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Archbold Review

Cases in Brief

Appeal—incompetence of counsel—proper approach—responsibility of counsel for conduct of case—closing speech
EKAIREB [2015] EWCA Crim 1936; December 16, 2015
(1) Where an appellant advanced grounds of appeal based on the incompetence of counsel, the approach in *Day* [2003] EWCA Crim 1060 ("in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe") was to be preferred to that in *Bolivar and Lee* [2003] EWCA Crim 1167 ("the test to be applied in relation to a barrister's conduct, is: was it *Wednesbury* unreasonable and such as to affect the fairness of the trial?"). The former was the more modern approach, it was simpler to apply, avoided consideration of how *Wednesbury* unreasonableness was to be applied to the conduct of an advocate, and was more in accord with the Privy Council formulation in *Sankar v. State of Trinidad and Tobago* [1995] 1 W.L.R. 194, 200F–G.
(2) There was no basis upon which an advocate could be instructed as to what to say in a closing speech by the instructing solicitor or lay client, or when to conclude it. That was the advocate's responsibility: *Farooqi* [2014] 1 Cr. Ap. R. 8.
(3) Although counsel's closing speech failed to meet the detailed case put by the prosecution and was ill-judged, patronising, contained inappropriate attempts at humour and made inappropriate and unprofessional observations about Crown counsel, these failings did not render the conviction unsafe. The Court had not been referred to any case in which an incompetent defence speech had formed the basis of a successful ground of appeal. The trial judge had the responsibility to ensure that a defendant's case was accurately before the jury, which may involve correcting or amplifying a closing speech. Should that prove impossible it may, in an extreme case, be necessary to discharge the jury (the Court referred to the Bar Standards Board the contents of counsel's website, the issue of undertaking other work at the same time as appearing in the trial and counsel's criticism of Crown counsel).
(4) Any criticism of an opposing advocate should be made to the judge. The practice of making personal criticisms of prosecution advocates, which the Court had been told had become a feature of some defence speeches, could form no proper part of a speech, and should cease.

Evidence—hearsay evidence—exclusion under the Criminal Justice Act 2003 s.126—preliminary view of scope—whether differential threshold for defence and prosecution evidence
DRINKWATER [2016] EWCA Crim 16; February 23, 2016
The exact scope of the discretion to exclude hearsay evidence under the Criminal Justice Act 2003 s.126 may need further consideration, if and when the point arose (*Riat* [2012] EWCA Crim 1509, [24]). The Court's strong preliminary view was that, in order to prevent the potential admission of barely relevant evidence, s.126 permitted the court to exclude hearsay evidence which lacked significant probative value, a view supported by the Report of the Law Commission Evidence in Criminal Proceedings: Hearsay and Related Topics, in the light of which the provision was enacted (see para.11.18 of the Report). Professor Ormerod has also commented that a restrictive interpretation of s.126 would open an astonishingly wide scope for the admissibility of defence evidence with little or no opportunity to filter unreliable or spurious evidence: *James*, Crim.L.R. [2005] 643; and see Professor Spencer in *Hearsay Evidence in Criminal Proceedings*, 2nd edition, paras 5.55 to 5.58. There was nothing in the language of the section which required

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the court to apply a different threshold test for exclusion depending on whether the evidence was tendered by the prosecution or the defence; nor was there any principled justification for such a difference.

Magistrates—procedure—approach to underlying offence where defendant convicted of aggravated offence—practical issues arising

HENDERSON v CPS [2016] EWHC 464 (Admin); March 9, 2016

(1) There was a divergence of views as to how the court should proceed in relation to underlying offences of harassment (in this case) or assault or criminal damage, where a defendant was convicted of a racially or religiously aggravated version of the offence arising from the same facts. *DPP v Gane* (1991) 155 JP 846 and *R (CPS) v Blaydon Youth Court* [2004] EWHC 2296 (Admin) supported the proposition that it was open to the magistrates to either adjourn the trial of the underlying offences *sine die*, or to convict and impose no further penalty, or a nominal penalty. In *R (Dyer) v Watford Magistrates Court* [2013] EWHC 547 (Admin), 177 J.P. 265, the Court expressly declined to follow those cases, concluding that as a matter of principle a defendant should only stand convicted of one offence (the aggravated) arising out of the same facts (irrespective of penalty). The Court of Appeal, Criminal Division had regarded *Dyer* as an example of "true alternatives" offences (as opposed to "forensic alternatives") in *Akhtar* [2015] 1 WLR 3046 and upheld the same approach, The Court concluded that *Dyer* was right. As a matter of principle where there were two charges which were properly characterised as alternatives there should not be findings of guilt on both charges (and accordingly guidance to the contrary issued to Justices' Clerks was wrong). If the defendant wished to plead guilty to the underlying offence but contest the aggravated offence, the offer to plead should be noted but the plea should not be taken.

