SWEET & MAXWELL

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# Archbold Review

## Cases in Brief

*Assault—moderate and generally acceptable physical contact—officer holding arm of defendant to attract his attention as a warning not to commit an offence*

**PEGRAM v DPP [2019] EWHC 2673 (Admin); 17 October 2019**

(1) Where an officer took hold of P's arm with what he judged to be just enough force to get his attention, in order to warn him that he may be about to commit a public order offence, he was acting in the execution of his duty (Police Act 1996 s.89(1)). It was a technical assault for a police officer physically to detain a person without violence and without any intention to arrest the person: *Kenlin v Gardiner* [1967] 2 QB 510. However, it was lawful for a police officer or any other person to make moderate and generally acceptable physical contact with another person for the purpose of attracting their attention. When not making an arrest, a police officer had no more right than an ordinary citizen to make physical contact with another person; but a police officer had his rights as a citizen like any other. In applying the test of "generally acceptable standards of conduct" (see *Collins v Wilcock* [1984] 1 W.L.R 1172, 1177A-1179H per Goff LJ), whether by a police officer or any other citizen, account was to be taken of the context. In the case of a police officer that included the duty to investigate crime.

(2) *Blackstone's Criminal Practice* 2019, B2.40, in stating that the concept of execution of an officer's duty "has never been the subject of precise judicial scrutiny" misstated the effect of *Ahmed v CPS* [2017] EWHC 1272 (Admin), a case in any event in which only two cases were cited, not including those cited in P's case.

*Evidence—production orders—Police and Criminal Evidence Act 1984 s.9(1) and Sch.1—journalistic material—"purposes of a criminal investigation"— "substantial value"—"relevant evidence"—test for*

**R (BBC) v NEWCASTLE CROWN COURT [2019] EWHC 2756 (Admin): 22 October 2019**

E, who had been a footballer, was a complainant in a trial of O, a youth football coach, on multiple counts of sexual offences committed against boys and young men. E had given a television interview in which he made allegations against O which differed in some respects from his witness statement. Prior to the live interview, E had undergone an unrecorded mock interview with a BBC researcher. The Northumbria Police sought a production order under the Police and Criminal Evidence Act 1984 s.9(1) and Sch.1 of the notes of questions and answers made by the researcher after the mock interview. The trial judge made a production order after the jury had been sworn. E gave his permission for the use of the notes, so they constituted special procedure material, not excluded material (ss.11, 13 and 14 of the 1984 Act).

(1) The BBC argued in its application for judicial review of the judge's decision that the material was not being sought "for the purposes of a criminal investigation" (s.9(1)). It was clear that the dominant purpose (cf *Southwark Crown Court ex p Bowles* [1998] AC 641) of the application for a production order was the disclosure of the material. While the duty to disclose did not arise unless the material was in the possession of the prosecution (Criminal Procedure and Investigations Act 1996 ss.3(2) and 7A(6)), if the prosecutor and the police had reason to believe that a third party possessed material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the defence case, they should not simply sit on their hands. It was incumbent on the investigator to take reasonable steps to obtain access to the material, which may include applying to the court under the 1984 Act s.8(1) for a search warrant or s.9(1) and Sch.1 for a production order.

(2) The BBC argued that to satisfy the access condition re-

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lating to "substantial value" (Sch.1, para.2(a)(iii)), the applicant must have a reasonable belief that it was "likely to be" of substantial value, not merely that it (*R (BSkyB) v Chelmsford Crown Court* [2012] EWHC 1295 (Admin); [2012] 2 Cr.App.R 53) and that a mere possibility that it might require to be disclosed was insufficient. The judge had been right to reject the submission and find that the material was likely to be of substantial value, either on the basis that it assisted the defence by casting doubt on E's credibility, or (contrary to the BBC submission) it could have assisted the prosecution – it would do so, for instance, if the material had been more consistent with the witness statement than the live interview.

(3) The judge was wrong, however, to find that there were reasonable grounds to believe that "the material is likely to be relevant evidence" (Sch.1, para.2(a)(iv)). He did so on the basis that by one route or another, the material was likely to be admitted in evidence, but each way was contingent on what happened when E gave his evidence. In so ruling, he sought to distinguish *Derby Magistrates' Court, ex parte B* [1996] AC 487, in which the House of Lords held that witness summonses requiring the production of solicitors' attendance notes and proofs of evidence of a non-defendant were wrongly made, because to constitute "material evidence" under the Magistrates' Courts Act 1980 s.97, the material must be immediately admissible per se and without more, rather than becoming admissible only after a witness gave evidence inconsistent with the statements sought, under the Criminal Procedure Act 1865 ss.4 and 5. The differences in wording between s.97 of the 1980 Act and Sch.1, para.2 were immaterial in this context, and the two should be interpreted similarly; the authority of the *Derby* case was not affected by the change to the force of evidence admitted under Lord Denman's Act by the Criminal Justice Act 2003 s.119(1), which did not speak to the reasoning of the House of Lords; and it made no difference that the application in *Derby* was made by the defence, not the prosecution. Had the matter been free of authority, the court would have come to the same conclusion as a matter of statutory interpretation.

(4) In the result, *Derby* remained binding authority for the proposition that a person could not be ordered to produce material under the Magistrates' Courts Act 1980 s.97, and by analogy under Sch.1, para.2 of the 1984 Act, unless it was likely that the material, if produced, would be immediately admissible in evidence without more. It was not enough that the material would become admissible if particular events happen at the trial. This was how the balance has been struck by Parliament between the public interest in the effective investigation and prosecution of crime, and the rights of citizens to privacy and freedom from interference with their property. The production order was therefore unlawful.

*Investigation of crime—restraint orders—Proceeds of Crime Act 2002—discharge under s.42(7)—nature of the provision—circumstances likely to be relevant to whether proceedings started within a reasonable time*

**R v S [2019] EWCA Crim 1728; October 17 2019**

A judge had been wrong (on the facts) to discharge an all assets restraint order against S and others who were under investigation for money laundering offences, on the basis that proceedings for the alleged offence had not been started within a reasonable time under s.42(7) of the Proceeds of Crime Act 2002. The appeal, however, raised important questions as to the proper meaning and application of s.42(7).

