SWEET & MAXWELL

Issue 4 May 24, 2016

Archbold Review

Abuse of process—adjournment—relationship

AKHTAR [2016] EWCA Crim 390; March 4, 2016

A was charged with racially aggravated intentional harassment (Public Order Act 1986 s.4A, Crime and Disorder Act 1998 s.31) following a minor argument on the street. She had significant mental health issues, and special measures were directed for her to follow and participate in the trial from another room with the assistance of an intermediary. On the day of trial, the necessary equipment had not been set up, and when it was, it failed. After pressing Crown counsel as to the desirability of continuing with the prosecution, the judge effectively invited A's counsel to apply for a stay of proceedings, which he granted. The Crown sought permission to appeal against the ruling (Criminal Justice Act 2003 s.58). The Court granted leave and refused the appeal. While a judge could not stay a prosecution simply because it was his or her view that to continue the prosecution was a waste of public resources *(B(F)* [2010] 2 Cr.App.R 35) the judge was not exercising his discretion as a means of getting rid of a case which he thought had no purpose in being in the Crown Court at all. He was evidently concerned about the complete technological failures that had occurred at the Crown Court which meant that the case could not properly be tried that day, and was entitled to find as a fact that there could be no fair trial then. An adjournment to the following day would have served no purpose, and therefore the case, (already 14 months after the incident) would have had to have been put off yet again. In such circumstances the question of adjournment and the question of stay were inextricably linked. The judge had to decide whether or not to adjourn, and was entitled to have regard to the fact that this was by no means an important matter of its type. He also had other factors to take into account, not least the mental health position of A. In such circumstances the judge was entitled to refuse to grant an adjournment. True it was that the Crown then wished to proceed, but a fair trial could not be had on that day. The judge was entitled to draw the conclusion, and exceptionally so, that the appropriate course then was to stay these proceedings.

[*Comment*: if the Crown comes to regret the unusual approach upheld here – excluding the possibility of an adjournment before coming to a conclusion on an abuse of process application – it only has itself to blame for stubbornly insisting on prosecuting – then appealing – a minor argument between two people of the same ethnicity about cycling on the pavement.]

Abuse of process—defendant convicted in absentia *following absconding—subsequently extradited on condition he be retried at his election—condition overlooked—whether second limb abuse of process extended post-conviction—whether threshold for exercise made out*

R (TAGUE) v GOVERNOR OF FULL SUTTON PRISON AND NATIONAL CRIME AGENCY [2015] EWHC 3576 (Admin); December 10, 2015

In 2000, T was convicted in his absence (he having absconded while on bail after the close of the evidence) and sentenced to 23 years' imprisonment. In 2013, he was arrested in Spain on a European Arrest Warrant (issued in 2006). The Spanish court order authorising his surrender to UK authorities was conditional upon T being retried (if he so requested). The condition was in compliance with Spanish domestic law, but that law had been found some months earlier to be in breach of EU law: *Melloni v Ministerio Fiscal* Case C-399/11. Whether the Spanish court was required to adhere to domestic or EU law during this period was unclear; as was whether the imposition of the condition was mandatory or discretionary, and if discretionary, how the court would have acted had it appreciated that the condition was not capable of being fulfilled as a matter of the law of England and Wales. No-one from the UK authorities was present at the Spanish court to so inform the court; and the order itself (as opposed to covering emails etc) was not translated into English before T's surrender. The condition only became known to the UK authorities when attempts were made to prosecute T for the bail offence. As a result, T sought a writ of *habeas corpus ad sujiciendum*; and an order under CPR rule 87.5(g) that he be released from prison. T argued that the original bench warrant issued in 2000, while valid, should not be enforced.

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(1) T argued that the *Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 limb of abuse of process (where trial offended the Court's sense of justice and propriety) was capable of extending to cover misconduct post trial, relying on *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (and the interlocutory judgment at [2011] EWHC 3647 (Admin)), relating to control orders and terrorist prevention and investigation measures (Prevention of Terrorism Act 2005 s.3(10); Terrorist Prevention and Investigation Measures Act 2011 s.9). But in that case (and on appeal, *Mohamed & CF v Secretary of State for the Home Department* [2014] EWCA Civ 559) both forms of order were subject to proceedings before a court on a review, one result of which could be quashing of the orders. T's case involved an extension of the jurisdiction – the contention that public confidence in the criminal justice system justified extending the abuse jurisdiction beyond the trial which was subject to judicial control to post-conviction conduct which was not; that is, it entailed a broader understanding of the concept of the criminal justice system beyond criminal proceedings to the enforcement of sentence. The Court was not prepared to accept that was correct: but as counsel for the NCA had conceded the point, it was appropriate to consider the application on the assumption that the jurisdiction did so extend.
(2) On the proper approach, after considering the authorities (*CC and CF; ex p Bennet; Latif and Shahzad* [1996] 1 WLR 104; *Maxwell* [2011] 1 WLR 1837; *Mullen* [2000] QB 520; and *Warren v Her Majesty's Attorney General for the Bailiwick of Jersey* [2012] 1 AC 22), maintaining confidence in the criminal justice system had to be considered from different directions. On the one hand was gross misconduct which the criminal justice system could not approbate (e.g. *Bennett* and *Mullen*). On the other, it was important that state incompetence or negligence should not necessarily justify a "Get Out of Jail Free" card: in such cases, the public might conclude that the justice system was little more than a game. There was no bright line and a broad-brush approach was likely to be necessary.
(3) The conduct of the prosecution demonstrated no more than a lack of care and precision, rather than (as T submitted) a deliberate bad faith policy to ignore or exercise wilful blindness. The fact that Spanish law was in breach of EU law made the case significantly less serious than *Mullen* and *Bennett*, and for that matter *CC and CF*, in which no abuse was found.

