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Archbold Review

Cases in brief

Abuse of process—historic sexual abuse cases—proper approach

F [2011] EWCA Crim 726; March 24, 2011

From a review of the authorities in relation to the effect of delay on an application to stay a prosecution of an historic sex abuse case for abuse of process (*JAK* [1992] Crim. L.R. 30; *Jenkins* [1998] Crim. L.R. 411; *B* [2003] 2 Cr.App.R. 13; *Smolinski* [2004] 2 Cr.App.R. 40; *Joynson* [2008] EWCA Crim 3049; *MacKreth (deceased)* [2009] EWCA Crim 1849; and *Hereworth* [2011] EWCA Crim 74), the Court derived the following propositions: (1) The court should stay proceedings on some or all counts of the indictment for abuse of process if, and only if, it was satisfied on the balance of probabilities that by reason of delay a fair trial was not possible on those counts. (2) It was now recognised that usually the proper time for the defence to make such an application and for the judge to rule upon it was at trial, after all the evidence had been called. (3) In assessing what prejudice had been caused to the defendant on any particular count by reason of delay, the court should consider what evidence directly relevant to the defence case has been lost through the passage of time. Vague speculation that lost documents or deceased witnesses might have assisted the defendant was not helpful. The court should also consider what evidence had survived. The court should then examine critically how important the missing evidence was in the context of the case as a whole. (4) Having identified the prejudice caused to the defence by reason of the delay, it was then necessary to consider to what extent the judge could compensate for that prejudice by emphasising guidance given in standard directions or by formulating special directions to the jury. Where important independent evidence had been lost over time, it might not be known which party that evidence would have supported. There might be cases in which no direction to the jury could dispel the resultant prejudice which one or other of the parties must suffer. (5) If the complainant's delay in coming forward was unjustified, that was relevant to the question whether it was fair to try the defendant so long after the events in issue. In determining whether the complainant's delay was unjustified, it must be firmly borne in mind that victims of sexual abuse were often unwilling to reveal or talk about their experiences for some time and for good reason. The Court also noted that it had been said in some of the cases that a stay on grounds of delay would only succeed in rare cases. While that was no doubt true because the prosecution would be astute to weed out cases, such a statement was of limited help in any individual case (the Court quoted Rix L.J. in *MacKreth*: "since about 2000 the courts have been astute to pay real and not mere lip service to a concern to do justice in such cases"). There were also references in the cases to the judge's power to compensate for delay by excluding evidence. While the power would be borne in mind by the judge during the course of the trial, if the stay application was made at the end of the trial, all decisions on the admission of evidence would have been made. In the instant case, the application for a stay should have been allowed where the allegations related to events between 30 and 40 years before trial, where specifically identified potential evidence was unavailable because of the delay and where (one of) the complainants' failure to complain earlier was not justified, she having confronted F with the allegations 27 years ago.

Contempt—publication of prejudicial photograph online—"substantial risk"—prejudice—impeding or prejudicing trial

A-G v ASSOCIATED NEWSPAPERS AND NEWS GROUP NEWSPAPERS [2011] EWHC 418 (Admin); April 3, 2011

A prejudicial photograph of a defendant in a notorious murder trial appeared for a number of hours, as a result of accidents, on the defendants' newspapers' online news

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websites at the start of the trial. At issue was whether there was any substantial risk that a juror had seen the photographs (and thus whether the "strict liability rule" applied under the Contempt of Court Act 1981 s.1). (1) The assessment of risk was a prospective exercise (*Attorney General v English* [1980] A.C. 116 and *Attorney General v MGN Ltd* [1997] 1 All E.R. 456). That the jury did not in fact see the photograph did not demonstrate that there was no substantial risk that they would have done so. The Court was prepared to accept that evidence of the history of hits on the relevant site was relevant (as circulation figures might be), and that that evidence suggested that few looked at the article, but it was not determinative. Large numbers of people could have had access, had they chosen to do so. (2) In assessing the risk that a juror might see the photograph, the court should consider whether the appearance of the photograph had been only fleeting or remained available for a substantial period. It was true that publication occurred the moment that the photograph was originally posted. But in assessing whether a substantial risk was thereby created it was necessary to look at all the circumstances of the publication, including the time during which it was available for access and at what times of day it remained available (see *Attorney General v Independent Television News Ltd* [1995] 2 All E.R. 370 at 382–383, and on the time of "publication" for another purpose *HM Advocate v Beggs (No.2)* [2002] SLT 139). (3) The Court rejected the defendants' argument that, because seeing the photograph involved positively clicking on links to access the story, a juror could only have accessed it in defiance of the judge's direction not to consult the internet. The judge did not prohibit the jury from reading press reports (and indeed, noted that there was press interest). A reasonable juror in the habit of reading news online rather than in a newspaper might well regard that as being outwith the prohibition against "consulting" the internet. Uninhibited by the prohibition, on this understanding, the Court was sure that there was a substantial risk. Had the Court found otherwise as to a reasonable juror's reading of the judge's prohibition, it would not have been sure that there was a substantial risk that the jury would have disobeyed the judge's very recent instruction (see *Central Criminal Court Ex p. The Telegraph Plc* [1993] 1 W.L.R. 980 and *Barot* [2006] EWCA Crim 2692; [2007] E.M.L.R. 5). (4) There was clearly a substantial risk that a juror coming across the photograph would be adversely influenced by it—it showed the defendant, who claimed self-defence (albeit in a case not involving firearms) posing with a gun, potentially giving the impression of a man enjoying demonstrating a propensity for violence. (5) The defendants argued that even if there was a substantial risk of the photograph being seen and that it was prejudicial, nevertheless there was no substantial risk that it would have seriously impeded or prejudiced the trial. There were potentially conflicting lines of authority on the issue. One suggested that the Court could not conclude that a contempt had been proven unless it would have concluded that the prejudice was such as to justify a stay or a successful appeal against conviction (*Attorney General v Guardian Newspapers Ltd* [1999] E.M.L.R. 904), and accordingly cases relating to the effect of publicity on the safety of a conviction could be relied on (e.g. *Abu Hamza* [2007] Q.B. 659 and *Stone* [2001] EWCA Crim 297). Alternatively, there were authorities which suggested that it was sufficient to prove that publication would have created a seriously arguable ground of appeal (*Attorney General v Birmingham Post and Mail Ltd* [1999] 1 WLR 361 and *Attorney General v Unger* [1998] 1 Cr. App. R. 308). The Court in the instant case endorsed the latter approach. The statutory question posed by s.2(2) of the 1981 Act was not the same as that posed on a conviction appeal by Criminal Appeal Act 1968 s.2(1)(a). The Court of Appeal looked back and considered the impact of the publication in the context of the history of the trial, the nature of the evidence and the directions given by the judge. The Divisional Court was required to look forward and to assess risk. Both must be consistent in their recognition of the ability of a jury to put aside extraneous material, but the trust which was placed on juries to do so could not always be relied upon by those whose publications put the prospects of a fair trial at substantial risk. The publisher who had created a risk could not always rely upon the steps taken to allay the very risk it had created. But the Court did not need to resolve the controversy, because even if the former approach were adopted, if a juror had seen the photograph but the judge continued the trial with the same jury, an appeal would have succeeded. (6) The criminal courts have been troubled by the dangers to the integrity and fairness of a criminal trial where juries can obtain easy access to the internet and to other forms of instant communication. The courts, while trusting a jury to obey a prohibition on consulting the internet, have been concerned to meet the problem. This case demonstrated the need to recognise that instant news requires instant and effective protection for the integrity of a criminal trial.

