SWEET & MAXWELL

Issue 4 May 14, 2014

Archbold Review

Cases in Brief

Anonymity—order under Children and Young Persons Act 1933 s.39—whether expired when subject of order became 18—whether failure to order capable of judicial review

R. (JC AND RT) v CENTRAL CRIMINAL COURT [2014] EWHC 1041 (Admin); April 8, 2014

(1) An order made by any court under the Children and Young Persons Act 1933 s.39 could not extend to reports of the proceedings after the subject of the order has reached the age of majority at 18. Whether *obiter* or not, the views of Rose L.J. in *R. (Ex p. W, B & C) v Central Criminal Court* [2001] Cr.App.R. 2, at [38], were clearly adopted in *T v DPP and North East Press* [2003] EWHC 2408 (Admin) and could not possibly be said to be wrong. The position, however, was not satisfactory. There were powerful arguments in relation to victims, witnesses and other persons concerned in criminal proceedings (quite apart from the position of defendants), who were also covered by s.39. It was difficult to see why, at the very least, they should not have similar potential protection to that afforded to adults pursuant to the Youth Justice and Criminal Evidence Act 1999 s.46 who could enjoy life-long anonymity (and the position would be no better if s.45 of the 1999 Act were brought into force: not only would it not cover the post-18 position of those who, as adults, would have been entitled to an order under s.46 but it did not extend protection beyond contemporaneous reporting of proceedings by newspapers or broadcasters). It was, however, for Parliament to fashion a solution: the problem required to be addressed as a matter of real urgency.

(2) Although the point was not argued, the Court noted that doubts had been expressed as to whether judicial review was open to claimants in the position of JC and RT: see *Archbold 2014*, para.7-13, reflecting *R. (Ex p. B (A Minor)) v Winchester Crown Court* [1999] 1 W.L.R. 788. The Court had, however, tended to consider that s.39 orders (and orders discharging such orders) were amenable to judicial review by the child affected (see *R. (Ex p. S (A Minor)) v Leicester Crown Court* [1993] 1 W.L.R. 111; *R. (Ex p. Barnes) v Inner London Crown Court* [1996] COD 17; *R. (Ex p. P&S) v Central Criminal Court*; *R. (Ex p. Perkins) v Harrow Crown Court* (1998) 162 J.P. 527; *R. (Ex p. H (A Juvenile)) v Manchester Crown Court* [2000] 1 W.L.R. 760; *R. (Ex p. W, B & C) v Central Criminal Court* [2001] Cr.App.R. 2; *R. (Ex p. T) v St Albans Crown Court* [2002] EWHC 1129 (Admin); *R. (Ex p. Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin); and *Lee* [1999] 1 W.L.R. 111).

Appeal—use of Criminal Appeal Act 1968 s.20 to dismiss frivolous or vexatious applications—complaints of incompetent representation—duties of fresh representatives in respect of

ACHOGBUO [2014] EWCA Crim 567; March 19, 2014

Summarily dismissing an application for leave to appeal conviction under the Criminal Appeal Act 1968 s.20 as frivolous and vexatious, the Court noted that lately it had become the habit for a number of cases to be brought on appeal on the basis of incompetent representation by solicitors or counsel. While it was said in *Doherty and McGregor* [1997] 2 Cr.App.R. 218 that it was proper for fresh representatives to speak to former counsel as a matter of courtesy, today circumstances had changed. Now counsel and solicitors would be failing in their duty to the Court if they did not make enquiries which would provide an objective and independent basis, other than complaints made by the convicted criminal, as to the substance of the allegations of incompetence. In W's case, there had also been a failure to disclose that a previous application for leave had come to nothing (which

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the Court referred to the Solicitors Regulation Authority). The court would henceforth consider exercising the power in s.20 more frequently if such cases recurred.

Contempt—nature of "civil" and "criminal" contempt—whether committal for "civil contempt" barred by principle of specialty in extradition

O'BRIEN [2014] UKSC 23; April 2, 2014

An analysis of the Extradition Act 2003 and its predecessors made it clear that nothing could constitute an extradition offence under the Act (whether for the purposes of Pt 1, Pt 2 or Pt 3) unless it was a criminal offence under the law of the relevant state. Not every alleged criminal offence would amount to an extradition offence, but it was a necessary precondition of an extradition offence that the conduct or alleged conduct was proscribed by the criminal law of the relevant state. There was a distinction long recognised in English law between "civil contempt"—conduct which was not in itself a crime but which was punishable by the court in order to ensure that its orders are observed—and "criminal contempt". Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt, but a contempt of that kind did not constitute a criminal offence. Although the penalty contained a punitive element, its primary purpose was to make the order of the court effective. A person who committed this type of contempt did not acquire a criminal record. A criminal contempt was conduct which went beyond mere non-compliance with a court order or undertaking and involved a serious interference with the administration of justice, such as physically interfering with the course of a trial, threatening witnesses or publishing prejudicial material. The distinction depended on the nature and purpose of the order. It was fallacious to argue that because the order was made by a criminal court, rather than a civil court, disobedience amounted to a crime, whereas it would not have been a crime to disobey a similar order imposed by a civil court. The question whether a contempt was a criminal contempt did not depend on the nature of the *court* to which the contempt was displayed; it depended on the nature of the *conduct*. "Civil contempt" was not confined to contempt of a civil court. It simply denoted a contempt which was not itself a crime. Accordingly, an order committing O to prison for 15 months for contempt of court in disobeying a restraint order made against him under Proceeds of Crime Act 2002 s.41 was not barred by the principle of specialty, the prohibition against proceeding against a person who has been extradited for a particular offence for other offences committed before his extradition, to which expression was given in Pt 3 of the 2003 Act, under which O had been extradited from the United States.

