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Archbold Review

Cases in Brief

Appeal—abandonment—nullity

RILEY [2017] EWCA Crim 243; March 10, 2017

R was convicted of conspiring with H. His defence was that H had committed the offence to revenge himself on R, rather than at R's behest. Grounds of appeal were settled on the basis that the Crown had failed to disclose that H had entered into a Serious and Organised Crime Act 2003 s.73 arrangement, in circumstances where counsel for R had suggested in cross-examination that H's evidence was influenced by the hope of a lighter sentence, but had had no knowledge of the agreement upon which to base further cross-examination. It subsequently transpired that the CPS had disclosed the agreement, but it had not been communicated to counsel by his clerk, and as a result the application for leave was abandoned. The abandonment had been a nullity. It was not a "wrong advice" case (see *Archbold* 2017 [7-188]), but where the note of the conference indicated that counsel had stated that abandonment was necessary, indicating that in effect R was given no choice, that R was not advised that abandonment was terminal, and (a point which would not have sufficed on its own), the Form A abandoning the application had been signed by solicitors, not R in person, it was not possible to say that R's mind had gone with the notice.

Education—failure of child to attend regularly at school—meaning of "regularly"—construction of criminal statutes

ISLE OF WIGHT COUNCIL v PLATT [2017] UKSC 28; April 6, 2017

The word "regularly" in the Education Act 1996 s.444(1) (a parent is guilty of an offence if a child "fails to attend regularly at school") meant "in accordance with the rules prescribed by the school," and not, as the Administrative Court had found in this case and in *London Borough of Bromley v C* [2006] EWHC 1110 (Admin), [2006] ELR 358, "sufficiently frequently". Above all, such a construction was far too uncertain to found a criminal offence. There were also very good policy reasons against such an interpretation; it was correct as matter of statutory construction; and in the light of the history of the provision. While this meant that to miss a single attendance without leave or unavoidable cause could lead to criminal liability, criminal liability could in theory also arise in relation to many trivial matters, and the answer was a sensible prosecution policy, including the use, as in this case, of fixed penalty notices. More generally, while the general rule was that statutes imposing criminal liability should be construed strictly, so as not to impose it in cases of doubt, it was an even more important rule that statutes imposing criminal liability should do so in a way which enabled everyone to know where they stood, to know what was and was not an offence. It was therefore not a matter of fact and degree whether the child had attended "regularly," and *Crump v Gilmore* (1969) 68 LGR 56 and *London Borough of Bromley v C* should no longer be followed.

Recording of crime—whether a reported incident should be recorded as disclosing no offence—burden of proof for decision maker—reasonableness of decision

R (PITTS) v COMMISSIONER OF POLICE OF THE METROPOLIS [2017] EWHC 646 (Admin); March 29, 2017

P sought to challenge a determination by the defendant force's Force Crime Registrar that a reported incident of rape should not be reclassified as one which disclosed no offence. The decision was made in accordance with the Home Office document "Crime Recording General Rules".

(1) While it was agreed that a decision to record an incident as a crime depended on a decision taken on the balance of probabilities, P contested that the same test should apply to a determination to remove such a classification.

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The Registrar had been right to proceed on the basis that the decision to "no crime" was to be taken on a standard of beyond reasonable doubt, and not on the balance of probabilities. The use of the word "determines" for the decision pointed strongly to a different standard than the balance of probability; and in the context in which the Rules applied the only alternative was beyond reasonable doubt.
(2) The determination was to be made on the basis of "additional verifiable information", according to the Rules. The word "verifiable" was intended to convey that the information was reliable and accurate. It might also, depending upon the circumstances, have conveyed the notion that the additional information was supported by other information or, at least, was capable of being supported. While the Registrar was given responsibility under the Rules for the determination and was acting as would a "specialist tribunal", the decision in the instant case was unreasonable on a close examination of the facts and the history of the treatment of the report, and the decision was quashed.

Self-defence—dangerous driving—whether defence available
RIDDELL [2017] EWCA Crim 413; April 5, 2017
R had hit a man with her car occasioning him minor injuries. She was charged with dangerous driving and assault occasioning actual bodily harm, counts which, for reasons the court did not fully understand, were put in the alternative. In such circumstances, self-defence was available as a defence to the count of dangerous driving, and the judge should have directed the jury accordingly, rather than, as he did, on duress of circumstances. There was a clear distinction in law between the defence of self-defence and the defence of duress of circumstances. In particular, among other differences, only the latter defence gave rise to a requirement of reasonableness as to the relevant belief held. The elements of dangerous driving were, in law, quite different from the elements of an offence such as assault occasioning actual bodily harm. In the latter, the application of force was an inherent part of the offence. In the former it was not. Conventionally self-defence ordinarily arose where a person used force in order to meet actual or perceived force or threat of force. There was no reason in principle to deny altogether the availability of the defence simply because the charge was one of dangerous (or, for that matter, careless) driving. Whilst such a charge did not *of itself* convey the use of force, the alleged facts relating to the driving charge may nevertheless be such that force had indeed been applied in response to threatened or actual force. In the vast majority of driving cases, a defence of self-defence could not arise because on the facts, the driver would not be using force against another. Even where a person in a car responded to perceived force by fleeing in the car, and drove dangerously in so doing, self-defence ordinarily, applying the conventional approach, would not arise, because the defendant would not in fact be using force to meet force. But there were potentially rare cases where on the facts the driving *did* involve the use of force. *Symonds* [1998] Crim LR 280 appeared to have been such a case (the court noting the brevity of the report, and some ambiguity in its apparent reasoning), as was R's case. Accordingly, the fact that a count of dangerous driving was a charge which, by reference solely to its constituent legal elements, did not inherently involve the use of force should not preclude the availability of self-defence where, on the particular facts, use of responsive force was indeed involved in the dangerous driving alleged. The court recognised that it might appear anomalous that self-defence was not available where a driver was fleeing force, but was available where a driver in his or her car was confronting threatened force. The apparent anomaly was better viewed as a consequence of the absence of force involved in the former scenario and of the legal differences, settled on authority (see e.g. *R v Z* [2005] UKHL 22, [2005] 2 AC 467 and *Martin* (1989) 88 Cr.App.R 343), between the defences of duress and self-defence. In any event, this consideration would not justify confining self-defence, as Crown counsel argued, on the basis of the legal nature of the offence charged, without reference to the underlying facts. This conclusion was consistent with cases such as *Renouf* [1986] 1 WLR 522; *Morris*, [2013] EWCA Crim 436, [2014] 1 WLR 16; *Conway* [1989] 1 WLR 290; and *Willer* (1986) 83 Cr.App.R 225.

