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Archbold Review

Cases in brief

Abuse of process—entrapment—disclosure of authorisations under Regulation of Investigatory Powers Act 2000—undercover operation to establish shop to purchase stolen goods

PALMER [2014] EWCA Crim 1681; August 7, 2014

(1) Surveillance authorisations for an undercover operations under the Regulation of Investigatory Powers Act 2000 ss.28 and 29 should have been routinely disclosed, redacted as necessary, if only to allay the concerns of defence counsel. The failure to do so did not amount to an abuse of process.

(2) Where undercover officers set up a shop in an area suffering from a high level of domestic burglary and let it become known that they were willing to buy stolen goods, and particularly identity documents ("Operation Gemini"), it did not amount to a disproportionate attempt to target an entire community, involving wholesale virtue testing of an economically deprived community during a recession. As the judge found on the *voir dire*, the submission underestimated the seriousness of domestic burglary, and the effectiveness of the operation. The fact that many identity documents purchased were those of the vendors or their families did not undermine the integrity of the whole operation, and those who engaged with the undercover operation were not vulnerable or enticed into selling the goods, except by their own greed. The way in which the operation was planned and implemented did not come close to police misconduct.

Evidence—of convictions—Police and Criminal Evidence Act 1984 s.73—application to convictions in EU Member States before

M(E) [2014] EWCA Crim 1523; July 18, 2014

M argued that his convictions in Bulgaria before the accession of that country to the EU could not be proved by a certificate pursuant to the Police and Criminal Evidence Act 1984 s.73, as amended by the Coroners and Justice Act 2009, because a requirement that the conviction should have taken place while Bulgaria was a Member State should be read into the section: the amendment had been made to give effect to the EU Council Framework Decision 2008/675/JHA of July 24, 2008, which required equivalent treatment of convictions in other Member States as in the UK. The Framework Decision did not amend the obligation to respect the rights laid down in the European Convention on Human Rights (Art.1.2 of the Framework Decision; Treaty on European Union Art.6, enshrining the Convention as an EU obligation). In order to bring domestic law into compliance with the Framework Decision it was necessary, M argued, to construe s.73 pursuant to the Human Rights Act 1998 s.3. Accordingly, s.73 should be held not to apply to any conviction that took place under a regime which failed to guarantee a fair trial by the standards of Art.6 of the Convention, as, it was accepted, may have been the case in Bulgaria at the time of M's convictions. The Court rejected the submission. It was important to distinguish between proof of a conviction and the admission in evidence of that conviction in criminal proceedings. There was no issue that the appellant had been convicted as the certificate stated. M's argument was that the evidence of his conviction should not be received having regard to the unfairness of the proceedings in which the conviction had taken place. There were two ways in which courts in England and Wales would ensure that the treatment of a conviction in a Member State would be the same as the treatment of a conviction by a national court. First, by s.74(2) proof of the conviction would constitute a rebuttable presumption that the offence was committed "unless the contrary is proved". Accordingly, whether the conviction was by a national court or the

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court of a Member State, it would be open to the defendant to challenge the correctness of the conviction. Secondly, if there were evidence that the conviction was the result of a trial which failed to reach appropriate standards of fairness, it would be open to the court to decline to admit the evidence in the exercise of its discretion, either under the Criminal Justice Act 2003 s.101(3) or pursuant to the Police and Criminal Evidence Act 1984 s.78. There was no occasion to qualify the express terms of s.73 in order to ensure compliance with the Framework Decision because the law of England and Wales was already compliant.

Health and safety at work—Health and Safety at Work Etc Act 1974 s.33—submission of no case to answer—whether breach of duty under s.2 possible where incident result of foolishness of employee

POLYFLOR LTD v HEALTH AND SAFETY EXECUTIVE [2014] EWCA Crim 1522; July 17, 2014

The judge had rightly refused a submission of no case to answer, where the accident which occasioned a prosecution under the Health and Safety at Work Etc Act 1974 s.33 (based on a breach of the duty in s.2) came about because (as he himself admitted) the victim had behaved foolishly. The Court rejected the argument that there was no breach of duty where a risk would only materialise where an employee did something very foolish. The prosecution had only to adduce *some* evidence of exposure to *risk*—that is, some evidence that an employee was exposed to a possibility of danger. Once that was established the onus shifted to P to show on the balance of probabilities that it did all that was reasonably practicable to ensure that its employee was not exposed to such risk. At that point, it was open to a defendant to rely on evidence that it had done all that it was reasonably practicable to do. In the present case the defendant chose not to adduce such evidence, preferring to rely on answers obtained within the prosecution case. That was an entirely justifiable forensic approach, but the Court suggested that a jury was more likely to be persuaded that an employer had *probably* done all that could reasonably have been done to obviate an obvious risk if it adduced a positive case. The Court considered *Tangerine Confectionary Ltd and Veolia ES (UK) Ltd* [2011] EWCA Crim 2015; *Baker v Quantum Clothing Group Ltd* [2011] 1 W.L.R. 1003; *Porter* [2008] EWCA Crim 1271; and *Chargot* [2008] UKHL 73.

Money laundering—converting criminal property (Proceeds of Crime Act 2002 s.327(1)(c))—where person outside jurisdiction allowed criminal property to be paid into bank account outside jurisdiction—Parliamentary intention in respect of Proceeds of Crime Act 2002 —general approach to territorial jurisdiction

ROGERS [2014] EWCA Crim 1680; August 1, 2014

The judge had been right to reject R's submission that there was no jurisdiction in English courts to try him on a count of converting criminal property contrary to Proceeds of Crime Act 2002 s.327(1)(c), where he was a person living and working in Spain who merely permitted money to be received into his Spanish bank account and then withdrawn from it. The money had been obtained by fraud in this country by others. It was undisputed that the offence would be possible if the bank account had been in the UK (*Fazal* [2010] 1 Cr.App.R. 6).