(2) In convicting of the underlying charges in this case, the District Judge doubted whether the magistrates could adjourn *sine die*, and noted practical problems with doing so. The Court considered (a) that the statutory powers of the Crown Court sitting in its appellate capacity (in particular under the Senior Courts Act 1981 s.48(2) and (4)) were sufficiently wide to enable it, when allowing an appeal for the aggravated offence, to substitute a conviction for an alternative underlying offence adjourned by the Magistrates. The Court reached this conclusion on the basis of the broad statutory wording, while recognising that there was also support for it in *Dutta v Westcott* (1987) 84 Cr.App.R. 103; (b) it was open to the magistrates to adjourn *sine die*. While the Magistrates' Court Act 1980 s.9(2) required that at the conclusion of a trial magistrates should either convict or dismiss the charge, s.9 was directed to procedure at trial and did not prevent the adjournment of the trial or part of it: *Redbridge Justices, ex parte Gurmit Ram* [1992] QB 384. The general power to adjourn was in s.10, and was not cut down by s.18. There might be difficulties in securing a defendant's attendance if there was no remand; however, in these circumstances there would be no need for a further hearing before the Magistrates' Court; (c) practical difficulties with closing or archiving files should not be an insurmountable problem; and (d) the Interpretation Act 1978 s.18 did not provide statutory authority for conviction on true alternative charges.

Identity Cards Act 2006/Identity Documents Act 2010 offences—defence in the Immigration and Asylum Act 1999 s.31 — Asylum and Immigration (Treatment of Claimants) Act 2004 s.2 — approach of Court — CCRC practice

NORI; YY [2016] EWCA Crim 18; February 26, 2016

It was clear that (a) there was an obligation on those representing defendants charged with an offence of possession of an identity document with improper intention under the Identity Cards Act 2006, or, now, the Identity Documents Act 2010 to advise them of the existence of a possible Immigration and Asylum Act 1999 s.31 defence; (b) legal advisers should properly note the instructions received and the advice given; (c) on an appeal based on a failure to so advise, the Court would assess whether the defence would "quite probably" have succeeded; and (d) it was appropriate for the Court of Appeal to assess the prospects of an asylum defence succeeding by reference to the findings of the First Tier Tribunal (Immigration and Asylum Chamber), if available (*Mohamed Abdalla, V(M), Mohamed (Rahma Abukar), Nofallah [2011]* 1 Cr.App.R 35*; Ali Reza Sadighpour* [2012] EWCA Crim 2669; *Mateta* [2014] 1 WLR 1516). The same principles applied to advice on whether a defendant charged with an offence under the Asylum and Immigration (Treatment of Claimants) Act 2004 s.2 had a defence under that section; the complication in relation to s.31 was that the defence was not identified in the statute which created the defence and, on occasion, had been overlooked. However, while recognising the very real contribution made by the CCRC in this area of the law (*Mateta* [2014] 1 WLR 1516), the CCRC, the Court understood, would now pursue such cases where the case had not previously been before the Court of Appeal, on the basis that there were exceptional circumstances (Criminal Appeal Act 1995 s.13). The result of the substantial jurisprudence of the Court on these issues was that it was now common for the Registrar of Criminal Appeals to refer such cases to the full court. The Registrar was more than able to require waiver of privilege and avoid delay. If the exceptional procedure available to the CCRC was being deployed as a matter of routine, where a case could have come directly to the Court of Appeal, resources were not being deployed as efficiently as possible; and detailed consideration of other cases of alleged miscarriage of justice which had exhausted all rights of appeal were being delayed. The Court recognised that appeals to the Crown Court after a plea of guilty had to be processed via the CCRC, given the constraints on the Crown Court sitting on appeal (see the Magistrates' Court Act 1980 s.108(1); *McNally* 38 Cr.App.R 90 and *S v Recorder of Manchester* [1971], meaning that the Crown Court was limited to a consideration of matters apparent to the magistrates and, if a plea was equivocal, were bound to remit: the Senior Courts Act 1981 s.48(2)). But that was not the case in respect of the Court of Appeal, and the Court encouraged the CCRC to review its criteria, so that it investigated only cases in which there had been appeals to the Court of Appeal, or magistrates' appeals. Other cases could be passed to the Criminal Appeal Office.

Trial—fitness to plead—criticism of criteria established in Pritchard *(1836) 7 C&P 303—capacity to be assessed in relation to characteristics of the particular proceedings*
MARCANTONIO; CHITOLIE [2016] EWCA Crim 14; February 24, 2016
(1) The criteria for assessing fitness to plead set down in *Pritchard* (1836) 7 C&P 303, 304-5 had been subjected to much criticism: see *Murray* [2008] EWCA Crim 1792, *Diamond* [2008] EWCA Crim 923 and *Walls* [2011] EWCA Crim 443 and the Law Commission's Report on Unfitness to Plead (Law Com No 364), but were firmly established as the law to be applied by the Court of Appeal. The Court in particular thought there were strong arguments in favour of a distinct test of capacity to plead guilty, where the other *Pritchard* competences may not be met, as proposed by the Law Commission.
(2) In applying the *Pritchard* criteria the court was required to undertake an assessment of the defendant's capabilities in the context of the particular proceedings. An assessment of whether a defendant had the capacity to participate effectively in legal proceedings should require the court to have regard to what that legal process would involve and what demands it would make on the defendant. It should be addressed not in the abstract but in the context of the particular case. The degree of complexity of different legal proceedings may vary considerably. Thus the court should consider, for example, the nature and complexity of the issues arising in the particular proceedings, the likely duration of the proceedings and the number of parties. There could be no legitimate reason for depriving a defendant of the right to stand trial on the basis of a lack of capacity to participate in some theoretical proceedings when he or she did not lack capacity to participate in the actual proceedings. It was in the interests of all concerned that the criminal process should proceed in the normal way where this was possible without injustice to the defendant. Such an approach was essential, given the emphasis which was now placed on the necessity of considering special measures to assist an accused: see, for example, *Walls* [2011] 2 Cr.App.R 6). The effectiveness of such measures could only be assessed in the context of the particular proceedings.