Indictment—sexual offences—principles where conviction on time-barred offence—application—powers of the Court of Appeal—poor drafting of indictments—remedial steps
WALKER; COATMAN [2017] EWCA Crim 392; April 6, 2017
C and W were (in separate trials) convicted of offences stated as being contrary to the Sexual Offences Act 1956 s.13, which were time barred by s.7 of the 1956 Act.
(1) The principles to be derived from the authorities (*Silverwood and Chapman* [2015] EWCA Crim 2401; *Forbes* [2016] EWCA Crim 1388, [2017] 1 W.L.R. 53*; Stocker* [2013] EWCA Crim 1993, [2014] 1 Cr.App.R. 18 and *AD* [2016] EWCA Crim 454, [2016] 4 W.L.R. 122) were as follows. (a) The test for the court remained one of safety of the conviction. (b) There was "a clear judicial and legislative steer away from quashing an indictment and allowing appeals on the basis of a purely technical defect. The overriding objective of the criminal justice system is to do justice… To that end, procedural and technical points should be taken at the time of the trial when they can be properly and fairly addressed." (*Stocker*, [42]). (c) The question for the court was whether the error in the indictment was a purely technical defect or whether the count itself was fundamentally flawed because it breached Criminal Procedure Rule r.14.2 in that it failed to identify sufficiently the legislation allegedly contravened. The clear purpose of the relevant parts of r.14.2 was to ensure that an accused had sufficient information to know the case to be met and for all parties to know which statutory provisions applied (*Stocker*, [43]). (d) The determination of which defects were properly to be categorised as fundamentally flawed rather than being a mere drafting or clerical error was a particularly fact-sensitive issue (*AD*, [22]). (e) It was necessary to discern the true intention of the drafter and the effect of the error upon the conduct of the trial (*AD*, [23]-[24]; *Forbes*, [56]-[59]).
(2) In C's case, the prosecution intended to charge gross indecency contrary to the Indecency With Children Act 1960 s.1, and the police charged gross indecency contrary to s.13 of the SOA 1956. Both were wrong. The appellant could not be charged with offences under s.1 because of the age of the complainant at the time and could not be charged with offences under s.13 because they were time barred. The errors were repeated in the indictment. The particulars referred to acts of gross indecency *with* a male under the age of 14. As counts of gross indecency contrary to s.13, they may have been flawless in form; but they were fundamentally flawed

in substance. From the beginning to the end of the process, therefore, the allegations (masturbating and oral sex) were gross indecency and not indecent assault. The court had no power to quash the convictions and order a re-trial (the power in the Criminal Appeal Act 1968 s.7 presupposing a "trial" on a valid indictment) and no power to substitute an offence of indecent assault contrary to s.15 of the 1956 Act (s.15 was not an offence of which "…the jury could on the indictment have found him guilty": 1968 Act s.3). The court had no choice but to declare the proceedings a nullity. The court, having heard limited argument, was unprepared to conclude that it had the power to issue a writ of *venire de novo* in these circumstances. Faced with the choice of proceeding on the basis that the court did have the power, and thereby risking further proceedings; reconvening to hear further argument; or simply declaring the proceedings a nullity, the court took the third option. The court adverted to the possibility of an application for a voluntary bill. In W's case, it was clear that the intention had been to charge s.1 of the 1960 Act. The only error had been the appearance of s.13 of the 1956 Act in the particulars. The averments in the statement of offence were apt to the s.1 charge and the trial proceeded on that basis. The error was one of form not substance, and was not to be distinguished from the position of the appellant Warren in *Forbes*.

(3) The court had issued repeated warnings about the poor quality of drafting of indictments in historic sex cases. These trials, in 2016, showed those warnings had gone unheeded. The court had been informed that the Crown profoundly regretted the errors made and the following steps had been taken: (a) a note had been sent to all heads of CPS Rape and Serious Sexual Offences units instructing them to remind all prosecutors of the unavailability of s.13 offence; (b) the units had been instructed to check all existing cases and address any defective indictments currently before the courts; (c) misleading, out-of-date information relating to s.13 has been removed from the CPS legal guidance; and (d) the s.13 precedent on the electronic case management system used to draft indictments had been removed. These steps should have been taken years ago.

