SWEET & MAXWELL

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Archbold Review

Cases in brief

Conspiracy—allegation of involvement of acquitted conspirator in trial of co-conspirators—application of principle in Mitchell *[1964] Crim. L.R. 297*

AUSTIN [2011] EWCA Crim 345; February 24, 2011

The judge allowed a submission of no case in relation to E and directed his acquittal in the first trial of several conspirators, and as a result certain evidence against A relating to his transactions with E was not relied on by the prosecution. Subsequently, the jury was discharged for an unrelated reason, and A was convicted at the second trial. On appeal, A argued that in all the circumstances, the prosecution should have been prevented from alleging that E was one of the conspirators and should not have led the evidence abandoned in the first trial. The appeal was dismissed:

(1) The principal in *Mitchell* [1964] Crim. L.R. 297 was of general application. Although the issue was only briefly dealt with among a number of other grounds of appeal (the court in the first instance case consulted the transcript of *Mitchell,* in which the case was referred to as *R. v Dyer, Lowry and Field)*, the principle was as laid out in Professor Sir John Smith's commentary. The Court disagreed with the first instance observation by Field J. in *R. v Gibbins* Unreported July 21, 2004 that *Mitchell* was authority only for the proposition that the prosecution could give in evidence the acts of the acquitted person, and must do so without alleging he was party to the conspiracy. It was clear from the decision in *Mitchell*, the statement of principle by Professor Sir John Smith and from general principles that Field J.'s observations could not be correct; the single sentence in the judgment of the court given by Finnemore J. in *Mitchell* relied on by Field J. referred to the fact that the person acquitted in that case could not be indicted again. The Court approved the view of the editors of *Archbold* 2011, para.33–66.

(2) It was immaterial that in A's case, E had been the beneficiary of a successful submission of no case to answer, with the result that A had reaped an advantage at the first trial, whereas in *Mitchell* the equivalent alleged conspirator had had his conviction quashed by the Court of Appeal. The Court rejected A's submission that he was bound to lose that advantage (despite having knowledge of the Crown's intention to rely on *Mitchell* in a future trial). A could have argued against the decision to discharge the jury (a decision about which the Court expressed some disquiet). Neither was it improper for the Crown to assert E's involvement because the judge had allowed a submission of no case. The judge had not found that there was no evidence against E, but rather that in the particular circumstances of the case, it would have been wrong to have allowed the prosecution to change the basis on which the case was put, and adduce further evidence, following the discovery of a general misapprehension about the significance of certain evidence. It was not a case where there was no evidence against E—rather, there was substantial evidence against him. But in any event, even if that were not the case, it was for the judge in the second trial to determine whether there was material which it was proper to put before the jury for the purpose of proving the conspiracy against A that E was also a party to the conspiracy. The position may have been different if at the first trial the Crown had accepted that there was no evidence against E (and nothing new had emerged).

*Evidence—adverse inferences (Criminal Justice and Public Order Act 1994 s.34)—lies (*Lucas *[1981] 3 W.L.R. 120)—directions as to—relationship between*

HACKETT [2011] EWCA Crim 380; March 1, 2011

H initially lied to the police in saying that he had not driven his co-defendant to a petrol station; then admitted that he had done so, but to buy petrol for an innocent reason, not to fuel a petrol-bomb, and that the lie had been motivated by a desire to avoid prosecution for drinking and driving. The judge had been wrong to give both a direction on Criminal

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Justice and Public Order Act 1994 s.34 and a *Lucas* [1981] Q.B. 720 direction. The case illustrated the tortuous considerations which must be undertaken in applying the over-complicated jurisprudence in relation to s.34 and *Lucas* directions. The guiding principle should be to avoid confusion, to avoid deflecting the jury from the real issues and to provide the jury with guidance as to how to approach those issues. In the instant case, there was no warrant for protecting H from the consequence of his lie as to his visit to the petrol station and his purpose in going there once the jury were sure that he had lied. If the jury was sure he had lied, they were left without any sensible reason for the trip other than to fetch petrol for the fire-bomb. Accordingly, the examples of innocent reasons for lying which the judge advanced to the jury were unnecessary, confusing and unduly favourable to the defence. The only protection to which the defendant was entitled was that the jury could draw no adverse inference from his failure to give his reason for going to the petrol station unless and until the jury rejected his explanation for that failure. The judge did direct the jury as to that but only in his unnecessary lies direction, not in his s.34 direction. The cases (to which the judge had not been referred) indicated that, first, it was not appropriate to give a s.34 direction in relation to facts accepted to be true: *R. v Webber* [2004] 1 Cr. App. R. 40, 513; secondly, it was usually unhelpful to give a jury both a s.34 direction and a *Lucas* direction. The judge should select and adapt the direction more appropriate to the facts and issues in the case: *R. v Mubbashar Rana* [2007] EWCA Crim 2261; and thirdly, where directions were given, both as to a failure to mention a relevant fact and as to lies, it was important that the directions were consistent: *R. v Stanislas* [2004] EWCA Crim 2266. In H's case, the direction should have started with the explanations given by the defendant: first, that he had gone to the petrol station for an innocent reason and second, that the reason he had not given that explanation earlier was his fear of the consequences of revealing that he had driven after drinking. Once the jury rejected the appellant's explanation for travelling to the petrol station the jury was left with no sensible reason for going there other than to fetch petrol for the petrol-bomb. The prosecution was entitled to such a direction without the protection a *Lucas* direction afforded to a defendant. A direction limited to s.34 would have made those issues clear, but it would have had to have been qualified by a direction that no adverse inference should be drawn unless the jury rejected the defendant's reason (drink driving) for concealing any reference to the petrol station. If the factual context of the case was such that a defendant was entitled to a *Lucas* direction, then that protection could be incorporated into a s.34 direction (appeal dismissed).