Appeal—point fully taken only on appeal—whether the Court of Appeal would consider merits; conspiracy—Criminal Law Act 1977 s.2(2)—"spouse"—whether should be read to include those in relationship akin to marriage

SUSKI [2016] EWCA Crim 24; January 22, 2016

S and his co-defendant on conspiracy counts were neither married nor civil partners, but were (as the Crown conceded) living together in a relationship akin to marriage. On appeal, S argued that their agreement should be excluded from being capable of being a conspiracy, as would those between spouses or civil partners under the Criminal Law Act 1977 s.2(2). To do otherwise would breach the European Convention on Human Rights Art.8 with Art 14.
(1) While it was highly objectionable that the matter should be raised on appeal without having been fully canvassed in the Crown Court, the Court would not refuse to consider the point. If, "as a dry point of law" s.2(2) would afford S a defence, justice would require the Court to permit the point to be raised.
(2) *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 207 and *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557, in which the House of Lords read statutes down to include homosexual partners as "man or wife" or member of a family in connection with succession to certain tenancies, were to be distinguished. The position in relation to criminal offences was different to other rules of law (*Jones* [2006] UKHL 16: determining the bounds of criminal conduct was for Parliament, not the judges). In 2004 Parliament had added civil partners to spouses in s.2(2), but had not included informal relationships. Rather, the Court would follow the reasoning in *Pearce* [2002] 1 W.L.R. 1553 in relation to compellability of a spouse, an approach which the European Court of Human Rights would consider within the UK's margin of appreciation (see *Van der Heijden v The Netherlands* [2013] 57 EHRR 13).

Firearms—Firearms Act 1968 s.5(1)(aba)—Firearms Act 1982 s.1—question as to whether imitation firearm required conversion to be a firearm or not—effect of R v Bewley *[2012] 2 Cr.App.R 27*

HEDDELL [2016] EWCA Crim 443; April 14, 2016

H, the director of a company supplying decommissioned and stage and screen firearms, was convicted of possessing a prohibited firearm contrary to the Firearms Act 1968 s.5(1)(aba). The firearm had originally been manufactured as a cap-firing toy, but had been converted using properly machined substitute parts by a person with skill and knowledge so that it was capable of firing live rounds; it was disabled from doing so when found in H's possession only by an easily removed steel bolt in the barrel. In interview, H said he had not known this was the state of the weapon. The Crown expert said that the gun was a firearm capable of being fired after the removal of the bolt; the defence expert stated that it was an imitation firearm readily convertible to a firearm by removal of the bolt. The Crown had declined to add a count under the Firearms Act 1982 s.1 to the indictment (and thus allow the defence to argue the defence in s.1(5), that H did not know the gun was readily convertible). The judge had been right to leave the contrasting cases of Crown and defence for the jury's consideration. The 1982 Act did not of itself create any offence, but rather widened the scope of the 1968 Act so as to cover imitation firearms which were readily convertible (as per s.1(6)) into firearms. In *Freeman* [1970] 54 Crim App Rep 251, following *Cafferata v Wilson* [1936] 3 All E.R.149, it had been held that the definition of "firearm" in s.57(1) of the 1968 Act covered the case of a starting pistol the construction of which included features intended to prevent the discharge of missiles, where those features could easily be removed by drilling with readily available tools. In *Bewley* [2012] 2 Cr.App.R 27, however, the Court qualified the decision in *Freeman* in the light of the provisions of s.1 of the 1982 Act, holding that such a weapon would only be a firearm within the 1968 Act if it could be converted into a weapon from which a missile could be discharged without any special skill or the necessity for specialist equipment, unlike the item in that case. But while in *Bewley* [2012] 2 Cr.App.R 27 it was said that the principle identified in *Freeman* was no longer of any application following the 1982 Act, *Bewley* was

not to be read as affecting the position where an item which already satisfied the definition of a firearm within s.57(1) required some minor repair or attention before it could be discharged (as was acknowledged in *Bewley* at [16]).

Harassment—Family Law Act 1996 s.42—"harass" in a non-molestation order to have same meaning as in Protection From Harassment Act 1997—misdirection—safety of conviction
O'NEILL [2016] EWCA Crim 000; March 23, 2016
O was wrongly convicted of breach of a non-molestation order under the Family Law Act 1996 s.42A, as defined in s.42. The terms of the non-molestation order forbade O to "intimidate, harass or pester" the complainant. The Court understood that this wording was standard, or at least very widely used in such orders. The word "harass" in the order was to be read as it would be under the Protection from Harassment Act 1997, and thus included the defence under s.1(3)(c) of the 1997 Act. Where, therefore, the judge directed the jury that "harassment means causing alarm or distress", it was a misdirection. The definition of "harassing a person" in s.7 of the 1997 Act was inclusive, not exhaustive. Harassment involved improper oppressive and unreasonable conduct that was targeted at an individual and calculated to produce the consequences described in s.7. Harassment within the meaning of the order could not simply be equated to causing alarm or distress, and some further wording dealing with the element of oppressive conduct which served to focus the jury's mind on the distinction between criminal conduct and conduct, however unpleasant, falling short of that attracting criminal liability was necessary. The misdirection was as to an important, central element or ingredient of the offence. While the jury may very well have convicted on a strong Crown case (including O's admission that some of the communications were "rather intimidatory", the judge having correctly directed the jury on "intimidate"), the Court could not be sure that the jury *must* have convicted, and so the conviction could not be safe despite the misdirection.