Trial—defendant dying during trial—proper approach
TURK (DECEASED) [2017] EWCA Cr 391; April 6, 2017

After the jury had sent a note to the judge indicating unanimous verdicts on some counts (a mix of convictions and acquittals) and deadlock on others, they were sent home for the night. Overnight, T committed suicide. In the morning, after hearing counsel, the judge asked the jury to deliver their verdicts. They did so, adding three to the 13 indicated in the note. The judge then followed the procedure in *Archbold* 2017 [3-238] and declared the indictment of no legal effect. The judge had been wrong to accept the verdicts. The judge erred in reasoning that the jury's decisions had been taken before T's death (because of the additional verdicts); and, in refusing a certificate to appeal, to observe that there was no prejudice to T in receiving the verdicts (see the Civil Evidence Act 1968 s.11 on the effect of a conviction in civil proceedings). Prior to the insertion of the Criminal Appeal Act 1968 s.44A, there was no power permitting the family or personal representative of a deceased defendant to pursue an appeal to the Court of Appeal (*Jefferies* (1968) 52 Cr.App.R 654; *Kearley No 2* (1994) 99 Cr.App.R 335). The court recognised that the Crown Court was not governed by the same statutory provisions as the Court of Appeal, but it had not been suggested that there was any statutory authority or rule of court which permitted continuation of proceedings in the Crown Court and there was no reason why the same general principle should not apply. In any event, it was important that there was a bright line rule which could be applied whatever the circumstances. In order to preserve that bright line, that criminal prosecutions were not pursued against those who have died, there was no discretion as to the course of action to be taken by a judge. As soon as a judge learned that a defendant had died, it was his or her duty to take no further step in the case against that defendant save for receiving proof of death whereupon the indictment, as far as it concerned that defendant (it may continue in respect of other defendants), must be declared of no effect. The verdicts were wrongfully returned and must be set aside as a nullity, pursuant to the inherent jurisdiction of the Court: see *Booth, Wood and Molland* [1999] 1 Cr.App.R 457.

SENTENCING CASE

Sentencing; Extreme Old Age
Clarke and Cooper [2017] EWCA Crim 393 (6 April 2017)

The appeals raised the issue of the appropriate allowance to be made for extreme old age in the sentencing process. The appellants were at the time of sentence aged 101 and 96 respectively. Both were sentenced for historical sexual offences.

The court stated that whilst an offender's diminished life expectancy, age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors as was recognised in *Forbes* [2016] EWCA Crim 1388 2 Cr.App.R (S) 44 the correct approach is to take such matters into account in a limited way.

Mindful that this conclusion leaves open the possibility that an offender may die in prison, the court drew attention to s.248 of the Criminal Justice Act 2003 which grants the Secretary of State power at any time to release a prisoner on compassionate grounds. The section makes clear that there must exist exceptional circumstances justifying the release. Early release may also be considered where a prisoner becomes bedridden or severely incapacitated, or if further imprisonment would endanger their life or reduce their life expectancy.

The court considered sentencing authorities relevant to cases involving ill health and concluded that the approach endorsed in relation to old age was similar to that adopted by the court in relation to cases involving ill health (see [27] for the particular cases considered). Such similarity was deemed unsurprising, since similar considerations arise and since, often, ill health and old age are inter-twined.

The court dismissed each appeal as regards the grounds relating to the old age of the appellants. The court did make some amendment to the sentences imposed in order to correctly apply s.236A of the Sexual Offences Act 2003.

Features

The Protection of Official Date: A Law Commission Consultation

By Alex Davidson[1]

In 2016 the Law Commission started its project to examine the efficacy of the laws that protect official data. The review encompasses both substantive offences, including those contained in the Official Secrets Acts 1911-1989, and procedural matters relating to investigation and trial. On 2 February 2017, the Law Commission published a consultation paper containing a number of provisional conclusions and consultation questions.

The Official Secrets Acts

The key offences that protect official information are contained in the Official Secrets Acts 1911-1989. This legislation was enacted in piecemeal fashion as evidenced by the statutes' different purposes. The 1911-1939 Acts are concerned with espionage, whereas the 1989 Act criminalises the unauthorised disclosure of specific categories of information by specific officeholders.

The Official Secrets Acts 1911-1939

Aside from the presentational problems attributable to the legislation's Edwardian origins, the Law Commission has identified several problems with the current law. For example, to commit an offence under the 1911 Act the conduct must be "useful to an enemy". Notwithstanding the negative diplomatic consequences that could follow from designating a state as an enemy in court, it could be impossible to regard certain states as enemies, or even potential enemies, of the United Kingdom. The Law Commission has provisionally proposed replacing the term "enemy" with "foreign power" to account for the different ways in which foreign power may be exercised, including by non-state actors.

Simply substituting such words could render the offences overly broad. The Law Commission therefore asks for views on whether other elements of the offences ought to be reformed: (1) replacing the term "safety or interests of the state" with the narrower term "national security"; (2) incorporating a subjective fault element in relation to foreign power: that the defendant knew, or had reasonable grounds to believe, that his or her conduct was capable of benefiting a foreign power; (3) incorporating a subjective fault element so that the defendant must intend, or be reckless as to whether, his or her conduct would prejudice national security. At present, as the House of Lords confirmed in *Chandler v DPP*,[2] the offence contains no subjective fault element; whether a defendant's purpose is prejudicial is determined by the court.