Offensive weapons—dual purpose article—whether capable of being offensive weapon per se

VASILI [2011] EWCA Crim 615; February 23, 2011

An object which was both a flick-knife and a cigarette lighter remained a weapon offensive per se (Prevention of Crime Act 1953 s.1(4); *Simpson* [1983] 3 All E.R. 789). The recorder had been right to so rule and to withdraw the question from the jury on a charge of possession of the article under s.1(1) of the 1953 Act. The Court rejected the argument that where an item was made for two purposes, it could not be an offensive weapon per se—an object which had all the characteristics of a flick-knife did not cease to be a flick-knife because it also had the secondary characteristic of being a lighter.

Public order—demonstrations—apprehended imminent breach of the peace—lawfulness of containment of demonstrations

R (MOOS AND MCCLURE) v COMMISSIONER OF POLICE FOR THE METROPOLIS [2011] EWHC 957 (Admin); April 14, 2011

For a police officer to take steps lawful at common law to prevent an apprehended breach of the peace, the apprehended breach must be imminent. Imminence was not an inflexible concept but depends on the circumstances. If an officer were justified in taking steps, those steps must be necessary, reasonable and proportionate, and depending on the circumstances, steps which included keeping two or more different groups apart may be so, if

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a combination of the groups was reasonably apprehended to be likely to lead to an imminent breach of the peace. Where it was necessary in order to prevent an imminent breach of the peace, action may lawfully be taken which affects people who are not themselves going to be actively involved in the breach (*Laporte v Chief Constable of Gloucestershire Constabulary* [2007] 2 A.C. 105). Where there were two demonstrations, located about a quarter of a mile apart, one violent and disorderly, the other largely peaceful, and the violent demonstration has been lawfully subject to confinement ("kettling", an expression not used by the Court), it had been unlawful to contain the peaceful demonstration for several hours, with the object of preventing people from the violent demonstration joining the peaceful one on the dispersal of the violent demonstration. To be justified as being the lawful exercise of the common law power to take reasonable steps to prevent a breach of the peace and (in substance, the same question), not breaching art.5 of the ECHR, the police had reasonably to apprehend an imminent breach of the peace at the peaceful demonstration or one so associated with it that containing that demonstration was reasonably necessary. A breach of the peace is imminent if it is likely to happen. Immediacy or imminence was an essential condition which should not be diluted, although it may be applied with a degree of flexibility. If a breach of the peace were imminent, the police may lawfully take preventive action. They must take no more intrusive action than appears necessary to prevent the breach of the peace, and it must be reasonable and proportionate. The police may only take such preventive action as a last resort catering for situations about to descend into violence. There have to be proper advance preparations. It was only when the police reasonably believed that there was no other means whatsoever to prevent an imminent breach of the peace that they could as a matter of necessity curtail the lawful exercise of their rights by third parties. This test of necessity was met only in truly extreme and exceptional circumstances—the case of *Austin v Commissioner of Police of the Metropolis* [2009] 1 A.C. 564, where the containment was held to be lawful, was a very exceptional case. In the instant case, the conduct of those at the largely peaceful demonstration on its own was not capable of justifying containment. While there was a risk of the violent demonstrators joining the peaceful one, it was only a risk and not imminent at the time when the peaceful demonstration was contained. While the police may have been justified in taking some action to counter the risk, other steps were available to them. Similarly, a "pushing operation", associated with the containment to move the peaceful demonstration some distance was not reasonable or proportionate (*O'Kelly v Harvey* (1882) 10 L.R. Irl. 285; (1883) 14 L.R. Irl. 105; *Moss v McLachlan* [1985] 1 R.L.R. 76; *Redmond-Bate v Director of Public Prosecutions* (1999) 163 J.P. 789 also considered).