Evidence—bad character—Criminal Justice Act 2003 s.101(l)(d)—whether primary evidence of "matter in issue" must be led before bad character adducible

BOWMAN AND LENNON [2014] EWCA Crim 716; April 15, 2014

B and L were convicted of possession of a firearm with intent to endanger life and other firearms offences. Evidence of L's previous bad character was adduced under the Criminal Justice Act 2003 s.101(l)(d), on the basis that the "important matter in issue between the defendant and the prosecution" was that B had brought a gun with him to the place where the offence took place (which founded L's liability in joint enterprise). The Court rejected L's submission that the prosecution must adduce primary evidence of the alleged matter so as to establish factually the "issue between the defendant and the prosecution", before any question of the admission of bad character arose. The 2003 Act did not contain such a precondition. Section 101(1)(d) was not directed at evidential sufficiency but instead it principally concerned the relevance of the evidence that it was proposed should be introduced, and particularly it focused attention on the issue of whether the bad character evidence would throw light on the real issue or issues in the case (for the centrality of relevance, see *Bullen* [2008] 2 Cr.App.R. 25, at [29] and [33]). The way to test the sufficiency of the evidence was by way of a dismissal application (Sched. 3 of the Crime and Disorder Act 1998), a submission of no case to answer, or when considering the "fairness" provisions (Police and Criminal Evidence Act 1984 s.78 or ss.101(3) and 103(3) of the 2003 Act). For the purposes of strict admissibility, when resolving whether the evidence was to be admitted as relevant to an "important matter in issue" the court did not, as a discrete question, need to satisfy itself as to the strength of the prosecution's case as regards the particular "matter". The Court was fortified in so concluding by *Hanson* [2005] 1 W.L.R. 3169, in which the court only considered the consequences of evidential weakness in the context of applying ss.101(3) and 103(3), rather than s.101(1)(d).

Fraud—indictment—guilty pleas on counts alleging offences unknown to the law—responsibilities of parties and the judge

WHITE [2014] EWCA Crim 714; April 15, 2014

W pleaded guilty to three counts of obtaining a pecuniary advantage by deception contrary to s.16(1) of the Theft Act 1968 and one offence of fraud contrary to s.1 of the Fraud Act 2006, having secured a number of mortgage advances on the basis of false claims of employment. Following a comment arising from W's sentence appeal in *Criminal Law Week* 12/20/17 pointing out that all four counts alleged offences unknown to the law, W applied for a substantial extension of time and leave to appeal conviction. The 1968 Act offences were wrongly indicted on the basis identified in *Preddy* [1996] 2 Cr.App.R. 524, and the Fraud Act offence alleged a failure to disclose that he was unemployed in a mortgage application when he was under no such obligation. The Court granted the extension and leave, allowed the appeal, and substituted (Criminal Appeal Act 1968 s.3A) three convictions for obtaining a money transfer by deception contrary to Theft Act 1968 s.15A. No substitution was possible in relation to the Fraud Act count (applying *R* [2007] 1 Cr.App.R. 10; *Wilson (Clarence)* [1984] 1 A.C. 242; and *Burke* [2000] Crim.L.R. 413). The case revealed many failings in the system, primarily on the part of the prosecution but extending beyond that to the defence and the court. While primary responsibility for the indictment lay with the CPS, the overriding ob-

jective in the CPR included a requirement that criminal cases be dealt with justly (which includes acquitting the innocent and convicting the guilty) and each party must prepare and conduct the case in accordance with that objective. Criminal justice was not a game and it would not be acceptable for the defence to sit back and defeat the pursuit of the overriding objective. The judiciary must be satisfied that indictments proceeded on a legally sound footing, but the adversarial nature of the system must be recognised—judges would inevitably focus on the issues placed before them. The Court expected the DPP to institute an urgent review of how charging practice could so utterly have failed, and to institute measures to ensure it did not recur.

Search warrants—public interest immunity—disclosure of information after execution of warrant—jurisdiction of magistrates' court to consider—procedure

COMMISSIONER OF POLICE FOR THE METROPOLIS v BANGS [2014] EWHC 546 (Admin); March 3, 2014

B's application for disclosure of the information sworn to secure a search warrant of her home under the Misuse of Drugs Act 1971 s.23 was allowed by the district judge, and the Commissioner appealed on the basis of public interest immunity. A redacted version of the information had been supplied. B sought the information in contemplation of civil litigation.

(1) There was no statutory code regulating an application for disclosure of an information before a magistrates' court. Part 22 of the CPR applied to disclosure obligations in criminal proceedings, and did not, therefore, apply to the case where no such proceedings were instituted. Its provisions did, however, provide useful guidance in considering the questions in the case.

(2) The magistrates' court did have jurisdiction to consider the application for disclosure after the warrant had been executed, as had been assumed in *EastEnders Cash and Carry v South Western Magistrates Court* [2011] 2 Cr.App.R. 11 and *G v Commissioner of Police* [2011] EWHC 3331 (Admin). When considering an application for a search warrant and exercising a statutory power to grant one, the magistrates' court was under a duty to provide its reasons for granting such an application in public, unless there was an exceptional reason for not doing so, such as a valid claim to public interest immunity. It followed that where the police object to an application on the grounds of public interest immunity, the question whether or not to accept the claim was an issue for the magistrates' court to consider. To regard the magistrates' court as *functus officio* after the warrant was executed would negate the entitlement of a person to obtain the information in order to assess whether it contains material justifying the issue of a warrant, because, in almost all cases, the property owner would not know about the warrant until it was executed.

