SWEET & MAXWELL

Issue 8 October 26, 2018

Archbold Review

Cases in Brief

Defences—self-defence—intoxication—defendant affected by paranoia induced by proximate ingestion of drink or drugs but not presently intoxicated—genuine mistake—whether "attributable to intoxication"

TAJ [2018] EWCA Crim 1743; July 24, 2018

T was convicted of attempting to murder a man he genuinely (it was accepted) thought was a terrorist. It was agreed that at the time he was suffering from an episode of psychosis induced by the ingestion of drugs and/or alcohol in the days or weeks prior to the attack, although there was no evidence that at the time he was directly affected by drink or drugs in his body. On appeal, it was argued that the defence of self-defence, as codified in the Criminal Justice and Immigration Act 2008 s.76, should have been left to the jury. The appeal was dismissed.

(1) The court reviewed the authorities (including *Coley*; *McGee*; *Harris*, [2013] EWCA Crim 223; [2013] M.H.L.R. 171*; DPP v Majewski* [1977] A.C 443; *Beard* (1920) 14 Cr.App.R 159; *Davis* (1881) 14 Cox CC 563; *O'Grady* (1987) 85 Cr.App.R 315; *Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr.App.R 16; *Williams (Gladstone)* (1983) 78 Cr.App.R 276; *Oye* [2013] EWCA Crim 1725, [2014] 1 Cr.App.R 11; *Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1; *Beckford v The Queen* [1988] A.C. 130; *Dewar v DPP* [2010] EWHC 1050 (Admin); *Unsworth v DPP* [2010] EWHC 3037 (Admin); *Palmer v The Queen* [1971] A.C 814; *Oatridge* (1994) 92 Cr.App.R 367; *Yaman* [2012] EWCA Crim 1075, [2012] Crim L.R. 896; *Lipman* [1970] 1 QB 152; *O'Grady* [1987] Q.B. 995; and *Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr.App.R. 16, CA).

(2) Analysing *Majewski*, while that case focused on the crime committed while specifically under the influence of drugs or alcohol, it was, however, difficult to see why the language, and the policy, therein were not equally apposite to the immediate and proximate consequences of such misuse. That was not to say that long-standing mental illness which might at some stage have been triggered by misuse of drugs or alcohol would be covered. The point was that a defendant who was suffering the immediate effects of alcohol or drugs in the system was not in a different position to a defendant who had triggered or precipitated an immediate psychotic illness as a consequence of proximate ingestion of alcohol or drugs in the system whether or not they remain present at the time of the offence.

(3) In terms of s.76 of the 2008 Act, the words "attributable to intoxication" in s.76(5) ("But subsection (4)(b) [genuine mistake] does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced") were broad enough to encompass both (a) a mistaken state of mind as a result of being drunk or intoxicated at the time and (b) a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned was not drunk or intoxicated at the time, the short-term effects could be shown to have triggered subsequent episodes of e.g. paranoia. This was consistent with common law principles.

Homicide—infanticide—causation—whether disturbed balance of mind required to be sole cause of acts or omissions

TUNSTILL [2018] EWCA Crim 1696; July 19, 2018

In the Infanticide Act 1938 s.1(1) (facts otherwise amounting to murder or manslaughter of an infant by his or her mother were infanticide if "at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child"), the phrase "by reason of" should not be read as "solely by reason of". As long as a failure to recover from the effects of birth was an operative or substantial cause of the disturbance of balance of mind, that should be sufficient, even if there were other underlying mental problems

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(perhaps falling short of diminished responsibility) which were part of the overall picture. To interpret Judge LJ's obiter dictum in *Kai-Whitewind* [2005] EWCA Crim 1092, [2005] 2 Cr.App.R 31, [134] that "no other circumstances are relevant" other than that the balance of the mother's mind was disturbed because the mother had not recovered from giving birth (or – not relevant in the instant case – the effect of lactation) as meaning that a pre-existing mental condition was not relevant was unnecessarily harsh and ran counter to the intent of the legislation. "By reason of" imported a consideration of causation, an issue for the jury. The law was familiar with the notion that in considering causation a person's conduct need not be the sole or main cause of the prohibited harm: *Smith* [1959] 2 QB 35, 42 and *Hughes* [2013] UKSC 56, [2013] 1 W.L.R. 2461 [22]. The reasoning in *Deitschmann* [2003] UKHL 10, [2003] 1 A.C. 1209, while considering different legislation (Homicide Act 1957 s.2(1)), was to a degree parallel, finding that an abnormality of the mind was not required to be the sole cause of a defendant's acts in killing.

Obstructing the highway—elements—relationship between reasonable use of the highway and no lawful excuse—application

BUCHANAN v CPS [2018] EWHC 1773 (Admin); July 7, 2018

B crossed into the road in Parliament Square using a light-controlled crossing, remaining there once the light changed and deliberately moving to place himself in front of oncoming vehicles in pursuance of a political protest. He was convicted of obstructing the highway contrary to the Highways Act 1980 s.137(1).

(1) While three elements of the offence were identified in *Hirst and Agu v Chief Constable of West Yorkshire* (1987) 85 Cr.App.R 143 – obstruction of free passage along the highway; that it be deliberate, and lack of lawful excuse – in *Director of Public Prosecutions v Jones* [1999] 2 A.C. 240, the House of Lords effectively equated the test for obstruction of the highway with the extent of the right to use the highway. The majority, albeit recognising that the primary purpose of a highway was that of passage, held that, if an activity did not unreasonably obstruct that public right of passage, then it was within the scope of those activities for which the public may lawfully use the highway and it could not amount to an obstruction of the highway. Thus, in *Westminster City Council v Haw* [2002] EWHC 2073 (QB), the court found that H's use of the highway (a pavement opposite Parliament) to display posters etc that encroached more than de minimis onto the highway was not obstruction because it was a reasonable use, (inter alia) because it was in an ideologically appropriate location for the expression of his rights under the European Convention on Human Rights Art.10 rights. As a result, since *Jones*, the third element had to a large extent been incorporated into the question of whether there has been an obstruction, a question turning on whether the activity on the highway was reasonable. Where the first element was satisfied, and there was lawful authority, or excuse, for the use of the highway – e.g. the proper and appropriate exercise of Art.10 rights – the use would generally be reasonable under the third element.

