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Archbold Review

Cases in brief

Alibi notices—Criminal Procedure and Investigations Act 1996 s.6A(2)(a)—whether proper to only give notice after statement taken—whether gave rise to wasted costs order (Prosecution of Offences Act 1985 s.19A)—general approach to wasted costs orders

RE JOSEPH HILL [2013] EWCA Crim 775; May 21, 2013

The obligation in the Criminal Procedure and Investigations Act 1996 s.6A(2)(a) to give notice to the prosecution of the particulars of any witness whom the defendant "believes is able to give evidence in support of his alibi" was triggered by the defendant's belief that the witness was able to give such evidence. It was not necessary that the alibi witness could give such evidence, let alone that he or she was also willing to do so. Nor was the defendant's belief in the witness's ability to give evidence dependent on the witness giving a proof of evidence; if it were, the efficacy of the provision would be easily defeated by the failure of the witness to co-operate. It may well be prudent for those drafting defence statements to have a signed proof of evidence from an alibi witness before drafting a defence statement, but in very many cases this would be entirely impracticable or even impossible, for a variety of reasons, not least because alibi witnesses are sometimes reluctant. The practice, if such it was, of advising that the names and addresses of alibi witnesses should not be disclosed unless and until they have provided signed proofs of evidence was misguided and wrong. It was doubtless based on the concern that a defendant might be criticised if a person identified in the notice did not, in fact, give evidence. In certain cases, that might be justified; in other cases, given that the notice is triggered only by the defendant's belief (rather than certain knowledge), it would be wrong to do so. However, the judge at the Crown Court had been wrong to make a wasted costs order: applying the standards laid down in *Ridehalgh v Horsefield* [1994] Ch. 205, although the appellants may have fallen into error, it did not amount to an "improper, unreasonable or negligent act or omission" under the Prosecution of Offences Act 1985 s.19A. In the future, now the Court had explained the proper interpretation of the requirements of s.6A, no one could reasonably make the mistake again. The Court added by way of a footnote that, in the light of the ever pressing need to ensure efficiency in the courts, the power to make a wasted costs order could be valuable but this case, and others recently before the Court, demonstrated that it should be reserved only for the clearest cases otherwise more time, effort and cost went into making and challenging the order than was alleged to have been wasted in the first place.

Consumer protection—Consumer Protection from Unfair Trading Regulations 2008—"commercial practice"—offence requiring company to be knowing or reckless—role of controlling minds; reporting of first instance decisions

X LTD [2013] EWCA Crim 818; May 23, 2013

The judge had been wrong to allow a submission of no case to answer on counts alleging unfair commercial practice contrary to provisions of the Consumer Protection from Unfair Trading Regulations 2008.

(1) The term "commercial practice", as defined in reg.2, was sufficiently wide to cover both isolated acts and repeated behaviour; and there may not need to be any commercial transaction at all. The concept was concerned with systems rather than individual transactions. The indictment was not limited to the formation of the contract. It was clear that a commercial practice could include a "course of conduct ... directly connected with ... the supply of a product ... after a commercial transaction", which could cover implied pre-contractual representations. Such an approach did not place an undue burden on the company: if a failure was the fault of a third party and the defence of due diligence could be made out, no offence would be committed.

(2) Counts were charged under reg.8, which required that

CONTENTS

Cases in brief 1

Sentencing cases 3

Comments 4

Feature 7

In practice 9

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the company knowingly or recklessly engaged in a commercial practice which was unfair, in that it contravened the requirement of professional diligence and that materially distorted or was likely to distort the economic behaviour of the average consumer. The judge had taken too narrow a view in ruling that there would have to be evidence that at least one of the directors, as controlling minds, knew the circumstances of the case before there could be a prima facie case. The question was whether the depth of the evidence relating to this one customer led to the inference that the way in which the company operated (through at least one of its controlling minds) demonstrated reckless disregard for the requirements of professional diligence generally. It did not matter that the particular controlling mind could not be identified: *Airtours Plc v Shipley* (1994) 158 J.P. 835. Following the approach identified in *Jabber* [2006] EWCA Crim 2964, per Moses L.J. at [24], approved in *Goring* [2011] EWCA Crim 2, there was clearly evidence from which a jury could reasonably reject innocent explanations and reach a conclusion that the only proper inference to draw on the facts was that the company was knowingly or recklessly operating a commercial practice as charged.

(3) The Court expressed surprise that a first instance decision (*R. (London Borough of Tower Hamlets) v Christopher Steele* [2012] CTLC 109, Mr Recorder Lowe Q.C., Crown Court at Snaresbrook) of a judge neither of the High Court nor sitting in the High Court had been reported. It had no authoritative value.

