SWEET & MAXWELL

Issue 3 April 9, 2014

Archbold Review

Cases in brief

Conspiracy to be concerned in the production of a controlled drug by another—whether offence known to law

DANG [2014] EWCA Crim 348; March 7, 2014

D and others were involved in the large scale importing and sale of hydroponic and other equipment capable of use in the production of cannabis. They were convicted of conspiracy to be concerned in the production of a controlled drug by another in contravention of s.4(2)(b) of the Misuse of Drugs Act 1971. They argued that the count did not disclose an offence known to the law, by analogy with *Kenning* [2008] 2 Cr.App.R. 32 and *Hollinshead* [1985] A.C. 975 (an agreement to aid and abet an offence was not in law capable of constituting a criminal conspiracy under Criminal Law Act 1977 s.1). The appellants submitted that the importing and selling of the equipment was relied on by the prosecution as "the course of conduct" for the purpose of s.1(1) of the 1977 Act; and that did not "necessarily amount to" or "involve the commission" of any offence within the meaning of s.1(1)(a). The consequence contemplated by the agreement was too remote from the agreement to be a criminal conspiracy. The Court dismissed the appeal. "Being concerned in" an activity was a broad concept: *Nguyen (Khin Quoc)* [2010] EWCA Crim 2658. The act of being concerned could take place before or after the production. Section 4(2)(b) of the 1971 Act did not require proof of involvement in any *particular* process of production. A mere agreement to sell equipment, one of whose uses may be unlawful, could not amount to a statutory conspiracy under s.1 of the 1977 Act. However, that was not the offence left to the jury by the judge. The judge expressly distinguished such an agreement from that charged. There was a critical distinction to be made between the agreement and the substantive offence, contrary to s.4(2)(b), of being concerned. To establish the substantive offence the prosecution must prove that cannabis was produced and that the defendant was concerned in its production. To establish a conspiracy to commit the substantive offence the prosecution must prove an agreement that cannabis would be produced by another with the conspirators' assistance. The offence charged was the making of the agreement to be concerned in the production of cannabis by others. If the agreement was carried into effect it would necessarily involve the commission of the offence of being concerned in the production of cannabis.

Evidence—confession—Police and Criminal Evidence Act 1984 s.76—general approach—requirements in relation to right to legal advice

BEERES v CPS [2014] EWHC 283 (Admin); February 13, 2014

(1) Where a confession was the sole evidence relied upon by the Crown, a Court would need to be especially vigilant to ensure that it was reliable and/or fair. Under the Police and Criminal Evidence Act 1984 s.76, for the reliability of a confession to be challenged all that was required was a "representation" to the Court that the confession met the conditions in s.76(2)(b). Parliament did not intend to impose a high burden. Provided the representation was not mere assertion and was based upon some credible, more than insignificant or trifling, evidence then the rebuttable presumption against admission of the confession evidence was triggered—the confession was inadmissible unless the prosecution established beyond reasonable doubt that the confession has not been obtained in a way that contravened s.76. The representation need not demonstrate that the confession "was" unreliable; merely that it "may have been" unreliable. Section 76 was concerned to protect against a risk of unreliability. The test for the Court was not whether the confession was reliable *per se*. The Court was concerned

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not with the intrinsic quality of the confession as evidence but with the manner in which it came into being and as to the risk of it being unreliable (see s.76(2): a confession may be excluded "notwithstanding that it may be true"). The focus of the analysis was the position that pertained at the time of the impugned confession. The Court therefore could not examine the confession in the light of other evidence. Culpability on the part of the police was not a *sine qua non* to exclusion of a confession. The position under s.78 of the 1984 Act would not *normally* differ from that based upon the application to the same facts of s.76. Both s.78 and the common law would enable a Court to examine a case, including one also engaging s.76, from a perspective of overall fairness. Hence in principle a tailpiece to any s.76 application would be a "fairness" appraisal. The fact that there may be substantial overlap and that a s.76 analysis might normally indicate the result of a fairness test did not mean that the two tests were always or necessarily identical and that s.76 precluded the operation of s.78.
(2) Where B had been advised, and reminded of, her right to consult a solicitor, either face to face or over the telephone, there was no breach of Code C:6.5 where she had not been told in a formal two-stage way (face to face, then telephone, advice), and nor did C:11.2 make it necessary to repeat the two-stage advice process before interview. Neither was it a breach that the officers had not mentioned a "duty solicitor".

Magistrates' courts—new information laid following dismissal of case when prosecutor failed to appear (Magistrates' Court Act 1980 s.15)—whether abuse of process on basis akin to autrefois acquit—whether defendant "in peril"—approach to use of Magistrates' Courts Act 1980 s.15
DPP v JARMAN [2013] EWHC 4391 (Admin); December 10, 2013
Magistrates dismissed the case against J when the prosecutor failed to appear (Magistrates' Courts Act 1980 s.15). A new information was subsequently laid alleging the same offence. The District Judge had been wrong to hold that the second information should be stayed as an abuse of process, being akin to a prosecution barred by a plea of *autrefois acquit*.
(1) The question depended on the meaning of the word "dismiss" in s.15. It did not follow from s.27 (a "dismissal" of an either way offence was to the same effect as an acquittal on indictment) that the dismissal of a summary-only offence was to the same effect. In the absence of a statutory definition "dismiss" must be construed as an ordinary word and so it was synonymous with "discharge". Section 6 provided that when magistrates were sitting as examining magistrates, they could either commit the accused for trial or discharge him, and a discharge was no bar to a further prosecution on the same facts, like discontinuance pursuant to the Prosecution of Offences Act 1985 s.23: *Holmes v Campbell* (1998) 162 J.P. 655. *R. v. Hendon Justices Ex p. DPP* [1993] 96 Cr.App.R. 227 and *R. (on the application of O) v Stratford Youth Court* [2004] EWHC 1553 (Admin) were decisions on their own very particular facts and were to be distinguished.
(2) A plea of *autrefois acquit* would in any event have been unlikely to have succeeded. To be "in peril" for double jeopardy purposes, a defendant must be at a hearing for the purpose of determining guilt (*J* [2013] 2 Cr.App.R. 10 [50]). Such a hearing required the presence of the prosecution.
(3) Generally, while the overriding objective included the requirement to deal with cases efficiently and expeditiously, the use of the power to dismiss proceedings pursuant to s.15 must not be used, save in the most exceptional cases, to punish the prosecution for its inefficiency.