The consultation paper examines other aspects of the 1911-1939 Acts. For example, the 1911 Act contains an extensive list of "prohibited places". Reflecting the era in which the legislation was enacted, this list is primarily concerned with sites that store munitions of war. To ensure the legislation protects sites that may be targeted today, the consultation paper asks whether sites should be capable of being designated as a "protected place" if it is in the interests of national security to do so. This would be similar to the scheme in ss.128-131 of the Serious Organised Crime and Police Act 2005.

In addition, by virtue of s.2(2) of the 1920 Act, a jury may infer the defendant acted with a purpose prejudicial to the safety or interests of the state unless he or she proves otherwise. This reverse legal burden, which absolves the prosecution of having to prove a key ingredient of the offence, is difficult to reconcile with contemporary human rights standards. For that reason, the Commission welcome views as to whether this, and similar provisions, which ease the prosecution's burden of proof, ought to be removed.

The Official Secrets Act 1989

The Commission identifies numerous problems with the current law. First, all the offences in the 1989 Act (apart from those contained in s.1(1) and 4(3)), require the prosecution to prove that the unauthorised disclosure was damaging to a specified interest or that the information is of such a type that its unauthorised disclosure would be likely to cause damage of that type. This requirement can pose an insuperable hurdle to bringing a prosecution for the reason explained by Lord Nicholls in *Shayler*:

> "Damage already done may well be irreparable, and the gathering together and disclosure of evidence to prove the nature and extent of the damage may compound its effects to the further detriment of national security".[3]

For this reason, the Commission provisionally proposes redrafting the offences to focus on the defendant's culpable state of mind, rather than on the consequences of his or her conduct. This would constitute a significant change. Currently, as the Court of Appeal confirmed in *Keogh*,[4] an individual can be found guilty of an offence without proof of his or her state of mind.

The Commission also asks whether the maximum sentence of two years' imprisonment for an offence under the 1989 Act is capable of reflecting the potential harm and culpability that may arise in the most egregious cases.

The consultation paper also considers the position of those suspected of committing offences contrary to the Acts. The Commission proposes that a disclosure made to a legal representative for the purposes of receiving legal advice

1 Research Assistant, Law Commission of England and Wales.
2 [1964] AC 763.
3 [2002] UKHL 11 at [85].
4 [2007] EWCA Crim 528 at [29].

should be an exempt disclosure, subject to the need to safeguard any information that may be disclosed. Additionally, the Commission provisionally proposes that there ought to be defence of prior publication where the defendant proves that the information in question was already lawfully in the public domain and widely disseminated to the public.
Finally, the Commission welcomes views on whether the categories of information protected by the 1989 Act ought to be more narrowly drawn. Given the conclusion of the Franks Committee that "exceptionally grave injury to the economy qualifies for the protection of criminal sanctions", the Commission also asks whether sensitive information relating to the economy insofar as it relates to national security ought to be included as a distinct category.

Miscellaneous unauthorised disclosure offences
The review has also considered the wider legislative landscape of unauthorised disclosure offences to assess the extent to which these offences form a rational scheme for the protection of information. The Commission provisionally concludes that there is a lack of uniformity as to the type of conduct that the offences criminalise, their *mens rea*, the defences available, as well as the maximum sentences. In light of these inconsistencies, the Commission asks whether a future full review of these miscellaneous unauthorised disclosure offences ought to be undertaken.

Procedural matters relating to investigation and trial
At the trial itself the principle of open justice is vital. The Commission proposes that the power to exclude the public that is contained in s.8(4) of the Official Secrets Act 1920 be narrowed to a strict necessity test: a hearing could only be held *in camera* if necessary to ensure that national safety - which is the term used in the legislation - is not prejudiced. The Commission further proposes that the guidance on the power to undertake authorised jury checks be amended so that such checks must be brought to the attention of the defence representatives if they are undertaken.
Outside the specific sphere of the Official Secrets Acts, the Law Commission invites views on whether a separate review ought to be undertaken to evaluate the extent to which the current mechanisms strike an appropriate balance between the right to a fair trial and the need to safeguard sensitive material in criminal proceedings.

Freedom of expression and the introduction of a public interest defence
Given the importance of ensuring that any proposals for reform are compatible with the ECHR and the intensity of the debate surrounding the introduction of a public interest defence, separate chapters have been devoted to each issue. Following the House of Lords' decision in *Shayler*, and the absence of Strasbourg jurisprudence which holds otherwise, the Commission provisionally concludes that compliance with Art.10 of the ECHR does not mandate a statutory public interest defence. The Law Commission's analysis of the relevant case law demonstrates that Art.10 compliance requires the existence of a robust process that enables concerns to be raised as a viable alternative to making a public disclosure.
On the basis of that ECHR position, the Commission provisionally concludes that the public interest would be best served by the introduction of a direct reporting mechanism to an independent, external statutory commissioner who holds or has held high judicial office and who has statutory powers to investigate concerns, oblige departments to comply, and report findings. In reaching this proposal, the Commission was influenced by the views of the organisations Liberty and Article 19 that "relying on whistleblowing to expose wrongdoing is unsatisfactory and a poor substitute for properly effective structures of accountability, both internal and external".[5]

Conclusion
The present review is the first occasion that the Official Secrets Acts regime in its entirety has been subject to sustained, holistic, independent scrutiny. Although the consultation formally closed on 3 May, the Commission will consider responses after the deadline.

