was a crime and what was not. Parliament reviewed the position in 2004 and removed the potential inequality by extending the same protection to civil partners and married couples. In doing so it decided against any further extension to informal partnerships of any duration, whatever the gender of the partners. There was no reason to extend any further than statute required a rule of the common law which had come to be regarded as anomalous today. There were very good grounds why a court trying a charge of conspiracy should not have to inquire closely into the nature of personal relationships of alleged conspirators, infinitely variable as they were likely to be from case to case. The criminal law should not turn upon such vagaries.

*R v Pearce* [2001] EWCA Crim 2834; [2002] 1 WLR 1553, CA applied

*Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113, HL(E) distinguished.

# CORRUPTION/AGENT

## R v AIL

[2016] QB 763; [2016] 2 WLR 1287; [2016] 1 Cr App R 21; [2016] WLR (D) 8, CA

15 Jan 2016

*Crime — Corruption — Agent — Alleged corrupt payments to agents abroad — Whether offence committed where bribes targeted the agent of a foreign principal — Prevention of Corruption Act 1906, s 1*

The first defendant, AIL, was a company incorporated in England and Wales which was part of a multinational conglomerate (“the Group”) operating in the power generation and transport sectors. In November 2000 GH, the second defendant, was appointed chairman and chief executive of AIL; RH, the third defendant, was managing director of an Indian subsidiary. The Serious Fraud Office (“SFO”) alleged that, between June 2000 and November 2006, AIL paid bribes to secure various transport contracts for companies within the Group; GH was involved in the corrupt payments in India and Poland and RH was involved in negotiating and arranging two false “consultancy agreements” in India. The bribes were all paid from an English bank account to officials or other agents of three foreign organisations in India, Poland and Tunisia. The defendants were charged with offences contrary to section 1 of the Prevention of Corruption Act 1906 and with conspiracies. At a preparatory hearing, under section 7 of the Criminal Justice Act 1987, the defendants submitted that, prior to the coming into force of the Anti-Terrorism, Crime and Security Act 2001 on 14 February 2002, no offence could be committed under the 1906 Act in circumstances where the bribes targeted the agent of a foreign principal, even if all the relevant parties were present in England and all the conduct took place in the jurisdiction. They argued that that conclusion followed from the true construction of the legislation. The significance of that proposition (if accurate) was that much of the alleged conduct pre-dated 14 February 2002, when the 2001 Act came into force. The judge held that, prior to the coming into force of the 2001 Act, it was not an offence under the 1906 Act to corrupt an agent of a foreign principal or foreign public body, even in a case where the actus reus of the alleged offence took place within the territorial jurisdiction of England and Wales.

On appeal by the Crown under section 9(11) of the Criminal Justice Act 1987

*Held*, allowing the appeal, that the 1906 Act created an entirely new statutory offence of corruption; the offence was framed in terms of “principal” and “agent”. The key element of the 1906 Act offence was corrupt conduct of an “agent” in connection with the affairs of his “principal”. The meaning of those words was clear: absent other indications, the words included both foreign and domestic persons or organisations; the words were neutral in terms of nationality, location or territory. Unlike the Public Bodies Corrupt Practices Act 1889, which expressly limited the meaning of “public body” to UK public bodies, the 1906 Act contained no similar wording which limited the meaning of “agent” or “principal” to UK persons. If Parliament had intended to exclude foreign principals from the scope of the 1906 Act, it would have done so. Prior to the coming into force of the 2001 Act, it was an offence under section 1 of the Prevention of Corruption Act 1906 to corrupt an agent of a foreign principal or a foreign body. Accordingly, the judge’s ruling should be reversed.

# EVIDENCE/CHARACTER

## R v Awoyemi

[2016] EWCA Crim 668; [2016] 4 WLR 114; [2016] WLR (D) 327, CA

08 Jun 2016

*Crime — Evidence — Character — Defendant's bad character — Conditions for admissibility in evidence of gang affiliation — Whether evidence properly admitted — Whether adequate directions given to jury — Criminal Justice Act 2003 (c 44), s 101(1)*

The defendants faced charges which included attempted murder and possessing a firearm with intent to endanger life following an incident in which the complainant was shot and wounded. The first and third defendants also faced charges, including possession of a firearm with intent to endanger life, arising out of an incident which occurred two weeks later. The prosecution case was that the defendants were members of a gang and their intended target was a member of a rival gang. Included in the defence were denials that the defendants were members of the named gang and denials that that gang had had any dispute with the other gang to which the prosecution referred. The prosecution applied, in reliance on section 101(1) of the Criminal Justice Act 2003, for the admission into evidence of various matters said to support the assertion of gang affiliation. The evidence came principally from a police officer who was described as an expert on gang affiliation. The trial judge ruled in favour of the application. All three defendants were convicted of possession of a firearm with intent to endanger life and the second and third defendants were found guilty of attempted murder. The defendants appealed on the grounds that (i) the bad character evidence should have been excluded and (ii) the trial judge had not given adequate directions to the jury about it.

On the appeals—

*Held*, appeals dismissed. (1) The evidence of gang affiliation was relevant and admissible on the facts of the case. The incidents bore all the hallmarks of gang related violence. The evidence indicated the extent to which the individuals had signed up to gang and gun culture. Reliance had been placed on Court of Appeal authority in which the court had set out four questions to be considered when analysing the issue of gang evidence in such a case as that before it. The third question read: “Does the evidence, if accepted, go to show that the defendant was a member of or associated with a gang or gangs which exhibited violence or hostility to the police or links with firearms?” The court had not intended to lay down questions which had to be asked in every case but had merely applied the statutory principles to the facts of the case which had been before it. In any event the evidence was admissible in the present case to establish a link with firearms (paras 35–37).

*R v Lewis* [2014] EWCA Crim 48, CA considered.

(2) The trial judge's directions to the jury were not inadequate: they accorded with the principles laid down by the Court of Appeal. The judge had made abundantly clear the basis upon which the evidence was admitted, he had directed the jury on how to use the evidence and he had repeatedly warned the jury that, even if they found the individuals were members of the gang, they should not assume they were guilty of an offence. It was not necessary to identify each and every item of bad character evidence admitted and give specific directions in relation to each (paras 39, 41, 42).

*R v Campbell (Kenneth)* [2007] 1 WLR 2798, CA applied.

*R v Lowe* [2007] EWCA Crim 3047, CA not applied.

# EVIDENCE/CHARACTER

## R v Mittal

[2016] EWCA Crim 451; [2016] 4 WLR 91; [2016] 2 Cr App R 8; [2016] WLR (D) 213, CA

26 Apr 2016

*Crime — Evidence — Character — Defendant doctor charged with theft — Crown wishing to adduce evidence of warning previously issued to defendant by Scottish Procurator Fiscal in respect of shoplifting incident — Crown agreeing not to seek to adduce evidence of warning unless defendant seeking to establish good character — Whether correct approach to defendant's good character*

The defendant was charged with the theft of £130 in cash from a medical centre where she was employed as a doctor. Shortly before the trial, it came to light that, a few years earlier, the defendant had been charged in Scotland with an offence of shoplifting but that, having accepted a warning from the Procurator Fiscal, the charge had not been proceeded with. The Crown gave notice of an application to have evidence of the warning admitted as bad character evidence of propensity to commit such an offence, pursuant to the Criminal Justice Act 2003. However, following discussion between counsel and the trial judge, the judge proposed, and counsel agreed, that the Crown would not seek to adduce evidence of the warning and the underlying events unless the defendant sought to establish her good character beyond the mere fact of her status as a practising doctor of medicine, in which case the good character direction would have to be balanced by disclosure of the warning. No evidence was placed before the jury as to the defendant's character and nothing was said about the defendant's character in the summing up. The defendant was convicted. She appealed on the ground that the defendant had been denied a good character direction as a result of judge and counsel's failure to understand the status of the Procurator Fiscal's warning, which, as a matter of Scottish law, did not constitute a conviction and did not entail an admission of guilt.

On the defendant's appeal—

*Held*, appeal dismissed. It was unfortunate that the precise status of the warning by the Procurator Fiscal had not been ascertained at an earlier stage and that the position had not been clearly understood by the parties and the court at the outset of the trial. In future, when such warnings had to be considered, the Crown should supply full information on the subject to the court in the pre-trial processes. What occurred in this case did not render the defendant's conviction unsafe. Whether the giving of the warning entailed an admission of guilt by the defendant or not, any attempt on the defendant's behalf to make out a case of positive good character would have risked a successful application by the Crown to cross-examine the defendant on admitted background facts of the incident in Scotland, as they were recited in the warning letter sent to her by the Procurator Fiscal. Counsel for the defendant at trial decided not to run that risk, since the jury knew the defendant was a practising medical practitioner and were likely to assume she was of good standing. The judge had not regarded that fact as putting her character in. The position was that there was no evidence before the jury as to the defendant's character. It was impossible to contend that a good character direction should be given. The judge would have been fully entitled to decline to give such a direction as a matter of his discretion, given that both sides had sought to exclude the question of character as a whole from the jury's consideration. The judge had not erred in proceeding as he did. The conviction was safe (paras 18, 19, 20).

*R v Hamer* [2011] 1 WLR 528, CA considered.

# EVIDENCE/CHARACTER

R v A

[2016] WLR (D) 433, CA

28 Jul 2016

*Crime — Evidence — Character — Defendant's bad character — Whether evidence about pornographic material found on defendant's computer wrongly admitted — Criminal Justice Act 2003 (c 44) s 101*

*Crime — Sexual offences — Indecent assault — Statutory provision restricting evidence or questions about complainant's sexual history — Whether restrictions applying to questions about previous allegations made by complainant — Youth Justice and Criminal Evidence Act 1999 (c 23) s 41*

The defendant was charged on five counts of indecent assault contrary to section 14(1) of the Sexual Offences Act 1956 and two counts of indecency with a child contrary to section 1(1) of the Indecency with Children Act 1960. The events related to 1990 to 1992 when the complainant was seven or eight years of age. The complaint was made to the police in 2012 by the complainant and the defendant's then partner. The defendant denied that the events had taken place. During the trial the defence applied under section 41 of the Youth Justice and Criminal Evidence Act 1999 to cross-examine the complainant in relation to allegations of sexual offences which she had made against two young men in 1996 and which she had made against her mother's then boyfriend in 2012 which were said to be similar to the alleged incidents involving the defendant. The trial judge allowed the application under section 41 only to a limited extent. During the trial the prosecution applied to adduce evidence of the bad character of the defendant as shown by pornographic material found on his computer although criminal charges in relation to that material had been dismissed in the absence of evidence that the images had been downloaded by the defendant rather than by others who had access to his computer. The trial judge ruled that the evidence was admissible under section 101(1)(d) of the Criminal Justice Act 2003 and was not excluded by section 101(3) of that Act. The defendant was convicted. He appealed on the grounds that (1) the ruling on the application under section 41 of the 1999 Act should not have been limited, and (2) the ruling under section 101 of the 2003 Act was unfair.

*Held*, appeal allowed. (1) Questions about the 1996 allegations would have been about the failure to complain, not about sexual behaviour of the complainant for the purposes of section 41 of the Youth Justice and Criminal Evidence Act 1999, and should have been permitted.

*R v T* [2002] 1 WLR 632, CA applied.

(2) Questions about the 2012 allegations concerning the complainant's mother's then boyfriend would not have involved impugning the complainant's credibility within section 41(4) of the 1999 Act, whether a wider or narrower meaning of "impugning the credibility" were adopted.

*R v A (No 2)* [2002] 1 AC 45, HL(E) and *R v Martin* [2004] 2 Cr App R 22, CA considered.

(3) The trial judge had failed to address several of the difficulties in the way of the application under section 101 of the Criminal Justice Act 2003.



# EVIDENCE/CHARACTER

## R v Platt

[2016] EWCA Crim 4; [2016] 4 WLR 51; [2016] 1 Cr App R 22; [2016] WLR (D) 11, CA

15 Jan 2016

*Crime — Evidence — Bad character — Admissibility — Co-defendant applying to adduce evidence of appellant's previous convictions — Whether common law still relevant — Criminal Justice Act 2003 (c 44), s 101(1)(e)*

The appellant and a co-defendant, M, were charged with the murder of a man who had died as a result of carbon monoxide poisoning following a fire in a hostel for ex-offenders in which all three resided. The prosecution case was that the appellant and M had carried out a joint attack on the deceased and set the body on fire. The case against M depended upon establishing the case against the appellant. While M ran a “cut throat” defence against the appellant, the appellant did not make a positive case against M, merely suggesting that he might have killed the deceased. At trial M applied to adduce evidence of the appellant's previous convictions under section 101(1)(e) of the Criminal Justice Act 2003 on the basis that the evidence “had substantial probative value in relation to an important matter in issue between the defendant and the co-defendant”. The judge admitted evidence of three of the defendant's previous convictions, namely a conviction of arson some 23 years earlier, when the defendant was 15, and two convictions for causing grievous bodily harm, finding that the matters in issue between the appellant and M were disputes of fact as to credibility. In reaching her decision she referred to a decision of the House of Lords on the common law and held that a defendant was entitled to disprove his guilt by tendering evidence of propensity on the part of a co-accused where to do so would show that his version of the facts was more probable than that of the accused. The appellant was convicted and M was acquitted. The appellant appealed against conviction.

*Held*, appeal dismissed. Common law cases were not relevant to the determination of admissibility which was governed by the provisions of the Criminal Justice Act 2003. It was particularly important that the test set out in the 2003 Act was the test solely applied for admissibility because, unlike the position between the prosecution and the defendant, the court had no discretion to refuse the admission of the evidence where the statutory conditions for admissibility were met. The test of “substantial probative value” to an important matter in issue between a defendant and a co-defendant under section 101(1)(e) was a higher test than that applicable under section 101(1)(d) of “relevance” to an important matter in issue where the issue arose between the defendant and the prosecution. Accordingly, the proper course that the judge should have followed on the question of admissibility was solely to consider: (1) whether the evidence had substantial probative value and (2) whether the matter in respect of which the evidence was substantially probative was a matter of substantial importance in the context of the case as a whole. If the judge had followed that course in relation to the question as to the probative value of the convictions in relation to propensity, she would have concluded that the previous convictions of arson and assault causing grievous bodily harm were not of substantial probative value to that issue and should not have been admitted. Although the judge had erred in allowing the limited evidence of the appellant's bad character to go before the jury, her direction to the jury stressed its limited value to propensity. She emphasised the age of the convictions and their very different circumstances. She stressed the limited assistance that the jury would obtain from the convictions for dishonesty which had been subsequently admitted. Applying those directions, the jury would have attached little or no weight to the previous convictions. Furthermore the evidence against the appellant was very strong. Accordingly, the conviction was not unsafe.

*R v Phillips (Paul Andrew)* [2012] 1 Cr App R 332, CA applied.

*R v Randall* [2004] 1 WLR 1413, HL(E) considered.

# EVIDENCE/DISCLOSURE

## R (Haralambous) v Crown Court at St Albans

[2016] EWHC 916 (Admin); [2016] 1 WLR 3073; [2016] WLR (D) 209, DC

22 Apr 2016

*Evidence — Disclosure — Closed material procedure — Claimant's premises searched and property seized under search warrant — Information granting warrant redacted for claimant — Whether redacted information constituting unpermitted closed evidence procedure — Whether common law right to information after issue of search warrant requiring sufficient information to be provided to claimant to assess its legality — Police and Criminal Evidence Act 1984 (c 60), s 8 — Criminal Justice and Police Act 2001 (c 16), s 59*

A detective constable of the second defendant police applied for two search warrants under section 8 of the Police and Criminal Evidence Act 1984 and Crim PR r 6.30 in respect of the claimant's home and business premises, which was subsequently issued by a justice of the peace and executed, leading to the seizure of the claimant's property and his arrest. The claimant requested a copy of the information sworn in support of the application and the reasons for the issue of the warrant, and was provided with a redacted copy of the information. The magistrates' court refused disclosure of the unredacted information. Under a consent order between the claimant and the police, an earlier judicial review claim made by the claimant was disposed of, the warrants quashed, the seizures under them declared unlawful and the material seized to be returned, but only subject to any order made as a result of the police's application under section 59 of the Criminal Justice and Police Act 2001 to the first defendant Crown Court. The Crown Court judge subsequently held that the redactions in the documents disclosed to the claimant were necessary in the public interest and that no further disclosure was necessary, and issued an order authorising the retention of the material seized under the search warrant. The claimant sought judicial review of the Crown Court's order on the grounds that the redaction of the information behind the warrants constituted a closed evidence procedure for which there was no parliamentary approval, and that alternatively even if closed evidence proceedings were permitted, it was necessary that the police disclosed enough information to enable the claimant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them.

*Held*, claim dismissed. The common law right to obtain information justifying a warrant had to be seen against the statutory background that Parliament had established for search warrants. Parliament had contemplated that in some cases information grounding the warrant might not be disclosed if that was in the public interest. A magistrate or judge would need to consider both whether the search warrant or the retention of property seized was justified and what information could be disclosed to the party affected by the warrant. It might be that as a result of the information withheld the person could not see how the warrant could be lawful, but that was the balance Parliament had struck. It was not conceivable that Parliament would have contemplated such arbitrary results as it being a matter of chance whether there was enough disclosable material justifying a search warrant or the retention of material seized. Moreover, it would be at odds with the public interest in the investigation and prosecution of crime to disclose an informant's identity or to return the material seized whenever a search warrant was to be based largely on material which it was not in the public interest to disclose. Furthermore, the common law right to information justifying a search warrant did not arise in judicial review proceedings. Therefore, the claimant's argument that the police could not justify their retention of property seized from him when it did so on the basis of evidence which was not disclosed to him did not succeed in the context of a warrant issued under section 8 of the 1984 Act. The same conclusion applied to an application to retain material pursuant to section 59 of the 2001 Act. It would be artificial and it could not have been intended by Parliament for a judge in the Crown Court to restrict himself to considering material that could be disclosed if, as in this case, there was additional information which quite properly would be considered by a magistrate were a fresh application to be made (paras 37–38, 39, 40, 41, 42, 44, 45, 48).

Dicta of Lord Dyson JSC in *Al-Rawi v Security Service* [2012] 1 AC 531, para 69, SC(E) not applied.

## EVIDENCE/HEARSAY

### R v Drinkwater (Paul Alec)

[2016] EWCA Crim 16; [2016] 4 WLR 42; [2016] 1 Cr App R 30; [2016] WLR (D) 92, CA

23 Feb 2016

*Crime — Evidence — Hearsay — Judge’s discretion to exclude — Whether threshold for exclusion of defence evidence lower than that for prosecution evidence — Criminal Justice Act 2003 (c 44), s 126*

In 1984 three young women were attacked and sexually assaulted by a stranger wielding a large knife and wearing a balaclava to conceal his face. The defendant was interviewed by the police, as was another man, H, but they were both released without charge. In 2012, as part of a cold case review, the retained specimens were re-tested using the latest DNA profiling techniques. The prosecution alleged that the DNA profiles matched those of the defendant. At his trial in December 2014, on charges of rape, robbery and sexual assault, the defendant said in evidence that by 1985 he had been convicted of a number of offences and had therefore been a regular visitor at the relevant police station which gave rise to the possibility that his DNA had come into contact with the complainants. However, he did not call any scientific evidence to support the possibility of contamination in that way or to rebut the Crown’s scientific evidence. The judge refused the defendant’s application to admit into evidence certain hearsay evidence which consisted of a confession by H (who had died in 2007) to involvement in one of the incidents of rape although H had then immediately retracted his confession and refused to sign the statement the police had prepared at the time. The defendant was convicted. He appealed against conviction on the ground that the judge had wrongly exercised her discretion under section 126 of the Criminal Justice Act 2003 to exclude the hearsay evidence, contending that the threshold for the exclusion of evidence tendered by the defence was a lower one than that for evidence tendered by the prosecution.

