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Archbold Review

Cases in Brief

Appeal—inconsistent verdicts—development of case law—reassertion of proper test—undesirability of elaboration of test in judgments; Court of Appeal—proper approach of Court to development of case law

FANNING AND OTHERS [2016] EWCA Crim 550; April 28, 2016

(1) Giving judgment in four conjoined appeals, the Lord Chief Justice reviewed the authorities on the role of the jury and the approach of the court to applications to appeal based on what were said to be inconsistent verdicts by the jury. The starting point was the adoption of the approach set out by Devlin J in *Stone* [1955] Crim LR 120, quoted in *Hunt* [1968] 2 QB 433 and formally adopted in *Durante* (1972) 56 Cr.App.R 708, that the burden was on the applicant to show that the verdicts could not stand together, that is, that no reasonable jury could have arrived at that conclusion, which was fact-specific. The test was applied for some time, but over time a more complex approach developed from *Trundell* (unreported, 28 June 1991) via *McCluskey* (1994) 98 Cr.App.R 216, that inconsistency was insufficient, and it also required that the only explanation for the inconsistency was that the jury was confused or adopted the wrong approach (the Court quoted Professor Sir John Smith's critical comment on this approach in a commentary on *Harrison* [1994] Crim LR 859); and a further gloss was added *Campbell* (unreported, 26 January 1996): there was a further category of not-logically inconsistent verdicts, which nevertheless suggested that the jury could not have rationally applied its mind to the evidence. There then developed a further approach, that logical inconsistency was insufficient, and the applicant must also show that the jury's reasoning could not unreported, be sensibly explained, developed in *Clarke and Fletcher* (unreported, 30 July 1997), *R v G (Steven)*, [1998] Crim L R 483 and *Martyn W* (unreported, 30 March 1999) and thereafter applied in many cases, and further refined until the statement in *Dhillon* [2011] 2 Cr.App.R 10 (with some further additions in *Dobson* [2011] EWCA Crim 1856 and *R v RB* [2013] EWCA Crim 2301).

(2) The Court's conclusion was that *Stone* set out a test that was clear, could be applied by the Court without further elaboration and accorded with the constitutional position of the jury. It was not clear why, from *Trundell* on, a much more elaborate formulation evolved. The court should return to the clear law set out in Devlin J's test and apply it rather than the reformulation in *Dhillon*. The *Stone* test did not need elaboration, but rather careful application to the circumstances of each case. In particular (the contrary having been suggested), different tests did not apply to multiple counts arising out of a single sexual episode, and those arising over a long period of time; and it was unnecessary and inappropriate to compare the circumstances of one case with another as was urged on the court in *R v S* [2014] EWCA Crim 927.

(3) Although the approach the Court set out needed no further elaboration, it was necessary to mention three matters: (a) the burden to show that verdicts could not stand was with the applicant; (b) a jury may logically find a witness credible on one count but not another (*contra* an interpretation of *Grizzle* [1991] Crim LR 553 and *Cilgram* [1994] Crim LR 861); and (c) in the overwhelming generality of cases it would be appropriate for the judge to give the standard direction that the jury must consider the evidence separately and give separate verdicts on each count. However, there may be rare cases where it would be necessary for a defendant wishing to contend that he or she could only be found guilty if guilt on another count was established, to seek such a direction from the judge (the Court instanced *Beach and Owens* [1957] Crim LR 687, *Cova Products R v Cova Products* [2005] Crim LR 667 and *Chohan* [2007] EWCA Crim 3175 (but noting the qualification in respect of the latter in *Winson* [2009] EWCA Crim 746)).

(4) It was essential for the sound development of the criminal law and to prevent over-complication that it should rarely be necessary for a court to reformulate or add a gloss to well established law (as after *Stone, Hunt* and *Durante)*. Where

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a court thought it necessary to summarise the law or to add a gloss, its judgment should not be treated in subsequent cases or in the textbooks as a new formulation of the law, unless the court made that expressly clear in the judgment. In 1994 it was possible for Professor Sir John Smith to say, as he did, criticising *Trundell* in his commentary on *Harrison*, that it would have been better if a case had not been reported; today each decision of the Court was made available electronically. It was therefore of the greatest importance that these observations were given the necessary attention. In addition to the cases mentioned above, the Court considered *Hopkins-Hudson* (1950) 34 Cr.App.R 47; *Drury* (1972) 56 Cr.App.R 104; *Segal* [1976] RTR 319; *McKechnie* (1992) 94 Cr.App.R 51; *McCluskey* (1994) 98 Cr.App.R 216; *Malshev* [1997] Crim LR 587; *Bell* (unreported, 15 May 1997); *Mackenzie v R* (1996) 190 CLR 348 (High Court of Australia); *R v RG* [2002] EWCA 224 (Crim), *R v AC* [2002] EWCA Crim 1299, *R v VV* [2004] EWCA Crim 355, *R v B & Q plc* [2005] EWCA Crim 2297; *Lewis, Ward & Cook* [2010] EWCA Crim 496; *Aldred & Butcher* [1995] Crim LR 160; *Van der Molen* [1997] Crim LR 604; *Rafferty and Rafferty* [2004] EWCA Crim 968; *Hayward* [2000] Crim LR 189; *Rogers (Ian)* [2004] EWCA Crim 489; *Cross* [2009] EWCA Crim 1553; *Formhals* [2014] 1 WLR 2219; *Formhals* [2014] 1 WLR 2219; *Mote* [2008] Crim LR 793; and *Angel* (unreported, 25 June 1992); *R v C* [2008] 1 WLR 966.

Conspiracy—Criminal Law Act 1977 s.2(2)—spousal exception—parties to polygamous marriage—when "spouse"—"domicile"

BALA AND OTHERS [2016] EWCA Crim 560; May 10, 2016

(1) A "spouse", with whom an agreement cannot constitute a statutory conspiracy (Criminal Law Act 1977 s.2(2)), was confined to a husband or wife under a marriage recognised under the law of England and Wales, and thus did not include the parties to a polygamous marriage entered into outside England and Wales while at least one of the parties was domiciled in England and Wales, such a wedding being void by virtue of Matrimonial Causes Act 1973 s.11(d). The same was true for the purposes of the Police and Criminal Evidence Act 1984 s.80 (compellability of spouse) (see *Pearce* [2002] 1 Cr.App.R. 39).

