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Cases in Brief

Animals—animal fights—Animal Welfare Act 2006 s.8 – "placed with" – "for the purpose of fighting"

RSPCA v McCORMICK AND OTHERS [2016] EWHC 928 (Admin); April 29, 2016

M and others (on the prosecution case taken at its highest) took dogs into the countryside with the object of finding other animals, such as badgers or deer, with which the dogs would then fight. The district judge had been right to conclude that such conduct could not be charged as animal fighting under the Animal Welfare Act 2006 s.8. The exhaustive definition of "an animal fight" in s.8(7) required a "protected animal" (which included dogs) to be "placed with" an animal "for the purpose of fighting". The phrase "placed with", as a matter of ordinary language, and in the context of the section as whole, focused as it was on organised and controlled animal fights, connoted the placing together of the two animals (which, the Court noted, was express in the predecessor Protection of Animals Act 1911 s.5A): it could not be equated with the release of a protected animal into the actual or potential unrestricted vicinity of another animal. Thus taking a dog on to land where there might be wild animals and letting the dogs go in the hope that they would hunt and then attack those wild animals leading to a fight could not amount to a "placing" for this purpose. A fight within the meaning of s.8 could not be the by-product of a chance meeting. It must be a contrived or artificial creation specifically for the purpose of a fight during which the other animal has no natural means of escape: the two criteria were proximity – the animals must be immediately present; and control – the other animal must not be able to escape. To meet a possible counter-example, the Court concluded that if two fighting dogs were released together in a field, the purpose of "placing" for "the purpose of fighting" would be accomplished because neither would seek to escape, thus not requiring control or restraint. To the extent that the district judge found that the offences under s.8 required the involvement of money, he was wrong. It may be an aggravating factor, but it was not a necessary element.

Evidence—bad character—relating to events which if charged subject to presumption of doli incapax*—relevance to admission*

DM [2016] EWCA Crim 674; May 20, 2016

DM was convicted of sexual offences after his 14th birthday committed before the abolition of the presumption of *doli incapax* (Crime and Disorder Act 1998 s.34), but the prosecution sought to adduce evidence of sexual assaults occurring before that age under the Criminal Justice Act 2003 s.101(c) and (d).

The Recorder had been right to admit the evidence. But for the age of the appellant at the time, there could have been little serious argument that evidence of the incidents was potentially admissible, and while not every judge would have admitted them, the Recorder's view was plainly one that was properly open to him. The appellant's age at the time did not call for a different approach based on the presumption of *doli incapax*. DM was not facing a criminal charge in relation to the incidents and therefore the presumption had no direct application: see *R v H* [2010] EWCA Crim 312 (one count was nonetheless quashed where, as the evidence came out, it was possible that the offence occurred before DM's birthday, and the Recorder failed to direct the jury that the evidence upon which they could find that he understood that his conduct was seriously wrong must extend beyond the evidence of the acts amounting to the offence: *C (a minor) v DPP* [1996] 1 AC 1).

CONTENTS

Cases in Brief.....1
Sentencing Case.....3
Comment.....4
Feature.....5
Feature.....7

Evidence—gang affiliation—admissibility—basis

AWOYEMI AND OTHERS [2016] EWCA Crim 668; June 8, 2016

In a case in which A and others were convicted, variously, of attempted murder and firearms offences related, on the Crown case, to inter-gang violence, evidence of their gang affiliation was properly admitted. The gang affiliation evidence (which included violent rap lyrics written by one, a YouTube video featuring aggressive speech and letters to and from A identifying members and attitudes within the gang) provided a link between the appellants and a gang that gloried in violence and the use of firearms, mourned murdered friends and threatened violent retribution for those who crossed them. The Crown could thereby establish a possible motive for the shooting, an association with firearms and lethal violence and could negative innocent presence and association. The evidence was inevitably prejudicial, though not unduly so. It went far beyond simple membership of a gang, shared tastes in music and hyperbole on a video. It indicated the extent to which the individuals concerned had signed up to gang and gun culture. The Court rejected the argument that the evidence was inadmissible because the Crown could not prove hostility between the gang to which the appellants were affiliated and that of the supposed intended victim of the shooting – gangs did not necessarily commit their feuds to writing or camera. That did not mean that evidence of a gang's culture, membership and attitude to violence would be irrelevant. Counsel for A had fallen into the error of assuming that the four questions set out by Leveson LJ in *Lewis* [2014] EWCA Crim 48 were intended to be required to be asked in every case involving gang affiliation. Rather, they were the product of taking the principles from the Criminal Justice Act 2003 and applying them to the facts of that case. In particular, Leveson LJ did not purport to establish a rule that gang affiliation evidence could only be admitted if it went "to show that the defendant was a member of or associated with a gang or gangs which exhibited violence or hostility to the police or links with firearms". The Court was, however, concerned as to the manner in which the evidence was adduced – had documents been edited, or admissions made, it would, for instance, have been possible to avoid the jury learning of a previous prosecution of A (resulting in acquittal). Nonetheless, the parties agreed to the admission of the evidence in that form, and it did not put the safety of the convictions in doubt.