5 Liberty and Article 19, *Secrets, Spies and Whistleblowers: Freedom of Expression in the UK* (2000), para.7.3.

Are we doing enough to ensure juries understand expert evidence and judicial directions?

By Joe Stone QC[1]

Recent Research
In a recent survey some 60% of experts thought that juries were *not* equipped to understand technical expert evidence. The findings are contained in the 2016 national annual expert witness survey carried out by Bond Solon, a leading expert witness training company. Approximately 744 experts were consulted in diverse fields covering hundreds of specialisms. Bond Solon's conclusions were that:

> "… this could be due to experts not explaining things properly or clearly enough or because the issue is so complex ordinary citizens cannot be expected to understand. If the former, the experts may need further training and perhaps judges should allow different types of evidence eg/ videos or demonstration aids".[2]

1 Doughty Street Chambers.

2 Bond Solon, *Annual Expert Witness Survey Report 2016 – First Joint Annual Expert Witness Survey in collaboration with The Times,* 16 December 2016.

Relevant Background - Juror Comprehension of Evidence/Directions

Jurors' ability to understand legal directions is a crucial element in the proper functioning of the jury decision-making process and concerns about jurors' inability to understand complex evidence and follow judicial directions are not new. In a study of 7,000 jurors in 1993 Michael Zander found that almost all jurors felt they had little difficulty understanding judges legal directions[3]. But there had been no research examining jurors' *actual* comprehension of judicial directions. In 2007 Lord Phillips (then then Lord Chief Justice) publicly called for legal directions to juries to be simplified[4]. He also suggested that it might be time to reconsider proposals made by Lord Justice Auld for restructuring the trials to aid comprehension[5]. Lord Justice Auld, it will be recalled, recommended that at the start of the trial the judge should give the jury a summary of the case and the questions they will have to decide, supported by a written *aide memoire*. After the evidence, the judge would no longer direct the jury on the law but would provide the jury with written factual questions the answers to which would lead to a verdict of guilty or not guilty.

A later Lord Chief Justice, Lord Judge, has also suggested that courts in future might need to present more information visually instead of orally to juries to reflect everyday advances in information technology[6].

Whilst there had been studies in other jurisdictions examining how certain tools or procedures could aid juror comprehension[7], until 2010 there had been no similar research in the UK. Then in 2010 the Ministry of Justice commissioned a paper - *Are Juries Fair* by Professor Cheryl Thomas - a member of the Centre for Empirical Legal studies in the Faculty of Laws, University College, London[8]. This study inter alia involved "an initial exploration of how well jurors actually understood judges oral instructions on the law and whether certain tools may improve comprehension"[9]. The research was detailed and involved case simulation studies at Nottingham, Winchester and Blackfriars (797 jurors). The conclusions were:

> "Most jurors believed they understood the judges' directions on the law. However, a substantial proportion of these jurors in fact did not fully understand the directions in legal terms used by the judge. A written summary of legal directions improved juror comprehension of the law... Such understanding is crucial to ensure that miscarriages of justice do not occur as a result of jury misunderstanding of legal instructions. Our study did not examine juror comprehension of complex or specialist evidence but these are issues of concern".[10]

In the light of the Bond Salon 2016 Expert Witness Survey this was a prescient observation.

A step in the right direction: amendments to the Criminal Practice Direction

Following recommendations by Sir Brian Leveson in his *Review of Efficiency in Criminal Proceedings* in 2015[11], a number of significant amendments were made to the Criminal Practice Direction last year[12], intended to address the concerns described above. For reasons of space only a summary of them can be given here. They are important, however, and deserve to be read in full – by practitioners, and by judges too. Counsel should be proactive to ensure that they are brought to the attention of the trial judge, to ensure maximum jury participation and comprehension of the evidence at trial.

CPD 25A.1 opens by reminding us that CPR 3.11(a) requires the court, with the active assistance of the parties, to establish what are the disputed issues in order to manage the trial. It then says that prosecution opening speeches should be used for this purpose. CPD 25A.2 then complements this by reminding us of CPR 25.9(2)(c), which provides for the defence to set out the issues in the defendant's own terms immediately after the prosecution opening, and adds that "for the defendant to take the opportunity at this stage to identify the issues may assist even if all he or she wishes to announce is that the prosecution is being put to proof". CPD 25A.3 then points out that:

> To identify the issues for the jury at this stage also provides an opportunity for the judge to give appropriate directions about the law; for example, as to what features of the prosecution evidence they should look out for in a case in which what is in issue is the identification of the defendant by an eye witness. Giving such directions at the outset is another means by which the jury can be helped to focus on the significant features of the evidence, in the interests of a fair and effective trial.

CPD 25A.4 provides that a defendant is not entitled to identify issues at this stage by addressing the jury unless the court invites him or her to do so. However, given the advantages described above, usually the court should extend such an invitation. Examples are then given of situations in which it might be appropriate for such an invitation to be withheld – one of which is where "that the case is such that the issues are apparent".

CPD 25A.5 provides that the question of whether or not there is to be a defence identification of issues, and if so in what terms, is a matter to be resolved in the absence of the jury.

CPD 25A.6 makes it plain that the court's invitation to identify the issues by addressing the jury is one which the defendant is at liberty to refuse. However, "where the court decides that it is important for the jury to be made aware of what the defendant has declared to be in issue in the defence statement then the court may require the jury to be supplied with copies of the defence statement, edited at the court's direction if necessary."