Road traffic—obligation on registered keeper to provide information—whether imposed duty to be available at registered address

R (PURNELL) v SNARESBROOK CROWN COURT [2011] EWHC 934 (Admin); March 20, 2011

The Road Traffic Act 1988 s.172 did not create a duty on the registered keeper of a motor vehicle to make sure that he or she was available at the registered address to receive communications such as Notices of Intended Prosecution. Rather, a failure to be so available was a factor which might make it very difficult, if not impossible, for a registered keeper to discharge the burden of proving a defence under subs.(7)(b) (that either the information was provided as soon as reasonably practicable after the time limit for compliance had elapsed, or it had not been reasonably practicable to provide the information at all), particularly if the defence was that it was not reasonably practicable to comply with the Notice because it was never delivered to the registered address.

Trial—conduct of judge

TEDJAME-MORTTY [2011] EWCA Crim 950; April 5, 2011

Where, shortly before he gave evidence, the judge, without warning counsel, spoke directly to T, accusing him of behaving in an intimidating manner towards a person in the public gallery and revoking his bail over the weekend, T's convictions would be quashed. The judge spoke, according to counsel, in a raised voice and with an unpleasant tone, and the content of what he said was rude and sarcastic. In doing so, he may have unsettled the appellant, who had concerns about childcare because of the withdrawal of bail, such that he did not give his evidence as best he might. His evidence was critical to discharging the burden of proof on a statutory defence, his defence was by no means weak, and the jury were eventually to convict him on one of two counts only by a majority and after a comparatively lengthy retirement. The Court collectively was left with a sufficient sense of unease about what the outcome of the case might have been to compel the conclusion that the convictions were unsafe. The judgment was not to be regarded as requiring judges to treat defendants with kid gloves just before they gave evidence. There would often be times when the natural course of the trial resulted in a defendant being upset just before he gave evidence (for instance on the rejection of a submission of no case or following unexpected allegations from a co-defendant), and there would be times when a judge quite properly decided to revoke a defendant's bail just before he gave evidence. The difference in this case was that the quality of the defendant's evidence could have been affected by conduct on the part of the judge which was wholly inappropriate.

SENTENCING CASES

Required minimum sentence

BOATENG [2011] EWCA Crim 861; March 10, 2011

Where a young woman aged 20, of previous good character, was found in possession of a bag containing a prohibited firearm and ammunition, which had been left at her flat a few days earlier by a friend, and the sentencing judge found that the woman genuinely had no knowledge that the firearm and ammunition were in the bag, there were "exceptional circumstances" justifying the court in not imposing the required minimum sentence of five years' detention in a young offender institution.

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Suspended sentence order—defendant spending time in custody on remand equal to term of sentence imposed and suspended

MAUGHAN [2011] EWCA Crim 787; February 22, 2011

Where the defendant had spent 198 days remanded in custody before sentence, it was wrong to impose a sentence of six months' imprisonment, suspended for two years. Six months' immediate imprisonment substituted.

HEWITT [2011] EWCA Crim 885; March 22, 2011

The Criminal Justice Act 2003 s.240(7) provides that for the purposes of this section, a suspended sentence is to be treated as a sentence of imprisonment when it "takes effect", that was to say when it was activated following breach by a further conviction or failure to comply with the community requirements of such a sentence. It follows that time in custody on remand prior to the imposition of a suspended sentence generally falls to be taken into account when the suspended sentence is activated rather than imposed. When a judge imposes a suspended sentence, he should not ordinarily give credit for days spent on remand in determining the appropriate length. Those days should be taken into account by the judge activating the sentence who should, in the usual way, give a s.240 direction with the number of days specified, unless it would be unjust to do so. If a sentencing judge decided to reduce the term of a suspended sentence in view of the fact that the defendant had spent time in custody on remand, the appropriate procedural course would be for the judge to impose the sentence merited by the offence and suspend it, with an indication that if there were a breach in the future sufficient to warrant activation of the sentence, then the defendant could expect to have a s.240 direction in his favour. If the sentence was effected in another way, the judge imposing a sentence should make it very clear what was done and why. A judge activating a suspended sentence should not assume that days on remand were taken into account by the judge imposing the sentence when fixing the length of the sentence, although, where it was clear and obvious that a judge imposing a sentence did in fact do so, it would be open to the activating judge not to make a direction under s.240 on the basis that it would be unjust for the defendant to obtain double credit for the days the defendant had in fact spent in custody on remand. If the defendant had already been in custody on remand for a period longer than that which he would serve in prison in respect of a custodial sentence of a length merited by the offence, the judge must consider whether it would be appropriate to impose a suspended sentence at all. It was important not to impose a suspended sentence that might be either more severe in its custodial impact than the maximum appropriate sentence of immediate custody, or alternatively be of no practical effect on activation because of the effect of s.240.

Community order—defendant spending substantial period in custody before community order made

RAKIB [2011] EWCA Crim 870; April 1, 2011

Where the defendant had spent 173 days in custody on remand before sentence, it was not wrong in principle to impose a community order with requirements of supervision and attendance at a programme involving treatment as a sex offender. The Criminal Justice Act 2003 s.142(1), which was mandatory in effect, made clear that whilst the punishment of an offender was one purpose of any sentence, it was not the only purpose. The rehabilitation of offenders and the protection of the public were other purposes to which the judge must have regard when considering sentence. When the court was considering a non-custodial sentence, as opposed to a suspended sentence, the position was different. The court had to consider, not only the punishment of the offender but also the rehabilitation of the offender and the protection of the public, as required by s.142 of the 2003 Act. The court was required to weigh any period spent on remand with the various elements of the potential community order being considered, including both punitive and rehabilitative elements of such an order. In the light of its duty under s.142, if the court considered a community order appropriate, the period on remand was not and could not be a necessarily determinative factor in deciding what the appropriate sentence was. That was recognised by s.149 of the 2003 Act, which provided that in determining the restrictions on liberty to be imposed by a community order, the court may have regard to any period for which the offender had been remanded into custody. *Hemmings* [2008] 1 Cr.App.R.(S.) 106 (p.623) disapproved.