*Held*, appeal dismissed. The evidence that the defendant was seeking to put before the jury as true was internally inconsistent, confusing and contradictory and did not prove or assist in the proof of anything and was of no value in determining the guilt or innocence of the defendant. In the language of section 126 of the Criminal Justice Act 2003 the case for excluding this hearsay evidence “taking account of the danger that to admit it would result in undue waste of time ... taking account of the value of the evidence” was overwhelming. Whatever, therefore, the threshold for exclusion in section 126 this evidence plainly failed to surmount it. There was nothing whatever in the language of the section which required the court to apply a different threshold test for exclusion depending on whether the evidence was tendered by the prosecution or the defence; nor was there any principled justification for such a difference. Accordingly, the judge’s ruling was correct (paras 46, 47, 50).

*Per curiam*. Although no developed argument on the scope of section 126 of the 2003 Act was put forward the court’s strong preliminary view was that, in order to prevent the potential admission of barely relevant evidence, section 126 permits the court to exclude hearsay evidence which lacks significant probative value (paras 40, 41, 45).

*R v Riat* [2013] 1 WLR 2592, CA considered.



## EVIDENCE/LIES

**R v Murray (Robert)**  
[\[2016\] EWCA Crim 1051](#); [\[2016\] WLR \(D\) 438](#), CA

29 Jul 2016

*Crime — Evidence — Lies — Defendant alleged to have told lies during police interview — Whether jury to be given special direction concerning alleged lies*

The defendant was charged on counts of rape contrary to section 1 of the Sexual Offences Act 1956, assault by penetration contrary to section 2 of the Sexual Offences Act 2003, and sexual assault contrary to section 3 of the 2003 Act. The defendant was a security guard at a shopping centre and the complainant worked in one of the shops. The prosecution case was that the defendant led the complainant to a secluded area and sexually assaulted her. CCTV footage showed them entering a loading bay and emerging a few minutes later. In interview after his arrest the defendant denied having asked the complainant to join him for a cigarette break and said he had no recollection of going with her to the loading area. In a later interview, when shown the CCTV footage, he denied that any sexual activity had occurred. At the trial the defence was a denial that sexual activity had taken place. In cross-examination the defendant agreed that he had gone to the loading bay and had arranged to meet the complainant to go for a smoke, but he continued to deny that he was aware of the complainant's presence in the loading bay area; asked why he had pretended, during the interview when he was shown the CCTV footage, that he had not met the complainant, he said he was "shocked"; when it was put to him that in interview he had continued to lie by denying that he and the complainant had met up, he said that that was not the case. The trial judge did not give any specific direction to the jury in relation to the prosecution's allegation that the defendant had lied. He was convicted. He appealed on the ground that a Lucas direction in relation to alleged lies should have been given to the jury.

*Held*, appeal dismissed. A direction to remind the jury that people sometimes lied, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour from their family, was only required if there was a danger that the jury might regard a conclusion that the defendant lied as probative of his guilt of the offence concerned. If there was no need for a Lucas direction, as in the normal case where there was a straight conflict of evidence, such a direction would add complexity and do more harm than good. A Lucas direction was usually required where: (i) the defence relied on an alibi; (ii) the judge considered it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence drew attention to lies told, or allegedly told, by the defendant; (iii) the prosecution sought to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which was sought to be proved; (iv) although the prosecution had not adopted the approach set out in (iii), the judge reasonably envisaged that there was a real danger that the jury might do so. A critical feature might be whether it would be natural for a jury, when trying to resolve a conflict of evidence, to look at peripheral evidence such as whether the defendant was telling the truth when interviewed. A Lucas direction had been unnecessary in the present case as what was critical was whether the jury were sure of the evidence of the complainant in the light of the defendant's emphatic denial that he had even seen her on the loading bay, let alone assaulted her: indeed a Lucas direction would have confused and complicated an essentially simple issue (paras 8–22).

*R v Lucas* [1981] QB 720, CA, *R v Burge* [1996] 1 Cr App R 163, CA, *R v Middleton* (unreported) 23 March 2000, CA and *R v Anjum* [2003] EWCA Crim 493, CA considered.

# EXTRADITION/ABUSE OF PROCESS

Auzins v Prosecutor General's Office of the Republic of Latvia

[\[2016\] EWHC 802 \(Admin\)](#); [\[2016\] 4 WLR 75](#); [\[2016\] WLR \(D\) 184](#), DC

14 Apr 2016

*Crime — Extradition — Abuse of process — Res judicata — Issue estoppel — Requested person discharged in extradition proceedings in Scotland on grounds of ill-health — Second European arrest warrant issued for substantially identical matters — District judge ordering extradition following contested hearing in English court — Whether issue estoppel arising from res judicata applying to extradition proceedings — Whether question of surrender res judicata — Whether requesting authority estopped from seeking surrender — Whether attempt to seek extradition under second warrant abuse of process*

The appellant was arrested in Latvia in connection with four offences of theft. He admitted guilt in relation to some of the offences and was released subject to certain conditions. In breach of those conditions he left Latvia and subsequently came to live in England. He was arrested in Scotland pursuant to a European arrest warrant (“EAW”) issued by the Latvian judicial authority, and extradition proceedings followed in the Sheriff Court. He resisted extradition on health grounds. A letter from the Latvian authorities accepted that the medical treatment available within the Latvian prison system for the treatment of the appellant’s medical problems would be insufficient and incompatible with European guidelines. The court concluded that, while there were no bars to extradition under the section 11(1) of the Extradition Act 2003, the appellant’s physical condition was such that it would be oppressive to extradite him. Three years later, a replacement, second, EAW was issued, reflecting the fact that one of the offences for which extradition had originally been sought had become time barred. The appellant was arrested pursuant to the second EAW in England. Updated evidence from the Latvian authorities showed that the position as to the availability of treatment for the appellant’s conditions had improved in the intervening period. Following a contested hearing, the district judge ordered the appellant’s extradition. The appellant challenged that decision on grounds, inter alia, that the district judge should have discharged him because: (i) the issue of his surrender was res judicata or subject to an issue estoppel on account of his discharge in the earlier Scottish proceedings for substantially the same matters; alternatively, (ii) in seeking his surrender the Latvian authorities were abusing the process of the court.

On the appeal—

*Held*, appeal dismissed. It was established principle that issue estoppel arising from res judicata had no place in English criminal law. There was no basis for excluding extradition proceedings from the scope of that general principle, there being nothing in the Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between member states or the Extradition Act 2003 which supported a different approach. The alternative protection afforded by the application of the abuse of process doctrine was the appropriate mechanism in appropriate cases for guaranteeing that a requested person was not subjected to oppressive conduct. It could not be an abuse of the English court for a judicial authority of another member state to issue a European arrest warrant; rather the abuse, if an abuse there was, had to be connected with the efforts to enforce the warrant in the jurisdiction, the purpose of the abuse doctrine in the extradition context being to protect the statutory scheme of the 2003 Act and the integrity of the EAW system. In those circumstances, a second attempt to secure the surrender of a requested person could be an abuse of process where the requesting authority raised in the subsequent proceedings matters that could have been dealt with in the earlier proceedings. The position was different where what the court had to consider was a state of affairs at the time of the extradition hearing which in its nature could change, the state of a requested person’s mental or physical condition being a clear example. The critical factor which had led the Scottish court to conclude that it would be oppressive to surrender the appellant appeared to have been the lack of appropriate medical facilities for his treatment in Latvia. That position had changed by the time of the renewed request for the appellant’s surrender three years later. The appellant had avoided extradition on the last occasion because of deficiencies in

the treatment that would be made available for him on return. The district judge had concluded on up-to-date evidence that the same situation no longer existed. Accordingly, there was no abuse in seeking the appellant's surrender by reference to the evidence of a changed landscape (paras 36–37, 44, 46–47).

*R v Humphreys* [1977] AC 1, HL(E) and *Hamburg Public Prosecutor's Office v Altun* [2011] EWHC 397 (Admin), DC considered.

## EXTRADITION/BAR TO EXTRADITION

### *Puceviciene v Lithuanian Judicial Authority* [2016] EWHC 1862 (Admin); [2016] WLR (D) 414, QBD

22 Jul 2016

*Extradition — European arrest warrant — Bar to extradition — Proper approach to determining whether extradition barred for absence of prosecution decision — Second stage of inquiry — Relevance of mutual legal assistance in inquiry — Extradition Act 2003 (c 41), s 12A (as inserted by Anti-social Behaviour, Crime and Policing Act 2014 (c 12), s 156(2))*

As to the second stage of the inquiry into whether a requested person's extradition to a category 1 territory pursuant to a European arrest warrant is barred under section 12A of the Extradition Act 2003 because of the absence of a prosecution decision, if there is evidence which raises an issue as to whether a decision to charge or a decision to try has been taken, the requesting judicial authority must be provided with some explanation of what was meant by the terms "decision to charge" and "decision to try". Simply to use those terms without such an explanation is insufficient. There is no reason why any formality is required in relation to the making of a decision, unless the procedural law of the requesting state prevents informality. Furthermore, a decision to charge or try is none the less a decision to charge or try even if it is conditional or subject to review. A decision to charge is the decision which is made when there is sufficient evidence under the relevant procedural system to make an allegation that the defendant has committed the crime alleged. A decision to try is simply a decision where the relevant decision-maker has decided to go ahead with the process of taking to trial the defendant against whom the allegation is made (paras 52–56).

The consideration of mutual legal assistance by the requesting judicial authority in the context of questions arising under section 12A is inconsistent with the statutory scheme of the 2003 Act and the underlying Framework Decision 2002/584/JHA (para 68). Where, therefore, in the first and third cases a district judge ordered the requested person's extradition to a category 1 territory pursuant to a European arrest warrant and each requested person appealed, and where in the second case a district judge discharged the requested person from an European arrest warrant and the judicial authority appealed.

*Held*, appeals in the first and third cases dismissed and appeal in the second case allowed. In each case the district judge, in deciding whether the sole reason why there had been no decision to charge or try was the requested person's absence from the territory of the requesting state, had erred by inquiring whether the requesting judicial authority had considered the use of mutual legal assistance. Furthermore, in each case, the judge had been incorrect to find on the evidence that there were reasonable grounds for believing that the relevant decision had not been made (paras 110, 112, 128, 133, 206, 214, 215).

*Kandola v Generalstaatsanwaltschaft Frankfurt, Germany* [2015] 1 WLR 5097, DC disapproved.

# HOMICIDE/ATTEMPTED MURDER

R v Anwar (Umar)

[2016] EWCA Crim 551; [2016] 4 WLR 127; [2016] WLR (D) 349, CA

04 May 2016

*Crime — Homicide — Attempted murder — Joint enterprise — Mental element necessary for secondary party to be guilty of murder — Judge finding no prima facie case that any particular defendant identifiable as participating in attempt to kill or having relevant knowledge of loaded weapon — Whether judge erring in law in identifying reasonable inferences that jury might draw*

The victim was telephoned and offered a supply of cannabis, as a result of which he drove to the appointed place where he got into a silver car, joining the three occupants, to complete the purchase. The front passenger pointed a shotgun at his face while the driver brandished a knife. As the victim attempted to escape two men exited a white van nearby and attempted to take his car. The man with the shotgun fired two shots but the victim escaped. Six defendants stood trial on charges of attempted murder, conspiracy to commit robbery and possession of a firearm with intent to commit robbery. The Crown argued that this was a well-planned criminal enterprise as shown on the CCTV footage and by the frequent mobile phone calls between the defendants which showed that all the robbers had the necessary knowledge that a firearm was to be carried with the intention that it should be used during the course of the robbery with the required, if conditional, intention to kill. The trial judge ruled that, although there was a case for all defendants to answer in respect of the count of conspiracy to rob, there was no case in relation to attempted murder and possession of a firearm with intent because there was no evidence to establish a prima facie case as to (a) any particular defendant being in the silver car; (b) any particular defendant holding the shotgun either in the silver car or when the shots were fired; or (c) crucially, any particular defendant being aware, by the time of travelling to the scene, that the shotgun was loaded, or that he was intending that it should be used if necessary specifically to kill. The Crown appealed against the judge's ruling, pursuant to the provisions of section 58 of the Criminal Justice Act 2003.

On the appeal—

*Held*, appeal allowed. It was clear, as a result of recent Supreme Court authority, that for any defendant to be guilty of an offence on the basis of joint enterprise he had to have knowledge of existing facts necessary for the principal's intended conduct to be criminal and knowledge, if such there was, that any particular weapon was carried by the principal would be evidence going to the jury's assessment of the defendant's intention. The jury would, of course, continue to look at the full picture or factual matrix in order to determine whether the relevant and necessary intent could be inferred and the same facts, which would previously have been used to support such an inference of mens rea would equally be used now. What had changed was the articulation of the mens rea. What was now required was that a co-defendant intended that the principal defendant cause grievous bodily harm or kill if the circumstances arose. Thus, the evidential requirements justifying a decision that there was a case to answer were likely to be the same even if, applying the facts to the different directions in law, the jury might reach a different conclusion. The judge had been wrong to conclude that the existence of a case to answer depended on proof that any one defendant was inside the silver car where the size of the shotgun was likely to have alerted all occupants to its presence or otherwise played some identifiable role in the events of that night. That error could be described equally as an error of law in identifying what reasonable inferences could be drawn from the facts proved or admitted, or an unreasonable overall conclusion as to the sufficiency of the evidence at this stage of the trial that it was not open to a reasonable judge properly directing himself to reach. Accordingly, the judge's ruling would be reversed and the proceedings before the Crown Court resumed (paras 20–22, 29, 31).

*R v Jogee* [2016] 2 WLR 681, SC(E) considered.

# HOMICIDE/JOINT ENTERPRISE

## R v Jogee Ruddock v The Queen

[2016] UKSC 8; [2016] 2 WLR 681; [2016] 2 All ER 1; [2016] 1 Cr App R 31; [2016] WLR (D) 84, SC(E)

18 Feb 2016

*Crime — Homicide — Murder — Joint enterprise — Defendant charged as secondary party to murder — Co-defendant committing act which resulted in victim's death — Mental element necessary for secondary party to be guilty of murder — Judge directing jury that foresight by secondary party that co-defendant might attack victim with mens rea for murder sufficient — Whether necessary for secondary party himself to have mens rea for murder — Whether to be inferred from foresight of what co-defendant might do*

In each of two cases the defendant was charged with murder, together with a co-defendant, the victim having been killed by the use of a knife by the co-defendant. In each case the prosecution alleged that the defendant was an accessory who had participated in a joint enterprise with his co-defendant to commit the act which had resulted in the victim's death. In the first case the judge directed the jury that the defendant was guilty of murder as an accessory if he had participated in the attack on the victim and realised that his co-defendant might stab the victim with intent to cause him really serious harm. In the second case the judge directed the jury that the prosecution had to prove that the defendant and his co-defendant had shared a common intention, and that that common intention included a situation where the defendant knew that there was a real possibility that his co-defendant might "have a particular intention and with that knowledge, nevertheless, went on to take part" in the offence. Each defendant was convicted of murder and sentenced to life imprisonment. The Court of Appeal dismissed the defendant's appeal against conviction in the first case. The Court of Appeal of Jamaica refused the defendant permission to appeal in the second case. The defendants appealed on the grounds, inter alia, that in each case the judge's directions to the jury on the mental element which had to be proved in cases of parasitic accessory liability were flawed and that the case law which was binding on judges in regard to the directions to be given to the jury needed to be reassessed. The appeals were heard together.

On the defendants' appeals—

*Held*, the appeals were allowed. Accessory liability required proof of a conduct element accompanied by the necessary mental element. The requisite conduct element was that the accessory had assisted or encouraged the commission of the offence by the principal. The mental element was an intention to assist or encourage the commission of that crime. Foresight that the principal might commit the offence charged was not to be equated with intent to assist. The correct approach was to treat foresight as evidence, for the jury to consider, of intent to assist and encourage. The law had taken a wrong turn in *Chan Wing-Sui v The Queen* [1985] AC 168, when it had equated foresight with intent to assist, as a matter of law. It was not legitimate to treat foresight as an inevitable yardstick of common purpose; in doing so the law had departed from the rule which had been well established over many years that the mental element required for accessory liability was an intention to assist or encourage the principal to commit the offence charged. Accordingly the rule which had the judges had followed in giving the directions to the jury had to be set aside. Therefore both convictions would be quashed (paras 79, 83, 87–99).

*R v Collinson* (1831) 4 Car & P 556, *R v Smith* (Wesley) [1963] 1 WLR 1200, CCA and *R v Reid (Barry)* (1976) 62 Cr App R 109, CA approved.

*Davies v Director of Public Prosecutions* [1954] AC 378, HL(E); and *R v Anderson, R v Morris* [1966] 2 QB 110, CA considered.

*R v Powell; R v English* [1999] 1 AC 1, HL(E) departed from.



*Chan Wing-Sui v The Queen* [1985] AC 168, PC disapproved.

*Per curiam.* The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as it was then laid down. The error identified of equating foresight with intent rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice can be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been appreciated, have been charged with a different offence (para 100).

Decisions of the Court of Appeal (Criminal Division) [2013] EWCA Crim 1433 and of the Court of Appeal of Jamaica reversed.

## HUMAN RIGHTS/FAIR TRIAL

### R (Ismail) v Secretary of State for the Home Department

[\[2016\] UKSC 37](#); [\[2016\] 1 WLR 2814](#); [\[2016\] WLR \(D\) 363](#), SC(E)

06 Jul 2016

*Human rights — Fair hearing — Letters of request — Request for service of foreign criminal judgment upon person in United Kingdom — Extent of Home Secretary's discretion in relation to serving foreign judgment — Whether right to fair hearing engaged — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6 — Crime (International Co-operation) Act 2003 (c 32), s 1*

The claimant, an Egyptian national, was chairman of a transportation company based in Egypt. In 2006 a ferry operated by the company sank in the Red Sea and more than 1,000 people lost their lives. Shortly thereafter, the claimant entered the United Kingdom, where he remained. The claimant was charged with manslaughter in Egypt. A trial took place in his absence, although he was legally represented, and he was acquitted. The prosecution appealed. The claimant was again legally represented, although the Appeal Court ruled that submissions made on his behalf should not be taken into account as he was not present. The claimant was found guilty and sentenced to seven years' imprisonment with hard labour. The Egyptian authorities requested the Home Secretary to serve the judgment of the Appeal Court on the claimant. The Home Secretary informed the claimant that she intended to serve the judgment pursuant to section 1 of the Crime (International Co-operation) Act 2003. The claimant contended that the judgment was irrational, politically motivated, and vitiated by proceedings which had been flagrantly unfair and that the Home Secretary would be acting in breach of his rights under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms if she served it on him. In response, the Home Secretary made inquiries with the Egyptian authorities as to the effect which service of the judgment would have on the claimant. She was informed that the judgment could be appealed by a lawyer acting on the claimant's behalf within ten days of service and that, otherwise, the judgment would become final but that it could still be appealed to the Court of Cassation if the claimant appeared in person. The Home Secretary then confirmed her intention to serve the judgment. The claimant sought judicial review of that decision. The Divisional Court of the Queen's Bench Division allowed the claim.

*Held*, appeal allowed. The wording of section 1 of the 2003 Act suggested an administrative procedure which did not routinely require an examination of the proceedings which prompted the request for service of the judgment in order to investigate whether they were infected by obvious illegality or bad faith. On the other hand, the fact that the Home Secretary was invested with a power, as opposed to an obligation, to effect service of the foreign process indicated that there would be circumstances in which it would be appropriate not

to authorise service. A person who was physically present in a country which had acceded to the Convention was entitled to its protections, even where the actions of the member state would expose him to consequences in a non-contracting foreign state which would amount to a violation of Convention rights. However, the decision of the Home Secretary to serve the judgment on the claimant did not have a direct consequence of exposing him to the risk of violation of his Convention rights since he could simply decide not to return to Egypt. There was a clear distinction between serving a judgment and taking steps to ensure that it was enforced since enforcement necessarily altered the legal position of the person against whom the judgment had been obtained, whereas, although the claimant's legal options might have been narrowed by service, his essential legal position would remain unchanged. Serving a foreign judgment on a person within the United Kingdom did not involve any significant compromise on the sovereignty of the United Kingdom. The prospect of a future extradition agreement between Egypt and the United Kingdom, or some other request by Egypt for the claimant's extradition, did not engage article 6 of the Convention at the present stage. Accordingly, in the circumstances, the claim for judicial review should be dismissed (paras 25–26, 31–38, 42–43, 47–48, 51–54).