Production order—Police and Criminal Evidence Act 1984 s.9 and Sch.1—whether evidence adduced ex parte *permitted*
R. (B SKY B BROADCASTING) v METROPOLITAN POLICE COMMSSIONER [2014] UKSC 17; March 12, 2014
B Sky B objected to the reception of evidence *ex parte* by the judge considering an application for a production order of material in the possession of a journalist employed by B Sky B in a case involving (admitted) passing of information by members of the armed services to the journalist. The special procedure under Police and Criminal Evidence Act 1984 s.9 and Sch.1 applied. The Court upheld the quashing of the production order by the Administrative Court at [2011] EWHC 3451 (Admin). The principle in *Al Rawi v The Security Service* [2011] UKSC 34 (in a trial, the use of a closed material procedure was so alien to the right of a party to know the case advanced against it as to be permissible only by an Act of Parliament), was, as a general proposition, not to be applied to an application made by a party to litigation or prospective litigation to use the procedural powers of the court to obtain evidence for the purposes of the litigation from someone who was not a party or intended party. Such applications involved an ancillary procedure aimed at allowing relevant evidence to be made available to a court determining a substantive dispute and would not ordinarily involve the court deciding a question of substantive legal rights between the applicant and the respondent. However, the instant situation was different. Compulsory disclosure of journalistic material was a highly sensitive and potentially difficult area. It was likely to involve questions of the journalist's substantive rights. Parliament had recognised this by establishing the special, indeed unique, procedure under s.9 and Sch.1. If evidence was to be admitted in support of a production order application under that special procedure, the requirement that the hearing be heard *inter partes* was inconsistent with evidence being given *ex parte*.

Terrorism—Terrorism Act 2000 Sch.7—lawful use—establishing dominant purpose—freedom of the press—use in connection with—proportionality—European Convention on Human Rights Art.10
R. (MIRANDA) v HOME SECRETARY AND OTHERS [2014] EWHC 255 (Admin); February 19, 2014
M, the spouse of a journalist who had been involved in publication of, and using, secret documents obtained by another from an American security agency, was stopped, questioned and detained at an airport under powers in the Terrorism Act 2000 Sch.7. He was found to be in possession of a hard drive containing a large number of confidential documents.
(1) In considering whether the dominant purpose (*R. v. Southwark Crown Court Ex p. Bowles* [1998] A.C. 641) for which the power was being used was the statutory purpose (that a person appeared to be within the definition of "terrorist" in s.40(1)(b)), the Court was not limited to a consideration of the examining officers' subjective state of mind. Parlia-

ment must have enacted Sch.7 in the knowledge that there might be very good reasons why the examining officers (who might, as here, be junior in rank) should not be privy to the whole story, which was congruent with the evidence of the senior officer at the airport that a "firewall" was maintained between "the intelligence case and the examination, to prevent any unwitting disclosures to the subject of the examination." Sch.7 did not require that the examining officer must be the one to determine whether the subject appeared to fall within s.40(1)(b). It may well be someone else, to whom the results of the stop were referred. In such a case, while the document requesting the exercise of the powers (a Port Circulation Sheet, or PCS) provided the essential, even if not the whole, rationale for the decision, it may, purposely or unwittingly, be misleading, and the Court should have some evidence of the hierarchy of decision-making behind and above the PCS; and there might be cases where there was no PCS. An analysis of the decision making by the examining officers' superiors revealed that the purpose in fact was to ascertain the nature of the material which M was carrying and if on examination it proved to be as was feared, to neutralise the effects of its release (or further release) or dissemination. On a proper construction of the concept of "terrorism" (s.1) upon which the definition of "terrorist" in s.40(1)(b) depended, and of the powers in the schedule, such a purpose fell within Sch.7. The definition was very wide indeed (*Gul* [2013] 3 W.L.R. 1207); the definition did not create a criminal offence and did not import any mental element; and there was no prior requirement that examining officers had any grounds for suspecting that a person fell within s.40(1)(b) (and so were only subject to a general requirement that the power be exercised on some reasoned basis, proportionately and in good faith). The s.1 definition was capable of covering the publication or threatened publication, for the purpose of advancing a political, religious, racial or ideological cause of stolen classified information which, if published, would provide details of individuals such as would endanger their lives, where the publication was designed to influence government policy on the activities of the security and intelligence agencies (s.1(1)(b) and (c) and (2)(c)).

(2) The use of the powers was not a disproportionate interference with free speech or the freedom of the press (considered as a matter of common law). M was not a journalist; the stolen intelligence material he was carrying was not "journalistic material", or if it was, only in the weakest sense. But he was acting in support of his spouse's activities as a journalist. The Sch.7 stop constituted an indirect interference with press freedom, though no such interference was asserted by the claimant at the time. However, it was shown by compelling evidence from government and security officials, not effectively countered by M or his spouse's witness statements, to have been justified. There was no question of a source being revealed. The fact that the material was stolen, though it did not exclude the law's intervention to protect free speech, went in the scales in favour of the defendants. The Sch.7 stop was a proportionate measure in the circumstances. Its objective was not only legitimate, but very pressing. In a press freedom case, proportionality involved the striking of a balance between two aspects of the public interest (not the contrasting of private and community interests): press freedom itself on one hand, and on the other whatever was sought to justify the interference: here national security. On the facts of this case, the balance was plainly in favour of the latter.