(2) It was not contested that B's action was deliberate, and accordingly, the question was whether the Crown Court had been entitled to conclude that the use of the highway in the manner was unreasonable, and thus amounted to an obstruction. The Crown Court had been right to find that it was, in the light of the following factors: (a) B had moved from a demonstration on the pavement adjacent to the grassed part of Parliament Square, a demonstration which, whilst on the highway, was a reasonable use thereof; (b) in moving onto a busy multi-lane road, he put not only himself, but also others, including potential rescuers, at risk of physical harm, and property damage; (c) he deliberately disrupted traffic for (as the Crown Court found) five minutes; (d) he positively wanted to be arrested: and his conduct indicated that he understood that what he was doing was wrong, and amounted to an arrestable offence; (e) before he was arrested he had been twice warned to desist from disrupting traffic by an officer, and when the officer pushed him out of the road, he evinced an intention to return to further disrupt traffic; (f) his action was clearly not de minimis (the court reviewed the cases, including *Seekings v Clarke* (1961) 59 L.G.R 268; *Hertfordshire District Council v Isabel Hospice Trading Limited* [2001] JPL 597; *Wolverton Urban District Council v Willis* (1961) 60 L.G.R 135; *Torbay Borough Council v Cross and Mills* (1995) 159 JP 682 and *Westminster City Council v Haw* [2002] EWHC 2073 (QB), (2002) 146 S.J.L.B. 221); and (g) as the Crown Court found, B's removal and arrest were a necessary interference with B's art.10 and art.11 rights in the interests of "public safety and the protection of the rights and freedoms of others", and accordingly his use of the highway was not reasonable.

Possession of indecent photographs of child—possession of extreme pornographic images—"possession"—images in digital files—extent of knowledge/access necessary

OKORO (No 3) [2018] EWCA Crim 1929; August 22, 2018

O had been convicted of possessing an indecent photograph of a child (160(1) of the Criminal Justice Act 1988 s.160(1)) and possessing extreme pornographic images (Criminal Justice and Immigration Act 2008 s.63(1)). The question arose as to what requirements were imported by the notion of "possession" where a digital file comprising the image on a device could not be shown to have been actively downloaded by a defendant, and the defendant claimed that material had been sent to him uninvited. It could not be the case that it must be shown that a defendant was aware of all of the relevant content on a digital file on a device, as then the statutory defences (Criminal Justice Act 1988, s.160(2)(b) and(c); Criminal Justice and Immigration Act 2008 s.65(2)(b) and (c)) would be redundant. Rather, the statute required proof of possession of the pornography or images of child abuse, as a preliminary step before the burden of proof shifted to the accused, to establish the statutory defences. A defendant could not be convicted in relation to material of which he or she was genuinely totally unaware. Nor could a defendant be said to be in possession of a digital file if it were in practical terms impossible for him or her to access that file. However, possession was established if the defendant could be shown to have been aware of a relevant digital file or package of files which he or she had the capacity to access, even if he or she could not be shown to have opened or scrutinised the material. That represented the closest possible parallel to the test laid down in the authorities (*Atkins v Director for Public Prosecutions* [2000] 1 W.L.R. 1427; *Porter* [2006] EWCA Crim 560, [2006] 1 W.L.R.

2633; *Leonard* [2012] EWCA Crim 277, [2012] 2 Cr.App.R. 12; and *Ding Chen Cheung* [2009] EWCA Crim 2965), and was consistent with the criminal law of possession in other fields, such as unlawful possession of drugs. The result was that in a case such as O's, in which he said unsolicited images were sent on WhatsApp and automatically downloaded to his phone's memory, two elements had to be made out in order for an individual to have possession: (1) the images must have been within the appellant's custody or control, i.e. so that he was capable of accessing them; and (2) he must have known that he possessed an image or a group of images (knowledge of their contents not being required).

Prison mutiny—participation under Prison Security Act 1992 s.1(4)—whether "reasonable opportunity of submitting to lawful authority" required order during the currency of mutiny

BARRATT [2018] EWCA Crim 1603; June 19, 2018

Where a prisoner was charged with "deemed participation" in a mutiny under the Prison Security Act 1992 s.1(4) ("Where there is a prison mutiny, a prisoner who has or is given a reasonable opportunity of submitting to lawful authority and fails, without reasonable excuse, to do so shall be regarded for the purposes of this section as taking part in the mutiny"), the requirement of synchronicity outlined in *Mason and Cummins* [2004] EWCA Crim 2173, [2005] 1 Cr.App. R. 11 simply meant that the failure to submit to lawful authority, where there was a reasonable opportunity to do so, must be at a time when the mutiny was in process. The offence was not committed only by failing to follow an express instruction during a mutiny. A reasonable opportunity of submitting to lawful authority did not require any order to have been given. The fact that an order has been given and not heeded may well be powerful evidence that the defendant did, in fact, have a reasonable opportunity to submit to authority and failed to do so, but it was not necessary. Accordingly, the fact that the only relevant order in B's case – that prisoners return to their cells – was given before the mutiny started was a distraction. The fact that such an order to prisoners had been given before a mutiny started may well, depending on the facts, fall to be characterised as a continuing instruction; but whether it did so was not determinative whether there has been a failure to submit to lawful authority.

Trial—conduct of judge to defendant and counsel

HUSSAIN [2018] EWCA Crim 1785; May 18, 2018

During exchanges in the absence of the jury when the judge was drawing attention to what he considered attempts by H to distract the jury during cross-examination, the judge should not have called H "you offensive man" (when, apparently, H made an obscene gesture); should have given H a cooling off period over the lunch adjournment and given him the opportunity to apologise (cf Crim PR 48.5(2) re contempt) rather than excluding him for part of the remainder of the trial; and, when court resumed after lunch, should not have said of H's counsel that "fortunately, I haven't had to see you in front of me for about two years". However, he had been correct to decline to recuse himself, and in the light of his direction to the jury that they should not be concerned at H's absence and that the trial should continue (although he might have added H's absence was no support for the prosecution), the conviction was not unsafe.