Public order—Public Order Act 1986 s.5—freedom of expression (European Convention on Human Rights art.10)—relationship

ABDUL v DPP [2011] EWHC 247 (Admin); February 16, 2011

The principles to be distilled from the cases (*Percy v DPP* [2001] EWHC Admin 1125; 166 J.P. 93; *Dehal v Crown Prosecution Service* [2005] EWHC 2154 (Admin); 169 J.P. 581; *Redmond-Bate v DPP* [2000] H.R.L.R. 249; *Abu Hamza* [2006] EWCA Crim 2918; 2 W.L.R. 226; *Hammond v DPP* [2004] EWHC 69; 168 J.P. 601 and *Brutus v Cozens* [1973] A.C. 854) in relation to the relationship between the Public Order Act 1986 s.5 and European Convention on Human Rights art.10 could be summarised as follows: (a) The starting point was the importance of the right to freedom of expression. Legitimate protest could be offensive to some, and on occasions must be, if it is to have impact. The right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful. (b) The justification for interference with the right to freedom of expression must be convincingly established. The restrictions contained in art.10(2) were to be narrowly construed. (c) There was no universal test for resolving when speech went beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law was the threat to public order, in respect of which the facts of the case would be of the first importance. (d) But the risk of violence by those reacting to a protest was not determinative—it may be that the protesters were to be protected. That said, in striking the right balance when determining whether speech was "threatening, abusive or insulting", the focus on minority rights should not result in overlooking the rights of the majority. (e) Even if there was otherwise a prima facie case for contending that an offence has been committed under s.5, it was still for the Crown to establish that prosecution was a proportionate response, necessary for the preservation of public order. (f) The decision was for the Magistrates or District Judge, and the Administrative Court would not interfere unless the decision was one that could not properly have been made.

Reporting restrictions—blanket ban on reporting of three sequential trials—whether justified

Re MGN's APPLICATION [2011] EWCA Crim 100; January 25, 2011

The trial of a large number of defendants for murder in a case attracting considerable public attention had been split into three trials for case management purposes. An order made by the trial judge under the Contempt of Court Act 1981 s.4(2) imposing a blanket prohibition on any reporting of the trials until the conclusion of the last was quashed. The first question was whether reporting would give rise to a not insubstantial risk of prejudice to the administration of justice. The second question was whether an order under s.4(2) would eliminate that risk. If it would, the court still had to consider whether the risk could satisfactorily be overcome by less restrictive measures. Third, even if there was no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made—that required a value judgment. There was a need for care to avoid confusing the senses in which the word "necessary" was used in the legislation. Adapting Viscount Falkland's famous aphorism, the court's approach should be that, unless it was necessary to impose an order, it was necessary not to impose one; and if it was necessary to impose an order at all, it must go no further than necessary. In summary, an order under s.4(2) of the 1981 Act should be regarded as a last resort: *R. v Sherwood, ex p. the Telegraph Group Plc* [2001] 1 W.L.R. 1983, and see *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 A.C. 190. It was the position of witnesses which led the judge to impose the order. Some were young and

attended the same educational institution as the defendants and might be affected by hostility over the course of the three trials, or be subject to innocent "memory adjustment" as a result of reading reports. Without minimising the difficulties, the Court very much doubted whether fair contemporaneous reporting of the first trial would extinguish or significantly diminish the difficulties. The defendants themselves would have no difficulty in identifying the witnesses giving evidence and informing the community. Some of the defendants were on bail. Some of them would have families and friends attending the proceedings. None of this could be avoided by the imposition of the order under s.4(2). In effect, it was already too late, and would inevitably be too late, for the processes under s.4(2) to be deployed for the purposes of protecting these witnesses from whatever troubles may be anticipated for having assisted the police or (if they did) for having given evidence at the first trial. The potential problem of differing evidence at each trial was not a new one, and would not be diminished by a reporting ban. The concerns were largely the same as attended the giving of evidence in any very high profile case.

Sanctions offences—United Nations Act 1946 s.1—whether time limit on vires to make orders in council

FORSYTH AND MABEY [2011] UKSC 9; February 23, 2011

There was no requirement that an order in council made under United Nations Act 1946 s.1 in order to give effect to a United Nations Security Council resolution must be made at or about the time that the Security Council resolution was made, and accordingly the Iraq (United Nations Sanctions) Order 2000 (SI 2000/3241), made 10 years after the relevant resolution, was *intra vires*. *A v HM Treasury* [2010] 2 A.C. 534, relied on by F and M, was concerned with a very different aspect of the scope of the power in s.1—it sought to properly limit the *content* of orders, whereas F and M sought to limit the *time* within which the power could be exercised. In *A*, the Court examined *Hansard* to exclude the possibility that Parliament had intended the granting of a power so wide it could be used to override fundamental rights. In the instant case there was no need to look behind the drafting of the 1946 Act. While it was obviously envisaged that the power would generally be used speedily, there was nothing to suggest that Parliament's intention was to confine its use as F and M contended—had there been such an intention, it would have been clearly provided for in the Act, and it was not.