(2) The question of where someone was domiciled was a mixed question of fact and law: in B's case, the question was whether his domicile of origin in a jurisdiction (Nigeria) in which (it was assumed) the polygamous marriage would have been valid had been lost, and by the time of the marriage, his domicile had become England and Wales, which in turn depended on his residence and his intention (or lack of it) of indefinite residence at the time. Given the evidence, the Court concluded that the judge in B's particular case had been entitled (in effect) to withdraw the factual issue from the jury; were there any lingering dissatisfaction with that conclusion, the evidence was such that the conviction was safe.

(3) The Court considered *obiter* the "difficult" question of whether s.2(2) of the 1977 Act would have applied if both parties had, indeed, been domiciled in Nigeria. While the implicit corollary of s.11(d) of the 1973 Act was that a polygamous marriage would be valid in England and Wales if neither party were domiciled there at the time of marriage, the Court adopted the view in *Dicey, Morris and Collins on The Conflict of Laws* (15th ed), para 17-199 (and to similar effect *Halsbury's Laws of England*, (4th ed) vol 19, para 522) that this was so only in the absence of "a strong reason to the contrary." However, following a discussion, including consideration of the preceding common law, the relevant Law Commission report and the underlying policy of s.2(2) of the 1977 Act, the Court concluded that there was no such strong reason and so s.2 (2)(a) of the 1977 Act extended to a spouse under a polygamous marriage recognised under English law as valid. The Court noted the passages tending to the contrary in *Archbold* 2016 para 8-66 and *Phipson on Evidence* (18th ed) para 9-25 in relation to compellability, and concluded that *Khan* (*Junaid)* [1987] 84 Cr.App.R. 45, referred to in both works, was not conclusive on the question).

Joint enterprise—submission of no case—sufficiency of evidence before and after R v Jogee*;* Ruddock v The Queen *[2016] 2 WLR 681*

R v ANWAR and OTHERS [2016] EWCA Crim 551; May 4, 2016

On an interlocutory appeal under s.58 of the Criminal Justice Act 2003 the Court of Appeal discussed the effect of the Supreme Court judgment in *Jogee; Ruddock v The Queen* [2016] 2 WLR 681 in the context of what now constituted a "case to answer". The Supreme Court had made it clear that, where the Crown case depended on proving a joint enterprise, juries frequently decided questions of intent (and conditional intent) by a process of inference from facts and circumstances proved. Where the jury was satisfied that D1 and D2 had an agreed common purpose to commit a crime, and that D2 must have foreseen that the D1 might well commit a further crime, the inference that the D2 had the necessary conditional intent that the D1 should commit the second crime if the occasion arose may be justified; but it was a question of fact in all the circumstances ([93] to [94]). Thus, the same facts which would previously have been used to support the inference of *mens rea* before the decision in *Jogee* would equally be used after. What had changed was the articulation of the *mens rea* and the requirement that to prove (in the case of *Jogee*) the crime of murder it was not sufficient that D2 foresaw that D1 might intentionally cause grievous bodily harm or kill if the circumstances arose. What was now required was that D2 intended that D1 cause grievous bodily harm or kill if the circumstances arose. But the evidential requirements justifying a decision that there was a case to answer were likely to be the same even if, applying the facts to the different directions in law, the jury might reach a different conclusion.

Reporting restrictions—prejudice occasioned by comments by member of the public on media reports on the internet—Senior Courts Act 1981 s.45(4)—Contempt of Court Act 1981 s.4(2)—appropriate orders under

RE BBC AND OTHERS, R v F AND D [2016] EWCA Crim 12; February 11, 2016

In the light of "vile" comments posted by members of the public on a Facebook link to a local newspaper's (unexceptional) reports of the opening of a notorious murder trial, the judge made an order under the Senior Courts Act 1981 s.45(4) (conferring on the Crown Court like powers to the High Court, including in relation to contempt of court) directing media organisations to remove comments posted, and disable the facility to comment, on their own websites, to remove links to Facebook and other social media websites and to refrain from tweeting in relation to the trial. Shortly afterwards the jury were discharged in the light of the prejudice occasioned by the comments. Following further submissions from media organisations, in particular as to whether the order was workable, the judge discharged the order and substituted an order postponing (virtually) all reporting of the trial under the Contempt of Court Act 1981 s.4(2), which was appealed under the Criminal Justice Act 1988 s.159 by the media organisations. The Court, having found that such comments posed a substantial risk of serious prejudice, made an order (not opposed by the media organisations) under s.45(4) of the 1981 Act directing the media organisations,

until verdict or further order, (a) not to place any report of the trial on their respective Facebook profile page and (b) to disable the ability for users to post comments on their respective news websites on any report of the trial. The order was also directed to be published to the Press Association so that other media outlets not specifically involved in or aware of the proceedings could take appropriate steps to ensure that they did not risk a breach of the 1981 Act on the basis that, in the light of the foreknowledge available from the proceedings, the defence of reasonable care provided by s.3(2) of the 1983 Act would not be open to them. The Court also ordered Facebook to take down a specific page, and emphasised that individuals posting prejudicial material could face prosecution. In the light of this outcome, and in the absence of an intervention by the Attorney-General, the Court declined to resolve broader issues in relation to what was accepted was the new issue of prejudicial comments by members of the public receiving wide circulation on social media.