(3) The approach by the district judge in excluding B's representatives from the hearing when hearing the evidence from the police officer and considering the contents of the information and submissions based on that evidence and those contents was correct and broadly followed normal Crown Court procedure. However (noting the guidance provided by the CPR), the general rule that the court must consider representations first by the party seeking public interest immunity, then by the defendant, in open court should have been followed. The district judge should also have provided adequate information about her decision following the application (*Bank Mellat v HM Treasury* [2013] 4 All E.R. 495).

(4) As to the test applied by the district judge, although it was clear that she was aware of the need to balance the competing interests, neither her judgment nor the case stated indicated how she did so, or the weight she gave to the different interests, and whether she regarded either interest as having particular force in the circumstances of this case. But insofar as the district judge asked whether disclosure "would" result in the harm identified by the Commissioner, rather than whether there was a real risk of it occurring, she fell into error. Further, she did not accord the appropriate weight to the view of the officer who gave evidence that, if the information was disclosed, there was a "very strong likelihood" that the public interest which it was sought to protect would be fundamentally compromised. There was no recognition in the case stated of the expertise of the police or of the officer, or of the significance of the matters to which the officer referred in his evidence in assessing whether there was a real risk of disclosure compromising the public interest. Accordingly, the exercise did not amount to a balancing exercise of the sort referred to in *Conway v Rimmer* [1968] A.C. 910; *Powell v Chief Constable of North Wales* Unreported, December 16, 1999; *McNally v Chief Constable of the Greater Manchester Police* [2002] 2 Cr.App.R. 37; *Al Rawi v Security Services* [2012] 1 A.C. 531 and *D v NSPCC* [1978] A.C. 171.

(5) Reassessing the balancing act, the Court took into account that it was not a case in which the liberty of the defendant was at stake; that the head of public interest immunity invoked was a particularly weighty and sensitive one (in respect of which the Court of Appeal had stated that judges should adopt a robust approach); and, pointing in a different direction, that B's property was entered by officers and she was subjected to an intimate personal search, and concluded that the public interest in withholding the information was clearly stronger than that in the administration of justice served by ordering disclosure.

SENTENCING CASES

Possession of bladed articles; sentencing guidelines; young offenders

MONTEIRO [2014] EWCA Crim 747

The Court of Appeal heard six appeals against sentence in cases involving offences under s.1 of the Prevention of Crime Act 1953 and ss.139 and s.139A of the Criminal Justice Act 1988 together in order to review whether the guidance given in *Povey* [2008] EWCA Crim 1261 was being followed and applied, and to give consideration to whether any further guidance was required.

In *Povey*, Sir Igor Judge emphasised the dangers caused by carrying knives and the increased number of offences involving knives, in particular the carrying of knives in pub-

lic places. He made clear that sentences passed must focus on the reduction of crime, including its reduction by deterrence and the protection of the public.

In the Crown Court, the guidance given in *Povey* is being followed and no further guidance is required. However, the appeals illustrate that the position is more complex in cases where offences are dealt with by way of caution or in the magistrates' court and Youth Court. Information was therefore sought concerning the way in which the police, the magistrates and the Youth Court approached the imposition of cautions and sentencing.

Cautions in relation to knife crimes are issued by the police in accordance with Guidelines issued by ACPO in July 2009 entitled *Guidelines on the Investigating, Cautioning and Charging of Knife Crime Offences*. Also of relevance is the ACPO *Youth Offender Case Disposal Gravity Matrix*. The most recent version of this matrix was issued in March 2013.

The sentencing Guidance for magistrates was revised in August 2008. That Guidance did not mention *Povey* and the increased prevalence of knife crime referred to by Sir Igor Judge. The Guidance has been updated and strengthened with effect from April 1, 2014 not only in relation to *Povey* but also in the light of changes in practice and legislation. Magistrates' courts must strictly apply the new Guidance in relation to knife crime and the starting point of 12 weeks' custody for the lowest level of offence involving the use of knives.

In the Youth Court the principles are set out in the Guideline of the Sentencing Guidelines Council dated November 2009 entitled *Overarching Principles: Sentencing Youths*. There are also a number of statutory restrictions concerning the sentencing of young offenders.

Having concluded that no further guidance is needed in relation to the Crown Court pending the issue of a guideline by the Sentencing Council, the Court of Appeal made the following observations.

First, it is important that the Youth Court pay the closest attention to the guidance given in *Povey*. Given the prevalence of knife crime among young persons, the Youth Court must keep a very clear focus, if necessary through the use of more severe sentences, on preventing further offending by anyone apprehended for carrying a knife in a public place, and on securing a reduction in the carrying of knives. Such sentences fulfil the principles applicable to the sentencing of such persons as set out in s.142A of the Criminal Justice Act 2003 and the Sentencing Council Guidelines. Very serious consequences can follow from the carrying of knives by young persons and it is of great importance that the Youth Court maintain the clear focus called for in *Povey* by imposing appropriate sentences that will contribute to preventing further offending and to a reduction in knife crime.

Second, it is important particularly in relation to knife crime that the guidance given in respect of cautions be aligned to the sentencing practice in the Youth Court, the magistrates' courts and the Crown Court. There is an urgent need for this to be done.

The Court of Appeal also made reference to the new offences created by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). Section 142 of LASPO amended the Prevention of Crime Act 1953 to introduce s.1A, and amended the Criminal Justice Act 1988 to introduce s.139AA. These sections came into force on December 3, 2012.

Section 1A of the Prevention of Crime Act 1953 creates the offence of using an offensive weapon to threaten another in a public place in such a way that there is an immediate risk of serious physical harm to that other person. The section provides a mandatory minimum sentence for those aged over 18 of six months' imprisonment (save where it is unjust to do so). Section 139AA of the Criminal Justice Act 1988 creates the offence of using a knife to threaten another in a public place or school in such a way that there is an immediate risk of serious physical harm to that other person. The section also provides a mandatory minimum sentence for those aged over 18 of six months' imprisonment (save where it is unjust to do so).

