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Cases in Brief

Drink driving/in charge—evidential breath test—initial "ambient fail" message—whether constable entitled to conduct further test—whether result of roadside test admissible as evidence of reliability of evidential machine; magistrates' court appeal by way of case stated—importance of representations if draft case deficient

DPP v VINCE; KANG v DPP [2016] EWHC 3014 (Admin); November 25, 2016

K's roadside breath test showed 157 mg of alcohol per 100 ml of breath. At the police station, an initial attempt to use a *Lion Intoxilyzer* produced an "ambient fail" message, because (so the district judge found) K had been holding the breath tube too close to his mouth. The officer restarted the machine and obtained a lower reading of 143 mg per 100 ml. The District Judge found that the machine was working perfectly.

(1) The officer had been entitled to restart the machine and attempt a successful test – the situation was analogous to that in *Denny v Director of Public Prosecutions* [1990] RTR 417, where the officer was entitled to use a machine at another police station where that at the first had not been working. Indeed, it was doubtful that, after the "ambient fail" test, the officer could have required a blood or urine sample instead, as K submitted, as the conditions for so doing in the Road Traffic Act 1988 s.7(3) would not have been satisfied. As the test (i.e on the second attempt) was successful, requirements to enter reasons for the failure of a test on the relevant forms were not engaged, and the failure of the officer to do so did not render the test invalid or inadmissible.

(2) However, where an officer continued with a further test after an "ambient fail" message, it would be necessary for the magistrates' court to determine whether the machine was, in fact, operating correctly. In K's case, the District Judge relied in part on the roadside test to come to the conclusion that the machine was operating successfully. While a constable was empowered to require a roadside breath test under the Road Traffic Act 1988 s.6, it was merely a preliminary test for the purpose of obtaining an initial indication that a person's breath alcohol was over the limit. The specimens of breath which establish whether or not a person has committed an offence were those provided at the police station pursuant to s.7: see *Smith v Director of Public Prosecutions* [2007] EWHC 100 (Admin), [2007] RTR 36, [26]. However, the District Judge was entitled to rely on the roadside test as one piece of evidence among others supporting the reliability of the station procedure. The District Judge did not treat the roadside test as the basis for K's conviction, which was based on the s.7 test. The only relevance of the roadside test was that it was one piece of evidence confirming the reliability of the results obtained at the police station.

(3) The DPP appealed against the magistrates' finding that there was no case to answer in V's case. The drafting of the case was so poor that it was not possible for the Court to determine whether the magistrates' reasoning was flawed (as in some respects it appeared to be) or reasonable. In the circumstances, the appeal must be dismissed, the alternatives – to require redrafting, when the CPS had made no representations, or to start again with a new panel – were even less satisfactory. The case showed the importance of the parties considering a draft case stated carefully and making representations if it were considered deficient. On an appeal by way of case stated, the Court could only consider the facts therein stated. It was thus vital that the case contained all the matters that should be before that Court. Evidence not referred to in the case may not be referred to, even if it were undisputed before the lower court. If the lower court refused to amend the case, and the parties did

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not agree that it should be amended, an application for its amendment could be made under the Senior Courts Act 1981 s.28A. The result of the failure of the prosecution authorities to do this in V's case was that it was not possible to say that the magistrates erred in law in the disposal of her case.

Duress—elements of defence—whether indirect transmission of threat excluded defence—relationship between defence of duress and coercion in the context of an affectionate relationship—withdrawal of defence; appeal—length of written submissions

BRANDFORD [2016] EWCA 1794; December 2, 2016

(1) The court outlined the current law of duress. (a) Duress was exonerating, and so for policy reasons was to be narrowly and carefully defined: *Hasan*; [2005] UKHL 22, [2005] 2 AC 467. (b) The accepted test was formulated by Lord Lane CJ in *Graham* [1982] 1 All ER 801, approved in *Howe* [1987] AC 417: first limb: may the defendant have been impelled to act as they did because, as a result of what they reasonably believed the threatener had said or done, they had good cause to fear that if they did not so act the threatener would kill or seriously injure them? Second limb: if so, would a sober person of reasonable firmness, sharing the characteristics of the defendant, have responded to the threat by taking part in the offence? (c) Only a very limited category of threats qualified, traditionally confined to death or serious injury (*Hasan*), but they were not confined to those directed to the defendant, and included family members and those for whom the defendant would reasonably regard themselves as responsible. The threat must carry immediacy. Where the second limb of the test was reached, it was, save exceptionally, a jury issue: *David Lyness* [2002] EWCA Crim 1759, [24]–[25]. (d) A person could not rely on duress if they had voluntarily exposed themselves to the risk of duress by, for instance, joining a criminal gang. Voluntary association was not confined to foresight of coercion to commit crimes of the kind with which the defendant was charged. Foresight must be judged objectively. (e) Where there was evidence sufficient to raise an issue of duress, the burden was on the prosecution to disprove it to the criminal standard. (f) Where no reasonable jury properly directed could fail to find the defence of duress disproved, the judge was entitled to withdraw it from the jury: *Bianco* [2001] EWCA Crim 2516; but the power was to be exercised with caution: *Hammond* [2013] EWCA Crim 2709.