Search warrant—Police and Criminal Evidence Act 1984 s.8; Criminal Justice and Police Act 2001 s.59—information upon which issue based, or retention justified—whether redaction of information permissible which resulted in insufficient information to justify

R (HARALAMBOUS) v CROWN COURT AT ST ALBANS AND HERTFORDSHIRE CONSTABULARY [2016] EWHC 916 (Admin); April 22, 2016

The information used to justify an initial search warrant issued under the Police and Criminal Evidence Act 1984 s.8, and a subsequent application to retain material under the Criminal Justice and Police Act 2001 s.59, that was available to H was so redacted, following public interest immunity procedures, that it did not provide sufficient material to justify the issue of a search warrant or the subsequent retention of material seized. The common law right to obtain information justifying a warrant must be seen in the context of the statutory scheme under the Police and Criminal Evidence Act 1984. That provided for *ex parte* proceedings before a magistrate for the issue of a search warrant, including the provision of undisclosable material. Parliament must have contemplated that in some cases information grounding the warrant may not be disclosed on public interest grounds. A magistrate or judge would need to consider both whether the search warrant or the retention of property seized was justified and what information could be disclosed. It may be that as a result of the information withheld the person could not see how the warrant could be lawful, but that was the balance Parliament had struck. The Court rejected an argument that the withholding of information constituted an impermissible closed evidence procedure for which there was no Parliamentary approval: *Al-Rawi* v. *Security Service* [2012] 1 A.C. 531. While Lord Dyson said *obiter* that the principle in *Al-Rawi* applied to judicial review ([69]), the common law right to information justifying a search warrant did not arise in judicial review proceedings, but before a magistrate under the procedure approved in *Commissioner of Police for the Metropolis v. Bangs* [2014] EWHC 546 (Admin) for challenging issue or execution, or by a judge in a s.59 application (see *R (on the application of Panesar)* v. *Central Criminal Court* [2015] 4 All ER 754). In both cases the magistrate and judge also considered what material could be made available and what should be redacted in the public interest. Although there were differences between issue under s.8 and retention under s.59, the same principle applied. Whilst a s.59 application was *inter partes*, at its heart was a notional re-consideration by the magistrate of a fresh s.8 application, and it would be artificial for the s.59 judge to be restricted to disclosable material where a s.8 magistrate was not.

SENTENCING CASE

Drug offences; prevalence

BONDZIE [2016] EWCA Crim 552; May 5, 2016

The appellant had pleaded guilty to three counts of supplying class A drugs and one count of being concerned in the supply of a class A drug and been sentenced to a total of four years and 10 months' detention in a Young Offender Institution. He was sentenced to three years' imprisonment for the supply offences, and to four years and four months' imprisonment (concurrent) for the being concerned offence. A six-month suspended sentence was also activated in full and ordered to run consecutively. The appellant submitted that a starting point of six and a half years for the drugs offences was unduly harsh. It was common ground that the appellant fell into a category three, significant role, of the definitive drugs guideline. For that category and role the starting point is four and a half years with a range of three and a half to seven years custody.

The sentencing judge's remarks indicated that the starting point had been increased by reason of prevalence. After considering the Sentencing Guidelines Council's guideline on Overarching Principles: Seriousness, the Court of Appeal stated that sentencing levels set in guidelines such as the Drugs Guideline take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributes to a harmful social effect upon a neighbourhood or community. It is not open to judges to increase sentence for prevalence in ordinary circumstances or in response to their personal view that there is "too much of this sort of thing going on in this area". Firstly, there must be evidence provided to the court by a responsible body or by a senior police officer. Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time to allow meaningful representations about that material to be made. Even if such material is provided, judges will only be entitled to treat prevalence as an aggravating factor if (a) they are satisfied that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels); (b) that the circumstances can properly be described as exceptional and (c) that it is just and proportionate to increase sentence for such a factor in the particular case. A court should be hesitant before aggravating a sentence by reason of prevalence. Only if the evidence placed before the court demonstrates a level of harm which clearly exceeds the well-understood consequences of drug dealing by a significant margin should courts be prepared to reflect this in sentence. If judges do so, they must clearly state that they are doing so when sentencing.

If the Crown intends to invite the court to consider prevalence, it must expressly say so at the hearing, identifying the materials upon which it relies and referring the judge to the relevant guideline. If a judge is independently contemplating prevalence as a factor, he or she should clearly identify that as a matter to be addressed in submissions. Any sentence imposed should then identify if prevalence has been a factor and provide reasoning so that the parties, and possibly the Court of Appeal, may understand how it has influenced the sentencing decision.

Allowing the appeal, the Court stated that it had not been satisfactory to take account of prevalence both on the basis of the evidence available to the sentencing court and in the circumstances of the appellant's hearing. The Court substituted a sentence of three years and six months' imprisonment on count four, giving a total term of four years' imprisonment.

Comment

Hubble, Bubble, Fines and Trouble

By Gerard Forlin, QC[1]

This is the second part of an article on the new Sentencing Council Definitive Guidelines on Health and Safety offences, Corporate Manslaughter and Food Safety and Hygiene offences which came into force on 1 February 2016.[2] It will cover some of the real practical and technical issues involved.

Before doing so, it is worth noting that since Part 1 of the article was published, one can already see a steady increase in fines and prison sentences. On 29 April 2016, Travis Perkins pleaded guilty to two Health and Safety offences arising from a fatal accident. They were fined £2 million pounds and £115,000 in costs. After a *Newton* hearing on causation the judge found that their culpability was medium, the harm level Category A and a high likelihood of harm. They also had a similar previous conviction. The deceased had been loading planks onto his vehicle when he suddenly fell backwards after a strap unexpectedly gave way, then was tragically run over by a company HGV. The judge said: *"it was an accident waiting to happen"*. The turnover was £2 billion but the judge discounted the fine based on mitigation and an early plea being entered.

Also in April, Balfour Beatty were fined £2.6 million after pleading guilty to a series of Health and Safety charges arising from the collapse of a trench that killed a sub-contractor on a wind-farm project. This was the second million-pound-plus fine for Balfour Beatty in 2016.

McCain Foods (GB) Ltd were fined £800,000 after pleading guilty to offences after an employee's arm became entangled in a machine when the appropriate guard had not been fitted. A risk assessment had failed to identify. Although the employee's arm was saved, the injury resulted in him having limited future hand movement.