(1) An application to vary or discharge made under s.42(3) and (5) in terms connoted that the court had a discretion as to whether to discharge or vary ("(3) an application … may be made"; (5) "The court (a) may discharge…; (b) may vary …"). However, s.42(7) operated on a different basis, stipulating that, if the relevant condition in s.40 which had been satisfied was that an investigation had been started, then the court *must* discharge the order if, within a reasonable time, proceedings for the offence were not started. So, no residual discretion was available: discharge was mandatory.

(2) It was a connected general principle that the powers of the court under the 2002 Act were to be exercised by reference to the matters set out in s.69(2) (powers, including under s.42, to be exercised with a view to realising property for a confiscation order or, where no such order made, to secure no diminution of assets etc): the "legislative steer", as it was often called . But those matters were necessarily subordinated, where proceedings were not started within a reasonable time, to the provisions of s.42(7): where that scenario arose, the court was not exercising a power but was under a statutory obligation to discharge.

(3) The words of s.(7) were not to be glossed, and it was likely to be unhelpful to invoke supposedly comparable phrases in other statutes. No requirement for exceptionality was to be written into s.42(7) (doubting the court's "somewhat tentative" suggestion in *R and W* [2016] EWCA Crim 1938, in respect of s.40(7), that a finding of undue delay would only be made in exceptional circumstances). There was no reason to qualify the words "reasonable time" in s.(7) and they were not to be read restrictively.

(4) It was for the court to decide whether or not the proceedings had been started within a reasonable time. The circumstances relevant would vary from case to case, and could not be exhaustively listed, but the following were usually likely to be relevant: (a) the length of time that had elapsed since the restraint order was made; (b) the explanations advanced for such lapse of time; (c) the length (and depth) of the investigation before the order was made; (d) the nature and extent of the order; (e) the nature and complexity of the investigation and of the potential proceedings; and (f) the degree of assistance or of obstruction to the investigation.

*Magistrates' courts—time limit for prosecution—Welfare of Animals at the Time of Killing (England) Regulations 2015 Reg.41—other like provisions—time limit from prosecutor's conclusive certificate*

**CHESTERFIELD POULTRY LTD v SHEFFIELD MAGISTRATES' COURT [2019] EWHC 2953 (Admin); 6 November 2019**

In an application for judicial review of a ruling by the district judge on a prosecution for offences under the Welfare of Animals at the Time of Killing (England) Regulations 2015, the court considered a provision extending the ordinary time limit for prosecutions in the Magistrates' Court Act 1981 s.127(1) to three years from the commission of the offence, or "before the end of the period of six months beginning with the date on which evidence which the pros-

ecutor thinks is sufficient to justify the proceedings comes to the prosecutor's knowledge", where the provision of a certificate "stating the date on which such evidence came to the prosecutor's knowledge is conclusive proof of that fact" Reg 41. The provision was materially identical to a number of others, including: the Road Traffic Act 1988 s.6; the Computer Misuse Act 1990 s.11; the Social Security Administration Act 1992 s.116 and the Animal Welfare Act 2006 s.31.

(1) A conclusive evidence provision prevented the court, subject to very limited exceptions, from enquiring whether the fact certified was correct. Accordingly, the certificate must comply strictly with the statutory requirements. It must certify the fact referred to and not some other fact, and it must be signed by or on behalf of the correct person or body ("the prosecutor"). A certificate which failed to do so was a nullity.

(2) There was, however, no greater scope for a defendant to invoke policy considerations to challenge a certificate which was valid on its face. On the contrary, powerful policy considerations favoured upholding the conclusive nature of a certificate. It promoted certainty, avoided the court second-guessing prosecutorial judgements and avoided possibly lengthy satellite litigation. The language of the provision made clear the judgement was a primarily subjective one for the prosecution lawyer and was as to the date on which evidence sufficient to justify a prosecution came to his or her knowledge. The court considered *Woodward* [2017] EWHC 1008 (Admin), [2017] Crim. L.R. 884; *RSPCA v Johnson* [2009] EWHC 2702 (Admin); *Letherbarrow v Warwickshire County Council* [2014] EWHC 4820 (Admin); *Riley v DPP* [2016] EWHC 2531 (Admin), [2017] Crim. L.R. 222; *Burwell v DPP* [2009] EWHC 1069 (Admin), [2009] Crim. L.R. 897; *Azam v Epping Forest District Council* [2009] EWHC 3177 (Admin); *R v Haringey Magistrates' Court, ex parte Amvrosiou* (unreported, 13 June 1996); *Morgans v DPP* [1999] 1 W.L.R 968; *Lamont-Perkins v RSPCA* [2012] EWHC 1002 (Admin); *Donnachie* [2007] EWHC 1846 (Admin), [2007] 1 W.L.R. 3085; and *RSPCA v King* [2010] EWHC 637 (Admin).

(3) On the basis of policy, the language of the provision and the authorities, the court concluded: (a) although the prosecutor was the CPS, it was the knowledge of the lawyer making the decision whether to commence proceedings which counted for the purpose of Reg.41; (b) the statutory question was when evidence which (in the opinion of the lawyer) satisfied the Code tests came to his or her knowledge, not when he or she formed the opinion that proceedings were justified. That date was not, however, to be equated with the date on which the relevant evidence was placed on his or her desk or inbox. It was the date on or by which it has been considered so that knowledge of the content has been imparted. In most cases, no doubt, the two would be the same, but they need not be (thus disagreeing with Hickinbottom J's statement on post-knowledge assessment of public interest in *Woodward*, [23(iii)]; (c) a prosecutor's certificate was not merely conclusive evidence of the date when particular pieces of evidence came to the prosecutor's knowledge. It was conclusive evidence of the relevant date from which the six-month period began to run; (d) in the absence of fraud, a certificate in proper form which contained no error on its face was conclusive evidence of that date and was not open to challenge by reference to extraneous evidence showing that it was wrong or even "plainly wrong".