Trial—defendant medically unable to give evidence—whether judge right to require trial to proceed—adequacy of directions

WELLAND [2018] EWCA Crim 2036; September 14, 2018

Where W suffered a number of stress-related fits in court, which, it was accepted, were genuine, the judge had been wrong to continue with the trial despite the inability of W to give evidence, following his refusal of W's application, supported by the Crown, that the jury be discharged.

(1) Although it was not a case where a trial had taken place in the absence of the defendant, the judge required the trial to continue, even if that meant that the appellant would not give evidence, without properly investigating whether steps could be taken that might enable him to do so. That the judge accepted that W's physical or mental condition made it undesirable for him to give evidence (Criminal Justice and Public Order Act 1994 s.35(1)(b)) was implicit in his directions to the jury.

(2) The right of a defendant who wished to do so to give evidence in his or her own defence was an important element of the right to a fair trial. If it was to be real and not illusory, a defendant who wished to give evidence must be given a full and fair opportunity to do so. A decision to proceed in circumstances where such a defendant was understood not to be in a fit state to give evidence should be taken, if at all, only after the most full and careful consideration. There was no doubt that the defendant wanted to testify and that his counsel considered it essential to his defence that he should do so.

(3) While it was regrettable that the defence failed to obtain medical evidence, the defence should have had a proper opportunity to explore the possibility of what special measures might have assisted W to give evidence by obtaining medical evidence during the trial.

(4) The judge's direction was in any event inadequate. It was inapt to say, as the judge did more than once, that W had his "permission" not to give evidence, where the decision was one for the defence; and merely to tell the jury not to hold his failure to give evidence against him was cursory – the judge should have spelt out consequence of the fact that W was unable to give evidence.

SENTENCING CASE

Arson—young offenders

JT [2018] EWCA Crim 1942; July 18, 2018

The appellant, who was 16 at the date of sentence, had pleaded guilty to an offence of arson being reckless as to whether life would be endangered. In March 2018 he was sentenced to three years' detention pursuant to s.91 of the Powers of Criminal Courts (Sentencing) Act 2000.

The offence was committed in May 2016, when the appellant set fire to newspapers and magazines left on the floor of a bus, destroying the bus and seriously damaging the nearby bus station. He was arrested and interviewed in January 2017, summoned to attend court six months later and sent to the Crown Court. In August 2017 he pleaded guilty, on a basis, at the first hearing in the Crown Court. A psychiatric report that had been ordered was only available on the date of sentence. Passing sentence, the judge stated

> The arithmetical approach that I take to your case is to start with a sentence of seven years' detention if you'd been an adult, but, in accordance

> with the way the guideline on the subject of sentencing youths suggests, to take more appropriately not that starting point ... but a starting point ... two-thirds of that – the sentence therefore of 56 months. From that, you are also entitled to credit for your guilty plea, and ... giving you a generous full discount for your plea of guilty ... the sentence I am going to pass upon you is one of three years' detention.

The Court of Appeal stated that the judge erred in the following respects: (i) The starting point adopted, even for an adult, was too high. The usual range of sentences after trial for arson intending to endanger life is between eight to ten years. Where a reckless arson approaches the culpability involved in intentionally endangering life a sentence approaching the lower end of the eight to ten-year range will be appropriate, but this was not such a case. For an adult, the appropriate sentence after trial would not exceed six years' imprisonment. (ii) Inadequate reference was made to the Sentencing Council's guideline on sentencing for youths. Paragraphs 1.2, 1.5, and 1.16 of the general sentencing principles set out were of particular relevance to this case. (iii) This suggests the appropriate sentence for those aged 15-17 is around a half to two-thirds of the adult sentence. There was no proper basis for the reduction of one third rather than a half. The appropriate sentence after a trial would have been three years' detention. With full discount for a plea, the maximum sentence was, therefore, two years' detention.

Through no fault of his, the appellant was sentenced nearly two years after the event. The delay should have been a significant factor. Twenty-two months in the life of an immature troubled teenager is a very long time indeed.

The judge's approach properly reflected the seriousness of the offence but failed to reflect the very low culpability involved and the approach required by the Sentencing Council guideline. Such offences, even when committed by a 15-year-old, will often result in immediate custody but this was an exceptional case. The sentence of three years' detention was quashed and replaced with a youth rehabilitation order for a period of eighteen months with an intensive supervision and surveillance programme attached.

Two Cases on the Law of Theft: a Concertina Movement?

By J.R. Spencer

For over 15 years the case-law on the law of theft stood still. This was hardly surprising, perhaps, as a series of cases – in particular, *Gomez*[1] and *Hinks*,[2] seemed to have deprived the offence of any intelligible limits, leaving no points of law about its essential ingredients left to decide; so that, to quote the catch-phrase of Dr Heinz Kiosk, the mythical psychological pundit from the Peter Simple column in the *Daily Telegraph*, "We are all guilty". But the last twelve months have seen two cases on the law of theft of considerable significance. And viewed in combination, they work like a concertina: one pulls the offence yet further out, and the other squeezes it back in.

The first is the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd.*[3] With this decision most readers will already be familiar; but as a brief reminder, this was the civil case where a casino resisted a gambler's claim for his winnings on the ground that he had cheated. Denying cheating, the gambler said that an ingredient in cheating is "dishonesty" as defined, for the purpose of the Theft Act, in *Ghosh*.[4] This required (i) conduct in breach of accepted standards of behaviour and (ii) awareness in the actor that it is so. The gambler admitted using a covert stratagem to raise his chances of winning, but said he thought it was legitimate to do so – and so he had not cheated. Dismissing his appeal, the Supreme Court ruled that "dishonesty" in the Theft Act sense is not an essential ingredient in cheating. But having done so, it then condemned at length the second limb of the *Ghosh* test, which it said did not correctly represent the law.