CPD 26K.1 reminds us that Sir Brian Leveson's recommendations for improving the efficiency of jury trials included the early provision of appropriate directions, the provision of a written route to verdict, a summing up delivered in two

3 Crown Court Study, Royal Commission on Criminal Research Study No 19 London HMSP – 1993.
4 *Trusting the Jury;* Criminal Bar Association Kalisher Lecture, 23 October 2007.
5 In his *Review of the Criminal Courts* (2001).
6 *The criminal justice system in England and Wales: Time for Change?* Speech to the University of Hertfordshire – 4 November 2008..
7 Dann - 2005 – *"Testing the effects of selected jury trial innovations on juror comprehension of contested DNA evidence"* - US Department of Justice.
8 Ministry of Justice Research Series 1/10 – February 2010.
9 Ibid, p.4.
10 Ibid, p.48.

11 Online at https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf
12 Criminal Practice Direction (CPD) Part VI Trial 25A.1 to 25A.6 - Identification for the jury of the issues in the case CPD Part VI Trial 26K1 to K22 - Jury Directions, Written Materials and Summing Up. For a hard copy version, see *Archbold* (2017) Second Supplement, pp 486-488 - Para B-349.

parts, with the first part prior to the closing speeches and the second part afterwards, and streamlining the summing up to help the jury focus on the issues.

Following this through, CPD 26K.8-10 make provision for early directions in cases where "the judge decides it will assist the jury in their approach to the evidence and/or evaluating the evidence as they hear it". Paragraph 10 sets out a long list of examples in which an early direction might be thought appropriate. These include identification cases, where a *Turnbull* direction might help the jury when hearing the evidence of eye-witnesses, and – of particular relevance to the topic discussed earlier in this article – the evidence of expert witnesses.

CPD 25K.11 and 12 then deal with written routes to verdict.

> "Save where the case is so straightforward that it would be superfluous to do so, the judge should provide a written route to verdict. It may be presented (on paper or digitally) in the form of text, bullet points, a flowchart or other graphic."

Elaborating this, CPD 25K.13, 14 and 15 then encourage providing juries with "other written materials"; in particular, where these may "assist the jury in relation to a complex direction or where the case involves a complex chronology, competing expert evidence or differing descriptions of a suspect".

CPD 26K.16 then deals with split summings-up.

> Where the judge decides it will assist the jury when listening to the closing speeches, a split summing up should be provided. For example, the provision of appropriate directions prior to the closing speeches may avoid repetitious explanations of the law by the advocates.

The following paragraph then gives a list of examples of situations in which a split might be appropriate.

In the recent case of *Brown*[13] convictions were quashed because the judge had not provided the jury with a written route to verdict. From this it seems clear that the Court of Appeal expects these new provisions of the Criminal Practice Direction to be understood and applied.

13 [2017] EWCA Crim 167; summarised in Issue 3 of *Archbold Review*.

The Prison and Courts Bill: Online courts and the right to a fair trial

By Sebastian Walker[1]

The new Prison and Courts Bill, introduced on 23 February 2017, contained a number of measures designed to further the Ministry of Justice's ongoing plans to transform and modernise the justice system. It aimed to establish new procedures for civil, criminal and family courts and tribunals aimed at ensuring greater efficiency and time and cost savings. The proposed reforms primarily focused on an enhanced use of technology in the courts and criminal justice system.

The proposed reforms would have introduced a number of changes: greatly expanding the availability of live audio and video links to give evidence in criminal hearings;[2] introducing a written information procedure allowing preliminary criminal proceedings, such as indication of plea and mode of trial, to be dealt with on the papers and evidence submitted in writing (and electronically);[3] and abolishing local justice areas and creating a unified magistrates' court.[4]

The flag-ship of the Bill, however, and what this article will focus on, was the proposed new procedure for the automatic online conviction, and sentencing, of low-level offences.[5]

With the dissolution of Parliament for a snap election this Bill has now been abandoned. However, it does not require the deepest of gazes into the proverbial crystal ball to foresee that the Bill – or at any rate, the money-saving parts of it – are likely before long to be revived. That being so, the advantages and drawbacks of the proposed new online procedure are still a topic well meriting discussion; and if we are optimistic, a discussion of the problems at this stage might persuade a future government to produce a new version of the scheme which improves upon the first one.[6]

Under the new procedure – which would have been available only for non-imprisonable, summary-only offences to be specified by the Secretary of State – an accused would be able to plead guilty to an offence and accept a number of fixed penalties (including a fine, driving penalty points, compensation and prosecution costs) online, avoiding any need for in-court proceedings. These penalties would be made apparent to the accused before he or she decides whether to accept an online conviction, and the fixed level penalties will be set by the Secretary of State for each offence. Convictions and sentences accepted under the automatic online conviction system would both be subject to potential review by a magistrates' court. The Government's initial intention was to pilot the scheme with the offences of railway fare evasion, tram fare evasion, and possession of an unlicensed rod and line – offences with no identifiable victim.

There is much in principle to be welcomed here. Delays continue to plague the criminal justice system – on average it takes 55 days from the charge or laying of information for a case to be finally disposed of in the magistrates' courts, and a staggering 218 days in the Crown Court[7] – and many courts remain poorly fitted for the use of video evidence or Wi-Fi. As Sir Brian Leveson identified in his 2015 report on the criminal justice system as it stands "the criminal courts are now lagging significantly behind modern practices".[8]

1 Research Assistant at the Law Commission. The views expressed in this article are solely the views of the author and do not represent the views of the Law Commission. Thanks are owed to Lyndon Harris for his invaluable feedback on this piece.