Trial—cross-examination cut short by indisposition of witness—whether rendered trial unfair; jury trial—Taxquet v Belgium *[2011] Crim.L.R. 236—whether in breach of European Convention on Human Rights art.6(1)*

LAWLESS [2011] EWCA Crim 59; January 20, 2011

(1) Where a cross-examination was cut short by the indisposition of the witness, the overriding question for the judge was whether it was still possible for the accused to have a fair trial. A major consideration was whether the witness' evidence (perhaps edited for the purpose) would have been available to the jury if his indisposition had happened before instead of during the trial and/or whether it would have been available before a jury on a retrial. This witness' evidence would have, under the Criminal Justice Act 2003 s.116. It was to L's advantage that he had been able to put at least some questions in cross-examination. The judge was entitled to conclude that the mishap would be corrected or sufficiently mitigated by a strong judicial direction, which he duly gave.
(2) L's conviction by the jury was not a breach of the European Convention on Human Rights art.6(1), as he argued, on the basis of *Taxquet v Belgium* [2011] Crim.L.R. 236 (November 16, 2010). As always when addressing a Strasbourg decision, close attention must be paid to the facts of the case before determining how relevant it was to the instant circumstances. The Belgian proceedings involved numerous questions for the jury, and co-defendants. The facts were complicated and in the circumstances the Grand Chamber concluded that the safeguards were insufficient, although the Court's reasons were not perhaps as fully explained as they might have been. In particular with a jury trial, it was necessary to ensure that the disadvantage of not having reasons was offset by a clear framework of questions and directions so that the outcome could be understood—it was held that neither the indictment nor the jury questions contained sufficient information in that case as to the applicant's involvement in the crimes of which he was accused. In L's case, there was no lack of clarity about the case, or the jury's conclusions, and there were no co-defendants. The law of England and Wales did not require juries to give reasons nor explain what they thought of each piece of evidence, and there was no reason to suppose that that was likely to change in the immediate future because of *Taxquet*. The Court also noted that the Strasbourg court had made the point that *Taxquet* could only appeal on a point of law, which was not the position here.

SENTENCING CASES

Automatic deportation

MINTCHEV [2011] EWCA Crim 499; February 11, 2011

It is not correct to shorten an otherwise appropriate sentence of 12 months' imprisonment or detention in a young offender institution to avoid subjecting the offender to automatic deportation under the UK Borders Act 2007 s.32.

Confiscation order—available amount

WALKER [2011] EWCA Crim 103; January 24, 2011

Where the defendant had a beneficial interest under a discretionary trust, his interest was "free property" for the purposes of the Proceeds of Crime Act 2002 s.82.

Confiscation proceedings—whether hearsay evidence admissible

CLIPSTON [2011] EWCA Crim 446; March 4, 2011

Hearsay evidence is admissible in confiscation proceedings. A judge faced with the proposed introduction of hearsay evidence in the course of confiscation proceedings should bear in mind that the post- conviction stage has been reached and the jury is not involved. The procedure must be both flexible and fair. In many instances there will or should be no realistic issue as to the admissibility of the evidence, given the focus of the Proceeds of Crime Act on "information". Where admissibility is a live issue, the regime under the Criminal Justice Act 2003, applied by analogy, will furnish the most appropriate framework for adjudicating on such issues. The

vital need is for the judge to understand the potential for unfairness and to "borrow", as appropriate, from the available guidance in s.114(2) of the 2003 Act. When applying that regime, and especially the "interests of justice" test in s.114(1)(d), the judge should keep the post-conviction context in mind. Where the real issue is the weight rather than the admissibility of the evidence or information in question, the checklist contained in s.114(2) and the matters set out in s.116 of the Criminal Justice Act 2003, suitably adapted to address weight rather than admissibility, will provide a valuable if not exhaustive framework of reference. In every case, the judge must proceed judicially, having regard to the limitations of the evidence or information under consideration. Care must invariably be taken to ensure that the defendant has a proper opportunity to be heard.

Time in custody on remand—community order
BODMAN [2010] EWCA Crim 3284; December 20, 2010
Where a court made a community order in the case of an offender who had spent 114 days in custody on remand before the order was made, and warned the offender that if he were found to be in breach of the order, the 114 days spent in custody would not count towards a custodial sentence, the sentencing judge was justified when re-sentencing in declining to give credit for the time spent in custody before the community order was made. *Stickley* [2008] 2 Cr. App. R. (S.) 33 (p.191) disapproved.

Time spent in custody on remand—suspended sentence
BAILEY [2011] EWCA Crim 397; February 10, 2011
Where a court passed a suspended sentence of twelve months on an offender who had been in custody for 178 days on remand before he appeared before the Crown Court, and the sentencing judge indicated that as the 178 days spent in custody on remand had been taken into account in deciding to deal with the matter by way of a suspended sentence, none of the time spent in custody on remand would count towards the sentence, if the appellant breached the suspended sentence order, the sentencing judge was not justified in ordering that the time spent in custody should not count against the sentence when it was ordered to take effect.

Confiscation order—determination whether Proceeds of Crime Act 2002 or Criminal Justice Act 1988 applies
EVWIERHOWA [2011] EWCA Crim 572; February 4, 2011
Where the defendant was convicted on a count charging conspiracy to make false instruments "between the first day of January 2003 and the 16th day of May 2007" the confiscation proceedings were governed by the Criminal Justice Act 1988, not the Proceeds of Crime Act 2002, notwithstanding that the first act done in pursuance of the conspiracy did not occur until October 2003.