(3) The additional requirement of European Convention on Human Rights, Art.10(2), that the interference with press freedom was "prescribed by law", was satisfied. The Sch.7 powers did not fail the test of legal certainty: *Beghal* [2014] 2 W.L.R. 150, with the reasoning of which the Court agreed. The Court also noted, in connection with the European Court of Human Rights' reference in *Gillan and Quinton v UK* (2010) 50 E.H.R.R. 45 to the undesirability of unfettered executive discretion bearing on fundamental rights, that in this jurisdiction the executive never enjoyed unfettered power. All state power had legal limits, for it was conferred on trust to be exercised reasonably, in good faith, and for the purpose for which it was given by statute; and where a discretionary power touched a fundamental right, its use must fulfill the proportionality principle. Neither had the Strasbourg Court developed an absolute rule of prior judicial scrutiny for cases involving state interference with journalistic freedom, even if the Court's reasoning was sometimes expressed in very general terms (interveners had relied on *Sanoma Utigevers BV v Netherlands* (2010) 51 E.H.R.R. 31; *Telegraaf Media Nederland Landelijke Media BV v Netherlands* (2012) 34 BHRC; and *Nagla v Latvia* [2013] ECHR 688).

(4) The Court considered, *obiter*, the formulation of the proportionality test by Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] 3 W.L.R. 170; and in particular his fourth element, that "whether … a fair balance has been struck between the rights of the individual and the interests of the community" (which appeared to have come into the law from *Razgar* [2004] 2 A.C. 368 at [20] and *Huang* [2007] 2 A.C. 167 at [19] and [20], drawing on what was said by Dickson C.J. in *Oakes* [1986] 1 S.C.R. 103). This requirement needed to be approached with some care. It appeared to require the court to decide whether the measure, though it had a justified purpose and was no more intrusive than necessary, was nevertheless offensive because it failed to strike the right balance between private right and public interest; and the court was the judge of where the balance should lie. There was real difficulty in distinguishing this from a political question to be decided by the elected arm of government. If it were properly within the judicial sphere, it must be on the footing that there was a plain case (*per* Laws L.J.).

SENTENCING CASES

Murder; life sentences

ATTORNEY-GENERAL'S REFERENCE No.69 OF 2013 (McLOUGHLIN); NEWELL [2014] EWCA Crim 188; February 18, 2014

The Court of Appeal considered the statutory scheme for sentencing an adult guilty of murder set out in the Murder (Abolition of Death Penalty) Act 1965, the Criminal Justice Act 2003 and the Crime (Sentences) Act 1997 following the decision of the Grand Chamber of the European Court of Human Rights in *Vinter v UK* (66069/09) 34 B.H.R.C. 605. The Court of Appeal held that in *Vinter*, the Grand Chamber accepted that there are crimes that are so heinous that just punishment may require imprisonment for life. For such imprisonment to be compatible with Art.3, there must both a prospect of release and a possibility of review.

The Grand Chamber in *Vinter* considered s.30 of the Crime (Sentences) Act 1997. Section 30 provides that:

"(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.

(2) Before releasing a life prisoner under subsection (1) above, the Secretary of State shall consult the Parole Board, unless the circumstances are such as to render such consultation impracticable."

Guidance concerning the Secretary of State's policy regarding release on compassionate grounds is set out in Chapter 12 of the Indeterminate Sentence Manual (the Lifer Manual) (Prison Service Order 4700). The criteria date from April 2010 and state:

"the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]), or the ISP is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stoke; and the risk of re-offending (particularly of a sexual or violent nature) is minimal; and further imprisonment would reduce the prisoner's life expectancy; and there are adequate arrangements for the prisoner's care and treatment outside prison; and early release will bring some significant benefit to the prisoner or his/her family".

In *Vinter*, the Grand Chamber found that it was unclear whether the Secretary of State considering release under s.30 would apply the restrictive policy set out in the Lifer Manual, or would go beyond such criteria and consider the requirements of Art.3 (an approach set out by Lord Phillips in *Bieber* [2009] 1 W.L.R. 223). Due to this lack of certainty, the Grand Chamber concluded that s.30 did not provide a regime for reducibility compliant with art.3.

The Court of Appeal disagreed with the Grand Chamber on this point, holding that the domestic law is clear: the Secretary of State is bound to exercise his power under s.30 in a manner compatible with principles of domestic administrative law and with Art.3.

The Court then set out how s.30 is to be applied. First, the power of review arises if there are exceptional circumstances. The offender subject to the order must demonstrate that exceptional circumstances have arisen since the whole life term was imposed. The Court declined to specify what such circumstances might be, stating that the term "exceptional circumstances" is sufficiently certain.

Second, the Secretary of State must then consider whether such exceptional circumstances justify release on compassionate grounds. The Lifer Manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release on compassionate grounds; their discretion cannot be fettered by considering only the matters set out in the Lifer Manual.

Third, the term "compassionate grounds" must be read in a manner compatible with Art.3. "Compassionate grounds" is a term with a wide meaning that can be elucidated on a case by case basis. It is not restricted to matters set out in the Lifer Manual.

Fourth, the Secretary of State's decision must be reasoned by reference to the circumstances of each case and is subject to scrutiny by way of judicial review.

The Court concluded that the law of England and Wales therefore does provide to an offender "hope" or the "possibility" of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable.

Although the Grand Chamber in *Vinter* did not determine that the imposition of a whole life tariff violates Art.3, the Court of Appeal considered the position were it to be found that the whole life tariff violated Art.3.