*Trial—good character—*Vye *97 Cr.App.R. 134 direction—no obligation to give such a direction in favour of a defendant with previous convictions—reaffirmation of decision in Hunter [2015] EWCA Crim 631*
MORGANS [2015] EWCA Crim 1997; November 4, 2015
M was convicted of arson with intent to endanger life, the Crown alleging that he had set fire to the victim's home in revenge for the victim having caused M to be arrested by calling the police following a traffic accident. M had a criminal record (as became clear, in outline, at the trial, when the electronic tag he had been wearing at the time shed damaging light on his whereabouts); but his record included no previous convictions for arson or for criminal damage. M therefore appealed on the ground (*inter alia*) that, in these circumstances, he had been entitled to a modified *Vye* 97 Cr.App.R. 134 direction — i.e. a direction that his clean record as regards offences of the type of which he now stood accused made his guilt of that offence less likely. Dismissing the appeal, the Court said that this line of argument had been explicitly rejected in *Hunter* [2015] EWCA Crim 631. "A defendant with convictions is not entitled as of right to any part of the good character direction, for the simple reason that he does not have good character. The approach of the court in *Gray* [2004] EWCA Crim 1074 was expressly disavowed in *Hunter.* If the conviction or convictions qualify under all three heads of being old, minor and irrelevant (which they did not here) the judge must decide whether to treat a defendant as of effective good character. If he does, then the judge should give the direction. Where an offender has convictions that are not old, minor or irrelevant (as here), it is a matter for the judge to decide whether or not to give any part of the good character direction. He or she has a broad discretion, with the exercise of which this court will be reluctant to interfere. We do not intend to do so in this case." Counsel had drafted this ground of appeal before *Hunter* and it should have been abandoned when he read the judgment in that case. The Court which, some months later, had then decided *Styles* [2016] EWCA Crim 1619 was "most unfortunately" not referred to *Hunter*; so no reliance should be placed on *Styles* for the purposes of either seeking a good character direction at trial, or invoking the absence of one as a ground of appeal.

R v McManaman [2016] EWCA Crim 3; January 15, 2015 is an important case on the power of a judge to continue a case without a jury following jury tampering under the Criminal Justice Act 2003 s.46, covering the standard of proof as to the tampering, that the defendant need not be involved in the tampering, the proper approach where tampering is found and the judge's right to require an adequate police investigation. We will be covering it in Cases In Detail in a future issue.

SENTENCING CASE

Conspiracy to transfer of prohibited weapons and ammunition
ATTORNEY-GENERAL'S REFERENCE NOS 128-141 OF 2015 AND 8-10 OF 2016 (STEPHENSON & ORS) [2016] EWCA Crim 54; March 9 2016.
The Solicitor General referred the sentences passed on 17 offenders to the Court under s.36 of the *Criminal Justice Act* 1988. All the offenders had pleaded guilty or were convicted of conspiracy to transfer prohibited weapons and ammunition. The sentencing judge had imposed the following sentences (prior to discount for plea): 19½ years for the leader of the criminal enterprise; between 17½ and 11 years for the armourer and others playing a principal role in the offending; between 11 and 7½ years for those purchasing guns and weapons and between 12 and 5 years for those assisting the purchasers.
Having referred to the comments of Lord Judge CJ in *Wilkinson* [2009] EWCA Crim 1925 concerning the gravity of gun crime and summarising the courts' use of increasingly more severe sentences for such offences, the Court gave the following general guidance:
i) For the leader of an enterprise of supplying guns and lethal ammunition, a very long determinate sentence is required. The sentencing judge appeared to have assumed (due to the minimum term of 11 years imposed in *Wilkinson*) that the maximum determinate sentence was 22 years for a large scale enterprise engaged in the supply of guns. No such maximum was indicated by the Court of Appeal in *Wilkinson*. Here, the appropriate sentence was

25 years, before discount for plea. Later courts should not take this as a maximum. A materially greater sentence would be appropriate if there was any previous conviction for gun offences. It made no difference that the criminal enterprise was engaged in converting or acquiring guns rather than importing them; the essence of the criminality is the organisation of a criminal enterprise to supply guns and lethal ammunition, irrespective of their source. The leader's subordinates should have received sentences reflecting the leader's sentence (before any discount for plea), depending on the role played.

ii) Those seeking to buy a gun and lethal ammunition from this criminal enterprise must have required such items to "kill and maim, terrorise or intimidate". Their sentences should have been in the region of 15 years; significantly higher sentences would be appropriate were there any previous convictions in relation to guns.

iii) The role played by those assisting in these transactions varied, but as Parliament stipulated a minimum sentence of five years for those possessing a gun, sentences with a starting point of less than eight years were inappropriate for those who assisted in putting guns into circulation. Sentences materially greater were required in cases where the assistance was significant. Here the sentences should have ranged from 12 to 8 years, depending on the role played and any previous association with guns.

Substituting significantly heavier sentences, the Court concluded that such heavy sentences reflect the intention of Parliament to punish gun crime so as to deter criminals from dealing in guns and lethal ammunition. Not finding it necessary in this case to revisit the sentencing judge's decision against imposing life sentences, the Court stated that in such cases a sentence of life imprisonment must always be considered.