Manslaughter of baby by shaking

ATTORNEY GENERAL'S REFERENCE NO.125 OF 2010 (GRAEME DRAPER) [2011] EWCA Crim 640; March 2, 2011

Three and a half years' imprisonment for manslaughter of a baby aged four months by shaking increased to five years. Observations on the approach to sentencing in cases of manslaughter of young children in the light of *Appleby* [2010] 2 Cr.App.R.(S.) 46 (p.311) and *Burridge* [2011] Crim. L.R. 251.

Rape of victim by burglar

ATTORNEY GENERAL'S REFERENCES NOS 73, 75 AND 03 OF 2010 (MICHAEL ANIGBUGU) [2011] EWCA Crim 633; March 3, 2011

The jurisdiction of the Court Appeal Criminal Division to amplify, to explain or to offer a definitive sentencing guideline, or to issue guidelines if it thought fit, was undiminished by the statutory provisions for sentencing guidelines. When a defendant was convicted of rape or a really serious sexual offence, it was unwise for the court to pass sentence without seeking at the very least a pre-sentence report; the possibility that the defendant fell within the provisions designed to provide protection from dangerous offenders should not be overlooked. Taking a photograph of a victim should always be treated as an aggravating feature of any case and in particular a sexual case. In a case where rape had been committed after or in the course of burglary in a home, even if there were no additional features beyond the rape and the burglary, the starting point would rarely be less than 12 years' imprisonment. Where rape or serious sexual assault was perpetrated in the course of a burglary, and additional aggravating features were present, such as the taking of photographs, the starting point for consideration would increase to 15 years' imprisonment and beyond. In all such cases the questions of dangerousness must be fully examined.

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Comment

Duplicitous Indictments and Sexual Offences

By L.H. Leigh

Grout [2011] EWCA Crim 299 shows that defects in criminal pleadings cannot always be cured on appeal. The decision also raises, but does not decide, questions of wider significance. The appellant was convicted on count one of a three count indictment. That count, which charged the appellant with intentionally causing or inciting a child under the age of 13 to engage in sexual activity, contrary to s.8 of the Sexual Offences Act 2003, was plainly duplicitous, a circumstance noted neither by the judge nor by either counsel (as to indictments see *Archbold* para.20–20). The second count, which charged the appellant with a further offence under the same section, went to the jury, which acquitted the appellant.

At the relevant time both the appellant, aged 18, and the complainant, aged 12, were members of a church group. A series of text messages, MSN messages and webcam communications took place between them. The appellant had, however, re-formatted his computer so that messages were permanently lost. The appellant allegedly tried to induce the complainant to show him her bra strap via the webcam, which she did by pulling back the neck of her jumper so that it was visible via the webcam. He also asked her whether she would take off clothing. Those formed the basis of count 1. The appellant then asked the girl whether she would go into a room with him naked to which she made no answer. That formed the basis of count 2. The appellant furthermore engaged in sexually suggestive conversations the purport of which was whether the complainant would like to see the appellant naked and knew what happened to a boy's penis when he became excited. The evidence was, thus, of activities which the appellant wished the complainant to carry out, and sexually suggestive comments which referred to potential conduct by the appellant himself.

The wording of s.8(1) of the SOA 2003 which count 1 tracked contains two offences, of causing and of inciting, and is further complicated in that penetrative activity is, by reason of s.8(2), an aggravating factor in both offences (see *Walker (Simon John)* [2006] EWCA Crim 1907 at para.30). In this instance, count 1 charged four separate offences: causing or inciting the victim to show her bra strap, and causing or inciting the victim to engage in webcam or MSN conversations in the course of which he asked her whether she would take off clothing. This in itself was confusing. Further confusion ensued because it was not fully appreciated by the judge or either counsel that whereas the conduct which allegedly causes or incites is that of the other party, the appellant in this case, the sexual activity which is caused or to which the incitement relates must be that of the child.

This led the learned trial judge to provide the jury with a complicated written "steps to verdict". The Court concluded that, given the way in which the judge directed the jury, the Court would have to deal with his directions both on what constituted an "activity" and "sexual".

Duplicity considered

The Court noted that s.8 creates two distinct offences directed towards inciting the child to engage in sexual activity and that the section does not define "activity". The Court was prepared to accept, for the purposes of the appeal, that the activity on the child's part could embrace the activity of engaging in conversations or text or MSN messages depending on the circumstances. Whether a child's conduct in sending a text or MSN message could qualify as a sexual activity would depend upon whether it came within the definition of sexual in s.78 of the 2003 Act. In determining whether an activity is or may be sexual, the court in *H* [2005] 1 W.L.R. 2005 specifies three relevant questions which must be answered:

> The first question, under section 78(a), is whether a reasonable person would consider that the relevant "activity", *whatever* its circumstances or any person's purpose in relation to it, is by its very nature "sexual". In short, would a reasonable person consider that the relevant "activity" is intrinsically "sexual". If the answer is "yes", there is no need to go further. But if the answer is "no", then the second question arises. This second question, under section 78(b), is whether a reasonable person would consider that the relevant "activity", because of its nature *may be* "sexual". It appears that if the answer is "*yes it might be, depending on the circumstances*", then the third question becomes relevant. That is: would a reasonable person consider (i) because of the circumstances or (ii) the purpose of any person in relation to it, (or both (i) and (ii)), that the relevant "activity" is "sexual.