The Court held that s.3 of the Human Rights Act could not be used to read down the legislation to preclude the imposition of whole life tariffs as s.269(4) of the Criminal Justice Act 2003 states that if the court is of the opinion that no order for early release should be made because of the seriousness of the offence alone or in combination with others, it must order that those provisions do not apply. Section 6(2) of the Human Rights Act therefore disapplies the obligation on the court as a public authority to act compatibly with the Convention. The only remedy available in the domestic courts would therefore be a declaration of incompatibility. Such a remedy is not available in the Crown Court and would not affect the continuing operation of the statutory scheme.

Sentencing; Dangerous Offenders

ATTORNEY-GENERAL'S REFERENCE No.27 of 2013 (BURINSKAS); PHILLIPS [2014] EWCA Crim 334; March 4, 2014

The Court of Appeal considered the effect of amendments to the dangerous offender provisions in Chapter 5 of the Criminal Justice Act 2003 made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The Court summarised the new provisions introduced by LASPO as follows:

1. Under s.224A, after conviction for a second listed offence, the judge must pass a life sentence, unless the particular circumstances make it unjust.
2. Under s.225, a sentence of life imprisonment must be passed if the offender commits a serious offence, is dangerous and the seriousness of the offence is such as to justify the imposition of a life sentence.
3. LASPO also introduced a new form of extended sentence and significant changes to the early release provisions for extended sentences.

After reviewing the specific provisions introduced by LASPO, the Court set out the general approach to sentencing where Chapter 5 applies.

The first question to be considered in all cases where the dangerous offender provisions apply is whether the offender is dangerous. Although where s.224A may be relevant there will be a temptation to move straight to a consideration of that provision, that temptation should be resisted as it may entail overlooking the crucial question of whether the offender is dangerous.

The judge should approach sentencing in a case of this type as follows:

1. Consider the question of dangerousness. If the offender is not dangerous and s.224A does not apply, a determinate sentence should be passed. If the offender is not dangerous and the conditions in s.224A are satisfied then (subject to s.2 (a) and (b)), a life sentence must be imposed.
2. If the offender is dangerous, consider whether the seriousness of the offence and offences associated with

it justify a life sentence. Determining whether the seriousness of the offence is such as to justify a life sentence requires consideration of the seriousness of the offence and associated offences (in accordance with s.143(1) of the Criminal Justice Act 2003); the defendant's previous convictions (in accordance with s.143(2)) of the Criminal Justice Act 2003); the level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger and available alternative sentences.

3. If a life sentence is justified then the judge must pass a life sentence in accordance with s.225. If s.224A also applies, the judge should record that fact in open court.
4. If a life sentence is not justified, then the sentencing judge should consider whether s.224A applies. If it does then (subject to the terms of s.224A) a life sentence must be imposed.
5. If s.224A does not apply the judge should then consider the provisions of s.226A. Before passing an extended sentence the judge should consider a determinate sentence.

Comment

Proceeds from Pursuing Private Prosecutions

By Adam Gersch and David Rosen[1]

The recent increase in private prosecutions is a predictable result of the scaling back of state resources.

In *R. (Virgin Media Ltd) v Zinga*[2] the Lord Chief Justice held that confiscation proceedings under the Proceeds of Crime Act 2002 ("POCA") could be invoked by private prosecutors. The Lord Chief Justice also criticised a deal that saw the Metropolitan Police agree to help Virgin Media in the private prosecution of a gang of fraudsters in exchange for a share of the compensation.

The prosecution was commenced with the assistance of the police and without the magistrates' court being told that it was a private prosecution: an omission which the Court of Appeal had criticised when, at an earlier stage in the proceedings, the defendants had unsuccessfully appealed against conviction.[3] When the defence opposed the compensation order on the ground that calculating the loss to Virgin would be too complicated,[4] the claim for compensation was abandoned, and with it, Virgin's original deal with the police. However, Virgin then pressed ahead with confiscation proceedings, in the expectation that the police would eventually receive a share of the defendant's confiscated profits under a scheme introduced by the Home Office in 2004 (see below). A confiscation order for £8,771,300 having been made against him, the defendant then challenged the right of Virgin, as a private prosecutor, to bring confiscation proceedings; and as previously reported in this *Review*,[5] the Court of Appeal held that it could. On the propriety of a victim of a crime agreeing to split the proceeds of a compensation order with the police, as originally envisaged, the Court had doubts; but with the propriety of the confiscation proceedings, as eventually pursued, it was satisfied (if not enthusiastic).

In reaching this conclusion, the Court of Appeal made these general remarks:

The issues raised are of importance. First, there is an increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions. Second, the impugning of the propriety of the agreement between the Metropolitan Police Authority and Virgin has to be considered in the light of the considerable reduction in funds available to the police. Third, there is an obvious and serious conflict of interest inherent in Virgin's original position as a private prosecutor and a company seeking very substantial compensation for its lost revenue through confiscation proceedings.

A major concern in such cases is the independence of the police, and the extent to which the police can be involved in commercial deals. Section 93 of the Police Act 1996 provides:

"Acceptance of gifts and loans

(1) A police authority may, in connection with the discharge of any of its functions, accept gifts of money, and gifts or loans of other property, on such terms as appear to the authority to be appropriate.

(2) The terms on which gifts or loans are accepted under subsection (1) may include terms providing for the commercial sponsorship of any activity of the police authority or of the police force maintained by it."

Whilst there are many examples of police legitimately accepting financial assistance from the private sector in a general sense, what is less known is the fact that many prosecutions involve the police working with other agencies in return for a "slice of the cake"' from monies recovered in compensation.