Case in depth

Jogee — the "parasite" excised

By J R Spencer

The decision of the Supreme Court and the Privy Council in *Jogee* and *Ruddock v The Queen*[1] has attracted so much comment that most readers will already know in outline what has been decided; but to remind us, the Court(s) used the occasion to narrow the criminal law by demolishing a seemingly well-established head of accessory liability.

Heretofore, the law would treat D2 as an accomplice to D1's crime ("crime X") not only where he encouraged or assisted D1 to commit it, but also where he had joined D1 in the commission of a different crime ("crime W"), foreseeing the possibility that D1 might commit crime X in the course of it. The paradigm case was the pre-planned burglary, where D1 had a gun. If during the burglary D1 shot and killed the householder, D2 would be an accessory to the murder, irrespective of any encouragement to shoot, if he knew about D1's gun and foresaw the possibility that he might use it with intent to kill or cause grave injury. This extended form of liability the Court in *Jogee* called "parasitic accessory liability", but it also went by other names. One of these was "joint enterprise": a confusing title, because the phrase is also used to describe the simpler case where D1 and D2 just commit a single crime together — like the initial burglary in the example given. Judges sometimes called this the "plain vanilla" version of joint enterprise[2] (as against, presumably, the "tutti frutti version"). Known by whatever name, this extended form of liability was condemned, in the clearest terms, in a single judgment from Lord Hughes and Toulson, in which Lords Neuberger and Thomas and Lady Hale concurred. So in the hypothetical case about the burglars, D2 would now be an accessory to D1's murder only if he intentionally helped or encouraged D1 to shoot. The fact that D2 knew that D1 carried a gun and foresaw that he might use it is now *evidence* that D2 intentionally provided encouragement or help, but nothing more.

For condemning this extended form of liability their Lordships gave five reasons,[3] but in essence these come down to three. (i) It was, historically, a recent aberration from the guiding principles of the common law governing complicity in crime as traditionally accepted. The source, they said, was the Privy Council decision in *Chan Wing-Siu* in 1984[4]. The law as stated in that case, and those that followed it,[5] was wrong, and should be no more followed. (ii) The doctrine was troublesome to apply in practice. And (iii), it was unduly harsh.

Their first reason has already been attacked by those who deny that *Chan Wing-Siu* was an aberration.[6] As one who commented on the decision at the time without noticing that it was heretical,[7] I suspect that an alternative history of the law of accessory liability could indeed be written if anyone wished to justify the extended form of liability supported by it. But thirty years on, the history of the doctrine seems less important, and less interesting, than the reasons for abandoning it.

The second reason, that the doctrine was difficult to apply, is surely beyond argument. While approving it in *Powell and English* the House of Lords — aware, if dimly, of its potential harshness — glossed it by saying that D2 escaped liability if D1's crime, though foreseen as a possibility in outline, was in some major detail a "fundamental departure" from

1 [2016] UKSC 8, [2016 UKPC 7, [2016] 2 WLR 681.

2 The phrase seems to come from Lord Hoffman in *Brown and Isaac v The State* [2003] UKPC 10.

3 [80] to [84].

4 [1985] AC 168.

5 In particular, *Powell and English*, [1999] 1 AC 1.

6 See James Richardson, CLW 16/07/07.

7 (1985) 44 *Cambridge Law Journal* 8. If I erred I did so in good company. Professor J.C. Smith's note on the case began "The judgment provides a valuable restatement and clarification of this branch of the law …" : [1984] CrimLR, 550.

the crime D2 foresaw; as in *English*, if D2 foresaw that D1 might cause V grievous bodily harm by beating him with a wooden post, but not that D1 would stab him. This led to an explosion of futile cases on what, in concrete terms, constitutes a "fundamental departure" from what else. This luxuriant growth of case-law made the task of explaining the rules — whether to juries, or to law students — particularly difficult[8]. For judges, and for law teachers, the abrupt disappearance of the doctrine must come as a relief.

The third reason was that this extended form of accessory liability was unreasonably harsh. And this criticism was valid, I believe, because it resulted in people being convicted of grave crimes of respect of which, in reality, their blameworthiness was comparatively small.

This harshness was particularly evident in murder cases, because of the way the doctrine reacted with some of the peculiar features of that offence: in particular, the fact that it is a constructive crime, for which intent to do grievous bodily harm suffices and intent to kill is not required, and the mandatory life sentence, which applies equally to accessories[9]. All this might have been acceptable — just — if the doctrine had been limited to crimes that were genuinely pre-planned. But the harshness was much accentuated when the courts tacitly accepted that the doctrine applied equally to spontaneous crimes, like arguments between groups of youths which develop into fights; so making every member of the group a potential murderer if he suspected that any other member had a knife and foresaw the possibility of his using it.

Normal accessory liability arises where D2 helps or encourages D1 to commit a crime, and does this intentionally. But here, by contrast, the *actus reus* was merely helping to create, by the commission of a lesser crime, the scenario in which D1 then chose to commit the greater one; and the *mens rea* was not intention, but mere foresight of a risk. A moral basis for liability as wide as this was approved by Holmes (Sherlock, that is, not the US Justice):

> "I must take the view … that when a man embarks upon a crime he is morally guilty of any other crime that may spring from it."[10]

This is, in essence, the justification for constructive crimes, and for some, this reason may be good enough for imposing criminal liability for the greater offence, and punishing accordingly.[11] But to others, including me, it seems unreasonably severe — particularly when the greater offence is much more serious.