Delay—European Convention on Human Rights Art.6—"charge"—for purpose of reasonable time guarantee and guarantee of legal assistance; bias—whether judge's remarks indicative of apparent bias

O'NEILL AND LAUCHLAN v HM LORD ADVOCATE [2013] UKSC 36

(1) O and L, while serving prisoners, were released into police custody in September 1998 and detained for questioning under the Criminal Procedure (Scotland) Act 1995 s.14 about a suspected murder. Neither made any comment in interview. They were neither arrested nor charged and no further proceedings took place at that point. They were charged with the murder in 2005 and convicted in June 2010. The question for the Supreme Court was whether, for the purposes of the guarantee of disposal of a charge within a reasonable time in the European Convention on Human Rights Art.6(1), the 1998 detention and questioning amounted to a "charge". The test had been considered, both in connection with "charge" in the reasonable time guarantee and the requirement for legal assistance after "charge" in Art.6(3)(c). A person was charged when he or she was substantially effected, which was as soon as the suspicion was being seriously investigated and the prosecution case compiled—while generally this was the time of official notification of the allegation, it may include other measures which carried the implication of such an allegation (*Deweer v Belgium* [1980] 2 E.H.R.R. 439, para.46; *Eckle v Germany* [1982] 5 E.H.R.R. 1, para.73; *Shabelnik v Ukraine* (Application No.16404/03) Unreported February 19, 2009, para.57; *Corigliano v Italy* [1982] 5 E.H.R.R. 334, para.34. See *Ambrose v Harris* [2011] 1 W.L.R. 2435). O and L were questioned without the assistance of lawyers (cf. *Salduz v Turkey* (2008) 49 E.H.R.R. 421; *Cadder v HM Advocate* [2010] 1 W.L.R. 2601). They were "charged" for the purposes of Art.6(3)(c), but that was not necessarily the same time as "charge" for the purposes of the reasonable time guarantee in Art.6(1). The date from which reasonable time began to run was the subject of a separate guarantee from the guarantee that the trial would be fair, and it required to be approached separately. It was not enough that they were being subjected to questioning in circumstances that might have affected their right to a fair trial. The question was whether they were charged on that date in the sense indicated by *Eckle v Germany*, para.73, as explained by Lord Bingham in *Attorney General's Reference (No.2 of 2001)*, para.27. Were they officially notified that they would be prosecuted as it was put in *Eckle*, or officially alerted to the likelihood of criminal proceedings against them as it was put by Lord Bingham, when they were being interviewed? They were not formally charged. They both asked if they were being charged, and it must have been obvious to them that the reason why they were not being charged was that the police did not yet have enough evidence. While they were both asked directly whether they had killed the victim, it could not be said that this amounted to an official notification that they were likely to be prosecuted. The time at which they were "charged" for the relevant purpose was during the 2005 proceedings.

(2) O and L's murder trial had been immediately preceded by a trial for related sexual offences, which was presided over by the same judge. Following their conviction at the first trial, the judge, holding over sentence until after the murder trial, remarked, having considered their previous convictions, "you are both evil, determined, manipulative and predatory paedophiles of the worst sort". The test for bias in *Porter v Magill* [2001] UKHL 67; [2002] 2 A.C. 357 had brought the common law into line with the Strasbourg jurisprudence (*Lawal v Northern Spirit Ltd* [2004] 1 All E.R. 187; *Abdroikov* [2007] 1 W.L.R. 2679, para.14, acknowledged in *Szypusz v United Kingdom* (Application No.8400/07) Unreported September 21, 2010, para.39). When he made his remarks, the judge was addressing the appellants in the performance of his judicial function. The fair-minded and informed observer provided for in that test would appreciate that he was a professional judge who had taken the judicial oath and had had years of relevant training and experience. The remarks were made in open court from the bench while he was performing his duty as a judge at the trial. The observer would appreciate, too, that when the judge was presiding over the next trial, he would be doing so in the performance of his duty to preside over that case. He or she would understand that the judge had functions to perform which required him to be impartial. But it would only be if the judge expressed outspoken opinions about the appellants' character that were entirely gratuitous, and only if the occasion for making them was plainly outside the scope of the proper performance of his duties in conducting the trial, that the observer would doubt the professional judge's ability to perform those duties with an objective judicial mind. The remarks were not incompatible with a fair trial for the purposes of Art.6; and nor should the judge have recused himself, to which question the same test applied.

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Jury—allegations of misconduct made by juror to defendant—post-conviction allegations not reported to judge—approach of Court

LEWIS AND OTHERS [2013] EWCA Crim 776; May 23, 2013

After the appellants had been convicted of one count by a majority and while the jury was out on another count, a juror (P) visited L and made allegations that other jurors had used extraneous material and were biased against the appellants. As L's solicitor was informing the court, a note was received to the effect that the jury could not decide on the other count and the jury was discharged. The juror was subsequently interviewed by police and signed an affidavit in contempt proceedings, and the Court directed an investigation by the Criminal Cases Review Commission. The questionnaire used by the CCRC showed that ten jurors denied use of extraneous material (or minor and immaterial use), and one recorded that P and another juror had talked of looking up a relative of one of the appellants on the internet. P declined to co-operate and the other juror denied this account. The Court had not been asked to and did not examine whether what P said to L, P's interview, or his affidavit, were inadmissible. To that extent the normally rigid prohibition on disclosure of jury discussions had been circumvented. This was an unusual situation, and in future contempt proceedings the possible consequences of public reference to any matters which came within the proper ambit of the deliberations of the jury would have to be handled with great circumspection. In the circumstances, the Court examined P's assertions *de bene esse*, and underlined that nothing decided on the appeal was intended or could undermine the principles identified by the House of Lords in *Mirza; Connor and Rollock* [2004] 1 A.C. 1118. The reality was that P disagreed with the majority verdict. Notwithstanding the clear directions given, none of his concerns had been reported to the judge. Given the clear instructions which were now given to juries, a post verdict complaint by a member of the jury simply would not do. As Gage L.J. remarked in *Adams* [2007] 1 Cr.App.R. 34, "Silence as to any such irregularity will ... almost certainly mean that this court will assume that none occurred". In view of the additional directions given since *Adams*, the inference that complaints after verdicts simply represented a protest by a juror at a verdict with which he disagreed was likely to be overwhelming.