(Both sections also provide a similar minimum sentence of four months' imprisonment for those aged 16 and 17. In its original form, the judgment of the Court of Appeal indicated that the provisions pertaining to those aged 16 and 17 are not yet in force. This was a slip, because s.142 was brought into force in its entirety on December 3, 2012 (Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.3 and Saving Provision) Order 2012 (S.I. 2012 No. 2770)); it will be corrected in later versions.)

Comment

Contempt of Court—Criminal Court Reporting

By Henry Skuda[1]

Background

The Law Commission has published the second of three reports on the topic of contempt of court.[2] This report deals with the issue of contempt by publication in the context of reporting restrictions issued by the criminal courts. Specifically, it looks at the operation of orders postponing contemporary court reporting.

Such orders are ordinarily made under s.4(2) of the Contempt of Court Act 1981 (the 1981 Act). The orders prohibit, for some fixed period of time, the reporting of matters which occurred in court, in order to avoid prejudice to criminal proceedings.

However, at present there is no formal system for notifying potential publishers that such a restriction is in force,

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2 For more details on this project see: http://lawcommission.justice.gov.uk/areas/contempt.htm.

or why. Generally, orders are simply posted by hand on the courtroom door, and the media need to make specific enquiries of the court in each case to clarify the existence and terms of any order. Those publishers who breach an order restricting reporting risk being pursued for contempt of court—with a maximum penalty of two years' imprisonment and/or an unlimited fine.

Contempt of Court (2): Court Reporting[3] (the Report) addresses this issue and recommends that orders made under s.4(2) of the 1981 Act are posted on a single publicly-accessible website (as currently operates in Scotland). The website would include a further restricted area where, for a charge, registered users could find out the details of the reporting restrictions and could sign up for automated email alerts of new orders.

This article firstly examines the legal position and the problems with the current state of affairs. It then goes on to outline and explain the chief recommendations of the Report.

The present position

The law of contempt of court is governed by both the common law and the 1981 Act.[4] Presently, the law imposes strict liability on the publisher[5] of material, "which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[6] This arises under s.2(2) of the 1981 Act which defines the ambit of common law strict liability.

It is presently unclear what the requisite *mens rea* for contempt of court is when a s.4(2) order is breached.[7] One view is that recklessness is not sufficient. On the other hand, if it is, then a failure to make checks may give rise to liability, since from that failure a court can infer recklessness.

During the Law Commission's consultation, a wide range of consultees—including a plethora of stakeholders from the media—expressed concerns about the uncertainty surrounding the existence of s.4(2) orders in practice. The orders are not readily discoverable and a publisher may inadvertently breach a s.4(2) order without knowing it ever existed. This is further compounded by the lack of clarity in the present law regarding the requisite *mens rea*.

The end result is system which currently meets neither the interests of the media, nor the public interest in receiving prompt and accurate information about contemporary legal proceedings.

The Law Commission's recommendations

Following a successful pilot scheme,[8] it was recommended that an online system of s.4(2) orders in force in England and Wales be implemented. This online list would be maintained by a public body or private contractor tasked with administering this database and would involve a minimal administrative burden—somewhere in the order of three or four hours per month.[9] Such a system would largely mirror the one which currently operates in Scotland.[10]

This would provide potential publishers (including the general public) with a single, easily-accessible source which details the existence of current s.4(2) orders. This would generally mean that, where no order is listed, a publisher would not be in contempt of court for publishing a fair and accurate report of those proceedings. An exception would be in instances where a publisher has actual knowledge of the order, for example, if they were in court when it was made.

In terms of how the orders would appear, only the case name, the date of the s.4(2) order and the name(s) of any linked cases would be listed. If a potential publisher then wished to know more about a particular case, they would be directed to the details of the court at which that case was being heard.

Another recommendation of the Report, influenced by the Scottish system and the views of consultees, is that some access be granted to the terms of s.4(2) orders themselves. This not only assists with legal certainty, but also prevents practical difficulties in terms of publishers meeting tight deadlines when court staff may be unavailable.

However, those wishing to receive this enhanced service containing the actual terms of orders under the Report's recommendations, will have to pay a small subscription fee which would fund the extra time and effort in providing this enhanced list. This fee is justifiable on two grounds: firstly the added convenience it affords users; and, secondly, traceability. In the rare case that re-publication of an order's content occurred in breach of that order's terms, the source of the breach can be easily traced with a view to committing that user of the enhanced service for contempt of court.

The main objection to the open publication of the full terms of the s.4(2) orders is that this would undermine their very purpose. The recommendations of the Report strike the right balance through the limitation of access to the terms of orders. This ensures defendants' right to a fair trial whilst also guaranteeing the media's right to freedom of expression.

Conclusion

The Report's proposed scheme has already been tried and tested in Scotland and works well. Its extension to England and Wales, along with an enhanced subscription option, would provide legal certainty and clarity with minimal burden on the body that would be responsible for its administration.

3 Law Com. No. 344. Available at: http://lawcommission.justice.gov.uk/docs/lc344_contempt_of_court_court_reporting.pdf.

4 For a more detailed espousal of this, see *Contempt of Court: A Consultation Paper*, Consultation Paper No. 209, Ch.2. Available at: http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court.pdf.

5 Publication is defined non-exhaustively in s.2(1) of the 1981 Act. For a fuller exposition of this term, see *Contempt of Court: A Consultation Paper*, Consultation Paper No. 209, paras 2.29–2.49.

6 On the definition of "publisher" and "creating a substantial risk of proceedings being seriously impeded or prejudiced", see *Contempt of Court: A Consultation Paper*, Consultation Paper No. 209 at paras 2.29–2.49 and the Report, paras 2.6–2.16.