*Soering v United Kingdom* (1989) 11 EHRR 439 distinguished.

*Per curiam*. There could be circumstances in which the service of a foreign judgment would engage article 6 of the Convention or call for further investigation of the basis on which the judgment had been obtained. It is conceivable that service of a judgment might lead more directly to its enforcement or other material consequences, or that obvious illegality or bad faith, which would affect the person on whom service was made in a way which does not arise for the claimant, would warrant a more probing inquiry (para 53).

Decision of the Divisional Court of the Queen's Bench Division [2013] EWHC 663 (Admin) reversed.

## IDENTITY DOCUMENTS/POSSESSING FALSE DOCUMENT

### R v Boateng (Kenneth)

[\[2016\] EWCA Crim 57](#); [\[2016\] 4 WLR 70](#); [2016] 2 Cr App R 5; [\[2016\] WLR \(D\) 145](#), CA

16 Mar 2016

*Crime — Identity documents — Possessing false document — Defendant pleading guilty to immigration and documentation offences after taking legal advice — Whether errors in indictment technical defects or fundamental flaws rendering convictions unsafe — Whether offence of facilitating wrongful entry or remaining in United Kingdom of person requiring dishonesty on part of that person — Whether passport with falsely obtained Home Office residence stamp false “identity document” — Whether wrong advice given to defendant rendering all convictions nullities — Immigration Act 1971 (c 77), s 24A(1) (as inserted by Immigration and Asylum Act 1999 (c33), s 28) — Identity Cards Act 2006 (c 15), s 25 — Identity Documents Act 2010 (c 40), s 4*

The defendant, a Ghanaian national, held a non-European Union passport. His wife, also a Ghanaian national, assumed the identity of a deceased Ghanaian national, who had had Dutch citizenship, and obtained a Dutch identification card and a Dutch passport under that false identity. The defendant and his wife had an infant daughter. On the false premise that he and the daughter were entitled to reside in the United Kingdom by virtue of his wife's falsely assumed status as a European Union national, the defendant obtained residence cards, each in the form of a Home Office stamp in a non-European Union passport, for himself and the daughter. On three occasions the defendant used his passport, containing the residence card stamp, to enter the United Kingdom, and on one occasion he used it to open a bank account in there. The defendant and his wife were charged with various immigration and documentation offences. The defendant pleaded guilty to eight counts, charged as follows: (i) seeking or obtaining leave to enter or remain in the UK by the deception of applying to the Home Office for a residence card for himself (count 2) and for a certificate of naturalisation (count 12), contrary to section 24A(1)(a) of the Immigration Act 1971; (ii) facilitating the commission of a breach of section 10(1)(c) of the “Immigration Act 1999” by obtaining leave for his daughter to enter or remain

in the UK by the deception of applying to the Home Office for a residence card for her, contrary to section 25(1) of the 1971 Act (count 3); (iii) possessing false identity documents with intent, contrary to section 25(1) of the Identity Cards Act 2006 (counts 4 to 7); and (iv) being in possession or control with intent of an identity document, namely a British passport in his own name that he knew or believed to have been improperly obtained in February 2012, contrary to section 4 of the Identity Documents Act 2010 (count 13).

On the defendant's appeal—

*Held*, appeal allowed on counts 2, 4, 5 and 12. (1) As to counts 2 and 12, the prosecution accepted that the defendant had not sought or obtained leave to remain in the UK for the purposes of the Immigration Act 1971 and had therefore been indicted under the wrong subsection. He should have been indicted under section 24A(1)(b) of the 1971 Act (namely “he secures or seeks to secure the avoidance, postponement or revocation of enforcement action against him”), rather than section 24A(1)(a). The error was neither a mere drafting or clerical error nor a purely technical defect. It was a fundamental flaw. The wrong details had been given in the particulars of offence, and an offence under section 24A(1)(b) was not an alternative to an offence under section 24A(1)(a). Counts 2 and 12 were not, therefore, sustainable (para 15).

*R v Graham* [1997] 1 Cr App R 302, CA and *R v Stocker (Keith Anthony)* [2014] 1 Cr App R 18, CA applied.

(2) As to count 3, the misdescription of the Immigration and Asylum Act 1999 as “the Immigration Act 1999” was a technical error which could not have any fundamentally adverse impact on the adequacy of the charge. While the reference in the particulars of offence to section 10(1)(c) of the 1999 Act should have been a reference to section 3(1)(b), the former provided the mechanism of removal under the latter and, as it was clear what was being alleged against the defendant, the error was akin to a mere drafting or clerical error and did not invalidate the count. Further as to count 3 the offence under section 25 of the 1971 Act did not require that the person, whose entry into, or remaining in, the UK, was facilitated, had acted dishonestly (paras 17–19, 25–27).

*R v Kaile* [2009] EWCA Crim 2868, CA distinguished.

(3) As the prosecution accepted, counts 4 and 5 could not stand because section 25 of the Identity Cards Act 2006 was not in force at the dates of the alleged offences (para 20).

(4) As to counts 6 and 7, a passport with a falsely obtained Home Office residence stamp was, having regard to section 42 of the 2006 Act, a false “identity document” within section 25 of the 2006 Act (paras 22–24).

(5) As to all of the counts, the advice given to the defendant had been wrong in certain respects, but the defence which might have been mounted was not one which would quite probably have succeeded nor had a clear injustice had been done (paras 49–50).

*R v Mateta* [2014] 1 WLR 1516, CA applied.



# INDICTMENT/VALIDITY

R v D (A)

[\[2016\] EWCA Crim 454](#); [\[2016\] 4 WLR 122](#); [\[2016\] WLR \(D\) 249](#), CA

29 Apr 2016

*Crime — Indictment — Validity — Statements of offence charging defendant with indecent assaults against woman rather than man under wrong section of correct statute — Whether drafting flaws fatal to safety of convictions — Sexual Offences Act 1956 (c 69), ss 14(1), 15 (as amended by Sexual Offences Act 2003 (c 42), s 140, Sch 7, para 1) — Crim PR rr 1.1, 14.2*

The defendant was charged with two counts on an indictment which particularised the offences as amounting to indecent assaults against his son, a boy under the age of 14. The statements of offence stated that the defendant was charged with “Indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956”. That section created the offence of indecent assault on a woman, the correct provision for indecent assault on a man being section 15 of the 1956 Act. The drafting error escaped the notice of the parties and the court before and during the trial and the defendant was convicted. The error was noticed when the defendant applied for leave to appeal against conviction and the question arose as to whether the mistake was fatal to the safety of the convictions. The procedural position at the relevant time was governed by the Criminal Procedure Rules rather than their predecessor, the Indictment Rules 1971. Crim PR r 14.2(a)(i) provided that a statement of offence had to identify any legislation that created the offence. Rule 6(a) of the 1971 Rules had provided that, in the case of an offence created by a provision of an Act, the statement of offence had to contain a reference to the section of, or the paragraph of the Schedule to, the Act creating the offence.

On the defendant’s appeal—

*Held*, appeal dismissed. (1) The change in wording of the rules relating to the contents of the statement of offence did not call for a broadening of the test of whether an indictment was sufficient. The identification of “any legislation that creates” the offence charged, under the Crim PR, was merely a shorthand way of referring to the relevant section of the statute or provision of the subordinate instrument referred to in the Indictment Rules 1971. Any other interpretation would lead to the absurd conclusion that so long as the right statute or subordinate instrument was identified in the statement of offence, then the indictment was compliant with the Crim PR, however inapposite the specific section or provision relied on. Accordingly the statements of offence in the defendant’s case breached Crim PR r 14.2 (para 13).

(2) However, the Crim PR, like the 1971 Rules, were directory rather than mandatory and should not be approached any more inflexibly. Accordingly the question arose as to the circumstances in which a breach of Crim PR r 14.2 was inconsistent with the safety of a conviction which had been secured upon a defective indictment. Recent cases pointed in the direction of a growing prioritisation of substance over form. In the present case, the defects in the indictment, while reflecting a degree of culpable oversight on the part of those whose responsibility it was to get it right, did not render the convictions unsafe. The salient features of the appeal were the following. (i) The mistake had been a simple drafting or clerical error made when drafting the indictment and had not been made in the summons, which had correctly identified the relevant section. (ii) From the beginning to the end of the process the charge had been, in substance, one of indecent assault under section 15 of the Sexual Offences Act 1956 and as far as the judge, jury, Crown and defence were concerned, the defendant was tried on and convicted of the right offence under the right Act. The defendant had properly been before the Crown Court and the indictment had been, in every other respect, in proper form and, therefore, valid. The particulars of the offence could and did support a conviction of indecent assault contrary to section 15 of the 1956 Act. The trial and defence case would have been conducted in the same way irrespective of the errors in the statement of offence. The offence under section 14 of the 1956 Act was known to law at the time of the defendant’s offending. (iii) The defendant was guilty on the verdict of the jury of committing an

offence of indecent assault. The offence in the statement of offence did not differ so significantly in substance from the actual nature of the offending proved, that it would be objectionable for the matter safely to remain on the defendant's record in its present form. The gender of the victim had been the only material difference between the scope of operation of the offences under sections 14 and 15 respectively. The statutory maximum sentences in respect of each section were identical at the level of ten years' imprisonment. (iv) The slip in the drafting of the statement of offence had caused no prejudice to the defendant, no breach of his Convention rights nor rendered the trial process unfair. A finding that the wholly technical flaws in the drafting of the two counts under consideration should mandate the quashing of the convictions would be starkly inconsistent with the overriding objective in Crim PR r 1.1, which now directly governed the proper interpretation of the rules relating to the forms and contents of indictments (paras 14, 27, 28).

*R v Graham* [1997] 1 Cr App R 302, CA, *R v McKenzie* [2011] 1 WLR 2807, CA, *R v Stocker* [2014] 1 Cr App R 18, CA and *R v Boateng* [2016] 4 WLR 70, CA considered.

## MISCARRIAGE OF JUSTICE/STATUTORY COMPENSATION

R (Hallam) v Secretary of State for Justice

[2016] EWCA Civ 355; [2016] 3 WLR 329; [2016] 2 Cr App R 11; [2016] WLR (D) 182, CA

11 Apr 2016

*Crime — Miscarriage of justice — Statutory compensation — Court of Appeal quashing claimants' convictions on grounds of new evidence — Statute providing for compensation for "miscarriage of justice" — Statutory amendment providing that miscarriage of justice occurring "if and only if the new or newly discovered fact shows beyond reasonable doubt" offence not committed by person — Secretary of State refusing claimants compensation on basis of failure to meet statutory test — Claimants seeking judicial review on basis that statutory test contrary to Convention presumption of innocence by requiring claimant to prove innocence of particular offence — Divisional Court dismissing claims on basis of Supreme Court authority that Convention right of presumption of innocence not applicable despite contrary European Court of Human Rights authority — Whether Court of Appeal bound by Supreme Court authority — Whether statute as amended incompatible with Convention right — Criminal Justice Act 1988 (c 33) (as amended by Anti-social Behaviour, Crime and Policing Act 2014 (c 12), s 175), s 133(1) (1ZA) — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6.2*

Both claimants were convicted of serious criminal offences and had their initial appeals against conviction dismissed. In the first case the Criminal Cases Review Commission referred the claimant's conviction for murder to the Court of Appeal (Criminal Division), which quashed it on the basis the safety of the conviction was undermined by the unsatisfactory nature of identification evidence and doubts as to whether the claimant's alibi had been falsely made. In the second case the commission referred the claimant's conviction for attempted rape to the Court of Appeal, which quashed it on the basis that the weakness of identification evidence and fresh DNA evidence taken from the victim's clothing had had a substantial effect on the safety of the conviction. In both cases the Secretary of State refused the claimant compensation, under section 133 of the Criminal Justice Act 1988, as amended, on the basis that he had failed to show beyond reasonable doubt that the claimant had not committed the offence. The claimants' claims for judicial review of the Secretary of State's decisions, on the grounds that section 133(1ZA) of the 1988 Act (inserted by section 175 of the Anti-social Behaviour, Crime and Policing Act 2014 and providing that there has been a miscarriage of justice in relation to a person convicted of a criminal offence "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence") was incompatible with article 6.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms in that it infringed the presumption of innocence, were dismissed by the Divisional Court of the Queen's Bench Division which held that (i) the court was bound by authority of the Supreme Court (and also of the Court of Appeal) to hold that article 6.2 of the Convention was not applicable to compensation decisions made under section 133 of the 1988 Act; and (ii) the statutory scheme under section 133 maintained the presumption of innocence, did

not require the applicant for compensation to prove his innocence and that only if the Secretary of State was satisfied that the new fact conclusively showed his innocence was compensation to be paid. The court also refused the claimant in the second case permission to proceed with a claim for judicial review on the basis that the Secretary of State was obliged to carry out a full review of the material before him in a particular case to determine whether the claimant was innocent.

On the claimants' appeals—

*Held*, appeals dismissed. (1) The Supreme Court having found that the presumption of innocence in article 6.2 of the Convention was not applicable to the operation of section 133 of the Criminal Justice Act 1988, that decision remained binding precedent on the point, as the Divisional Court had rightly found, regardless of any subsequent observations of the Grand Chamber of the European Court of Human Rights and later cases in that court, so that the appeals were bound to be dismissed (paras 21, 23).

*R (Adams) v Secretary of State for Justice (JUSTICE intervening)* [2012] 1 AC 48, SC(E) applied.  
*Allen v United Kingdom* (2013) 36 BHRC 1, GC considered.

(2) Even if the presumption of innocence in article 6.2 of the Convention were applicable to section 133 of the Criminal Justice Act 1988, as amended, that section was not incompatible with it because, critically, the section did not require an applicant for compensation to prove his innocence generally. The key issue for the purpose of establishing eligibility for compensation was the effect of the new or newly discovered fact which had led to the conviction being quashed on appeal. The assumption was that the Secretary of State proceeded on the basis that the applicant had been acquitted of the offence and was entitled to be treated as innocent in consequence. He was only required to look at whether the new fact showed beyond reasonable doubt that the applicant had not committed the offence, the statutory focus of the section in both its original and amended versions being on the effect of the new fact and nothing else. Such a focus was central to the underlying object of limiting eligibility to compensation to a narrower category of cases than the entire corpus of cases where a conviction had been quashed. The fact that the Secretary of State was not persuaded beyond reasonable doubt by the new fact that an applicant was innocent did not mean that he cast doubt on the applicant's innocence generally, rather he was merely saying that the applicant's innocence had not been proved by the new fact (paras 48, 50). Innocence was presumed in all cases where a person was applying for compensation, the conviction having been quashed (paras 52, 48, 70–72).

*Per curiam*. Had the court not been bound by the Supreme Court decision, since the line of European Court of Human Rights jurisprudence that article 6(2) applies to claims for compensation following the quashing of convictions is so clear and constant, the Court of Appeal should have followed it (para 34).

Decision of the Divisional Court of the Queen's Bench Division [2015] EWHC 1565 (Admin) affirmed.

# PLEA/FITNESS TO PLEAD

R v Orr

[\[2016\] EWCA Crim 889](#); [\[2016\] 4 WLR 132](#); [\[2016\] WLR \(D\) 378](#), CA

07 Jul 2016

*Crime — Plea — Fitness to plead — Defendant becoming unwell after giving evidence-in-chief at trial — Experts assessing defendant unfit to plead but defendant wishing trial to continue — Proper approach to be adopted — Criminal Procedure (Insanity) Act 1964 (c 84), s 4A(1) (as amended by Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c 25), s 2 and Domestic Violence, Crime and Victims Act 2004 (c 28), Pt II, s 22(4)) — Criminal Justice and Public Order Act 1994 (c 33), s 35(1)(b) (as amended by Crime and Disorder Act 1998 (c 37), Sch 10, para 1)*

The defendant's trial for being concerned in a money-laundering arrangement commenced two years' after his first trial was terminated, because he had become unfit when being cross-examined by the Crown. He gave evidence-in-chief but when the Crown were due to cross-examine him, he was unwell and the judge adjourned the trial to determine the nature and extent of the defendant's mental incapacity and to enable him to be cross-examined by a defence psychiatrist. The psychiatrist attended with a colleague and prepared a report, before giving short oral evidence in the absence of the jury. He gave his opinion that, having examined the defendant that day and utilising the principles relevant in determining capacity to make a decision in accordance with the Mental Capacity Act 2005, the defendant was unable to participate in his trial, unable to be responsive to cross-examination and that position was unlikely to ameliorate in future. The judge was informed of the attendance of a second psychiatrist whose report could be used in any fitness to plead proceedings which might arise. Counsel for the defendant indicated that he wished the trial to continue, even if the Crown were denied the opportunity to make a closing speech because he wanted to avoid the stigma of the jury making a finding of fact against him in fitness to plead proceedings. He invited the judge to publicly express a view to dissuade the Crown from continuing with the prosecution in the circumstances. The judge gave a provisional view that the trial should proceed with limits on the Crown's closing speech. The second psychiatrist, instructed by the Crown, assessed the defendant as unfit to plead in her report. The Crown referred to the fact the defendant had already given evidence-in-chief and asked the judge to assess whether the defendant had been unfit to give evidence, as well unable to give evidence under cross-examination, in deciding the issue of fitness to plead. The judge indicated his view was that the defendant was unfit to be cross-examined but had been fit to give the evidence he had already given and likened the defendant to a vulnerable witness who should not be disadvantaged by not being able to give evidence. He considered the Crown should be able to make a closing speech, even if it was curtailed in view of the defendant's involuntary incapacity. The Crown drafted a closing speech prepared in accordance with the judge's direction that it should not contain reference to any subject which the defendant had not been in a position to meet in cross-examination and edited it further at the request of the defence prior to delivery. Neither counsel referred the judge to section 35(1)(b) of the Criminal Justice and Public Order Act 1994, as amended by paragraph 1 of Schedule 10 to the Crime and Disorder Act 1998. The defendant was convicted and appealed against conviction on the ground that, having found the defendant was unable to be cross-examined as a result of being unable properly to respond to questions asked in cross-examination, the judge should have ruled that he was not fit to be tried, discharged the jury from returning verdicts then proceeded to a determination by the jury as to whether the defendant had done the act or made the omission charged against him, in accordance with section 4A(1) of the Criminal Procedure (Insanity) Act 1964, as amended by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and Part II, section 22(4) of the Domestic Violence, Crime and Victims Act 2004.

On the appeal—

*Held*, appeal allowed. The issue of fitness to plead identified in section 4 of the Criminal Procedure (Insanity) Act 1964 was better identified as “fitness to participate in the trial process,” since the supposed

disability could be determined at any stage up to “verdict of acquittal” and could not be determined by reference to part only of the trial process. Section 35(1)(b) of the Criminal Justice and Public Order Act 1994 catered for the situation where the physical or mental condition of the accused made it undesirable for him to give evidence. A finding that the defendant was unfit to give evidence in cross-examination did not necessarily determine the question of fitness to plead. The trial judge’s provisional and present views and ruling on the renewed application to discharge the jury from returning a verdict did not articulate a rigorous enough examination or careful enough analysis of the Pritchard criteria (*R v Pritchard* (1836) 7 C & P 303) as interpreted in *R v Podola* [1960] 1 QB 325). Counsel had not drawn the judge’s attention specifically to section 35 of the 1994 Act. Once the issue of fitness to plead had been raised, it had to be determined and the judge explicitly found that the defendant had been fit to participate in his trial up to the point of cross-examination. He thereby implicitly determined that the defendant was no longer able to fully participate in his trial within the Pritchard refined criteria after that. The procedure to be adopted in those circumstances was clearly set out in section 4A of the Criminal Procedure (Insanity) Act 1964. That was a statutory mandatory requirement which could not be avoided by the court’s general discretion to order proceedings otherwise. The jury should not have been allowed to return a verdict other than a verdict of acquittal, if they were not satisfied on the evidence already given in the trial that the defendant did the act charged against him (paras 23, 24, 26, 27, 29, 30–31).