(1) The language of the 2002 Act gave strong indications that it was intended to have extra-territorial effect. Whilst s.327(1)(e) stipulated that criminal property must be removed from the UK, no geographical limitation was placed on the other methods of committing the offence, including s.327(1)(c). Section 327(2A) provided a defence of knowing or believing that relevant criminal conduct occurred outside the UK, and was not unlawful there. The provisions of ss.327(2A)(a) and 340(2)(b) gave a strong indication that a defendant's money laundering activity abroad was potentially within the jurisdiction of the courts. The definition of criminal property in s.340(3), taken together with the provision in s.340(9) that "Property is all property *wherever situated*…", was a further indication of the extra-territorial reach intended by Parliament. Moreover, the specific provision at s.340(11)(d) that money laundering was an act which would constitute an offence if done in the UK, admitted of no other construction than that Parliament intended extra-territorial effect. The offence of money laundering was *par excellence* an offence which was no respecter of national boundaries. It would be surprising if Parliament had not intended the Act to have extra-territorial effect.

(2) In any event, the modern approach to criminal jurisdiction was as set out in *Smith (Wallace Duncan)* [2004] 2 Cr.App.R. 17, adopting the approach in *Treacy* and *Liangsiriprasert* and in *Smith (Wallace Duncan)* [1996] 2 Cr.App.R. 1: where a substantial measure of the activities constituting a crime took place within the jurisdiction, then the courts of England and Wales had jurisdiction to try the crime, save only where it could seriously be argued on a reasonable view that the activities should, on the basis of international comity, be dealt with by another country; in particular it was not necessary that the "final act" or the "gist" of the offence should occur within the jurisdiction. The criminal acts which led to the property in this case becoming criminal property took place in and had an impact upon victims in the UK. The laundering of the proceeds by R in Spain was directly linked to those acts in the UK by virtue of the fact that the property was criminal property. This was not a case where the conversion of criminal property related to the mechanics of a fraud which took place in Spain and which impacted upon Spanish victims, where our courts would not claim jurisdiction. The significant part of the criminality underlying the case took place in England, including the continued deprivation of the victims of their monies and there was no reasonable basis for withholding jurisdiction. It was not an offence in which the Spanish authorities would have an interest

Offences against the person—Offences Against the Person Act 1861 s.20—sexually transmitted disease—guilty plea—effect of failure to follow CPS Guidance—sufficiency of evidence

GOLDING [2014] EWCA Crim 889; May 8, 2014

G pleaded guilty to inflicting grievous bodily harm contrary to Offences Against the Person Act 1861 s.20 on the basis that he recklessly infected a sexual partner with genital herpes.

(1) That the Crown had failed to follow the relevant CPS Guidance on assaults arising out of sexually transmitted infections, in particular failing to procure the sort of medical and scientific evidence envisaged by the Guidance, did not affect the safety of the conviction. In the absence of oppression or misconduct the decision to prosecute was for

the prosecutor, and an erroneous failure to apply policy or guidance would not found an abuse of process submission, nor a broad submission based unfairness (see *A* [2012] EWCA Crim 434 and in particular the observations of Lord Judge C.J. at paragraphs [79] to [87]; and *R. (Barons Pub Company Ltd) v Staines Magistrates' Court* [2013] EWHC 898 (Admin)). Any shortcomings, including insufficiency of evidence, could have been addressed by the trial process, or, on appeal, by admitting and examining fresh evidence.
(2) The evidence that was available sufficed to make a *prima facie* case. The evidence of the severity of the disease was sufficient for a jury to consider that it amounted to really serious bodily harm (*Ashman* [1858] 1 FF 88; *Bollom* [2004] 2 Cr.App.R. 6; and *Dhaliwal* [2006] 2 Cr.App.R. 24 considered); the medical histories of G and the victim, her evidence that she was not engaged in another sexual relationship and G's admissions and lies were sufficient to show "inflicting" (and see *Dica* [2002] 2 Cr.App.R. 28 and *Ireland and Burstow* [1998] 1 Cr.App.R. 177); and G's history and knowledge of herpes were sufficient for "recklessness".
(3) That being so, the Court was satisfied that G's guilty plea was a properly informed, voluntary and unequivocal plea, freely made. There was nothing in the fresh evidence heard by the Court (medical expert evidence and oral evidence from the appellant, the victim and the trial solicitor advocate) which could undermine the safety of the conviction.

Remand for report on mental condition—Mental Health Act 1983 s.35—purpose; whether within jurisdiction of High Court

R. (M) v KINGSTON CROWN COURT [2014] EWHC 2702 (Admin); July 17, 2014

(1) At M's trial on a charge of assault causing grievous bodily harm with intent contrary to the Offences Against the Person Act 1861 s.18, the issue was expected to be intent, and M's capability, in the light of his mental health, to form an intention. The judge had been wrong to make an order under the Mental Health Act 1983 s.35 for M to be remanded to hospital for assessment, where the purpose of the assessment was the clarification of the Crown's psychiatrist's diagnosis, to inform a judgment as to M's capability of forming the intent necessary for the offence charged. The purpose of an order under s.35 was to inform a court about issues relating to fitness to plead and to disposal, which related to the defendant's mental state at the time of the order, not at the time of the offence. In so far as evidence emerged which the Crown sought to use against the defendant, its admissibility would be subject to the Police and Criminal Evidence Act 1984 s.78. But the fact that that safeguard existed in respect of the use of evidence emerging during a s.35 assessment did not mean that the power could be exercised for the purpose of obtaining evidence relevant to an issue in the trial. That would amount to detaining a person (who would be at risk of extending the detention if he or she did not answer questions, and who would not have the benefit of a lawyer) for the purpose of obtaining evidence against him or her. Although no case law had been cited, the Court considered that such detention would not be compliant with the European Convention on Human Rights Art.5, and evidence so obtained compliant would, if admitted, not be Art.6 compliant.
(2) Although the making of s.35 orders were "matters relating to trial on indictment" (Senior Courts Act s.29), and in this case, one notably proximate to trial, nevertheless the Court had jurisdiction to consider the issue on the basis set out in *Maidstone Crown Court ex p.Harrow LBC* [2000] Q.B. 719 and *R. (on the application of Kenneally) v Crown Court at Snaresbrook* [2002] Q.B. 1169, as an order in respect of which the defect was so severe that it deprived the court below of jurisdiction to make it. The Court noted that had M been detained, an application for *habeas corpus* would succeed, and the fact that it was superficially supported by an order of the court would not avail the Crown or hospital because of the reasoning in *Re S-C (Mental Patient: Habeas Corpus)*, *The Times*, December 1995, *per* Lord Bingham.