In March 2016 a national company, Falcon Crane Hire, was fined £750,000 and ordered to pay costs of £100,000 after two people died when the jib separated from the main mast of the crane. Metal fatigue was found to have caused this failure. The court found that the company *"… had an inadequate system to manage the inspection and maintenance of their fleet of cranes"*. The Court also heard that some bolts had previously failed – an exceptional occurrence, the significance of which should have been recognised.

Watling Tyre Services Ltd were fined £1 million and £100,000 in costs after pleading guilty to two health and safety charges. This incident occured in 2006 when a young apprentice died when repairing a puncture to a tyre of a Dresser loading shovel that exploded, throwing him more than 30 feet in the air.

In May 2016, Scottish Power Generator were fined £1.75 million after an employee was seriously scalded when he opened a valve which emitted high-pressure steam. He survived and the company pleaded guilty to one count under the Health and Safety at Work Act 1974. An investigation found that the company had been aware of the defect but had not taken appropriate steps to rectify the situation.

In another case in May 2016 two companies were fined after they pleaded guilty to Health and Safety charges arising from a failure to manage the risks to employees of vibration from tools used in the servicing of crushers and screeners. They were fined £280,000 and £12,000 plus costs respectively. This was not a fatality and the heavy fines arguably represent a major shift in sentencing severity and a precursor of what is to come.

Recent cases also show an increase in severity in sentences imposed on individuals. At Manchester Crown Court in April 2016 one director was sentenced to six years imprisonment for gross negligence manslaughter and another to eight months imprisonment for Health and Safety offences after an employee died in a fall through a skylight. The same employee had nearly fallen through another skylight the day before but was ordered back on the roof. There was no method statement on risk assessment in place. The main company pleaded guilty to various charges and was fined £400,000 and £55,000 in costs. The turnover was less than £2 million.

In May 2016, a director was sentenced to 40 months imprisonment after pleading guilty to gross negligence manslaughter and perverting the course of justice. Another director was disqualified from being a director for two years and ordered to do 120 hours of community service after pleading guilty to s.37 of the Health and Safety at Work Act 1974. The company was also fined £75,000. This was a particularly bad case in that the director tried to cover up the accident and lied to the police and cajoled workers to provide false statements. After a six metre fall the worker was driven home and put to bed. The Authorities were not notified. He was found dead on the floor the next day. With regard to both defendants the judge found that the category of culpability was high and the level of harm was medium and the seriousness of harm was level A – the highest level possible.

In May 2016, a restaurant owner was sentenced to six years imprisonment for being found guilty of manslaughter and six food safety offences when a customer suffered a severe anaphylactic shock after eating a takeaway containing peanuts. He had specified no nuts in his order.

At Swansea magistrates' court in April 2016, a self-employed contractor was sentenced to six months' imprisonment after an employee died when he entered a trench, which collapsed, burying him. The court found that the risk assessment was neither suitable nor significant.

At Peterborough Crown Court in May 2016 a sole director trading as a company pleaded guilty to a charge under the Provision of Work Equipment Regulations 1998 (PUWER) and was sentenced to 15 months' imprisonment, suspended for 24 months, fined and had full costs imposed of £45,000.

1 Cornerstone Barristers, 2-3 Gray's Inn Square.

2 The first part appeared in *Archbold Review* Issue 3.

A worker entered a machine when it suddenly started, killing him.

Another recent case concerned a director who was sentenced to 26 weeks' imprisonment after being found guilty by a jury of s.3 of the Health and Safety at Work Act when an elderly lady died in the defendant's specially adapted vehicle, which he was driving. The seat-belt was inadequate and in consequence the lady came out of her seat and struck her head when the vehicle was involved in a collision. He was also sentenced to 36 weeks for causing death by careless driving, reduced to 11 weeks on appeal[3]. This case clearly indicates the new climate of higher individual penalties.

Not all these cases, it should be noted, involved fatalities.

Turning to some of the practical issues, and in no particular order:

Guilty Pleas

We all wait in anticipation for the new guidelines on guilty pleas. The draft guideline on which a final decision is currently awaited "seeks to encourage those defendants who are aware of their guilt to enter a plea as early in the court process as possible".[4] With the aim of increasing speed and efficiency, the proposal seeks to cut down the one-third reduction for a guilty plea in cases where defendants do not plead guilty at the outset; with the likely result that, in practice, fewer defendants will in future qualify for the full discount. The draft purports to provide some degree of flexibility for defendants whose delay is not caused by their attempting to "play the system", but it is minimal. If the consultation process, which closed on 5 May, does not lead to major changes to the draft guideline, the new regime for credit could cause havoc not only in these types of cases, but in all regulatory cases.

It is, disappointingly, not uncommon for the prosecution not to have served adequate disclosure by the first hearing. This makes advising clients extremely difficult. Further, the current time anticipated by the guidelines will be often be insufficient to obtain evidence and to instruct experts, who are often highly specialised and involved in numerous other cases.

Many defendants will be corporate and require instructions to be taken from various management layers, including Boards which may be headquartered abroad.

Additionally, the proposed changes involving *Newton* hearings and the potential reduction of credit will prove to be particularly problematic. As explained in the first part of this article, there will inevitably be more *Newton* hearings, both in relation to sentencing, as to what was the real risk as shown by the evidence, and recourse to experts in accountancy, risk and highly technical issues.

The criminality in these types of cases are rarely clear-cut and in my view, shared by many others, the current status quo should continue. I further suspect that if the proposed changes come into effect, there will be an actual increase in the numbers of trials as defendants take the view that the best method of bringing the full mitigating factors to the forefront is by fighting the case. This would, of course, result in the complete opposite objective that the proposed Guidelines are attempting to achieve.

Listing Issues

Both in the magistrates' and Crown Courts there are already very lengthy waiting times. These types of complicated cases, especially fatalities, are meant to be listed before a High Court judge, or another judge only when the presiding judge had released the case or the resident judge has allocated the case to that judge.