In *H* Lord Woolf C.J. notes that a trial judge may have to address threshold questions before leaving the question whether the child's activity was or might have been sexual to the jury.

The Court in *Grout* then passes to an analysis of the indictment. The jumble of offences in count 1 caused problems both for judge and jury. Count 1, the Court concludes, should have been broken down. The prosecution allegation that mattered was that the defendant caused the complainant to engage in sexual activity by showing her bra strap on the webcam. Two questions arose: was the activity sexual, and did the appellant intentionally cause the complainant to engage in such sexual activity? The second relevant allegation was whether the appellant intentionally incited the complainant to engage in sexual activity by asking her whether she would take off clothing. Here the key allegations would be whether taking off of clothing could be a sexual activity and whether the appellant intentionally incited her to do so. Had the judge undertaken a careful analysis of the count at the outset of the trial he would have had to conclude that there was no evidence that the appellant intentionally caused the victim to remove clothing and that the evidence relating to incitement was too weak to go to the jury. That failure rendered the conviction unsafe because the jury was asked to consider within the same count two offences which it should not have been asked to consider. It could not be said upon which of the offences contained in a duplicitous count the jury had convicted. That in itself would render the

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defect incurable (cf. *Marchese* [2009] 1 W.L.R. 992).
The Court concluded that if the four offences in count 1 were to be proceeded with, they should have been the subject of separate counts. These problems should have been tackled at the outset when the flaws in the indictment and the evidential weaknesses in the prosecution's case would have become clear. Nor was it appropriate to charge the appellant with both causing and inciting H to engage in "sexual activity" in the form of showing her bra on the webcam. Because count 1 was left for the jury's consideration in its portmanteau form, it was, the Court states, almost inevitable that the jury would be uncertain as to what elements of a particular offence had to be proved before they could find the appellant guilty of one or other offence alleged. A second jury question clearly demonstrated this. Furthermore, the judge's directions to the jury on the ingredients of the offences set out in count 1 were unsatisfactory.

Wider considerations—"sexual"
While Lord Woolf's judgment in *H* sets out the questions to be asked, it does not tackle a fundamental problem which this case throws up. That is, when the child's activity in equivocal circumstances is to be regarded as sexual in nature (however the child viewed it) because of the other party's motivation in causing or inciting the child to engage in it. This issue was considered in *H* where, at para.10, the Court refers to *George* [1956] Crim. L.R. 52. There, under the old law on indecent assault, Streatfield J. held that a foot fetishist who removed girls' shoes from their feet for the purposes of sexual gratification could not be convicted given that the accused's activity was not accompanied by circumstances of indecency. Of this Lord Woolf C.J. remarks that it is possible that the removal of shoes in that way might not be capable of being regarded as sexual under the definition in s.78 of the SOA 2003. That might, Lord Woolf remarks, be a question that it would be necessary for a jury to decide. As, however, the activity concerned is not that of the child victim the question would not seem to arise under s.8. The use of such an example perhaps illustrates why close attention has sometimes not been given to the question of whose activity is in issue.
Reference to the former law is not very helpful. Lord Woolf's reference to *George* does, however, suggest that s.8, taken with s.78, is rather wider in its potential application than the court in *H* recognized. Section 78 distinguishes between an activity which is objectively sexual, an activity on the part of the child which cannot be regarded as sexual whatever the motivation of the actor (presumably because of its objectively innocent nature) and an activity which may be sexual because its circumstances or the purpose of any person in relation to it or both it is sexual. This suggests an activity which is objectively equivocal. So we have a structure in which activities engaged in by the child are either objectively sexual, objectively non sexual, or possibly sexual. Of course courts must operate the statutory scheme according to its plain meaning and purpose, but the scheme of s.78 is not free from difficulty. From what is the child being protected? Protection is not directed solely to the bodily integrity of the child but surely extends to activities which might be seen as grooming or preliminary to a campaign of grooming. This suggests that s.78(b) in this context may well be interpreted more broadly than the court in *H* envisaged. Conversely, the circumstances surrounding the activity may not be sufficiently manifest to be helpful, nor may it be easy to prove that the accused's purpose was, for example, to incite a child to engage in showing or removing clothing with a view to grooming her for other activities in the future. In this case, had the prosecution not gone wrong from the start, the evidence of sexually suggestive conversations could well have been sufficient to show that the accused's motivation in causing the victim to show her bra strap was sexual (assuming that that activity was capable of being regarded as possibly sexual). Nor, given those conversations, was the appellant's conduct such as fell merely technically within the offence. The victim's perceptions may in some cases assist the prosecution, but not here, where the victim simply thought that the appellant was behaving oddly and did not attach a sexual connotation to it. There is a further problem of determining by reference to what criteria an activity such as the display of a bra strap may be said to be manifestly non-sexual or, conversely, possibly sexual. A jury may need considerable assistance in addressing this matter.

Feature

Confiscation orders: Update, Part I

By D.A. Thomas QC

Cases on confiscation orders occupy a great deal of the time of the Court of Appeal, Criminal Division and produce many judgments. This review attempts to identify the most important themes which have emerged from recent case law. It appears in two Parts: the second will appear in the next issue of *Archbold Review*.

Getting the right statute
Although it is eight years since the confiscation provisions of the Proceeds of Crime Act 2002 came into force on March 24, 2003, it is still essential in every case where confiscation is a possibility to identify the statute which will govern confiscation proceedings—preferably at the stage when the indictment is settled. Minor details which may appear unimportant when the indictment is being finalised may have a dramatic impact on confiscation. The key provision is hidden in a statutory instrument—the Proceeds of Crime Act 2002 (Commencement No.5, Transitional Provisions, Savings and Amendment) Order 2003. Paragraph 3(1) of this order provides:

(1) Section 6 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 6(2) was committed before 24th March 2003.