Readers worried that *Jogee* marks a dangerous weakening of the law can take comfort in how much of the previous law on accessories remains the same: including, incidentally, some other parts of it which have been criticised in the past as over-broad. Among the old rules that survive are these:

Joint enterprise, "plain vanilla" version. If a group of defendants jointly plan a crime, all of them are guilty of it when the plan is executed — including those who take no active part in its execution.

Irrelevant ambiguity; the rule in Maxwell[12]. If D2 says "I knew that D1 intended, with my help, to commit either crime X or crime Y, but I did not know which one he had in mind", his ignorance is no defence; in law, D2 is an accessory to crime X, or to crime Y, depending on which one D1 then committed.

Accessory liability for purveyors of equipment. Those who knowingly provide equipment or other forms of assistance for the commission of a crime (or crimes) are then accessories to the crimes committed with the help provided.[13] They need not know the details of the crime to be committed, or even the precise type of crime; and they are treated as "intending" to help if they knew that their behaviour would be helpful, whether or not they desired the crime to be committed; "oblique intention" is enough.[14]

Knowing encouragement by presence. Although mere presence at the scene of a crime does not make the spectator an accessory, a person who is voluntarily present when the principal commits a crime will be an accessory if his presence encourages the principal to commit the crime, and he knows this.[15]

The limited mens rea required for accessory liability for murder. D1, who killed V, is guilty of murder only if he intended to kill V, or intended to cause him grievous bodily harm. But to incur liability as an accessory, D2 need not himself intend V to suffer death or grievous bodily harm; it is enough that he "intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1".[16]

Accessories and constructive crimes. In constructive crimes, a lesser crime becomes a graver one when a given consequence results from it, whether or not D intended or foresaw it. This extended form of liability attaches not only to principals, but also to accessories.

That this is still the rule follows from what was said *Jogee and Ruddock* about accessories to constructive manslaughter. At [96], the Court said:[17]

> If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would re-alise carried the risk of some harm (not necessarily serious) to another, and death in fact results …

This was said with approving reference to earlier cases where this line was taken in the past,[18] and criticism of those that seemed to question it.[19]

So if the demise of "parasitic accessory liability" means that a range of defendants will in future avoid convictions for murder, for many or most of them a conviction for manslaughter now seems their likely fate.

8 In the latest edition of *Smith and Hogan*, for example, of a 74-page chapter on accessories, 22 are devoted to explaining the mysteries of parasitic accessory liability.

9 Together with the "Blunkett tariff" under Sch.21 of the CJA 2003.

10 "The Priory School", in Conan Doyle, *The Return of Sherlock Holmes.*

11 Instructive, if depressing, was the coverage of the *Jogee* in *The Sun* – and some of the readers' comments on the website: online at http://www.thesun.co.uk/sol/homepage/news/6939637/Hundreds-of-convicted-murderers-could-appeal-following-landmark-court-ruling.html It was populist pressure of this sort that led to the enactment in 2006 of the new offences of causing death by careless driving, and causing death by driving when unlicenced, disqualified or uninsured (RTA 1988 ss.2B and 3ZB).

12 [1978] 1 WLR 1363; approved in *Jogee* at [14]-[15].

13 *Bainbridge* [1960] 1 QB 129; this case was not mentioned in *Jogee,* but the principle was affirmed in [10].

14 *National Coal Board v Gamble* [1959] 1 QB 11, expressly approved in *Jogee* at [9], [10], and [99].

15 *Jogee*, at [11].

16 *Jogee,* at [90]; and earlier, at [10].

17 *Jogee*, at [96].

18 In particular, *Reid* (1975) 62 Cr App R 109, discussed at length in [34]-35].

19 Notably *Anderson and Morris* [1966] 2 QB 110, discussed at [33].

Comment

The Guidelines have finally arrived: "When the Levee Breaks"

By Gerard Forlin QC[1]

This is the first of a two-part article on the new Sentencing Council Definitive Guidelines on Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences.[2] These came into effect in 2016 and apply to any relevant cases heard on February 1 or after that date, irrespective of when the offence occurred. This first article will review the actual Guidelines themselves; the second will discuss some of the real practical and technical issues involved.

The new Guidelines followed a consultation exercise to which, somewhat surprisingly, only 104 organisations and individuals responded. Very little has changed from the consultation document, and although we will never be sure, industry may have lost a useful opportunity to get changes by its failure to engage with the consultation process.

Further, in December 2015 and January 2016, before the Guidelines came into force, fines had already started to dramatically increase, perhaps as judges warmed up to this new regime. Of this, some striking examples can be given. In December 2015 Total were fined £1.25 million after a gas leak into the North Sea. In February 2016, Conoco Philips were ordered to pay £3 million after pleading guilty to gas releases on the Lincolnshire gas gathering system in December 2012, and ordered to pay £159,459 costs. (As the sentencing hearing began in January 2016 the Guidelines did not apply.) In January 2016 Balfour Beatty were fined £1 million after a worker died repairing a central reservation barrier, UK Power Networks (Operations) Ltd were fined £1 million plus costs after a jogger ran into a fallen 11,000-volt wire, and CRO Ports London Limited were fined £1.8 million after pleading guilty to a breach of s.2 of the Health and Safety at Work Act in connection with an accident in which a worker suffered multiple fractures and nerve and ligament damage to his left arm. (This last case, it should be noted, was not a fatality.) These fines seem generally much higher than hitherto, and may be a precursor of what is to come.