Jury—complaint of non-unanimity by jurors after verdicts given—second thoughts after verdict irrelevant—unexpressed disagreement with verdict irrelevant—enquiry as to objective assent to verdict by jurors

UL HAMID AND KHAN [2016] EWCA Crim 449; March 17, 2016

Between 16 and 35 minutes after ostensibly unanimous verdicts, notes were received from three jurors (from a jury of 11) to the effect that some of the verdicts were not unanimous. The judge, rightly considering himself *functus officio*, properly referred the matter to the Registrar of Criminal Appeals and submitted a written report. The Court ordered questions to be put to all jurors by the Criminal Cases Review Commission, which all save one of the objecting jurors answered. The verdicts were safe. Second thoughts after a verdict have been delivered were not relevant. It was therefore irrelevant, where a juror has indicated assent to a verdict, for the juror thereafter to say, after the verdict has been delivered, that in his or her mind he or she had harboured doubts or had been unsure. It was also irrelevant, where a juror had indicated assent to a verdict, for that juror thereafter to say that he or she had, in fact, been "unsure" but had simply gone along with the majority. What counted was the ostensible demonstration of assent in the jury room to the verdicts as actually thereafter delivered in open court. Overall, ostensibly regular jury verdicts, as delivered, were to be respected. In this case, there could be no question of wholesale repudiation of the jurors' oaths. Further, eight of the jurors were subsequently unequivocal that the verdicts had, indeed, been unanimous at the time. The Court considered the reaction of the uncooperative juror unsatisfactory and to be discounted. The responses from the other two, which were similar to one another, were equivocal. In their answers to the CCRC, neither juror said that they had spelt out in terms to the other jurors that they were in favour of not guilty verdicts before the jury had returned to court. They did not say that they had been placed under undue pressure. The fact that one or other of them may have felt under pressure was not the same thing as being placed under undue pressure by other jury members. The Court took into account other factors, including that there had been no prior indications of difficulty in reaching unanimous verdicts, unlike in *Charnley* [2007] 2 Cr.App.R 32, nor any indication of dissent when the verdicts were delivered or the jury discharged; and the fact that mixed verdicts on a number of defendants had been returned was consistent with the proper discharge of the jury's function.

[Comment: the Court repeats the frequently made observation that a change of mind by a juror after the verdict is delivered is irrelevant to the validity of the claim that the verdict was, in fact unanimous, but takes that as the justification for a further conclusion, that a secret doubt harboured at the time that an apparently unanimous verdict was arrived at does not invalidate unanimity. Previously, the Court has limited itself to the view that a post-verdict rejection of unanimity gave rise to an inference that the juror had changed his or her mind after the verdict (and that such an inference will usually be overwhelming: Lewis *[2013] 6 Archbold Review 776). This case (albeit on dubious reasoning) goes a step further by saying that even if a disagreement is contemporaneous with the jury's apparent agreement on a verdict, dissent will not count if it is secret. This may mean that the focus of the enquiry in future cases will move to the factual question of whether a juror assented to the delivered verdict in the retiring room (perhaps influenced by the amendments to the prohibition on revealing jury determinations effected by Criminal Justice and Courts Act 2015 ss.74) (RP).]*

Indictment—misstatement of offence—whether rendered indictment a nullity

AD [2016] EWCA Crim 454; April 29, 2016

The statement of offence in two of the 11 counts of which AD was convicted in error referred to indecent assault contrary to s.14 of the Sexual Offences Act 1956 rather than s.15, the victim being a boy. The same error had occurred (albeit in connection with a trial of the act under the Criminal Procedure (Insanity) Act 1964 s.4A) in *McKenzie* [2011] 1 W.L.R. 2807, in which the appeal was allowed. However, there was undeniably a tension between *McKenzie* and

Stocker [2014] 1 Cr.App.R. 18, which pointed in the direction of a growing prioritisation of substance over form, continued in more recent cases (e.g. *White* [2014] 2 Cr.App.R. 14). The distinction was usefully illustrated by *Boateng* [2016] EWCA Crim 57. The indictment in that case was riddled with errors, some of which were held on appeal to be fatal and others to be merely technical. Of central importance to the finding that some counts were fundamentally flawed was that it was not a matter of inadvertence that the relevant counts referred to the wrong section. In respect of some counts, the prosecution intended to allege a breach of an inapplicable section, and the drafting of the indictment perfectly reflected that intention. The form was flawless, but the substance misconceived. By contrast, a count which wrongly named an Act and specified the wrong section in the particulars where the statement of offence was correct and the specified section was not irrelevant was properly accounted a "mere drafting or clerical error". On the *Boateng* approach, in AD's case, the salient features were that (a) the mistake was a simple drafting or clerical error; (b) from beginning to end, the charge was as a matter of substance indecent assault contrary to s.15; (c) *McKenzie* had to be read in the light of *Stocker* and in any event was a case under s.4A of the 1964 Act; (d) the offences did not differ so significantly in substance that it would be objectionable for the matter safely to remain on the appellant's record in its present form, the only difference being the sex of the victim, and the maximum sentence was the same; and (e) the drafting slip did not cause AD prejudice, breach his Convention rights or otherwise render the proceedings unfair.