SENTENCING CASE

Drug offences; conspiracy; sentencing guidelines

TUMARA AND WHEATON [2014] EWCA Crim 1667

The two appellants had been sentenced on January 17, 2014 for their parts in a major international drug-dealing operation. Wheaton had been sentenced to three years' imprisonment after pleading guilty to (i) conspiracy to fraudulently evade the prohibition on the importation of a controlled drug (10 kilograms of cannabis), and (ii) conspiracy to supply a controlled drug (5 kilograms of the cannabis he had imported), for which no separate penalty was imposed. Tumara had been convicted following a trial of conspiracy to supply a controlled drug (84 kilograms of cannabis resin), for which he was sentenced to three years and nine months' imprisonment.
All three offences were committed in 2008, when cannabis was classified as a Class C drug. In 2009 cannabis had been re-classified as a Class B drug. Both appellants submitted that the sentencing judge was required to impose sentences in accordance with the 2012 Sentencing Guidelines for a Class C, not a Class B drug.
The Court of Appeal found that this submission was "misconceived" citing the Court's earlier judgments in the cases of *Herridge* [2005] EWCA Crim 1410, *Donovan* [2004] EWCA Crim 1237, *Mitchell* [2004] EWCA Crim 2945, and *Attorney-General's Reference No.12 of 2006* [2006] EWCA Crim 936.
These authorities establish that the re-classification of cannabis from Class B to Class C in 2004 did not result in any reduction in sentences for supply or importation. Previous sentencing guidance, based on cannabis as a Class B drug, continued to apply. This was so because s.284 of, and Sch.28 to, the Criminal Justice Act 2003 increased the maximum terms for supply and for importation of Class C drugs to 14 years' imprisonment, bringing them into line with the statutory maximum for Class B drugs. Thus, Parliament intended the statutory penalty to be the same for both classes of drug.
The 2012 Sentencing Guidelines apply to all sentences passed on or after February 27, 2012. They categorise cannabis as a Class B drug. No special provision has been made for offences committed between 2004 and 2008 when cannabis was a Class C drug.
After having regard to the relevant authorities on the reclassification and the applicability of the 2012 Guidelines, the sentencing judge had found that there seemed to be little

difference in the level of sentencing in 2009 between a Class B and a Class C drug for offences of supply and importation of cannabis. The Court of Appeal did not find this approach to be wrong in principle or open to criticism.

It was accepted that, in the case of Wheaton, the Judge appeared to have mistakenly treated the quantity of cannabis on the importation count as falling within category 2 of the guidelines when according to the basis of plea, which had been accepted by the judge, the quantity of cannabis fell within category 3 of the guidelines.

Considering the significant role he played in the offences, his continued involvement in drug dealing following commission of these offences and all mitigation advanced on his behalf, the Court concluded that, after a trial, the appropriate sentence would have been three and a half years' imprisonment, not four and a half years' imprisonment on the importation count. It was intended that this sentence would also reflect the criminality involved in the supply count, for which no separate penalty was imposed. After credit for his guilty plea, the appropriate sentence would be one of two years and four months' imprisonment. The sentence of three years' imprisonment was therefore quashed and a sentence of two years and four months' imprisonment was substituted.

In the case of *Tumara*, the Court found that the sentence of three years and nine months' imprisonment, after a trial, was neither wrong in principle nor manifestly excessive.

The Court did not consider that there was any unjust disparity between Tumara and any other co-defendant. Wheaton received a lower sentence because he received full credit for his guilty pleas, and the quantity of drugs involved was significantly less. Another co-defendant, Renato Haughian, had been convicted after a trial for conspiracy to supply cannabis resin. The quantity involved in his case was three metric tons with a street value of nearly £9 million. Haughian was sentenced to four years and two months' imprisonment. It is likely that this sentence was only five months longer than Tumara's sentence because the Judge found that within the Guidelines, he fell on the cusp between a "significant" role and a "lesser" role. The Court accepted that there was force in the Crown's submission that the co-defendant's sentence was a lenient one. However, even so, this would not provide any grounds upon which the Court could properly reduce Tumara's sentence.

Case in detail

A (G) [2014] EWCA (Crim) 299; [2014] 1 W.L.R. 2469

A sexual encounter took place between D, aged 21, deaf and with an IQ of 51, and V, of similar age and intelligence, a friend from the special school they both attended. When news of this got out, D found himself accused of rape, a charge later reduced to sexual assault. In the Crown Court he was found unfit to plead, after which there was a hearing under s.4A of the Criminal Procedure (Insanity) Act 1964 to determine whether he had committed the facts alleged. On a finding that he had, a two-year supervision order was imposed. The finding and the order were quashed on appeal. The central issue in the court below had been V's capacity to consent, and in relation to this, two serious mistakes were made: (i) an expert called by the prosecution was permitted to give the jury her own interpretation of the facts and to express her personal opinion that V had not consented; and (ii) the trial judge told the jury that, in this sort of case, V's lack of capacity need only be proved on the balance of probabilities. (The second mistake arose because s.2(4) of the Mental Capacity Act 2005 makes this the standard of proof when incapacity is an issue in proceedings under the Mental Capacity Act. But, of course, that does not make this the appropriate standard in criminal proceedings brought under other legislation.)