The new Guidelines represent a significant change of emphasis in the approach to sentencing these types of offences. Hitherto, the approach was largely based upon the actual consequences of the offence. For the future, however, the courts when sentencing for health and safety offences are enjoined to remember that these are:

> "… concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. The offence is in creating a risk of harm."

The new approach will be based on risks of harm, linked to the various tables which the Guidelines contain. It seems likely that, in many cases, this exercise will now require expert evidence (including medical evidence) at *Newton* hearings in order to ascertain the actual risk and the medical prognosis of physical and mental injury.

The Guidelines contain various signposts as to how to assess the appropriate fine. These include the seriousness of the harm created by the offence and the likelihood of that harm arising. The Guidelines tell us that the Court needs to consider in the round (1) whether the offence exposed a number of workers or members of the public to the risk of harm and (2) whether the offence was a significant cause of [the] actual harm. These factors may in turn affect the harm category or category range.

The next step requires the court to focus on annual turnover or equivalent (including possibly group accounts) and other financial factors including pension provisions and Directors' remuneration. It is important to note the focus is on turnover, rather than solely upon profit. This step too seems likely to herald an increased use of expert evidence: this time from accountants and pension experts to opine on the financial health (or ill-health) of the defendant.

For a practical example, let us take the case of a very large organisation which has a turnover or equivalent of £50 million and over. A table on page seven states that in very high culpability cases involving a high likelihood of harm involving death, physical or mental impairment or significantly reduced life expectancy the "starting point" should be £4 million and the "category range" is £2.6 million to £10 million. Somewhat ominously the Sentencing Council goes on to say that:

> "Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence."

Despite calls in the consultation exercise for a more precise definition of what this meant, the Guidelines do not offer any further insight. For the thousands of UK organisations this caveat may cover, this is alarming.

The Guidelines then set out a non-exhaustive list of other relevant increasing factors, such as previous convictions and cost-cutting at the expense of safety; and conversely, factors tending to reduce the sentence, such as self-reporting and co-operation and, very interestingly, a new factor of high level co-operation with the investigation, beyond that which will always be expected. This new factor seems likely to engender lively debates as to what level of co-operation is to be expected, and what level of co-operation goes beyond it.

The Guidelines then state that the court should *"step back"* and review whether the proposed fine, based on turnover, is proportionate to the overall means of an offender and

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2 *https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf*

whether it is sufficiently substantial to have a real economic impact, sufficient to bring home to both management and shareholders the need to comply with health and safety legislation.

The last three steps in the exercise include considering what other factors may warrant adjustment of the proposed fine. These include the impact the fine would have on an offender's ability to improve conditions in the organisation so as to comply with the law, factors (like those already mentioned) which operate to mitigate the sentence, and finally a reduction for a guilty plea. (In this context we should also look ahead to the new Sentencing Council Consultation exercise in February 2016 regarding reductions in sentence for a guilty plea, which could eventually lead to a substantial reduction in the final credit for guilty pleas in these types of cases.) The final step under the Guidelines involve compensation and other ancillary orders, considering the totality principle, and the giving of reasons pursuant to s.174 of the Criminal Justice Act 2003.

The Guidelines also deal with corporate manslaughter and here the harm and culpability factors are assessed by asking:

> "(a) How foreseeable was serious injury?
>
> (b) How far short of the appropriate standard did the offender fall?
>
> (c) How common is this breach in this organisation?
>
> (d) Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?"

In my view, these factors are also likely to lead, even after guilty pleas, to many *Newton* hearings complete with expert evidence. In the most serious cases involving organisations with a turnover above £50 million, the starting point is set at £7.5 million and the category range is £4.8 million to £20 million or greater in very large organisations. In instances where turnover is up to £50 million, the starting point is £3 million and the category range £1.8 million up to £7.5 million.

For individuals charged with health and safety offences, the Guidelines set out a series of factors to determine the relevant offence category. In cases where there is a very high culpability, as where the offender intentionally breached or flagrantly disregarded the law and created a risk of harm in a high category, such as death or grave physical or mental impairment, the starting point is 18 months custody and the range is 1–2 years. This represents a lowering of the previous custody threshold, and means more defendants now risk going to prison for longer periods. Of course, fines will also increase for individuals.

For a recent example, on February 5 Sherwood Rise Limited (providers of care homes) pleaded guilty to corporate manslaughter. A director was sentenced to 38 months imprisonment for manslaughter by gross negligence and disqualified. The manager of the care home was sentenced to one year's imprisonment suspended for two years and disqualified as a director for five years after being convicted under ss.3 and 37 of the Health and Safety at Work Act.

The Guidelines also cover food and hygiene offences for organisations and individuals.

The new Guidelines clearly represent a major gear-change in the approach to sentencing of both organisations and individuals. This development has already sent a chill through Corporate UK and many defendants, particularly larger corporate ones, and individuals. Further, as these cases often take a long time to come to court, a particular source of grievance for some defendants is likely to be that their old cases are now sentenced under the new and harsher rules.

These eye-watering changes (alongside other recent regulatory changes) must also raise a legitimate concern that some larger organisations may now consider scaling down their UK operations. Much bigger fines will also trigger much more adverse publicity and therefore have a real impact on reputational factors: big businesses do not tend to relish such developments.

(To be continued.)