Reporting restrictions—Youth Justice and Criminal Evidence Act 1999 s.46—appealability—ambit

RE ITN AND OTHERS [2013] EWHC Crim 773; May 21, 2013

(1) An order preventing the publication of a photograph or film of a witness under the Youth Justice and Criminal Evidence Act 1999 s.46 was capable of being appealed under the Criminal Justice Act 1988 s.159(1)(c) ("any order restricting the publication of any report of the whole or any part of a trial on indictment…"). These provisions were designed to enable the media or any member of the public aggrieved by an order restricting access to a trial in the Crown Court to invite the Court of Appeal to interfere with, amend or revoke the order. Given the importance attached to the principle that criminal justice should, so far as possible, be exercised in public, it should therefore be given the widest possible construction. This was the case regardless of whether there were other proceedings before the Court. If the order should not have been made, and in particular if there was no jurisdiction enabling the order to be made, it should be revoked whether or not there were any other proceedings. In the event of an appeal against conviction or sentence then the jurisdiction of the Court of Appeal to revoke any restriction or "excepting" order would be immediately engaged without the need for further reference to s.159 of the 1988 Act (s.46(12) of the 1999 Act).

(2) An order under s.46 could properly include a prohibition on the publication of photographs or film of the children of the witness. The eligibility conditions may be established where publication of the photographs of her children would be likely to lead to the identification of the witness, and the risks would be likely to impact on the quality of the mother's evidence at trial. Further, s.46 extended beyond the bare naming, that is the identifying, of the witness. A photograph or film of the witness may be prohibited if the eligibility test was satisfied, whether or not the name and identity of the witness was otherwise known.

SENTENCING CASES

Confiscation order—"tainted gifts"

SMITH [2013] EWCA Crim 502; March 8, 2013

Where the appellant had given £8,394 to relatives out of the proceeds of a benefit fraud, and there was no prospect of recovering the money, the gift remained a "tainted gift" for the purposes of the Proceeds of Crime Act 2002 s.9(1), and there was no basis for saying that the value of the gift was nil. The application of the statutory provisions led to the inevitable result that once items were included within the definition of "tainted gifts" there was no need for an investigation to be made as to whether in fact there was any prospect of the items being returned or their value being recovered. There was a specific statutory regime governing the valuation of tainted gifts in s.81. There was nothing in s.81 which linked the value of the gift to its recoverability, even though it contemplated the situation where the recipient of the gift had parted with it. The whole point of including assets which a defendant had given away as one of the components in assessing the amount which was available was to prevent a defendant dissipating his assets by giving them away.

Confiscation order coupled with compensation order—whether disproportionate

JAWAD [2013] EWCA Crim 644; May 3, 2013

A compensation order and a confiscation order were two different things. They derived from separate statutes and served different purposes. The power to make a compensation order was derived from the Powers of Criminal Courts (Sentencing) Act 2000 s.130. A confiscation order was designed to remove from the defendant the fruits of crime; a compensation order was designed as a limited and summary method of ordering the defendant to repay the loser and was available to short circuit a civil action against the defendant in straightforward cases.

A compensation order required the defendant to pay the specified sum to the court for the benefit of the loser. It was not the equivalent of a civil judgment in favour of the loser. It was enforceable by a magistrates' court by various means which were all of limited effect. They were limited

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by the availability of assets. Magistrates' courts might not take forms of action other than distraint unless there had been a means inquiry and the defendant was shown to have the means available. While a compensation order could not to be made unless the defendant appeared at the time of making it to have the means, it by no means followed that he would be unable to raise later the plea that he no longer had them. Unless assets could be identified at the enforcement stage, the magistrates' court could take no effective action to extract the money. If an order for commitment to prison in default was made, its effect was to bring an end to the obligation to pay the compensation order. In the different case of a confiscation order it was necessary to make a specific statutory provision stipulating that the obligation to pay was unaffected by serving any sentence of commitment in default (Proceeds of Crime Act 2002 s.38(5)). What these enforcement provisions meant for compensation orders was that the making of the order was not the equivalent of payment or restoration to the loser. It remained uncertain whether such restoration would be made. *Waya* [2013] Crim.L.R. 256 required the court to consider whether a confiscation order was disproportionate. The Court was satisfied that it generally would be disproportionate if it would require the defendant to pay for a second time money which he had fully restored to the loser. If there was no additional benefit beyond that sum, any confiscation order was likely to the disproportionate. If there was an additional benefit, an order which double counted the sum which had been repaid was likely to that extent to be disproportionate, and an order for the lesser sum which excluded the double counting ought generally to be the right order. The mere fact that a compensation order was made for the outstanding sum due to the loser, and this that that money might be restored, was not enough to render disproportionate a confiscation order which included the sum in question. What would bring disproportion was the certainty of double payment. If it remained uncertain whether the loser would be repaid, a confiscation order which included the sum in question would ordinarily not be disproportionate.