The Court's first and central reason for disapproving of the second limb of the *Ghosh* test was that it allows the defendant to be judged by his own standards of behaviour. Where – as in self-defence, for example – the law requires a person's behaviour to comply with the normal standards expected in society, the tribunal of fact decides what that standard is, and if the defendant disagrees with it he does so at his peril. By allowing the defendant to be judged by his own standards, the second limb of the *Ghosh* test, it said, has the

> unintended effect that the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour.

A subsidiary reason for its disapproval was that it

> has led to an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of civil justice.

The Supreme Court's condemnation of the second limb of the *Ghosh* test in this case has received extensive comment in the legal press, much of it distinctly critical.[5]

The first criticism is that, by pronouncing the condemnation as obiter dicta in a civil case, the Supreme Court has presented the criminal courts with an awkward puzzle. Under the rules of precedent as generally understood, Court of Appeal decisions are not overruled by obiter dicta from the court above, however pointed; which means that the Court of Appeal's decision in *Ghosh* is still an authority binding on first instance courts, and on the Court of Appeal itself unless and until it decides to overrule it. So what are first instance judges now to do?[6]

The second criticism is that to the Supreme Court's objections to the second limb of the *Ghosh* test there are answers, and when making the objections it did not mention them or deal with them.[7]

1 [1993] A.C. 442.
2 [2000] UKHL 53, [2000] 2 A.C. 241.
3 [2017] UKSC 67, [2018] A.C. 391.
4 [1982] 2 QB 1083.

5 James Richardson in 2017 CLW 39/4; Matt Dyson and Paul Jarvis, "Poison Ivey or herbal tea leaf?", [2018] *LQR* 198-202; Graham Virgo, "Cheating and dishonesty", [2018] *CLJ* 18-21; and similarly, Karl Laird in his commentary to the case in [2018] *Crim L.R.* 395-39.
6 On this point, see the comment by Richard Percival, [2018] 4 *Archbold Review*, 3.
7 "It is fair to assume that *Ghosh* and its effect upon the criminal law was not subject to detailed scrutiny at any stage in the proceedings in *Ivey*": Karl Laird, note 5 above.

As unsuccessful defendants in criminal proceedings face consequences far worse than do unsuccessful parties to a civil action, a more generous interpretation of the dishonesty requirement in their favour can hardly be described as "an unprincipled divergence".

And if the normal rule is that the law imposes standards of behaviour which are objective, to this rule there are significant exceptions, in the context of which the second limb of the *Ghosh* test does not stand alone. By s.21(1) of the Theft Act 1968 a person is guilty of the offence of blackmail where he makes a demand with menaces, unless he does so

> … in the belief (a) that he has reasonable grounds for making the demand, and (b) that the use of the menaces is a proper means of reinforcing the demand.

And similarly, s.5 of the Criminal Damage Act 1971 provides a defence to those who destroy or damage property in the belief that this is necessary to protect other property, and the belief that

> the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

This being so, the question, surely, should be whether dishonesty in theft is a proper case for a further exception to the usual rule. When commenting on *Ghosh* in 1982 I thought that it was not, and said

> For the courts to take their criminal law from the man on the Clapham omnibus is one thing; to take it from the man accused of stealing it is quite another.[8]

But 36 years later, and on the other side of *Gomez* and *Hinks*, I confess that I have changed my mind. In the context of an offence that potentially covers almost anything and everything, the innocence of anyone who genuinely believes his conduct to be proper by the ordinary standards of honest and reasonable people can be seen as an important limit; and rejecting it extends the offence of theft yet further.[9] In my view, the abolition of the second limb of the *Ghosh* test needs deeper thought than the Supreme Court gave to it in *Ivey*; and the Court of Appeal should think not twice but many times before it decides to accept the obiter dicta uttered in that case.

The second recent case of interest is *Darroux*.[10]

The defendant was the manager employed by a charity to run a sheltered housing project. Her duties included keeping records of the hours that she and the other employees worked and passing them to X Ltd, a company which provided the charity with payroll services. On the basis of her records, X Ltd would then calculate the employees' earnings and issue instructions to the charity's bank to pay them by direct debit. In her reports to X Ltd, she dishonestly exaggerated the hours that she herself had worked, thereby causing herself to be significantly overpaid. For this the Crown indicted her for theft, of which she was convicted; a conviction which the Court of Appeal then quashed, on the ground that her misconduct, though a clear case of fraud, did not constitute the crime of theft.

The Court of Appeal began by criticising the drafting of the indictment, which described the subject-matter of the theft as "monies belonging to [the charity]". The improper extraction of funds from another person's bank account, it said, should be charged as stealing the chose in action representing the debt due from the bank to the account-holder, not stealing "money", as if it were cash stored in a safe or till. But it quashed the conviction not for this, but because it thought the defendant's conduct in this case did not constitute an "appropriation", which by s.1 of the Theft Act 1968 constitutes the central and key ingredient in the crime of theft.

It reached this conclusion in the light of *Briggs*.[11] In that case the defendant, a predatory great-niece, undertook to help her aged relatives to sell their existing house and buy another; but when the existing house was sold, and the purchase money still held by the conveyancers who had handled the sale, she tricked the relatives and conveyancers into using the funds in their hands to buy the new house not for the aged relatives, but for herself. For this, she was prosecuted for theft of the funds which she had dishonestly caused the conveyancers to misapply for her benefit, and convicted. But the Court of Appeal then quashed her theft conviction, saying

> [12] … we consider that where a victim causes a payment to be made in reliance on deceptive conduct on the part of the defendant there is no "appropriation" by the defendant.