The Court of Appeal judgment contains three important messages.

The first was that, if prosecuting, the prosecutor should consider "the full array of offences created by section 30, and following, of the [Sexual Offences Act]".

Profuse as ever, the Sexual Offences Act 2003 creates no less than 12 separate offences of sexual activity involving persons with a mental disorder.

Sections 34–41 criminalise sexual activity with mentally disordered persons where this results from inducements, threats or deception, or where the defendant is a care-worker. For these offences, the key question in relation to the *actus reus* is whether the alleged victim was suffering from a mental disorder: here consent, or otherwise, is irrelevant.

Sections 30–33 criminalise various forms of sexual activity "with a person with a mental disorder impeding choice". For the purpose of these sections, a mental disorder "impedes choice" when the person suffering from it is "unable to refuse". And a person is treated as "unable to refuse" where either or both of two conditions are present. The first is where the person lacks "the capacity to choose" because they do not have "sufficient understanding" of various matters, which differ slightly as between the different sections. In s.30 the formula is "because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason", and in s.31 it is similar.[1] For ss.32 and 33 it is "because he lacks sufficient understanding of the nature of the activity, or for any other reason". Secondly, a person also counts as "unable to refuse" if, though capable of choosing, he or she is "unable to communicate [their] choice". The first "capacity" limb of this composite test covers much the same ground as is covered in s.74 of the Act, the provision which sets out the definition of consent applicable in the context of the "normal" sexual offences: "… a person consents if he agrees by choice, and has the freedom and capacity to make that choice". But the second "unable to communicate" limb is obviously wider.[2] So although there is an overlap between these two specific offences and the general offences like rape and sexual assault, the coverage of ss.32 and 33 is more extensive.

So a prosecutor who wishes to secure a conviction would obviously be wise to consider one of these 12 specific of-

1 Though confusingly, it is not identical.

2 Especially as interpreted by the House of Lords in the leading case of *Cooper* [2009] UKHL 42; [2009] 1 W.L.R. 1786.

fences, either as the sole count or an additional count, in any case where the complainant was mentally disordered and consent is likely to be raised as a defence if one of the "normal" sexual offences is charged. (Particularly as the maximum penalty for all of these offences is a high one: 7, 10 or 14 years' imprisonment.)
The Court of Appeal's second message was that the police and prosecutors should think twice before instituting criminal proceedings in cases such as this. About the case in hand, they said:

"The decision to charge him first with rape and then with sexual assault is astonishing … This defendant was a young man of good character, which fact should in our opinion should have weighed heavily in the context of the facts as a whole in informing the appropriate course to be followed."

The third and more general message was about when persons who are mentally disordered are to be treated as having the capacity to consent to sex. The Court of Appeal thought that, in principle, the test for criminal proceedings was the same as the test the civil jurisdictions use, and referred to the recent decision of the Civil Division of the Court of Appeal in *Re M* [2014] EWCA Civ 37; [2014] 3 W.L.R. 409. Adopting what was said there, the Court said that the capacity to consent to sex requires a general understanding of the nature and character of the sexual act, and the possible consequences. But

"[t]he question relating to the understanding of reasonably foreseeable consequences obviously should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity."

And quoting from *Re M*, they described this process as "largely visceral rather than cerebral, and owes more to instinct and emotion rather than to analysis".
In other words, it must be an informed choice—but it need not be a wise one.

Comment

"Fare-dodging"—Strict Liability for Fraud?

By John Spencer

It is widely believed, the writer believes, that a person only incurs criminal liability for travelling on a train without a valid ticket if they do so with dishonest intent. The belief will be reinforced by looking at s.5(3) of the Regulation of Railways Act 1889, the legislation which appears to cover this, which is as follows:
If any person—

(a) Travels or attempts to travel on a railway without having previously paid his fare, *and with intent to avoid payment thereof*; [my italics] or

(b) Having paid his fare for a certain distance, knowingly and wilfully proceeds by train beyond that distance without previously paying the additional fare for the additional distance, *and with intent to avoid payment thereof* [my italics]; or

(c) Having failed to pay his fare, gives in reply to a request by an officer of a railway company a false name or address,

(d) he shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale, or, in the discretion of the court to imprisonment for a term not exceeding three months.

In fact this is not so. As the law stands, travelling on the railway without a valid ticket is actually an offence of strict liability—and this twice over.
The first reason for this is the decision in *Browning v Floyd*,[1] which (in effect) turned s.5(3) into a strict liability offence. In this case Divisional Court, in a laconic judgment of one single paragraph, read the provision as if the phrase "with intent to avoid payment thereof" did not exist. Saying "intent to defraud does not matter", they thereby made the section equally applicable to a passenger who genuinely believes that his ticket is valid—as was the position with the defendant in that case. Though not explicitly spelt out, the Court's reasoning appears to be that having no intention to pay is the same thing as having an intention not to pay—which of course it is not, because an intention not to pay presupposes awareness that a payment is required.
The implications of this extraordinary decision seem not to have been widely understood, either at the time or later, because the offence has continued to carry in the public eye a sense of moral obloquy and disgrace. In 1948, only two years after it was decided, a conviction for this offence brought the glittering career of the BBC's first media don, the philosopher Dr C.E.M. Joad, to a sudden end; causing the BBC to drop him hurriedly, and "the loss of his (well-founded) hopes of a peerage".[2] Nor are its implications universally understood today. Discussing the s.5(3) offence on its website, a firm of solicitors specialising in fare evasion informs the public, "These are the classic evasion charges. The prosecutor must prove intent on the part of the defendant (unlike the byelaw offences which are strict liability offences)".
The second reason why travelling without a valid ticket is an offence of strict liability is the existence of another and more recent criminal offence, created by the 2005 Railway Byelaws. Of these, Byelaw 18 is as follows:

18. Ticketless travel in non-compulsory ticket areas

(1) In any area not designated as a compulsory ticket area, no person shall enter any train for the purpose of travelling on the railway unless he has with him a valid ticket entitling him to travel.