2 Prison and Courts HC Bill (2016-17) cls 32-34 and Schs 4-6.

3 Prison and Courts HC Bill (2016-17) cls 23-31.

4 Prison and Courts HC Bill (2016-17) cl 51 and Sch.12.

5 Prison and Courts HC Bill (2016-17) cls 35-36.

6 Prison and Courts HC Bill (2016-17) cls 35-36.

7 Ministry of Justice, *Criminal Court Statistics: July to September 2016* (15 December 2016) tables T2 and T4.

8 Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (January 2015) para.42.

Consultees however raised major concerns about the proposed reforms and their implications for defendant's right to a fair trial under Art.6 of the European Convention on Human Rights (the ECHR) when they were consulted on from September 2016 to November 2016. The consultation received 790 responses with around 250 consultees responding to the questions on online convictions.[9] A significant number of respondents noted fears about the inappropriate pressures they could create on the vulnerable to plead guilty; the risks of prosecutorial abuse of process; and the lack of open justice.[10]

The government response to consultation sought to assuage these fears, arguing that the online conviction system, and the standard statutory penalties, as proposed would not compromise the principles of our justice system and would provide a more efficient and proportionate way of dealing with low level cases. They noted the procedure would only be available for specified summary, non-imprisonable offences and required defendants to opt-in – pointing in particular to the fact that cases could always be considered by a magistrate under the single justice procedure[11] instead or heard by a full court. They argued that sufficient safeguards would be present to ensure that a defendant's right to fair trial would not be infringed by the online conviction system, and pledged that the system would be designed to provide as much clarity and information as possible to defendants. This article explores respondents concerns by reference to the Prison and Courts Bill as it stood at the dissolution, and its explanatory material, and asks whether such safeguards are now apparent.

Are the proposed automatic online convictions compliant with the right to a fair trial?

Article 6 of the ECHR guarantees the right to a fair trial. It requires that in the determination of a criminal charge "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". It also guarantees specific minimum rights for those charged with a criminal offence, including the right to be informed of the nature and cause of the accusation, to defend yourself in person, and to have the assistance of an interpreter.

The need for public hearings

One significant concern about the automatic online conviction process is how the requirement for hearings to be public will be maintained. While Sch.6 to the Prison and Courts Bill made provision for the public to be able to observe virtual criminal proceedings these provisions apply only to proceedings conducted purely by video or audio, and did not cover the automatic online conviction procedure. The Government response to the *Transforming our Justice System* consultation promised that "all interested parties, including victims, witnesses, the public and the press, will have access to case listings and outcomes where appropriate".[12] There was, however, no detail in the Bill, its explanatory notes or its impact assessment as to the form these disclosures will take.

The need to ensure public hearings must be delicately balanced with the right of an offender to rehabilitation, and to private life. While the vast majority of criminal proceedings are conducted in public, in reality very few people attend court hearings, and even fewer cases ever make the press, or become public knowledge. This is especially true of the low-level offences that the automatic online conviction process will deal with. The Government may for example decide that to ensure compliance with the right to a fair trial, all convictions and penalties should be published online. While this would certainly be Art.6 compliant concerns still remain in relation to the potentially disproportionate and negative impact such an approach could have on an offender's private life and employment prospects.[13] The lack of detail as to how the Government will deal with such concerns is worrying and it is surely incumbent upon them to explain in a more detailed manner how open justice will be maintained before the Bill is revived.

Pressure to plead

There remains a lack of information as to how offenders will be supported through the online courts system. The Secretary of State, in her recent appearance before the House of Lords Constitution Committee, said that she hoped the new focus on online courts:

> "...will cut out a lot of wasted money we are spending in helping people navigate a very complicated process and, instead, will make sure that lawyers will be used to best effect, giving expert legal advice and representation".[14]

The idea that there will be a reduced need for personalised legal advice is not necessarily problematic – online courts have been proposed to find savings – but more detail is necessary as to what steps will be taken to ensure that an accused receives sufficient, and effective, legal advice. Will the constituent elements of the individual offence, and any defences, be properly explained to them? And will the long-term legal implications of a criminal record? The only information that it was clear from the Prison and Courts Bill an accused will have before they plead is the penalties they will consent to.

Respondents on consultation raised valid concerns that the vulnerable may not understand the implications of their decision to plead and that the lower penalties would offer an improper incentive to plead rather than fight their case. While the Government has promised that the implications of a decision to plead will be made clear, and steps will be taken to ensure that no improper pleas are entered, there remains no detail on how this information will be conveyed, the level of detail it will entail and the scope for any more personalised legal advice.

The Bill did give the magistrates' court the power on infor-

9 Ministry of Justice, *Transforming our Justice System: Government Response* (Cm 9391, February 2017) available at: https://www.gov.uk/government/consultations/transforming-our-courts-and-tribunals.

10 Ministry of Justice, *Transforming our Justice System: Government Response* (Cm 9391, February 2017) 8-14.

11 The single justice procedure under ss.16A-F of the Magistrates' Court Act 1980 allows certain low-level cases to be tried on the papers by a single magistrate where the accused has not served a written notice stating a desire to plead not guilty or a desire not to be tried in accordance with this section. It was introduced by the Criminal Justice and Courts Act 2015 and interestingly attracted much less controversy.