For prosecutors, *Darroux* is a useful reminder that they should use the Fraud Act to prosecute misconduct of this sort, and not routinely prosecute everything as theft because (as the prosecutor wrongly imagined in this case) a theft charge is likely to be "simpler". Ms Darroux was unquestionably guilty of fraud by deception contrary to the Fraud Act 2006 ss.1 and 2; and were the facts of *Briggs* to recur today, the defendant in that case would clearly commit an offence against the Fraud Act too.[12]

More generally, it could also be seen as a reminder to everyone that theft is an offence which does have some clear factual requirements, and does not consist of dishonesty alone. But whether the decision really does establish this is not entirely clear, because *Briggs*, on which it heavily relies, is an authority which is distinctly shaky.

Although it was reserved, and emanated from a court containing both a former Law Commissioner and a future Lord Chief Justice, the judgment in *Briggs* makes no mention of the trilogy of House of Lords decisions, *Lawrence v Metropolitan Police Commissioner*,[13] *Gomez*[14] and *Hinks*[15]: presumably because none of them were cited or discussed in argument. In the first of these, *Lawrence*, the House of Lords accepted the proposition that it is an appropriation, and hence potentially a theft, to use deceptive conduct to cause the victim to make a payment – and in *Gomez* and *Hinks* the decision in *Lawrence* was approved and followed. If it can be an appropriation to use deceptive conduct to cause the victim to make a payment, it is hard to see why it cannot be an appropriation to use deceptive means to induce the victim to cause a payment to be made. The Court of Appeal in *Darroux* noticed that these decisions were not discussed in *Briggs*, but the omission seemed not to trouble them. But if

8 (1982) 41 *CLJ*, 222.
9 A point made trenchantly by Virgo, note 5 above.
10 [2018] EWCA Crim 1009.
11 [2003] EWCA Crim 3662, [2004] 1 Cr.App.R 34.
12 Fraud by deception, insofar as she told lies – and in the light of her relationship with the victims, presumably fraud by abuse of position too.
13 [1972] A.C. 626.
14 Note 1 above.
15 Note 2 above.

the court *Briggs* had failed to notice these decisions, the implication, surely, is that the case was decided *per incuriam*. The decisions in *Darroux* (and in *Briggs*) are also difficult to square with the earlier Court of Appeal decision in *Williams*.[16] Williams was a dishonest builder who specialised in deceptively overcharging vulnerable elderly clients, who paid his inflated bills with cheques: the issue of which then triggered a process which resulted in their bank accounts being debited to credit his. For this he was prosecuted and convicted for theft of their bank accounts – convictions which the Court of Appeal affirmed. The Court of Appeal in *Darroux* managed to distinguish the facts of *Williams* from the facts of the case before them.[17] But I suspect that many readers, and possibly some future courts, will see the distinction as one without a difference. (Once again, prosecutors who wish to avoid problems would be wise to prosecute defendants in this sort of case for fraud, and not for theft.)

The Court of Appeal quashed Ms Darroux's conviction "with no enthusiasm". In a sane world, it would have been able, when quashing her theft conviction, to substitute the fraud conviction that she clearly deserved, but as the law stands it had no power to do so: an issue, perhaps, for examination in a future article.

16 [2001] 1 Cr.App.R. 23 (362).

17 At [61].

Disclosure of Youth Criminal Records

By Katie Jones[1]

The unsatisfactory state of the criminal records disclosure regime in England and Wales has been the subject of much discussion in recent years, both within and outside of the courtroom. Since its origins the scheme has evolved significantly. It has been the subject of near-constant piecemeal reform with continued attempts made to fairly and effectively balance the often competing principles which underlie the system: safeguarding and rehabilitation.

One area of particular concern within the current regime is the manner in which youth cautions[2] and convictions for offending by those under 18 fall to be disclosed. The unique position of young people and the need to treat their offending differently from that of adults has been increasingly recognised in the criminal law and sentencing since the establishment of the modern youth justice system in 1998. Regrettably, the criminal records disclosure system has (it seems) failed to keep pace and to sufficiently differentiate its treatment of those whose criminal records stem from childhood offending. This failure has led the Chair of the Youth Justice Board to observe in his 2016 report

> the current system for criminal records lacks a distinct and considered approach to childhood offending.[3]

The question of the appropriateness of the system's current treatment of youth criminal records has now been brought to the fore as part of a number of conjoined appeals which were heard by the Supreme Court over three days in June 2018.

This article examines the state of youth criminal record disclosure and explores the possibility of reform. The article is divided into four sections. First, it sets out the history of the current system and the governing legislative framework as it applies to youth criminal records. Secondly, it provides a brief outline of the relevant cases before the Supreme Court. Thirdly, it examines a number of problems with the way in which the disclosure of youth criminal records operates at present. And finally, there is a brief exploration of alternative models from other jurisdictions and possible avenues for reform.

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2 Crime and Disorder Act 1998, ss.66ZA and 66ZB.

3 C Taylor, *Review of the Youth Justice System in England and Wales*, (December 2016) at para.85.

Background and Legislative Framework

The Rehabilitation of Offenders Act 1974 ("the 1974 Act") arose from recommendations of the independent Gardiner Committee, established in 1972 to consider how offenders who had not re-offended for a period of time could best be reintegrated into society. The Act provides that after a particular period of time (the rehabilitation period) following caution or conviction and punishment for certain offences, that caution or conviction becomes "spent". The effect is that the offender is treated for most purposes as if he or she had not committed the offence and it is no longer required to be disclosed.[4] The time period varies depending on whether the offence resulted in a caution or conviction, the disposal imposed and whether the offender was over 18 at the time of the offending. In the case of both adults, and children and young persons, a caution is spent immediately. Where a conviction results in a custodial sentence of between 30 months and four years, it becomes spent in the case of an adult after seven years and after three and a half years in the case of a child or young person. Sentences of over four years' custody are never spent in either case. Section 4 of the 1974 Act gives the Secretary of State an order-making power to create exceptions to the non-disclosure provision to that Act. These exceptions are set out in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the 1975 Order"). The 1975 Order disapplies the right to non-disclosure in a number of circumstances, including in response to questions asked for the purpose of assessing a person's suitability in the course of an application for certain types of employment, professions and licences and in other situations which require high levels of trust and/or where safeguarding considerations are relevant such as roles involving contact with children and vulnerable adults. In such cases even spent convictions need to be revealed.