Sexual offences—Sexual Offences Act 2003 s.63—specificity required as to alleged intended offences in indictment; whether Brown *(1984) 79 Cr.App.R. 115 direction necessary*

PACURAR [2016] EWCA Crim 569; April 13, 2016

(1) P was convicted of trespass with intent to commit a sexual offence contrary to the Sexual Offences Act 2003 s.8(1) on an indictment which did not specify which sexual offence under Pt 1 of the Act it was alleged that he intended to commit. The indictment was not defective. Criminal Procedure Rules rule 10.2 provided that an indictment must contain a statement of the offence that described the offence in ordinary language and identified any legislation that created it and "such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant". There would be many cases where the evidence pointed to a specific sexual offence intended and the Crown would be in a position to make clear what was alleged by identifying the offence in the particulars. However, there would be other cases, like P's, where the prosecution alleged it was obvious from all the circumstances that the defendant intended to commit a sexual offence but it was impossible to specify precisely which one and upon whom. Parliament intended s.63 to cover both situations, provided any prosecution and trial could be fair. P's trial was. In particular, the judge ensured that P was provided with sufficient particulars of the offence alleged in the combination of the Particulars of the Offence and in the way the case was put to the jury (that one or more offences on a scale from sexual touching to rape was intended against either a child or adult present in the house in which P trespassed). The appellant knew full well the case he had to meet, and the judge directed the jury appropriately. Had the Crown put the case on the basis that P intended to commit any one of the many offences in Pt 1 of the 2003 Act, the Court "could understand [counsel's] concern rather more", but the way the case was put narrowed it to ss.1 to 3, and 5 to 7, an approach similar to that adopted in *Jones* [2008] QB 460 in respect of s.62 (committing an offence with intent to commit a sexual offence). Crown counsel in P's case conceded that it might have been better to have included more details in the particulars, and he intended to do so in the future: other prosecutors may wish to do the same.

(2) Correspondingly, the judge had not been required to direct the jury that they had to agree on the sexual offence intended. The circumstances in which a *Brown* (1984) 79 Cr.App.R. 115 direction was necessary were now very limited; and it would not matter if some jurors were satisfied that P intended to commit an assault on one potential victim, and some that he intended to commit a more serious offence, provided they all agreed that the ingredients of the offence were made out; that he trespassed with the intent to commit a relevant sexual offence.

SENTENCING CASE

Terrorism

KAHAR [2016] EWCA Crim 568, May 17 2016

A five-judge Court of Appeal gave the following guidance in relation to sentencing offences under s.5 of the Terrorism Act 2006.

(i) Conduct threatening democratic government and state security has a seriousness all of its own.

(ii) The purpose of sentence in such cases is to punish, deter and incapacitate. Rehabilitation is unlikely to play a part.

(iii) The sentencer must consider the offender's culpability, and any harm which the offence caused, was intended to cause, or might foreseeably have caused.

(iv) The starting point is the sentence that would have been imposed if the intended act(s) had been carried out – the offence generally being more serious the closer the offender was to completion of the intended act(s).

(v) When relevant, it is necessary to distinguish between a primary intention to endanger life and a primary intention to cause serious damage to property – the most serious offences generally being those involving an intended threat to human life.

It makes no difference to the seriousness of the offence whether the intended act(s) were to occur abroad. See [20 and [21] for guidance concerning cases where the intended acts were to occur abroad.

The following are also likely to require consideration:

(i) The degree of planning, research, complexity and sophistication involved, and the offender's commitment to implement the act(s);

(ii) The time involved;

(iii) The depth and extent of the radicalisation of the offender;

(iv) The extent to which the offender has been responsible for indoctrinating, or attempting to indoctrinate others, and the vulnerability of the target(s) of the indoctrination (actual or intended).

Offences involving an intention to assist others to commit terrorist acts may be as or more serious than the offence of the person assisted. The particular vulnerability of the offender and, if particularly vulnerable, any grooming; and any voluntary disengagement may be considered in mitigation.

The Court set out six levels into which offences under s.5 could be divided. Consideration must always be given to a life sentence or extended sentence.

Level 1

The highest level is where the offender has taken steps amounting to attempted multiple murder, or something not far short of it, or to a conspiracy to commit multiple murder if it is likely to lead to an attempt that is likely to succeed – but no physical harm has been caused. Given the gravity of terrorist offences, the Definitive Guideline in relation to attempted murder is not directly applicable.

Level 2

This encompasses those who may not get quite so near in preparation or where the harm which might have been caused was less serious. A life sentence will generally be appropriate with a minimum term of 21-30 years, or a very long determinate sentence and a five year extension period.

Level 3

Examples of this level include the principal s.5 offence in *Parviz Khan* [2010] Cr.App.R 35 and *Usman Khan* [2013] EWCA Crim 468 and cases where the offender travels abroad and participates in combat. The offender will be dangerous. The appropriate sentence will be a life sentence with a minimum term of 15-20 years, or a determinate sentence of 20-30 years or more with an extension period of five years.

Level 4

The typical case is an offender who joins, or otherwise supports, a terrorist organisation, usually engaged in a conflict overseas, and either participates on the periphery of the actual combat or trains, whether in the UK or abroad, to that end, or with a view to carrying out one or more acts in the UK. Such an offender is likely to be dangerous. A determinate sentence in the range of 10-20 years or more with an extension period of five years is likely to be appropriate.

Level 5

The typical case is an offender who embarks to join a terrorist organisation engaged in conflict overseas but does not complete his journey or an offender who makes extensive preparations with a real commitment, but does not get very far, or who does not get very far in his preparations for an intended act, which will usually be in the lower realms of seriousness, in the UK. Where such an offender is not dangerous, the range of a determinate sentence is likely to be 5-10 years. From 13 April 2015, the provisions of s.236A/244A of the CJA 2003 will apply, as the s.5 offence is listed in Sch.18A.