Case in detail

AHMED AND AHMED [2011] EWCA Crim 184; February 25, 2011
The appellants had been convicted of offences under the Terrorism Act 2000 s.11 (membership of a proscribed organization). The prosecution case was that they were active members of Al Qaeda. RA's defence was that he was a member of an extreme Kashmiri organisation, Harakat-ul-Mujahideen, not Al Qaeda. HA's defence was that he was simply not a member of Al Qaeda.
RA applied unsuccessfully to the judge to stop the prosecution, arguing that it would be an abuse of process to try him, whether he was guilty or not, because after he was arrested in Pakistan, he had been tortured by the Pakistani authorities (and/or on the authority, he asserted, of the USA). On appeal it was argued that the prosecution should have been stopped on either or both of two grounds:

> (a) the UK authorities were complicit in an unlawful rendition of RA to this country; what occurred under the form of deportation was in fact a disguised extradition; and/or
>
> (b) the prosecution was tainted by torture in which the UK authorities were complicit.

The judgment of the Court was given by Hughes L.J. though he stated that "this is a judgment to which we have all contributed". The appeals were dismissed. Torture had not been demonstrated to have occurred, and had been demonstrated *not* to have occurred before the sole occasion when RA said he had been seen by British officers in Pakistan. Even if it had occurred later, it had no impact direct or indirect upon the trial.

> The question of principle is … important and is this. If intelligence is regularly shared with a State where there exists the possibility that torture may be employed, when should a prosecution against a man who has been in the hands of that State be stayed? That question was, in our view, answered authoritatively by the House of Lords in *A v Home Secretary (No 2)*[1] [2005] UKHL 71, [2006] 2 AC 221 (at para.32)…
>
> We are satisfied that the reasoning of the House in *A (No 2)* correctly reflects the basis on which English courts may stay a prosecution for abuse of process under the second limb of *ex p Bennett*. The jurisdiction does not exist to discipline the executive, the police or the intelligence services, although it may incidentally do so. It exists to preserve the integrity of the trial process. The judge was right to hold that what is required for its exercise is a connection between any alleged wrongdoing and the trial. Since no evidence which was the product of any torture (or indeed other ill-treatment) that there might arguably have been was adduced at the trial and since the judge held, after full enquiry, that neither had it impacted upon the trial by way of informing the investigation, he was right to refuse to stay the prosecution. Indeed, the latter part of the test applied by the judge was rather more favourable to the defendants than it need have been. It is apparent from A (No 2) that some impact upon the investigation would be lawful, so long as it did not amount, directly or indirectly, to employing the product of torture to make a case against the appellants (para.39).

The next ground of appeal concerned the admission of the evidence of the Director of the Royal United Services Institute, as an expert on the nature of Al Qaeda.

> There was no dispute that the jury required assistance on these matters. A time may come when judicial notice may be taken of generally accepted facts about Al Qaeda. That time had not been reached at the time of this trial. The evidence was plainly relevant. Nor was it disputed that Professor Clarke is a distinguished expert in the field of international terrorism… (para.58).

1 On which, see Richard Moules excellent analysis at [2006] 1 *Archbold News* 5–6.

We agree that an expert should not be called as a device to avoid the ordinary rules of evidence, and that if an expert's evidence were effectively unchallengeable because based on sources he refuses to expose to scrutiny that would be likely to be a reason for refusing to admit it. But neither of those situations applied in this case (para.68).

The Professor's evidence was rightly admitted, effectively tested, correctly summarised and properly left to the jury.

The third issue was whether the trial judge was right to tell the jury to construe "membership" simply as an ordinary word of the English language, without further definition. The Court derived assistance from the analysis by Jack J. in *Smith Kline Beecham Plc v Greig Avery* [2009] EWHC 1488 QB, and held that the core elements of membership within the meaning of s.11 were

….voluntary and knowing association with others with a view to furthering the aims of the proscribed organisation. We agree with the submission made to us that in some cases it will be necessary to make clear that unilateral sympathy with the aims of an organisation, even coupled with acts designed to promote similar objectives, will, whilst being clear evidence of belonging, not always be sufficient; the jury may need to consider whether there is the necessary element of acceptance or reciprocity which will be involved in belonging (para.89).

But in this case it was not necessary for the judge to embark upon an analysis of what could or could not amount to membership of a proscribed organisation. The direction was entirely appropriate.

Fourthly, there was the issue of territoriality. The appellants' contention that at the material time the offence under s.11 could only be committed by a person who belonged to a proscribed organisation when within the UK was well founded: see *Hundal and Dhawal* [2004] 2 Cr. App. R. 19. By s.17 of the Terrorism Act 2006, the UK adopted extra territorial jurisdiction in relation to the s.11 offence. But it did not come into effect until April 13, 2006, and was not retrospective. This was not appreciated at the trial and in consequence the trial judge did not direct the jury as to the territorial limitation on the commission of the offence. However, the Court held that, in the cases of both appellants, territoriality was not a live issue, and the absence of a direction upon it did not affect the safety of the convictions.

Finally there was a cross admissibility issue:

We are satisfied that the direction given by the learned judge was entirely appropriate. He made it clear that findings of fact in relation to one defendant might affect the verdict on another, but would not be decisive. He gave examples which clearly demonstrated the manner in which their findings of fact in relation to one defendant could be relevant to the case against the other. The argument that membership of a terrorist organisation by one accused was not relevant to the issue of membership of that organisation by another is unsustainable in this case (para.108).

(The Court also dismissed HA's appeal against his 10 year sentence; RA was sentenced to life imprisonment).