Since s.85 of the LAPSO came into effect on 12 March 2015 these types of cases, as set out in Annex 3 of CPD XIII, mean that an authorised District Judge must deal with any allocation decision, trial and sentencing hearing in proceedings for either way offences which, *inter alia*, involve death, or a significant life-changing injury, or a high risk.

To this we must add the stringent new requirements set out in the Better Case Management system implemented since 5 January 2016 and the new allocation guideline effective from 1 March 2016.

Many of the less serious cases will be heard in the magistrates' courts which already have very serious delays. In certain localised Crown Courts the situation is even worse! Further, with more *Newton* hearings requiring experts and other witnesses, lasting several days – the delay to cases being resolved will simply increase. This is, of course, unsatisfactory not only defendants but also for witnesses and victims and their families.

Other Factors

In addition to the above, much greater thought and immediate attention will need to be given to the extent of defence co-operation even before summonses are served. This includes draft internal investigation reports, submissions under caution, group accounts, directors' remuneration, pension provisions and shareholder dividends and a plethora of other important issues.

Given that these recent cases clearly illustrate the emphasis being placed on the risk or likelihood of harm and not the actual outcome and fines intended to have a real economic impact, much more investigation and preparation front-loading will be required by organisations and individuals in the aftermath of an incident. To simply sit and wait to see what the prosecution does and says will be to miss an opportunity which the new proposed timetable will punish.

Conclusion

It is demonstrably the case that penalties are dramatically ramping up and centred on the risk of harm, rather than just the actual consequences. To repeat a point made in the first part of this article, these higher fines will not only have an impact domestically, but could also have a knock-on effect internationally, from both a regulatory and reputational perspective.

It is hoped that this change of emphasis may trigger greater awareness that incident prevention is the touchstone of corporate survival and that in the event of an occurrence, immediate steps relating to internal investigations and improvement need to automatically happen: the prosecutors wait in the wings for the unready, or unwilling!

3 *Sutton* [2010] EWCA Crim 540.

4 http://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf

Feature

What would Brexit mean for British criminal justice?

By J.R.Spencer

In the Brexit debate one thing is clear: the standard of argument is depressing. Fighting fear with fear, each side makes dire predictions as what will happen if we vote to leave – or alternatively, if we vote to stay; and each prediction is then condemned by the other side as scare-mongering. And this is as true, sadly, in relation to predictions about criminal justice as to predictions about everything else. The glossy pamphlet which the Government spent £9 million distributing to all homes two months ago contained the following:

> **Keeping us safer** EU membership means the UK police can use law enforcement intelligence from 27 EU countries, and will have access to fingerprint and DNA information. EU cooperation makes it easier to keep criminals out of the UK. Since 2004, using the European Arrest Warrant, over 1,000 suspects have faced justice in UK courts and over 7,000 have been extradited

with the unstated implication that all this would stop if we should vote to leave. And by way of contrast, on 10 May the *Daily Express* published this:

> **Exclusive: Brussels plot to impose Euro law after EU referendum 'a threat to our freedom'** Plans to create a centralised EU prosecutor will fatally undermine our legal system and kill off the principles of trial by jury and 'innocent until proven guilty' which have been the fundamental rights of Britons since the Magna Carta… [an expert] told the Express that if the plans go ahead Brussels will soon have Britain 'by the throat' …

So what *is* the truth about the EU and British criminal justice? And what would *really* happen to it if we left? or if we stayed? In what follows I shall try, unlike the Government's vacuous pamphlet, to give some details and two sides of the story, and unlike the *Daily Express*, to avoid the wilder flights of fantasy. Before starting I should make it clear that I intend to vote to stay, and for reasons that are partly ideological. But I shall do my best to suppress my prejudices and give a dispassionate account.

What does EU criminal law consist of?[1]

The phrase "EU criminal law" suggests a separate criminal code and criminal procedure code, enforced in its own courts by its own personnel – as in the two-tier system that exists in the USA. But to date, EU criminal law exists only in a much looser sense. In concrete terms, it comprises five bodies of law governing five distinct but related matters.

The first is a body of law creating and regulating a group of EU agencies designed to secure the better functioning of criminal justice within the EU area. Of these, the most important are OLAF, Europol and Eurojust.

OLAF is the European anti-fraud office.[2] This has extensive powers to investigate fraud, corruption and other improper activities affecting Community finances. It has no power itself to prosecute and if criminal offences are discovered it has to pass the file to the authorities of the Member States concerned. The perceived reluctance of some of them to take action is the main driver for the proposal to create a European Public Prosecutor – of which more below.

Europol, the European Police Office, is a collegiate body, composed of representatives from the police forces of all Member States. Unlike OLAF (and the FBI in the United States) it has no power to investigate, much less to prosecute, its function being to support the national police forces by the collection, storage, analysis and exchange of information.

Eurojust is another collegiate body, in structure similar to Europol, but composed of public prosecutors; and its mission is to help co-ordinate the efforts of the different national prosecuting authorities and manage crimes committed across borders.

To join these three bodies a fourth one is now on the way: the European Public Prosecutor's Office, or EPPO, to be responsible for prosecuting EU budgetary fraud offences in the courts of the EU Member States. The *Corpus Juris* study[3], which first proposed the idea in 1997, envisaged a simple hierarchical structure with a single European Public Prosecutor, operating in the Member States through a network of national prosecutors on secondment; but the scheme currently under discussion in the Council involves a complicated collegiate structure – so complex, indeed, that some fear it will make prosecuting EU budgetary frauds more difficult, not easier.

The second component is a body of legal instruments designed to improve cooperation between the national law enforcement agencies of the different Member States. Of these, some create databases for the automatic exchange of information: like the Schengen Information System (SIS). Some set up schemes which give the authorities of the different Member States the right to request information: for example, on the criminal records of suspected criminals (ECRIS).[4] Others provide a legal basis for cross-border operations – for example, Joint Investigation Teams (JITs)[5], as used by France and Belgium to investigate the recent terrorist attacks in Paris and in Brussels.