Until 2006, police records of cautions and convictions were governed by a process called "weeding", which allowed for the deletion of certain cautions and convictions from the Police National Computer ("PNC") which was at the time governed by the Association of Chief Police Officers ("ACPO") (now the National Police Chiefs Council "the NPCC"). Under the weeding rules, cautions were to be retained for five

4 Cautions were only brought within the 1974 Act scheme in 2008.

years.[5] ACPO altered its data retention policy following the failings revealed by the Bichard Inquiry[6] after the murders of Holly Wells and Jessica Chapman by Ian Huntley, the caretaker of their school. He had previously come to the attention of Humberside Police in relation to eight separate allegations of sexual assault in the mid to late nineties which had not been disclosed to the girls' school. Weeding was replaced, in March 2006, with a new system of "step-down".[7] Under the step-down system all criminal record information contained on the PNC, including convictions, cautions, reprimands etc., would be retained until the individual turned 100 years old. An application process was introduced whereby an individual could apply to have his or her conviction, caution, reprimand etc. "stepped-down", at which point it would no longer be disclosable on either a standard or an enhanced criminal records certificate. This information, however, would remain recorded on the PNC. The step-down model was abandoned following a decision of the Court of Appeal in *Chief Constable of Humberside v Information Commissioner*[8] and so between 2009 and 2013 all information contained on the PNC was disclosed on criminal records certificates without exception.

In 2013, following a review of the criminal records disclosure system carried out by Mrs Sunita Mason[9] and the Court of Appeal decision in *R (on the application of T) v Chief Constable of Greater Manchester*[10] the Government introduced a revised system whereby some old and minor convictions and cautions could be "filtered" or removed from a person's criminal record certificate. There was apparently no discrete consideration given to the context of criminal records acquired while under 18 in the development of this new policy position, and convictions incurred by children and young persons did not form part of the review's terms of reference.

Where an individual whose conviction is spent but whose application for employment etc. falls within the 1975 exceptions Order a filtering system now applies allowing for certain convictions, which would otherwise be disclosable under the 1975 Order, not to be disclosed.[11] The conditions for filtering convictions, as contained in the Police Act 1997 (Amendment) Order 2013 ("the 2013 Order") are:

1. The individual has only one conviction.
2. That conviction did not result in a custodial sentence.
3. That conviction is not for an offence contained in the list of "non-filterable offences" (for example, serious violent or sexual offences).[12]
4. That conviction is 11 years old, in the case of an adult, and five and a half years old in the case of an offender under 18.

Under the filtering system, a caution issued otherwise than for an offence contained in the list of "non-filterable offences", becomes non-disclosable after six years, in the case of an adult, and after two years in the case of a person under 18 at the time of issue.

Current Practice

The filtering system was ostensibly introduced to prevent the unfair and unnecessary disclosure of old and minor convictions. Despite this stated aim, the system is not effective in practice and, in particular, is ill-suited to the management of the disclosure of youth criminal records. The Standing Committee for Youth Justice ("SCYJ"),[13] in its 2017 report on the youth criminal records system, detailed the results of an FOI request that it made in 2015 to the Disclosure and Barring Service[14] ("DBS") to ascertain the impact of the newly introduced filtering system. The request yielded the following results

> A significant number of under-18 cautions were still being disclosed; in 2013/14 and 2014/15 respectively, the DBS disclosed 8,935 and 9,722 under-18 cautions. Between 2013 and 2015, 93,799 checks disclosed an under-18 conviction. In fact, 88% of checks where the subject had an under-18 conviction, disclosed a conviction. Childhood convictions are slightly more likely to be disclosed than adult convictions. Furthermore, the DBS FOI response revealed that relatively minor under-18 convictions are routinely and widely disclosed. Between 2013 and 2015 under-18 shoplifting was disclosed 34,000 times and there were over 2,795 disclosures of under-18 convictions for theft of a cycle.[15]

These figures indicate that the filtering system is failing in its attempts to avoid the disclosure of minor and old offending, which is of particular concern for those who offended as children or young persons.

The present system only differentiates between adult and youth criminal records in respect of the time periods for rehabilitation under the 1974 Act and for filtering under the 2013 Order. The present requirements for disclosure in respect of youth criminal records can lead to longstanding issues, impacting well into adulthood, around employability. They can hinder individuals seeking to move away from their previous offending. The inflexibility of the filtering rules is inappropriate in the case of youth criminal records and can lead to overly harsh outcomes for those seeking employment. This is particularly true of the multiple conviction rule which imposes a lifelong disclosure requirement where the individual has more than one conviction, and of the long list of non-filterable offences. Surely, the existence of two incidents of minor offending by someone under 18 cannot, sensibly, always be relevant to a person's suitability for employment years later as an adult.

Ongoing Litigation

Earlier this year, the Supreme Court heard the Government's appeals against the decisions of the English and Northern Irish Court of Appeal in a number of conjoined cases involving the disclosure of old and minor convictions and cautions on standard and enhanced criminal record

5 *ACPO General Rules for Criminal Record Weeding on Police Computer Systems*, November 2000.

6 M Bichard, *The Bichard Inquiry Report*, (June 2004).

7 ACPO *Retention Guidelines for Nominal Records on the Police National Computer*, March 2006.

8 [2009] EWCA Civ 1079; [2010] 1 W.L.R 1136; the relevant police force successfully appealed against decisions of the Information Tribunal that certain old convictions should be deleted from the Police National Computer; the court held that in the circumstances the data protection principles under Sch.1 of the Data Protection Act 1988 did not compel the police to delete these old convictions.

9 Independent Advisor for Criminality Information Management, S Mason *A Balanced Approach: Independent Review*, March 2010; S Mason *A Common Sense Approach: a review of the criminal records regime in England and Wales – Report on Phase 1*, February 2011; S Mason *A common Sense Approach: a review of the criminal records regime in England and Wales – Report on Phase 2*, (November 2011).