Comments

Loss of Control and Diminished Responsibility: Monitoring the New Partial Defences

By Professor Barry Mitchell and Professor Ronnie Mackay

The Coroners and Justice Act 2009 replaced the partial defence of provocation with loss of control in murder cases and redefined diminished responsibility. If successful, the new defences still reduce liability to manslaughter.

Of the two, provocation was surely the more controversial. Although it had been part of English criminal law for centuries its interpretation had varied over the years. Indeed, the last 35 years or so of its existence were marked by a crescendo of criticism on the grounds that it was biased in favour of men and against women, that the loss of self-control requirement had never been properly explained, and that the objective test—that the reasonable person would have done what the defendant did in the same circumstances—had been anthropomorphised to an absurd degree.

Battered women who killed their abusive partners were effectively being forced to rely on diminished responsibility in an attempt to avoid a murder conviction and mandatory life sentence because they fell foul of the loss of self-control requirement. Such a requirement reflected the way in which men were likely to respond when provoked, but battered women instinctively knew they could not afford to do so; they had to choose their moment to get rid of their abuser and such deliberation and premeditation pointed all too clearly to a murder conviction. Moreover, it was never made clear whether the court had to be satisfied that the defendant was incapable of controlling his reaction or merely that he failed to do so.

The objective test laid down by Lord Diplock in *Camplin* [1978] A.C. 705 became the source of much expensive litigation and the appeal courts produced a series of conflicting cases about the extent to which the defendant's personal characteristics could be taken into account. The basic rule was that gender and age could be considered even though they only related to the defendant's ability to exercise self-control; otherwise characteristics were only relevant if they related to the provocation itself. Yet some appeal court decisions flew directly in the face of this, and the situation was further complicated when some decisions indicated that socially undesirable characteristics—including attention-seeking personality and glue-sniffing addiction—might be legitimate considerations. To make matters worse, some appellate decisions held that mental abnormalities which explained why the defendant had lost his self-control (but were not otherwise connected to the provocation) could be taken into account, thereby implying a potential overlap between provocation and diminished responsibility. Matters came to a head when the Privy Council (in *Attorney General for Jersey v Holley* [2005] UKPC 23) did what law students

are (initially) told is impossible—they overruled the House of Lords (in *Smith* [2001] 1 A.C. 146).

Although the law seemed to have been restored to the position it occupied after *Camplin*, there was a feeling that enough was enough. The Law Commission was asked to review the law and it concluded that the old law was too generous in some instances and too harsh in others. The Law Commission, unsurprisingly, recommended abandonment of the loss of self-control requirement but the then Labour government was worried that without it the law would be exploited in undeserving cases, such as those committed out of a considered desire for revenge—which was regarded as the very antithesis of a "genuine" provocation case. But not only has the requirement been preserved; it has been placed at the heart of the new plea!

The loss of self-control must have been triggered in one of two ways—either by a fear of serious violence from the victim against the defendant or another, or by words and/or conduct of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged. The fear trigger is generally to be welcomed; it is prima facie of assistance to battered women, but they will still face the formidable loss of self-control hurdle. The words or conduct trigger is littered with ambiguities and elastic terminology—"extremely grave character", "seriously wronged", etc. Whilst it was perhaps not surprising to find the government expressly excluding cases where words or conduct were incited by the defendant, the decision to exclude sexual infidelity—what many commentators traditionally regarded as a paradigmatic example of provocation—is much more controversial. In addition, the court now has to be satisfied that a person with normal tolerance and self-restraint would have reacted in the same or similar way as the defendant did. It is assumed that there is a common standard of tolerance and self-control, but it is difficult to avoid the view that this is a recipe for inconsistency.

It is also to difficult to avoid the suspicion that, had the government not already decided to review the old provocation defence, it would not have felt there was sufficient reason to re-examine the diminished responsibility law. Nevertheless, although expert psychiatrists who advise in such cases had managed to work with the law, the original wording of s.2(1) of the Homicide Act 1957 had been heavily criticised. The terminology in the subsection was almost certainly not what the psychiatric profession would currently choose, and the phrase "abnormality of mind" which lay at the heart of the plea was somewhat ambiguous. The requirement that the abnormality must have substantially impaired the defendant's "mental responsibility" was also rather puzzling—the two words "mental" and "responsibility" do not obviously go together—though the intended meaning was presumably that the defendant's mental condition significantly reduced his moral responsibility for his actions. Other obvious problems included the precise meaning of "substantial impairment". That the large majority of diminished manslaughter cases did not go to trial did not, of course, negate the problems with the wording of the old law.

The wording of the new law is considerably different from the original drafting of s.2(1) of the 1957 Act. "Abnormality of mind" has now been replaced with "abnormality of mental functioning". The words in parenthesis in the old law have been replaced with the requirement that the abnormality "arose from a recognised medical condition". The abnormality must have substantially impaired specific abilities of the defendant—understand the nature of his conduct, form a rational judgment, or exercise self-control—which were not spelt out in the original subsection. The abnormality must also explain the defendant's conduct in the killing, and it will do this if it caused the defendant to act as he did or if it was a significant causal factor. Again, this is a new feature of the law.

We would like to monitor these two defences for a minimum of twelve months to see how the new law works in practice. Professor Mitchell (Coventry University Law School: aa9112@coventry.ac.uk) is interested in the loss of control cases and Professor Mackay (De Montfort University School of Law: rdm@dmu.ac.uk) the diminished pleas. We therefore invite practitioners to contact us by e-mail if they are involved in a case in which one of the defences is raised (expressly or by implication), and we will then arrange a convenient method of obtaining relevant case data.