The third component is the body of legal instruments requiring the courts and other competent authorities of the different Member States to recognise and give effect to judgments and orders issued by their counterparts in other

1 For a more detailed account, see (ed Barnard and Peers) *European Union Law* (OUP 2014) ch 25; or Steve Peers, *EU Justice and Home Affairs Law* (OUP, 3d ed 2010), ch 9.

2 In French, *l'Office européen de lutte anti-fraude*, hence the title OLAF.

3 Published (in hard copy only) as (ed Mireille Delmas-Marty), *CORPUS JURIS introducing penal provisions for the purpose of the financial interests of the European Union*, Editions Economica, Paris (1997).

4 European Criminal Record Information System; Council Franework Decision 2009/315/JHA of 26 February 2009.

5 Council Framework Decision 2002/465/JHA of 13 June 2002.

Member States. Of these "mutual recognition" measures, the first and best known is the European Arrest Warrant, or EAW[6] – the merits of which are invoked by the "remain" camp as an argument for Remaining, and the demerits by the "leave" camp as an argument for Leaving – but there are others; providing, among other things, for the enforcement across national borders of fines[7] and prison sentences,[8] and in some circumstances, bail conditions – so potentially enabling a defendant from a different Member State to await trial at home instead of in a foreign prison.[9]

The fourth group consists of some 20 instruments designed to "harmonise" the substantive criminal law of the Member States by requiring them to ensure that certain forms of anti-social behaviour are punishable, and with penalties that are likely to deter. Prominent among these are the 2002 Framework Decision on Terrorism[10] and, more recently, the 2011 Directive on People Trafficking.[11] The aim, of course, is to ensure a common approach to common problems – in particular, ones committed across borders, or where the effects are felt across them.

The fifth and final group consists of instruments attempting to "harmonise" criminal procedure in the different Member States; as by requiring the courts of Member States to give the same weight to previous convictions incurred in other Member States as is given to their own,[12] and conversely, to avoid re-prosecuting those whose crimes have been dealt with previously in other Member States;[13] or by providing certain minimum protections for the victims of crime;[14] or certain minimum rights to those who are accused of committing them. This last group is "work in progress" and stems from an ongoing EU programme, published in 2009, known as the Roadmap[15]. The stated aim of this fifth group of measures is to bolster mutual recognition – on the basis that countries will more willingly enforce foreign judgments if they have confidence in the legal system that imposed them.

Where does EU criminal law come from?

The story began with the Schengen Treaty – whereby, in 1990, a group of Member States agreed to abolish their border controls, creating at the same time a package of police cooperation measures to deal with criminals who might misuse the extra freedom of movement so provided. Though originally concluded outside the Brussels legal framework, the Schengen Treaty was later brought within it by the Treaty of Amsterdam in 1997.

The second stage was the Treaty of Maastricht in 1992, which made provision for certain forms of criminal justice legislation under a set of constitutional arrangements known as the "Third Pillar". These arrangements were intended to be "intergovernmental", meaning that the national governments of the Member States were firmly in control, and legislative decisions required unanimity – so giving each Member State a veto. The Third Pillar provided for various types of legal instrument, of which the strongest were "Framework Decisions", which all Member States were obliged, in principle, to comply with. But – unlike with Directives and Regulations – there was no legal means of compelling them to do, because the Luxembourg court structure had no jurisdiction to entertain proceedings if they failed.

The third (and current) stage was the Treaty of Lisbon in 2009. This reformulated the EU's competence to legislate in criminal justice matters[16] and also provided that future EU criminal justice legislation should be made by the same legal processes that are used in other areas. So instead of Framework Decisions we now have Directives (and, potentially, Regulations). Decisions are now made by a qualified majority vote instead of unanimity, thereby abolishing the previous power of any Member State to veto new legislation. And the Court of Justice at Luxembourg (CJEU) is now competent to entertain infringement proceedings against Member States that fail to carry out their obligations in this area; not only in respect of new instruments, but – with effect from December 2014 – also in respect of existing measures adopted under the Maastricht arrangements.

What is the UK's present position in relation to EU criminal justice?

The UK's relationship with EU criminal justice developed in two main stages: the first under the Labour government, the second under the Coalition.

During the "New Labour" period, from 1997 to 2010, the UK enthusiastically cooperated in the development of EU criminal law – or at any rate, as much of it as reflected New Labour's promise to be "TOUGH ON CRIME" (in big letters) and "tough on the causes of crime" (in rather smaller ones). The government rejected the idea of a European Public Prosecutor when this was first proposed; but accepting that trans-border crime was a reality, it then actively helped to promote alternative measures – like the European Arrest Warrant – to deal with it. Although the Labour government did not wish to bring the UK into the "open borders" part of the Schengen agreement it was attracted to the enhanced police powers that came as part of it, and successfully applied for the UK to be permitted to accede to most of those, whilst retaining its closed borders.[17] In 2006, for reasons that were never publicly explained, it blocked moves towards an EU measure designed to reinforce the position of suspects and defendants; but three years later changed its mind and backed the "Roadmap" proposal for a raft of them.

Then finally, when the Lisbon Treaty was negotiated, the Labour government secured for the UK two important opt-outs from the new regime for EU criminal justice legislation. The first, contained in Protocol 21, preserves the UK's previous right to avoid new laws of which it disapproves by providing that the UK is not bound by new pieces of EU legislation in the area of justice and home affairs unless it elects to opt into them. The second, contained in Protocol 36, gave the UK the right to withdraw *en bloc* from all the measures adopted under the Maas-

6 Created by Council Framework Decision 2002/584/JHA of 13 June 2002.
7 Council Framework Decision 2005/214/JHA of 24 February 2005.
8 Council Framework Decision 2008/909/JHA of 27 November 2008.
9 On this, see Jodie Blackstock and Alex Tinsley, [2015] 8 *Archbold Review* 5-6, and the news item, [2016] 2 *Archbold Review* 9.
10 Council Framework Decision 2002/475/JHA of 13 June 2002.
11 Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
12 Council Framework Decision 2008/675/JHA of 24 July 2008.
13 Schengen Convention, Article 54.
14 Directive 2012/29 EU of 22 April 2012.
15 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [2009] OJ C 295/1.
16 Now set out Chapters 4 and 5 of Title V of Part 3 the Treaty of European Union (TEU).
17 Council Decision of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland, OJ L 395/70, 31.12.2004.

tricht regime before December 2014, when the CJEU would acquire full jurisdiction over them; with the right to seek readmission to those for which it was prepared to accept the CJEU's future jurisdiction. (What lay behind this, it is thought, was not a sudden change of attitude towards EU criminal law, but public pressure to submit the UK's accession to the Lisbon Treaty to a referendum; pressure more easily resisted, obviously, if the Treaty could be plausibly presented as leaving the UK's position as it was before.)