Trial—alternative offence—principles—relevance of silence in interview/failure to give evidence
BARRE [2016] EWCA Crim 216; February 10, 2016
The following four principles could be distilled from the authorities, most recently *Coutts* [2006] 1 WLR 2154 and *Foster* [2008] 1 WLR 1615, on when a judge should leave an alternative offence to the jury:
(1) The public interest in the administration of justice would be best served by a judge leaving to the jury any obvious alternative offence to the offence charged. The tactical wishes of trial counsel on either side were immaterial (noting Lord Bingham's observations in *Coutts* at [23]).
(2) Not every alternative verdict must be left to the jury: if it would be unfair, disproportionate, trivial or might lead to a compromise verdict not reflecting the real issues. The alternative should be *obviously* raised by the evidence and should reflect a view which the jury could reasonably come to; that is, where it arose as a viable issue on a reasonable view of the evidence.
(3) The question was fact specific, and the trial judge's feel of the case was important.
(4) Where an alternative was not left erroneously, the question before the Court of Appeal remained whether the safety of the conviction was undermined.
(5) The Court rejected B's submission that silence from the defendant – a failure to answer questions in interview and to give evidence at trial – supported the need for the judge to give an alternative direction. In general, no such wide conclusion could be drawn from silence.

SENTENCING CASE

IPP; post-tariff; recall
ROBERTS [2016] EWCA Crim 71; March 18 2016
The Court of Appeal considered 13 applications for an extension of time to apply for leave to appeal against IPP sentences. All the applicants had been either detained in custody long after expiry of the minimum term or been recalled for breach of licence. Their central submission was that the sentences were not justified by the statutory criteria. It was submitted that:
i) Whatever the position when the sentences of IPP were passed, s.11 of the Criminal Appeal Act 1968 allowed the court to pass what would now be the proper sentence.
ii) The court should reconsider the sentencing judges' assessments in the light of *Lang* [2005] EWCA Crim 2864.
iii) A time could and had been reached when the length of the imprisonment was so excessive and disproportionate compared to their offence that it could amount to inhuman treatment under Article 3 or arbitrary detention under Article 5 of the European Convention on Human Rights. The Court reviewed each of these submissions in turn.

a. The role of the Court as a court of review
The Court is a court of review; it considers whether the sentence was wrong in principle or manifestly excessive. It does not, years after the sentence, consider whether an offender should be sentenced in an entirely new way because of events in the penal system or because information has been supplied long after conviction. The review of sentences in the light of events occurring long after the original sentence is a matter for the Parole Board or, if change is required to the release regime, for the Executive and Parliament.

b. The case law
Referring to *Lang*, *Johnson* [2006] EWCA Crim 2486, and *C* [2009] 1 WLR 2158 the Court concluded that each of the sentences was in accordance with the statutory criteria.

c. The European Convention on Human Rights
The applicants submitted that the way in which a person subject to IPP has been dealt with long after sentence may render the detention arbitrary. This would not make the original sentence wrong. Only if the system of review breaks down or ceases to be effective could detention become arbitrary. This would not be the consequence of the original sentence, but of subsequent events. It would not therefore be a matter for this court. It would be a matter for judicial review.
The Court upheld the sentences imposed, and stated that it would not revisit sentences of IPP on the bases argued. The remedy, if any, was one the Executive and Parliament must address. The Court referred to the substantial criticism that many years after the expiry of (sometimes very short) minimum terms, many sentenced to IPP remain in custody or

have been recalled to custody for breach of licence, stating it was clear that:
(i) The effect of a long-term of imprisonment with no certain date of release is that in some cases it may increase the likelihood that an offender will re-offend. (ii) The effect of the license provisions will mean that offenders are subject to long periods of licence and, if they offend, are recalled.
The Court further referred to criticism of the imbalance between the test bringing an offender within the scope of an IPP (a significant risk to members of the public of serious harm occasioned by him of further specified offences) and the test for release (it is no longer necessary for the protection of the public that he should be detained). There is some evidence that long periods of imprisonment or recall of those sentenced to IPP may impede their rehabilitation or increase the risk they pose. It was not for the court to examine that evidence or to suggest a new test which might be premised on the basis that the Parole Board should consider, as a balancing factor, the risks posed by continued detention or long licence periods. That was a matter for Parliament and the Secretary of State. The Court recognised that simply releasing those who have completed their tariff periods would create a risk of danger. There were no likely solutions other than (1) that significant resources be provided to enable prisoners to meet the current test for release or (2) for Parliament to alter the test for release or (3) for those in custody to be re-sentenced on principles enacted by Parliament.
The Court concluded by stating that Parliament had legislated to establish a regime of sentences of IPP, which the courts had properly applied. It must, in our democracy and in accordance with the rule of law, be for Parliament to provide a correction for the outcome if it so wished.

Case in Depth

Trial Without Jury: Jury Tampering

By L.H. Leigh*

Introduction
McManaman[1] addresses issues of when and under what circumstances a trial judge may properly order the continuation of a trial without a jury pursuant to s.46 of the CJA 2003. Section 46 of the CJA 2003 is one of a bundle of sections dealing with jury tampering. Section 44 deals with the case where there is evidence of a real and present danger that jury tampering would take place if a jury trial were conducted, empowering the prosecution in such cases to apply for trial without a jury. Section 45 deals with the procedure to be followed on applications under s.44. Section 46 deals with the case where jury tampering is alleged to be taking place at trial. *MacManaman* is a significant addition to the case law interpreting these provisions.
This case concerned the retrial of the appellant on a charge of rape. A juror, Miss D, described by the trial judge as a tall and attractive young woman whose features were distinctive and memorable and who would be relatively easy to recognise, expressed concerns on Thursday to the usher that men in the public gallery appeared to be fiddling with their mobile telephones. Then, on the following Monday, Miss D said that at 6.30 pm on the intervening Friday she had received a Facebook friend request through a person she knew, SD. She was satisfied that the man, one Burke, whose photograph accompanied the request, was one of those associated with the appellant in court. She had taken a screen shot on her phone, which bore out what she said. Although she had been separated from the rest of the jury once the matter had been drawn to the attention of the court she had mentioned the matter to two other jurors. Burke, it transpired, is the appellant's nephew and he had attended most of the trial.
The trial judge then intimated that he was considering discharging the jury and allowing the trial to proceed without a jury. His Honour followed the procedure laid down in s.46(2) and *Guthrie*.[2] No representations were received from the appellant concerning discharge of the jury. The jury was discharged and the matter was adjourned until the following day to consider whether the trial should continue without a jury. Two police constables interviewed Burke, who said that he was looking through Facebook for attractive girls, saw Miss D and another young woman, and sent a friend request. He said that he had made a terrible mistake and did not take the matter further. He had used a mobile phone belonging to his Nan, the screen of which was smashed.
While the police investigation was criticised as being incomplete – tests were not carried out on a mobile phone belonging to Burke, perhaps because he said that he had used his Nan's phone, and his Facebook account was not examined – the trial judge concluded that the police's oral account of their interview with Burke provided him with sufficient information to enable him to order that the trial continue without a jury. In particular, the judge found that there was a link to the appellant and Burke, that Miss D was too frightened to continue as a juror, that Burke's approach to her was not an innocent accident, that his motivation was either to intimidate her or to seek to develop a relationship with her to interfere with the judicial process, and that it was appropriate to infer, even in the absence of direct evidence, that the tampering was done with the knowledge or acquiescence of the appellant. With due respect to contrary