7 D. Eady and A.T.H. Smith, *Arlidge, Eady and Smith on Contempt*, 4th edn (London: Sweet & Maxwell, 2011), at [7-246]–[7-261].

8 Detailed in Ch.4 of the Report.

9 For a detailed breakdown of how this was calculated, see the Report, paras 4.23–4.31.

10 Found at: http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders.

Feature

Amanda Knox—the Truth (About the Law)

By Irene Wieczorek[1]

The news that, on January 30, 2014, the Court of Appeal of Florence had reinstated the conviction of Amanda Knox and Raffaele Sollecito produced an outburst of adverse comment in the USA. An American lawyer, commenting on the proceedings for the BBC, said that the American public saw the Italian criminal justice system as "medieval and chaotic". This article obviously does not claim to reveal the truth about who really was responsible for the death of Meredith Kercher. But it does attempt to tell the truth about the legal proceedings—on which much of the comment in the English-speaking world has been regrettably ill-informed.

I The Italian criminal justice system—some clarifications

"Medieval"—an anachronistic inquisitorial system?

The first point to grasp about the Italian system of criminal procedure is that, far from being medieval, it is relatively modern. The basic rules are set out in the Italian Constitution[2] and by statute, in the form of the *Codice di Procedura Penale* (Criminal procedure Code—hereafter called the CPP). The code currently in force dates from 1988, when it was enacted with the deliberate purpose of introducing an adversarial model as opposed to the previous inquisitorial one, which dated from the fascist period.[3] Indeed, despite what one can sometimes read in the English-language press,[4] the modern Italian system does *not* have any of the following features, features which are sometimes attributed—rightly or wrongly—to the "inquisitorial system".

— *"No presumption of innocence"*
A fundamental starting point for the Italian criminal justice system, like the English one, is the presumption of innocence. Article 27(2) of the Italian Constitution provides that an accused person is not to be treated as guilty until there has been a conviction. This implies, obviously, that the burden of proving the defendant's guilt is on the prosecution. And interestingly, the official functions the public prosecutor is required to perform include seeking out and placing before the court evidence in favour of the accused (Art. 358 CPP.), as well as evidence against him. Furthermore, as understood in Italy, the presumption of innocence also implies that the penalty imposed upon conviction cannot be executed until the decision has become definitive, or final (Art. 650 CPP)—or, in other words, until after all rights of appeal against it have been finally exhausted. [5]
Acquittals, by contrast, are immediately effective, and so, for example, interrupt pre-trial periods of detention as soon as they are handed down, even if the acquittal is then appealed (Art. 532(1) CPP). It is because of this feature of the system, it should be noted, that Amanda Knox is currently in the United States, although the proceedings against her are still pending. During the proceedings at first and second instance she was held in pre-trial detention, on account of the perceived risk of her absconding. However, the moment the first appellate court delivered its acquittal decision, this took immediate effect. She was then freed and hence able to return to the United States. It is also because of this feature of the system that former Prime Minister Silvio Berlusconi has so far avoided serving any sentence, despite a series of criminal proceedings pending against him, and even convictions by some first instance and appellate courts. It was only in June of last year that the Court of Cassation handed down its first final conviction in one of these cases.[6]

— *"Limitless pre-trial detention"*
In Italy pre-trial detention is possible, but as in England its use is subject to clear legal limits. In line with the presumption of innocence, the law establishes, at least on paper, that pre-trial detention can be ordered only in certain special circumstances. As in England and Wales, its use must be justified by a strong *prima facie* case, and either the risk of flight, of interference with the evidence, or the risk of the commission of particularly serious crimes (Arts.273 and 274 CPP). However, in sharp contrast to the position in England and Wales, if a person is definitively acquitted, compensation for the time unjustly spent in prison is then available (Art. 314 CPP). Finally, both the Constitution and the CPP establish strict time limits to pre-trial detention (Art. 13(5) of the Constitution and Art. 303 CPP).

— *"Trial without jury"*
Contrary to what is sometimes said, in Italy, as in England and Wales, there are juries—although in Italy they operate rather differently. Within the Italian system there exist two courts, namely the Assize Court and the Assize Court of Appeal, where the tribunal of fact is composed of two professional judges and six jurors (*giudici popolari*—literally, "popular judges"). These

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2 For a version in English, see: http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

3 For an account of the Italian system in English, see Antoinette Perrodet, "The Italian System", in Delmas-Marty and Spencer (ed.)), *European Criminal Procedures* (Cambridge University Press, 2002), Ch.6.

4 See for example the comments on the Italian system by Nigel Farage in *The Independent on Sunday* on November 10, 2013; online at: http://www.independent.co.uk/voices/comment/innocent-until-proven-guilty-not-under-the-eus-justice-system-8931215.html. For a response, see http://www.law.cam.ac.uk/press/news/2013/12/law-in-focus-is-eu-criminal-law-a-threat-to-british-justice—john-spencer/2435.

5 It is more restrictively interpreted by Art. 6(2) of the ECHR, Art. 14(2) ICCPR and Art. 48(1) of the EU Charter, all of which all speak of persons being presumed innocent "until proven guilty according to the law". With this formulation, a simple first instance conviction can reverse the presumption.

6 See *The Guardian*, August 2, 2013: http://www.theguardian.com/world/2013/aug/01/silvio-berlusconi-prison-sentence-upheld. (On April 10, 2014 the Tribunale at Milan accepted his request to be allowed to perform community service as an alternative to imprisonment. So his sentence will now take the singularly lenient form of voluntary work for four hours once a week in a centre for the elderly.)

two courts deal with the most serious crimes, such as murder, or with crimes that have a strong political connotation, or crimes the trial of which requires some kind of ethical or moral evaluation, such the killing a consenting person (Art. 5 CPP).