The course that was pursued in *Zinga* had a precedent. In *Innospec*[6] an arrangement was explained that allowed the Serious Fraud Office ("SFO"), acting as prosecutor, to benefit from an "incentive scheme" which was introduced in 2004. Proceeds of a confiscation order, once collected by the Ministry of Justice, can be distributed according to a

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2 [2014] EWCA Crim 52.
3 [2012] EWCA Crim 2357, at [32] and [33].
4 In *Stapylton* [2012] EWCA Crim 728, and other cases, the Court of Appeal has held that compensation orders are only be used in cases where the defendant's loss can be calculated easily.
5 [2014] 2 *Archbold Review* 3.
6 [2010] EW Misc 7; [2010] Crim.L.R. 665.

protocol that allows the Home Office to retain a 50 per cent share, the investigating authority and prosecuting authority 18.75 per cent each, and HM Court Service 12.5 per cent. Accordingly if the SFO was responsible for the investigation and prosecution of a case it would receive 37.5 per cent of any recovered monies.

A potential conflict of interest is apparent if the prosecutor decided in favour of confiscation proceedings rather than a fine, since fines—unlike confiscated profits—are paid to and retained by HM Treasury and thus not part of the usual "carve up". The benefit to HM Court Service, it was said, would not create any position of conflict as funding was guaranteed by the Ministry of Justice regardless of income generated under the "incentive scheme".[7]

On February 4, 2014 Lord Taylor of Holbeach was challenged in the House of Lords by the opposition front bench over the issue of private prosecutions involving arrangements with the police over the sharing of the proceeds of crime recovered in compensation. Lord Taylor promised guidance on such deals and the Government has now given a commitment that the College of Policing is to introduce a new Code of Practice for all police officers.

So, is it right that the police are able to provide a service to the public sector in fulfilling their objective to fight crime, and at the same time seek to be paid for their time working for the private sector? High standards are expected of the police, but does the sharing of the proceeds of crime after a successful prosecution damage its integrity or independence?

At first blush some might say that it is wrong for the police to enter into financial deals with private entities. However, given the increasing demand on public funding it may be desirable that creative schemes are explored to reduce the burden on the public purse.

There are many examples of cases that are not investigated purely on grounds of expense. It is often reported that some police forces are not interested in investigating financial crimes, and victims are told to pursue a civil remedy. Home Office crime statistics and local priorities dictate which offences are investigated, and which are considered to be "non-crimes". There is sufficient variation in approach to justify the recent formation of a Parliamentary Select Committee to consider this issue.[8]

Decisions on cost do not simply stop at the investigation stage. Recently, a prosecution of three defendants for conspiracy to supply Class A drugs was abandoned mid-trial by the CPS purely on financial grounds.[9] The public is right to be concerned whenever the interests of justice have to make way for considerations of cost.

Absent firm action to combat crime irrespective of cost, there is a danger of a gradual creep towards disorder and civil unrest. There is also a risk that the police will lose public confidence leading to greater mistrust and fewer offences being reported. The police service was not formed with a view to making a profit, or indeed, to be commercially answerable to its paymasters but to maintain law and order, protect members of the public and their property and prevent crime.

If private funding is available to assist the police then it may be foolish to reject it. At the same time it would be wrong to embrace a two-tier system with some offences receiving special attention as a result of a corporate sponsorship. The correct balance perhaps lies in ensuring that the rules of fairness and integrity of proceedings are maintained regardless of the identity of the prosecuting authority. To this end, a number of safeguards exist for private prosecutions: (1) a private prosecution commences with the gathering of evidence in accordance with the Police and Criminal Evidence Act 1984 during which suspects receive a caution and should understand their rights; (2) the charging decision should involve an independent review of the evidence using CPS charging standards. There is already an in-built protection in that some more serious offences require the approval of the Attorney-General or DPP; (3) commencement of a private prosecution requires the laying of an information, involving the swearing of an oath by the investigator; (4) the disclosure obligations for private prosecutions are onerous and open to challenge; (5) subject to the application of its own guidance, the DPP reserves the right to take over any private prosecution and continue or discontinue proceedings; (6) any criminal proceedings may be challenged by way of an abuse of process argument, application to dismiss or motion to quash.

The objections following *Zinga* in the House of Lords seemed to turn on the fee-sharing arrangement in one particular case. There appeared to be less of an objection to the police being paid "overtime" for the cost of their investigative work, rather than accepting a percentage split of the proceeds.

Like the Bar under its Code of Conduct,[10] the police should be precluded from any arrangement that would permit absolute independence, integrity and freedom from external pressures to be compromised. The new proposed police Code of Conduct, on which the College of Policing is currently consulting, should be robust whilst allowing for enough flexibility to encourage private funding of criminal cases that would not otherwise be pursued.

7 Though the authors have noticed that conference rooms in some Crown Court appear to be kept locked except when needed by SFO prosecutions!

8 See http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/131106-new-inquiry-pccs/.

9 *Renata Andrews* Unreported, Blackfriars Crown Court, November 19, 2013 (H.H.J. Murphy); http://www.lawgazette.co.uk/practice/disclosure-costs-force-cps-to-drop-drugs-case/5039379.article

10 Prior to January 6, 2014.

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Feature

The *Mens Rea* of a Criminal Attempt

Findlay Stark[1]

The Criminal Attempts Act 1981 (the 1981 Act) makes specific provision for defendants who attempt to commit offences that it is impossible to bring about.[2] In such cases, the 1981 Act instructs the court to determine whether, if the facts had been as the defendant believed them to be, he would have had the "intent to commit an offence".[3] If he would have, then he can be convicted of an attempt once he has performed a more than merely preparatory act towards committing the offence.[4] The Court of Appeal's recent judgment in *Pace and Rogers*[5] grapples with this rule in the context of the offence under s.327 of the Proceeds of Crime Act 2002 (the 2002 Act), i.e. concealing, disguising or converting criminal property (the concealment offence). With due respect to the overworked Criminal Division, the reserved opinion in *Pace and Rogers* risks setting a dangerous precedent. This note argues that *Pace and Rogers* should not be followed in the future. Preference should be given to the earlier decision of the Court of Appeal in *Khan*.[6]