*Summary trial—appeal to the Crown Court—power of the court to sentence; careless driving—whether capable of being made out solely on the basis of condition of driver*

**JONES v CPS [2019] EWHC 2826 (Admin); 24 October 2019**

J was convicted of dangerous driving and two other offences by the magistrates and committed for sentence at the Crown Court. After sentence, his appeal against conviction was heard. The court allowed the appeal against the conviction for dangerous driving and substituted one for careless driving.

(1) One question on appeal by way of case stated was whether the power under Senior Courts Act 1981 s.48 to re-determine the sentence de novo of matters where the appeal has been unsuccessful, applied in circumstances where another Crown Court had sentenced on those matters on a committal for sentence, heard prior to the appeal. Just as, in *Dutta v Westcott* (1987) 84 Cr.App.R. 103, it was held that "the decision" in s.48 was the whole of the decision made by the magistrates' court on the relevant occasion, so the same principle applied even if the sentencing part of the decision has been carried out by the Crown Court on committal.

(2) The second question was whether the offence of careless driving could be established *solely* on the basis of the physical condition of a person when driving. In *Webster* [2006] EWCA Crim 415, [2006] 2 Cr.App.R. 6, the Court of Appeal held that it not sufficient to rely on the condition of the driver in respect of dangerous driving. The test for each offence was similarly phased in the Road Traffic Act 1988 ss.2(1)(a) and 3ZA(2) ("the way he drives falls below"/"falls far below…"). While there were dicta to the contrary effect in *Woodward* [1995] 2 Cr.App.R. 388, 395 (followed in *Marison* [1996] Crim LR 909), the court in *Webster* considered it distinguishable, and the Divisional Court should follow the last authority, and that which directly addressed the issue. Accordingly, it was the law that it was not sufficient merely to rely on the condition of the driver in order to prove the offence of careless driving or of causing death by careless driving. The condition of the driver was relevant and admissible. But it did not determine whether the way in which the defendant drove was careless.

# SENTENCING CASE

*Confiscation; calculation of benefit figure*

**WHITTLE [2019] EWCA Crim 1897, 25 October 2019**

The appellant, formerly the Parish Clerk and Responsible Financial Officer of a Parish Council, pleaded guilty to four offences involving dishonesty in the course of her employment. Two were thefts of £11,972.66 in total belonging to the Parish account. The other two offences were obtaining property by deception and fraud by false representation, these involving the appellant keeping for herself £14,928.64 that the Parish Council had agreed to pay into a pension fund held by the County Council for her benefit. The total sum obtained from the four offences was therefore £26,901.30 and a confiscation order was made in that full amount.

Accepting that the benefit figure was £26,901.30 and that this was the recoverable amount, the defence argued on appeal that it was disproportionate to require the appellant to

pay the £14,928.64 which should have been paid into her pension fund because she would have received the benefit of this money when she retired.

Concluding that the amount of the appellant's benefit did indeed include the money that should have been used to pay pension contributions (this following from s.76 (4) and (7) of the Proceeds of Crime Act 2002), the Court rejected the appellant's argument on proportionality. The appellant was not entitled to receive for her own benefit any of the relevant sums of money. She did not have a right to receive the amounts, or any part of them, at a later date (see [8] for further details on these points).

No question arose of valuing the pension rights which the appellant would have accrued had the money been paid into the fund, because on principle a defendant cannot argue that a confiscation is disproportionate by claiming that she would or might have acquired valuable rights if only she had acted honestly instead of acting dishonestly as she did. Determining what amount it is proportionate to require the defendant to pay is not simply an accounting exercise, as taking such an approach would treat the defendant's criminal enterprise as if it was a legitimate business and confiscation a form of business taxation (per Lord Walker and Hughes LJ in *Waya* [2012] UKSC 51, at [26]). It did not avail the appellant to say that she would or might have acquired pension rights if only she had acted honestly instead of defrauding the Parish Council of money which she had falsely represented was being used to make pension contributions. There was nothing disproportionate about confiscating the full amount of the benefit obtained and her appeal was dismissed.

**JONES v CPS [2019] EWHC 2826 (Admin)**

See page 3 above.

# Features

## Misconduct in Public Office and Prosecuting Boris Johnson

By Jonathan Rogers[1]

Mr Marcus Ball tried to start a private prosecution against Mr Boris Johnson on three counts of the offence of misconduct in public office. This related to Mr Johnson's participation in the campaign for Brexit in the run-up to the referendum in 2016. The then Mayor of London allegedly, on three occasions, told lies concerning the net money (purportedly £350 million per week) that is contributed by the United Kingdom to the European Union.

In the event, a summons for the offence was issued in Westminster Magistrates' Court on 29 May 2019. It was then quashed on judicial review, at the behest of Mr Johnson, before the date on which he would have had to appear in court to answer it: *Westminster Magistrates Court, ex p Alexander Boris de Pfeffel Johnson*.[2]

The decision to issue a summons in order to commence a private prosecution is a judicial, and not an executive, one for the issuing magistrate (or district judge, as in this case). The magistrate should be satisfied that an offence known to law is being alleged and that there is some evidence to support it.[3] The motives of the would-be private prosecutor may also be relevant, and counsel for Mr Johnson had urged the district judge to dismiss the application on this ground too.[4] The main reason for the High Court's decision was that the district judge had accepted too broad an interpretation of the scope of the common law offence. Rafferty LJ and Supperstone J also suggested that in the alternative, they might have quashed the summons on the basis that the district judge's inquiry into Mr Ball's motives in bringing the prosecution was unduly cursory.