A Response to "Turnbull Turned Turtle"

By D.S. Phil Priestley of Parkside Police Station, Cambridge

In the last issue of *Archbold Review* (see [2011] 2 *Archbold Review* 5-6), J.R. Lucas argued that the decision of the Court of Appeal in *Turnbull* [1977 Q.B. 224] was being misinterpreted by the police, and indeed used to take off "the investigative zeal of the individual police officer". He argued that this undermined public confidence. In fact, a constable will rarely "blame" one individual factor when it comes to concluding an investigation without a prosecution. Identification might be an issue—but we would also be likely to point out an absence of CCTV or forensic evidence also. Where there is insufficient evidence to proceed this should be explained carefully, and with empathy for the victim in his or her circumstance. First class victim care throughout the process of the investigation should reassure the victim and witnesses that the officer is both competent and hardworking. In addition, officers are trained to understand that in order to construct a successful prosecution case they need to obtain and preserve admissible and compelling material evidence from every available source. It is more likely that an identification is going to be compromised in some regard (to a greater or lesser degree), as opposed to being perfectly "text book" in its nature. For this reason other evidence is of great importance, and officers are encouraged to take a thorough and open minded attitude towards all lines of enquiry that lead both towards the suspect and away from him/her. In my personal experience, I have never encountered an officer who has been demoralised by the guidance contained in *Turnbull*.

The consequence of the police taking interpretation so strongly from the decision in *Turnbull*—whilst to some extent contrary to the intention of Lord Widgery—was both inevitable, and, practically speaking, a positive result. It is

difficult to agree that such interpretation has undermined the relationship between police, victims of crime, officer morale, or the CPS. I have encountered little evidence to suggest that this is the case. Reference to a particular document, such as *Key Points in Relation to Making a Street Identification* can be over emphasised, and the short comings of an individual guidance document is likely to be counter balanced by proper supervision and practical policing experience. Whilst it has been argued that it is not for police to examine their evidence and consider whether it is admissible to the court—suggesting that it is for the judge and jury to make that assessment (both in terms of admissibility and weighting)—the opposite is clearly true. Police officers are required to evaluate the quality of their investigations (both evidentially and in terms of the public interest) on an almost daily basis—and scrutiny of statements, and compliance with *Turnbull* is part and parcel of this process—albeit a much smaller part of this process than "Turnbull Turned Turtle" would recommend the reader to believe.

Feature

Child Witnesses and Cross-examination at Trial: Must it Continue?

By Professor J.R. Spencer, University of Cambridge

Twenty five years ago a number of features of the rules of criminal evidence conspired to ensure that child witnesses either went unheard, or if they were heard, were disbelieved.

The hearsay rule insisted that, if the court were to be informed that a child saw, heard, felt or otherwise experienced something, evidence of this must come directly from the mouth of the child as a live witness, and no other person—parent, doctor, police officer, social worker—could repeat to the court what the child had previously said. The hearsay rule worked in tandem with the competency requirement which, as glossed by the courts, formally precluded young children from testifying as witnesses. As the law then stood, a child could give evidence unsworn, but only if he or she could first explain to the court what it means to tell the truth; and to give evidence on oath a child would also have to explain "the particular importance of telling the truth in a court of law". The rule of thumb, as endorsed by the higher courts, was that no child should testify by either method who was under the age of eight. As Lord Goddard famously said in a case (*Wallwork* (1958) 42 Cr. App. R. 153) where an unsuccessful attempt had been made to persuade a child of five testify:

> "The court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us to be unfortunate that she was called and, with all respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of child of five: it is ridiculous to suppose that they could …".

If the child was competent to give evidence, a collection of rules which can be conveniently labelled the "adversarial package" then combined to make the experience particularly terrifying. The "rule against narrative" meant that the whole of the child's evidence had to be delivered, from his or her own lips, in the witness-box, in the presence of the defendant, and anything she managed to say under those conditions could not be supplemented—let alone replaced—by incorporating any statement she had made earlier. And having given evidence in chief, assuming that she did, the child was then subjected to a live cross-examination: conducted by the defendant himself, if he was unrepresented. Predictably, the result was often that, where the child did get as far as the witness-box, she could not be induced to utter.

If the child did testify, the corroboration rules then inhibited the court from acting on the evidence. If the child gave unsworn evidence, a formal statutory bar prevented the court from convicting on her evidence unless it was corroborated—and this by something other than the unsworn evidence of other children. And even if the child gave evidence on oath, the judge at a jury trial was obliged to direct the jury that it was "dangerous" to accept the uncorroborated evidence of any children: a warning which had to be given, no matter however convincingly the child had given evidence, and irrespective of how much corroborating evidence there actually was. Other technical rules, furthermore, restricted the types of evidence that could be produced as corroboration. Where the defendant was accused of a sexual offence against a child, for example, the prosecution could not normally produce evidence that he had previous convictions for paedophile offences, or other evidence showing that he was sexually attracted to children, like possession of child pornography. So even where evidence of this sort existed, the court would often have no evidence to go on other than the word of the child, which the judge was obliged to warn the jury it was dangerous to believe.

The combined result of all these rules was, of course, to confer a practical impunity on many who committed violent or sexual offences against children. In consequence, during the 1980s pressure grew to change them, and changed they partly were. As a result, the legal scene today looks very different.