(2) In B's case, the judge had been wrong to emphasise what she (inappropriately) referred to as "hearsay duress", that is that the threats (which were directed at B's boyfriend) had been relayed to B by the boyfriend. Although the issue of indirect transmission of threats had not been raised in the authorities, direct transmission was not one of the limits canvassed. The significant question was not whether the threat was directly or indirectly relayed, so much as its immediacy, imminence, the possibility of taking evasive action, the question of whether B reasonably believed the threat, her response to it and its objective reasonableness (the sober person test). It was very likely that the more directly a threat was conveyed, the more it would be capable of founding a defence of duress. Conversely, the more indirectly the threat was relayed the more readily the prosecution may disprove it. However, the mere fact that the threat was conveyed indirectly did not constitute a fatal bar to the defence. All must depend on the circumstances, of which the manner in which the threat was conveyed was but one, however important.

(3) The judge had also been wrong to suggest that there was "a basic irreconcilability" between pressure based on a relationship and fear. They were different, in that the first exploited affection or infatuation, not fear. But they were not irreconcilable and may operate cumulatively. The judge's reasoning could thus not be supported.

(4) The question remained: should the defence have been withdrawn? The Court noted that the inquiry was essentially the same as that undertaken by the Court when considering the safety of a conviction where there had been an error at trial. The Court asked whether despite that error the jury *must* have convicted; if yes, the conviction was safe; if no, and thus even if a jury may very well have convicted, the appeal must be allowed. A decision to withdraw a defence from the jury on faulty reasoning required particularly careful scrutiny before it could be upheld. On the other hand, judges should not be deterred from a "robust and reasoned approach where fanciful defences of duress are raised": *Hammond*. On the facts of the case, it was, despite the flawed nature of the judge's decision, one of the rare cases where a judge was entitled to withdraw the defence.

(5) By way of postscript, the Court added that there had been a 39 page submission for B's conviction appeal and a further 15 page submission on sentence (and lengthy submissions in respect of renewed sentence applications by co-defendants). Written submissions of this length were unnecessary, unhelpful and unacceptable. It was much to be hoped that this issue would soon be robustly addressed.

Evidence—expert—ultimate issue—experts providing opinion as to—proper approach to expert evidence by provision of yardstick for jury assessment—directions to the jury as to; gross negligence manslaughter—directions as to standard of gross negligence

SELLU [2016] EWCA Crim 1716; November 15, 2016

In the trial of S, a surgeon, for gross negligence manslaughter, prosecution expert witnesses had been allowed, and indeed encouraged, to proffer an opinion as to whether S's conduct had been grossly negligent, that is, on the ultimate issue. The law had developed to the point where an expert had been permitted to give his or her opinion on what has been called the ultimate issue but, in such a case, the judge was required to make it clear to the jury that they were not bound by the expert's opinion (see *Stockwell* [1993] 97 Cr App R 260, 265-6; and *Brennan*, [2014] EWCA Crim 2387, [2015] 1 WLR 2060; noting the significance of the psychiatric questions in relation to diminished responsibility). In S's case, for the jury to reach an adverse conclusion in relation to negligence, they had to be sure that his standard of care fell below what should reasonably have been expected from a competent surgeon in his specialism. In order to consider that question, the jury were entitled to receive evidence from appropriate medical experts of their opinion as to what should reasonably have been expected from such a surgeon and so to decide whether S fell below the requisite standard. However, whether any such negligence was "gross" (which was not a medical term) involved an evaluation for the jury. Medical opinion may be better informed on that point but it

was not and could not be determinative. Experts might be able to place negligence on a spectrum (and examples can be given of that spectrum) but such assistance needed to be considered by the jury in the context of all the circumstances as the jury find them to be, rather than as evaluated by the experts: see the affirmation of the importance of the jury as final decision maker in *Pora* [2015] UKPC 9, [2016] 1 Cr.App.R. 3 (PC), where Lord Kerr adverted to the danger of an expert expressing an opinion being taken as an unalterable truth. Analysing the evidence, there were occasions on which the experts did provide a yardstick against which the jury could consider whether the criminal test had been met, but others were little more than assertion. The inherent dangers referred to by Lord Kerr in *Pora* did not appear to have been appreciated or guarded against. The jury was left on its own to trawl through the differing descriptions, which were adduced in evidence essentially by leading questions asking whether the relevant behaviour was gross negligence. In circumstances where those conclusions were not subject to any more detailed explanation and sat alongside a series of other descriptions which were also not expanded upon, the danger existed that the jury may have merely accepted without more that S had been grossly negligent on those occasions where an expert so stated. Thus, notwithstanding the judge's brief direction, the jury's role as the ultimate decision maker may have been supplanted. That the experts gave their evidence in this way did not provide sufficient ground for allowing the appeal, but it did provide the background to the judge's directions. As to those directions, no particular formulation was mandatory, but the jury must be assisted sufficiently to understand how to approach their task of identifying the line that separates even serious or very serious mistakes or lapses from conduct which was "truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal", to adapt the direction quoted in *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr.App.R 21. The judge in S's case did not do so. Combined with the failure to emphasise sufficiently that whether there was gross negligence was a matter for the jury and not the experts, and the way in which the expert evidence came out, the inadequacy of the directions rendered the conviction unsafe.