(2) A person shall hand over his ticket for inspection and verification of validity when asked to do so by an authorised person.

(3) No person shall be in breach of Byelaw 18(1) or 18(2) if:

(i) there were no facilities in working order for the issue or validation of any ticket at the time when, and the station where, he began his journey; or

(ii) there was a notice at the station where he began his journey permitting journeys to be started without a valid ticket; or

(iii) an authorised person gave him permission to travel without a valid ticket.

1 [1946] K.B. 597.

2 Oxford Dictionary of National Biography.

A "compulsory ticket area" is defined as one "designated as such under a Penalty Fares Scheme"—which will nowadays include, in practice, any train that runs commercially. Breach of Byelaw 18 is a summary offence, punishable in the magistrates' courts with a fine at level three (up to £1,000).[3]

In the light of s.18(3), it would be difficult to argue that this is not in other respects a strict liability offence.

How did this new offence come into being?

There was no equivalent offence in its predecessor, the Railway Byelaws of 1965, which dated from the days of nationalisation. It seems to have first appeared on the scene in 2000, as part of the individual byelaws created by the individual companies under powers initially conferred on them under the 1990s privatisation, which were made according to a standard template, and approved en bloc by the Minister of Transport in 2000. And it then remained on the scene when, in 2005, the current single set of Railway Byelaws were made by the Strategic Rail Authority,[4] and the individual byelaws—all 33 of them—were repealed. Neither the arrival nor the retention of this new offence seems to have attracted much attention, and its existence appears to be not widely known today.

Is it acceptable that it should be a criminal offence to travel on a train without a valid ticket, even where this is done in good faith and in consequence of a genuine mistake, which could be entirely reasonable? In the writer's view it is not, and for an extensive list of reasons.

First, it is objectionable for the reason that offences of strict liability are always objectionable: it is not right that the law should potentially make criminals of persons who were not at all to blame, and whose behaviour was entirely reasonable.

Even those who make this general objection usually concede that strict liability offences may be a necessary evil in those areas where excuses are easy to invent and difficult to disprove: exceeding speed limits, for example, or Construction and Use Regulations, covering matters such as having a defective rear light on a motor vehicle after dark. This justification might apply to travelling on trains without a valid ticket, if the rules relating to the validity of tickets were simple, as they once were, in days gone by. Regrettably, however, with our present fragmented system this is no longer true. The rules are now very complicated, and the difficulty of understanding them is a matter of constant complaint.[5] In some cases they are strangely counter-intuitive. (An example which attracted media attention recently was the case of the University professor with a ticket from Birmingham to Durham, who unwittingly invalidated his ticket by getting off at Darlington, one stop ahead of his destination—thereby making himself liable for a charge of £155.[6]) In consequence, as has been often pointed out,[7] it is easy for a passenger to make an honest mistake; for which, as the law stands, criminal liability is potentially incurred.

Strict liability is tolerable, if not desirable, only provided that the offence in question is not socially stigmatic. But convictions for travelling without a valid ticket, unlike convictions for breach of Construction and Use Regulations, do carry social stigma. In the words of a firm of solicitors who specialise in this type of case:

"A successful prosecution not only leads to a fine but also to a criminal record. For a professional person, a criminal conviction is for life (i.e. it will never become spent and will always have to be declared). A conviction may also prevent travel to and the ability to work in certain foreign countries including the USA and Australia. A conviction for fare evasion is for an offence of dishonesty which may jeopardise your present employment and will certainly adversely affect any future job applications."[8]

This is obviously true if the conviction is for the offence under the 1889 Act, part of the definition of which (albeit set at nought in *Browning v Floyd*) is intent to avoid payment. But it is surely no less true even if the conviction is for the offence under Byelaw 18, because even here the defendant's behaviour, when the case is reported by the local paper, is almost certain to be described as "fare-dodging".

In this country, when complaints are made about the apparent severity of some aspect of the criminal law the stock answer is "But a feature of the legal system in this country is the discretion to prosecute. The authorities can be trusted to use it wisely." Where the authorities in question are the police and the Crown Prosecution Service this may be so. These are organs of the State and, one hopes, are guided in their prosecution policies by the public interest. But prosecutions for fare evasion are private prosecutions, brought by the train operating companies, whose main concern is likely to be to maximise their revenue; a fact of which we were reminded by the news—ill-received by the media—that Southeastern Railways had decided not to prosecute a millionaire who had systematically evaded £43,000 worth of fares, because he had, on detection, refunded the money.[9] Indeed, these offences, and the fact that strict liability attaches to them, make them particularly useful—and no doubt very welcome—to the train operating companies because they give an extra set of teeth to the system of penalty fares. Penalty fares are in theory purely civil, and refusal to pay one is not as such a criminal offence. But if the passenger who gets one tries to argue with the ticket inspector, the fact that travelling without a valid ticket is a strict liability offence means that the inspector can say, quite truthfully, "If you don't pay up you will be prosecuted." Or the inspector, if he or she is feeling in the mood, can dispense with the threat and set criminal proceedings going by formally charging the passenger then and there—having first, to his intense embarrassment, cautioned him in front of his fellow passengers "in accordance with the Police and Criminal Evidence Act".[10] And because the offence is one of strict liability, the passenger is then faced with criminal proceedings to which he has no conceivable defence, however honest his conduct may have been. His only way out is to write a grovelling letter to the train operating company's prosecution department, offering to pay the penalty fare and their

3 Compulsory ticket areas can include parts of stations as well as trains; and under Byelaw 17, there is a further offence of entering, without a valid ticket, any compulsory ticket area.