Here it will be suggested that the High Court was right on the scope of misconduct in public office, and the decision is most welcome. This means that the correctness of the High Court's indicated decision as to Mr Ball's motives is rather moot. But it might be doubted, and it may be worthwhile to explain why.

### Misconduct in Public Office

The accepted formula is that misconduct in public office is made out where D:

i) is a public officer acting as such;
ii) wilfully neglects to perform his duty and/or wilfully misconducts himself;
iii) does so to such a degree as to amount to an abuse of the public's trust in the office holder;
iv) acts without reasonable excuse or justification.[5]

The High Court found that the first element could not possibly be made out at any trial: Mr Johnson was not acting in his position as Mayor of London. The court was also concerned that no prosecution for like conduct had previously been brought; and by enacting and then re-enacting a narrower offence of publishing a false statement about a candidate for elected office, Parliament had impliedly declined to extend the range of electoral offences in such a way as to cover the present case.[6] But it more clearly rested its decision on the basis that first element of the common law offence could not be made out.

1 Lecturer in Criminal Justice, Cambridge University.
2 [2019] EWHC 1709 (Admin).
3 *R (Kay ) v Leeds Magistrates' Court* [2018] 1233 EWHC (Admin).
4 See above.
5 Attorney-General's Reference (No 3 of 2003) [2005] QB 73.
6 The pros and cons of creating such an offence are examined by Michael Doherty in "Should making false statements in a referendum campaign be an electoral offence?", available at: https://ukconstitutionallaw.org/2016/07/04/michael-doherty-should-making-false-statements-in-a-referendum-campaign-be-an-electoral-offence/

This being so, it would seem that several other recent prosecutions for the common law offence have been misguided.

**"Acting as such"**

Remarkably, little until now has been decided about what it means for the office holder to have been acting "in his capacity as such". No mention is made of it in the guidance issued by the Crown Prosecution Service.[7] But here the point was fully taken, on the basis that telling the truth about the costs of membership of the EU did not relate to any of the duties of the office of Mayor of London.

Underlying this argument is the premise that the office holder only acts "as such" when he misconducts himself in respect of one of the duties or powers that he has by virtue of his office. It is not for the office holder to create his own duties or policies, such that he can then be liable for misconduct in public office if he misuses or promotes them. Any criminal liability for such misuse of office resources, or bringing his office into disrepute, would lie elsewhere.

The High Court seemed to accept this in its brief analysis, and it concluded briefly:

> This ingredient requires a finding that as he discharged the duties of the office he made the claims impugned. If, as here, he simply held the office and whilst holding it expressed a view contentious and widely challenged, the ingredient of "acting as such" is not made out.[8]

**The previous unwelcome trend**

The ruling might seem hard to question. But curiously, we have seen in recent years several convictions which seem to ride rough shod over any such analysis, and it was no doubt this trend that had encouraged Mr Ball to apply for his summons.

Thus, it has apparently been assumed that an officer might also act in his capacity as such if his conduct related to the perks, privileges or opportunities arising from his office. This assumption has enabled convictions of police and prison officers for such conduct as (arguably) consensual sexual affairs with prisoners or with vulnerable witnesses, abusing a credit card facility meant for purposes connected with the office, and accessing the Police National Computer for private purposes.[9]

Perhaps the most extreme example was the conviction of Keith Wallis, a constable who emailed his MP to say, falsely, that he had witnessed the dispute which led to "Plebgate" (a well-publicised verbal dispute in the street between another police officer and a then cabinet minister). But when he did so, he posed as an ordinary member of the public, and not as a fellow police officer.[10] So anyone could have acted as he did.

Remarkably, in none of these cases did the defendant apparently argue that he was not acting within his office "as such". Most of these officer holders straightforwardly pleaded guilty. Unfortunately, this seems to have cowed the Law Commission in its previous reviews of the offence, where the lack of reliable case law is noted,[11] but no doubts have been raised of the correctness of what has been, by any measure, a recent and unchallenged development.

**The problems with the wider interpretation**

Some will no doubt object that the wider understanding of the offence does enable some desirable prosecutions. To that, the following may be said:

Where we wish to punish a public officer for abusing his position in general terms, we ought to be able to identify an offence which more directly identifies the nature of that abuse. Offences under the Data Protection Act are apposite for misusing the Police National Computer, and charges of fraud are apposite for abusing credit card facilities available for office-related expenditure[12], and so on.

Admittedly there is not always an alternative offence to be found. As the Law Commission noted, nothing in the Sexual Offences Act 2003 can apply to arguably consensual sexual relationships between prison officers and prisoners.[13] But then the question arises; why do we need a catch-all offence for the public officer who exploits a gap in legislation of general application, and not for other people who exploit similar gaps?

Adopting the wider interpretation also risks the criminalisation of conduct which (only) brings one's office into disrepute. This in turn exacerbates the grey area between conduct best left to disciplinary proceedings and that which should be the proper business of the criminal courts; as Keith Wallis, and seemingly several others, have recently found to their cost.

**What is the effect of *ex p Johnson?***

The High Court in *ex p Johnson* was not asked to consider the broader implication of their decision (i.e, that several recent convictions now seem dubious). Nonetheless it seems clear that in future the prosecution should need to show that D purported to exercise a power or duty which is recognised by law to arise from his office at the time of the misconduct. Moreover, this is surely now to be regarded as a matter of law (or mixed law and fact for the judge). A broad duty "not to bring one's office into disrepute", should not be recognised, notwithstanding the Law Commission's reference to it.[14] Nor should we routinely accept an argument to the same intended effect, that by going off on some jaunt of his own, the defendant was committing misconduct by non-feasance, i.e, by neglecting the many and various other things which he ought to have been doing instead.[15]

This is not to deny that defining the scope of an office holder's duties may be difficult. They will not always be all written down; some will derive from common law instead of statute, others may arise through negotiation with relevant officials upon appointment and conceivably some may arise through convention. But if doubts in borderline cases discourage some prosecutions, that is not obviously a bad thing in any event.