Starting with the last of the points previously mentioned, the statutory ban on convicting on the uncorroborated evidence of unsworn children was abolished in 1988, and with it the judicial duty to warn of the danger of convict-

ing on the uncorroborated evidence of children;[1] and six years later, judges were also relieved of the parallel duty to warn juries of the danger of convicting on the uncorroborated evidence of the complainant—of whatever age—in a sex case.[2] Then in 2003, the reshaping of the rules on evidence of bad character in Pt 11 of the Criminal Justice Act opened the door to evidence of "propensity", so making it generally possible to adduce evidence of a given defendant's propensity to use violence against children, or to abuse them sexually.

The same Act also relaxed, to some extent, the rule against hearsay—so making it possible, in certain cases, for the court to hear from the mouth of an adult what a little child had said. In *J(S)* [2009] EWCA Crim 1869, for example, a little girl of 30 months was found by her mother to be bleeding from the vagina, and when later asked what happened, told various people that "Sid" had hurt her. Sid was the only person other than the mother who had ready access to the room, and what is more, at the time the child was hurt he was the worse for drink. Invoking s.114(1)(d) of the CJA 2003—the "safety-valve" provision which gives the court an "inclusionary discretion" to admit hearsay evidence "where the court is satisfied that it is in the interests of justice for it to be admissible"—the trial judge admitted the hearsay evidence of what the child had said. Upholding the conviction, the Court of Appeal said it had "no doubt that the judge was right to rule the evidence in".

Four years earlier, the Youth Justice and Criminal Evidence Act 1999 rewrote the rules about competency, removing any requirement that, in order to be permitted to give evidence, a child witness must demonstrate that he "understands the duty of speaking the truth". Section 53 of this Act now proclaims that "all persons are (whatever their age) competent to give evidence", and adds that a potential witness is only to be rejected on grounds of incompetence where he is not "(a) able to understand questions put to him as a witness, and (b) give answers to them which can be understood". Subsequent case-law has held that this provision means exactly what it says, and in consequence a child can, in principle, give evidence as soon as he or she can talk. In *Macpherson* [2005] EWCA Crim 3605; (2006) 1 Cr.App.R 30, the Court of Appeal upheld the decision of a judge to apply this section so as to treat as competent to give evidence a little girl of about four and a half, and more recently a similar result was reached in *Barker* [2010] EWCA Crim 4, a decision of which more is said below.

Over the same period, other legislation has made important adjustments to the "adversarial package". In 1988[3] it was made possible for children to make their appearance as live witnesses at trial by means of a live video-link situated outside the main court-room, and three years later a further and more radical change enabled a child's evidence in-chief to be replaced by the playing of a videotape of an earlier interview[4]—usually conducted by a specialist police officer following guidance contained in an official document, the first version of which was called the *Memorandum of Good Practice*, and the current one *Achieving Best Evidence*. In 1999, the Youth Justice and Criminal Evidence Act extended the possibility of using the live-link, or the pre-recorded statement, or both, to other categories of vulnerable witness as well as children. The same Act made provision for a number of other "special measures" for vulnerable witnesses, including by s.29 the possibility of the examination being conducted "through an interpreter or other person approved by the court for the purposes of this section ('an intermediary')". In similar spirit, this Act put a stop to unrepresented defendants in sex cases conducting the cross-examination of the complainant in person (s.34 et seq).

By s.28 this Act also creates, in theory, the possibility of holding the cross-examination of a vulnerable witness out of court and in advance of trial: but for reasons that are discussed below, this provision has never been implemented, and for the last 12 years has remained a statutory dead letter, existing purely in the realm of "virtual law".[5] So if a child—however young—is to be heard as a witness in a criminal case, this can still only be done at the price of producing him or her to undergo a live cross-examination at the trial. The cross-examination will usually be carried out over a live video link. But this means that the child must come to court. And it also means that, when she gets there, she or he will usually be subjected to a cross-examination about the contents of a video-recorded interview that took place many weeks, and in some cases many months, before.

In April 2009 the workings of the present arrangements were vividly demonstrated when Stephen Barker was convicted of an anal rape on the evidence of a little girl aged four and a half at the trial, and about three and a half when first interviewed by the police a year earlier. The high point of the proceedings—as prominently reported in the media—was the child's appearance as live witness at the trial, in order for Barker's counsel to attempt to cross-examine her. On this evidence Barker was convicted. He then appealed against his conviction, arguing that the child's answers to his counsel's questions during cross-examination demonstrated that she was not competent as a witness, or if she was, a cross-examination conducted a year after the original interview did not give him a fair chance to challenge her with the defendant's version of events. In a judgment in which the Lord Chief Justice emphasised that the old law on the competency of child witnesses had been completely swept away, the Court of Appeal affirmed Barker's conviction (and also his sentence of life imprisonment, with a specified minimum of 20 years).

The first reaction to this case by some of those who have fought for changes to the law on children's evidence might be to say "So that's all right then! The courts can now receive the evidence of little children, and when it is believed, convict on it. The *Barker* case shows that the current system works, and the reformer's task is done."

On closer inspection, however, what the *Barker* case surely shows is in fact the opposite. The facts of the case centre around the current requirement that, if the evidence of a little child is to be put before the court, the child has to be brought to the trial court for a live cross-examination. This requirement has grave disadvantages: for the child, for the defendant, and for justice.

1 Criminal Justice Act 1988 s.34.
2 Criminal Justice and Public Order Act 1994 s.33.
3 Criminal Justice Act 1988 s.32.
4 Criminal Justice Act 1988 s.32A, inserted by the Criminal Justice Act 1991 s.54.