## PRACTICE/ALTERNATIVE CHARGES

### Henderson v Director of Public Prosecutions

[2016] EWHC 464 (Admin); [2016] 1 WLR 1990; [2016] 2 Cr App R 7; [2016] WLR (D) 132, DC

09 Mar 2016

*Crime — Practice — Criminal proceedings — District judge convicting defendant after trial of racially aggravated offences and alternative offences of harassment against same victims arising from same facts — Whether convictions on both sets of charges appropriate — Whether alternatives to be adjourned sine die following conviction on racially aggravated offences — Whether convictions on non-aggravated harassment charges to be set aside — Magistrates’ Courts Act 1980 (c 43), s 10 — Senior Courts Act 1981 (c 54), s 48*

The defendant was charged with three offences of racially aggravated harassment, contrary to section 31(1)(b) of the Crime and Disorder Act 1998 and, in the alternative, three offences of harassment, contrary to section 4A of the Public Order Act 1986. Both sets of offences were alleged to have been committed against the same victims and arose out of the same set of facts. Following the trial, the defendant was convicted of the three racially aggravated offences but, having heard submissions from the defendant’s representative, the district judge declined to announce a verdict on the section 4A offences (“the underlying offences”) and adjourned the case. The matter came before a different district judge who concluded that the facts of the underlying offences had been proved before the district judge at trial with the result that guilty verdicts should be returned in relation to the three underlying offences, with no separate penalty being imposed. In so doing, the district judge rejected the defendant’s submission that the correct course of action, the aggravated offences having been proved, was to adjourn the underlying offences sine die pursuant to the power in section 10 of the Magistrates’ Court Act 1980. The defendant challenged his conviction on the underlying offences by way of an appeal by case stated.

On the appeal—

*Held*, appeal allowed. As a matter of principle, where there were two charges which were properly characterised as alternatives, there ought not to be findings of guilt on both charges; and it was not open to a magistrates’ court to make a finding of guilt on an alternative underlying offence having made a finding of guilt on the aggravated offence. The underlying offences and the aggravated offences with which the defendant had been charged were to be regarded as true alternatives. In order to avoid the objectionable course of convicting for both the underlying offence and the aggravated offence, the sensible course was to adjourn the trial of the



underlying offence sine die. If the defendant wished to plead guilty to the underlying offence but contest the aggravated offence, that offer to plead was to be noted but the plea not taken. If the magistrates' court considering two alternative charges convicted of the aggravated offence and adjourned the trial of the underlying offence, then, on an appeal to the Crown Court and following a full rehearing, it would be open to the Crown Court, pursuant to the powers in section 48 of the Senior Courts Act 1981, to reverse the conviction on the aggravated offence and convict on the underlying offence (paras 16, 30, 32, 40–41, 43).

*R (Dyer) v Watford Magistrates' Court* (2013) 177 JP 265, DC followed.

*Director of Public Prosecutions v Gane* (1991) 155 JP 846, DC and *R (Crown Prosecution Service) v Blaydon Youth Court* (2004) 168 JP 638, DC considered.

## PRACTICE/JURY

### R v Fanning

[2016] EWCA Crim 550; [2016] WLR (D) 218, CA

28 Apr 2016

*Crime — Practice — Jury — Inconsistent verdicts — Whether verdicts so inconsistent that no reasonable jury could have reached them — Proper approach*

The five defendants before the court, who had all been charged with sexual offences, had each been convicted of some counts and acquitted of others. They all appealed, or applied for leave to appeal, against their convictions on the grounds, inter alia, that the verdicts of the jury were inconsistent and that the verdicts on those counts of which they had been convicted were therefore unsafe.

On the appeals and applications for leave—

*Held*, appeals dismissed and applications refused. Where inconsistency between verdicts was advanced as a ground of appeal against conviction, the burden was upon the defendant to satisfy the court that the two verdicts could not stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion. If the jury could not have reasonably come to the conclusion, then the convictions could not stand. That test did not require elaboration. The verdicts of a jury were not to be treated as inconsistent simply because the jury was sure about some parts of the evidence given by a witness but was unable to be sure to the requisite standard about others. In each of the present cases, the defendant had failed to discharge the burden of proving that the verdicts of conviction on some counts and acquittal on others were logically inconsistent (paras 8, 15, 19, 22, 24, 27, 28, 40, 54, 75–77, 104).

*R v Durante* [1972] 1 WLR 1612, CA applied.

## R v McManaman

[2016] EWCA Crim 3; [2016] 1 WLR 1096; [2016] 1 Cr App R 24; [2016] WLR (D) 5, CA

15 Jan 2016

*Crime — Jury — Discharge — Continuation of trial without jury — Approach by third party to juror through social media website — Jury discharged — Trial ordered to continue without jury — Whether order wrongly made — Whether finding of jury tampering justified — Whether involvement of defendant required — Whether continuation of trial without jury fair to defendant and in interests of justice — Criminal Justice Act 2003, (c44), s 46*

The defendant was charged with rape. At the first trial the jury was discharged because the defendant needed more time to consider additional evidence served by the prosecution. At the beginning of the fourth day of the retrial the jury brought to the judge's attention a Facebook Friend request made to a juror relating to a man, SB, who had been sitting in the public gallery during the trial. After the judge had spoken to the juror, and police investigations had taken place, the judge indicated that he would consider discharging the jury and would consider continuing the trial without a jury under section 46 of the Criminal Justice Act 2003. As the defendant made no representations, the judge immediately discharged the jury. On the following day the judge, without seeing a transcript, heard a report from police officers about their interview with SB and he heard submissions made by the parties. The judge concluded (a) that jury tampering had been carried out by SB, (b) that it was not necessary that the defendant had been directly involved but it was enough that, as the judge found, the defendant had known of or acquiesced in the tampering, and (c) that it was fair to the defendant and in the interest of justice that the trial should continue without a jury. The defendant appealed against that ruling on the grounds that each of the judge's three conclusions had been wrong.

On the defendant's appeal—

*Held*, appeal dismissed. On (a), the judge had, correctly applying the criminal standard of proof, reached findings that he was fully entitled to make and, as the transcript contained nothing which materially changed the position, it would have made no difference if he had considered the transcript. On (b), proof of tampering was all that was required and it did not matter whether the defendant was involved. On (c), in the circumstances, and having regard to the fact that the main task would be assessment of the credibility of witnesses, an ordinary part of a judge's duty, it was fair to the defendant and in the interest of justice that the trial should continue without a jury.

# PRACTICE/REPORTING RESTRICTIONS

## In re Times Newspapers Ltd [2016] EWCA Crim 887; [2016] WLR (D) 381, CA

08 Jul 2016

*Crime — Practice — Reporting restrictions — Evidence of defendant's character ordered to be heard in private — Judge explaining in open court grounds on which order made — Judge's explanation frustrating purpose of order — Whether court having jurisdiction to prohibit publication of words spoken in open court — Contempt of Court Act 1981 (c 49), s 11*

A defendant was standing trial on a single count of rape. The judge granted the Crown's application that part of the trial where evidence was given by or on behalf of the defendant concerning his character should be held in private. On resuming the public hearing the judge gave a brief explanation of the grounds on which he had made the order. The Crown subsequently applied for an order under section 11 of the Contempt of Court Act 1981 that there be no reporting of the words of explanation ("the wording") used by the judge. A newspaper opposed the application. The judge heard the application in the absence of the newspaper and granted the Crown's application. The newspaper appealed against the section 11 order.

On the appeal, and on the question whether the court had jurisdiction to restrain publication of the wording under section 11 of the 1981 Act—

*Held*, appeal dismissed. Restraining the publication of something said in open court was rightly and plainly a matter of extreme sensitivity; no such order would be made lightly and without the most careful scrutiny. The only power capable of being invoked in this situation was contained in section 11 of the Contempt of Court Act 1981. However, the mere fact that something had been said in open court was not conclusive and fatal to any restraint; there was jurisdiction to correct mishaps. For the court to have the power under section 11 to give directions prohibiting the publication of a "matter" the court had, first, to have allowed the matter to be withheld from the public in proceedings before the court, and, second, to have had power to allow that matter to be thus withheld. The directions prohibiting publication were linked to the purpose for which the matter was withheld in the first place. The word "matter" did not have a fixed meaning but depended upon the context and was fact-sensitive in any given case. "Matter" allowed to be withheld from the public covered not only the subject of the order but also the reasons for that order, insofar as the publication of those reasons would otherwise have the effect of revealing the nature of the evidence to be withheld from the public. Accordingly, the court had jurisdiction, under section 11 of the 1981 Act, to restrain the publication of the wording. On the facts, for reasons which could not be elaborated in open court, it was necessary to depart from the principle of open justice by withholding the wording from the public since publication would frustrate or undermine the purpose of the order that part of the trial be held in private. Accordingly the section 11 order had been properly made (paras 23, 26, 27, 31–33, 35).

*In re Guardian News and Media Ltd* [2015] 1 Cr App R 4, CA and *In re Guardian News and Media Ltd* [2016] 1 WLR 1767, CA considered.

*Per curiam*. (i) When there is a hearing in camera, it is of the first importance to give proper attention to what is thereafter said in open court as to that hearing and any decisions there taken (para 38). (ii) The Senior Presiding Judge may wish to consider what arrangements could or should be made via presiding judges and resident judges with regard to the allocation of such applications, either to resident judges or to judges specifically designated by the resident judge (para 38).



## PRACTICE/REPORTING RESTRICTIONS

### Guardian News and Media Ltd v Incedal (No 2)

[2016] EWCA Crim 11; [2016] 1 WLR 1767; [2016] 1 Cr App R 32; [2016] WLR (D) 67, CA

09 Feb 2016

*Crime — Practice — Reporting restrictions — Threat to national security owing to nature of evidence to be given at trial — Judge ordering proceedings to be held in camera — Attendance of accredited journalists — Guidance as to proper approach to role of Director of Public Prosecutions and courts*

EI was charged with engaging in conduct in preparation of terrorist acts, contrary to section 5(1) of the Terrorism Act 2006 (count 1) and he and MR-B were charged with possessing a document containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58(1) of the Terrorism Act 2000 (counts 2 and 3). MR-B pleaded guilty to count 3. EI was acquitted of count 1 but convicted of count 2. The proceedings against the defendants had been the subject of reporting and other restrictions from the outset. At a preparatory meeting in May 2014 the Crown applied for an order that all or part of the proceedings should take place in camera and that earlier orders imposed under sections 4(2) and 11 of the Contempt of Court Act 1981 should be continued. The application was supported by certificates setting out the reasons relied on in support by the Secretary of State for the Home Department and the Secretary of State for Foreign and Commonwealth Affairs. Various media organisations opposed the application. The judge ordered that (i) the entire criminal trial should be held in camera (with the public and media excluded) and that the publication of reports of the trial would be prohibited under section 11 of the 1981 Act, unless and until the court made a different order; and (ii) the names and identities of the defendants should be withheld from the public and publication of their names/identities in connection with the proceedings would be prohibited. The media organisations appealed against that ruling. Part of the appeal hearing was in public, part was in private and a very small part was ex parte. The Court of Appeal varied the judge's order to allow the defendants to be named and to allow limited parts of the trial to be dealt with in open court, including the swearing in of the jury, the reading of the charges to the jury, part of judge's introductory remarks to the jury, part of the prosecution opening, the verdicts and, if any convictions resulted, the sentences imposed. The Court of Appeal further directed that up to ten accredited journalists (selected by the media parties, not the Secretaries of State) could attend the trial. At the conclusion of EI's trial the judge dismissed the media parties' application that the reporting restrictions should be lifted in whole or in part.

On appeal by the media parties against the judge's ruling—

*Held*, appeal dismissed. (1) In a case involving national security, it was for the Director of Public Prosecutions (“DPP”) alone, subject to the superintendence of the Attorney General and the ultimate supervisory jurisdiction of the court in exceptional cases, to determine whether to prosecute and whether to apply for part of the proceedings to be held in camera. The proper approach of the court was to examine the nature of the evidence and to determine the effect of hearing it in public. It was for the court and the court alone to determine if the stringent test of necessity had been met and whether the evidence or material in question should be heard in public or not. There was an important distinction in the constitutional functions of the court and the prosecutor and the prosecutor's view as to whether or not the prosecution would continue if the evidence was to be heard in public was not the determining factor. Deciding the issue on the basis that the DPP might not continue with the prosecution did not satisfy the test of necessity but, in effect, transferred the decision on whether to depart from the principle of open justice to the DPP (paras 43–48, 51, 53, 56–58). *Scott v Scott* [1913] AC 417, HL(E) and *Attorney General v Leveller Magazine Ltd* [1979] AC 440, HL(E) applied.

(2) If the DPP decided to proceed with a prosecution on the basis of the court's decision to allow certain information or evidence to be heard in public, no part of the Executive could refuse to provide the evidence required by the DPP on the basis that it perceived that it was not in the interests of national security to provide

it. The court had made its decision and the Executive had to abide by it. It had also to abide, subject only to the superintendence of the Attorney General and the possibility of judicial review, by the decision of the prosecutor, whether, in the light of the decision of the court, the prosecution should continue. If the DPP decided on continuation, then the Executive had to give the prosecution its full co-operation and assistance (paras 44, 61).

(3) From the nature of the evidence a departure from the principles of open justice was strictly necessary if justice was to be done in the instant case. Because of the nature of that evidence those reasons continued to necessitate a departure from the principle of open justice after the conclusion of the trial. That had the consequence that any public accountability for matters relating to the prosecution could not be achieved through the press in its function as “watchdog” of the public interest but, as the issues related to terrorism and those charged with combating it, it would be open to the Intelligence and Security Committee of Parliament to consider any issues it considered should be examined and for any public accountability to be achieved in that way (paras 73–75).

*Per curiam.* (i) The presence of the accredited journalists during significant parts of the trial made the management of the trial very much more difficult than if the trial had been conducted, as was conventional in such cases, with part in public and part in camera in the absence of any representatives of the media. It was not possible for the Court of Appeal to have foreseen those difficulties, but the experience of the way in which it affected the conduct of the trial led to the firm conclusion that a court should hesitate long and hard before it made a similar order given the unexpected effect it had on the conduct of the trial (paras 68, 69).

(ii) There are some cases, of which the present case involving issues of national security may be an example, where the judge would be greatly assisted by an independent lawyer assigned to provide assistance in the same way as in the present case both the judge and the Court of Appeal were assisted by counsel for the media parties; that has only occurred because of the unprecedented circumstances in which accredited journalists heard the evidence on the core issues given in camera. An independent lawyer cleared to the appropriate level of security should be provided to a judge where such assistance was requested by the judge (para 66).

(iii) In cases of this kind, whilst the judgments given in open court are a matter of public record and can be referred to, the closed judgments which contain the detailed reasons why the court has decided that the evidence should be heard in camera are not retained within the court files. That is not satisfactory. The Registrar of Criminal Appeals would be asked to form a working party from those interested in these matters to advise the Court of Appeal (Criminal Division) on the course of action it should adopt (paras 78–80).

## PRACTICE/REPORTING RESTRICTIONS

### R (Ewing) v Crown Court at Cardiff

[\[2016\] EWHC 183 \(Admin\)](#); [\[2016\] 4 WLR 21](#); [\[2016\] 1 Cr App R 32](#); [\[2016\] WLR \(D\) 62](#), DC

08 Feb 2016

*Crime — Practice — Criminal proceedings — Claimant taking notes of appeal proceedings in Crown Court — Judge indicating note-taking only permissible with express consent of court and refusing consent — Whether restrictions on members of public taking notes of public criminal proceedings lawful — Whether claimant’s note-taking posing risk to proper administration of justice*

During the course of criminal appeal proceedings heard in public before a circuit judge and two justices sitting at the defendant Crown Court, the judge noticed an individual in the public gallery making notes, whereupon he indicated that he would hear any application for permission to do so and added: “henceforth any taking of notes without permission will be regarded as a contempt of court and will be dealt with as such.” The claimant wrote a letter to the court threatening judicial review of the stance adopted on note-taking. The court replied, citing in support of its position the conventional rule that members of the public were

permitted to take notes of proceedings only with the permission of the court. At the adjourned hearing the claimant was observed taking notes and questioned by the judge as to why he was doing so without having been granted permission. In response to the claimant's observation that he was as a member of the public entitled to take notes, the judge responded that the promulgation of information regarding the case might have adverse consequences for appeal proceedings in a different court involving the same defendant and that he was therefore not prepared to grant permission to anybody to take notes of the proceedings. The claimant sought judicial review, challenging the appropriateness of the order preventing the public from taking notes of a hearing otherwise being held in public.

On the claim—

*Held*, claim allowed. The default position was that those who attended public court hearings should be free to make notes of what occurred, absent a requirement to seek the court's permission. Such freedom was a feature of the principle of open justice and was unlikely, without more, to interfere with the proper administration of justice, and the reasons for the distinction drawn between ordinary members of the public and journalists and legal commentators in connection with live text-based communications did not apply to ordinary note-taking. The right to take notes was subject to the control of the court which could withdraw the right if the note-taking in question threatened to interfere with the proper administration of justice. The reasons given for preventing the claimant from taking notes of the proceedings had been underpinned by the mistaken belief that notes could only be taken with the permission of the court. There had been no obligation on the claimant to explain and justify his desire to take notes. Furthermore, in all the circumstances, the note-taking by the claimant posed no threat to the proper administration of justice. Accordingly, the court had erred in ordering that no notes be taken of the appeal proceedings (paras 23–28, 30, 31).

Criminal Practice Directions 2015 [2015] EWCA Crim 1567, considered.

## PROCEDURE/INSTITUTION OF PROCEEDINGS

### R v Walker (Triston)

[2016] EWCA Crim 751; [2016] 4 WLR 131; [2016] WLR (D) 350, CA

29 Jun 2016

*Crime — Procedure — Institution of proceedings — Defendant sent for trial after crown prosecutor's decision to charge him but after crown prosecutor's written consent to institution of proceedings — Whether crown prosecutor's decision to charge constituting necessary consent — Police and Criminal Evidence Act 1984 (c 60), ss 37A, 37B (as amended by Criminal Justice Act 2003 (c 44), s 28, Sch 2, para 3)*

The defendant was charged with murder. On 4 August 2007 the crown prosecutor made a decision to charge his co-accused with assisting an offender. That decision was taken employing the threshold test in the Code for Crown Prosecutors issued by the Director of Public Prosecutions (“DPP”) under section 37A of the Police and Criminal Evidence Act 1984 and considering the statutory charging procedures set out in section 37B, namely that when a case was referred by police to the DPP, the DPP should decide whether there was sufficient evidence to charge, decide which offence to charge and notify the police of his decision. The co-accused was charged by police on 21 August and the next day he was sent for trial. On 10 October a crown prosecutor gave written consent to the institution of proceedings against the co-accused. At trial the co-accused gave evidence which was broadly supportive of the defendant's account but which contradicted that account in some respects. The defendant was convicted of murder. He sought leave to appeal against conviction, contending that the proceedings against the co-accused were a nullity, since the DPP had not given his consent until after he had been sent for trial; that, therefore, the co-accused should not have been on the same indictment as the defendant; that the co-accused's contradictory evidence had done collateral damage to

the defendant's case; and that the conviction was therefore unsafe.