The defendants in *Pace and Rogers* bought metal from undercover police officers. The metal was not, in fact, stolen, and so could not constitute "criminal property" for the purposes of the 2002 Act.[7] The defendants could not, therefore, be convicted of concealing criminal property. The Crown argued that the defendants had, however, suspected that the metal was stolen, which is the *mens rea* for the substantive concealment offence.[8] *Pace and Rogers* were thus charged with an attempt to commit the concealment offence. The trial judge thought that the *mens rea* required for this attempt was (i) an intention to conceal the metal and (ii) the suspicion that the metal was stolen. The Court of Appeal held that the trial judge was wrong, and that the appropriate forms of *mens rea* were (i) an intention to conceal the metal and (ii) an intention that the metal was stolen. A careful analysis of the law demonstrates that both the trial judge and the Court of Appeal went awry, albeit in different ways.

It is useful to begin by considering what the *mens rea* of the attempted concealment offence would have been *if* the metal had, in fact, been stolen. It is submitted that, in those circumstances, the Court of Appeal's decision in *Khan* would apply. The defendant in *Khan* had been charged with attempted rape. He had tried to have sexual intercourse with a woman who was not consenting, and he was reckless as to whether she was consenting. If he had managed to achieve penetration, Khan would have been liable for rape, recklessness being sufficient *mens rea* regarding the circumstance element of that offence (non-consent) at the time.[9] The Court of Appeal found it difficult to see how Khan, who was *trying* to do what was required in order for a rape to take place, was not *attempting* to rape the complainant. This meant, the court reasoned in *Khan*, that the defendant had "the intent to commit an offence", and thus had the *mens rea* for attempted rape, *even though* he did not intend each and every aspect of the *actus reus* of the substantive offence.

It would be a mistake to think that *Khan* is relevant only to offences involving recklessness. Unfortunately, the Court of Appeal in *Pace and Rogers* attempted to distinguish *Khan* on exactly this basis: *Khan* involved recklessness, and was thus irrelevant to the concealment offence, which involves *suspicion*.[10]

Admittedly, in *Khan*, recklessness as to the circumstance of the complainant's non-consent was viewed as being sufficient fault for attempted rape, when it was coupled with an intention to penetrate the complainant. Recklessness as to the absence of consent was the lowest acceptable form of *mens rea* at the time. Had the law on rape then been the same as it is now, under the Sexual Offences Act 2003, presumably the Court of Appeal would have found that the *mens rea* of attempted rape (in a case where the complainant is not consenting) is present where the defendant (i) intends to penetrate the complainant's vagina, anus or mouth with his penis (conduct)[11] whilst (ii) holding *no reasonable belief* in the complainant's consent (circumstance).[12] Applying the logic of *Khan*, if the defendant who lacked a reasonable belief in consent succeeded in what he was intending to do (penetrate the complainant) he would, in light of the complainant's non-consent, have been liable for rape. If he was intending to penetrate, and took a more than merely preparatory step towards that end, then the defendant should be liable for attempted rape.

(It might be worried that a defendant who possesses an honest, yet unreasonable, belief in consent can in no way be described as "trying" to rape the complainant, and "trying" might be viewed as the ordinary language equivalent of "attempting". The defendant with an honest yet unreasonable belief in consent will take himself to be trying to have consensual sex, and so it might be thought odd for the law to view him as *attempting* to commit rape. If it is accepted, however, that the defendant is *trying* to bring about the mix of conduct and circumstances that *the law* would describe as rape (if he achieved penetration), then there is a sense in which he *is* trying to bring about the wrong of rape by intending to penetrate the complainant. There is nothing wrong, in principle, with holding that attempted rape is made out where the defendant takes more than merely preparatory steps towards penetrating the complainant, in-

1 Jesus College, Cambridge. The author is indebted to Matt Dyson, Jo Miles, Jonathan Rogers, Andrew Simester, John Spencer, Shona Wilson Stark and Graham Virgo for discussions about *Pace and Rogers*.

2 Criminal Attempts Act 1981, s.1(2).
3 Criminal Attempts Act 1981, s.1(3).
4 Criminal Attempts Act 1981, s.1(1).
5 [2014] EWCA Crim 186.
6 [1990] 1 W.L.R. 813.
7 Proceeds of Crime Act 2002, s.340(3)(a).
8 Proceeds of Crime Act 2002, s. 340(3)(b).
9 Sexual Offences (Amendment) Act 1976, s. 1(1)(b).
10 *Pace and Rogers* at [52].
11 If preferred, penetration can be thought of as a consequence. This speaks to the lack of clarity over the conduct/consequence distinction.
12 Sexual Offences Act 2003, s.1(1).

tends penetration, and honestly, yet unreasonably, believes she is consenting.)

The next important decision on the *mens rea* of attempts, *Attorney-General's Reference (No.3 of 1992)*[13]—which involved aggravated criminal damage—can be analysed similarly (if the Court of Appeal's language of "missing elements" is put to one side for the moment). The full offence of aggravated criminal damage requires recklessness with regard to the endangerment of life.[14] The Court of Appeal found that recklessness would be sufficient fault with regard to the risk of endangering the lives of others, *if* the defendants intended to cause damage or destruction of property. Again, the thought was that the defendants would have been liable for the full offence if they succeeded in what they were intending to do (damage an occupied car through fire), and thus should be liable for an attempt when they took a more than merely preparatory step in line with that intention. If suspicion (rather than recklessness) that life would be endangered had been sufficient *mens rea* for aggravated criminal damage, the Court of Appeal might therefore have found that the *mens rea* of the attempted offence would be (i) an intention to cause damage or destruction to property (which belonged to another), with (ii) the *suspicion* that life might be endangered as a result.