Homicide—diminished responsibility—compliance with European Convention on Human Rights Art. 6—whether necessary to define "substantial" in relation to impairment of mental functioning; loss of control—relevance of personality disorder to circumstances of D (Coroners and Justice Act 2009 s.54(1)(c))

WILCOCKS [2016] EWCA Crim 2043; November 3, 2016

(1) The reverse burden of proof in respect of diminished responsibility imposed by the Homicide Act 1957 s.2(2) was not arbitrary or unreasonable and not inconsistent with the European Convention on Human Rights Art. 6 for the reasons given in *Foye* [2013] EWCA Crim 475. The Court rejected a submission that W's case, which post-dated the amendment to s.2(1) by the Coroners and Justice Act 2009 s.52(1), was to be distinguished from *Foye*, which pre-dated that amendment. The terms of s.2(2) had not changed. Whatever criticisms had been made of *Foye* (the Court referred to Professor Andrew Ashworth QC, [2013] Crim LR 849), the Court would generally consider itself bound by that judgment, against W's submission that it was wrongly decided, a conclusion reinforced by the fact that in that case the relevant point had been certified as a point of law of general public importance, and the Supreme Court had declined leave to appeal. The absurdity outlined by Lord Judge in *Asmelash* [2013] EWCA Crim 157, [2014] QB 103, [33] was that between different rules on the relevance of voluntary intoxication as regards diminished responsibility and loss of control, not burden of proof. It was nonsense to suggest, as W had submitted, that the burden should shift according to the individual facts of a case.
(2) The judge had not been wrong not to define "substantial" in relation to impairment of mental functioning. There was, as yet, no authority requiring a judge to do so; but there was authority to the effect that there was no such necessity. In any event the Court were not persuaded that on the facts of this case the provision of a definition of "substantial" would have made any difference.
(3) In directing the jury on the relevance of W's alleged personality disorders to the objective test for loss of control (Coroners and Justice Act 2009 s.54(1)(c) "a person … in the circumstances of D, might have reacted in the same or a similar way"), the judge had been right to tell them that for the disorder to be relevant, it must go further than simply reducing the appellant's general capacity for tolerance and self-restraint. He gave only one example of how the personality disorder might be relevant to the issue of loss of control (that it would be a relevant circumstance if, the disorder having caused him to attempt suicide, he had been taunted that he should have killed himself), but he did not exclude other possibilities.
[On point (2) above, see now *Golds*, p.4 below.]

SENTENCING CASE

Terrorism; meaning of "members of the public" in s.226A(1)(b) of the Criminal Justice Act 2003; comparison between facts of cases

ABDALLAH [2016] EWCA Crim 1868; 8 December 2016

Considering several cases arising from the decision in *Kahar* [2016] EWCA Crim 568 concerning sentences imposed for convictions s.5 of the Terrorism Act 2006, the court observed that none of them gave any basis for reconsidering the guidance in *Kahar.* This could readily be applied to each of the cases before the court and should therefore continue to be applied pending the issue of guidelines by the Sentencing Council.
The Court highlighted two matters of general application:

(i) The practice of some advocates in seeking to address the court on a comparison between the facts of cases.

(ii) The meaning of "members of the public" in s.226A(1)(b) of the Criminal Justice Act 2003 (the CJA 2003).

Attempts to compare the facts of cases

In one of the appeals (*Shazib Khan*), an attempt was made to contrast the facts in *Kahar* and other cases, as part of a submission that the offending fell into a less serious category. This type of argument is misconceived. Such an approach had been repeatedly condemned as unhelpful when considering guidance given by the Court of Appeal and when

considering the application of a guideline of the Sentencing Council. One of the chief purposes of giving guidance in *Kahar* was precisely to avoid attempts to make detailed comparisons between cases which are highly fact sensitive. For the same reasons, the descriptions of the guideline levels are not intended to be mechanistically applied. They deliberately focus on "typical" cases. The court will not pay any regard to such comparisons.

Dangerousness: members of the public

One of the appeals (*Gray*) raised the question of whether the phrase "members of the public" in s.226A(1)(b) of the CJA 2003 referred only to members of the public in the UK or whether it included members of the public of countries other than the UK. By this sub-section a necessary precondition for an extended sentence is the existence of:

"significant risk to members of the pubic of serious harm occasioned by the commission by the offender of further specified offences", but it does not define "members of the public". The court concluded that the phrase must be intended to include the public in other countries.

The "specified offences" are listed in Pt.1 of Sch.15 to the CJA 2003. From the time of its enactment, this has included offences which can be committed outside the UK (see [12] of the judgment for examples). The list of specified offences has been added to by amending legislation from time to time. Relevantly for the purposes of this case, the Schedule lists offences contrary to ss.54, 56, 57 and 59 of the Terrorism Act 2000, as well as offences under ss.5, 6, 9, 10 and 11 of the Terrorism Act 2006. Section 17 of the Terrorism Act 2006 has given the courts of England and Wales universal jurisdiction in relation to offences under Pt 1 of that Act wherever those offences are committed. It is clear therefore that Parliament has given attention to terrorism legislation which can have transnational effects within the framework of the dangerousness provisions.

It would therefore make no sense to suppose that, where there is a significant risk that the offender will commit further specified offences outside the UK, Parliament intended to confine the members of the public whose safety the court may consider to people within the UK. However, it will only be relevant to consider the risk of harm to such persons where the further specified offences are ones which, in view of their territorial scope, are capable of causing harm abroad.