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1 [2016] EWCA Crim 3 [2016] 1 WLR 1096.
2 [2011] EWCA Crim 1338; [2011] 2 Cr.App.R 20.

opinions[3] it is not difficult to see how Burke's actions could have affected the trial by, for example, making the juror feel insecure and afraid of reprisals. Nor does Burke's account appear other than mendacious (though an examination of his Facebook account might have been helpful in assessing this — for example, by showing whether he did in fact contact two women rather than the juror alone or immediately "unfriended" the juror when he realised that he had made what he described as a terrible mistake.)

A cynic might of course think it odd that the significance of Miss D's presence in the jury box did not occur immediately to Burke. It is rather more difficult to be confident, as the judge was, that Burke's actions were done with the appellant's knowledge and acquiescence but this, as will be seen, is in any event not always a critical issue and in any event the defendant failed to make any representations when invited to do so. His Honour further concluded that it was fair to the appellant to continue the trial without a jury and that given that the complainant had already had to give evidence twice, it was not in the interests of justice for the trial to be terminated.

Legal issues: the court's conclusions

This was, perhaps, not the strongest case of suspected jury tampering ever to come before the courts. Nonetheless, the Court of Appeal concluded that the trial judge was justified in concluding that jury tampering had been proven to the criminal standard. While the police interview was not transcribed until later it added little to the oral account furnished to the judge and its absence at the trial stage did not, therefore, constitute a valid ground of appeal.

The trial judge was justified, it said, in not waiting until the conclusion of the police inquiry. Such decisions as this have, it said, to be made very quickly. The Court added, however, that the police investigation was of an unacceptably low standard. The investigation should not have been entrusted to junior officers "particularly given the well-known problems in relation to attempts to interfere with juries in Liverpool". The court summed up the duties of the police in such cases as follows [32]:

> "As jury nobbling/tampering undermines trial by jury, Parliament gave to a trial judge under the provisions of the CJA 2003 the express powers to which we have referred. It is, in our view, implicit in those powers that it is the legal duty of the police to provide all the assistance a judge reasonably requires for the exercise of those powers. When therefore a judge hearing a trial requires the police to investigate an allegation of jury tampering in that trial, the investigation must be conducted under the close supervision of a senior officer of police who must personally provide regular reports to the judge as the investigation progresses. Moreover, it is essential that the investigation be conducted with the highest priority and urgency as the judge has to make a decision on whether to continue the trial with or without the jury as soon as is reasonably practicable, that is to say within a few days. As we have explained at paragraph 20, the judge needs regular reports so that he can assess by balancing the relevant considerations when he is in the best position to make that decision."

It does not, however, follow that a suitable police report to the judge must be provided immediately. In *Guthrie*, above, the case was re-listed for consideration whether the trial should continue without a jury ten days after the discharge of the jury. Police investigations must no doubt be conducted as rapidly as is possible but they need not be so rushed as to produce an imperfect and unhelpful report. Furthermore, as this case makes clear, it will not always be necessary for the trial judge to await a full police report.

The appellant raised as a ground of appeal that there was no proof that he was personally involved in jury tampering. The Court concluded that it need not be shown that a defendant was himself involved. The legislation requires only proof of tampering. The legislation is intended to protect the integrity of the jury, so whether tampering occurs with or without the instigation of a defendant or a person connected with him is irrelevant. It should, the Court said, make no difference even were it is shown that tampering was unconnected in any way to the defendant.

The Court further pointed out that it cannot have been intended that the trial judge, who will ordinarily continue with the trial, should have to determine whether the defendant was involved in tampering. The making of such a determination might place the judge in a position where he considered that he could not fairly try the defendant: as happened in *S*,[4] where the court drew attention to the relevance of issues of apparent bias on the part of the trial judge to decisions under s.46.

In s.46 the statutory requirement is that the judge be satisfied that it would be fair to the defendant to continue without a jury and that the interests of justice do not require the termination of the trial. Distinguishing remarks made in *JS and M*[5] in the context of s.44, it said that decision to continue a trial without a jury cannot be regarded as a decision of last resort: so indicating a real contrast between the approach to be taken under s.44 when considering whether to order a non-jury trial against a background of jury tampering and s.46 where the judge must decide whether to continue with trial alone.

Under s.44 the issue is whether in the context of ordering a new trial suitable measures can be taken to protect the jury, whereas under s.46 the fundamental question is whether in the interests of justice and having due regard to the need for fairness to the defendant the judge should continue with the trial alone. It is clear from *Twomey*[6] that as a general rule the trial should be continued by the judge alone. But in other respects, *Twomey* does not suggest any fundamental difference in approach. Under both sections similar and exacting statutory conditions must be satisfied. Both sections require proof of tampering to the criminal standard. Under both sections the public policy considerations are fundamentally the same. In most cases the invocation of s.46 by the trial judge will preclude any issue under s.44 from arising.