On the defendant's application for leave to appeal—

*Held*, application refused. Since the statutory charging scheme was introduced into section 37B of the Police and Criminal Evidence Act 1984 by the Criminal Justice Act 2003, the Director of Public Prosecutions determined the charge and, arguably, initiated the prosecution through crown prosecutors. Having regard to the terms of section 37B, a crown prosecutor who had decided that there was sufficient evidence to charge, identified the relevant offence and notified the police of his decision had either instituted proceedings personally, in which case no separate act of consent was necessary or, alternatively, had required the police to charge the offender, in which case notification of the decision constituted the giving of consent. The actions of the prosecutor in making a charging decision on 4 August 2007, applying the threshold test under the Code for Crown Prosecutors issued by the DPP in section 37A of the 1984 Act and considering the statutory charging procedures in section 37B of the 1984 Act, amounted to the necessary consent (para 29).

## PROCEEDS OF CRIME/CONFISCATION ORDER

R v Johnson (Beverley)

[2016] EWCA Crim 10; [2016] 4 WLR 57; [2016] WLR (D) 56, CA

03 Feb 2016

*Crime — Sentence — Confiscation — Tainted gift — Defendant making tainted gift to daughter by foregoing part of purchase price of property — Value of property subsequently decreasing — Defendant having no assets — Confiscation order made in sum of tainted gift — Whether confiscation order unjust — Proceeds of Crime Act 2002 (c 29), ss 9(1), 75, 77, 79, 81*

The defendant pleaded guilty to fraud. The prosecution sought a confiscation order on the footing that, as was accepted, the defendant had a criminal lifestyle within the meaning of section 75 of the Proceeds of Crime Act 2002. The application was made on the basis, among other things, that the defendant had made a gift of £20,000 to her daughter which was a tainted gift for the purposes of section 77 of the 2002 Act. The defendant accepted that she had, within the period for which section 77 of the 2002 Act provided, sold a freehold property to her daughter for £140,000 on the basis that she, the defendant, would, by way of gift, forego £20,000 of the purchase price. The judge, applying sections 79 and 81 of the 2002 Act, determined the value of the tainted gift as £20,000 and, applying section 9(1)(b) of the 2002 Act, held that that amount was to be included in the available amount. The defendant resisted the making of a confiscation order because the value of the freehold property had decreased to a lower amount than the sum outstanding on the mortgage and because she had no assets. The judge held that, as a matter of law, the assessment and taking into account of a defendant's means to pay, which was relevant for the purposes of section 9(1)(a) of the 2002 Act, had no application for the purposes of section 9(1)(b). A confiscation order was made in the sum of £20,000, to be paid within six months, with a sentence of 12 months' imprisonment in default of payment. In due course the defendant was committed to prison to serve the default sentence but a week later the outstanding amount was paid and the defendant was released. The defendant appealed against the confiscation order on the ground that, while the judge's ruling on the issue of law had been correct, the order was nevertheless unjust.

On the appeal—

*Held*, appeal dismissed. Where the prosecution applied to recover the value of a tainted gift which appeared to be worthless at the time of the application, the judge should carefully consider (i) the robustness of the evidence of the original value of the tainted gift, (ii) the proportionality of making an order in the sum proposed, not as a matter of general discretion, but respect being given to the Parliamentary objective, and

(iii) the appropriate term of imprisonment to be imposed in default, regard being had to the purpose of the term being enforcement, not further punishment. In the instant case the defendant had given the valuation of £20,000, so no ground of appeal relating to (i) arose. As to (ii) proportionality had not been raised before the judge and had to be addressed by the court; decided cases did not establish any general principle which might determine the instant case; none of the factors in the instant case effected any reduction in the amount which the defendant had obtained from crime; the confiscation order was therefore proportionate. Given that the order had been paid and the default sentence served, it was not necessary to consider whether the default sentence should, in the circumstances, have been shorter (paras 31, 35–39).

*R v Waya* [2002] AC 294, SC(E), *R v Jawad* [2013] 1 WLR 3861, CA and *R v Harvey (Jack)* [2016] 2 WLR 37, SC(E) considered.

## PROCEEDS OF CRIME/RECOVERY OF ASSETS

### Nuttall v National Crime Agency

[2016] EWHC 1911 (Admin); [2016] 4 WLR 134; [2016] WLR (D) 422, QBD (Collins J)

27 Jul 2016

*Crime — Proceeds of crime — Recovery of assets — Disclosure order made in civil recovery proceedings investigating conduct of applicants — Order made by High Court judge on ex parte application following consideration on papers — Applicants seeking to discharge disclosure order — Whether judge under legal duty to give reasons for making disclosure order — Whether court to discharge disclosure order — Proceeds of Crime Act 2002 (c 29), s 357(1) (as amended by Serious Crime Act 2007 (c 27), Sch 8, para 108)*

A predecessor agency to the National Crime Agency (“the NCA”) commenced a civil recovery investigation into the applicants under the Proceeds of Crime Act 2002. The basic suspicion against them was that the first applicant controlled a United Kingdom based bank account through which some £8m had been laundered. The investigator applied for a disclosure order under section 357 of the 2002 Act, which was granted ex parte by a High Court judge on consideration of the papers. Subsequently, two information notices were made pursuant to the disclosure order, which itself had been used to obtain information from 200 sources to enable the NCA to pursue its inquiries. The applicants sought to have the disclosure notice and the information notices discharged, inter alia, on the basis that in making the disclosure order the judge had failed to give reasons.

*Held*, application dismissed. There was no legal duty to give reasons on the making of a disclosure order under section 357 of the Proceeds of Crime Act 2002. The practice of seeking disclosure orders on paper had been instituted to save time and money in appropriate cases. It was open to a judge to require argument if the papers served did not persuade him that an order should be made. But he would only make the order if satisfied that the material put before him showed that the grounds for making it were established. Thus the giving of reasons was otiose. Obviously, if the judge thought it right, any of the requirements in the order sought could be amended. The evidence on which reliance was placed by the NCA would be disclosed once the particular individual against whom the order was made was aware of its existence if he sought to challenge it. That was the safeguard. Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms was likely to be engaged in disclosure order applications, but the law permitted the making of the order if the requirements were met and so there would be no breach of the Convention rights (para 5).

Dicta of Edis J in *National Crime Agency v Simkus* [2016] EWHC 255 (Admin) at [42] not followed.



# PROCEEDS OF CRIME/RECOVERY OF ASSETS

## National Crime Agency v Simkus

[2016] EWHC 255 (Admin); [2016] WLR (D) 94, QBD (Edis J)

12 Feb 2016

*Crime — Proceeds of crime — Recovery of assets — Disclosure order made in civil recovery proceedings — Order requiring disclosure relating to property not specified in it — Whether order invalid — Proceeds of Crime Act 2002 (c 29), Pt 8, s 341(2)*

In each of three separate cases, the court considered an application by a respondent to an order obtained by the National Crime Agency (“NCA”) from the High Court seeking the discharge of that order. In each case, the respondent claimed that the procedure by which the NCA obtained the order was inappropriate. In the first case, the challenge was to a property freezing order made under Part 5 of the Proceeds of Crime Act 2002. In the second and third cases, the challenge was to a disclosure order made under Part 8 of the 2002 Act. The respondents in the second and third cases submitted, inter alia, that the disclosure order was invalid because it enabled the NCA to find out what recoverable or associated property a target might hold or might have held, and as such it was capable of requiring disclosure relating to property which was not specified in it.

On the applications—

*Held*, applications dismissed. The issue whether the disclosure order was too wide was one of statutory construction and the provisions had to be read having regard to the statutory purpose and also to the fact that the 2002 Act conferred significant powers on the executive and the court which engaged rights of those affected under the Convention for the Protection of Human Rights and Fundamental Freedoms. A civil recovery investigation might be started where the NCA was able to specify property in its application which was reasonably suspected of having been obtained through unlawful (criminal) conduct, but there was no statutory warrant for confining the investigation to that specified property. The purpose of the investigation was to ascertain what recoverable property could be identified and where it might be. The power in section 341(2)(c) of the 2002 Act to allow investigation into the extent and whereabouts of the property suggested that the investigation was not limited to property of which the NCA had substantial detail at the time of the application. Since investigations were usually conducted in order to discover that which was not known, it was not necessary that the NCA should specify at the outset who held the property, otherwise it would not be given a power to find that out by section 341(2)(b). There was no indication in the 2002 Act that Parliament intended the powers to be restricted in the way contended for and the powers could not be interpreted so as to imply one. The power granted was a wide one and the statutory purpose, namely the deterrence of serious and organised crime, explained why that was so (paras 56, 63).

Dicta of Lord Phillips of Worth Matravers PSC in *Serious Offences Crime Agency v Perry* [2013] 1 AC 182, 213, SC(E) not applied.

# PROCEEDS OF CRIME/RECOVERY OF ASSETS

## National Crime Agency v Abacha

[2016] WLR (D) 408, CA

19 Jul 2016

*Crime — Proceeds of crime — Prohibition order — Prohibition order made at request of central authority of friendly foreign state — Respondents applying to inspect foreign state's request for assistance — Proper approach to party's right to inspect — Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181), art 141D — CPRr 31.14*

On the application of the National Crime Agency (“NCA”), the High Court made a prohibition order pursuant to article 141D of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 against the respondents, prohibiting the dealing with or disposal of the assets specified in the order. The NCA had made its application at the request of the United States Department of Justice, by way of mutual legal assistance. The respondents applied for an order under CPR rr 31.14 and 31.15, requiring the NCA to permit inspection of the request for mutual legal assistance, on the basis that the request was a document which had been “mentioned” in one of the NCA’s witness statements. The judge refused their application.

On the appeal, and on the question of what was the just balance to strike between the right to inspect the request forming the jurisdictional basis of the court’s power to grant the prohibition order and the general confidentiality of executive state to state communications—

*Held*, appeal allowed. (1) The approach to a party’s right to inspect a document mentioned in a witness statement under CPR r 31.14(1) was as follows. First, the mere fact that a document was “mentioned” in one of the documents specified in rule 31.14(1) did not automatically and without more entitle the other party to inspect it. The court retained a discretionary jurisdiction to refuse inspection. Secondly, the general rule was clear. Ordinarily, if under rule 31.14(1) a document was “mentioned”, inter alia, in a witness statement, the other party had a right to inspect it. Rule 31.14 reflected basic fairness and principle in an adversarial system; in accordance with the overriding objective, the parties were to be on an equal footing. Thirdly, the right to inspect under rule 31.14 was not, however, unqualified; it was instead subject to CPR based limits, which might be invoked by the party resisting inspection—the burden resting on that party to justify displacing the general rule. Thus, “proportionality” was part of the overriding objective in rule 1.1(2)(c) and, in an appropriate case, it would be open to a party to oppose inspection on the ground that it would be “disproportionate to the issues in the case”: see rule 31(3)(2). In determining any such issue of proportionality, a court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action. So too, the mere mention of a privileged document in (for example) a statement of case might not of itself lead to a loss of the privilege; rule 31.14 was to be read with and subject to rule 31.19(3) and (5). Fourthly and further, there was nothing to suggest that the RSC approach to confidentiality had changed under the CPR. Accordingly, while disclosure and inspection could not be refused by reason of the confidentiality of the documents in question alone, confidentiality (where it was asserted) was a relevant factor to be taken into account by the court in determining whether or not to order inspection. The court’s task was to strike a just balance between the competing interests involved—those of the party asserting an entitlement to inspect the documents and those of the party claiming confidentiality in the documents. In striking that balance in the exercise of its discretion, the court might properly have regard to the question of whether inspection of the documents was necessary for disposing fairly of the proceedings in question. Fifthly there was no free-standing “necessity” test which needed to be satisfied before permitting inspection where rule 31.14 was otherwise satisfied. The question of whether inspection was “necessary to dispose fairly” of the application or case was not rendered irrelevant—and might well arise in the context of proportionality or that of confidentiality. On that analysis “necessity” was or might be (depending on the facts) a relevant factor in striking the just balance; it was not a free-standing hurdle to be considered and surmounted in isolation before inspection may be permitted

(paras 27–35).

(2) A careful balance had to be struck between the strong and legitimate interest in the confidentiality of the request and the obvious and fundamental importance of dealing justly with and between the parties in cases before the court, in accordance with the overriding objective of the CPR. The correct balance in the case called for a different answer in respect of the property “identified” in the request and the question of whether that property was “relevant property”. It was right to start from the position that letters of request were confidential. On the other hand, the striking feature of the present case was that assistance was being sought pursuant to a legislative scheme requiring that the court was satisfied of the jurisdictional basis for making a prohibition order. The matter had thus moved beyond a communication between the executive branches of the friendly foreign state and of the United Kingdom simpliciter; the court was now involved. It was not the NCA which needed to be satisfied; it had no independent decision-making role. Nor was it a situation where no more was required than the obtaining and transmission of evidence for use in proceedings where proper safeguards could be anticipated to be in place. The request required invoking the procedures of the court for the grant of a prohibition order. One of those procedures involved disclosure and inspection of documents “mentioned” under CPR r 31.14. That any party requesting the court’s assistance, could reasonably be taken to accept that it must abide by the procedural regime of the court. A foreign central authority was not in any different position. The request involved inviting the court to exercise its jurisdiction to make a prohibition order; the natural corollary was that the US Department of Justice was prepared to place before the court the materials which satisfied the jurisdictional requirements for making the order. Absent good reason for doing so, invoking the court’s jurisdiction but declining to make available the materials necessary for establishing the claim advanced was neither an attractive nor a tenable position. As to the property identified in the request, inspection for the purposes of ascertaining that the NCA evidence had accurately recorded the property identified in the request was necessary for disposing fairly of the application. As to whether the property identified was relevant property for the purpose of the Proceeds of Crime Act 2002, on the facts the just balance was different and the interests of confidentiality should prevail (paras 47–52, 56).

Decision of Laing J [2015] EWHC 357 (Admin); [2015] Lloyd’s Rep FC 411 reversed in part.

## RIOT/STATUTORY COMPENSATION FOR DAMAGE

Mitsui Sumitomo Insurance Co (Europe) Ltd v Mayor’s Office for Policing and Crime

[\[2016\] UKSC 18](#); [\[2016\] 2 WLR 1148](#); [\[2016\] WLR \(D\) 208](#), SC(E)

20 Apr 2016

*Crime — Riot — Damage — Warehouse looted and destroyed during riots — Claim for statutory compensation for riot — Whether liability limited to physical damage to property — Whether compensation for consequential losses recoverable in principle — Riot (Damages) Act 1886 (49 & 50 Vict 38) (as amended by Police Act 1964 (c 48), s 63, Sch 9 and Police Act 1996 (c 16), s 103(1), Sch 7, para 9), s 2(1)*

During widespread civil disorder and rioting in London a group of youths smashed into a warehouse, looted it and burnt it down with petrol bombs, leading to the total destruction of the plant, equipment and stock. In three separate actions the claimants, who were respectively the insurers of the occupiers of the warehouse for property, customer stock and business interruption, the insurers of the owners of the warehouse for property damage and loss of rent, and the owners of certain stock held in the warehouse, claimed compensation under the Riot (Damages) Act 1886 from the defendant, which was the statutory body responsible for oversight of the relevant police authority. On the hearing of preliminary issues, the judge held, inter alia, that liability under section 2(1) of the 1886 Act, as amended, was limited to physical damage to the premises or property in it and did not extend to consequential losses, such as loss of profit or rent. The Court of Appeal allowed the claimants’ appeals against the judge’s determination on that issue, holding that section 2(1) provided a right to compensation for all heads of loss proximately caused by physical damage to property for which the trespassing



rioter was liable at common law, save to the extent that they were excluded by the statute, that the heads of compensation recoverable were to be determined with reference to the common law of tort as it developed over time, and that, therefore, the claimants were, in principle, entitled to compensation in respect of consequential losses.

On the defendant's appeal—

*Held*, appeal allowed. Although the wording of section 2(1) of the 1886 Act alone did not disclose whether the loss for which a person would be compensated as a result of rioting was limited to physical damage to property or extended to consequential losses, the Act clearly provided only partial compensation for damage caused by rioters. Section 2(1) did not create an unqualified causal test to which the normal rules of causation in tort could readily be applied. The words of the 1886 Act had to be construed in the light of the prior legislative history, which indicated that the community had not previously stood as sureties for the rioter for all purposes and that compensation had been limited to physical damage to property. There was no reason for inferring that Parliament, when enacting the 1886 Act, had intended to extend the scope of the compensation to cover consequential losses or to mirror the common law of tort. Accordingly, on a true construction, liability under section 2(1) was limited to physical damage to property and did not extend to consequential losses (paras 13–14, 16, 18–34, 41).

*Bedfordshire Police Authority v Constable* [2009] 2 All ER (Comm) 200, CA and *Yarl's Wood Immigration Ltd v Bedfordshire Police Authority* [2010] QB 698, CA considered.

Decision of the Court of Appeal [2014] EWCA Civ 682; [2015] QB 180 reversed.

## SELF DEFENCE/REASONABLE FORCE

### R (Collins) v Secretary of State for Justice

[2016] EWHC 33 (Admin); [2016] 2 WLR 1303; [2016] All ER 490; [2016] 1 Cr App R 25; [2016] WLR (D) 13, DC

15 Jan 2016

*Crime — Self defence — Householder case — Whether householder defence incompatible with Convention right to life — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 2 — Criminal Justice and Immigration Act 2008 (c 4), s 76(5A) (as inserted by Crime and Courts Act 2013 (c 22), s 43(2))*

In the early hours of the morning the claimant entered the home of B through the unlocked front door. The claimant was confronted by B who forced him into a headlock on the floor. The first police officers on the scene noticed that the claimant was not moving, his face was purple in complexion and he was not breathing. An ambulance was called and paramedics managed to revive him. As a result of that restraint, the claimant suffered serious personal injury from which he was not expected to recover. Following a police investigation the Crown Prosecution Service (“CPS”) decided not to prosecute B. The lawyer conducting a review of the decision on behalf of the CPS concluded that a jury was likely to find that B honestly believed that it was necessary to use force until the police arrived and also that at least one of the purposes for which B used force was to defend himself, it being “beyond any doubt” that he believed the claimant to be a trespasser, and that the “householder” provisions within section 76 of the Criminal Justice and Immigration Act 2008, as amended, applied. The claimant sought judicial review against the Secretary of State, contending that the “householder” defence was incompatible with article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The claimant abandoned a further claim against the Director of Public Prosecutions based on the CPS's decision not to prosecute B.

*Held*, claim dismissed. (1) The common law relating to self defence required consideration of two elements. The first was a subjective element, namely whether the defendant genuinely believed that it was

necessary to use force to defend himself; the second was an element which was partly objective (whether the nature and degree of force used was reasonable in the circumstances) and partly subjective (on the basis that what was reasonable had to be tested against the circumstances as the defendant genuinely, even if mistakenly, believed them to be). Section 76(5A) of the 2008 Act did not extend the ambit in law of the second self defence limb but, properly construed, provided emphasis to the requirement to consider all the circumstances permitting a degree of force to be used on an intruder in householder cases which was reasonable in all the circumstances (whether that degree of force was disproportionate or less than disproportionate). The operation of section 76(5A) automatically excluded a degree of force which was grossly disproportionate from being reasonable in householder cases. If the degree of force was not grossly disproportionate, section 76(5A) did not prevent that degree of force from being considered reasonable within the meaning of the second self defence limb. On the other hand, it did not direct that any degree of force less than grossly disproportionate was reasonable. Thus, presuming that the defendant genuinely believed that it was necessary to use force to defend himself, section 76(5A), read together with section 76(3) and the common law on self defence, required two separate questions to be put to the jury in a householder case: (i) was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer was “yes”, he could not avail himself of self defence. If “no”, then (ii) was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he had a defence. If it was unreasonable, he did not. Whether it was or was not reasonable would depend on the particular facts and circumstances of the case. On the plain words of section 76, a jury should consider those two questions disjunctively. The answer to the first question did not provide the answer to the second question (paras 13, 17–20, 22, 33, 72).