Recklessness was not, in short, crucial to the decisions in *Khan* and the *Reference* case. Nothing prevents the application of *Khan* and the *Reference* decision (if it is read in the way suggested above) to the concealment offence under the 2002 Act, which makes the trial judge's apparent reliance on them understandable. *Khan* seems readily applicable. Like rape, the concealment offence involves a conduct element (dealing with property in one of the proscribed ways)[15] and a circumstance element (that the property is "criminal property").[16] The *mens rea* with regard to the offence is (i) *intention* as to the conduct, and (ii) *suspicion* as to the circumstance. If the logic of *Khan* is applied, then the *mens rea* of attempted concealment is (i) an *intention* to conceal property, and (ii) a *suspicion* that the property is "criminal property". In those circumstances, if the defendant were to proceed with his intended conduct, he would necessarily commit the full concealment offence if the property is, in fact, stolen. He should thus be convicted of an attempt when he takes a more than merely preparatory step towards that end.

Perhaps detecting that a better reason for distinguishing *Khan* was required, the Court of Appeal also argued that that case was unhelpful in *Pace and Rogers* because the offence Khan had attempted was possible—the complainant was not consenting, and so could be raped.[17] In contrast, *Pace and Rogers* could not, in the absence of "criminal property", commit the concealment offence. In an "impossible" attempts case such as *Pace and Rogers*, the Court of Appeal concluded, the defendant must *intend* each and every aspect of the *actus reus* of the substantive offence.[18] The defendants would have to (i) *intend* to conceal property and (ii) *intend* that it was "criminal property".

This seems to suggest that *Khan* does not apply to impossible attempts cases. Nothing in *Khan* compels this limitation, so long as due regard is paid to s.1(3)(b) of the 1981 Act. This is the section that requires courts to assume that facts the defendant believed to exist *actually existed*, and so implicitly provides the *mens rea* for impossible attempts. Thus, if Pace and Rogers had *believed* that the metal was stolen, the court would proceed *as though* the property *was* stolen. Pace and Rogers would then have been intending to conceal metal, that metal (by dint of the legal fiction in s.1(3)(b)) would in fact have been stolen, and the defendants would have believed this to be the case. Belief is a "higher" *mens rea* state than suspicion, and thus—if the defendants had done what they intended to do—they would *necessarily* have committed the full concealment offence. In these altered circumstances, the defendants would have "the intent to commit an offence". This would be sufficient for a conviction for attempted concealment. Note that an *intention* that the metal was stolen is not necessary—a *belief* that the metal is stolen will suffice.[19] Note also that the reasoning in *Khan* can apply in this type of impossible attempt case.

The Court of Appeal noted correctly in *Pace and Rogers* that, on the Crown's version of events, the defendants had neither the intention nor the belief that the metal was stolen.[20] They merely suspected that it might be. Section 1(3)(b) could not apply in these circumstances, and this is fatal to the trial judge's approach to the *mens rea* of the attempted s.327 offence. In light of their beliefs, the defendants intended to embark on a course of conduct that *could not* result in the commission of the substantive offence, because the metal was not stolen and could not be *treated as* being stolen. If the logic of *Khan* is followed through, the defendants were properly acquitted. This is the conclusion that the Court of Appeal desired in *Pace and Rogers*, so it should have used the reasoning within *Khan* (and noted that the decision in that case could not, as the trial judge had thought, lead to the defendants' conviction), rather than distinguish it. The Court of Appeal certainly should not have implicitly cast doubt on *Khan's* validity. Regrettably, such a doubt arises from para.[62] of the judgment in *Pace and Rogers*:

> "Turning, then, to section 1(1) [of the 1981 Act], we consider that, as a matter of ordinary language and in accordance with principle, an 'intent to commit the offence' connotes an intent to commit all the elements of the offence. We can see no sufficient basis, whether linguistic or purposive, for holding otherwise."

The statement of the law in this paragraph is, for the reasons given above, incorrect. An intention that the metal be stolen is not necessary to secure a conviction for attempted concealment on the facts of *Pace and Rogers*. A *belief* that the property is stolen is all that is required.

The court's conclusion at para.[62] is also stated far too widely. The distinction between possible and impossible attempts is not adverted to, casting doubt on the validity of *Khan*. Does the Court of Appeal *really* mean to suggest that the *mens rea* of (possible and impossible) attempted rape is now made out *only* where the defendant has (i) an *intention* to penetrate another person's vagina, anus or mouth with his penis, and (ii) the *intention* that that other person not consent? This would make attempted rape virtually impos-

13 [1994] 1 W.L.R. 409.
14 Criminal Damage Act 1971, s.1(2)(b).
15 Proceeds of Crime Act 2002, s.327(1).
16 Proceeds of Crime Act 2002, s.340(3).
17 *Pace and Rogers* at [52].
18 *Pace and Rogers* at [62].
19 It has been alleged that intention often fades into belief with regard to circumstance elements of criminal offences, even outside the context of criminal attempts: A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (2013), 5th edn, p.137.
20 *Pace and Rogers* at [61].

sible to prosecute successfully. It would also place beyond the reach of the law those highly culpable defendants who intentionally took more than merely preparatory steps to penetrate another person sexually, whilst showing little or no regard for that person's sexual autonomy. If this is what the Court of Appeal takes the law to say, then legislative intervention cannot be far away. Those familiar with the legislature's last foray into inchoate liability—Part 2 of the Serious Crime Act 2007—will shudder at this thought.