Feature

Dishonesty in the first LIBOR trial

By Jonathan Rogers, Senior Lecturer in Laws at University College London

The recent trial of Mr Tom Hayes in August 2015 on eight counts of conspiracy to defraud over the manipulation of the Japanese Yen LIBOR (London Interbank Offered Rate) received much publicity. On appeal in December 2015, his convictions were upheld but his sentence was slightly reduced.

Undoubtedly the Court of Appeal had been right to dismiss the appeals against his convictions, which was based mainly on the judge's directions to the jury on the element of dishonesty. But one part of the Court's decision deserves further scrutiny. If the decision in *Hayes*[1] is taken at face value, the honesty of the defendant's conduct has to be viewed in isolation from any similar activity which is perpetrated separately by others.

The facts of Hayes

At the relevant time, the LIBOR for various currencies was determined by the British Banking Association from time to time by reference to submissions from different panel banks as to the interest rates which they were able to procure for inter-bank lending. It was understood that all banks had to submit such estimates in good faith and excluding their

1 [2015] EWCA Crim 1944.

own narrow financial interests, and without reference to the intended submissions of other panel banks. It was admitted that Mr Hayes had conspired with others to submit interest rates on behalf of his employer bank in relation to the Japanese Yen which did not reflect a detached estimate of the interest rates which his bank could procure and which was designed to influence the eventual LIBOR rate.

Mr Hayes gave evidence that he believed such activity to be relatively commonplace. There is rarely one single possible LIBOR estimate and inevitably many banks would prefer a plausible estimate which also furthered their own interests. He also adduced evidence of attempts by traders to influence LIBOR submissions, and documents showing that the British Banking association was aware that LIBOR submissions were "inaccurate" and that the Financial Services Authority (as it then was) shared that view and believed that the benchmark suffered from "flawed governance". He wished to argue that the honesty of his agreements should be judged against that background.

Dishonesty

As is well known, at common law, there are potentially two questions to be asked when deciding whether an accused person was "dishonest", applying *Ghosh*.[2] The first question is whether the defendant's conduct would be regarded as dishonest by the ordinary standards of reasonable and honest individuals, as represented by the jury itself. The second question, which only arises if the first question has been decided against the defendant, is whether the defendant (wrongly) believed at the time that what he did was not dishonest by those same standards. This second limb requires the defendant effectively to have wrongly second-guessed the jury's opinion on the first question.

Hayes wished to argue that the evidence of the prevalence of "inaccurate" LIBOR assessments was relevant to both limbs of *Ghosh*. Indeed, in this case, the defence seems to have been particularly concerned to argue that the conduct was not dishonest under the first limb, rather than merely relying on Hayes's beliefs in the second limb. There were at least two good reasons for this. First, Mr Hayes had already confessed that he knew his actions were dishonest, albeit that he would now testify that he had said this because he thought it was necessary in order to be tried in England rather than the USA. Second, not all of the extensive evidence of LIBOR manipulation was known to Hayes at the time, and so could not be relevant to supporting his belief in the honesty of his conduct.

But the trial judge, Cooke J, ruled that he would direct the jury not to consider evidence of the wider context of LIBOR submissions (whether or not known to Hayes himself) when considering the first limb of *Ghosh*. This was because the only possible relevance of such evidence would be to invite the jury to have regard to what other bankers thought to be honest behaviour; but that was an irrelevant consideration. The Court of Appeal, presided over by the Lord Chief Justice, agreed and said curtly (at [29]):

> It is clear therefore in our view that the only purpose of arguing that the evidence to which we have referred was relevant, was that the jury would be asked to set an objective standard for a market or a group of traders (whatever that standard might be) and not the ordinary standards of honest and reasonable people.

Thus, to some extent, Hayes' actions were to be judged in a vacuum, as though he and his co-conspirators were the only ones involved. The retort to that, as we can see, is that the similar activities of others are not relevant to any coherent argument that the conduct might have been honest by "ordinary" standards.

The relevance of context to dishonesty

To be sure, adducing evidence of wrongdoing by others should not be relevant if its only purpose is to invite a jury to infer a lesser standard of honesty within some community and to apply it themselves. In this sense, the decision in *Hayes* is a logical consequence of the *Ghosh* test. Perhaps the same should apply too where inviting the jury to consider other standards of honesty seems to be the defendant's "main" purpose too; certainly such a rule might facilitate trial management in complex fraud trials where there is already a large volume of more important evidence for the jury to consider.

Some may think, as a result of *Hayes*, that evidence of similar illegal behaviour by others will always be irrelevant to the first limb of *Ghosh*. But in some cases at least, such evidence of the "context" may help to explain the defendant's conduct in ways which might seem relevant even to the "reasonable and honest" juror who is carefully applying only the "ordinary" standards of honesty. Two examples spring to mind (and doubtless there are others).

The first example is where the evidence shows that the primary victims, or those appointed to safeguard their interests, had shown themselves to be indifferent to being defrauded.

Indeed, it would seem that the Crown Prosecution Service took such a "context" into account when deciding to charge only a handful of MPs with fraud over their expenses claims. Several cases seem to have been dropped on the basis that dishonesty would not be disproven, even though it could probably be proven that the MPs were at least "reckless" as to the truth behind their claims.

Presumably it was anticipated that they would claim that others did it too, in order to show that it was widely understood that a liberal expenses system was operating as though to compensate MPs for relatively low wages. It could then be argued that even on "ordinary" standards (and not by some other standard applied by MPs) it was not dishonest in some circumstances to submit modest but excessive expenses claims.