Conspiracy to supply class A drugs—relevance of Sentencing Council guidelines on drug offences
KAZIM ALI KHAN AND OTHERS [2013] EWCA Crim 800; April 26, 2013
Although the guidelines on drug offences only referred expressly to supplying or offering to supply or possession of a controlled drug with intent to supply, the guideline should be applied to an offence of conspiracy to supply a controlled drug. It was important to recall that a guideline represented guidance; it was not a rigid framework and it was not to be construed like a statute. Judges and practitioners were expected to approach the guideline with a degree of common sense and flexibility. The judge must do his or her best to reach a fair assessment of the overall offending, namely culpability and harm. Often a judge using the guideline would be dealing with a single substantive offence, but there would be situations in which the judge was sentencing in relation to more than one count. It might be appropriate for the judge to aggregate the quantity of drugs represented in individual counts so as to move to a higher category based on total indicative quantities of drugs involved and thus reflecting the nature of the offending before the court.

Comments

Revisiting Press Regulation—the Case for a Public Interest Defence for Journalists

By Joe Lewis, Barrister, Head of Corporate Crime Department, Rodney Warren & Co

If you ask a lawyer (or judge) to sort out a thorny issue (like regulation) you can bet that their answer will be … more law. The suggested law for regulation of the press is contained in the Crime and Courts Act 2013 (CCA 2013) which received Royal Assent on April 25, 2013. It is anticipated that it will brought into force in Autumn 2014.

The Crime and Courts Act envisages an "approved regulator" for "publishers of news related material", i.e. newspapers. The "approved regulator" is to be established using Royal Charter rather than direct legislation and s.34 of the CCA 2013 empowers the civil court to punish those newspapers which have not subscribed to the approved regulator with the threat of exemplary damages and costs if they lose a civil claim for example, libel, harassment or breach of privacy.

This form of regulation of the press is at best a fudge, at worst a recipe for disaster. The proposed "Recognition Body" has at its heart an objective (by the threat of punitive incentives), that all news print organisations agree to sign up to the replacement of the discredited Press Complaints Commission (PCC). The problem for the PCC was that not all newspapers agreed to be governed by the voluntary regulator. Further, the PCC had no investigatory powers to inquire into complaints about a newspaper's actions and conduct.

Newspapers have two just objections to the post-Leveson form of regulation: first, the use of legislated penalties to incentivise the press to sign up to the regulator established by Royal Charter. Secondly, the serious potential for former disgraced MPs, Government toadies and incompetents to be appointed to sit in judgement and regulate the "free" press.

But those in government would do well to recall the maxim: you get more with honey than you do with vinegar. Rather than threatening news print organisations, encourage them to sign by providing tangible benefits to their journalists, for example, a public interest criminal defence. Those organisations which sign up to a Press Regulator would then be enrolled in the defence.

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A public interest defence is not favoured by Lord Leveson, indeed he and Max Mosley are bedfellows on this point. Deep in the tome of Leveson, Vol.IV, Ch.6, p.1489, is a forensic exposition for why there should be no public interest defence for journalists. The argument is four fold:

- That it will be up to the CPS to decide whether it is right to prosecute a journalist who has broken the criminal law in pursuit of a story which has a 'public interest' element (allowing subjectivity to creep in).
- That the trial judge has discretion to stop cases as an 'abuse of process', the judge could offer 'advice' to the CPS to discontinue the case.
- That the jury could deliver a 'perverse' verdict. In other words, in the face of the judge's summing up and that in law the journalist, editor and newspaper have no defence, a jury could perhaps acquit.
- Finally, if a journalist or editor is convicted and thus branded a criminal, not to worry because the judge 'could' impose a nominal punishment.

The argument runs that in any society governed by the rule of law, it is undesirable for the press to have an unfettered power to utilise undercover techniques to solicit the commission of criminal offences and also to have a public interest defence to criminal charges. The essence of the argument by Lord Leveson is that if journalists were to have such:

> a defence in law it would be to emasculate almost all prospect of bringing a journalist to task for the way in which a story has been researched, whatever means, at first blush illegal, might have been used. (Leveson, Vol.IV, Ch.6, para.6.6).

By analogy it is worth considering the law regarding how much protection is afforded to those entrapped by undercover journalists into committing criminal offences. "It is a very, very clear case of entrapment solely to create a newspaper story." So said His Honour Judge Mitchell sentencing Edward Terry (father of England footballer John Terry), at Basildon Crown Court in 2010. The case was brought by the CPS following a *News of the World* "sting" where Terry was secretly filmed facilitating the supply of a small amount of cocaine to an undercover reporter. The law affords no protection to those who are entrapped by undercover journalists into committing criminal offences. It is established case law that, while offering significant mitigation at sentence, there is no defence of entrapment in English law (*Sang* [1980] A.C. 402). Edward Terry received a suspended prison sentence.

In 1999, Lord Hardwicke and his business partner Stefan Thwaites were given suspended prison sentences for dealing in cocaine after their trial at Blackfriars Crown Court. Unusually, the jury stated:

> The jury would like to say that the circumstances surrounding the case have made it very difficult for us to reach a decision. Had we been allowed to take the extreme provocation into account we would have undoubtedly reached a different verdict ([2001] Crim.L.R. 220).

It is clear that the jury felt constrained by the law as it stands and believed that the entrapment in this case, which again involved the supply of drugs to an undercover *News of the World* reporter, affected the propriety of the conviction and yet the jury convicted. Can it really be a pillar of an argument against a public interest defence for journalists to claim that juries may deliver a perverse verdict?