Level 6

The typical offender is one who never sets out or who sets out, but is unlikely to go very far, or returns without going far, or who has a minor role in relation to intended acts at the lowest end of seriousness in the UK. Sentences between 21 months to five years are likely to be appropriate.

The notification requirements imposed by ss.47-56 of the Counter Terrorism Act 2008 will always apply, along (when relevant) with the forfeiture provisions in ss.23A & 23B of the 2000 Act.

Comment

The Crown Court Compendium

By Simon Tonking[1]

How much can change within the span of a generation! It is just 30 years since the only guidance provided for judges trying criminal cases were short informal notes written by individual members of the senior judiciary. No-one could possibly have imagined a day when summaries of the law, lists of directions and examples of such directions would be provided in a work running to 397 pages; let alone the provision of a further 92 pages on all but the most obscure aspects of sentencing. Of these almost 500 pages is the *"Crown Court Compendium"* made.

Of course, this change did not come about in a single leap. In 1987 the original *"Specimen Directions to the Jury"* were issued by the Judicial Studies Board, which was itself in its infancy. This work included a guide on structuring a summing up which ran to all of five pages. Although the Specimen Directions were periodically updated, both in content and in language, by 2010 it was recognised that a more modern form of guidance was necessary, not least because the words of Lord Lane LCJ in the original Foreword that:

> "the directions will often require adaptation to the circumstances of a particular case: they should not be used as a magic formula to be used as an incantation"

despite repeated reinforcement by the Court of Appeal (Criminal Division), were by no means universally observed. Hence the *"Crown Court Bench Book – Directing the Jury"* was commissioned from Pitchford LJ. In this work he not only provided erudite summaries of particular aspects of the law but also many examples of directions to the jury which, being based on hypothetical scenarios, were less

1 As explained below, Simon Tonking was one of the team of authors.

amenable to being copied and pasted. Although this approach was greatly beneficial to those trying longer and more complex cases, the unforeseen result was that a number of judges, particularly those trying shorter cases in quick succession and under considerable pressure of time, continued to resort to the, by then outdated and sometimes inaccurate, Specimen Directions.

A partial, and in the event temporary, remedy was provided in December 2011 by publication of the *"Bench Book Companion"* in which topics were addressed not by specimen directions or hypothetical examples but by checklists, often in bullet-point form. Then, as a sequel to this work, just over a year later and for the first time, guidance was made available to sentencers in a second part of the *"Companion"*, which was presented in a similar style.

Even after the publication of these two works however the results of surveys held at Judicial College courses and of a questionnaire circulated to all judges and recorders sitting on criminal cases showed that the Specimen Directions were still being used by a significant minority, whilst others had moved on to *"Directing the Jury"* and/or its Companions. Thus a compelling case for a comprehensive, up-to-date and readily updateable single work was identified, as were four authors of whom it might be said that they came to the task with a wide and diverse mix of knowledge, experience and enthusiasm: Sir David Maddison, Professor David Ormerod QC, His Honour Judge John Wait and His Honour Judge Simon Tonking (as he was when work on the Compendium began).

The work started towards the end of 2013. Although not foreseen at the time, it was to be more than two years before publication. Why did it take so long? There are many reasons, among them logistics of coordinating the work of four already busy authors; obtaining expert advice on how directions should be presented to juries, most notably from Professor Cheryl Thomas, whose research and expertise on juries is unique, and also from the Plain English Campaign; peer review of every chapter by a large cadre of experienced judges, many of whom brought to bear specialist expertise; ongoing changes in the criminal law; formatting and presentation; and approval from the most senior members of the judiciary. The analogy of building and launching a huge ocean-going liner is perhaps a dangerous one: better to consider the gestation period of an elephant and, trusting that its lack of speed is a thing of the past, the longevity of a tortoise.

The Compendium is now available to all judges and recorders electronically through either the Judicial College Learning Management System (the LMS) or the Judicial Intranet. It is also publicly available, and so available to those Crown Court advocates who are not recorders, on the public judiciary website at: *www.judiciary.gov.uk*. Both parts of the Compendium are bookmarked for easy and quick navigation and Part II – Sentencing – contains hyperlinks to statutes, Guidelines and cases to which reference is made. Both parts will be updated regularly by, among others, a core team of Judicial College Course Directors.

The two parts of the Compendium are separate e-documents.

Part I – Jury and Trial Management and Summing up:
https://www.judiciary.gov.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf

Part II – Sentencing:
https://www.judiciary.gov.uk/wp-content/uploads/2016/05/crown-court-compendium-pt2-sentencing-20160607.pdf

Features

Section 74(1) of PACE: Re-stating the limits

By Aparna Rao[1]

Recent experiences in the magistrates' courts have suggested a potential misconception regarding the admissibility into evidence of convictions of someone other than the accused. It may sometimes appear convenient to employ[2] s.74(1) of the Police and Criminal Evidence Act 1984 ("PACE") as the basis for admitting convictions into evidence. It therefore seems appropriate to reiterate the law relating to this provision.

As originally enacted, s.74(1) was as follows:

> (1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given.

As amended,[3] its current form is slightly different:

> (1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or any other Member State or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

For present purposes, the significant change is the replacement of the phrase: "where to do so is relevant to any issue in those proceedings" with the phrase: "where evidence of his having done so is admissible"– a change made under the Criminal Justice Act 2003 as part of the reconstruction of the law relating to bad character evidence.