Anyone who meets the formal requirements to be a juror can ask to be added to the *Albo dei Giudici Popolari* (register for popular judges). So unlike in England and Wales, jury service is carried out by volunteers, rather than by conscripts. Jurors' names are then randomly drawn from this register, and once summoned they are then required to serve on the panel for which their name has been drawn. Having been charged with murder, Amanda Knox and Raffaele Sollecito were tried in a Court of Assize—with a jury—and then in an Assize Appeal Court—also with a jury.

— *"No separation between judges and public prosecutors"*

A further inaccurate statement about the Italian system is that its prosecutors double-up as judges, and *vice versa*. Within the Italian system, judges and public prosecutors do share the same training and are admitted to the profession through the same public exam. Once practicing as a judge or as a prosecutor they can ask to switch career, but having done so they cannot then continue to work in the same geographical area. So it can be fairly said that they lack a certain degree of *institutional* separation. However, this by no means affects their *functional* separation in the course of the given case. The prosecutor leads the investigation and the prosecution, while the judge, impartial, has a purely reactive and adjudicatory function, and takes no part in the investigation.

The intertwining career paths of judges and of prosecutors has sometimes been the subject of discussion. However, it has never been a source of *major* concern in Italy, not least because the Constitution itself establishes the principle of the impartial judge (Art. 111(2)), and the law requires any judge who has reason to be biased to recuse himself (Art. 36 CPP). Furthermore, insofar as the institutional connection between judges and prosecutors is a problem, it is only a problem in relation to professional judges, and not for jurors (alias *giudici popolari*). And as we have already seen, the courts that tried Knox and Sollecito were mainly composed of *giudici popolari*.

— *"A trial structure that is 'chaotic and medieval'"*

The structure of criminal proceedings in Italy is rather complex; though a central purpose of the complexity, it should be noted, is to ensure the highest number of guarantees to defendants. In principle, the proceedings at first instance are made up of three distinct phases. First there is an investigation, which is carried out under the direction of the prosecutor. In the second phase, judges then check whether there are sufficient grounds, not only to institute a prosecution, but then again, at a later stage of the proceedings, to continue with it. And then, as the third phase, comes the trial, where in principle all the witnesses testify orally, and are subject to cross-examination. Consequentially, criminal proceedings can be rather slow—and slower still, of course, if the first-instance proceedings are then followed by appeals.

However, various short-cuts are possible. The defendant has the right to request a shorter process with fewer guarantees, at which he will get, if convicted, a discount in the penalty (*giudizio abbreviato*—or fast-track trial, Art. 438 CPP et ff). Alternatively, defendants can plead guilty and thereby earn an even higher discount in the sentence (*applicazione della pena su richiesta delle parti*—guilty plea,[7] Art. 444 CPP et ff). In practice, these special procedures are widely used. So, for instance, the co-defendant of Amanda Knox and Raffaele Sollecito, Rudy Guede, opted for a fast-track trial.[8] Among the prominent Italian defendants who have pleaded guilty are Captain Schettino's junior officers in the Costa Concordia disaster, and a number of famous personalities linked to Silvio Berlusconi and charged in proceedings connected to those in which he featured as the main accused. These include Sergio De Gregorio, a former Member of Parliament accused of corruption of Members of the Senate, and Lele Mora a showbusiness manager very close to Berlusconi, who was involved in bankruptcy proceedings. However, Amanda Knox and Raffaele Sollecito opted for the proceedings to follow their full course, with all the guarantees for the defendants that this entails. Moreover they also went through all possibilities of appeal—as is explained below. This, among other factors, obviously entailed a certain length in the proceedings.

— *"No rule against double jeopardy"*

Italian criminal procedure does recognise the rule against double jeopardy; but in sharp contrast with the position in England and Wales, Italy grants equal rights of appeal to both prosecutor and defendant (Art. 468(4) CPP).

First instance decisions are appealed before a Court of Appeal (or the Assize Court of Appeal in the case of a decision of a Court of Assize). The appeal, furthermore, is in principle by way of a rehearing; although a rehearing that is limited to the specific points on which the appeal is grounded. Unlike what happens in England and Wales when a case is heard by the Court of Appeal Criminal Division, the Italian appeal court is expected to reconsider not only the law but also the facts, and to rehear and re-evaluate the relevant parts of the evidence. Appeal court decisions can then be further appealed to the *Corte di Cassazione*; though this court deals exclusively with points of law, and does not evaluate the evidence (Art. 606 CPP). The *Corte di Cassazione* can either reject the appeal, thereby confirming the decision of the lower court (Art. 615 CPP), or it can quash it. If it quashes, it can annul the decision of the court below without sending the case back to the court below, as it might do, for example, if it decided that the facts alleged do not constitute a crime (Art. 620 CPP). Or alternatively, and quite commonly, it can annul the previous decision and then send the case back to the lower court, in order for a different section of the court appealed from to reconsider it. The new court to which it is so sent is then expected to reach its own decision on the facts, although it will be bound by the *Corte di Cassazione's* rulings as to

7 But in Italy, unlike in England, the defendant, though accepting the punishment, does not formally admit his guilt.

8 He was convicted at first instance and his conviction was then confirmed by the appellate court and the *Corte di Cassazione*.

law (Art. 627 CPP). If either of the parties is then unhappy with this second decision they then both have the right, at least in principle, to go up to the *Corte di Cassazione* once again; although this further appeal cannot be based on the same grounds as those used to take the case to the *Corte di Cassazione* in the earlier appeal (Art. 628 CPP). There is in principle no limit to the number of times a case can shuttle to and fro in such a way; but as one set of facts can only give rise to a limited number of controversial points of law, repeated rounds trips of this sort are relatively infrequent.