Cases in Depth

Golds [2016] UKSC 61 (on appeal from [2014] EWCA Crim 748)

By Ronnie Mackay[1]

The Supreme Court in this case had to consider the proper meaning to be given to the word "substantially" in s.2 of the Homicide Act, which creates the partial defence of diminished responsibility. In doing so it dismissed the appeal and upheld the appellant's murder conviction. In the course of his judgment (in which the other members of the court concurred) Lord Hughes confirmed that the phrase "substantially impaired", although identical under the old and new diminished responsibility pleas, was now part of a more structured process which requires the jury:

> "...to address successive specific questions about (1) impairment of particular abilities and (2) cause of behaviour in killing. Both are of course relevant to moral culpability, but the jury is not left the same general "mental responsibility" question that previously it was. The word used to describe the level of impairment is, however, the same" [14].

There follows a careful assessment of the relevant authorities which in Lord Hughes' opinion, unlike that of the Court of Appeal, display no inconsistency and none of which supports the contention that any impairment beyond the trivial could be regarded as "substantial". Accordingly, although the word "substantial" is:

> "...capable of meaning either (1) "present" rather than illusory or fanciful, thus having some substance" or (2) "important or weighty", as in "a substantial meal" or "a substantial salary". The first meaning could fairly be paraphrased as "having any effect more than the merely trivial", whereas the second meaning cannot" [27],

it had to be accepted that the word must take its meaning from its context. The relevant authorities[2] clearly showed:

> "that in the context of diminished responsibility the expression 'substantially' has always been held, when the issue has been confronted, to be used in the second of the senses identified above" [28].

This conclusion was also influenced by policy, namely the need to recognise that diminished responsibility effects a radical alteration in the offence:

> "…it is appropriate, as it always has been, for the reduction to the lesser offence to be occasioned where there is a weighty reason for it and not merely a reason which just passes the trivial" [36].

While as Lord Hughes recognises there will be some cases where debate about "substantially" will not arise, where it does it should be made clear that this is an ordinary English

1 Professor of Criminal Policy and Mental Health, Leicester De Montfort Law School.

2 Discussed by Barry Mitchell and Ronnie Mackay in their comment on the Court of Appeal decision, [2015] 4 *Archbold Review* 7-9.

word which involves a matter of degree.

Although the decision is in principle a decision for the jury, Lord Hughes also referred[3] to my empirical research dealing with the original version of s.2 which showed that a large proportion of diminished responsibility pleas were then being accepted by the Crown and so did not come before a jury.[4] This means that in diminished responsibility cases the role of the psychiatrist was particularly important; and now even more so in the light of changes implemented by the new s.2, which more closely ties the partial defence to matters of psychiatric expertise. In which case, it is now clear that when psychiatrists consider this term they must do so in the sense in which it is used by the Supreme Court in *Golds*.

What might this mean for the future of the diminished responsibility plea? The new wording of the reformed s.2 had already made it clear that the defendant now has to prove more than under the old plea – or at least, that under the new law there are additional elements to be proved. But now with the further need for "substantial impairment" to go beyond the "more than trivial" to such a degree that it can be regarded as "significant", "severe" or reaching the level of "a serious degree of impairment" (or whatever other term might be regarded as appropriate) there is an extra hurdle for the defendant to get over before he can succeed under the new plea. Furthermore, with the degree of required impairment confirmed as needing to reach a level more towards "total" it seems probable that psychiatrists will now be more inclined to disagree on this issue than in the past.

A recent empirical study by myself and Barry Mitchell[5] shows that under the new plea there are more contested cases than under the original s.2, and also confirms that when diminished responsibility goes to trial the jury is more likely to reject the plea and convict for murder. This was true even before the decision in *Golds*; so one must now ask how the stricter approach towards "substantially impaired" will impact upon these figures.

The new wording of the partial defence of diminished responsibility was originally said to be a mere "modernisation" and "clarification" exercise, but in reality it seems to be rather more than this. An unintended consequence is that the number of murder convictions resulting from failed pleas has been rising; and after the decision in *Golds* they may now rise even further.

In the light of this, it might have been better if the Supreme Court had accepted that "substantially" is simply a matter of degree – thereby allowing psychiatrists and juries more flexibility by enabling them to find that a more than trivial degree of impairment is "capable" of being regarded as substantial, depending on all the evidence in the case in question. This would have meant that juries and psychiatrists could in some cases refuse to find that the impairment did reach the level of "substantial" even though it was more than trivial, but would not have been obliged to do so in all cases. Without this flexibility, there is an additional concern that some "deserving" cases, such as the depressed "mercy killer" or the post-natal mother who kills her 13-month-old child and who cannot use the statutory defence of infanticide, will fall outside the reformed defence of diminished responsibility because psychiatrists and/or the jury consider the degree of impairment to be insufficient to reach the level now required by *Golds*.

3 When discussing *Brennan* [2014] EWCA Crim 2387, [2015] 1 WLR 2060.

4 Ronnie Mackay: *Partial Defences to Murder,* Law Commission 290 (2004), at Appendix B paras 6.20 and 21.

5 *The New Diminished Responsibility Plea in Operation: Some Initial Findings*, [2017] Crim LR 18 at 26-27 and 35.

Editor's Comment

The new and tighter definition of diminished responsibility originated as a subsidiary element of the Law Commission's proposal to divide the existing crime of murder into "first degree" and "second degree" murder, with the mandatory life sentence, and the reformulated partial defence of diminished responsibility, applicable only to the first: the overall effect of which would have been to reduce the number of mandatory life sentences. Whilst rejecting the overall scheme the Government accepted the subsidiary element: with more mandatory life sentences the all-too-predictable result.