5 For the details, see "Special measures and unusual muddles" [2008] 6 *Archbold News* 7–9.

It is bad for the child, because it forces him or her to re-live the incident, many months afterwards, in circumstances that are certain to be stressful. Over 20 years ago, the Pigot Committee[6] put the matter thus:

> All of the submissions which we received that addressed [the child's welfare] indicated that most children are disturbed to a greater or lesser extent by giving evidence in court. The confrontation with the accused, the stress and embarrassment of speaking in public especially about sexual matters, the urgent demands of cross-examination, the overweening nature of courtroom formalities and the sense of insecurity and uncertainty induced by delays make this a harmful, oppressive and often traumatic experience (at §2.10).

More recently, Wall L.J., having observed that he had never known a child witness required to give live evidence in civil proceedings in his 11 years as a judge of the Family Division, added:

> At the same time, and during the same period, I attended numerous conferences at which every child and adolescent psychiatrist to whom I spoke, or whom I heard speak, condemned as abusive the process in criminal law whereby a child was required to attend court to be cross-examined, often many months and sometimes years after the event in order to have his or credibility impugned over abuse allegations…[7]

For the defendant the requirement that the cross-examination of the child to take place at trial is bad, because if his counsel manages to engage in any meaningful discussion with the child in these conditions at all, the communication is likely to be rudimentary, and give him little chance to probe the allegation. (To understand this point, one need look no further than the exchanges between the four-year-old girl and defence counsel in the *Barker* case which are set out verbatim in the Court of Appeal's judgment. Whatever one's feelings about the justice of the conviction, it is difficult not to feel some sympathy with defence counsel's argument that the cross-examination did not really produce much meaningful exchange.)

And the requirement is bad for justice, because in many of these cases the child fails to communicate at all, and when no cross-examination is possible, the prosecution—however well founded—usually has to be abandoned. That this happens all the time will be well known to anyone who has practical experience of this type of case as prosecutor, defender or as judge; and a number of cases where the child "dried up" and the trial was allowed to proceed have later attracted the attention of the Court of Appeal, which has then—understandably enough—felt it necessary to quash the conviction.[8]

In 1989 the Pigot Committee—on whose recommendations many of the reforms relating to children's evidence were based—put forward a scheme which would avoid the necessity for small children to be cross-examined live at trial. Under their proposal, the initial video-interview would have been followed as soon as possible by a further recorded interview at which the defence would be able to put their questions to the child "in informal surroundings" under the supervision of the judge; and just as the initial video-interview now usually replaces the child's live evidence in-chief, so the second recorded interview would have replaced the child's live cross-examination.

Although this proposal attracted widespread support, it was opposed by those who said that it would be unfair to the defendant. The defence, it was said, might wish to cross-examine the child about matters which only came to their attention when the prosecution carried out its duty to disclose "unused material", which would usually happen only at a later stage. At the time of the Pigot Report this argument prevailed, and so it was that Parliament in 1991 enacted, instead of the "full Pigot" scheme, the "half Pigot" which is still with us now. An attempt to legislate for the "full Pigot", or something like it, was then made in s.28 of the Youth Justice and Criminal Evidence Act in 1999. But so far, similar concerns have prevented its being implemented.

Are these worries really justified?

Though not implemented in England and Wales, schemes along the lines of the "full Pigot" have indeed been implemented in some other parts of the common law world, notably in Western Australia. Similar schemes have also been created in some parts of continental Europe. In these countries, interestingly, the movement has been in the opposite direction. At one time, the continental tradition would have seen nothing wrong in allowing the court treat the child's initial interview as evidence without giving the defence the chance to put their questions, and the move towards a Pigot-style solution has been made with an eye to the defendant's "fair trial" rights under art.6 of the European Convention on Human Rights, and in particular, his right under art.6(3)(d) to "examine or have examined witnesses against him".

For those who advocate a "full Pigot" solution here—and indeed, for those who currently oppose it—it is important to know how well, or otherwise, the systems of this type that have already been created actually work. In the hope of answering this question, on April 14, 2011 Cambridge University is holding a one-day conference at which speakers who are familiar with these systems will talk about them. They include Judge Hal Jackson, from Western Australia, Dr Trond Myklebust, from the Norwegian Police College, Professor Verena Murschetz from the University of Innsbruck, Austria, and Emily Henderson, a practising barrister from New Zealand who, at an earlier phase of her life, gained a PhD from Cambridge with an excellent doctoral thesis on cross-examination.

This conference is organised by Professor J.R. Spencer, the author of this article, in company with his colleague from Psychology, Professor Michael Lamb. It is sponsored by the Nuffield Foundation, the Metropolitan Police, the Cambridge Centre for European Legal Studies and by the John Hall Fund of the Cambridge Law Faculty. With this support, it is possible to offer the programme for a booking fee of only £50 (which includes the cost of coffee, tea and lunch). Attendance carries 5.5 CPD points from the Law Society, and should do the same for the Bar, provided registration—currently pending—is granted.

At the time this goes to press, places are still available. For further details, or to register, contact Felicity Eves-Rey, School of Law, University of Cambridge, Cambridge CB3 9DZ or by email to fre20@cam.ac.uk.

6 Chairman His Honour Judge Thomas Pigot QC, *Report of the advisory group on video-recorded evidence* (London: Home Office, 1989).

7 *In Re W (Children) (Concurrent Criminal and Care Proceedings)* [2009] EWCA Civ 644; [2009] 2 Cr. App. R. 23.

8 *Powell* [2006] EWCA Crim 3; [2006] 1 Cr. App. R. 31; *Malicki* [2009] EWCA Crim 365; cf. *DPP v R.* [2007] EWHC 1482 (Admin).

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