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Paragraph 1(3) provides:

Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it shall be taken for the purposes of this Order to have been committed on the earliest of those days.

The importance of this Order was demonstrated by *Evwierhowa* [2011] EWCA Crim 572; [2011] Crim. L.R. 493. The appellant was indicted on a count charging a conspiracy "between the first day of January 2003 and the 16th day of May 2007". The first act done in pursuance of the conspiracy occurred in October 2003. If the Proceeds of Crime Act 2002 applied to the case, the defendant's benefit would have been £450. If the Criminal Justice Act applied, the defendant's benefit was £278,537. The Court held that as the count charged conspiracy, and the conspiracy was complete the moment the agreement was made, the 1988 Act applied.

In *Moulden* [2009] 2 Cr.App.R.(S.) 15 the defendant was indicted for separate frauds on two separate indictments. The first consisted of a series of fraudulent applications for credit cards. All these offences were committed before March 24, 2003. The second indictment charged a mortgage fraud, committed after March 24, 2003. If either s.72AA of the 1988 Act applied, or the case had been caught by the criminal lifestyle provisions of the 2002 Act, the benefit figure, after applying the assumptions, would have been £524,000. The Court held that for the purpose of confiscation proceedings, each indictment was a separate proceeding. It followed that the first set of frauds were covered by the Criminal Justice Act 1988 and the mortgage fraud by the Proceeds of Crime Act 2002. As a result, neither s.72AA nor the criminal lifestyle provisions applied, and the benefit was limited to a total of £26,600. If it had been possible to join all the counts in the same indictment, it seems likely that s.72AA would have applied and the benefit figure would have been £524,000.

In *Stapleton* [2009] 1 Cr.App.R.(S.) 38 (p.209) the defendant pleaded guilty to a series of benefit frauds committed between July 2002 and August 2006. The prosecution applied for an order only in respect of the offences committed after March 24, 2003. The Court of Appeal, following the earlier decision in *Aslam* [2005] 1 Cr.App.R.(S.) 116 (p.660) held that the Crown Court was entitled to make an order under the 2002 Act, notwithstanding the wording of the commencement order quoted above. This decision, which arose out of a mistake in the terms of the application made by the prosecution, is criticised in detail at [2008] Crim. L.R. 813.

The problem of dealing with a confiscation order made under the wrong statute was considered in *Bukhari* [2009] 2 Cr.App.R.(S.) 18. The prosecution had given notice that it would be appropriate for the court to proceed under s.71 of the 1988 Act. After the confiscation order was made it became apparent that all the counts to which the appellant had pleaded guilty involved offences committed on or after June 4, 2003, and that accordingly the confiscation proceedings should have been conducted under the provisions of the Proceeds of Crime Act 2002. Almost 10 months after the confiscation order was made, the sentencing judge varied the original confiscation order by substituting a reference to the 2002 Act for the reference to the 1988 Act. The Court of Appeal held that the variation of the original confiscation order was unlawful, quashed the order and, acting under s.11(3) of the Criminal Appeal Act 1968, substituted a confiscation order in the same sum under the Proceeds of Crime Act 2002. In this case it seems that the application of either Act produced the same result; problems may arise where the different Acts produce widely different results (particularly where the defendant has a criminal lifestyle under the 2002 Act but does not qualify under the 1988 Act for the application of the discretionary assumptions under s.72AA).

Judicial discretion

The scheme of both the Criminal Justice Act 1988 and the Proceeds of Crime Act 2002 severely limit the scope for judicial discretion in relation to confiscation orders. In both cases, if the basic conditions are satisfied and the prosecutor asks the Crown Court to proceed with a view to confiscation, the Crown Court must do so. The sentencing judge has a discretion to initiate confiscation proceedings on his own initiative if he believes it is appropriate to do so, if no application has been made by the prosecutor, but the court has in general no discretion not to proceed in the face of an application from the prosecution. Attempts by judges to manufacture a discretion where the pursuit of confiscation seems unfair or a waste of time have failed (see *Hockey* [2008] 1 Cr.App.R.(S.) 50). The only case in which the court is entitled not to proceed in the face of a prosecution application is provided by s.6(6) of the 2002 Act (similar to s.71(1C) of the 1988 Act), which provides that the duty to make a confiscation order is to be treated as a power if the court "believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct". This discretion does not come into play if the defendant makes a voluntary payment of compensation before the confiscation order is made (see *Farquhar* [2008] 2 Cr.App.R.(S.) 104) or if cash is seized from the defendant under the Proceeds of Crime Act 2002 s.298 (see *Revenue and Customs v Crisp and Berry* [2010] 2 Cr.App.R.(S.) 77). In those cases where it does come into play, the section does not create a broad discretion enabling the court to disapply the statutory provisions. The exercise of the court's power under s.7(3) of the 2002 Act to do what it believes to be just must be seen in the context of the statute and its purpose to deprive criminals of the benefits of their crimes (*CPS v Nelson* [2010] 1 Cr.App.R.(S.) 82).

Abuse of process

A number of cases have explored the use of abuse of process as a route out of the mandatory confiscation process where the prosecution apply for confiscation under either Act. The possibility of confiscation proceedings being stayed was acknowledged in *Mahmood and Shahin* [2006] 1 Cr.App.R.(S.) 96 (p.570), where the appellants, brother and sister, pleaded guilty to assisting in the laundering of the proceeds of thefts made by their brother. The appellants' brother pleaded guilty on the basis that he had stolen a total of £233,000 and subsequently repaid that amount. Some of the cash was provided by the appellants. In confiscation proceedings against the appellants, it was contended that the sentencing judge should take into account the payment of £233,000 already made by the thief.