Lex mitior and Article 7: the Supreme Court decision in *Docherty* [2016] UKSC 62

By Sebastian Walker[1]

The principle of *lex mitior* – the right to retroactive application of more lenient criminal law – is not one that has previously warranted much discussion in English criminal law. *Lex mitior* requires that where there is a change in the law, between D committing the offence and sentence, which provides for a more lenient penalty, the offender must be given the benefit of that penalty. The principle has long been enshrined in numerous international instruments,[2] but until recently it has not been guaranteed by the European Convention on Human Rights (ECHR) nor recognised in domestic law.

Article 7(1) of the ECHR embodies the general principle of legal certainty: "that only the law can define a crime and

1 Research Assistant at the Law Commission in the Criminal Law team. The views expressed in this article are solely the views of the author and do not represent the views of the Law Commission.

2 See for example Article 15(1) of the International Covenant on Civil and Political Rights.

prescribe a penalty".[3] It requires that offences and penalties be clearly defined in law and prohibits the imposition of a penalty more severe than the law at the time of the commission of the offence permitted. However, until the decision in *Scoppola v Italy*[4] it was not considered to guarantee the principle of *lex mitior* which in some ways is the converse principle.

The decision in Scoppola v Italy

In *Scoppola,* the Grand Chamber of the European Court of Human Rights (ECtHR) departed from a consistent line of decisions stretching back to *X v Federal Republic of Germany*[5] in 1978 that Article 7 did not guarantee the principle of *lex mitior*. The decision in *X v Germany* hinged on the lack of any express provision guaranteeing to an offender the benefit of a more lenient sentence. The Grand Chamber in *Scoppola* departed from this on the grounds that an international and European consensus had since emerged that *lex mitior* had "become a fundamental principle of criminal law".[6] The Court held that while Article 7 does not contain any express provision guaranteeing *lex mitior*, the principles of the rule of law, and the foreseeability of penalties, in combination with this new consensus meant that Article 7 "guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law".[7]

The decision in *Scoppola* clearly affirmed the principle of *lex mitior* but it gave no guidance as to how the principle was intended to apply in the future. Further, while *Scoppola* carried the weight of a decision of the Grand Chamber, it was a majority ruling of eleven to six, the decision of the majority attracting harsh criticism by the minority: alleging they had "re-written [Article 7] in order to accord with what they consider it ought to have been".[8] There was then a degree of uncertainty with regard to if and how the decision would be followed.

The challenge in Docherty

Docherty was convicted on two counts of wounding with intent under s.18 of the Offences Against the Person Act 1861 on 13 November 2012. On 20 December 2012 he was sentenced to a term of imprisonment for public protection (IPP) with a minimum custodial term of five years and four months. IPP had been abolished from 3 December 2012, but only for convictions on or after that date.[9] It remained available for Docherty at the date of his conviction.

Docherty appealed to the Court of Appeal on two grounds.[10] Firstly, that the judge had failed to consider whether or not a lesser sentence would have enabled the protection of the public. Secondly, that the imposition of a sentence of IPP after its repeal contravened his rights under the ECHR, in particular his rights under Article 7 – the sentence was in violation of the principle of *lex mitior* – and Articles 5 and 14 – that the sentence amounted to a discriminatory deprivation of his liberty.

Both grounds were rejected by the Court of Appeal. The Court dealt with the arguments relating to a lesser sentence succinctly: a sentence of IPP was neither excessive, nor wrongly imposed. In relation to Articles 5 and 14, the Court considered that even if the case did fall within the ambit of Article 14, which was doubted,

> "...it is hard to see how, unless the appellant is successful on the art.7 point, the state could fail to establish the necessary objective justification [for the discrimination]."[11]

In relation to Article 7, the CACD avoided commenting on whether *lex mitior* would be recognised in England and Wales by deciding that *lex mitior* could not apply here as on the facts there was a "real possibility" that Docherty could have received a life sentence instead of a sentence of IPP if IPP had not been available.

Docherty appealed to the Supreme Court arguing again that the imposition of a sentence of IPP contravened his rights under the ECHR as well as advancing a new point of appeal: that because the purpose of the provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 were to abolish IPP that the transitional provisions preserving it in SI 2012/2906 were *ultra vires*.[12]

The Supreme Court, examining the decision in *Scoppola,* noted that the language of the judgment meant the scope of *lex mitior* was unclear. The ECtHR, it was considered, appeared to suggest both a narrow definition of *lex mitior* – that it is wrong to impose a penalty which the state has since recognised to be excessive – and a much wider definition of *lex mitior* that required the court to apply the most favourable "of all the laws in force during the period between the commission of the offence and the delivery of the final judgment"[13] to the offender when sentencing. The Court, in a judgment delivered by Lord Hughes, noted that while England has never recognised *lex mitior* explicitly, the common law had long accorded with this narrow concept of *lex mitior*. English courts sentence according to the law and practice at the time of sentence, whenever the offence was committed. The wider expression of *lex mitior*, the Court considered, could not have been intended by the ECtHR: it would constitute a complete change of approach to Article 7 and the principle of *lex gravior* - that the punishment imposed did not exceed the limits fixed. Adopting then this narrower definition of *lex mitior*, and applying it to *Docherty*, the Court held that that the appellant's arguments as to Article 7 and the ultra vires nature of commencement must fail. The legislation here was the subject of legitimate phased commencement, and as such IPP was still available for him at sentence, and the new extended determinate sentence was not (having not yet been commenced). There is nothing irrational or contrary to statutory purpose in the practice of phased commencement, and the appellant could not seek to use these arguments to benefit from the planned commencement of provisions not yet in force. Finally, as to the matter of discrimination, the Court considered that a change in sentencing law will inevitably be discriminatory. If a simple difference in treatment on the grounds of date of conviction or sentence was objectionable discrimination it would be impossible to change the law. Accordingly the appeal was dismissed.