Finally, the instant case raised issues concerning the complainant's credibility. The Court pointed out that assessing credibility is an ordinary part of the judge's duty, adding that under s.48(5) of the CJA 2003 the defendant has the added protection of a reasoned judgment.

3 Richardson, CLW 16/10/2.

4 [2009] EWCA Crim 2377, [2010] 1 WLR 2511.
5 [2010] EWCA Crim 1755, [2011] 1 Cr.App.R 5.
6 [2009] EWCA Crim1035, [2010] 1 WLR 630.

Archbold Review

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Feature

Intensifying Anti-Money Laundering Laws – The Last 30 Years

By Rudi Fortson QC[1]

Incremental reform

When a legislator is confronted with a mischief that requires an unpalatable statutory regime to address it, one technique is to introduce measures by a process of incremental reform. The technique is to start with a particular "scourge" and then, over a period of years, to enlarge the scope of the provisions until the regime, which had perhaps been in contemplation from the start, is installed. The technique was manifestly in play in relation to post-conviction confiscation of the proceeds of crime. The "scourge" of drug trafficking persuaded Parliament to introduce the Drug Trafficking Offences Act 1986 that included rebuttable statutory assumptions that property, which had passed through the offender's hands, were his proceeds of drug trafficking.[2] Part VI of the Criminal Justice Act 1988 created (as originally enacted) a significantly less severe regime for confiscating the proceeds of certain other crimes. Statutory assumptions were then added to the CJA regime, in 1995.[3] Under the Proceeds of Crime Act 2002, the description of the offence is no longer determinative of whether confiscation proceedings can be initiated, but the type and scale of offending is relevant to the question of whether or not the defendant has a "criminal lifestyle".[4]

Rules against another "scourge", money-laundering, have also developed incrementally. This activity has been described as posing a threat to the "soundness, integrity and stability of credit institutions and financial institutions, and confidence in the financial system as a whole".[5] Between 1991 and 2005, "Brussels" adopted three Money Laundering Directives in 1991,[6] 2001,[7] 2005,[8] and each has each been the subject of a revised set of regulations (as amended), namely, SI 1993/1933, SI 2003/3075, and SI 2007/2157. Whereas the focus of the 1st Directive was in respect of the laundering of the proceeds of certain drug offences,[9] the 2nd Directive[10] encompassed a wider range of serious crimes and it extended anti-money-laundering obligations to a broader range of professions (and activities). The 3rd Directive enlarged those measures to include terrorist financing and it introduced more stringent requirements in relation to (among other things) customer identification and due diligence.

On May 20 2015, the European Parliament and Council adopted a 4th Money Laundering Directive,[11] to be transposed into national law no later than June 2017. The 3rd Directive, and its Implementation Directive (2006/70/EEC), will be revoked from June 26 2017. The UK Government, proceeding on the basis that the Directive will have to be implemented in this country, has said there will be a three-month consultation period in 2016 before the 4th Directive is implemented here.[12]

Much of the 4th Directive restates pre-existing measures. The 'risk-based' approach to the prevention and detection of money-laundering is retained. But there are four significant developments. First, greater provision is made to peel away the cloak of secrecy by which natural persons operate behind trusts, or who own or control a legal entity through direct or indirect ownership of shares, or voting rights or by "other means" [art 3(6)(a)]. This includes a requirement that Member States obtain and hold adequate and reliable "beneficial ownership information" on a "central register" [art 30]. Secondly, certain categories of natural persons and legal persons are identified as being particularly at risk of being targeted and exploited by money-launderers. These include professionals and entities tasked to create trusts, and corporate structures, as well as entities through whom the proceeds of crime may be laundered (for example, by the provision of "gambling services"[13]). Thirdly, further provision is made for "obliged entities" (defined by art.2.1)[14] to apply customer due diligence measures (and enhanced measures in specified situations, notably in respect of "high risk" third countries). Fourthly, there is greater emphasis on cooperation ("to the greatest extent possible") between Member States, their respective Financial Investigation Units (FIUs)), and with the Commission [arts 51-52].

All four Directives require Member States to prohibit "when committed intentionally" the conversion or transfer,[15] concealment or disguise,[16] acquisition, possession or use,[17] of

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2 Drug Trafficking Offences Act 1986, s.2.
3 Section.72AA was inserted into the CJA 1988 by the Proceeds of Crime Act 1995, (from November 1,1995: S.I. 1995/2650, art.2).
4 A "criminal lifestyle" attracts the full force of Pt 2 (E&W), Pt 3(Scot.) and Pt 4 (NI) of the 2002 Act.
5 4th Money Laundering Directive, 2015/849/EU, preamble, para.(4).
6 91/308/EEC.
7 2001/97/EC.
8 2005/60/EC; 2006/70/EC.
9 That is to say, the activities in art.3(1)(a) of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It was open to Member States to designate any other "criminal activity" as such for the purposes of the 1st Directive [art 1]. Note that the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime went considerably further and it was to be applied to any "predicate offence", namely, "any criminal offence as a result of which proceeds were generated" [art 1].
10 The 2nd Directive amended the 1st Directive.
11 2015/849/EU.
12 Written Question No. 27588; February 25, 2016.
13 Article 2.1(f), and article 2.2.
14 These include (among others) credit institutions, financial institutions, auditors, external accountants, tax advisors, notaries and independent legal professionals where they participate in any financial or real estate transaction, and other persons trading in goods with a cash value of EUR 10 000 or more, and providers of gambling services.
15 4th Directive, art.1.3(a).
16 4th Directive, art.1.3(b).
17 4th Directive, art.1.3(c).