The Conservatives and Liberal Democrats who formed the Coalition that held office from 2010 to 2015 were divided in their views on Europe, and unsurprisingly, an incoherent policy towards EU criminal law was the result. The first step, driven by the Conservatives, was to render future participation by the UK in any project for a European Public Prosecutor politically impossible by clauses of the European Union Act 2011 which subject any move in this direction to previous approval in a referendum. In other ways, however, the Coalition government at first continued on the same path as its predecessor, enthusiastically opting the UK into a number of new measures: most strikingly, the European Investigation Order, which extends the mutual recognition principle to orders from courts in other Member States related to the collection of evidence.[18]

But then the Protocol 36 opt-out was discovered by the eurosceptic wing of the Conservatives, which pressed the government to make use of it, apparently in the erroneous belief that it gave the UK the right to detach itself from EU criminal justice once and for all. To this pressure David Cameron yielded, announcing – off the cuff and in the course of a press conference during a trade mission to Brazil in September 2012 – that the Protocol 36 opt-out would be invoked; to the considerable surprise of his partners in the Coalition, who had not been consulted. The result – to cut a long story very short[19] – was that the UK did then exercise the opt-out, but only to opt back in again, in December 2014, to all the Maastrich measures from which any practical consequences flowed. And while it ran, the Protocol 36 soap-opera caused a lock-down on further developments; in particular, as regards the UK's further involvement in the "Roadmap" measures.

The opt-back-in-again list was headed by the European Arrest Warrant: the EU instrument which the Conservative eurosceptics particularly wished to see the back of, because (in their view) it leads to Britons being exposed to Continental criminal justice, the quality of which is likely to be inferior. As David Cameron, in opposition, had opposed the legislation to implement the EAW on these grounds, he found his words thrown back at him when the Government sought to opt the UK back into it. The Government took this position, however, in deference to the views of the police, who saw the EAW as a vital tool in fighting crime and were very anxious not to lose it.

To placate the critics of the EAW, the implementing legislation was amended by adding two new grounds for refusing to surrender the wanted person: (i) that to extradite the wanted person would be "disproportionate",[20] and (ii) that the competent authorities in the requesting State have "not made a decision to charge or have not made a decision to try"[21]. This second ground was added to meet the complaint that persons surrendered under EAWs then faced long periods of detention before trial. The Home Secretary presented it to Parliament as providing "extra safeguards for British citizens", but it is not so limited.[22]

To sum up the effect of this tangled story, the UK's current position in relation to the five groups of measures of which EU criminal law is composed is now as follows:

(a) the UK is subject to the jurisdiction of OLAF, and is an actively participating member of Europol and Eurojust; but by imposing the "referendum lock" it has made it politically impossible for itself to join the project for a European Public Prosecutor, even should it ever wish to do so.

(b) It is bound by, and makes extensive use of, nearly all the instruments designed to further police cooperation; and it is bound by, and makes use of to varying extents, the "mutual recognition" instruments – in particular, the European Arrest Warrant.

(c) It is no longer bound by most of the "harmonisation" measures requiring Member States to punish certain forms of misbehaviour by application of their criminal law. Most of these were "Maastricht measures", which the UK opted out of in the Protocol 36 saga, without then opting back; (not because it disapproved of them, but seemingly because it wished to boost the score of "powers clawed back from Brussels" which the exercise could be said to have achieved).

(d) It is, by contrast, still bound by nearly all the EU "harmonisation" measures relating to criminal procedure. The exceptions are the most recent of the "Roadmap" measures intended to provide guarantees of fair treatment to suspects and defendants.[23]

(e) In respect of those parts of EU criminal law that still apply to it, the UK now accepts the jurisdiction of the CJEU. (This means two things only: (i) UK courts can make preliminary references to the CJEU on doubtful points of law[24], and (ii) a failure to carry out its obligations could result in the UK being made the subject of infringement proceedings. It does not create a new tier of criminal appeal.)

(f) As regards future measures, Protocol 21 continues to apply; so that no new EU measures in the area of criminal justice apply to the UK unless it decides to opt into them.

18 Directive 2014/41/EU of 3 April 2014-which is due to be implemented by 22 May 2017. The UK opted in when the negotiations began, in 2010.

19 The full story (or most of it) can be found in "Opting out of EU criminal justice: withdrawal, or an exercise in smoke and mirrors?" [2013] 8 *Archbold Review*, 6-9.

20 Extradition Act 2003 s.21A.

21 Ibid, s.12A.

22 As the Administrative Court pointed out in *Kandola v Germany* [2015] EWHC 619 (Admin), [2015] 1 W.L.R. 5097 - in which all three applicants were foreign nationals.

23 The UK opted into the first two Roadmap instruments: the Directive on Translation and Interpretation (Directive 2010/64 EU) and the Directive on the Right to Information (Directive 2012/13/EU). It refused to opt into a later Directive on the right of access to a lawyer (Directive 2013/48/EU). In March 2014 the Minister of Justice, Chris Grayling, told the House of Commons that the UK would not be opting into other Directives in the Roadmap series then under discussion. Following this policy, the UK has not opted into the Directives on the Presumption of Innocence and on Procedural Safeguards for Children, which were adopted earlier this year.