7 https://www.cps.gov.uk/legal-guidance/misconduct-public-office (last accessed 15 September 2019).

8 Note 2 above at [29].

9 Examples noted by the Law Commission in *Misconduct in Public Office Issues Paper 1: The Current Law* (January 2016) at paras 2.116–2.124.

10 https://www.theguardian.com/uk-news/2014/feb/06/plebgate-keith-wallis-jailed-police-andrew-mitchell.

11 The Law Commission referred to this, with some understatement, as an underdeveloped element" of the offence: See n.9 at 2.118. In its later Consultation Paper *Reforming Misconduct in Public Office*, No 229 (2016) at para 2.11, it treats the matter in two sentences, the second of which reads "The practical significance of this is unclear."

12 See J Spencer "Police behaving badly – the abuse of misconduct in office" (2010) 69 (3) *Cambridge Law Journal* p.423.

13 The Law Commission notes this alongside some other examples, see n.9 in Ch.6.

14 See n.9 at 2.122.

15 The argument is also mentioned by the Law Commission, ibid, but without acknowledging the close similarities.

Misconduct in public office is, or should be, rather about egregious conduct done under the colour of authority: D should be purporting to exercise his legal powers. Until recently, the requirement that the officer was acting in his position "as such" arguably captured that idea, although alas, the occasion never arose to emphasise it in the case law: until this century, prosecutions for misconduct in public office were altogether very rare.

The late legal philosopher John Gardner tried to explain why ordinary crimes might be more serious when committed by public officials.[16] His reasoning was that offences committed openly by public officials, in the belief that the criminal justice system will operate so as to protect them, also pose deeper threats to the rule of law.

Gardner was not referring to misconduct in public office, but the argument can be adapted. What should be distinct about the offence of misconduct in public office is that it recognises that holding public office may enable the defendant to make gains or to cause hardships to others whilst asserting legal authority for what he does. As a rough guide, the more that the defendant "owns" what he has done as an officer, and the less he seeks to conceal it, the more likely he or she acts in his position "as such" – and vice versa, as in the case of Keith Wallis. Typically, in a "proper" case of misconduct in public office, the defendant will not have concealed what he did, or decided, but will only want to conceal his motives or some other circumstances which influenced him, So, the prosecutor who accepts a bribe for dropping a case will only want to conceal the bribe. But he clearly acts "as a" prosecutor when he identifies himself as the person who decided to drop the case; and that moment of decision is when the offence of misconduct in public office should be regarded as committed (and only the separate offence of bribery was committed when the bribe was sought or accepted).

**The motives of the private prosecutor**

As noted above, had the decision been necessary, the High Court would apparently alternatively have quashed the summons because the district judge's decision that Mr Ball was not improperly motivated was unduly cursory.

It certainly had been cursory. But there are still two criticisms that should be made of the High Court's approach.

**When are bad motives for prosecuting?**

First, the Court itself says nothing of the approach to be taken when determining whether a private prosecution is vexatious, or is undermined in any other way by the prosecutor's motives. Mixed motives do not in themselves defeat private prosecutions any more than they defeat public prosecutions: *Bow Street Metropolitan Stipendiary Magistrate ex p. South Coast Shipping Co. Ltd.*[17]

Further, even though victims as private prosecutors have a personal stake in the proceeding, it does not mean that their predominant motive is not to seek retributive justice (which is quite proper, when sought through the courts): *D Ltd v A.*[18]

Some care, therefore, must be taken not to impose double standards when private prosecutors are similarly motivated. Probably the best formulation is to say that a prosecution (whether public or private) is improperly motivated if the prosecutor is not primarily concerned with securing a verdict from the court, but more concerned simply that the process of prosecution should begin, perhaps with the main objective that the criminal process will cause the defendant embarrassment, stress, anxiety or other costs (including legal costs). The primary motivation of self-promotion through the spectacle of a public trial, in the case of a private prosecutor, would also be improper.

There was indeed some indication that Mr Ball sought the publicity of a trial as part of his campaign against Brexit. He had also earlier stated that proving in court that lies had been told during the first referendum would help to secure a second referendum. At the same time, however, he was not indifferent to the outcome of a trial and he assumed that he would have to prove his case to advance his campaign. Some of his earlier statements also suggested that he was genuinely outraged by what he regarded as lies told during the referendum in 2016, and that he felt that punishment of the offenders would be justified in itself.

It would have been better than had the High Court said more about the proper approach to suggestions of mixed motives. It would be regrettable if private prosecutions brought by campaigners were now more routinely to be regarded with undue suspicion.

**The approach when granting a summons**

The second criticism of the High Court is that perhaps we should only expect cursory scrutiny into the motives of the private prosecutor at the stage of granting a summons. Deeper consideration may later be given to the propriety of his motives on an application to stay the proceedings for abuse of process. Two reasons generally to prefer the latter are:

Abuse of process is only to be invoked in exceptional circumstances, including where the prosecution is brought privately: *D Ltd v A.*[19] It would be anomalous if it were permitted to be relatively routine for contested motives to defeat the initial granting of a summons.

It is uncertain which types of "abuse of process" arguments should be entertained by magistrates (or in magistrates' courts). While this is so, we should be wary of allowing magistrates to decide abuse-related points.

It is submitted that the district judge in ex p Johnson was right to give this issue only a cursory examination. As seen above, the decision regarding Mr Ball's motives was far from clear cut and an application for abuse of process at trial would have been the appropriate occasion for deep consideration of the matter.

**Conclusions**

We should praise the High Court in *ex p Johnson* for its decision which appears to limit the scope of misconduct in public office. It is submitted that the CPS should now modify its charging guidance to highlight that it is a separate element that D was acting "as a public officer as such". We might be less complimentary about the indication that they would also have been inclined to quash the summons on the basis of Mr Ball's motives. The decision on the facts was difficult enough that the district judge was right to cursorily reject the complaint and to leave it to be determined as an application to stay the proceedings as an abuse of process.