Section 74(1) is narrowly framed. Where a person other than the accused has been convicted of an offence, s.74(1) provides a means of proving that the offence was actually committed. Where this is done, s.74(2) then provides that:

> (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or any other member State or by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved.

1 Dr Aparna Rao is a Barrister at 5 Paper Buildings.
2 Often on the day of trial and without any notice.
3 In particular, by the Criminal Justice Act 2003 Sch.36(5) para.85(2), having effect from 15 December, 2004.

Between them, these provisions circumvent the need for the present tribunal of fact to decide whether that offence was committed, where the commission of that offence is admissible in relation to the charge currently being tried. Sub-section 74(3) is a parallel provision in respect of the accused's convictions.

Crucially, s.74(1) can only be used to show that a person other than the accused committed an offence if "*evidence of his having done so is admissible*". It does not of itself render that evidence admissible. It merely provides a convenient and sensible means of proving the truth of that evidence, if that evidence is already admissible.

Thus, before s.74(1) can be used (by any party), the admissibility of the conviction must be established. Evidence of a person's conviction is evidence of his bad character.[4] The evidence of the conviction must now therefore be admissible under the bad character regime in Chapter 11 of the Criminal Justice Act ("CJA") 2003, before s.74(1) can be used. This is simply a matter of logic: if convictions were rendered admissible by s.74, then Chapter 11 of the CJA would have few or no teeth. An accused's convictions would be admissible purely under s.74(3), which is plainly absurd in the face of the existence of s.101 of the CJA. Similarly, a non-accused's convictions would be admissible under s.74(1), in defiance of the requirements of s.100 of the CJA.

There are two ways in which evidence of a non-accused's conviction may become admissible, before s.74 is utilised to prove that conviction in criminal proceedings:

(1) If evidence of the conviction falls within s.98(a) of the CJA (in which case it is not strictly evidence of bad character within the definition in s.98 and s.112(1)); or

(2) If one of the gateways in s.100(1) of the CJA is satisfied (for which proper notice must be given and the court's leave must be obtained, unless all parties consent to admissibility).

As originally enacted, s.74(1), as we saw earlier, simply provided that evidence of a non-defendant's conviction was admissible wherever his having committed the offence in question was relevant to any issue in the case, but in its current form this is no longer so. Care should therefore be exercised when using cases pre-dating the amended version of s.74. It may well be that in many or most cases the result would still be the same, but the question now is whether the evidence would be "admissible" by operation either of s.98(a) or s.100.

In the event that option (1) is satisfied, the evidence then immediately comes out of the Chapter 11 regime. This leaves it subject to the common law rules of admissibility, which include rendering admissible evidence of a conviction that is itself a pre-requisite to the commission of the present offence.[5] The role of s.74(1) in such instances is a practical one. It assists in proving the fact of conviction so that the court need not be troubled with trying to prove that element. But once again it should be stressed that s.74(1) does not of itself make the evidence admissible. The common law rules of admissibility must still be satisfied.

The application of the above two methods can be seen in the following magistrates' court example. The defendant, D, cohabited with prolific burglar, X, who had (in separate proceedings) pleaded guilty to several dwelling burglaries. Items from those burglaries were found in the jointly-occupied house, and D was charged with handling those stolen goods by receiving them. The issue in dispute was whether D believed the items to be stolen; she stated that she thought they were gifts from, or belongings of, various relatives who visited the house. X had several *previous* recent convictions for domestic burglaries. These were relevant to the mental element: was it credible that D did not believe the items were stolen, given that she knew her partner X was a convicted domestic burglar? It would be incorrect to seek to admit these convictions under s.74(1), which does not render evidence admissible. As for the above two options for admissibility, these convictions did not fall within s.98(a) of the CJA. They were not to do with the facts of the present burglaries. The only way to admit the evidence of the previous convictions for burglary was for the Crown to make an application under s.100 of the CJA. In contrast, the question whether the goods in the house were stolen could be established by X's convictions for the *current* burglaries, which were properly admissible via option (1) and thus could be proved under s.74(1) without reference to s.100.

Finally, it should be noted that even where a conviction is in principle admissible, and could be proved under s.74(1), it may still fall to be excluded under s.78 of PACE if – as will commonly be the case – it is to be adduced as evidence for the prosecution.

In *O'Connor*,[6] the Court of Appeal considered the position where admitting the co-accused's conviction on a plea of guilty for the same offence of conspiracy had (in effect) enabled the prosecution to use against the defendant a statement which had been made by the co-accused in the defendant's absence; and even more prejudicially, a statement in respect of which the co-accused had not been tested by cross-examination. Though as against this, it might have been thought repugnant to common sense that A should be guilty of conspiring with B where B is not guilty of conspiring with A. Having weighed up the competing arguments, the Court of Appeal said:

> "We find this a difficult point, and, without deciding the full scope of section 74 [for which now substitute s.98(a)], for the purposes of this case, it is sufficient to say that if it was appropriate within the section to admit the conviction of [the co-accused] in the proceedings, we take the view that it would have resulted in a very unfair state of affairs. … section 78 ought to have been brought into play by the learned judge. This was a case in which the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it."

The decision will depend on the facts, but it is suggested that there must be a compelling reason to admit such evidence. As observed by the editors of *Archbold*: "Any argument to the effect that the jury should be told of the co-defendant's plea merely for the purpose of clearing up the mystery as to what had happened to him is disingenuous and should be resisted."[7]

It could not be clearer that admissibility of a conviction and proof of it are two separate concepts. Regrettably, the niceties of these perhaps obvious points have sometimes been passed over.