4 This was wound up by the Railways Act 2005, and its functions distributed among other bodies. But the Byelaws remain in force, unless and until they are replaced.

5 See for example Patrick Collinson, "Fare and unfair: the best and worst tickets", *The Guardian*, August 2, 2014, 43.

6 http://www.bbc.co.uk/news/uk-england-11420790. When he complained, the operating company agreed to waive the charge.

7 "Innocent rail passengers facing huge fare dodging penalties, watchdog warns", *Daily Telegraph*, May 22, 2012.

8 Gray Hooper Holt LLP.

9 "Outrage at high flying City asset manager who became 'biggest fare dodger in history' by avoiding £43,000 in rail tickets while owning two country mansions worth £4million", *Daily Mail* August 2, 2014. "Millionaire City executive who dodged £43,000 in train fares unmasked", *Guardian* August 4, 2014.

10 "If you demonstrate an intent to avoid payment, you will be asked to provide your contact details and may be cautioned and interviewed. This is in accordance with the Police and Criminal Evidence Act 1984 (PACE) and you will be advised of the actions to follow." Virgin Trains' revenue protection policy, online at http://www.virgintrains.co.uk/assets/pdf/revenue-protection-policy/revenue_protection_policy.pdf

costs, in the hope that—as with the City millionaire and his £43,000 fare evasion—this will persuade them to drop the prosecution.[11]

That all this is highly questionable itself should go without saying. And it is doubly so, because the penalty fare system is also questionable. Penalty fares are not designed to compensate the train operating company for its loss, but are a threat held *in terrorem*—to use the phrase the courts use when condemning penalty clauses in contracts, a device in principle identical, of which the common law has traditionally disapproved. Part of their commercial purpose, it seems fair to assume, is to enable the train operating company to employ fewer staff: in the hope and expectation that the reduced risk of being caught is counterbalanced by the risk of greater punishment if it happens. And it is not right, surely, that the State has put the criminal justice system—with its power to ruin reputations and to disrupt lives—at the disposal of a group of private companies, as a tool to reinforce a commercial policy designed to maximise their profits.

In the writer's view, the position is deeply unsatisfactory and two reforms are urgently needed to put it right. First, the substantive law on "fare-dodging" should be amended, so that a passenger without a valid ticket does not commit a criminal offence if he is acting in good faith. And secondly, the power to prosecute should be taken away from private companies and vested in the State, as is the position in Scotland, and as the Philips Commission wisely proposed many years ago, as part of the package of recommendations which led to the creation of the Crown Prosecution Service. But with Parliament and the executive apparently united in their taste for offences of strict liability,[12] and with the CPS—already underesourced—now facing yet a further round of funding cuts, the likelihood of either of these changes happening in the short term looks regrettably remote.

11 For an example of this happening, see "Fare-dodging: a commuter tells how he was 'prosecuted for protesting'", *The Guardian*, October 23, 2010.

12 Striking examples in recent legal history are to be found in the Sexual Offences Act 2003; and in particular in s.53A of the Sexual Offences Act, added in 2009, which creates a new offence of paying for sex with a prostitute who has been exploited or coerced—where strict liability is explicitly provided for.

Feature

Getting an Accurate Picture—A Fresh Look at Fresh Representation

By Master Michael Egan QC, Registrar of Criminal Appeals

When appointed to this post[1] this author was struck by how often fresh representatives instructed to advise on appeal appeared to ignore their predecessors, even where there was no criticism of those lawyers. There seemed to be a tendency for fresh representatives to avoid criticism, sometimes being specific that no criticism was being made. This author could not understand why the former representative was not put on notice and wondered whether such a stance had been taken to circumvent input from former lawyers.

Up to March 2014 lawyers were guided by *Doherty & McGregor.*[2] That decision dealt with legal professional privilege and carried with it an endorsement of the Bar Council's guidance of December 1995 on the procedure. *Doherty & McGregor* made clear that it was perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds were lodged but gave fresh counsel discretion in the matter.[3]

Seventeen years on, it appears that a majority of fresh representatives were exercising that discretion by not contacting previous lawyers. It may be that that decision arose from a worry over privilege; practitioners may have thought that any communication with former representatives carried a danger of privileged information being disclosed. *Doherty & McGregor* decided that the waiver procedure should be carried out by the Registrar, so practitioners were leaving the whole exercise to be dealt with by this author's Office. Such an approach conflated two issues: is waiver necessary? If so; getting former lawyers to respond.

If those two issues are approached separately the problem disappears. If criticism of former representation is to be made, the fresh lawyer would need to advise the defendant about the waiver of privilege procedure. It is their responsibility to obtain a signed waiver of privilege from the applicant and lodge it with the grounds or inform the Court that the applicant is unwilling to waive privilege and has been advised as to the consequences of that decision. Even where severe criticism was made previous lawyers could always be shown a draft of the grounds, if only to put them on notice.

Failure to adopt that approach meant that it was often not possible from the grounds to tell whether waiver was necessary. This would have the result that that decision was left to the Criminal Appeal Office which meant its lawyers had to decide whether the case required waiver. This was unsatisfactory because the one person who should know whether there needs to be a waiver is the author of the grounds.[4]

To go further: any lawyer who holds themselves out as having sufficient expertise to criticise their predecessors but is unable to assess whether waiver of privilege will be necessary, should be asking themselves serious questions as to whether they are competent to advise at all.

1 December 2011.

2 [1997] 2 Cr.App.R. 218.