16 J Gardner "Criminals in Uniform" in *The Constitution of the Criminal Law* (eds. R Duff, L Farmer, S Marshall, M Renzo, V Tadros) OUP 2013.
17 [1993] QB 645.
18 [2017] EWCA Crim 1172 at [60].
19 n.18 above.

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# Identifying and Accommodating Vulnerable People in Court

By HHJ Simon Drew, QC and Lynda Gibbs[1]

**Introduction**

The importance of identifying and accommodating the needs of the vulnerable has been an important and persistent theme within the criminal justice system over the past 10 years. Guidance on dealing with "vulnerable witnesses" and "vulnerable defendants" has been handed down by the Court of Appeal on numerous occasions during that time, and the Criminal Procedure Rules (CrimPR) and Criminal Practice Directions (CrimPD) have sought to provide a structured approach to the way that courts should manage cases involving vulnerable people.

Despite enormous efforts, it remains the experience of many that, once special measures have been granted, little or no further consideration is given by advocates or the court to the needs of vulnerable witnesses. Indeed, it is frequently the case that, unless an intermediary has been granted for a witness, neither the advocates nor the judge will consider holding a Ground Rules Hearing despite the CrimPR[2] at 3E stating that, "Discussion of ground rules is good practice, even if no intermediary is used, in all young witness cases and in other cases where a witness or defendant has communication needs".

The approach taken towards vulnerable defendants is even more problematic, with many judges taking a highly sceptical view of the need for intermediaries for defendants and in particular for the duration of the whole trial. There is still a great deal of tension between the courts and intermediaries with regard to "evidence only" assistance.[3] Where there is no intermediary, it is rare that any real thought is given to the needs of a vulnerable defendant. As a result, the court system regularly falls short in respect of both vulnerable witnesses and defendants.

One of the key problems faced by the courts in trying to implement the guidance handed down by the Court of the Appeal, which must be read alongside the provisions in the CrimPR and CrimPD, is the inconsistent terminology used throughout and the lack of a universal definition for vulnerable people in the courts. Remedying this is particularly important given the status the CrimPR and Crim PD now have; CPD 1A.3 provides as follows:

> The Criminal Procedure Rules and the Criminal Practice Directions are the law. Together they provide a code of current practice that is binding on the courts to which they are directed, and which promotes the consistent administration of justice. Participants must comply with the Rules and Practice Direction, and directions made by the court, and so it is the responsibility of the courts and those who participate in cases to be familiar with, and to ensure that these provisions are complied with.

Without a clear definition, the courts will continue to fail in their duty to recognise that they are dealing with a vulnerable person, and, even if they do, the current widespread and confusing terminology means that inadequate consideration will continue to be given to accommodating the needs of those people.

**The terminology used by the Court of Appeal**

The Court of Appeal has dealt with a number of cases which have focused on the way in which the courts should treat "vulnerable witnesses"; see for example *Barker*[4]; *Wills*[5] and *Watts*.[6]

The case of *Lubemba; JP*[7] brought everything to a head. Hallett VP identified the issue raised on the appeal, namely, "what measures a trial judge may legitimately take to protect a *vulnerable witness*, without impacting adversely on the right of an accused to a fair trial [*emphasis added*]."

Regrettably, in the judgment in *Lubemba*, the term "vulnerable witness" was not defined. This was particularly unfortunate as the key passage in Hallett VP's judgment (at [38] - [46]) is headed, "The treatment of vulnerable witnesses".

Having referred to s.53 of the Youth Justice and Criminal Evidence Act 1999, Hallett VP quoted paras [38] to [43] from *Barker* in her judgment and went on to refer to vulnerable people at various stages in the following ways: "vulnerable witness"; "young and/or vulnerable people"; "young or otherwise vulnerable witnesses"; "vulnerable witness or defendant"; "the vulnerable witness and also the accused"; and "young and vulnerable witnesses".

This raises a number of issues, including:

(a) In the absence of any definition, to whom do these terms apply, when and how?

(b) Without a formal definition, how are these individuals to be identified consistently?

(c) Are there distinctions to be drawn between these terms? If not, why not? If so, how and why?

Without seeking to answer those questions directly it seems, with respect, that the terminology used is both inconsistent and unclear. As a result, judges and practitioners may be forgiven for struggling to apply this important guidance in the way that was intended.

**References to Vulnerable People in the Crim PR and Crim PD**

Since *Lubemba*, the CrimPR and the CrimPD[8] have been substantially amended in order to try to give guidance to judges and practitioners on their approach to the vulnerable. Part 3 of the Crim PR deals with Case Management. Rule 3.11(c)(iv) and (v) provide:

1 Dean of the Inns of Court College of Advocacy.
2 Criminal Practice Directions 2015 Consolidated.
3 *Biddle* [2019] EWCA 68 (Crim).
4 [2010] EWCA Crim 4.
5 [2011] EWCA Crim 1938; [2012] 1 Cr.App.R 2.
6 [2010] EWCA Crim 1824.
7 [2014] EWCA Crim 2064; [2015] 1 W.L.R 1579.
8 Criminal Practice Directions 2015 Consolidated.

**3.11 Conduct of a trial or an appeal**
In order to manage the trial or an appeal, the court—
….
(c) may require a party to identify—
…
(iv) what arrangements are desirable to facilitate the giving of evidence by a witness,
(v) what arrangements are desirable to facilitate the participation of any other person, including the defendant …

CrimPD I General Matters 3D is headed "Vulnerable people in the courts" and seeks to provide detailed guidance on facilitating the participation of witnesses and defendants.

3D.1 In respect of eligibility for special measures, "vulnerable" and "intimidated" witnesses are defined in sections 16 and 17 of the YJCEA 1999 …; "vulnerable" includes those under 18 years of age and people with a mental disorder or learning disability; a physical disorder or disability; or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case.