3 *Achour v France* (2007) 45 EHRR 2, [41].
4 *Scoppola v Italy (No.2)* (2010) 51 EHRR 12.
5 *X v Federal Republic of Germany* (7900/77) 6 March, 1978.
6 *Scoppola v Italy (No.2)* (2010) 51 EHRR 12 at [106].
7 *Scoppola v Italy (No.2)* (2010) 51 EHRR 12 at [109].
8 *Scoppola v Italy (No.2)* (2010) 51 EHRR 12 at O-II9.
9 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 4 and Saving Provisions) Order 2012/2906, art 6.
10 *Docherty* [2014] EWCA Crim 1197; [2014] 2 Cr App R (S) 76.
11 *Docherty* [2014] EWCA Crim 1197; [2014] 2 Cr App R (S) 76 at [34].
12 *Docherty* [2016] UKSC 62 at [1]. [2017] 1 WLR 181.
13 *Scoppola v Italy (No.2)* (2010) 51 EHRR 12 at [119].

The continued issue of transition in sentencing legislation

The case of *Docherty* highlights the continued issue of transition and commencement in sentencing legislation, an issue that continues to plague the courts and in recent years has attracted their vocal opprobrium.[14] While the law was correctly applied in *Docherty,* the case of *GJD*[15] involved the unlawful imposition of a sentence of IPP (for an offence committed before commencement) which was not recognised for over eight years. The Law Commission's work on the New Sentencing Code will significantly improve the accessibility and clarity of the law in this regard.

The Commission's novel approach to transition[16] will sweep away these layers of historic transition ensuring that when offenders are convicted, no matter when their offence was committed, the latest version of the law will apply. Exceptions will be made only when the availability of new sentences would increase the maximum penalty available for an offender or result in the application of a new minimum sentence or recidivist premium. While the Supreme Court in *Docherty* noted that "English courts sentence according to the law and practice at the time of sentence, whenever the offence was committed",[17] this is, with respect, perhaps a slight misrepresentation of the complexity of the situation. Activity requirements as part of a community order are, for example, only available for offenders whose offence was committed before 1 February 2015, while their replacement, rehabilitation activity requirements, are only available for offenders whose offence was committed after 1 February 2015. The New Sentencing Code will change this, ensuring that the new rehabilitation activity requirements are available to all offenders who can receive a community order. Further, where exceptions are made these restrictions will be apparent on the face of the legislation, contained in the statutory provision itself rather than hidden in transitory statutory instruments.

The Law Commission is due to publish the draft of the New Sentencing Code in summer 2017, with accompanying commentary. The scale and breadth of this consultation exercise will be unprecedented and the Commission will seek consultees' views on the Code, and potential accompanying reforms, with a view to producing a final report and draft Bill for the New Sentencing Code in 2018.

14 See for example *R (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30; [2010] 1 WLR 1743.
15 [2015] EWCA Crim 599.
16 Set out in detail in A New Sentencing Code for England and Wales (2016) Law Com No 365, http://www.lawcom.gov.uk/project/sentencing-code/.
17 *Docherty* [2016] UKSC 62 at [1].

Feature

Judicial review of decisions to prosecute

By Jonathan Rogers[1]

The Rule in *Kebilene*

Decisions to prosecute are not amenable to review, save where the decision is prompted by "dishonesty, bad faith or some other exceptional circumstance": *R v DPP, ex p Kebilene*.[2] This restriction is justified by concerns over satellite litigation and the need to reduce delays in the criminal process. The principle in *Kebilene* applied straightforwardly to the facts. Here judicial review was sought to clarify whether a reversed burden of proof, which would apply to the defendant, would be compatible with Article 6 (2) ECHR. Clearly such arguments can be made easily enough at trial.

But where the objection is made to the decision on public interest grounds, the courts are still trying to work out what might constitute an "exceptional circumstance" within the meaning of *Kebilene*. An uncontroversial example is *R (on the Application of E, R and S) v DPP*.[3] Here the application was successfully sought by the young victims' mother on the basis that while the trial was pending, the victims were not receiving much needed urgent therapeutic treatment, and that no account was taken of this by the prosecutor. This case is relatively easy because for this applicant, judicial review was the only possible remedy.

The situation is more difficult in the usual cases when it is the defendant who seeks the review on public interest grounds, because he can wait for the trial and plead abuse of process. But this remedy is only available when the decision to prosecute is regarded as "oppressive": *R* v *A*,[4] *Moss & Son Ltd v CPS* and *R (on the application of Barons Pub Co Ltd) v Staines Magistrates' Court*[5] where it was said that:

> "oppression above and beyond the ordinary consequences of initiating a prosecution would have to be shown" at [47].

It is something of a question whether the House of Lords in *Kebilene* had meant the defendant's position to be quite as bad as this.