4 s.112(1) of the CJA: "*misconduct*" means the commission of an offence or other reprehensible behaviour.

5 See *Archbold* at para 13-6 for examples, including convictions relating to charges of joint enterprise, conspiracy, or secondary offending. See also 9-86 et seq, and 13-18.

6 (1987) 85 Cr.App.R. 298 at 302-303.

7 Para 4-342.

Setting sights on reform: Government adopts the Law Commission's recommended reforms of firearms law

By Rory Kelly[1]

On the 16 December 2015, the Law Commission published its Report on firearms law.[2] The majority of its recommendations have recently been accepted by the Government and are included in Pt 6 of the Policing and Crime Bill 2015-2016.[3] The recommendations followed the publication of a Scoping Consultation Paper that sought consultees' views on a range of provisional proposals intended to remedy the most pressing problems undermining the effectiveness of the law governing the use and possession of firearms.[4] The Commission received responses from over 200 consultees including individual members of the licensed firearms community in addition to a number of representative organisations, the police, the Crown Prosecution Service, and the Scottish Government. Set out below are the recommendations for resolving the pressing problems within firearms law, an explanation of the relevant clauses of the Policing and Crime Bill and the case for the codification of the law.

Pressing problems and recommendations to remedy them

Broadly speaking, consultees were supportive of provisional proposals that aimed to address pressing problems. If enacted, these recommendations should benefit both criminal justice professionals and members of the licensed firearms community by improving the clarity of the law. By improving the coherence of the regulation of firearms, they are also likely to improve public safety.

Defining "lethal"

Under the Firearms Act 1968, a firearm is defined as a "lethal barrelled weapon".[5] The term "lethal", however, is left undefined in the 1968 Act. The practical effect of this omission is that expert witnesses disagree on how "lethal" ought to be defined as well as on whether the particular firearm at issue meets their definition. This adds unnecessary complexity and ultimately causes lengthier trials.

The Scoping Consultation Paper proposed that the term "lethal" be defined by reference to a fixed muzzle kinetic energy. Given the level of support for this, in the Report the Commission recommends that a firearm be deemed to be lethal if it discharges a projectile with a muzzle kinetic energy of one joule.[6] That is a test that can be easily and consistently applied. It also promotes public safety: research has not revealed any cases of serious injury or death caused by a firearm with a muzzle kinetic energy below one joule.[7]

To ensure this new definition of lethality does not disproportionately impact upon the use of and trade in airsoft imitation firearms, the Commission also recommends that a higher energy threshold be set for airsoft imitations. This higher threshold is set with reference to scientific tests that have specified safe kinetic energy thresholds for airsoft imitation firearms to operate within. To ensure consistency in how these thresholds are measured, the recommendation is for the Home Office *Guide on Firearms Licensing Law* to be further revised to include guidance on how muzzle kinetic energy ought to be tested.[8]

Defining "Component Parts"

Component parts of firearms are classified as firearms under the Firearms Act 1968.[9] As such, whenever the legislation refers to a firearm it is also referring to a component part. Despite this, the term "component part" is also left undefined in the 1968 Act. Certainty over what constitutes a component part is needed both by members of the licensed firearms community and the authorities.

In its Scoping Consultation Paper[10], the Commission provisionally proposed the adoption of a statutory list of parts which, if capable of functioning, would constitute "component parts". Following the support expressed by consultees, that approach has become a firm recommendation in the Report. Those parts that the Commission recommends constitute "component parts" are the barrel, chamber, cylinder, frame, body, receiver, breech block, and bolt or other mechanism for containing the charge at the rear of the chamber.[11] Additionally, it was proposed that a new defence to relevant firearms offences should be introduced: that the individual did not know that a component part was functional and that they had no reason to suspect that it was. This would prevent a person being prosecuted when they possessed a deactivated a firearm, but there had been a flaw in the deactivation process. Both proposals became recommendations in the Report.

A further recommendation is that the list should be future-proofed by making it capable of amendment by the Secretary of State. Some consultees were concerned that this would give too much discretion to the Secretary of State. To allay their concern, it is recommended that amendment by the Secretary of State should be by way of the affirmative resolution procedure. This would require Parliament to agree to any proposed amendment.

Currently, the component parts of shotguns do not need to be held on certificate. Because the Commission was unable appropriately to gauge the impact this would have on the police and members of the licensed firearms community, no recommendation on whether they should be subject to control was made.

1 Research Assistant in the criminal law team at the Law Commission.
2 *Law Commission, Firearms Law–Reforms To Address Pressing Problems* (2015), Report No 363.
3 This article is based on the Bill as on the 20 May 2016.
4 *Law Commission, Firearms Law* (2015), Consultation Paper No 224.
5 Firearms Act 1968, s.57(1).
6 A joule is the standard unit of energy and work in the International System of Units.
7 The Minister of State for Policing, Fire, Criminal Justice and Victims, Mike Penning MP, commented that the Government have also found no such cases, HC Deb 12 April 2016, vol 608, 255.
8 Home Office, *Guide on Firearms Licensing Law* (Home Office, April 2016).
9 s.57(1)(b).
10 See Vincent Scully, [2015] 7 *Archbold Review* 7.
11 This list is based on the list of component parts compiled by the Firearms Consultative Committee as a suggestion for legislation. Firearms Consultative Committee, *Ninth Annual Report* (1998) para 6.