3D.2 However, many other people giving evidence in a criminal case, whether as a witness or defendant, may require assistance: the court is required to take "every reasonable step" to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant (r.3.9(3)(a) and (b)). This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends. Regard should be had to the welfare of a young defendant as required by section 44 of the CYPA 1933[9] and generally to Parts 1 and 3 of the Criminal Procedure Rules …

3D.3 Under Part 3 of the rules, the court must identify the needs of witnesses at an early stage (r.3.2(2)(b)) and may require the parties to identify arrangements to facilitate the giving of evidence and participation in the trial (r.3.11(c)(iv) and (v). There are various statutory special measures that the court may utilise to assist a witness in giving evidence. Part 18 of the rules gives the procedures to be followed. Courts should note the "primary rule" which requires the court to give a direction for a special measure to assist a child witness or qualifying witness and that in such cases an application to the court is not required (r.18.9).

These provisions introduce a new term, "vulnerable people", which broadens and (it is suggested) substantially enhances the courts' approach to vulnerable witnesses and defendants. The term "vulnerable people" includes not only ss.16 and 17 witnesses but also the "many other people giving evidence in a criminal case, whether a witness or defendant" who "may require assistance"; thus introducing a much broader term, with a much wider scope, which applies to both witnesses and defendants.

CDP 3D.2 and 3 then goes on to set out what the court must do in relation to those "vulnerable people". In particular, they must have their needs identified at an early stage. To that end CPD 3D.2 appears to echo the words of Hallett VP in *Lubemba; JP* (above) when it says:

> the court is required to take "every reasonable step" to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant (r.3.9(3)(a) and (b)). This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends.

Under Pt.3 of the Crim PR's, the court must identify the needs of witnesses at an early stage (r.3.2(2)(b)) and may require the parties to identify arrangements to facilitate the giving of evidence and participation in the trial (r.3.11(c)(iv) and (v).

Unfortunately, CPD 3D.3 does not refer to defendants. It is unclear as to the reason why and it is respectfully suggested that is an unfortunate omission. The CrimPR applies to defendants as well as witnesses, and the omission in the CPD 3D.3 seems inconsistent with the overall approach advocated in rule Crim PR 11.3.

Part 3 of the CrimPR deals with "Case Management", and therefore in practical terms, the needs of all "vulnerable people", including defendants, should be considered and addressed from the PTPH onwards.

More significantly, CDP 3D appears to underline the sea change in approach called for in *Lubemba; JP;* it makes it clear that the court is under a duty to identify and facilitate the needs of a very broad spectrum of people (both witnesses and defendants), who should now be referred to as "Vulnerable People"; and, that should be done from the very outset of the case.

Unfortunately, due to the terminology used, CPD 3E (below) does not sit very easily alongside CPD 3D and once again emphasises the need for clarity.

CPD I General Matters 3E deals with "Ground Rules Hearings to plan the questioning of a vulnerable witness or defendant". The provisions are as follows:

3E.1 - The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of *a child or vulnerable witness* should be stopped. Intervention by the judge, magistrates or intermediary (if any) is minimised if questioning, taking account of the individual's communication needs, is discussed in advance and ground rules are agreed and adhered to.

3E.2 Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge, magistrates, advocates and intermediary before the witness gives evidence. The intermediary must be present but is not required to take the oath (the intermediary's declaration is made just before the witness gives evidence).

3E.3 Discussion of ground rules is good practice, even if no intermediary is used, *in all young witness cases and in other cases where a witness or defendant has communication needs.* Discussion before the day of trial is preferable to give advocates time to adapt their questions to the witness's needs. It may be helpful for a trial practice note of boundaries to be created at the end of the discussion. The judge may use such a document in ensuring that the agreed ground rules are complied with.

3E.4 All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to

9 *Archbold*, main work, § 5A-947.

> *young and/or vulnerable people*, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non-vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is *young or otherwise vulnerable*, the court may dispense with the normal practice and impose restrictions on the advocate "putting his case" where there is a risk of a *young or otherwise vulnerable witness* failing to understand, becoming distressed or acquiescing to leading questions.

There are a number of things to note. The "child or vulnerable witness" reference is adopted again in CPD 3E.1. It is not clear which parts apply to defendants, which do not, and why. Furthermore, the provisions do not refer to the "vulnerable people" who are referred to in CPD 3D. A consistent approach requires that they too should have the benefit of judicial protection and if necessary, intervention, but the CrimPD is silent on this issue.

CPD 3E.3 appears to create yet a further sub-set; "young witnesses" cases and other cases where, "a witness or defendant has communication needs". It is far from clear why there is this further distinction. Arguably a GRH should at least be considered in all cases involving "vulnerable people", which seems to fit with the approach in CrimPD 3D.

CPD 3E.4 seems to be nearer the mark when it says; "all witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can". However, the lines are blurred by what follows, which includes the return to the phrase "young and/or vulnerable people".

CPD 3G is specifically titled, "Vulnerable defendants"; however, it does not deal with vulnerable defendants in a comprehensive way. Instead, it deals with a limited number of issues, in broad terms: joinder, pre-trial visits, the use of intermediaries, live link, publicity, arrangements in the courtroom and timetabling. It does not set out a structured or overarching approach: instead, it reads like a series of useful but far from comprehensive bullet points. There is no definition of "vulnerable defendant", making it all too easy for the applicability of the provisions to be overlooked.

It is suggested that all of the provisions in the Crim PD should be capable of being applied to any "vulnerable person", and it should then be for the court to determine what steps, if any, should be taken, depending upon the circumstances that relate to a particular witness or defendant. It is acknowledged that this may require a redrafting of the Crim PD to reflect this, but for the reasons we have set out that should result in much clearer guidance being provided to advocates and judges.

The *Advocate's Gateway Toolkits*, which are specifically referred to in CPD 3D.6, do not use the term "vulnerable people", no doubt because they were drafted before the latest iteration of the CDP was issued, but they do chime with CPD 3D more generally. In addition, they acknowledge that there is no single agreed definition of who is a vulnerable witness or defendant, but also emphasise the duty on the court to look for signs of vulnerability throughout the proceedings and to make suitable adjustments as and when necessary.