The latest case in the saga is *R (Robson) v CPS*.[6] It suggests that the availability of judicial review may rest on a distinction between challenges to the legality of a prosecutorial policy and challenges to its application to the facts, only the latter

1 Senior Lecturer, Faculty of Laws, University College London.
2 [1999] 3 WLR 972.
3 [2011] EWHC 1465 (Admin).
4 [2012] EWCA Crim 434.
5 [2013] EWHC 898 (Admin).
6 [2016] EWHC 2191 (Admin).

being generally prohibited. The case is welcome in itself but raises the question of whether we should have an even more flexible approach.

Reconciling *Moss & Sons Ltd* with *Robson*

In *Moss & Sons Ltd*, the Divisional Court reviewed a District Judge's refusal to accede to a plea of abuse of process on the basis that a prosecutor had misapplied a "public interest" prosecutorial policy to the facts of the case. The Court, presided over by Thomas LJ (as he then was), found that the prosecutor had not erred in his application of the policy, but even if he had, abuse of process should still have failed because the decision was not "oppressive". The Court took the opportunity to say that nonetheless, abuse of process had to be tried, rather than judicial review, because:

> "It is only in the exceptional case where such a remedy is not available that an application can be made to seek judicial review of the decision to prosecute in breach of a policy" (at [23]).

The Divisional Court went even further. Even if, for some exceptional reason, judicial review were available, perhaps to ward off some further problems which might be occasioned by the wait for the trial, or perhaps mindful that abuse of process decisions by District Judges in magistrates' courts are themselves subject to judicial review, still the same test of "oppression" should apply:

> "That requirement [of finding oppression] must be the same in the rare cases where a challenge can be made by judicial review. In the course of argument reliance was placed on an observation at paragraph 56 of the decision in *R (on the application of E, S & R) v the DPP* where the challenge to a decision had been brought by way of judicial review for reasons described by the court in *R v A* as "wholly exceptional". We do not read the judgment in *E, S & R's* case as implying any different test; indeed it is impossible to see how the test could be different in judicial review to that on an abuse of process application" (at [25]).

We now turn to the facts and decision in *Robson.* Mrs Robson had admitted causing substantial criminal damage to her ex-partner's cars and coat, at a time when the couple had already stopped living together. She later voluntarily paid for the damage, showed genuine remorse and her ex-partner asked for the matter to be dropped. However the police regarded this as an incident of domestic violence and, apparently with regret, sent it to the CPS for consideration instead of offering Ms Robson a caution. The Crown Prosecutor also took the view that this was an incident of domestic violence, for which the alternative of a conditional caution was precluded by a policy document issued by the DPP.[7]

The Divisional Court allowed the judicial review to proceed, and decided that the policy was not intended to be mandatory and that there was some residual discretion to offer a conditional caution instead of prosecution in exceptional cases. It quashed the decision to prosecute and required it to be reconsidered in the light of the residual discretion. The Court explained why it even entertained the review at [35]:

> "A challenge to the decision to prosecute by way of judicial review is only permissible in this case, as both sides accepted, because the underlying nature of the challenge was to the lawfulness of the DPP's Guidance, particularly as set out in paragraph 3.1 (referred to above) and as reflected in the Guidelines. The decision as to whether the Guidance and Guidelines are lawful in that respect obviously leads to an issue as to their interpretation, and whether they have been correctly interpreted by the CPS in the present case. However, this case is not about the lawfulness of their application; that would be for an abuse argument."

So, judicial review might be available where this is a pure question of law which is merely raised by the facts. It seems to follow that there is then no question of having to find that the decision to prosecute was "oppressive" on the facts, as is the case when the application of the policy to the facts should be challenged as an abuse of process, as in *Moss*.

Legality of a policy and its application to facts

The distinction made between the legality of the policy and its application is in principle sound. In a case such as *Robson*, it provides a clear way forward.

But it will not always be easy to distinguish between a challenge to the legality of a policy and its application to the facts. Suppose that the prosecutor in *Robson* had exercised his discretion and concluded that: "given that this was nonetheless a domestic violence case, I do not consider that the mitigating factors and the attitude of the victim outweigh the reasons to prosecute".

Suppose too that it were then argued that he erred in treating the case as one of "domestic violence" at all. Would that be an error of law (the decision being based on a misunderstanding of what is meant by "domestic violence") or one of application to the facts?

One might expect a judicial review to be entertained in such a case. In *Caetano v Commissioner of Police for the Metropolis,*[8] a caution for assault was offered, in preference to no further action, because the conduct in question was thought to constitute domestic violence. It was quashed on judicial review. Goldring LJ observed:

> "It cannot be enough, as it seems to me, simply to say, this offence occurred in a domestic context; it is therefore domestic violence": at [43].

Since Ms Caetano was able to have her caution (which she had at least chosen to accept) quashed on that ground, it would be surprising if, in this hypothetical variation, Ms Robson could not have had a decision to prosecute her reviewed on the same ground. In her case too, one may wonder whether an overly broad definition of domestic violence, one which does not go as far as looking for signs of controlling or coercive behaviour, was applied.

Yet one may wonder if, properly speaking, the ratio of *Robson* would not apply to this variation of the case. Perhaps a distinction should be drawn between a purely legal decision, such as whether a policy is intended to be mandatory, and a question of law *related to fact finding* arising from the policy. A decision as to whether a reasonable prosecutor could rationally accept that a particular set of facts amounted to domestic violence might be regarded as a question of law, but would still be fact-specific.