A second example might be where the evidence shows an environment of competition with others, such that the person who is scrupulously honest stands to lose out to dishonest competitors. Imagine a poker game as played out

2 [1982] QB 1053.

in several movies, where most players are trying to cheat their way to win the big hands.

When one new participant to the game realises belatedly that he has lost many rounds because one or more parties has a card hidden up his sleeve with which to win, one might surely argue that he is not dishonest if he starts to do the same, at least in order to recoup approximately the amount which he believes himself to have unfairly lost. At the very least, it is possible here to see that the activities of others might be relevant to an "ordinary" appraisal of D's actions, without necessarily inviting a jury to adopt the sense of honesty of the gambling community.

Many a jury might think that in such a case all the cheating players are dishonest. But this does not seem inevitable, at least in the case of one who did not initiate the cheating, and did not seek to make a large profit overall.

Such cases are admittedly likely to be unusual. More often the main relevance of showing activities by others may well be to invite the jury to apply other standards of honesty. Quite probably the case of *Hayes* itself did fall into this category. Even if the authorities themselves knew full well of the shortcomings of LIBOR and were slow to resolve the situation, this is not the same as being indifferent to receiving insincere estimates. Indeed, when fixing the final rates, the British Banking Association often excluded altogether estimates in the top and bottom quarters of the range, presumably as a safeguard against distortion. The case of Mr Hayes also seems different from the case of the cut-throat poker players. Mr Hayes' actions were systematic, sought to influence others and his actions were presumably likely to affect many who had no part in the operation of the LIBOR.

So the Court of Appeal's decision on the facts of *Hayes* seems defensible; the main impact of the evidence could well be said to inform the jury of other standards of honesty. But it should not be thought that contextual evidence of irregular activities by others is always irrelevant to the first limb of *Ghosh*.

Misunderstood points about dishonesty

It is submitted that on two other points concerning the *Ghosh* test, errors were made, though neither affects the safety of the conviction; indeed the first error favoured the defendant.

The first point is that the trial judge nonetheless admitted the evidence which suggested manipulation by others on the basis that it was relevant to the second limb of *Ghosh*. This was over-generous, though the Court of Appeal did not pick up on it. Hayes could only rely on the second limb of *Ghosh* if he believed that reasonable and honest people would have found his actions to be honest by ordinary standards. But he can surely only be heard to have believed that he thought that a properly directed jury, *considering only relevant evidence*, would have thought that he acted honestly.

If the evidence of LIBOR manipulation by others was irrelevant to the appraisal of ordinary standards, then it was equally irrelevant to the mistaken belief that the defendant is allowed to rely upon in the second limb. An analogy may be made with consent in sexual offences; although D is allowed to rely upon a reasonable belief in consent "in the alternative", he must have believed in facts which would in fact amount to consent in law.

This means that if the evidence was rightly irrelevant to the first limb of *Ghosh*, then it should not have been admissible at all. Be that as it may, the fact that the jury did consider the evidence surely confirms the safety of the conviction. For, even if it were thought, *pace* the Court of Appeal, that the evidence should have been relevant to the first limb of *Ghosh*, it is very hard to argue that the judge's directions affected the verdict of the jury, since they considered the evidence in the context of a largely parallel argument in the second limb of *Ghosh*, and still convicted.

The second point arises from the submission of defence counsel that some of the evidence of LIBOR manipulation which was *unknown* to Hayes could be admitted to the first limb of the *Ghosh* test.

The significance of this submission was also not picked up on, presumably because none of the contextual evidence was thought to be relevant. But if any evidence of manipulation by others had been thought to be relevant, then surely only those facts which were known or suspected by Hayes, and which might thus have influenced his conduct, should have been relevant. Otherwise, the cheating poker player, considered above, might evade a finding of dishonesty on the first limb of *Ghosh* even if he had no idea that others had been cheating too. The first limb of the *Ghosh* test is akin to a criminal law defence whereby the defendant's conduct is measured by communal values. But his "conduct" includes his state of mind and his reasons for acting as he did; indeed it is his reasons which should be of special interest to the jury when they are asked to measure his conduct by ordinary standards.

These two points can be shortly summarised thus. Evidence which is properly irrelevant to the first limb of *Ghosh* is also irrelevant to the second limb. The only exception is that at the second limb it is relevant, indeed necessary, for D to give evidence that he had considered the honesty of his actions from the perspective of the ordinary person applying his own values, and had concluded that he was not acting dishonestly. Evidence of the defendant's knowledge and beliefs in facts and motivations for acting is equally relevant to both limbs.

Conclusions

The *Hayes* decision may serve as an invitation to narrow the scope of evidence of parallel offending behaviour as purportedly relevant to the first limb of *Ghosh* in most, though not all cases. If it is appreciated that in these cases, the evidence should equally be irrelevant to the second limb of *Ghosh*, then there may be significant scope for trial judges to exclude some such evidence altogether and reduce the duration of some serious fraud trials.

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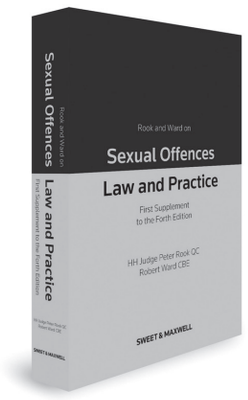

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