A common criticism of the Italian appeal system in the English-language press is that does not respect the principle of double jeopardy because it allows new prosecutions following acquittals.[9] This is not strictly true, because Art. 649 CPP makes it clear that no one can be subject to a second trial on the same matter once his case has reached the point of a definitive decision. A final decision can be reopened in favour of a convicted defendant using a special procedure called *revisione* if there is new and compelling evidence that could require the conviction to be overturned (Art. 629 CPP); although in Italy it is not possible, as is now possible in England and Wales, for a final decision to be reopened for the purpose of reversing an acquittal.[10] So in Italy, final acquittals cannot be revisited. But what is possible, however, is for a prosecutor to appeal against a first or a second instance decision of acquittal, and thereby have the case of a person initially acquitted reheard by a different panel: something that could not happen, in principle, in the case of a jury acquittal in the English system. However, from the Italian perspective, what happens here is just a further stage within the *same* proceedings, as they work their way steadily onwards, through one phase after another, towards the eventual goal, a definitive decision. In Italy this is not seen as an infringement of the rule against double jeopardy.

II What has so far happened in the Amanda Knox and Raffaele Sollecito case

The proceedings

Meredith Kercher died on November 1, 2007 and after this, Amanda Knox and Raffaele Sollecito were arrested and charged with her murder, with faking a burglary as a cover-up, and sexual assault. In these proceedings, Amanda Knox was also charged with slander for having falsely accused another person, Patrick Lumumba, of the murder. For this they were originally tried, at first instance, by the Court of Assize of Perugia. On November 5, 2009, at the conclusion of those proceedings, both defendants were convicted of the murder, and Amanda Knox was also convicted of slander. They were sentenced respectively to 26 and 25 years of imprisonment. During the proceedings they were held in pre-trial detention because of fears they might abscond.

The decision was appealed before the Assize Court of Appeal in Perugia, and on December 3, 2011 this acquitted Knox and Sollecito of the crime of murder and of sexual assault and also of the charge of simulated burglary. The conviction of Amanda Knox for slander was conversely confirmed, and the sentence increased from one year, as originally imposed, to three years' imprisonment. The acquittal part of the decision was immediately appealed to *Corte di Cassazione* by the prosecution, and the conviction part by Amanda Knox as regards the affirmation of her conviction for slander. However, because of the acquittal, their pre-trial detention was immediately lifted. At this point Amanda Knox returned to the United States, while Raffaele Sollecito remained in Italy.

About a year and a half later, on March 26, 2013, the *Corte di Cassazione* handed down its decision. On the one hand, it rejected the appeal of Amanda Knox on her conviction for slander, which at that point became final. However, she was not required to return from the United States to serve the sentence as she had already spent the three years in prison in the framework of her pre-trial detention, which had lasted in total roughly four years. On the other hand, the Court reversed the acquittals on the murder charges on the basis that the reasoning of the appeal court had been illogical and erred on several points of law. At this point, the case would normally have been sent back to the court below, to be reheard by another division of that court. However, as the Perugia assize appeal court is a small one, with only one division, the file was sent to the assize appellate court in Florence, before which it was reheard.

On January 30, 2014, as widely reported in the press, the Florence assize appeal court found both Knox and Sollecito guilty and sentenced them respectively to 26 years and 6 months and 25 years of imprisonment. No pre-trial detention was ordered, but a ban on leaving the Italian territory was imposed on Sollecito. Once the conviction in the Florence assize appeal court had been announced, both defence counsel declared their intention to appeal against the decision to the *Corte di Cassazione*.[11]

What to expect now?

If the defendants persist in their appeal, the first thing that will happen is a second hearing in the *Corte di Cassazion*e. The *Corte* might refuse to hear the appeal because the appellants have failed to raise new grounds, in which case the convictions would be final. Alternatively, it might agree to hear the appeal but then confirm the lower court's conviction, which then again becomes final. As a third possibility, it might hear the appeal but quash the previous decision, acquitting Knox and Sollecito without sending the file back to an appellate Court. In this case the acquittal decision would then become final. And, as a fourth and final possibility, it could quash the conviction and then send the case back to another section of the Florence Assize Court, which would have then again to decide the case all over again.

In the event of a final acquittal, Knox and Sollecito would then see their innocence formally acknowledged and—unlike most successful appellants in England the Wales—they would then be entitled to compensation from the state for the time unjustly spent in prison. In the event of a final conviction, both accused would be liable to serve the sentences of imprisonment. The four years spent in pre-trial detention would be fully counted and deducted from the sentence for Sollecito, though only one year would be deduced for Knox, given that three of these years have already counted as the sentence served for her conviction for slander. Sollecito is already on Italian

9 For an example, see http://www.theatlantic.com/international/archive/2014/01/amanda-knox-and-italys-carnivalesque-justice-system/283487/.