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The judge indicated that if he had had power to take into account the voluntary repayment made by the thief, he would have done so, but he had no discretion to do so. On appeal, it was accepted on behalf of the Crown that a judge had in principle a discretion to stay proceedings if what the Crown was proceeding to do amounted to an abuse of process. If before the institution of confiscation proceedings, a defendant and the Crown had agreed, after full disclosure, that restitution would be made in a particular way, and pursuant to that agreement, restitution had been made, the judge would have power to stay confiscation proceedings that unjustly or without proper cause sought to go behind such an agreement. It was not an abuse of process simply because there would be a recovery of more than had been stolen.

A confiscation order was quashed on the grounds of abuse of process in *Shabir* [2009] 1 Cr.App.R.(S.) 84, where a pharmacist inflated claims which he was entitled to make by a small amount, so that he obtained a total of £464 to which he was not entitled on top of £179,000 to which he was entitled. A confiscation order in the amount of £ 212,464 (inflated as a result of the criminal lifestyle provisions) was quashed on the basis that the form in which the counts were charged (obtaining a money transfer by deception in respect of the total amount in each claim by representing that the claim was a true and accurate figure) was oppressive, as it brought the criminal lifestyle provisions into operation when they would not have applied if the charges had reflected the small amount by which the appellant had inflated his claims. The Court emphasised that this was an unusual and exceptional case. Similar comments were made in *Lowe* [2009] EWCA Crim 194; [2009] 2 Cr.App.R.(S.) 81 where the Court emphasised that the jurisdiction to stay confiscation proceedings as an abuse must be exercised sparingly and with considerable caution. It must be confined to cases of true oppression, and could not be exercised simply on the ground that the judge disagreed with the decision of the Crown to pursue confiscation. It was not sufficient to establish oppression that the effect of the confiscation would be to extract from a defendant a sum greater than his net profit from his crime. In *CPS v Nelson* [2010] 1 Cr.App.R.(S.) 82 the Court of Appeal returned to the theme. Lord Judge C.J. said that abuses of confiscation processes might occur, and when they did, the appropriate remedy would normally be a stay of proceedings. However, an abuse of process argument could not be founded on the basis that the consequences of the proper application of the legislative structure might produce an oppressive result with which the judge might be unhappy. The responsibility for deciding whether to seek a confiscation order was effectively vested in the Crown. When the Crown did seek a confiscation order, the court lacked any corresponding discretion to interfere with that decision if it had been made in accordance with the statute. To conclude that proceedings properly taken in accordance with statutory provisions constituted an abuse of process was tantamount to asserting a power in the court to dispense with the statute. That was impermissible.

An order staying confiscation proceedings as an abuse of process was upheld in *R. (Secretary of State for Work and Pensions) v Croydon Crown Court* [2011] 1 Cr.App.R.(S.) 1 (p.1). The prosecution asked for a confiscation order in the amount of £25,703 in a case of benefit fraud. The defendant was sentenced to 50 weeks' imprisonment suspended for two years and directions were given regarding the confiscation application; the judge indicated to the defendant that if payment were made there would not be any need for the confiscation application to proceed. The defendant paid the amount of £25,703, but the prosecution maintained the application for confiscation. A second judge held that as the sentencing judge had given an unequivocal representation that there would be no confiscation proceedings if the defendant repaid the money, and the prosecution had said nothing to correct what the offender had been told, it would be an abuse of process if the confiscation application were allowed to continue after the defendant had repaid the money. His decision was upheld.

Postponement

Provisions of the earlier statutes on postponement of confiscation proceedings gave rise to a mass of conflicting case law and the quashing of confiscation orders on highly technical grounds which had nothing to do with any merits of the case. This came to an end as a result of the decision of the House of Lords in *Soneji and Bullen* [2006] 1 Cr.App.R.(S.) 79 (p.430) and the provision of a longer period of postponement in the Proceeds of Crime Act 2002—two years as opposed to the six months in the earlier legislation.

Problems have arisen because the details of the provisions governing postponement of confiscation proceedings are often overlooked. Section 15(1) of the Proceeds of Crime Act 2002 allows the court to postpone confiscation proceedings and proceed to sentence, but s.15(2) provides that in sentencing the defendant for the offence (or any of the offences) concerned in the postponement period the court must not impose a fine on him, make an order falling within s.13(3), or make an order for the payment of compensation. Orders falling within s.13(3) are an order involving payment by the defendant, which covers orders to pay prosecution costs, an order under s.27 of the Misuse of Drugs Act 1971 (normally for the forfeiture of drugs), an order under s.143 of the Sentencing Act (deprivation) and an order under s.23 of the Terrorism Act 2000. These orders may be made within an appropriate period after the confiscation proceedings have been concluded. Similar provisions are found in the Criminal Justice Act 1988 and the Drug Trafficking Act 1994.

Making an order in breach of s.15(2) does not deprive the Crown Court of the power to make a confiscation order. In *Donohoe* [2007] 1 Cr.App.R.(S.) 88 (p.548) the appellant pleaded to possessing a controlled drug with intent to supply. An application for a confiscation order under the Proceeds of Crime Act 2002 s.6 was made and postponed. The appellant was then sentenced to five years' imprisonment with an order under the Misuse of Drugs Act 1971 s.27, for the forfeiture and disposal of the drugs seized. The confiscation proceedings were further postponed on a number of occasions and it was eventually submitted that the Crown Court had no jurisdiction to make a confiscation order after the making of the order under the Misuse of Drugs Act 1971 s.27. The Court of Appeal upheld the confiscation order. Neither s.15(2), or s.14(11) and (12), had the effect of depriving the Crown Court of jurisdiction to make a confiscation order when there had been a failure to observe the prohibition in s.15(2). It would frustrate the object of the Act to hold that the erroneous imposition of a trivial fine or the forfeiture of drug deal-

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ing paraphernalia rendered the court powerless to proceed with substantive confiscation proceedings. There was nothing in the Act which said that such an order deprived the sentencing court of jurisdiction thereafter to proceed with the confiscation hearing which had been validly postponed. Such a result would defy common sense.