It is considered to be an abuse of court process for agents of the state to lure citizens into committing illegal acts and then seek to prosecute them for doing so. State-created entrapment of this sort will result in a stay of proceedings. The leading case is *Loosely* [2001] UKHL 53. Lord Nicholls said that if the police conduct preceding the commission of the offence was no more than might have been expected by others in the circumstances this would not constitute entrapment. If, however, it went beyond this, an abuse of process by the state may well be established. For defendants who commit crimes following entrapment by private parties, the abuse argument is impossible to sustain. In *Shannon (aka Alford)* [2001] 1 W.L.R. 51; [2000] Crim.L.R. 1001, which followed the "fake-sheikh" sting by the *News of the World*, the former London's Burning actor was filmed supplying drugs to the undercover reporter. Shannon appealed against his conviction on the basis that the evidence was obtained unfairly under s.78 of the Police and Criminal Evidence Act 1984. In the Court of Appeal, Potter L.J. stated that it is insufficient that the unfairness complained of relates to the fact that the defendant would not have committed the crime but for the incitement of others, unless the behaviour of the police or the prosecuting authority has been such as to justify an abuse of process. The problem for defendants in private entrapment cases is that, unless there is some kind of criticism to be levelled specifically at the police or the CPS relating to how the evidence was obtained, then any argument regarding exclusion of evidence or an abuse of process will fail.

Abuse of process stays the prosecution of a defendant in criminal cases. As such, judges are loath to grant such defence applications. It would be inconceivable for a judge to stay a prosecution of a journalist as an abuse of process based upon the fact that the criminal act perpetrated by the journalist was only undertaken in the "public interest". After all, in the *Terry*, *Shannon*, *Hardwicke* and *Thwaites* cases no abuse of process was granted. Why would it be granted for a journalist? Once the CPS has decided that a prosecution should ensue, the remedies appear remote, the judge has virtually no power to prevent the prosecution and juries are unlikely to acquit.

Therefore, back to the suggestion. A "public interest" defence for certain criminal charges. The defence would be available only to those news organisations which were signed up to their "recognised" regulatory body, for example OFCOM and the replacement to the PCC. The defence would apply only to limited criminal charges, for example bribery and/or probing into private data, would be available only for an investigation commenced on a matter of "public interest". All news organisations have access to their legal departments. Prior to the potential criminal activity occurring, the journalist will have set out the scope of their investigation to their legal team. A member of the legal team could be called during the criminal trial to confirm that the "journalistic investigation" was not a recent fabrication but rather a legitimate preplanned enquiry.

It will happen. Journalists will be arrested for doing their job. Better that whilst sitting in a police cell they be able to know that their actions were in the public interest and that the criminal law will not brand them a criminal. They will just have to be wise enough to remember that not every thing that interests the public is in the public interest.

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Can Capacity be a Backstop in Sexual Consent Cases?

by Chandra Sekar, Barrister, Angell Park Chambers

In "The effect of 'deception' in the Sexual Offences Act 2003" [2013] 4 *Archbold Review* 5) Jonathan Rogers (at p.9) states that "it should be noted that a person who does not understand the essence of the sexual activity that takes place simply lacks 'capacity' for the purpose of s.74" (SOA 2003). However, this simple statement conceals a wealth of assumptions which may unnecessarily complicate the lives of those deciding what the appropriate charge is for a sexual offence.

"Capacity" in SOA 2003 s.74 must be understood in its usual legal sense, whether it be mental or physical. Mental capacity is determined by the Mental Capacity Act 2005 (in force from 2007), and in particular ss.1–3 which state:

1 The principles

…

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

…

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2 People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

It is not difficult to see why the introduction of these concepts may cause problems in a case where "capacity" may not be clear cut, not least the potential for arguing that what appeared to be an unusual sexual decision, may well have been simply "unwise" (MCA s.1(4)). (We've all been there.) This question was dealt with comprehensively by the House of Lords in *C* [2009] 1 W.L.R. 1786; (2009) UKHL 42, which makes it clear that any decision on consent in sexual offences where capacity may be involved must consider the sexual autonomy of the victim, the circumstances obtaining at the time and the individual person, all of which could affect whether they had the capacity to consent to the specific sexual act that is the subject of the offence.

C was concerned with the application of s.30 of the SOA 2003 (replacing the unfortunately titled and defective s.7 of the SOA 1956), an offence specifically aimed at circumstances where a person may not have capacity where they have a mental disorder within s.1 of the Mental Health Act 1983. As their Lordships pointed out, there are several overlapping offences in the SOA which could be charged in any specific situation involving issues of consent and capacity, ranging from rape under s.1 of the SOA to the offences under ss.30–33 of the SOA. In fact so comprehensive is the Act that there are specific offences involving inducements, threats or deception to obtain sexual activity with a person with a mental disorder under ss.34–37 of the SOA. The three major differences between charging the "ordinary" sexual offences and the mental disorder sexual offences appears to be that:

(i) The mental disorder offences do not specifically mention rape but appear to cover the elements of the offence.

(ii) Proof of lack of consent and the consequent mens rea for the mental disorder offences may be easier;

(iii) Rape (s.1) covers the situation where a person has a physical incapacity to communicate lack of consent (s.75(2)(e) SOA) but no mental disorder;

An interesting aspect of *C* is that, being person and situation specific, a person may have their capacity to make sexual choices undermined or impeded by irrational fear, or other irrational thoughts, including those induced by the offender, though in the civil jurisdiction, *C* is doubted as applying to situations other than specific sexual acts in a criminal context (see *D Borough Council v AB* [2011] 3 W.L.R. 1257; [2011] EWHC 101).