(2) As to compatibility of section 76(5A) of the 2008 Act with article 2 of the Convention, the ultimate question was whether the criminal law of England and Wales effectively deterred offences against the person in householder cases. The starting point had to be the deterrent effect of the catalogue of offences against the person for which a householder using force against an intruder might be liable. Murder, manslaughter, and non-fatal offences against the person applied without distinction in terms of the substantive definition of the offence in householder cases. Section 76(5A) served to exclude a householder’s grossly disproportionate use of force from being reasonable. When read with section 76(6), which provided that in non-householder cases all disproportionate force was excluded from being reasonable, section 76(5A) could be seen to offer a discretionary area of judgment to the jury as to whether if the force was disproportionate, it was nevertheless reasonable in the circumstances. The effect of section 76(5A) was not to give householders carte blanche in the degree of force they used against intruders in self defence. A jury had ultimately to determine whether the householder’s action was reasonable in the circumstances as he believed them to be. In that regard, the reasonableness limb of self defence was compatible with the article 2.2 requirement of “absolute necessity”. On any view, therefore, the test of reasonableness in the circumstances in private party householder cases, even after the minor qualification of section 76(5A), would not cause a breach of the article 2.1 positive obligation, which was shorn of strict proportionality. Accordingly, the criminal law of England and Wales on self defence in householder cases, taken as a whole, fulfilled the framework obligation under article 2.1 of the Convention (paras 58–61, 63, 64, 70, 71, 72).

## SENTENCE/AGGRAVATED VEHICLE-TAKING

R v Beech

[2016] WLR (D) 229, CA

04 May 2016

*Crime — Sentence — Aggravated vehicle-taking — Defendants passengers in stolen getaway car being driven at very high speeds — Defendants sentenced to disqualification from driving until having passed extended driving test — Whether sentence appropriate where defendants passengers — Theft Act 1968 (c 60), s 12A — Road Traffic Offenders Act 1988 (c 53), s 36*

The four defendants were variously convicted or pleaded guilty to offences of conspiracy to rob, conspiracy to steal and aggravated vehicle-taking, contrary to section 12A of the Theft Act 1968, and were sentenced to terms of imprisonment. The three who were involved in the conspiracy to steal were apprehended by the police as they were stealing from an ATM. They attempted to escape by driving off in a stolen car, at one point reaching a speed of 150 mph. In addition to the terms of imprisonment imposed, all three were disqualified from driving for periods of two to five years and each was ordered to take an extended driving test at the end of the period of disqualification, pursuant to section 36 of the Road Traffic Offenders Act 1988. The two who were passengers in the getaway car appealed against the imposition of the extended driving test on the grounds that it was wrong in principle to make such an order where they were only passengers, relying on earlier Court of Appeal authority to that effect.

On the appeal—

*Held*, appeals dismissed. Although these two defendants were not as culpable as the driver of the getaway vehicle, their culpability was nevertheless extremely high because the car was being driven at exceptionally high speeds that took no account of the risks to other members of the public using the roads. The purpose of an extended driving test was to make sure that offenders were safe to drive again and it was essential that this was brought home to both these defendants. The judge accordingly exercised his discretion correctly and had been exactly right to order in each of these cases that they be disqualified from driving until an extended driving test had been passed.

*R v Wiggins* [2001] RTR 3, CA and *R v Bradshaw* (Note) [2001] RTR 4, CA not followed.

# SENTENCE/APPEALS AGAINST

R v Rogers (Georgina)  
[2016] EWCA Crim 801; [2016] WLR (D) 358, CA

01 Jul 2016

*Crime — Sentence — Appeals against sentence — Appellant seeking to adduce fresh evidence on appeal — Guidance on application of statutory conditions — Criminal Appeal Act 1968 (c 19), s 23*

*Crime — Sentence — Practice — Defendant pleading guilty to offence for which sentence mandatory — Defendant submitting that exceptional circumstances justifying reduction in sentence — Proper procedure before sentencing judge*

The general principles which apply in relation to the admission, pursuant to section 23 of the Criminal Appeal Act 1968, of fresh evidence in appeals against conviction will generally apply also in appeals against sentence, so that it will usually be case and fact specific and will focus on the interests of justice. In sentencing appeals the court will scrutinise intensely any application to give factual explanation that was not before the sentencing court. The terms of the Criminal Practice Direction make clear the procedure which should be followed in relation to establishing the factual basis for sentencing. It is therefore the duty of all advocates to deploy before the sentencing judge all the evidence, information and other material on which they seek to rely. In certain circumstances the court will receive updated information about the offender which was not before the trial judge. The formal procedures for the admission of fresh evidence are not followed. The Court of Appeal, Criminal Division, simply considers the evidence before it. The exception is strictly limited. It will include updated pre-sentence and prison reports on conduct in prison after sentence, but not fresh psychiatric or psychological evidence in support of an argument that a finding of dangerousness ought not to have been made or a hospital order should have been made. In such a case, the court will apply the provisions of section 23. Compliance with section 23 is necessary for two reasons: first, because it is incumbent on those acting for the defendant to call all the evidence before the sentencing court, persuasive evidence is required to explain why it was not all called; second, the court must consider whether it is in the interests of justice that it should be admitted notwithstanding that failure. If the advocate representing the applicant before the court did not represent the applicant at the trial or sentencing hearing, that advocate must obtain information from the advocate previously instructed as to why the evidence was not called (paras 1–10).

*R v Jones (Steven)* [1997] 1 Cr App R 86, CA, *In re Caines* [2007] 1 WLR 1109, CA, *R v Erskine* [2010] 1 WLR 183, CA, *R v Beesley* [2012] 1 Cr App R (S) 15, CA and *R v Thames Water Utilities* [2015] 1 WLR 4411, CA considered.

Where a defendant has pleaded guilty to an offence for which the sentence is mandatory and he wishes to submit that there are exceptional circumstances which justify a lesser sentence, the procedure before the sentencing judge should follow that of a Newton hearing (*R v Newton* (1982) 77 Cr App R 13). If such a hearing takes place the judge must determine the matters to the criminal standard of proof and the burden is on the Crown to disprove the defendant's account of the circumstances of the offence. If the Crown fails to do so, the judge must proceed on the basis the defendant's version is correct. It does not, however, follow that the judge, even if he accepts the defendant's version of events, will find that it amounts to exceptional circumstances. The hurdle for the defendant, in establishing exceptional circumstances, remains a high one (para 121).

# SENTENCE/CONFISCATION ORDER

## R v Brooks

[2016] EWCA Crim 44; [2016] 4 WLR 79; [2016] WLR (D) 168, CA

10 Mar 2016

*Crime — Sentence — Confiscation order — Defendant convicted of conspiracy to import cocaine following seizure by Irish navy — Confiscation order made in sum including value of cocaine and 50% interest in property in Spain — Whether value of drugs part of defendant’s benefit — Whether value of seized drugs capable of being part of defendant’s available assets — Whether value of Spanish property part of defendant’s available assets — Whether mortgage payments tainted gifts — Proceeds of Crime Act 2002 (c 29), ss 9(1)(b), 76(4), 77(1)(b)(2), 78(1)*

Following the seizure of a large consignment of cocaine by the Irish navy, the defendant was convicted in the United Kingdom of conspiracy to import drugs and sentenced to a term of imprisonment. In confiscation proceedings under the Proceeds of Crime Act 2002 the recorder ruled that the defendant had a criminal lifestyle for the purposes of section 75 of the 2002 Act. He assessed the defendant’s benefit as being a little over £3.6m, comprising the value of the drugs at just under £3m and a 50% interest in a Spanish property valued at £296,000, and held that the recoverable amount was the same as the benefit figure on the basis that, although the defendant’s identifiable assets amounted to just under £1,400, he had undisclosed assets which he had failed to show were less than his benefit. Accordingly, the recorder made a confiscation order in the sum of the benefit figure. The defendant appealed against the order on the grounds that the recorder had erred in (i) including the value of the drugs in the benefit figure on the basis that the defendant had purchased them or contributed to their purchase, when there was no evidence that the defendant had done so; (ii) including the value of the drugs in the recoverable amount, when they had been seized by the Irish authorities; and (iii) including the value of the property in the recoverable amount, when under Spanish law the defendant’s partner was the legal and equitable owner.

On the appeal—

*Held*, appeal allowed. (1) There had been no evidence before the judge to enable him to conclude that the defendant had purchased or contributed to the purchase of the drugs. However, there was ample evidence to demonstrate that he had nevertheless “obtained” the drugs within the meaning of section 76(4) of the Proceeds of Crime Act 2002 and thus benefited from his criminal conduct in respect of the drugs. The fact that the drugs had been seized by the Irish navy did not operate to take their value outside the benefit figure. Accordingly, although the judge had erred in finding that the defendant had purchased or contributed to the purchase of the drugs, he had been right to include their value in the benefit figure (paras 16–20).

(2) It was established that there was no principle that a court was bound to reject a defendant’s case that his current realisable assets were less than the full amount of his benefit, merely because it concluded that he had not revealed their true extent or value. The judge had moved too precipitately from a rejection of the defendant’s evidence to an inclusion of the value of the drugs in the available amount. In truth, once the drugs had been seized they no longer represented an asset of any value held by, or available to, the defendant (paras 25, 27, 30). *R v McIntosh* [2012] 1 Cr App R (S) 60, CA and *R v Kakkad* [2015] 1 WLR 4162, CA applied.

(3) With regard to the Spanish property, there was no need for a consideration of what the position was under Spanish law. The judge had found that the defendant must have made the mortgage payments in respect of the property on the basis that his partner had no ability to meet them. This should have led him to consider the tainted gifts provisions under sections 77 and 78 of the Proceeds of Crime Act 2002. Application of section 77(1)(b)(2) should have led to a finding that the mortgage payments were tainted gifts since, applying section 78(1), there was no evidence that they had been made for consideration. The judge should have calculated the value of the payments, adjusted it for inflation and treated it as part of the available sum, pursuant to section 9(1)(b). The inclusion of a 50% beneficial interest in the value of the Spanish property had been wrong, since it

exceeded the value of the tainted gifts and there was no firm basis for it (paras 36–37).

(4) Accordingly, in significant respects, the judge’s approach to the question of the recoverable or available amount was seriously flawed in a way which had resulted in an excessive confiscation order being made. The nature of the defendant’s activities led to the inference that the defendant had significant amounts of cash available to him. The judge found that the only available assets apart from the Spanish property had been cash, premium bonds and £1,400 in a bank account. He would have been entitled to add the value of the mortgage payments, uplifted for inflation. After applying the currency conversion rate, the total of the specifically identifiable assets was £135,000. Given the judge’s findings as to the nature and level of the defendant’s cash lifestyle, at the time of the hearing, there remained available substantial hidden assets which should be taken into account in the section 9 calculation, in addition to the identified assets and tainted gifts. The judge’s error in taking into account the value of the drugs as approaching £3m led to the overall order in the sum of £3.6m. Taking into account the tainted gifts and the £1,400 of specifically identified assets, the value of available assets was £500,000. The original confiscation order would be quashed and a confiscation order in the sum of £500,000 substituted (paras 38–44).

## SENTENCE/CONFISCATION ORDER

### R v Palmer

[2016] EWCA Crim 1049; [2016] WLR (D) 441, CA

28 Jul 2016

*Crime — Sentence — Confiscation order — Defendant convicted of engaging in licensable conduct otherwise than in accordance with licence — Whether benefit acquired from criminal conduct or lawful trading — Private Security Industry Act 2001 (c 12), s 3(1)(6) — Proceeds of Crime Act 2002 (c 29), ss 76, 340(2)*

The defendant traded without a licence as the sole principal of a security business, which required him to have a licence for some of the activities he undertook, such as manned-guarding. He was convicted of engaging in licensable conduct, otherwise than in accordance with a licence contrary to section 3(1) and (6) of the Private Security Industry Act 2001 and sentenced to three months’ imprisonment, suspended for 12 months, with a requirement to carry out 100 hours of unpaid work. At a confiscation hearing pursuant to the Proceeds of Crime Act 2002 the judge refused to make a confiscation order against the defendant, holding that his receipts had been obtained as a result of lawful trading activity in the security business and not from his criminal conduct, which had been his failure to obtain a licence.

*Held*, appeal allowed. The question of whether benefit had been obtained from criminal conduct, for the purposes of section 76 of the Proceeds of Crime Act 2002, depended on the proper interpretation of the statute creating the offence, which meant identifying the criminal conduct which had been proved or admitted. It was not helpful to look at other statutes and other factual circumstances to answer the question that arose in any particular case. Engagement in licensable conduct was an essential element of the offence under section 3(1) of the Private Security and Industry Act 2001. Section 3(1) made clear that it was an offence for a person to engage in any licensable conduct, with an exception where it was engaged in, in accordance with a licence. The engaging in licensable conduct, namely manned-guarding, without a licence, amounted to criminal conduct within the meaning of section 340(2) of 2002 Act. Section 3(1) of the 2001 Act created and defined a prohibited act and criminalised the activity of engagement in licensable conduct, not simply failing to obtain a licence (paras 18, 22, 24, 30, 31).



# SENTENCE/CONFISCATION ORDER

R v Powell (Jacqueline)

[2016] EWCA Crim 1043; [2016] WLR (D) 439, CA

27 Jul 2016

*Crime — Sentence — Confiscation order — Directors of waste management company committing environmental offences and subsequently going into liquidation — Whether pecuniary advantage accruing to company constituting benefit to directors — Whether appropriate to pierce corporate veil — Proceeds of Crime Act 2002 (c 29), s 76(5)*

The first defendant was a director and major shareholder of a waste management company. The second defendant was active in the management of operations at the site and held a small number of shares. The first defendant was convicted of two counts of consenting or conniving as a director in the failure of the company to comply with the condition of an environmental permit, and one count of consenting or conniving as a director of the company in the commission of an offence by the company, namely treating, keeping or disposing of controlled waste in a manner likely to cause pollution. The second defendant pleaded guilty to similar offences, not on the basis of consent or connivance, but on the basis that the company's offence was attributable to his neglect. They were sentenced to suspended terms of imprisonment. At the subsequent confiscation proceedings the Crown contended that by abandoning the site the company had avoided the considerable costs of dealing with leachate and the resultant pollution and had thereby obtained a pecuniary advantage, which should be attributed to the defendants when calculating their benefit under section 76(5) of the Proceeds of Crime Act 2002. The judge rejected that application on the basis that the corporate veil could only be pierced on the "evasion" principle or the "concealment" principle which, he held, only applied to the sole controller or sole owner of the company. Accordingly, the judge made confiscation orders in sums lower than those sought by the Crown, based on the defendants' direct benefit from the offences. The Crown applied under section 31 of the 2002 Act for leave to appeal against the confiscation orders, seeking to vary them upwards, contending that the judge had erred in holding that it was necessary for the prosecution to establish that a defendant was the sole controller and/or sole shareholder of a company before he or she could be held liable for what was initially the company's avoided liability. The defendants accepted that the judge's reasoning was incorrect on this point but contended that an individual's degree of control of a company was an important factor to be taken into account in deciding whether a case was one in which the fact of incorporation could be disregarded.

On the Crown's application for leave to appeal—

*Held*, application refused. When determining whether to pierce the corporate veil in the context of confiscation proceedings, regard should be had to the nature and extent of the criminality involved. In the present case there had been no facade or concealment for hiding behind the company's structure in a way which abused the corporate shield. The company was not being run for an unlawful purpose but rather was a legitimate business which had broken the criminal law through its failure to observe the necessary regulations. It was also relevant that the defendants were not the sole shareholders. So it could not be concluded that the corporate veil could be pierced on the grounds that the defendants had done acts in the name of the company which constituted a criminal offence. Nor did the evasion principle apply. There was no separate obligation imposed on either of the defendants; their criminal liability arose in a secondary way through the operation of the well-known framework by which criminal responsibility could attach to senior managers and officers of a company if consent, connivance or neglect were present and the relevant legislation so provided. Only where there was abuse of the corporate veil to evade or frustrate the law could the legal personality of the company be disregarded and persons in the position of the defendants fixed with a personal liability, for example under the confiscation procedures.

When the basis upon which the prosecutor had put forward this application was examined, the facts pointed away from showing that this was the sort of case in which a benefit obtained by a company should be treated in

law as a benefit obtained by the individual criminal. Neither of these defendants had a personal liability under the 2002 Act confiscation procedures for the costs of cleaning up the company's polluted site. Accordingly, the judge's decision was correct, albeit his reasoning was erroneous (paras 24–28, 30–35).

*R v Seager* [2010] 1 WLR 815, CA, *Prest v Prest* [2013] 2 AC 415, SC(E) and *R v Boyle Transport (Northern Ireland) Ltd* [2016] 4 WLR 63, CA considered.

## SENTENCE/CONFISCATION ORDER

R v Malhi (Hardip Singh)

[2016] WLR (D) 347, CA

29 Jun 2016

*Crime — Sentence — Confiscation order — Reconsideration of confiscation order — Term of imprisonment in default of payment — Maximum term increased subsequent to date of offence — Imposition of term of imprisonment on reconsideration longer than maximum applicable at date of offence — Whether imposition of such term unlawful — Whether term imposed manifestly excessive — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 7 — Serious Crime Act 2015 (c 9), s 10*

In 2006 the defendant pleaded guilty to a charge of conspiracy to obtain property by deception. He was sentenced to 12 months' imprisonment. In confiscation proceedings his criminal benefit was assessed at over £800,000 but, as he had no available assets, a confiscation order was made in the nominal sum of £1. Subsequently, the defendant having bought a house, the prosecution applied under section 22 of the Proceeds of Crime Act 2002 for reconsideration of the available amount. In July 2015 the amount of the confiscation order was varied from £1 to £108,010, the value of the defendant's equity in the house, with five years' imprisonment to be served in default of payment. The defendant made a late application for permission to appeal against conviction and sentence. The application was dismissed except that it was adjourned as to two of the proposed grounds of appeal, namely (i) that the default sentence was excessive because, at the time of the offence, the maximum period of imprisonment in default of payment of a confiscation order in relation to a sum between £100,00 and £250,000 was three years and the judge had therefore been wrong to have regard to the increased maximum period provided for in section 10 of the Serious Crime Act 2015 which, by regulation 3(g) of the Serious Crime Act 2015 (Commencement No 1) Regulations 2015 came into force on 1 June 2015; (ii) that the term imposed was manifestly excessive.

*Held*, permission to appeal given and appeal allowed. (1) Section 10 of the Serious Crime Act 2015 applied to any order made on or after 1 June 2015 irrespective of the date of the offence. The default term related to the amount of the available assets at the date of the order. The commencement order contained no transitional provisions. Further, it was clear that other provisions applied to all orders made on or after 1 June 2015. (2) Increases in the default period were not incompatible with article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 7 was concerned with penalties for offences. The present case was concerned with a penalty for not discharging an order. Any default would have to occur after 1 June 2015, so there could be no breach of article 7 because the penalty was not referable to the offence but to something which occurred later than 1 June 2015. (3) The default period imposed was manifestly excessive. The maximum period was inappropriate and would be quashed; a default term of three years' imprisonment was to be substituted.

# SENTENCE/CONFISCATION ORDER

**R v Boyle Transport (Northern Ireland) Ltd**  
[\[2016\] EWCA Crim 19](#); [\[2016\] 4 WLR 63](#); [\[2016\] WLR \(D\) 121](#), CA

25 Feb 2016

*Crime — Sentence — Confiscation order — Assessment of benefit from criminal conduct — Second and third defendants pleading guilty to conspiracy and resigning as company directors — New company established by second and third defendants with different directors — Assets from old company transferred to new company — Whether appropriate to pierce corporate veil — Proceeds of Crime Act 2002 (c 29), s 76(2), 50*

The second and third defendants who were charged with conspiring to make false instruments pleaded guilty to the conspiracy and resigned as the sole directors of a road haulage business. They were sentenced and a new company, the first defendant, was established with different directors. The assets from the old company were transferred to the first defendant and it obtained an operator's licence. At the confiscation hearing, pursuant to the Proceeds of Crime Act 2002, the second and third defendants' agreed benefit from their general criminal conduct was £10,016,810 in each case and the judge made confiscation orders against them in the available amounts of £1,097,622 and £738,171 respectively. They were later returned to prison to serve default sentences and the judge appointed an enforcement receiver over their realisable assets. He found the transfer of assets from the old company to the first defendant had not been genuine and treated the turnover and assets of the old company as property obtained by and belonging to the second and third defendants individually. He lifted or pierced the corporate veil by extending the appointment of the enforcement receiver over the assets of the first defendant. The first defendant appealed against the judge's decision and the second and third defendants applied for leave to appeal against their confiscation orders.