24 See Helen Malcolm, "What is a Preliminary Reference? And why should I care?" [2015] 9 *Archbold Review* 5-6.

What would happen to all this if the UK left the European Union?[25]

The truthful answer to this question is that, as with most of the other predicted consequences, no one really knows. The UK's departure from the EU would presumably take place under the procedure set out in Articles 50 and 218 of the TEU – which means negotiations, leading to a Treaty in which the terms of departure would be contained. The "exit package" so negotiated could, presumably, include terms under which some parts of EU criminal law continued to apply to the UK: in which case it would be "business as before". In the more likely scenario of a "clean break settlement", the UK would be liberated from the burdens that EU criminal law imposes, but also deprived of the corresponding benefits. As EU criminal law was created to deal with the unwanted consequences of the free movement of persons, goods, services and capital – all basic elements of EU policy – the loss of benefits deriving from EU criminal law would matter more, or matter less, depending on the future of free movement. If the UK were to isolate itself from its neighbours, like a sort of European North Korea, loss of the benefits of EU criminal law would matter little; but the loss would matter more, obviously, if free movement in some shape or form continued.

The worst problems would arise from the UK's ceasing its involvement with the European crime-fighting bodies, and non-participation in the "mutual recognition" instruments and the instruments that facilitate police cooperation. In each case, however, the risk of damage, if real, could be mitigated – at least to some extent.

OLAF, Europol and Eurojust have already concluded formal arrangements for cooperation with a number of non-EU states, and similar arrangements could be made for the UK. But in future the UK would participate as a second-class citizen, with little or no say in the making of policy or the way these organisations are run.

To replace the mutual recognition instruments, and the police cooperation instruments, would pose a bigger problem. In principle these could be replaced by new "intergovernmental" instruments negotiated bilaterally with each of the other Member States, but this is something easier said than done. There are at present 27 other Member States, and to ensure its ability to deal with trans-border crime, in 2014 the UK government negotiated the UK's readmission to 35 of the "Maastricht measures". On the basis of these figures, the number of intergovernmental instruments to be negotiated would be 945!

The task could be simplified, at least to some extent, in one or other of two ways. First, in some cases it might be possible for the UK to make an agreement with the EU collectively, rather than with its individual Member States. And secondly, there are some Council of Europe Conventions, on the basis of which the UK and the other Member States already cooperate with a range of countries which are not EU members; and these could be the legal basis for doing business with the remaining Member States in future. Of these, an obvious example is the Council of Europe Convention on Extradition of 1957 (and its Protocols). But this existing network of Conventions would only partly solve the problem. In the first place, in some areas there is no existing Convention to fall back on. Secondly, and more obviously, these instruments are less effective than the newer EU instruments – which is why the EU instruments were created to replace them. For example, the Council of Europe Convention on Extradition, unlike the EAW, allows contracting States to refuse to extradite their nationals: including France, Germany and Poland – though not the UK. Where this reservation applied, it meant that if a national of that country committed a crime in the UK and then promptly fled back home, he could only be brought to justice by arranging for the criminal proceedings against him to take place in his home State; something which was frequently impracticable, and so meant that justice failed. If this Convention were to replace the EAW, the same problems might recur.

By contrast, few if any practical consequences would follow from the UK's ceasing to be bound by the EU instruments designed to "harmonise" aspects of substantive criminal law, or aspects of criminal procedure. As regards the first, it would give the UK freedom (from EU law restraints, at least) to decriminalise cybercrime, people-trafficking and child pornography – as well as terrorism, drug-trafficking and bribery, which it already acquired the right to decriminalise in the Protocol 36 opt-out in December 2014. And as regards the second, it would acquire a similar degree of freedom to legislate for the ill-treatment, in equal measure, of victims of crimes and those who are suspected of committing them. But these are freedoms which, one hopes, no UK government would wish to take advantage of.

And if the UK remained in the EU?

The *Daily Express* theory of the "Brussels plot" to force the UK to abolish the common law and replace it with a horrifically oppressive "Napoleonic system" is a total fiction; on a par with another lurid story once carried by that newspaper, under the headline: "EU's plan to liquify corpses and pour them down the drain".[26]

The ultimate origin of the theory of the "Brussels plot" is a bizarrely distorted account of the *Corpus Juris* project which first appeared in a small-circulation eurosceptic magazine, and was then picked up and "splashed" – evidently without checking sources – as a front-page story by the *Daily Telegraph* in November 1998; where it was read and believed by many people, and in due course internalized not only by UKIP[27] but also by a large section of the Conservative Party; a chain of events which led, in 2011, to the enactment of the provision of the European Union Act 2011which now makes it impossible for the UK to take part in any project for a European Public Prosecutor without prior approval in a national referendum.[28]

The carelessness with which some sections of our media publish inaccurate information is depressing; and so too is the credulity of those politicians who are willing to believe it.

25 For a fuller account, see (ed Birkinshaw and Biondi), *Britain Alone!* (Wolters Kluwer, 2016), chapter 10.

26 *Daily Express*, 8 July 2010; to be found, with many other "euromyths" and their demolition, in the "euromyths" section of website of the European Commission: see http://blogs.ec.europa.eu/ECintheUK/euromyths-a-z-index/

27 See Nigel Farage, "Innocent until proven guilty? … Corpus Juris, used in Europe, is not a system of justice we should be welcoming." in *The Independent* 10 November 2013; and for a video refutation, http://sms.cam.ac.uk/media/1605689

28 I told the full unhappy story in "Who's afraid of the big, bad European Public Prosecutor?", (2011-2012) 14 *Cambridge Yearbook* of *European Legal Studies* ch 14.

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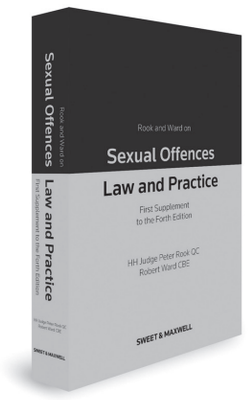

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