10 [2013] EWCA Civ 25; [2013] 1 W.L.R 2515.

11 Police Act 1997 (Amendment) Order 2013.

12 The list of non-filterable offences is set out in two places: for the purpose of the rehabilitation of offenders, in art.2A(5) of the 1975 Order; and for the purposes of criminal records certificates, in s.113A(6D) of the Police Act 1997.

13 The SCYJ is a membership body that serves as an umbrella organisation for NGOs and voluntary organisations working together to influence policy and improve the youth justice system.

14 The body responsible for the issue of criminal records, created under the Protection of Freedoms Act 2012 to replace the Criminal Records Bureau and Independent Safeguarding Authority.

15 Standing Committee for Youth Justice *Growing up, Moving on: A report on the childhood criminal records system in England and Wales*, (June 2017), p.8.

certificates.[16] Two of these appeals, *W* and *G*, involve the disclosure of information held on police central records relating to events which took place when the respondents were under 18.

W was convicted in November 1982, aged 16, of assault occasioning actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861. He received a conditional discharge and was bound over to keep the peace for 12 months. W has committed no further offences in the 31 years since this single conviction, yet as the s.47 offence is contained in the list of non-filterable offences, it remains disclosable indefinitely. As such, in 2013, when W was required to obtain a criminal record certificate from the DBS for the purpose of his employment, the certificate showed his conviction.

W's challenge at first instance was solely on the basis of the disclosure regime's interference with his Art.8 rights, he did not challenge the filtering scheme itself. Simon J, in rejecting W's appeal, noted the perceived unworkability of the introduction of a review mechanism and Parliament's right to draw "bright-line" rules which will inevitably produce "hard cases at the margins". The Court of Appeal, though recognising the merits of Simon J's reasoning in favour of the drawing of a bright line, allowed W's appeal on the grounds that the disclosure of the offence after such a prolonged period of time cannot be relevant to the risk to the public today or proportionate and necessary in a democratic society.

In September 2006, G, aged 13, received two reprimands from the police for behaviour that has been described as sexual curiosity and experimentation. Over a period of months, G had been involved with two other boys, one three years his junior and the other three and a half years his junior, in a series of "dares" involving sexual touching and anal intercourse. Following an investigation with the involvement of the CPS, for reasons including his age, an out of court disposal of two reprimands was considered appropriate. At the time of issue, it was the belief of all involved that the reprimands would be subject to the "weeding" process and no longer appear in police records after five years. Subsequent policy changes, first in 2006 when the five-year period was extended to ten years (when the reprimand would then be "stepped down") and subsequently in 2009, resulted in all juvenile reprimands remaining indefinitely on police central records and subject to lifelong disclosure.

In 2011 G was required, in the course of his employment as a library assistant, to apply for an enhanced criminal record check from the DBS as his work involved some contact with children. He was informed that his reprimands would be disclosed in accordance with policy. However, somewhat unusually, the disclosure officer wrote to G offering to include additional contextual information on the enhanced criminal record certificate to reduce the potential detrimental impact of the disclosure given the nature of the offence. He wrote

> In view of the lack of a specific risk this potential adverse effect is disproportionate when viewed alongside the applicant's rights.[17]

This letter, despite its concessions, led G to withdraw his application and resulted in the loss of his employment. G subsequently sought to challenge the disclosure on a number of grounds. These included the decision to administer the reprimands in the first place, the failure to adequately consult G or his mother, the failure to take account of statutory and international obligations to protect the welfare of the child. The decision of the Chief Constable not to expunge the reprimands from G's record, as well as the revised filtering system, were also the subject of challenge.

At first instance, Blake J (applying the reasoning of the Divisional Court in *R(P &A) v Secretary of State for Justice*[18]) set out "a compelling case" for a review mechanism that was both "needed and practicable" before going on to conclude that the existing disclosure regime could not be said to be in accordance with the law as the absence of sufficient safeguards in relation to his Art.8 rights meant that G had no means of persuading a public authority that the disclosure of his childhood record was not relevant and therefore unnecessary; there is no protection for the individual to guard against arbitrariness.[19]

In the Court of Appeal, the Secretaries of State[20] argued that Blake J had been wrong to conclude that in order for Art.8 interference in this context to be "in accordance with the law" there was a requirement for a review mechanism for testing proportionality in individual cases. This appeal was dismissed, albeit for different reasons to those identified by Blake J. The court observed

> It is particularly noteworthy, in the case of G, that the rule provides no opportunity for the age of the individual at the time of the offence to be taken into account.

We await the outcome of the Government's appeal to the Supreme Court in both *W* and *G*, as well as the linked appeals in the cases of *P* and *Gallagher*.

Issues

The two conviction rule

This rule means that if an individual has more than one conviction, that conviction remains indefinitely disclosable, regardless of the nature of the offending concerned, how long ago the offending took place or whether the offences were linked.[21] This can lead in some cases to very harsh outcomes. For example, in the case of a 14-year-old who committed two minor offences forming part of a single incident and subsequently desisted from any offending well into adulthood, regardless of the particulars, those offences will both remain disclosable forever. This rule, although the question did not strictly fall to be answered, was held by the Court of Appeal in *P* to be a disproportionate interference with the right to privacy afforded by Art.8 of the ECHR and otherwise than as is necessary in a democratic society.[22] The SCYJ have previously recommended that there should be no limit on the number of convictions incurred while under 18 which can be filtered.[23] That could go some way towards recognising and mitigating the fact that children and young persons may go through an offending "phase" in their youth and as a result of the two conviction rule they are permanently forced to relive and disclose the details of this chapter, which can cause great anxiety and shame as well as impeding rehabilitation.