"property"[18] which the offender knows[19] is "derived from criminal activity".[20] In this respect, the Directives are similar to the terms of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[21] The definition of "criminal activity" in art.3(4) of the 4th Directive has remained largely unchanged, but "tax crimes" relating to direct or indirect taxes "as defined in the national law of the Member States", are now included.[22]

Member States may enact stricter measures than those covered by the Directives,[23] and with the Proceeds of Crime Act 2002 (POCA) the UK has done so. Two examples suffice. First, whereas the Directives and the 1988 UN Convention refer to *intentional* conduct, it is sufficient for the purposes of ss.327-329 that the defendant *suspected* the facts mentioned in s.328,[24] and s.340(3). Secondly, the aforementioned money-laundering actions (concealing etc.) are the subject of the offences created by ss.327[25] and 329[26] of the POCA 2002 (Pt 7). Section 328 (arrangements that facilitate the acquisition, retention, use or control of criminal property) goes further than required by the Directives, albeit that it is consistent with the spirit of them.[27]

Readers should be aware that on the September 29 2014, the United Kingdom signed the "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism" (the "Warsaw Convention"), which had been open for signature since May 16, 2005. The UK ratified that Convention on April 27 2015, and it came into force there on August 1 2015.[28]

There is much in the Warsaw Convention that replicates the provisions of the 1990 Convention (see Art.9 in respect of "laundering offences"). The United Kingdom has taken the view that "no new legislation is required in the UK to implement the provisions of the Warsaw Convention",[29] and that it will consider itself bound "by at least the provisions corresponding to the provisions of the 1990 Convention".[30] It has reserved the right not to apply, in whole, the provisions of Art.47 (international cooperation for postponement of suspicious transactions). It has also made various declarations on ratification by which certain Articles will be applied subject to conditions.[31]

18 Defined by art.3(3) of the 4th Directive as "assets of any kind".
19 The 4th Directive, art.1.6 states that "Knowledge, intent or purpose required as an element of the activities referred to….may be inferred from objective factual circumstances".
20 4th Directive, art.1.3, art.3(4). Since the adoption of the 2001 Directive, "any kind" of criminal activity in the commission of the specified "serious crimes" falls within the Directive.
21 Cm 804, transposed into UK law by the Criminal Justice (International Co-operation) Act 1990, PtII; and see *Montila and Others* [2004] UKHL 50.
22 4th Directive, article 3(4)(f).
23 91/308/EEC, art.15; 2005/60/EC, art.5; and (EU) 2015/849, art.5.
24 That the arrangement facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
25 Concealing, disguising, converting, transferring, removing, criminal property.
26 Use, acquisition, etc., of criminal property.
27 See *Bowman v Fels* [2005] EWCA Civ 226., which provides a useful analysis of Pt 7 POCA and the 1st and 2nd Directives.
28 See para.12, of the UK Explanatory Memorandum, command paper No. 8972: https://www.gov.uk/government/publications/ts-no272015-council-of-europe-convention-on-laundering-search-seizure-and-confiscation-of-the-proceeds-from-crime-and-the-financing-of-terrorism.
29 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378883/EM_Misc_10.2014.pdf.
30 Cmnd paper 8972, para.13.
31 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378883/EM_Misc_10.2014.pdf.

The three POCA money laundering offences: recent cases

The legal principles in respect of ss.327-329 are well developed, but three recent appellate judicial decisions should be mentioned.

Section 327: concealing, transferring, etc.

In *Ogden*,[32] the appellants were convicted on counts that included conspiracy to convert criminal property (namely, "controlled drugs"[33]).[34] The prosecution alleged that the defendants worked together to sell drugs. Section 340(3), POCA, defines property as "criminal property" if, "(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit…, and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit". The Court of Appeal rejected the submission (as did the trial judge) that "mere possession or physical transfer of the drugs (or tobacco) by or between the Appellants did not amount to offence of 'conspiracy to convert criminal property' because it involved no 'benefit from criminal conduct'" (at [42]). As the Court pointed out (at [51]) the prosecution does not need to prove, for the purposes of s.327, that the alleged offender must derive a benefit from his acts of conversion, transferring (etc.). However, the Court went on to say (at [52]) that:

> ….illegal drugs by their nature always represent "criminal property". The reason is that the process of manufacturing, trafficking, importing, distributing, supplying and selling Class A, B and C drugs always necessarily involves a "benefit" for one or more of the individuals involved. Illegal drugs always, therefore, plainly fall within the definition of s.340. It is a crime knowingly to possess illegal drugs (similarly, counterfeit or stolen tobacco).

Presumably, the expression "illegal drugs" was used as "shorthand" for criminal violations of the Misuse of Drugs Act 1971, and the Court did not intend to imply that drugs are "illegal" merely because they are controlled. "Controlled drugs" may be lawfully handled (perhaps for medicinal applications) in accordance with the Misuse of Drugs Regulations 2001. It is not necessarily "a crime knowingly to possess illegal drugs". Were that the case, police officers and forensic scientists who handle unlawfully imported controlled drugs in the course of an investigation, would be in peril of prosecution (but they are not). But, property, which is someone's "benefit", is not "criminal property" unless the alleged launderer knows or suspects that to be the case. This is the effect of s.340(3).