To a large extent the arguments are circular as consent/choice is used to determine capacity and capacity may dictate consent/choice. What is clear, however, is that mere lack of understanding of sexual activity is plainly not enough. Maybe the wiser view is to charge appropriate provable offences, such as s.30 of the SOA where there is a clear capacity issue, in consideration of what a jury will have to decide as facts, and the judge as law, and leave potential lacunae to be dealt with in time-honoured fashion, by the legislators.

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Feature

The New Mode of Trial and Committal for Sentence Regimes

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After 10 years on the statute book, Schedule 3 to the Criminal Justice Act 2003 (CJA 2003), which makes significant changes to the mode of trial and committal for sentence procedures for either-way offences (including the abolition of committal hearings), has finally been brought fully into force. In a press statement, the Justice Minister, Damian Green, claimed that the changes would "make the justice system swifter" by requiring "60,000 fewer hearings ... each year". However, the new regime is far from straightforward and, with more and more cases having to be dealt with by the already overstretched Crown Court, it remains to be seen whether this is just another badly thought through cost-cutting exercise on the part of the government. After such a long wait one might have thought that the commencement at least would be straightforward. No such luck. Schedule 3 has been brought into force on a phased basis since April 2012 beginning with 12 areas in June 2012 (Criminal Justice Act 2003 (Commencement No.28 and Saving Provisions) Order 2012 (S.I. 2012 No. 1320)), a further 29 areas in November 2012 (Criminal Justice Act 2003 (Commencement No.29 and Saving Provisions) Order 2012 (S.I. 2012 No. 2574)), and all remaining areas with effect from May 28, 2013 (Criminal Justice Act 2003 (Commencement No.31 and Saving Provisions) Order 2013 (S.I. 2013 No. 1103)). On top of that there are complicated savings provisions to cope with. However, very little guidance has been issued on the subject and this article will aim to give practitioners a practical guide to working with the new regimes.

The mode of trial and plea before venue procedure for adult defendants

The changes brought about by the commencement of Sch.3 only relate to either-way offences. Either-way offences can now be split into two categories: those that will be sent straight to the Crown Court, and those that must still go through plea before venue and allocation.

Either-way offences which require plea before venue and allocation

Where an adult is charged with an either-way offence which is not linked to other defendants or related offences, and where no notice is being served under new s.51B or 51C of the Crime and Disorder Act 1998 (CDA 1998) (see *post*), the Magistrates' Court will proceed with plea before venue and allocation. The procedure is similar to that under the old regime and is set out in s.17A of the Magistrates' Courts Act 1980 (MCA 1980) (as amended). The allegation is put, the defendant is informed of the plea before venue procedure, warned that he may be committed for sentence and asked for an indication of plea.

If a defendant indicates a guilty plea he will be treated as though he had been summarily convicted and the court may then decide whether or not to commit for sentence.

Where a not guilty plea is indicated by an adult defendant who is not facing any related offences and is not jointly charged, the magistrates' court must make a decision as to allocation under the new s.19 of the MCA 1980 (as substituted by the CJA 2003 s.41, and Sch.3, paras 1 and 5). The substituted section is significant because it allows the prosecution to inform the court of an accused's previous convictions, as well as allowing representations from both the prosecution and defence. This reverses the decision in *Colchester JJ., Ex p. North East Essex Building Co Ltd* [1977] 1 W.L.R. 1109, DC, in which it was held that details of previous convictions should not be given at this stage in the proceedings. When reaching a decision the court must consider whether its sentencing powers are adequate and any representations made by the prosecution or defence, and it must have regard to any allocation guidelines. The seventh update to the sentencing guidelines for magistrates' courts, issued on June 11, 2012, imported such an allocation guideline which states that "in general, either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient".

If the court decides that trial on indictment is more suitable, the case will be sent to the Crown Court and there will be no committal proceedings. If, however, it appears to the court that summary trial is more suitable, the procedure in s.20 of the MCA 1980 applies (as substituted by the CJA 2003 s.41, and Sch.3, paras 1 and 6). The position for the defendant is then effectively the same as before: he can consent to be tried summarily or elect trial on indictment.

The only difference under the new regime is that the accused may at this point request an indication of sentence (s.20(3)), which is an indication of whether a custodial or non-custodial sentence would be more likely if he were to be tried summarily and plead guilty. The court is not required to give such an indication and there is no guidance in the legislation as to the basis on which it should make such a decision. If it does give an indication, the accused is then asked whether he wishes to reconsider his earlier indication as to plea. If he then indicates a guilty plea he will be treated as having been tried summarily and pleaded guilty. Under new s.20A of the MCA 1980, the magistrates are then limited as to how they may deal with an accused because they may not impose a custodial sentence unless one was indicated. However, the defendant may still be committed to the Crown Court for sentence on the basis that he meets the criteria for an extended sentence under s.3A of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000), or where he has already been committed for related offences under s.4 of the 2000 Act. In both those circumstances the Crown Court will not be bound by the indication of sentence given in the magistrates' court (ss.3A(4), 4(8) and 5(3) of the 2000 Act). It should also be noted that if a defendant does not change his plea to guilty after an indication, that indication will not be binding on any court and a sentence may not be challenged or be the subject of appeal in any court on the ground that it is not consistent with an indication of sentence.

If either the court does not give an indication, or the defendant does not indicate that he wishes to change his plea after an indication, or does not indicate that he would then plead guilty,

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he will then be asked if he consents to summary trial or wishes to be tried on indictment (s.20(8) and (9) of the 1980 Act).