This being so, it might be thought better in such a situation to let such trials proceed. The fullest picture of the facts would then emerge and the accused might be expected

7 The *Director's Guidance on Adult Conditional Cautions* (7th ed, April 2013); a policy document now amended in response to this case.

8 [2013] EWHC 375 (Admin).

to testify and to answer questions in cross-examination which are relevant to the reasons why the prosecutor had thought the policy to be engaged. The trial judge would retain the option of belatedly stopping the prosecution as an abuse of process if he took the view having heard the evidence that no prosecutor could reasonably have thought the policy to be properly applicable to the facts. The prospect of a remedy is not so fanciful. In *Adaway*,[9] it was thought possible to regard the prosecution as "oppressive" partly because of the aggressive and unfounded cross-examination of the accused at trial on facts that were critical to the policy in question.

So in this variation of the case (where the issue is whether the behaviour can reasonably be classified as "domestic violence" at all), the court would have to choose between apparent inconsistency with *Caetano* and the general desire to allow fact-related disputes to be raised in an abuse of process application.

An alternative approach

No doubt, this distinction between legality and application will be with us for a while longer. Perhaps it will stand the test of time. But, we might wish to consider a different approach to the application of *Kebilene*.

As noted above, *Kebilene* itself did not concern a challenge to the decision on public interest grounds, and the distinction now drawn between legality and application is by no means implied by the decision. Rather, the main concern in *Kebilene* was to avoid delays and satellite litigation. From that, it should follow that judicial review should be open, as ever at the court's discretion, where there are good reasons to review the public interest test which outweigh the considerations that it may delay the trial or trespass on the proper role of the criminal court.

Needless to say, there should have to be good reasons to prefer judicial review to possible remedies at trial. Claims based on assurances of non-prosecution, or oppressive applications of policy, should still be left to trial. In particular it should be recalled that it is also quite a proper role of the criminal court to entertain a prosecution which it does not agree with (provided that it is not oppressive) and to mark its disapproval only in sentencing. So the fact that a relatively harsh prosecutorial position has been adopted should not be a good reason for judicial review.

But it is possible to suggest good reasons occasionally to prefer judicial review, which may outweigh concerns about delay and trespassing on the role of the criminal court.

First and foremost, it must be a good reason that there is thought to be a good prospect that the review will succeed on any of the standard judicial review grounds (without the need for hearing oral evidence). This should outweigh the general concern about delaying the trial, because it would be likely that the review will avoid the trial altogether. This is all the more so now that all judicial review is presumptively barred where it is thought "highly likely" that, if a decision were required to be reconsidered, there would be "substantially" the same outcome: s.84 of the Criminal Justice and Courts Act 2015.

Second, assuming at least reasonable prospect of success, permitting judicial review may give senior judges a ready opportunity to consider points of law which ought to assist the CPS or the wider legal profession. This point could have applied in *Robson*, where the prosecutor, misreading the policy on domestic violence, exercised no independent discretion at all. But it might be thought that, for as long as we value prosecutorial discretion including a "public interest" element, it is in everyone's interests that it is so exercised, perhaps especially so when cuts to the CPS may otherwise encourage a box-ticking, quasi-bureaucratic, approach to the matter. Publicly quashing this decision by judicial review may have more impact against this sort of approach.

Third, if the question is whether the defendant should be prosecuted as opposed to receiving a caution or conditional caution, as again was the case in *Robson*, then it is not so obvious that the matter *can* be fully dealt with at the criminal trial. If the prosecution were instead halted by abuse of process, then it would be something of a question whether it would still be proper to offer a conditional caution instead. By contrast, simply quashing the decision at the outset very clearly leaves all options open.

Fourth, judicial review might avoid vulnerable defendants from suffering particular hardships while awaiting trial. One might hope that the CPS would give especially anxious consideration to such cases. But there is no formal system of review of decisions to prosecute within the CPS, as there is for victims who are disappointed by decisions *not* to prosecute. One notes with concern in *Robson* that questions by the applicant's solicitor were seemingly ignored, and the magistrates granted an adjournment until the CPS had provided written reasons in response. Regrettable though it may be, in some cases it might be that only judicial review will draw attention to a case which merits closer attention.

It is submitted that considering the availability of judicial review on the basis of whether there are good reasons to prefer judicial review will not greatly widen the jurisdiction. There is certainly nothing to suggest that such an approach would be inconsistent with *Kebilene*. As shown above, we would probably reach the same conclusion on the facts of *Robson*.

But we also might not struggle so much with the variation where it is argued that no reasonable prosecutor could have regarded the incident to be one of "domestic violence" at all. We would be freed from the formalistic distinction between legality and application to facts. We would ask the more pertinent question whether the CPS should be required to address the matter fully in judicial review, and whether the guidance that might be offered by senior judges would further the proper and consistent administration of justice significantly more than if the matter were left to be dealt with at trial on an application for abuse of process.

Conclusion

Robson offers a suitable way forward which enables more challenges to the decision to prosecute on public interest grounds to be considered on judicial review. But the distinction between the legality of its policy and its application to facts is not without its problems. Articulating more fully what are, and what are not, good reasons from allowing judicial review seems to be the best way forward.

9 [2004] EWCA Crim 2831.

Editor: Professor J.R. Spencer, CBE, QC
Cases in Brief: Richard Percival
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