16 [2017] EWCA Civ 321; [2018] 1 W.L.R 3281 and [2016] NICA 42.
17 [2017] EWCA Civ 321; [2018] 1 W.L.R 3281 at 82.
18 [2016] EWHC 89 (Admin); [2016] 1 W.L.R 2009.
19 [2016] EWHC 89 (Admin); [2016] 1 W.L.R 2009 at 50 and 85.
20 The Secretary of State for Justice and the Secretary of State for the Home Department.
21 Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371 at 5.66.
22 [2017] EWCA Civ 321; [2018] 1 W.L.R 3281 at 77.
23 Standing Committee for Youth Justice, *Reform of Childhood Criminal Record Legislation*, (May 2016).

The List of Non-Filterable Offences

The requirement that offences contained in the list of non-filterable offences be permanently disclosed was examined in detail in the Law Commission's 2017 report.[24] The rule fails to take into account any consideration of the age of the offender. It is arguable that some offences, which justifiably warrant indefinite disclosure when committed by an adult, should be allowed to reach some closure in the case of a young offender.[25] For example, an offence involving the sharing of indecent images of a child, when committed by an adult, has significantly more relevance to risk assessment than when children or young persons commit the offence by sending an explicit image of themselves to a peer. This failure to distinguish between adult and youth offending with a view to predicting future behaviour and safeguarding can result in unjust and arbitrary outcomes for young offenders.[26]

Cautions vs convictions

The effect of cautions is an area of particular concern in relation to children and young persons which would benefit from closer scrutiny. A caution for a listed offence remains indefinitely disclosable. However, it is arguable that the very fact that the circumstance of the offending resulted in a caution signals that it was towards the lesser end of the scale in terms of seriousness. If the offending was considered only serious enough to merit a caution, can it at the same time be so serious as to merit disclosure for life?

While cautions are intended for first time offenders who commit minor offences, there have historically been cases of more serious offences resulting in cautions (previously reprimands) due to the peculiar facts of those cases. This was so in the case of *G* (discussed above) where reprimands were issued for an offence of considerable gravity. Given the nature of the type and circumstances of offending which attracts a caution, it is worth exploring whether the rule that cautions for listed offences remain indefinitely disclosable should be abolished or perhaps whether a smaller list of non-filterable offences (for example, those considered to be the most serious or have the greatest bearing on the prospect of future offending) should be compiled with cautions in mind.[27] This is an area that would benefit greatly from further research and discussion but this can only properly take place following the resolution of the litigation currently before the Supreme Court.

Discriminatory impact

A further area of concern emerging from recent research into the impact of the criminal records disclosure regime on young people is that the system may have a disproportionate impact on certain vulnerable groups.[28] For example, children in care, children and young persons whose offending was linked to mental health problems; and more generally, it may impact disproportionately and Black and Minority Ethnic (BME) children and young persons.[29] The House of Commons Justice Committee, in its 2017 report on the disclosure of youth criminal records, reported concerns that children in care settings were coming into contact with the criminal justice system for trivial incidents which would never come to police attention were they to take place in the family home.[30] This risk has been recognised by the Sentencing Council in its 2017 *Definitive Guideline: Sentencing Children and Young People*.[31] The damage from the over-representation of BME young people in the criminal justice system[32] is compounded by the detrimental impact on employability in later life stemming from the longstanding need for disclosure well into adulthood. This results in secondary discrimination against a group already subject to higher stop and search rates, higher arrest rates stemming from stop and search as well as higher caution rates.[33] Other groups identified by the Justice Committee's report as being disproportionately affected include girls forced into prostitution,[34] and children and young persons seeking to become British citizens. This disproportionate impact follows these children into adulthood and acts as a further barrier to their life chances.

A new approach to youth criminal records?

There are a number of potential avenues for reform, only some of which can be examined within the scope of this short article. There have been calls for a distinct system for dealing with childhood and youth criminal records to reflect the growing scientific consensus around the later stage maturation of the adolescent brain as well the impact of socio-economic factors, often outside the control of those under 18, as barriers to desistence from offending. Further, there are lessons to be learned from abroad. For example: in Canada, convictions acquired during childhood are subject to periods of finite disclosure. The body responsible for disclosure in Spain does not hold information on lesser disposals such as cautions which are therefore filtered out. Sweden tailors its disclosure to the role sought.[35] An assessment of the merits of these systems and their compatibility with the systems in place in the UK could be valuable in developing a principled system for disclosure going forward. Any future work in respect of the disclosure system should have regard to the following non-exhaustive list of factors: the nature of the offending and its relevance to the purpose for which the disclosure is sought; the lapse of time since the offending behaviour; the personal circumstances and age of the individual concerned at the time of the offending behaviour; and the disposal imposed.

While we await with interest the Supreme Court judgments, whatever the outcome, it is clear that there is a pressing need for a considered evaluation of the current system and potential reforms. It will be for Parliament, if the Government's challenges are rejected by the Justices, to determine what any recalibration of the system should look like. That is no small task. This is an area of law and practice of great complexity with a real human impact which will require thorough review to ensure that any new system is fit for purpose. The Law Commission, in its review of the filtering system in 2017, advocated a wider review of the system as a whole. The need for this is as strong now as it was then. Given the legislative complexity coupled with the impact on individuals, this is an area of law which would be particularly well suited to the Law Commission's legal expertise and strong consultative tradition.

24 Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371.
25 Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371 at 5.76
26 See also K Jones, *Criminal Records Disclosure: a pressing case for reform* [2017] *Archbold Review* Issue 2.
27 Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371 at 5.82.
28 Unlock *A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood,* (May 2018).
29 Disclosure of youth criminal records (2017-19) HC 1 at 61.
30 Disclosure of youth criminal records (2017-19) HC 1 at 62.
31 At para.1.16.
32 David Lammy, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, (September 2017).
33 Disclosure of youth criminal records (2017-19) HC 1 at 61.
34 See [2018] EWHC 407.
35 Unlock & Winston Churchill Memorial Trust, *Rehabilitation & Desistance vs Disclosure. Criminal Records: Learning from Europe* (April 2015).

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Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019

Archbold Review is published in 2018 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell.
Registered in England & Wales. Company number 1679046. Registered office 5 Canada Square, Canary Wharf, London E14 5AQ.

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ISSN 0961–4249

Typeset by Matthew Marley
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

30807509