If a defendant consents to summary trial, attention then turns to s.25 of the MCA 1980 (as amended). This section originally dealt with the court's power to change from summary trial to committal proceedings, and vice versa. That is now abolished. What s.25 now provides is that the *prosecution* may apply to the court for the offence to be tried on indictment. Such an application must be made before the trial begins and before any other application or issue in relation to the summary trial is dealt with. This would appear to preclude the prosecution from raising the issue after, e.g. a special measures application has been heard. The court can only allow the prosecution's application if it is satisfied that the sentence which a magistrates' court would have the power to impose for the offence would be inadequate, which suggests that such an application will be made where the prosecution have further evidence which indicates that the offence is more serious than originally thought. A successful application will then of course lead to the case being sent to the Crown Court.

Either-way offences that will be sent straight to the Crown Court

As mentioned previously, there are now situations in which the plea before venue and allocation procedures will be avoided completely for either-way offences. The first is where a notice is served under new s.51B of the CDA 1998 by a designated authority (the DPP, the Director of the Serious Fraud Office, the Director of Revenue and Customs Prosecutions, or the Secretary of State) that the evidence of the offence charged is sufficient for the person to be put on trial, and reveals a case of fraud of such seriousness or complexity that it is appropriate that the management of the case should without delay be taken over by the Crown Court. The second is where a notice is served under the new s.51C of the 1998 Act by the DPP that there is evidence sufficient for the person charged to be put on trial, that a child would be called as a witness at trial, and that to avoid any prejudice to the welfare of the child, the case should be taken over by the Crown Court without delay. This only applies to offences specified in s.51C(3). The third is where a defendant is charged with an either-way offence which relates to an indictable-only offence, or to an offence in respect of which a notice has been given under s.51B or 51C of the 1998 Act (s.50A(3)(a) of the 1998 Act). However, it should be noted that immediate sending to the Crown Court is only obligatory where the defendant appears at the magistrates' court in relation to the related proceedings at the same time as he appears for the indictable-only or "notice offence". If he appears on the related either-way charge at a later date the magistrates do not have to send the case to the Crown Court. The fourth is identical to the third, save that it relates to the situation where the defendant is charged with an either-way offence, and a co-defendant is charged with an indictable-only offence or one subject to s.51B or 51C. Again, immediate sending is obligatory where the defendants appear before the court at the same time, but is discretionary where the defendant charged with the either-way offence appears on a subsequent occasion to the co-defendant.

Committal for sentence for adult offenders

There have been some changes to the committal for sentence procedures for adults. Section 3 (committal for sentence on summary trial of offence triable either way) of the PCC(S)A 2000 has been amended so that the magistrates' court may commit if it is of the opinion that the Crown Court should "have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment". Previously the magistrates' court could commit for sentence if it was of the opinion that greater punishment should be inflicted for the offence than the court had the power to impose or where, in the case of violent or sexual offences, a custodial term for longer than that available to it was necessary to protect the public from serious harm. These requirements have been removed from s.3(2). New s.3A (inserted by the CJA 2003 s.41 and Sch.3) provides that a case must be committed to the Crown Court for sentence if a defendant is convicted of certain violent or sexual offences, and it appears to the court that the criteria for the imposition of an extended sentence would be met. Section 4 deals with committal for sentence of an either-way offence where the defendant has already been sent to the Crown Court for trial for one or more related offences. Finally, s.6 (committal for sentence in certain cases where offender committed in respect of another offence) (with minor amendments) still applies.

Children and young persons under the new regime

The position remains that, in general, children and young persons who are charged with an indictable offence will be tried summarily (MCA 1980 s.24(1) (as amended by the CJA 2003 ss.41 and 332, and Sch.3, paras 1 and 9)). However, there are circumstances where a young defendant's case will be sent straight to the Crown Court for trial, or where a plea before venue procedure will be followed.

Section 51A of the CDA 1998 provides that where a child or young person is charged with (i) a homicide offence, (ii) certain firearms offences, or (iii) a specified offence and it appears to the court that it would meet the criteria for an extended sentence on conviction, or where (iv) a notice has been served in a serious or complex fraud case, or (v) a notice has been served in a case involving child witnesses, the case will be sent forthwith to the Crown Court for trial. There are two things to note here. First, "homicide offence" is undefined in the legislation and it is unclear how broad its scope is. Secondly, s.24A distinguishes between cases that may meet the criteria for an extended sentence and those subject to the grave crimes procedure (PCC(S)A 2000 s.91), so that extended sentence cases will now be sent directly to the Crown Court, whereas grave crimes cases will still require an indication of the defendant's plea before determining whether or not to commit for trial (s.24A(1)(b)).

New ss.24A to 24D of the MCA 1980 (as inserted by the CJA 2003 s.41 and Sch.3, paras 1 and 10) make provision for a type of plea before venue hearing for defendants under the age of 18 in certain circumstances. Those circumstance are (i) where an adult defendant has been sent to the Crown Court for trial and a youth is jointly charged with the adult (having appeared on the same or a subsequent occasion) with an indictable offence, or an indictable offence that appears to be related to the adult's offence, (ii) where a child or young person has been sent to the Crown Court for trial under (i), but is charged with other related indictable or summary offences (s.51(8) of the 1998 Act), (iii) where a child or young person is charged with a grave crime (s.51A(3)(b) of the 1998 Act), or (iv) where a child or young person has been sent to the Crown Court under (iii), but is charged with other related indictable or summary offences either at the same time or on a subsequent occasion (s.51A(4) and (5) of the 1998 Act).