3 In 1997 the legal landscape was different. Solicitors could have higher rights of audience but the overwhelming number of these cases would be dealt with by counsel. That is no longer the case.

4 Although it is for the Registrar to decide whether to obtain comments from trial representatives under the waiver procedure, the need for waiver is a fact sensitive exercise and the person best able to judge that is the advocate who drafts the grounds.

In practice failing to contact trial lawyers may cause three problems:

(i) There is a danger that the person advising and drafting grounds will not be aware of all that occurred whilst the case was in the hands of the previous lawyers.

(ii) There is no notice given to the trial lawyers that a case they were involved in is being critically examined and on what basis.

(iii) Waiver of privilege may not be addressed at the time of lodging the grounds by the person best able to see the need for it. If it is deemed necessary further on in the proceedings, it will result in former representatives being asked for detail after they could first have been informed.[5]

The discretion as to whether fresh representatives contact previous lawyers has now been removed as a result of a series of cases that examined another issue entirely. The Lord Chief Justice, sitting in the Court of Appeal (Criminal Division) has had occasion to consider cases where newly instructed legal advisers seek extensions of time to submit what are hopeless applications for appeal: see *Davis and Thabangu*[6]; *Achogbuo*[7]; and *McCook*.[8] The following principles arise from the combination of those decisions:

(1) The Court of Appeal expects strict compliance with the duties of advocates and solicitors, there is a fundamental duty on them to make applications to the Court only after the exercise of due diligence.[9] For fresh lawyers this necessarily entails taking steps to ensure that they are fully apprised of all that occurred whilst the case was in the hands of the previous lawyers insofar as that is relevant to the new proceedings.

(2) In cases where an application is based upon allegations of actual or implicit incompetence by previous legal advisers then it is essential that enquiries should be made of those prior lawyers said to have acted improperly and equally important that other objective and independent evidence be sought to substantiate the allegations made.[10]

(3) These principles apply not only where there is an allegation that previous lawyers have erred or failed in some way but also in any case where it is essential to ensure that the facts are correct.[11]

There is an obvious public interest in avoiding the Court of Appeal being required to devote resources to the processing of hopeless cases, and it can be anticipated that no competent representative is likely to lodge the kind of grounds in the *Davis* case[12] or to make the kind of errors demonstrated in *Achogbuo* or *McCook*.[13] However there is now a change to the approach set out in *Doherty & McGregor* that affects all fresh legal representatives who submit applications to the Court.

5 See, for example *Gohil*; [2014] EWCA Crim 1393 at [38].
6 [2013] EWCA Crim 2424; December 5, 2013.
7 [2014] EWCA Crim 567; March 19, 2014.
8 [2014] EWCA Crim 734; April 10, 2014.
9 *Achogbuo* at [20].
10 *Achogbuo* at [20].
11 *McCook* at [11].
12 The grounds applied for an extension of time of over eight years in relation to two foreign nationals who had not been advised that they had a potential defence under s.31 of the Immigration and Asylum Act 1999. Far from presenting themselves to a port of entry with false documents the applicants had actually pleaded guilty to a "black dollar" fraud on businesses in Melton Mowbray.
13 *Achogbuo's* first application was based on the admission of prejudicial evidence which inquiry would have shown had been successfully excluded by trial counsel. In *McCook* fresh solicitors and counsel would have been warned that they had actually got the wrong trial.

The rulings highlight the necessity of finding out what has actually happened in the Court below. Lawyers should not rely solely on assertions made by a convicted applicant. It is important to emphasise that this does mean that convicted criminals do not tell the truth about their cases. The reality, as any practitioner will know, is that defendants are often poor historians of their own proceedings. An everyday example will illustrate this: in court proceedings no competent advocate would act on the recollection of his client as to whether he had previous convictions or what they were. They would check with the prosecution before asking the officer to confirm the defendant was of good character. If they did not and got an unfortunate reply they would be likely to be subject to wasted costs if the proceedings were aborted.
After all, what is wrong with wanting as much material as possible about what had gone on before? If someone is presuming to give an expert opinion on proceedings where they were not present, there is something uncomfortable about ignoring the former representatives.
This author did some of this work as counsel and, looking back over some old papers, sees that he used a standard phrase when writing to former counsel:

I would greatly appreciate any other comments you have. I am acutely aware that I was not at the trial with all the attendant disadvantages that that brings.

When beginning this kind of work in 1994 this author relied on what the Court of Appeal said in *Clarke & Jones,*[14] one of the two cases that preceded *Doherty.*[15] It's maybe true that the letter was just a statement of the obvious and perhaps it was luck but it should still be noted that courteous replies were always received. It also put the predecessor on notice as soon as possible after the trial.
When researching for this article it was important to look back at *Clarke & Jones,* having been guided by that. Looking at the judgment at pp.47C–48F is interesting because the Court in 1994 clearly thought that there should be an obligation on fresh lawyers to communicate with their predecessors:

"This case illustrates two aspects of these kinds of appeal which the Court finds disturbing. First, it is not until there is a hearing that the appellant's new representatives know the full story of what happened at the trial. Sometimes they have made enquiries; sometimes not. Here, there was the enquiry in January 1992 in the case of Jones, but there have been no further enquiries, so far as we understand it, since then. In relation to Clarke, it seems that no such enquiries have ever been made.

The second aspect is the question of delay. These, as the present cases demonstrate, can become considerable. The present appeals relate to a trial three and a half years ago. Necessarily, solicitors and counsel newly instructed want to see the transcripts or records of the trial proceedings. They apply for legal aid, and there may be a considerable expenditure of public funds.

We are conscious that the Court should be alert not to prevent or to place any difficulties in the way of proper applications of this kind, but we feel also that the Court should be concerned that there are procedures in place which are apt to avoid delays in meritorious cases and to avoid unnecessary expenditure and delay in those cases which are not.