As for the notion of "benefit", where a defendant obtains a controlled drug as payment for his role in a criminal venture, this plainly falls within s.340(5).[35] Furthermore, it was held by the House of Lords in *Islam*[36] (unfortunately not cited in *Ogden*) that the market value of controlled drugs obtained as a result of (or in connection with) criminal conduct, can form part of the offender's "benefit" notwithstanding that the drug was seized by investigators.[37] It is

32 [2016] EWCA Crim 6. The case has attracted strong criticism: see CLW/16/5/3.
33 See s.37 of the Misuse of Drugs Act 1971.
34 Contrary to s.1(1) of the Criminal Law Act 1977, and s.327 of POCA 2002.
35 "A person benefits from conduct if he obtains property as a result of or in connection with the conduct" (s.340(5)). The wording mirrors s.76(4) [confiscation proceedings under Pt2, POCA 2002].
36 [2009] 1 A.C. 1076.
37 See the judgment of Lord Mance, at [49]; and see *Askew* [2010] EWCA Crim 629 at [23]; and note POCA 2002, s.80 [value of property obtained from conduct].

important to stress that, as stated in *GH*,[38] the reference to "proceeds of crime" " is clearly a reference to the proceeds of an earlier offence" [39] The conduct element of the "predicate offence", as it is usually called, cannot be treated as a conduct element of the Pt.7 offence (e.g. "acquires" or "possesses" [s.329]). For example, if D steals £100, his initial theft does not make him guilty of money laundering in respect of the £100 he stole. Subject to that qualification, "all three principal money laundering offences now apply to the laundering of an offender's own proceeds of crime as well as those of someone else".[40] Thus although D's initial theft does not constitute money laundering, he can commit the offence by what he does with the money after he has stolen it. Accordingly, it would seem that once it is proved that a drug was "criminal property" in D's hands, it may fall within Pt.7 of POCA if it is concealed or transferred (etc) by him — subject to prosecutorial and judicial discretion to prevent abuses in the enforcement of that Part. However, the description of such conduct as "laundering" rather than "supplying" gives rise to issues of "fair labelling" and the preferment of appropriate charges.

The Court of Appeal was right to say (in *Ogden*) that the term "conversion….bears its plain, ordinary meaning in this context" (at [53]). The Oxford Concise English Dictionary defines "convert" as "change or cause to change in form, character, or function". However, the Court held that the trial judge had "correctly observed" that "it is not necessary for criminal property to change its form in order to convert under the POCA provisions". The Court cited *Fazal*[41] where the Court of Appeal observed that the conduct of a person, who lodges, receives, retains and withdraws monies from his bank account, would amount to converting the monies concerned.[42] By holding that even the "receipt" of a deposit to a bank account can amount to conversion, the Court's interpretation of s.327 rendered "an already wide offence yet wider".[43] However, it is respectfully submitted that such receipt will bring about some change in the form or function of the deposited property.

It is not clear why, in *Ogden*, the prosecution did not allege the "transfer" of drugs rather than their conversion. Given that s.327 creates one offence that may be committed in any of five ways, it is perhaps moot whether the particular action pleaded in a court or charge is a material averment.

Section 328: arrangements

In *GH*,[44] the Supreme Court held[45] that, for the purposes of s.328, the arrangement into which D enters is one that facilitates the acquisition, retention, use or control by another person in respect of property that was "criminal property" *at a time when the arrangement operates on it* (see the judgment of Lord Toulson JSC at [40]).[46] Thus, an arrangement may be in existence and remain dormant until the moment that criminal property engages the arrangement. In that case, D was said to be guilty of laundering by "arranging" under s.338 when he made his bank account available to a fraudster selling bogus motor-insurance, as the place to direct the victims of his frauds to pay the "premiums" he had extracted from them into. The money became "criminal property" only when the victims paid it into D's account. But "[W]hat rendered the property which the defendant received from the victims 'criminal property' was not the arrangement made between [the fraudster] and the defendant, but the fact that it was obtained from the victims by deception."[47] Thus, for the purposes of s.328, the "predicate offence" is one that is separate from D's alleged act of money-laundering, by which the subject-matter became "criminal property".

Extra-territorial jurisdiction

In *Rogers*[48] it was held that the specific provision at s.340(11)(d) that money laundering is an act which would constitute an offence under ss.327-329 (including when committed inchoately) if done in the United Kingdom, appears to admit of no other construction than that Parliament intended extra-territorial effect to Part 7 of POCA.[49]

In that case, the count (under s.327(1)(c)) gave the following particulars: "converted the sum of £715,000.00 being criminal property obtained by fraud from England and Wales by permitting the receipt of money into his personal bank accounts in Spain and allowing the subsequent withdrawal of the money". The appellant appealed on the ground (among others) that the count did not involve any activity taking place within this jurisdiction. The Court noted (among other indications) that although s.327(1)(e) stipulated that criminal property must be removed from a jurisdiction within the UK, no such geographical limitation was placed on the other methods of committing the offence, including s.327(1)(c).[50]

Deficiencies in the UK/EU strategy against money-laundering

There are at least three problems capable of undermining the global anti-money laundering strategy. The first is the lack of cooperation between enforcement agencies. Accordingly, the 4th Directive declares that "certain coordinating measures are necessary at a Union Level"[51] including:

(i) That "operationally independent and autonomous FIUs [financial investigation units]" are established to collect and analyse the information that they receive in respect of "suspicious transactions" with the aim of investigating criminal conduct (including terrorism) [preamble, para. 37];

(ii) That "all suspicious transactions including attempted transactions" should be reported to the FIU "regardless of the amount of the transaction" [para. 37];

(iii) That the processing of personal data should be permitted for the purposes of complying with the Directive (and for no other reason) [para. 43];

(iv) That Suspicious Transaction Reports (STRs) "reach

38 [2015] UKSC 24, [2015] 1 WLR 2126.
39 *Ibid, at* 2135B.
40 See para.469 of the Explanatory Notes to POCA 2002; and see *GH* [2015]UKSC 24 [33] and [34].
41 [2009] EWCA Crim 1697.
42 [2009] EWCA Crim 1697, at [21].
43 [2010] Crim. L.R. 2010, 4, 309-312; Professor David Ormerod.
44 [2015] UKSC 24.
45 Consistently, it is submitted, with *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128; [2008] 1 W.L.R. 1144.
46 See the commentary to that case by the writer: [2015] Crim. L.R. 637, at 640; [2015] 6 *Archbold Review*, 5.
47 *Per* Lord Toulson, at [50]. And see Ann Mulligan, 'The Supreme Court closes a money-laundering lacuna' [2015] 6 *Archbold Review*, 5.
48 [2014] EWCA Crim 1680.
49 [2014] EWCA Crim 1680, para.47.
50 See also the case note and comment on *Rogers* [2014] Crim. L.R.908.
51 Preamble, para.(2).

the FIU of the member state where the report would be of most use", in accordance with the "detailed rules" laid down in the Directive [para. 54];

(v) That "a range of administrative sanctions…at least for serious, repeated or systematic breaches" of the requirements for customer due diligence, record-keeping, reporting of suspicious transactions, and internal controls of obliged entities, are introduced by Member States [para. 59].