The plea before venue procedure in these circumstances is

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set out in s.24A of the MCA 1980 and is as follows. The allegation is put, the defendant is informed of the plea before venue procedure, warned that they may be committed for sentence and asked for an indication of plea. It should be noted that children and young persons do not have the opportunity to request an indication of plea which is now an option for adults (see ante). If a guilty plea is indicated the defendant will be treated as though he has been convicted summarily. He will then be dealt with by the magistrates' court or committed for sentence under the grave crime or dangerous offender provisions. If no indication is given, or a not guilty plea is indicated, the magistrates must decide whether or not to send the case to the Crown Court for trial in the usual way, i.e. if it is a grave crime the court will consider whether there should be the option of sentencing him to long-term detention under s.91 of the PCC(S)A 2000, and, if the defendant is jointly charged with an adult who has been sent to the Crown Court, the court will consider whether it is in the interests of justice for him to also be sent. It should be noted that under s.24B if, as a result of the defendant's disorderly conduct, his presence is not possible, the plea before venue procedure may take place in his absence provided that he is legally represented.

Committal for sentence for children and young offenders

Children and young offenders may be committed to the Crown Court for sentence in a number of circumstances under the new regime. The provisions to pay attention to here are the new ss.3A, 3B and 4A and 6 of the PCC(S)A 2000.

Under s.3B an offender *may* now be committed for sentence for an offence to which s.91 of the PCC(S)A 2000 applies, where he is deemed to have pleaded guilty in the magistrates' court having indicated a guilty plea. It should be noted that s.3B will not apply if a not guilty or no indication is given and he is convicted after summary trial—the youth court is then obliged to pass sentence itself. Under s.3C an offender *must* be committed for sentence where he is convicted of a specified offence and it appears to the court that the extended sentence criteria would be met. Under s.4A a defendant *may* be committed for sentence where he appears charged with an offence mentioned in s.91 of the 2000 Act which the court believes relates to offences already committed to the Crown Court. On committing the s.91 offence for sentence, unless the magistrates state that, in their opinion, they also had power to commit for sentence under s.3B(2) or 3C(2) of the 2000 Act, the Crown Court will only be able to sentence for the s.91 offence within the magistrates' courts' sentencing powers. Finally, s.6 (committal for sentence in certain cases where offender committed in respect of another offence) (with minor amendments) still applies.

Saving provisions

If the above system wasn't complicated enough, the saving provisions in relation to these commencement orders are far from easy to follow. The simple bit is that, in relation to all three commencement orders, the amendments are to have no effect in relation to any offence if a person first appeared in respect of that offence *before* the coming into force of the commencement order. However, if a person appears in respect of an offence *on or after* the date of the coming into force of the commencement order, and the offence is related to an offence that is triable only on indictment, and the person charged with the related indictable-only offence first appeared before the magistrates in relation to those proceedings *before* the date of the coming into force of the commencement order, then the amendments also have no effect. An offence is related to an indictable-only offence for these purposes if the magistrates would have been required to send the person charged with the related offence, or could have done so, to the Crown Court for trial under old s.51 of the CDA 1998 (i.e. as it was before the coming into force of these commencement orders).

However, it does not stop there. Under the most recent commencement order (S.I. 2013 No. 1103), Art.4 effectively removes the effect of the saving provisions in all three commencement orders. It provides that in cases where the saving provisions would have applied but where, by August 30, 2013, the court has not decided to proceed to summary trial, and the person charged has not been committed or sent for trial, the saving provisions will no longer apply. The effect is to ensure that as of August 31, 2013, the committal procedure for either-way offences will be fully abolished in all local justice areas.

In practice

Crime and Courts Act 2013: Consultation on the "equal merit" provision

The Crime and Courts Act 2013, which received Royal Assent on April 25, 2013, implements a number of recommendations of the Lord Chancellor's Advisory Panel on Judicial Diversity, and was introduced following a Ministry of Justice consultation on *Appointments and Diversity: A Judiciary for the 21st Century* (May 2012).

Schedule 13 Pt 2 of the Crime and Courts Act 2013 provides for measures to promote consideration of diversity in the judicial appointments process. For one of those measures, to be known as the "equal merit" provision, para.9 clarifies that making selections "solely on merit" does not prevent a candidate being chosen on the basis of improving diversity when there are two candidates of equal merit. The Act amends s.63 of the Constitutional Reform Act 2005 as follows:

(3) After subsection (3) insert—

'(4) Neither "solely" in subsection (2), nor Part 5 of the Equality Act 2010 (public appointments etc), prevents the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity within—

(a) the group of persons who hold offices for which there is selection under this Part, or

(b) a sub-group of that group.'

The consultation closes on August 5, 2013.

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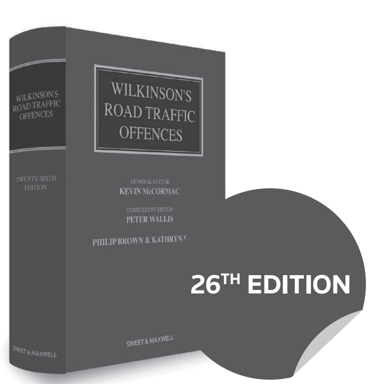

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