The validity of an order made in breach of s.15(2) (or its predecessors) was considered in *Paivarinta-Taylor* [2010] 2 Cr.App.R.(S.) 64. Confiscation proceedings under the Criminal Justice Act 1988 were postponed, and the appellant was fined £1,000, with 28 days' imprisonment in default. About one month after the date on which the fine was imposed, the confiscation proceedings were concluded. The Court of Appeal held that the premature imposition of the fine resulted in no prejudice or injustice to the appellant. Parliament could not be taken to have intended that the imposition of a fine before making a confiscation order should render the fine itself invalid, nor did it intend that a court could no longer proceed to consider the making of a confiscation order.

The proper course in both cases would have been to delay making the order and then make it after the confiscation order had been made. This course was followed in *Constantine* [2011] Crim. L.R. 164, but unfortunately the permitted period was exceeded and an order for payment of costs was made after the period of 28 days allowed by the Proceeds of Crime Act 2002 s.15(4) had expired (the 1988 Act allows 56 days). In an imaginative ruling the Court of Appeal held that notwithstanding the express wording of s.15(4), the sentencing judge had power to adjourn the issue for more than the 28 day period mentioned in s.15(4).

The generally relaxed attitude to procedural provisions after *Soneji and Bullen* does not mean that they can be ignored completely. In *Revenue and Customs Prosecution Office v Iqbal* [2010] 2 Cr.App.R.(S.) 72 the respondent pleaded guilty in January 2006 to conspiracy to supply heroin. Confiscation proceedings were postponed for an unspecified period and no application was made for a postponement within the period of two years from the date of the conviction. The Court of Appeal referred to s.14(8), which provided that if proceedings were postponed and an application to extend the period was made before the permitted period ended, the application to extend the period might be granted even after the permitted period ended. The clear intention of this subsection was that only in these limited circumstances might an extension be granted after the permitted period had ended. Section 14(11), which provided that a confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement, did not assist, as no confiscation order had been made. The wording of s.14, and in particular subss.(3) and (8), made it clear that Parliament intended to give prosecutors a longer period than the six months allowed under the earlier legislation, but at the same time intended that any application to extend a period of postponement had to be made before the permitted period expired. The prosecutor's appeal against the Crown Court's decision not to make a confiscation order was dismissed.

The absent defendant.

When can the Crown Court proceed to make a confiscation order in the absence of the defendant? In *Spearing* [2010] EWCA Crim 2169; [2011] Crim.L.R. 71 the defendant absconded during his trial and was convicted in his absence. He did not appear for confiscation proceedings under the Criminal Justice Act 1988 and in his absence he was found to have benefited in the sum of £1,873,870, and a confiscation order was made in that amount. The Court of Appeal held that there was nothing in the Criminal Justice Act 1988 which precluded confiscation proceedings taking place in the absence of a defendant who decided to abscond. The House of Lords had held in *Jones* [2003] A.C. 1 that a defendant who absconded from trial thereby waived his right to legal representation both at common law and under the European Convention on Human Rights. By analogy this approach also applied to confiscation proceedings, so that where a defendant absconded and left his legal representative without any instructions, the Crown Court was able to continue with the confiscation hearing in his absence. It is open to question whether this decision would apply to confiscation proceedings under the Proceeds of Crime Act 2002, which contains express provision for the case of a defendant who absconds before confiscation proceedings have begun.

In *Gavin, Tasie* [2010] EWCA Crim 2727; [2011] Crim. L.R. 239 the defendants were unable to be present at their confiscation hearings because they had been deported. Tasie had been deported against his will and he was not an absconder to whom s.27 could apply. The Court of Appeal held that a discretion to continue proceedings should never be exercised where it was the action of the state itself which caused the defendant's absence. There was a fundamental difference between a case where the defendant was unable to attend trial because he had a long-standing illness and the case where he could not do so because the state itself, or an arm of the state, had prevented him from being present. Continuing with the proceedings in these circumstances would be a breach of art.6 and an abuse of process at common law. Gavin had made a request to immigration officials to return to Jamaica under the facilitated return scheme. He was deported a few weeks later and the confiscation hearing took place just over two weeks after his deportation. The Court of Appeal held that the judge was entitled to conclude that there could be a fair hearing notwithstanding the appellant's absence. He had chosen to take advantage of a scheme which secured his removal from the country far more quickly than might otherwise have been the case with full knowledge that confiscation proceedings were on foot.

(To be continued.)

IN THE NEWS

The Bribery Act 2010 will come into force on July 1, 2011. The CPS and SFO have issued joint guidance to prosecutors: see *www.cps.gov.uk*.

For the Act generally, see [2010] 6 *Archbold Review* 6–9. The Government has published guidance to help commercial organisations understand the sorts of procedures they can put in place to prevent bribery: see *www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf*.

The CPS consultation on their *Interim Guidance on Perverting the Course of Justice—Charging in cases involving rape and/ or domestic violence allegations* closes on May 6: see *www.cps.gov.uk/consultations/pcj_index.html*

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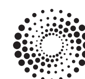
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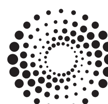

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