10 See s.75 of the Criminal Justice Act 2003.

11 As quoted in the *New York Times*: see http://www.nytimes.com/2014/01/31/world/europe/amanda-knox-trial-in-italy.html?_r=1.

territory and he has been prevented from leaving it. Knox, however, is in the United States—and to make her serve her sentence, extradition procedures would have to be activated.
Italy and the United States have an extradition Treaty dating back to 1983.[12] This Treaty envisages an obligation for both parties to comply with an extradition request (Art. I). It does impose a double criminality requirement and a penalty threshold for its application (Art. II). This should not be an issue for the case in hand as murder is undoubtedly punished under the law of both countries, and its punishment certainly meets the threshold. Finally the Treaty does not treat the fact that the requested person is a national of the requested State as a valid ground for refusal (Art. IV). In the press the suggestion has been made that Knox's extradition could violate her protection against double jeopardy under the US Constitution.[13] However, as sketched above, it is debatable whether the Italian system fails to respect the double jeopardy requirement, as understood under the US Constitution, given that the acquittal was not followed by a conviction in new criminal proceedings, but was a consequence of an appeal within the original proceedings, which under Italian law were still ongoing. Secondly, there is nothing within the extradition Treaty that allows for a refusal on the ground that the conviction within the requesting State violated constitutional provisions in the requested State. There is a provision on *ne bis in idem*, but it allows the requested State to refuse extradition on the basis that the person has already been tried in the requested State itself (Art.VI). This is obviously not the case for Amanda Knox.
In conclusion, if the Italian authority requests the extradition of Amanda Knox there seem to be little leeway for the United States to refuse to comply with such request.
A political attempt to block the extradition, if legally possible, would seem unwise in diplomatic terms. The United States itself is very active when it comes to issuing extradition requests, and it might not want to upset diplomatic relations by refusing the surrender of someone convicted for a murder, when it has tried to negotiate the return of wanted persons in cases significantly more politically sensitive, like those of Julian Assange or Edward Snowden. However, it is worth noticing that, while American authorities would appear to be obliged to comply with an extradition request, the Italian authorities would not be obliged to issue one. Indeed, in the past Italy has sometimes decided against issuing an extradition request where the case was particularly sensitive—as it did in the Abu Omar case, for example.[14]

III A critical eye on the system(s)

The Italian criminal justice system, like any other, is very far from perfect. Particular problems include the length of the criminal proceedings, which often fail to comply with the reasonable time requirement specified by Art. 6 of the European Convention on Human Rights,[15] and the fact that pre-trial detention, though in theory limited, often seems to represent the rule rather than the exception. However, the system is not known for being particularly "unjust" in terms of final outcome, as some comments on the Knox case appear to have suggested. The number of innocents convicted, and of criminals wrongly acquitted, does not go above the small percentage that is inevitably present in any criminal justice system. Scandals about wrongful convictions caused by unreliable evidence, of which English criminal procedure can provide a litany of disquieting examples—at any rate, from the period before the Police and Criminal Evidence Act of 1984—are not particularly common. If Italian criminal procedure is much slower than it ought to be, it does at least manage to be thorough.
Admittedly, to grasp the functioning of a foreign system is not an easy exercise, and misunderstandings are possible; as with much of the commentary on the Italian system in the English-language media in relation to the Knox case.
But that difficulty recognised, there are features of the English or US criminal justice system which, viewed from the perspective of an Italian lawyer, seem equally open to criticism. Prominent among the dubious aspects are unreasoned verdicts, and in particular, guilty verdicts rendered without reasons given to explain them. Another is an appeal system that seems overly restrictive, if compared to the Italian one, and which also allows final acquittals to be reopened with a view to further prosecutions. Equally odd, and "chaotic" if you will, might appear the American system whereby a defendant can be first tried in a state court and acquitted, and then tried again for the same offence at federal level, if the offence constitutes both a violation of state and federal law, and in the Federal court convicted. And continental observers also see it as potentially unfair that sentences can be executed before convictions become final, and therefore when there is still the possibility that they will be reversed; and no less unfair that compensation for time spent in prison is not granted where a defendant is held in custody pending proceedings ending in his acquittal, or where a person serves a prison sentence, or a part of one, in a case where the conviction is then quashed on appeal.[16]
Coming from a system where criminal proceedings are entirely governed by judges who belong to a fully independent and appointed body (*magistratura*), the presence of elected judges in the US appears contestable, and likewise the wide autonomous powers attributed in the English system to the police, who operate outside the supervision of a public prosecutor. And finally, there is the presence of the death penalty in certain parts of the United States; an institution which to an Italian public seems distinctly "medieval"—to quote the adjective applied to the Italian system by some American critics of the Knox case—given that capital punishment was abolished in Italy in 1948.
Hopefully, this short piece has made it easier for English readers to understand the Italian system, and corrected some of the false assumptions about it that have appeared about it in the press.

12 The text of the treaty can be found at http://internationalextraditionblog.com/2011/05/10/italy-extradition-treaty-with-the-united-states/.
13 See for example http://www.huffingtonpost.com/2013/03/26/amanda-knox-extradition-italy-us-constitution_n_2959522.html#slide=2266265.
14 For an account of the facts in the Abu Omar case, of the legal proceedings and the final decision not to request extradition see I. Wieczorek, "The Italian Court of Cassation delivers its ruling in the Abu Omar case. What to expect from the decision?" (2012) 3-4 *New Journal of European Criminal Law* 412, and I. Wieczorek and P. Insolera, "The Italian Court of Cassation delivers its ruling in the Abu Omar case. The decision" (2013) 1-2 *New Journal of European Criminal Law*, 180-184.
15 The European Court of Human Rights has repeatedly condemned Italy on this account. Of the more that 1,500 condemnations of Italy, roughly 60% concern the violation of Art. 6 of the Convention in the part in which spells out the requirement of a trial within reasonable delay.
16 On the theme of compensation see J.R. Spencer, "Compensation for wrongful imprisonment" [2011] *Criminal Law Review* 803-822.

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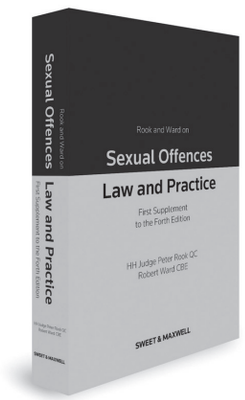

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Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019
Archbold Review is published by Sweet & Maxwell, 100 Avenue Road, London 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