For these reasons, it seems to us that there are very strong reasons for urging that there should be rules of professional conduct in cases such as these, which would cover essentially three points. First, an obligation upon the fresh solicitors and counsel to communicate promptly with those who appeared at the trial; secondly, an obligation on the trial counsel and solicitors to respond promptly to those enquiries; and third, of equal importance, those freshly instructed should immediately notify the Registrar of this Court if an appeal or application is in prospect, so that the Court can do its best to avoid the unconscionable delays such as have occurred in the pre-

14 Unreported July 29, 1994.
15 The other was *Sheila Bowler*; [1995] WL 1084192.

sent case and have occurred, to our knowledge, in many other cases also.

For those reasons, this Court will suggest to the professional bodies concerned, the Bar Council and the Law Society, that consideration should be given, as a matter of urgency, to rules of professional conduct of this sort."

When the Court of Appeal came to decide *Doherty & McGregor* the Bar Council (with the approval of the Lord Chief Justice) had endeavoured to deal with the concerns but the Guidance as drafted did not make contact with former lawyers mandatory. The three problems identified above are foreseen in that passage from *Clarke & Jones* and perhaps it is a pity that the *Doherty & McGregor* judgment did not quote from it. If it had, practitioners may have been keener to exercise the discretion the other way and the practice of keeping former representatives "out of the loop" would not have developed.

This author would recommend the following as the appropriate procedure for fresh lawyers and trial lawyers when applications are submitted to the Court of Appeal:

Fresh lawyers

(i) When drafting grounds make a sensible decision on whether waiver is required. Any ground that goes to the conduct of the trial is likely to require waiver. If so, advise the applicant about the waiver of privilege procedure. Either obtain a signed waiver of privilege from the applicant or note that the applicant declines having advised them of the consequences of doing so.

(ii) Send draft grounds to former representatives inviting their comments, particularly on the facts.

(iii) On receiving comments reconsider the draft grounds and include confirmation that trial counsel has seen the grounds or, in cases where there has been no response, that that is the position. Should the grounds still be arguable, finalise the same.

(iv) Lodge the grounds. In cases where waiver is judged to be necessary lodge the formal waiver document with the Grounds or (having confirmed that the applicant does not wish to waive privilege) inform the Court that the applicant is unwilling do so and has been advised as to the consequences of that decision.

Trial Lawyers

(i) Respond on the facts, it need not be lengthy. If put on notice of criticism confine yourself to the facts and explain that you cannot expand without waiver.

(ii) If there is no criticism but you do not feel able to respond fully without waiver of privilege, say so.

(iii) Whilst responding is a matter of courtesy, bear in mind that a failure to respond will be notified to the Court on consideration of the application.

In practice there is likely to be an unexpected benefit to applicants in applying this procedure. The practice of "keeping the trial lawyers out of the loop" often meant that they would be asked very late in the day and that response was often extremely defensive. This author has seen responses to the waiver procedure which would pass muster as a Respondent's Notice. All professionals are sensitive, lawyers no less than any other. A courteous inquiry early in the proceedings is much less likely to produce such a reaction.

In the News

Opting out of EU criminal justice—and then opting back in again

Two years ago, in Issue 7 of 2012, the *Review* published an article entitled "Opting out of EU Criminal Justice?". This described the "Protocol 36 opt-out", which gave the UK the right to pull out of all the EU criminal justice measures adopted between Maastricht and Lisbon in advance of the EU court at Luxembourg acquiring the right to condemn Member States that fail to implement them. Last year, in Issue 8 of 2013, the *Review* published a follow-up article, describing how the Government had decided to exercise the opt-out, though was planning to seek readmission to nearly all the measures that were practically significant, including the European Arrest Warrant: the measure which the police were as keen to keep as hard-line Eurosceptics were anxious to get rid of.

In July of this year the Government published a Command Paper giving a progress report, from which it seems that the UK's attempt to secure readmission is going fairly smoothly.[1] As the price of readmission, the UK has had to add one significant measure to its list of opt-back-ins—membership of the European Judicial Network. But otherwise it is likely to get its way. When the small print has been finally agreed in Brussels, Parliament will be invited to endorse the deal.

But if, having opted out of all the "Maastricht measures" we are now opting back into all the ones that are practically significant, the obvious question is: 'Why are we doing this at all?' To this there appears to be no convincing answer, and so the exercise has attracted, at one and the same time, the derision of Labour Party and the anger of the Tory Eurosceptic right. In Parliamentary debate in April, Yvette Cooper, the shadow Home Secretary, said:

"That is the historic transfer of powers that the Home Secretary boasted about … We have the power not to do a whole series of things we plan to carry on doing anyway, the power not to follow guidance we already follow, the power not to take action we already take, the power not to meet standards we already meet, the power not to do things that everyone else has already stopped doing."[2]

And in a further debate in July, an exasperated Tory Eurosceptic said the Prime Minister was behaving like a jellyfish. However, this story does have one potentially significant legal consequence. In an attempt to answer some of the criticisms of the European Arrest Warrant, the Government's Anti-social Behaviour, Crime and Policing Act 2014 makes a number of important changes to Part I of the Extradition Act 2003. These include two new grounds for refusing the surrender of a wanted person: that the requesting country is not yet ready to put him on trial, and that his surrender would be disproportionate.

1 Decision pursuant to Art.10(5) of Protocol 36 to The Treaty on the Functioning of the European Union, Cm 8897; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf

2 *Hansard*, HC, April 7, 2013, Col.36.

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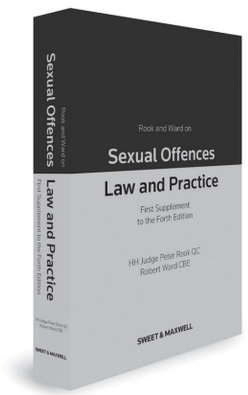

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