*Held*, appeals allowed. Where an issue of lifting the corporate veil was raised in criminal confiscation cases, Crown Courts needed to take into account the general propositions which were applicable to such cases. (1) The test was not simply one of justice, which would be vague, unprincipled and give rise to uncertainty and inconsistency in decision-making. (2) In assessing the reality of the matter, the Crown Court could not depart from the established principles which related to the separate legal status of a limited company. (3) The confiscation process under the Proceeds of Crime Act 2002 was not aimed at punishment and the punishment addressed by the sentence should not be topped up by the confiscation process. (4) The principles relating to the doctrine of lifting the corporate veil in the confiscation context were the same as in the civil courts. The 2002 Act contained no provision sanctioning a departure from the ordinary principles of company law. Crown Courts had to avoid invitations to adopt a robust or broad-brush approach and being distracted by niceties. (5) Regard should be had to the nature and extent of the criminality involved. (6) Where a company involved in relevant wrongdoing was solely owned and controlled by the defendant, it did not necessitate a conclusion, in a confiscation case, that it was an alter ego company, whose turnover and assets were to be equated with being property of the defendant himself. (7) All such decisions had to be geared to the facts and circumstances of the case (paras 88–97, 106, 108, 112, 131).

*Prest v Prest* [2013] 2 AC 415, SC(E) applied.

*R v Seager* [2010] 1 WLR 815, CA, *R v Sale* [2014] 1 WLR 663, CA and *R v McDowell* [2015] 2 Cr App R(S) 14, CA considered.

## SENTENCE/CONSIDERATION OF NEW MATERIAL FOLLOWING A-G REFERENCE

R v Nguyen (Attorney General's Reference No 79 of 2015)  
[\[2016\] EWCA Crim 448](#); [\[2016\] 4 WLR 99](#); [\[2016\] WLR \(D\) 167](#), CA

23 Mar 2016

*Crime — Court of Appeal (Criminal Division) — Reference by Attorney General — Court of Appeal finding sentence to have been unduly lenient — Whether permissible to have regard to new material in deciding sentence to be substituted — Criminal Justice Act 1988 (c 33), s 36(1)(b)(ii)*

The defendant pleaded guilty to attempting to inflict grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 and to having an offensive weapon contrary to section 1(1) of the Prevention of Crime Act 1953. He was sentenced to three years and four months' imprisonment and 12 months' imprisonment respectively. The Attorney General applied to the Court of Appeal under section 36 of the Criminal Justice Act 1988 for leave to refer the sentence as unduly lenient. At the same time the prosecution applied to the Crown Court under the Powers of Criminal Courts (Sentencing) Act 2000 for the sentence to be varied on the grounds that new material showed that, contrary to the way in which the case had been presented at the sentencing hearing, the complainant had been specifically targeted by the defendant. The time limit for making a variation order was subsequently extended by a Crown Court judge, and a variation order was later made by the sentencing judge. The defendant appealed against the varied sentence. On the hearing in the Court of Appeal it was common ground that there was no power to extend the time limit for the making of a variation order, so that the variation order had been invalid.

On the appeal and the reference—

*Held*, defendant's appeal allowed and Attorney General's application granted. It was common ground that the varied sentence had been invalid, so the original sentence stood. The new material could not be taken into account in considering whether the sentence had been unduly lenient: see R v WB (Attorney General's Reference No 19 of 2005) [2011] 1 Cr App R (S) 85, followed in R v Quain (Attorney General's Reference No 84 of 2009) [2010] EWCA Crim 1879. Those decisions left open the question whether, once a sentence had been found to be unduly lenient, new material could be taken into account for the purpose of substituting a fresh sentence. That question had been ventilated in R v Pearson (Attorney General's Reference No 74 of 2010) [2011] EWCA Crim 873 but had not been fully argued. The question turned on section 36(1)(b)(ii) of the Criminal Justice Act 1988 by which the court had to "pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with [the person to be sentenced]". The defendant submitted that the power of the original sentencing court depended on the facts so that the Court of Appeal could not consider fresh aggravating factors, but that could not be right as the responsibility was to pass an appropriate sentence and new information had therefore to be taken into account. The sentencing judge had erred in concluding that an extended sentence could not be passed and in taking too low a starting point. Accordingly, both the varied sentence and the original sentence would be quashed and an extended sentence of 11 years (seven years in custody and four years' extension) substituted.

## SENTENCE/DISHONEST BASIS OF PLEA

R v Newell (Luke)  
[\[2016\] WLR \(D\) 361](#), CA

05 Jul 2016

*Crime — Sentence — Plea of guilty — Defendant pleading guilty on basis dishonestly designed to reduce culpability — Appropriate reduction in sentence in such circumstances*

The defendant pleaded guilty to attempted burglary. His written basis of plea claimed that he had acted alone, which, in accordance with the Sentencing Guidelines for burglary, was less culpable than acting with others. He subsequently gave evidence to that effect at the trial of a co-defendant but, since the co-defendant was convicted, the defendant's claim to have acted alone was obviously not believed. The judge sentenced both the co-defendant and the defendant to three years' imprisonment, stating that he would give the defendant no credit for his plea of guilty because the basis of plea had been designed, dishonestly, to lower his culpability.

On the defendant's appeal against sentence—

*Held*, appeal allowed. It was necessary to distinguish between the defendant who had pleaded guilty and the co-defendant who had been convicted after a trial. There had to be some credit for a plea of guilty, even in circumstances where the basis of plea was dishonest. In all the circumstances, a reduction of just over 10% was appropriate. Accordingly, the sentence would be reduced from three years' imprisonment to 32 months' imprisonment.

## SENTENCE/DISQUALIFICATION FROM DRIVING

R v Needham  
[\[2016\] EWCA Crim 455](#); [\[2016\] WLR \(D\) 250](#), CA

28 Apr 2016

*Crime — Sentence — Disqualification from driving — Statutory provisions applying where court disqualifying offender and imposing sentence of imprisonment or offender already serving custodial sentence — Guidance as to correct interpretation of and interrelationship between provisions — Road Traffic Offenders Act 1988 (c 53) (as amended by Coroners and Justice Act 2009 (c 25), s 137, Sch 16, para 2(2) and Criminal Justice and Courts Act 2015 (c 2), s 30(1)(b)), ss 35A, 35B*

Where a court is sentencing an offender for an offence for which he could be disqualified from driving under sections 34 or 35 of the Road Traffic Offenders Act 1988 it should ask itself the following questions. (1) Does the court intend to order that the offender be disqualified under section 34 or 35 for any offence? If yes, go to step (2). (2) Does the court intend to impose a custodial term for that same offence? If yes, section 35A of the 1988 Act applies and the court must impose an extension period for that same offence and consider step (3). If no, section 35A does not apply and the court must go to step (4). (3) Does the court intend to impose a custodial term for another offence (which is longer or consecutive) or is the defendant already serving a custodial sentence? If yes, consider what increase (“uplift”) in the period of “discretionary disqualification” is required to comply with section 35B(2) and (3), ignoring in accordance with section 35B(4) any custodial term imposed for an offence involving disqualification under section 35A: the total period of disqualification will be the sum of the discretionary period, the extension period and the uplift. If no, there is no need to consider section 35B: the total period of disqualification will be the sum of the discretionary period and the extension period. (4) Does the court intend to impose a custodial term for another offence or is the defendant



already serving a custodial sentence? If yes, consider what increase (“uplift”) in the period of “discretionary disqualification” is required to comply with section 35B(2) and (3): the total period of disqualification will be the sum of the discretionary period and the uplift (paras 27, 31).

In section 35A(4)(h) “the custodial sentence imposed” means the sentence imposed in respect of the specific offence or offences for which both a custodial sentence and an order of disqualification were made (para 24). Where section 36B is engaged, the phrase “must have regard” in section 36B(2) appears to give a greater degree of latitude to the sentencer in fixing the term of disqualification than that which is achieved by the extension period mechanism under section 35A. But whilst section 35B is couched in language which recognises judicial discretion, courts are expected to make the section 35B adjustment or uplift in a way which ensures that the full period of disqualification is served outside custody (paras 26, 30).

Where an offender has spent time on remand prior to sentencing it is open to the court to take that into account in determining the appropriate discretionary period under section 35A (para 36).

Where an offence carries an obligatory minimum period of disqualification, that minimum period relates to the discretionary period alone, not the discretionary period plus the extension period (para 39).

When sentencing under section 35A the judge should state the total period of disqualification, breaking that period down into the discretionary and extension periods. When sentencing under section 35B the court should state the total period of disqualification imposed but then explain how the legislative steer of this section has been taken into account by indicating what the period of disqualification would have been but for section 35B and then indicating the period added by way of upward adjustment for the purposes of section 35B. Again, brief reasons should be given for the imposition of both these elements (para 48).

## SENTENCE/IMPRISONMENT FOR PUBLIC PROTECTION

### R v Roberts (Mark)

[\[2016\] EWCA Crim 71](#); [\[2016\] 1 WLR 3249](#); [\[2016\] WLR \(D\) 154](#), CA

18 Mar 2016

*Crime — Sentence — Imprisonment or detention for public protection — Sentences imposed in accordance with statutory criteria — Whether court having jurisdiction to review such sentences where changes subsequently taking place in penal system*

In each of the 13 applications before the court, the applicants applied for an extension of time in which to apply for leave to appeal against sentences of imprisonment or detention for public protection (“IPP”), imposed between 2005 and 2008 under the Criminal Justice Act 2003. Before the sentence of IPP was amended by the Criminal Justice and Immigration Act 2008, the court was required to make the assumption that an offender was dangerous if he had been convicted on an earlier occasion of a specified offence, unless it was unreasonable to do so. Where he was found to be dangerous, and over 18, the court was required to pass a sentence of IPP or life imprisonment; the 2003 Act removed all discretion from the court once it was found that the offender was dangerous. All the applicants had either been detained in custody long after the expiry of the minimum term or had been recalled for breach of licence. The applicants submitted (1) that whatever might have been the position at the time the sentences of IPP were passed, the Court of Appeal had power under section 11 of the Criminal Appeal Act 1968 to pass sentences that, in the light of what had happened over the intervening years, now would be the proper sentence; (2) the Court of Appeal should reconsider the assessments made by sentencing judges in the light of R v Lang [2005] EWCA Crim 2864; [2006] 1 WLR 2509, and (3) a time could and had been reached when the length of the imprisonment was so excessive and disproportionate compared to the index criminal offence that it could amount to inhuman treatment under article 3 or arbitrary detention under article 5 of the European Convention for the Protection of Human Rights



and Fundamental Freedoms. That was because the detention no longer had any meaningful link to the index offence. A much delayed review of a sentencing decision could therefore be a mechanism the court could employ to avoid a breach of those Convention Rights. As the period now served by each of the applicants was so much longer than any conceivable determinate sentence would have required, the continued detention amounted to preventative detention and was therefore arbitrary.

*Held*, applications for extensions of time refused. (1) The Court of Appeal, Criminal Division, was a court of review; its function was not to conduct a sentencing exercise of its own from the beginning; it was not established to perform the function suggested nor to carry out that function and it could not do so as presently constituted. The rectification of any injustice in the way in which the operation of those sentences had in fact eventuated was a matter for the Parole Board, or, if a change was required for the regime for release, for the Executive and Parliament under the powers granted under section 128 of Legal Aid, Sentencing and Punishment of Offenders Act 2012. Such a change would not amount to any impermissible interference with the sentence passed by the courts; it would be to correct a position that might have been unforeseen when the IPP sentencing regime was enacted. (2) In each case, for the reasons set out in respect of each application, each of those sentences was passed in accordance with the statutory criteria as interpreted in the case law of the Court of Appeal (Criminal Division). (3) There was nothing to suggest that a sentence of IPP in itself was a violation of articles 3 or 5 of the Convention. All that had been suggested was that the way in which a person subject to IPP had been dealt with long after sentence might render the detention arbitrary. That would not make the original decision of the court wrong. It was only if the system of review broke down or ceased to be effective could it possibly be the case that the detention became arbitrary. If such a state of affairs was reached, that would not be the consequence of the original sentence providing for arbitrary detention, but of subsequent events. It would not, therefore, be a matter for the Court of Appeal (Criminal Division). It would be as a result of a failure by the Secretary of State properly to carry out the sentence of the court or a failure by the Parole Board and would therefore be a matter for judicial review of the actions of the Secretary of State or the Parole Board. Accordingly, in each case, the judge had correctly applied the law and passed a sentence in accordance with the 2003 Act as interpreted in the decisions of the Court of Appeal (Criminal Division) (paras 19—21, 23, 30, 31, 41, 43).

## SENTENCE/LEAVE TO APPEAL

### R v Hyde (Daniel)

[\[2016\] EWCA Crim 1031](#); [\[2016\] WLR \(D\) 391](#), CA

17 Jul 2016

*Crime — Sentence — Leave to appeal — Whether single judge entitled to grant leave to appeal on limited grounds only — Guidance — Criminal Appeal Act 1968 (c 19), ss 11(2), 31*

The Court of Appeal (Criminal Division) gave the following guidance in relation to the granting of leave, under section 31 of the Criminal Appeal Act 1968, to appeal against sentence:

(1) The single judge is entitled to grant leave to appeal against sentence on limited grounds or against part of a sentence only. (2) The limited basis on which leave to appeal is granted should be made unambiguously clear on the form SJ. (3) It is a matter for the discretion and evaluation of the single judge (where not refusing leave outright on all grounds) as to whether to grant leave to appeal on limited grounds or whether to grant leave to appeal generally. (4) If an applicant desires to pursue those grounds for which leave to appeal has been refused by the single judge he is required to renew his application in the usual way within the prescribed time limit. (5) Where the single judge has granted leave, either generally or on a limited basis, leave from the full court is required to advance a further ground formulated since the single judge's decision. (6) If limited leave is granted by the single judge together with a representation order, that funding is limited to the ground(s) identified as arguable by the single judge. It will only extend to arguing renewed grounds of appeal if the full

court subsequently grants leave on the renewed grounds. (7) No different approach is called for where one element of the sentence relates to a Bail Act offence (although of course leave is not required to argue any ground challenging a sentence for a Bail Act offence). (8) Where a sentence requires to be corrected in order to put right an unlawful element of the sentence, but the totality of the sentence will not arguably be affected by correction of such error and there are no other grounds considered arguable and there is no other complexity, the single judge ordinarily should grant leave to appeal on that part of the sentence only, withholding a grant of representation order; the matter will then be dealt with by the full court as a non-counsel application. If in such a case any other grounds have been raised and rejected by the single judge the applicant is then required to renew in the usual way if he wishes to pursue those grounds (paras 15–17, 19–29, 31, 32).

## SENTENCE/OFFENDER ASSISTING POLICE

R v AXN

[2016] EWCA Crim 590; [2016] WLR (D) 292, CA

27 May 2016

*Crime — Sentence — Offender providing assistance to police — Credit to be given — Extent of obligation of police to provide confirmation of assistance*

Where an offender convicted of a crime has rendered assistance to the police or other law enforcement authorities, the police may provide the court with information regarding the assistance rendered in a confidential letter signed by a senior police officer, known as a “text”, but the obligation of the police to provide a text when requested by the offender is a very limited one. Although the court will always expect the police to inform the court of the fact that the police have made a decision not to provide a text as matter of case management, it is sufficient if the police merely state that they will not provide any information to the court in relation to the offender’s assertions of assistance. The police are not required to give any explanation of their reasons for the decision, or the stage at which they decided not to provide any information. The police need do no more than say that the police will not provide any information to the court. Such a statement to the court can generally be provided by letter and not by text. There may unusually be circumstances where the police would have to reveal in the reply the assertions of the offender that he had provided assistance; in such a case it might therefore be necessary to provide the response in the form of a text. Whether it is provided by letter or text, it must be signed by a senior officer of police (normally a superintendent) or an equivalent senior official in other law enforcement agencies (paras 6, 18, 22).

To protect offenders from error or malpractice there are appropriate bodies that can investigate any failures by the police: the Investigatory Powers Tribunal, the Independent Police Complaints Commission, the Criminal Cases Review Commission, or Local Ombudsman or other Ombudsmen in the case of most law enforcement agencies. An offender is always entitled to complain to them and, as investigative bodies, they are in a position, which a sentencing court is not, to carry out what is necessarily a confidential investigation of the matters raised by the complaint. Those safeguards are not only sufficient but are much more appropriate than an attempt by a court to try to examine, as part of a sentencing process, the reasons the police have declined to provide a text. The court should not therefore question the police about their reasons for not providing a text (paras 26, 27).

*R v X (Sentencing: Informer)* [1999] 2 Cr App R 125, CA considered.

## SENTENCE/PREVALENCE OF OFFENCE

### R v Bondzie (Marco) (Practice Note)

[\[2016\] EWCA Crim 552](#); [\[2016\] 1 WLR 3004](#); [\[2016\] WLR \(D\) 236](#), CA

05 May 2016

*Crime — Sentence — Prevalence of offence — When appropriate for judge to increase sentence on ground of prevalence of offence*

The defendant pleaded guilty to three counts of supplying class A drugs and one count of being concerned in the supply of a class A drug. He was sentenced to a total of four years, ten months' detention in a young offender institution, which included the activation of a six-month suspended sentence imposed on an earlier occasion for two offences of possession of class A drugs. When sentencing the judge said the court would be taking into account the "desperately serious drug problem in the area". The defendant appealed against sentence on the grounds that the sentence was too long and that, in view of his sentencing remarks, the judge might have increased the sentencing starting point by reason of prevalence.

On the appeal—

*Held*, appeal allowed. In the case of drugs supply, sentencing guidelines took account of collective social harm and that would cover the detrimental impact of drug dealing activities upon communities. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community. It was not open to the judge to increase sentence for prevalence in ordinary circumstances or in response to his own personal view that there was "too much of this sort of thing going on in this area". For a judge to take prevalence into account there had, firstly, to be evidence provided to the court by a responsible body or by a senior police officer and, secondly, that evidence had to be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material could be made. Even if such material was provided, a judge would only be entitled to treat prevalence as an aggravating factor if (a) he was satisfied that the level of harm caused in a particular locality was significantly higher than that caused elsewhere (and thus already inherent in the guideline levels); (b) that the circumstances could properly be described as exceptional, and (c) that it was just and proportionate to increase sentence for such a factor in the particular case before him. A court should be hesitant before aggravating a sentence by reason of prevalence. Judges would be only too well aware of the types of harm which were caused by drug dealing and would not be assisted by statements of the obvious. Only if the evidence placed before the court demonstrated a level of harm which clearly exceeded the well understood consequences of drug dealing by a significant margin should courts be prepared to reflect that in sentence and, if judges did so, they had to clearly state when sentencing that they were doing so. If a judge of his or her own motion was contemplating prevalence as a factor, he or she should clearly identify that as a matter to be addressed in submissions to the court. Any sentence imposed should then identify if prevalence had been a factor and provide reasoning so that the parties, and possibly the Court of Appeal, might understand how it had influenced the sentencing decision. The absence of clarity about how the question of prevalence affected the judge's sentencing decision in the present case was less than satisfactory and the overall sentence would accordingly be reduced to a total of four years' detention (paras 10, 11, 19, 21, 22).