Defining "Antique Firearm"

By virtue of s.58(2) of the Firearms Act 1968, antique firearms are exempt from the legislative regime.[12] Again, however, the 1968 Act fails to provide a definition for the key term – in this case "antique". In the Scoping Consultation Paper it was proposed that only firearms that do not pose a realistic danger to the public should be s.58(2) exempt. Thus functionality would be the criterion for deciding whether or not a firearm was an antique. This led to four suggested possible approaches to defining functionality: (1) a list of firearms which use obsolete cartridges;[13] (2) a list of firearms which use non-obsolete cartridges; (3) the age of the firearm; and (4) a list of obsolete firearm mechanisms. Consultees were divided between the first and fourth approaches. After consultation, the recommendation is for a combined approach. An antique firearm would be one that either:

(1) is chambered for a type of cartridge contained on an amendable list created by the Secretary State of cartridge types that are no longer readily available; or

(2) uses a type of ignition system contained on an amendable list of obsolete ignition systems.

Consultees responded negatively to the initial proposals to record the sales of antique firearms and to require purchases of antique firearms to be made by electronic means. Consultees thought that such measures would be overly burdensome and ultimately unenforceable. The difficulty with the provisional proposal was clearly one of utility. The traceable payment requirement and the requirement to maintain records would only make it possible for the authorities to trace a purchaser when an antique firearm is misused if they knew who to ask for the information. However, there is no database of either the sellers or sales of antique firearms and not all antique firearms have unique identifying marks. As a result, this was not carried forward as a recommendation in the Report.

Finally, it is recommended that antique firearms should no longer be exempt from the offences of carrying a firearm in a public place without reasonable excuse and trespassing with a firearm without reasonable excuse in the 1968 Act.[14]

Clarifying Deactivation Standards

The United Kingdom has some of the most stringent standards of deactivation in the world. It is not obligatory to follow these standards, however. The Commission recommends that for a firearm to be considered deactivated it must conform to Home Office or European Union approved deactivation standards. Broadly speaking, consultees were in favour of making the Home Office-approved deactivation standards mandatory. To ensure conformity with EU law, it is recommended that any deactivated firearm that is sold or otherwise transferred must comply with the deactivation standards approved by the EU.[15] It is further recommended that a firearm that has not been deactivated in an approved fashion will be presumed to be a firearm, unless the contrary is proven. The Commission's recommendations on deactivation were superseded by a directly effective EU regulation which came into force on 8 April 2016.[16]

Modernising the test for "ready convertibility"

By virtue of the Firearms Act 1982, readily convertible imitation firearms are subject to the same control as live firearms.[17] An imitation is "readily convertible" if it requires neither (1) "special skill" on the part of the convertor nor (2) the use of tools or equipment that are not "in common use by persons carrying out works of construction or maintenance in their own homes."[18]

The 1982 Act came into effect before the advent of the internet. The internet has exponentially increased the availability of tools that could be used to convert imitation firearms. This increased availability is problematic because weapons which should, from a public safety perspective, now be considered "readily convertible" might not be categorised as such. The Commission therefore proposed in the Scoping Consultation Paper that the element of the current test that focuses on whether the tools are commonly used in carrying out maintenance in the home should be replaced by a focus on the "ready availability" of the requisite tools.

Some consultees expressed unease about this amendment on the basis that it was too uncertain and too broad. The Commission concluded, however, that assessing whether a tool is "readily available" will not be unduly complex for a jury. Furthermore, the recommendation would affect neither the "special skill" element of the test above nor the defence contained in s.1(5) of the 1982 Act.[19] As such, the Commission is confident that its recommendation would not result in the test of ready convertibility becoming too broad.

Currently the law does not criminalise the possession of equipment with the intention of using it to convert imitation firearms into live firearms. This was considered to be a lacuna that needed to be filled through the creation of a new offence. By way of comparison, it is illegal to possess articles with the intention of using them in connection with fraud.[20] It is anomalous that a similar offence did not apply in the context of firearms, where there is a clear risk to public safety.

The Policing and Crime Bill 2015-2016

The 2015-2016 Bill, when enacted, will bring into force a number of the recommended reforms. The reforms are primarily achieved by amending existing legislation.

Clause 102 of the Bill would introduce three of the recommendations: it would define lethality by reference to the one joule threshold; add an exception to the one joule energy threshold for airsoft guns; and introduce the amendable list of component parts as outlined above.

Clause 103 would also amend the Firearms Act 1968, by introducing the definition of an antique firearm set out above.

12 Firearms Act 1968 s.58(2). This exemption only applies if the antique firearm is "sold, transferred, purchased, acquired or possessed as a curiosity or ornament." It should be borne in mind that antique firearms were initially designed to function as contemporary lethal weapons and not ornaments, and are sometimes still capable of lethal use.

13 This list currently exists in the non-binding Home Office *Guide* (n 8).

14 Firearms Act 1968 ss.19 & 20.

15 Available at: *http://europa.eu/rapid/press-release_IP-15-6110_en.htm* (last accessed 20 May 2016).

16 Commission Implementing Regulation (EU) 2015/2403 establishing common guidelines on deactivation standards and techniques for ensuring that deactivated firearms are rendered irreversibly inoperable [2015] OJ L 323/62, art.9.