12 Ministry of Justice, *Transforming our Justice System: Government Response* (Cm 9391, February 2017) 10.

13 The Law Commission's recent publication on the disclosure of criminal records raised significant concerns about the way such disclosures are made and the impact they have on individuals lives: Law Commission, *Criminal Records Disclosure: Non-Filterable Offences* (Law Com No 371, 2017).

14 Constitution Committee, *Lord Chancellor – Oral Evidence* (HL, 1 March 2017) Q11.

mation to set aside a conviction, or vary a sentence, that appears to them to be unjust: a power the court would be able to exercise of its own will or on the application of either the offender, or the prosecutor. While this went some way to mitigating these concerns, ensuring easy review of such decisions without having to formally appeal against conviction there was still no detail as to what form these applications would take. If it becomes a substantial hassle to appeal a conviction or penalty there is a significant chance that for the vulnerable such safeguards will simply not be effective.

Prosecutorial abuse of process - the need for an independent and impartial tribunal

In the determination of a criminal charge the right to a fair trial under Art.6 applies not only to the determination of guilt but also to the determination of sentence.[15] The Prison and Courts Bill made provision for a number of penalties to be imposed upon conviction – including for the offender to pay compensation and prosecution costs as determined by the prosecutor.

It is clear from the decision in *R (on the application of Faithfull) v Ipswich Crown Court*[16] that under English law a compensation order forms part of the determination of sentence.[17] It seems then *prima facie* inappropriate, and in contravention of Art.6, that the prosecution – instead of an independent and impartial tribunal – decides the compensation to be imposed: their discretion restricted only by the maximum that can be imposed for that offence under the automatic online conviction procedure.

The current European Court of Human Rights case law on the imposition of sentence is that Art.6 does not guarantee that all penalties will be imposed by an independent and impartial tribunal but merely that there must be a right of access to a court to challenge such penalties.[18] The Bill gave a magistrates' court the power to replace any penalty that they consider to be unjust and would thus seem to appear to be compliant but it is simply unclear to what extent this will provide an effective safeguard from a prosecutorial abuse of process, or how offenders will come to be aware of this process or the disproportionate nature of their penalties.

Questions must also be raised as to whether these changes would set a negative precedent for justice as a whole. The prosecution's ability to set the amount of compensation to be paid amounts to a sentence being imposed in a criminal court by one of the parties to the case and it is difficult to see how this is not abjectly contrary to the principle of a fair trial even if it is ECHR compliant. Historically the prosecution had no role at all in sentence and even now the prosecution's only role in sentence is to offer assistance to the court by drawing the courts attention to relevant facts, considerations and the law. Concerns must be raised about the ability for the prosecution in the context of the adversarial system to be able to act impartially and objectively with regard to sentence. While none of the offences for which the online conviction system is available are themselves imprisonable an offender could face a term of imprisonment in default for non-payment of a compensation order set by the prosecution.[19] The injustice of such a result is readily apparent and clear safeguards must be in place to avoid it.

Fixed penalties

The Bill made provision for the imposition of a number of fixed penalties - fines, driving penalty points and a surcharge. It seems problematic that fixed fines and penalties will be imposed, with no modification for the individual mitigating or aggravating factors of a case. Blunt penalties such as these do little to punish the most well off and can have a disproportionate effect on the poorest and most vulnerable. The fixed penalties will be set by the Secretary of State in a way that "will be based on current fining practice": looking at average fine levels, guidelines and income data.[20] While there were suggestions that fine levels might be different for offences committed in different circumstances – in relation to speeding offences for example the amount the offender is over the limit may result in an increased fine – this would only help ensure proportionality to the harm caused rather than the circumstances of the case. Individual specific mitigation will only be able to be raised on an application to a magistrates' court and will not be considered in sentence normally.

Conclusion

Since the introduction of the Human Rights Act 1998 there has been a duty on ministers to declare whether they consider a Bill is compatible with ECHR rights.[21] The Lord Chancellor's view in this case, that the online automatic convention system is compatible, may have been be correct, but certainly seems to require more explanation. There is a clear need for the Government to provide a more detailed response to the concerns that were raised on consultation.

The cornerstone of the criminal justice system is public faith in the process. Publishing clear draft documents as to the legal advice accused will be given prior to assenting to an automatic online conviction; consulting on planned fine levels for the offences that the Government plans to pilot the scheme with; laying out clearly how the disclosure of online convictions will operate – these are all steps that would go a long way to providing confidence in the online courts system and answering respondents' valid concerns. The explanations that were offered by the provisions in the Prison and Courts Bill, and its accompanying material, were simply not sufficient.

15 See *Eckle v Federal Republic of Germany (*1983) 5 EHRR 1 and *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.

16 [2007] EWHC 2763 (Admin).

17 For the purposes of Art.6 if something is domestically classified as part of the determination of a criminal charge that will be conclusive. See *Engel v The Netherlands* (1979-80) 1 EHRR 647 at [81].

18 See *Malige v France* (1999) 28 EHRR 578 at [45].

19 Compensation orders imposed under the Bill are to be treated as if made by a magistrates' court under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 for which imprisonment in default is available under s.76 of the Magistrates' Courts Act 1980.

20 Prison and Courts Bill: Explanatory Notes, para.260.

21 Human Rights Act 1998, s.19.

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