## SENTENCE/PROHIBITED WEAPONS

Attorney General's References (Nos 128 to 141 of 2015 and Nos 8 to 10 of 2016)  
[\[2016\] EWCA Crim 54](#); [\[2016\] 4 WLR 83](#); [\[2016\] WLR \(D\) 141](#), CA

09 Mar 2016

*Crime — Sentence — Prohibited weapons — Conspiracy to transfer prohibited weapons and ammunition — Proper level of sentence*

All the offenders pleaded guilty to or were found guilty of conspiracy to transfer prohibited weapons and ammunition. Sentences were imposed which ranged from 16½ years' imprisonment for the principal offender to four years, four months' imprisonment at the lowest end of culpability. The Attorney General sought the leave of the Court of Appeal to refer the sentences to the court for review pursuant to section 36 of the Criminal Justice Act 1988 on the grounds that those sentences were unduly lenient.

On the references—

*Held*, leave to refer granted and all sentences save one increased. If a life sentence was not passed courts had to impose long determinate sentences commensurate with the role played in any activity in relation to the supply of guns. Sentences had to reflect the hierarchy of the supply enterprise, the role played in individual transactions and any previous convictions in relation to guns. A mistaken view had been taken of an earlier authority that the maximum determinate sentence for a large scale enterprise was 22 years' imprisonment but for a leader of an enterprise in the business of supplying guns and lethal ammunition, where the conduct was of the utmost gravity, a very long determinate sentence was required. In the present case, the appropriate sentence for the leader was 25 years' imprisonment, prior to discount for his guilty plea, and that should not be taken as a maximum because a materially greater sentence would be appropriate if there were any previous convictions for offences involving guns. Those engaged in the criminal enterprise under the leader should receive sentences reflecting the sentence for the leader (before any discount for plea), depending on the role they played. Such sentences were severe but reflected the intention of Parliament to punish gun crime in a manner that would deter criminals from engaging in dealing in guns and lethal ammunition (paras 7, 8, 12, 21).

*R v Wilkinson* [2010] 1 Cr App R (S) 100, CA explained.

*Per curiam*. (i) A particular difficulty faced by the sentencing judge was that he was not put in a position where he could sentence all the offenders on the same occasion and in the order of their culpability. Listing officers must for the future ensure that in a complex case of this kind, a date is set for sentencing as soon as possible after the conclusion of the trials and all the defendants and their counsel are present on the same occasion. If there are any possible difficulties in ensuring this happens, the resident judge or presiding judge must be consulted and must direct that arrangements are made to enable all to be sentenced together (para 11).

(ii) Many of the weapons in which these offenders dealt were antique firearms. The increasing danger posed by criminals putting antique firearms into working order and providing ammunition to fit them is a matter that should be considered by the Home Office and by Parliament with a view to a re-examination of the exemption in section 58(2) of the Firearms Act 1968 (paras 15, 16).

## SENTENCE/POSSESSION OF EXTREME PORNOGRAPHIC IMAGES

R v Baddiel (David)

[2016] WLR (D) 123, CA

03 Mar 2016

*Crime — Sexual offences — Possession of extreme pornographic images — Defendant receiving images on iPhone — Whether ingredient of offence that sender of image having purpose of sexual arousal — Criminal Justice and Immigration Act 2008 (c 4), s 63*

The defendant was charged with six counts of possessing an extreme pornographic image, contrary to section 63(1) of the Criminal Justice and Immigration Act 2008, in respect of three images found on both his iPhone and his computer. At trial there was undisputed evidence that the images had been sent to his iPhone in a series of WhatsApp messages by someone who had sent them to a group of people of whom the defendant was one. By section 63(3) of the 2008 Act, an image was “pornographic” if it was of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal. The defendant contended that the images were not pornographic since the purpose of the sender of the images had not been to induce sexual arousal but rather to disgust, shock or amuse. The judge rejected that submission and withdrew from the jury the issue of what had been the purpose behind the sending of the images. The defendant was convicted of the three counts relating to his iPhone and acquitted of the three counts relating to his computer.

On the defendant’s appeal—

*Held*, appeal dismissed. Section 63(3) of the Criminal Justice and Immigration Act 2008 was concerned with whether the image had been produced for the purpose of sexual arousal; the question of who had produced the image was irrelevant. Subsections 63(2) and (3) were concerned with identifying what images would be pornographic. Subsection 63(4)(5) and (8) did not take the matter any further. The identity of the producer of the image was of no significance. Accordingly, the judge’s ruling was correct.

## SENTENCE/SEXUAL OFFENCES INVOLVING PENETRATION

R v Fruen

[2016] WLR (D) 264, CA

17 May 2016

*Crime — Sentence — Sexual offences — Offences involving penetration — Application of requirement for addition to custodial term of imprisonment of a one-year period of licence — Guidance for sentencing — Scope for correction on appeal — Criminal Justice Act 2003 (c 44), s 236A (as inserted by Criminal Justice Act 2015 (c 2), s 6, Sch 1)*

Section 236A of the Criminal Justice Act 2003 (“CJA”), as inserted, which applied to determinate custodial sentences for specified offences imposed on or after 13 April 2015, irrespective of whether the offence was committed before or after that date, required imposition of a sentence of imprisonment equal to the aggregate of the appropriate custodial term and a further period of one year for which the offender was to be subject to a licence. The specified offences, set out in Schedule 18A to the Act, included offences of rape of a child under 13 and assault of a child under 13 by penetration, contrary to sections 5 and 6 of the Sexual Offences Act 2003 (“SOA”) respectively, as well as offences contrary to abolished legislation which, if committed on the day on which the offender was convicted of the offence, would have constituted an offence

otherwise specified in Schedule 18A. The defendant in the first case pleaded guilty to two counts of indecent assault contrary to section 14(1) of the 1956 Act, the first of which was a specified offence for the purposes of Schedule 18A since it had involved digital penetration of a child complainant. He was sentenced to an aggregate of six years' imprisonment, the judge failing to give consideration to section 236A. The defendant in the second case pleaded guilty to 19 sexual offences, six of which were specified offences, being two offences contrary to section 6 of the SOA 2003 and four offences of indecent assault contrary to section 14(1) of the 1956 Act which had involved digital penetration of a child complainant. He was sentenced to an aggregate of 14 years' imprisonment, to which was added a further period of one year subject to a licence in accordance with section 236A of the CJA 2003. The court record ascribed that additional year to the two offences contrary to section 6 of the SOA 2003 but not to the four offences of indecent assault which had involved penetration. Application was made by each defendant for leave to appeal against sentence on the grounds that the sentence had been manifestly excessive, and in the second case, also on the ground that the sentence infringed the principle of totality.

On the applications—

*Held*, applications dismissed. (1) The purpose of section 236A of the Criminal Justice Act 2003, as inserted, was to ensure that persons released into the community at the end of a custodial period, who had failed on public safety grounds to satisfy the Parole Board that they could properly be released earlier, were subject to licence for a period after release even though, by definition, they had not been found to be dangerous by the sentencing judge (para 9).

(2) The approach to fixing the appropriate custodial term in these cases would be governed in the usual way by application of the relevant sentencing guideline. In relation to historic sexual offending the level of sentencing was to be guided by use of the applicable guideline for the equivalent modern offence but limited to the maximum sentence available at the time of its commission. Where an historical offence such as indecent assault did not plead the fact of penetration in the particulars section 236A would apply only if there had been an admission of penetration by the defendant to the court or a finding by the judge that penetration had taken place so that the offence came within the ambit of sections 5 or 6 of the Sexual Offences Act 2003 (para 10).

(3) The new legislation did not prevent the court from passing a non-custodial sentence such as a community order, though that would apply only in exceptional cases, but in practice a sentence under section 236A should not be suspended (paras 12–13).

(4) As to the structure of sentencing under section 236A, the following applied. Where a single offence was being dealt with, the court had only to identify the appropriate custodial term and add to it a further year's period of licence, but the court would have to take care not to exceed the maximum sentence for any individual count. Where the court was sentencing for multiple offences, the passing of concurrent sentences for multiple offences including section 236A offences should not occasion difficulty because the further period of one year attached to each count would run concurrently: in terms of release on licence where concurrent terms were imposed, section 244A(2) involved consideration of the case by the Parole Board, and the effect of section 244A(6) and section 263(2) of the 2003 Act were that an offender would not be eligible for release until the relevant portion of the longest of the concurrent terms had been served. In respect of consecutive sentences involving a combination of ordinary determinate terms and section 236A sentences, no particular problem would arise if concurrent section 236A sentences were to be passed consecutively to the sentences on other counts: in relation to release, section 244A(6) provided that reference to the Parole Board for consideration of release in the case of consecutive sentences involving section 236A offences was to be determined by section 264(2). But, as nothing in section 236A affected or limited the power provided by section 154(1) of the Powers of Criminal Courts (Sentencing) Act 2000 to impose a consecutive sentence, there was in principle no reason why a court should not impose consecutive section 236A sentences if that were considered it appropriate: that situation might well arise where an offender had committed section 236A sexual offences against different victims. In relation to consecutive section 236A sentences the question arose whether the terms of section 236A(2) meant that there should be a series of consecutive further one-year periods of licence to be served or whether the further period of licence should be limited to one year. Arguments for the latter presented



problems, so the court was forced to a conclusion in favour of the former, with the consequence that judges would need to give careful consideration to the structuring of their sentences as decisions as to whether to make sentences concurrent or consecutive would impact upon the length of the further licence period (para 14).

(5) A checklist of points to consider would run: (a) Was the offence listed in Schedule 18A? (b) If the offence was a repealed historic sexual offence, did it involve rape or penetration of a child under 13? (c) Was the offender aged 18 or over when the offence was committed? (d) Section 236A could not apply if the court imposed life or an extended sentence for the offence or an associated offence. (e) A sentence was to be expressed as a single term comprising the custodial element and a further one-year period of licence. (f) Each offence qualifying for section 236A had to be sentenced in the terms set out at (e) above. (g) Were the section 236A sentences to run concurrently or consecutively to one another? If concurrently, the overall custodial term for those offences plus one year further period of licence should be stated at the end of sentencing. (h) If consecutively, the total custodial term for those offences as well as the total further period of licence should be stated at the end of sentencing (para 27).

(6) It would clearly be helpful if those settling indictments were able to assist in recognition of section 236A cases by drafting counts which took account of threshold ages of alleged complainants or defendants, or by identifying if a relevant penetration occurred. But failure of an indictment to identify such matters would not be a fatal impediment to the imposition of a section 236A sentence if the sentencing judge were to state that he was satisfied on the evidence that age and penetration criteria had in fact been met (para 28).

(7) Where there had been a failure to impose a section 236A sentence, the Court of Appeal could not interpret the sentence passed as being the expression of an appropriate custodial term with an unexpressed further licence of one year because the sentence would then be greater than that imposed in the Crown Court and that was impermissible under section 11(3) of the Criminal Appeal Act 1968. Nor could the court treat the determinate sentence passed as if it incorporated a one-year licence period because it would be wrong to re-engineer what the Crown Court had concluded was an appropriate custodial term. But if the Court of Appeal were to conclude that the custodial term imposed was too long and reduced it by a period of at least a year, that would enable the court properly to substitute the reduced custodial term and to add to it the further one year period of licence which should have been imposed in the first place, without infringement of section 11(3) of the 1968 Act (paras 29–30).

(8) In neither of the instant cases could it be accepted that the sentence was manifestly excessive or, in the second case, that it infringed the principle of totality. In the first case section 236A was applicable but had been overlooked. The determinate sentences were to be upheld and the court did not have power to make them more severe by ordering the addition of a licence period. In the second case the sentencing judge had considered section 236A; he should have identified the offences which fell within that provision; the court record, which referred to two counts, required to be amended to specify all six relevant counts which incorporated the further one-year period of licence; but the irregularities did not furnish a ground of appeal (paras 39–41, 53, 57–59).

# SENTENCE/TERRORISM

## R v Kahar (Practice Note)

[\[2016\] EWCA Crim 568](#); [\[2016\] 1 WLR 3156](#); [\[2016\] WLR \(D\) 267](#), CA

17 May 2016

*Crime — Sentencing — Terrorism — Engaging in conduct in preparation of acts of terrorism — Sentencing guidance — Terrorism Act 2006 (c 11), s 5*

The following broad principles applied to sentencing offences of engaging in conduct in preparation of acts of terrorism, contrary to section 5 of the Terrorism Act 2006: (i) conduct threatening democratic government and the security of the state was particularly serious; (ii) the purpose of sentence would be to punish, deter and incapacitate but rehabilitation was unlikely to play a part; (iii) in accordance with section 143(1) of the Criminal Justice Act 2003, the sentencer had to consider the offender's culpability (usually extremely high), and any harm which the offence caused, had been intended to cause, or might foreseeably have caused; (iv) the starting point was the sentence that would have been imposed if the intended act(s) had been carried out; (v) when relevant, it was necessary to distinguish between a primary intention to endanger life and a primary intention to cause serious damage to property, with the most serious offences generally being those involving an intended threat to human life. It made no difference to the seriousness of the offence whether the intended act or acts were to take place in this country or abroad (paras 15, 18).

In addition to the number, nature and gravity of the intended terrorist acts(s), and to aggravating factors of general application, and depending on the facts of the particular case, further matters to be considered included: (i) the degree of planning, research, complexity and sophistication involved, together with the extent of the offender's commitment to carry out the act(s) of terrorism; (ii) the period of time involved, including the duration of the involvement of the particular offender; (iii) the depth and extent of the radicalisation of the offender as demonstrated, for example, by way of the possession of extremist material, and/or the communication of such views to others; (iv) the extent to which the offender had been responsible, by whatever means, for indoctrinating, or attempting to indoctrinate others, and the vulnerability or otherwise of the target(s) of the indoctrination (actual or intended) (para 19). Further, the offence would be aggravated if the preparatory conduct was carried out with a view to fighting UK armed forces (para 20).

Where a case involved acts of terrorism which were intended to take place abroad, matters likely to be of particular relevance included: (i) the relative degree of sophistication of the route and the means adopted by the offender to reach the intended country; (ii) whether the offender travelled, or intended to travel, alone or with others and the extent of any assistance by the offender to the others; (iii) the nature of any property taken or intended to be taken—with the taking or intended taking of equipment that might be used directly or indirectly for violent action, and/or the possession or intended possession of significant funds, or the wherewithal to obtain such funds on route, or to do so in the ultimate destination country, being potential aggravating features; (iv) if the offender reached the country, the period of time that they were there; the conduct that they engaged in whilst there; what their reason for returning was; and the method of their return (paras 20–21).

As to mitigation the particular vulnerability of the offender and, if particularly vulnerable, the extent to which they were groomed, and any voluntary disengagement, might be amongst the factors to be considered. However, the extent to which, if at all, any such factors did mitigate sentence would be highly fact-sensitive. In relation to all terrorist offences and terrorist related offences, so-called just or noble cause terrorism was irrelevant to sentence and did not provide any mitigation (paras 13, 23).

Since the range of conduct, both in terms of culpability and harm caused, was so broad, the levels of criminality that might be encompassed within the offence had to be regarded as points on a scale of offending which could

merit a life sentence, with a very long minimum term, to offending which might properly be marked with a relatively short determinate sentence. Six levels of offending were identified with Level 1 being the highest level, where the offender had taken steps which amounted to attempted multiple murder, down to Level 6 where the offender had a minor role in relation to intended acts at the lowest level of seriousness. Those levels were differentiated by two principal factors: the culpability of the offender and the harm which might have been caused (paras 25–36).

It was not in the public interest for the Crown Prosecution Service to provide judges with details of first instance cases to assist in sentencing. Open and fair justice required that all guidance was in the public domain and given by either the Sentencing Council or decisions of the Court of Appeal (Criminal Division) (para 1).

## SENTENCE/VARIATION

### R v Goss

[\[2016\] 4 WLR 124](#); [\[2016\] WLR \(D\) 165](#), CA

23 Mar 2016

*Crime — Sexual offences — Sentence — Judge imposing sentence of imprisonment — Judge concluding on reflection that original sentence inadequate and increasing sentence by application of slip rule — Whether slip rule applicable — Crim PR r 28(4)*

The defendant pleaded guilty to three charges of rape contrary, one charge of aiding and abetting rape, two charges of indecent assault and one charge of indecency with a child. He was initially sentenced to 16 years' imprisonment on each of the rape charges and on the aiding and abetting rape charge, and four years' imprisonment on each of the other charges, the seven sentences to run concurrently. The sentences of 16 years were calculated by taking a starting point of 24 years and deducting one-third for the guilty pleas. Some four weeks later the sentencing judge had the case re-listed and, in reliance on the "slip rule" in Crim PR r 28.4, he changed the four sentences of 16 years to 18 years on the footing that a reduction of 25%, not one-third, was appropriate in view of the fact that the defendant had made no admissions when, much earlier, the complainant had made complaints but no prosecution had resulted. The defendant appealed against sentence. Permission to appeal was given by the single judge on the ground that it had been established in R v Nodjoumi (1985) 7 Cr App R (S) 183 that it was incorrect to use the slip rule to change a sentence solely because the sentencing judge had, on reflection, concluded that the original sentence had been inadequate. On the hearing of the appeal, however, R v Nodjoumi was relied on only as support for a submission that the sentencing judge had not been justified in concluding that the reduction should be 25% rather than one-third.

On the appeal—

*Held*, appeal allowed. R v Nodjoumi 7 Cr App R (S) 183 had been reviewed on several occasions and the subsequent authorities had been gathered together in R v Jama [2009] EWCA Crim 2109. The procedures of 30 years ago did not reflect the power in section 36 of the Criminal Justice Act 1988 to refer a sentence to the Court of Appeal as unduly lenient. The power to exercise the slip rule was no longer encumbered in the way in which R v Nodjoumi had outlined. The sentencing judge had not, however, been entitled to increase the sentences by reason of the failures by the defendant to make admissions during earlier investigations. The sentences of 18 years' imprisonment would be quashed and sentences of 16 years' imprisonment substituted.

R v Nodjoumi (1985) 7 Cr App R (S) 183, CA disapproved.

# SEXUAL OFFENCES/TRESPASS WITH INTENT TO COMMIT SEXUAL OFFENCE

R v Pacurar

[2016] WLR (D) 183, CA

13 Apr 2016

*Crime — Sexual offences — Trespass with intent to commit sexual offence — Whether prosecution required to specify sexual offence defendant intended to commit — Sexual Offences Act 2003 (c 42), s 63*

The defendant was charged with trespass with intent to commit a sexual offence contrary to section 63(1) of the Sexual Offences Act 2003. The prosecution case was that the defendant had entered a family's home as a trespasser, and had been naked and touching his penis in the presence of family members: further, that while being ejected from the house by the father of the family, he had made an unseemly sexual suggestion. In interview with the police the defendant had denied ever having entered the house. On closure of the prosecution case the defendant submitted that there was no case to answer because the prosecution had not particularised the sexual offence which it was asserted that he had intended to commit. The prosecution submitted that it was sufficient that their case was that the intent relied on was to commit one or more of the offences set out in sections 1 to 3 and 5 to 7 of the Sexual Offences Act 2003. The trial judge rejected the submission of no case to answer and the defendant was convicted. The defendant appealed against conviction on the ground, among others, that the prosecution had been obliged to specify the sexual offence which it was asserted that the defendant had intended to commit.

On the appeal—

*Held*, appeal dismissed. This was the first occasion on which the court had to consider section 63 of the Sexual Offences Act 2003. There was no definitive guidance and the issue had to be determined on the bare words of the provision. The words were clear. Any sexual offence within Part I of the 2003 Act would suffice. In many cases it would be impossible to narrow the matter down to a specific offence, but it might be obvious from the circumstances that an offence was intended and that was so in the present case. Although the jury had not been told what sections of the 2003 Act were concerned, the offences under sections 1 to 3 and 5 to 7 had been identified and the trial judge had given appropriate directions concerning the different requirements in relation to consent. For the trial judge to have had to give directions about each offence would have been impossible, unnecessary, and in no one's interest including the defendant's. The defence had been given sufficient particulars to know the case which had to be met. The trial had been a fair one. It was not necessary for the jury to be in unanimous agreement as to a particular sexual offence which they considered that the defendant had intended to commit. Other grounds were unarguable. Accordingly, the conviction was safe.



# THE CRIMINAL LAW UPDATE

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