17 Firearms Act 1982 s.1.

18 Firearms Act 1982 s.1(6).

19 The defence being that the accused neither knew nor had reason to suspect that the relevant imitation firearm was readily convertible.

20 Fraud Act 2006 s.6.

As recommended, this would be achieved by introducing amendable lists of exempt firearms based on whether it is chambered for an obsolete cartridge type or uses an obsolete ignition system. These lists would be contained in secondary legislation. Further, Clause 103 would implement the recommendation to extend the offences of carrying a firearm in a public place and trespass with a firearm so that they can be committed by a person with an antique firearm. The proposed offence of being in possession of an article with the intention of using it unlawfully to convert an imitation firearm into a live firearm is included in clause 104. It would again be introduced by amending the Firearms Act 1968. The 2015-2016 Bill does not, however, include the recommendation to amend the test of whether an imitation firearm is readily convertible.

Clause 105 deals with deactivated weapons. As already explained, the reforms that were recommended were superseded by EU level reform. The 2015-2016 Bill does include a new offence applicable to a person who either owns or claims to own a defectively deactivated firearm. It would be an offence for such a person to make the weapon available either as a gift or for sale; or to sell or give it to another person. The offence would not apply where the weapon was made available to a person outside the EU and the weapon was due to be transferred to a non-EU country. This reform is achieved by amending the Firearms (Amendment) Act 1988. This clause did not follow a Law Commission recommendation.

Codification

In the Report the Commission concluded that the current law regulating the acquisition and possession of firearms is overly complex.[21] The law is dispersed across 34 pieces of legislation dating from the 19th century to present day.[22] There is also a large amount of case law that interrelates with these Acts. This labyrinth of legislation and case-law makes the law hard to locate, cumbersome to interpret and incoherent in effect. Three examples can be given to substantiate this point.

First, s.57(1) of the Firearms Act 1968 fails to define "weapon". This causes ambiguity in practice. For example, nail guns – tools widely used by carpenters – could meet the definition of lethal described above and are barreled. It is unclear whether nail guns either do or can constitute a weapon, however. A nail gun can of course be used as a weapon, but it is not designed to be used as such. Uncertainty as to what constitutes a weapon only adds further doubt to the fundamental issue of what is a firearm for the purposes of the law.

Secondly, s.12 of the Firearms Act 1968 creates exemptions from the need for a certificate to possess a firearm for film and theatrical purposes. The section's applicability is limited and does not take into account modern forms of media. In fact, on its face the exemption does not cover television, as it only applies to: "A person taking part in a theatrical performance or a rehearsal thereof, or in the production of a cinematograph film". The Home Office *Guide* reads in an equivalent exemption for the use of firearms in television.[23] This *Guide* is, however, not law. Further, the exemption does not cover new media and the Home Office *Guide* does not suggest that newer media should be read into the exemption. On one view this is perplexing given that professional YouTube channels can have higher incomes and larger audiences than some theatres and television channels.

Thirdly, s.11(5) of the 1968 Act creates an exemption from the requirement for a firearm to be held on certificate for the lending of shotguns. The exemption requires the lender (L) to be the occupier of private premises, the borrower (B) to only possess the firearm on those premises, whilst in L's presence and, if B is under 18, L must also be over 18.[24]

This exemption causes a number of problems worth highlighting. The degree of supervision required of L is uncertain. In addition, it is unclear whether or not hiring a shotgun for payment can constitute "borrowing". Finally, there is an illogical distinction between who may lend based upon the class of land right L has. This is due to the "occupier" requirement in the definition. The uncertainty created by the occupier requirement is apparent from the Home Office *Guide*, which advises that "the chief officer may need to consider seeking the advice of counsel".[25]

Given these problems, it is unsurprising that the overwhelming majority of consultees were in favour of codification. For this reason the Commission recommended codification in its Report. Although a decision has yet to be made on whether such an exercise will commence, the Minister for Preventing Abuse, Exploitation and Crime, Karen Bradley MP, made the following statement in the House of Commons:

> "The Government accept that firearms legislation needs a general overhaul, but our priority must be to address the issues that pose the greatest risk to public safety. The Law Commission recommended that firearms legislation be codified, and we are giving careful thought to the case for that."[26]

Conclusion

Although the Commission's recommended reforms would by no means remedy all the problems stakeholders brought to its attention, it is hoped they will improve the law for those who must enforce it and comply with it, whilst ensuring public safety is maximized. It is for this reason that the Commission is pleased that the Government has quickly and positively responded to the Report by including many of the recommendations in the Policing and Crime Bill 2015-2016. These reforms are only intended to tackle specific issues within firearms law, however, and do not address the underlying problems with the legal landscape. It is time to bite the bullet and codify firearms law.

21 See further, Rudi Fortson, *Firearms Law the Case for Reform* (commissioned by the Law Commission, but presenting the views of the author, 28 April 2015): http://www.lawcom.gov.uk/project/firearms/ (last accessed 20 May 2016).
22 An example of the former is the Gun Barrel Proof Act 1868, and of the latter is the Firearms Regulations SI 2015/860.
23 Home Office, *Guidance* (n 8) para 6.45.
24 The additional requirement for when B is under 18 was inserted by the Firearms (Amendment) Regulations 2010, SI 2010 No 1759, reg 2(2)(c).
25 Home Office, *Guidance* (n 8) para 6.18.
26 HC Deb, 26 April 2016, 608, 1393.

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