Such matters give rise, obviously, to legitimate concerns about human rights and procedural safeguards.

Secondly, there is the problem that property of high value, notably cash, continues to be moved by methods that make the detection of any underlying criminal conduct difficult. In 2015, Europol reported that since 2010, "vast sums of cash" (often between USD 0.5-1million) have been "openly declared" *en route* to Turkey,[52] but custom services in the European Union have encountered "legal obstacles preventing them from undertaking actions against the suspected cash movements".[53] It would seem that under the laws of some States, cogent evidence (and not merely suspicion of criminal conduct) is required in order to initiate an investigation.

Thirdly, there are weaknesses in the mutual recognition and enforcement by States of one another's court judgments and orders. Asset-recovery is often claimed to be one means by which the financing of crime can be disrupted.[54] In the UK, quite apart from confiscation (*in personam*) following conviction,[55] Pt.5 of POCA enacts two mechanisms by which illegally obtained property may be recovered in *civil proceedings* without proof of conviction ("civil recovery"),[56] namely, property other than cash,[57] and (ii) "cash" that has been obtained from, or which is intended by any person for use in, unlawful conduct.[58] Other statutory measures address terrorist financing.[59] Italy and the Republic of Ireland have also enacted civil recovery measures, which (in common with the UK) were developed on the basis of articles 53,[60] and 54[61] of the UN Convention against Corruption. However, the enforcement of civil recovery orders, in States where no reciprocal laws are in place, is problematic – even impossible.

Concluding remarks

It is reasonable that existing criminal laws should be amended or supplemented to address emerging or mutating mischiefs. But there are examples of law enforcement "mission creep" by which laws enacted for one purpose (e.g. terrorism) have been applied for unintended purposes (e.g. public order). Arguments have been advanced, with varying degrees of success, that the money-laundering offences under ss.327-329 ought not to be deployed in respect of conduct that is more aptly described by another offence (e.g. handling stolen goods): consider *GH*,[62] *Roberts and Chapman*,[63] *Nottinghamshire CPS v Rose*,[64] and R *(Wilkinson) v DPP*.[65] Arguably, *Ogden*[66] is another example. The Crown Prosecution Service has published charging standards which state, in respect of 'mixed cases', that "[t]his is an area where careful exercise of prosecutorial discretion is required, particularly with regard to the possession offence under s.329".

It is likely that the 4th Money Laundering Directive will result in more rules being enacted – to be applied, hopefully, with circumspection.

EDITORIAL COMMENT

Rudi Fortson's article is timely, because on 21 April – just as this Issue went to press – the Home Secretary announced an "action plan" to toughen up yet further the laws of the UK on money-laundering. Among the ideas floated is "*the creation of an illicit enrichment offence, for use when a public official has a significant and inexplicable increase in their assets*".

What is proposed, in other words, is to facilitate the conviction of the dishonest and corrupt by making the evidence suggestive of this sort of behaviour itself a criminal offence. This heavy-handed legislative technique has its precedents: among them, possession of explosives in suspicious circumstances[67] and being the parent of a child that fails to attend school[68]. And some other countries have indeed adopted legislation of this type to cover the issue the Home Secretary has in mind; among them Hong Kong, where s.10 of the Prevention of Bribery Ordinance provides that "Any person who, being or having been [a public official] (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence." The offence carries a maximum sentence of 10 years' imprisonment.

This proposal prompts many thoughts, of which there is space here to mention only one: and that is the intended target. In the UK, corruption and dishonesty by "public officials" in the civil service and in local government is, happily, not a matter of grave concern. But the same is not entirely true, unhappily, of our politicians. So if this new offence is created, let us hope that the definition of "public officials" extends to those who hold elected office.

52 *Why is Cash Still King?*, Europol, 2015; Strategic Report, p.27.
53 Ibid; Strategic Report, p.27; and see the *National Risk Assessment of Money Laundering and Terrorist Financing*; October 2015, UK HM Treasury and Home Office.
54 See *Recovering the Proceeds of Crime*, Performance and Innovation Unit, 2000; and see *An Examination of the Means of Establishing the Efficacy of Asset Recovery and Anti-Money Laundering Policies*, Matthew H. Fleming, University College London, 2008.
55 Under Parts 2, 3, and 4, of the Proceeds of Crime Act 2002; England Wales; Scotland, and Northern Ireland respectively.
56 Part 5, POCA, chapters 1 and 2.
57 POCA 2002, Part 5, chapter 1.
58 POCA 2002, Part 5, chapter 3.
59 Initially under the Terrorism Act 2000, and supplemented by the Anti-terrorism Crime and Security Act 2001.
60 Article 53(a): "Each State Party shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention."
61 Article 54.1: "Each State Party…shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party."
62 *GH* [2015] UKSC 24, [49] (*per* Lord Toulson JSC).
63 [2014] EWCA Crim 1475.
64 [2008] EWCA Crim 239.
65 [2006] EWHC 3012 (Admin).
66 [2016] EWCA Crim 6.
67 Explosive Substances Act 1884 s.4.
68 Education Act 1996 s.444.

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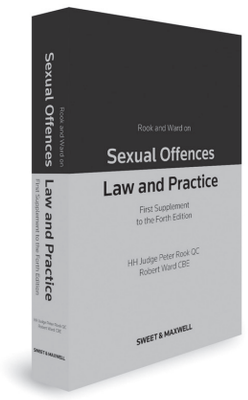

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