If the error in *Pace and Rogers* is recognised, however, there is no need for legislative intervention. It can be assumed that the *mens rea* of attempted rape is, in a case involving non-consent, that the defendant has (i) an intention to penetrate the complainant's vagina, anus or mouth with his penis, and (ii) no reasonable belief in consent. In a case where there is consent, the defendant must have (i) an intention to penetrate the consenting person's vagina, anus or mouth with his penis, and (ii) the *belief* that this is not consented to. This position accords with both *Khan* and s.1(3)(b) of the 1981 Act. If *Pace and Rogers* (or a similar case) is appealed to the Supreme Court, it is hoped that it is recognised as the correct legal position.

Admittedly, the "missing element" analysis presented in the *Reference* decision (which was earlier left to one side) can be read to offer some support to the conclusion in *Pace and Rogers*.[21] It will be remembered that, in the *Reference* case, it was suggested that any elements of the substantive offence that were "missing" would need to be intended by the defendant before she could be convicted of a criminal attempt. The "missing element" in *Pace and Rogers* was that the metal was not stolen. If the "missing element" analysis were correct, then the defendants must *intend* that the metal was stolen before they can be convicted of an attempt to conceal criminal property. That is inconsistent with s.1(3)(b) of the 1981 Act. The *Reference* decision as a whole has never been regarded as satisfactory.[22] Indeed, in *Pace and Rogers*, the judgment was described as "somewhat elliptical, if not self-contradictory".[23] The best course would be for future courts to choose to follow *Khan* (using s.1(3)(b) where appropriate), and shun the "missing element" test presented in the *Reference* decision and the "intention through and through" approach suggested in *Pace and Rogers*. The Supreme Court, if given the opportunity in the future, could ensure that this route is taken. Again, legislative intervention is unnecessary.

At no point in this note has the conclusion in *Pace and Rogers* been doubted. The defendants should have been acquitted of attempting to commit the concealment offence. What should prosecutors do, then, if faced with a situation where resorting to police "stings" using non-stolen property seems the only effective way to address the very real social menace of metal theft? It is submitted that Pace and Rogers could have been convicted, under s.45 of the Serious Crime Act 2007 (the 2007 Act), of assisting or encouraging the commission of the offence under s.327 of the 2002 Act, believing that it would be committed. They did an act (dealing with the metal) *capable* of encouraging another person (the supplier of the metal) to convert criminal property.[24] The defendants believed that an act (conversion of the property), which would amount to the commission of the s.327 offence would be done by that other person,[25] and that their act (dealing with the property) would encourage or assist its commission.[26] Further, the defendants were presumably reckless as to the circumstance element of the offence committed by the supplier of metal—i.e. that the metal was stolen.[27] They had a suspicion that the metal was stolen, and presumably it was in fact unjustified to deal with the property in those circumstances. Finally, if the defendants had been the ones supplying the metal, they would have had the *mens rea* of the s.327 offence with regard to the provenance of the metal—i.e. they would have at least suspected that the metal was stolen.[28] Although tortuous, working through ss.45 and 47 of the 2007 Act leads to the conclusion that the defendants were liable for encouraging or assisting a s.327 offence, believing that it would be committed. In short, the law already has a mechanism to deal with cases like *Pace and Rogers*. It is just not the law of criminal attempts, which the legislature should leave well alone.

21 *Reference* at 417.
22 See A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's, Criminal Law: Theory and Doctrine* (2013), 5th edn, pp. 350-351.
23 *Pace and Rogers* at [53].
24 Serious Crime Act 2007, s.45(a).
25 Serious Crime Act 2007, s.47(3)(a).
26 Serious Crime Act 2007, s.47(3)(b).
27 Serious Crime Act 2007, s.47(5)(b)(ii).
28 Serious Crime Act 2007, s.47(5)(a)(iii).

In the News

Thinking the Unthinkable?

In his *Review* in October 2001, Sir Robin Auld proposed a radical restructuring of the criminal courts. In place of the present binary division between the Crown Court and the magistrates' courts, he proposed a new unified criminal court, operating a tripartite scheme, with what he called a "middle tier of jurisdiction". In between the top tier, which would be much like the current Crown Court, and the bottom tier, which would be much like the current magistrates' court, there would be a new first-instance tribunal composed of a professional judge, sitting with two lay justices. The top tier would deal with offences that are indictable only, the bottom tier with purely summary offences, and the proposed middle tier would take most either-way offences—and hence many of the smaller cases which, when fought, now end up in the Crown Court before juries. When first announced this plan was ill received: not only by those who fervently believe in juries, but also by many lay magistrates, who thought it would reduce their status and their independence, and nothing more was heard of it. But in a speech to JUSTICE on March 3, the Lord Chief Justice has now revived it. Since 2001, he said, times have significantly changed and "Surely it is time to consider this issue again given the financial circumstances in which we are now placed." The full text of this important speech can be found at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf.

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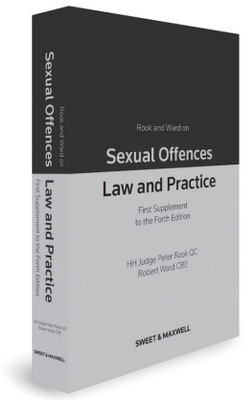

Publishing March 2014

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Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019
Archbold Review is published by Sweet & Maxwell, 100 Avenue Road, London NW3 3PF
Part of Thomson Reuters (Professional) UK Limited
(Registered in England & Wales, Company No 1679046. Registered Office and address for service: Aldgate House, 33 Aldgate High Street, London EC3N 1DL)
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ISSN 0961–4249

Typeset by Matthew Marley
Printed by St Austell Printing Co