**Conclusions**

With reference to vulnerable witness and vulnerable defendants, the terminology used by the Court of Appeal, in the CrimPR and in the CrimPD, is inconsistent and inevitably leads to confusion. As a result, judges and practitioners struggle to determine who is "vulnerable", and therefore what their duties towards them are. As a consequence, some of society's most vulnerable people, including children, victims and defendants, are being failed by the court process.

In order to remedy this, there is a clear and obvious need for clarity of language and consistency of approach. That leads us to propose the following approach to determining vulnerability. When referring to vulnerable witnesses or defendants the term "vulnerable witness" should only be used to refer to s.16 (and possibly s.17(4)-(6)) witnesses, otherwise the term "vulnerable person" should be used. The term "vulnerable person" should be defined in the CPD as referring to:

> any child, young person or adult, including a defendant, who may not be able to participate effectively at court if reasonable steps are not taken to adapt the court process to their specific needs.

It is suggested that the word "may" is retained because these provisions relate to anticipating difficulties rather than responding to them once they have arisen. This would bring clarity and consistency in approach and would then be of substantial assistance to advocates and judges when they consider how most effectively to manage the needs of all witnesses and defendants, bearing in mind the judgments of the Court of Appeal, the Criminal Procedure Rules, and the Criminal Practice Directions.

Finally, it follows that a redrafting of the Crim PD will be required in order to reflect this revised approach to vulnerable witnesses and defendants; however, for the reasons we have set out that should result in much clearer guidance being provided to advocates and judges.

# The importance of an independent Bar

By Yasmin Omotosho[1]

"Where there is no independent legal profession there can be no independent judiciary, no rule of law, no justice, no democracy and no freedom[2]"

Sitting at the back of a court on 8 Kouskovskaya Street, Moscow, on 29 August 2016, I observed a hearing concerning the theft of a laptop. The prosecution alleged that the accused had stolen his housemate's laptop and sold it. It was the defence's case that, as the accused was suffering from paranoid schizophrenia at the time of the offence, he did not intend to take the laptop and they requested medical examination of the accused. The defence's petitions to the judge fell on deaf ears and without further investigation or reference to any procedure, the accused was swiftly convicted.
This essay argues that the independent Bar is vital to the Rule of Law and, without the independent Bar, the criminal justice system will not survive. My response illustrates this argument by briefly discussing the public perception of the independent Bar, the quality of advocacy the independent Bar provides and examples of how diminished independent Bars have affected other jurisdictions.

## Public Confidence and the Independent Bar

The Rule of Law is the principle that the law applies to everyone, and that nobody, not even the Government, is above the law. The independent Bar has been vital in maintaining this constitutional principle for centuries. An orderly and just society is dependent on the rule of law, and the rule of law is upheld by a criminal justice system that works. Without the public's trust in the criminal justice system, the rule of law will fail.

The current public perception of the criminal justice system is concerning. According to the Crime Survey for England and Wales, in the year ending March 2018, only 53% of the public were of the opinion that the criminal justice system is effective, and 69% of the public thought that the criminal justice system is fair.[3] As the establishment continues to lose face over its management of Brexit, and the prospect of civil unrest becomes a looming reality, it is now more important than ever that the public have confidence in the criminal justice system. The independent Bar plays an integral role in building this confidence into the public psyche.

Lawyers "have a special position in society…because they are responsible for the rule of law".[4] It is vital that independent barristers are seen as gatekeepers of the rule of law in the daily theatre of the criminal court. In an adversarial system, especially where the mechanism of the State is brought to bear against the accused, the presence of an independent barrister in the courtroom displays to the public how the right of the individual is maintained against the power of the Crown.

## Quality Legal Representation

> The rule of Law … requires that all citizens have access to justice, [which means] effective access to competent advice and effective access to competent legal representation. [5]

The training that the independent Bar provides for lawyers meets this vital need. As Sir Bill Jeffery concluded in his review entitled *Independent Criminal Advocacy in England and Wales*, "the quality of advocacy [from the independent Bar] in our criminal justice system is a precious national asset".[6] To lose it would not be in the public interest.

## Diminishing Independent Bars in Foreign Jurisdictions

We must take heed of the cautionary examples from other jurisdictions of the wider political implications that the erosion/obliteration of the independent Bar has on the Rule of Law and the criminal justice system.

For instance, in Hong Kong, the Hong Kong Bar Association was at the vanguard of speaking out against politically motivated decisions by the court to convict participants in the mass "Umbrella Movement" protests.[7] More recently, they are pushing against censorship of barristers training future lawyers in common law disciplines in universities.[8] In Malaysia, recent legislation has fettered their independent Bar. This has had an impact on their ability to hold their law-making bodies accountable on the issues regarding the rule of law and issues with their justice system.[9] Yet, they still use what independence they have to call out corrupt criminal proceedings.[10]

These examples show that the independent Bar has relevance upholding the rule of law and ensuring the integrity of the criminal justice system outside the courtroom as well as in it.

## Conclusion

Without the independent Bar, there is a risk that Andrew Langdon QC's fear of the rule of law just being a slogan[11] will be realised. What's more, without the independent Bar, the criminal justice system will surely not survive, and it will be a matter of time before proceedings in English courts resemble those that took place in the court on Kouskovskaya Street.

1 Lamb Building Chambers. (This was the prize-winning essay in the CBA Bursary Competition.)
2 The Hon Michael Kirby AC CMG, Australia – The Independence of the Legal Profession Threats to the bastion of a free and democratic society.
3 The Office of National Statistics, data on confidence in the criminal justice system, years ending March 2008 to March 2018, Crime Survey for England and Wales, https://www.ons.gov.uk/peoplepopulationandcommunity /crimeandjustice/adhocs/008964dataonconfidenceinthecriminaljusticesystemyearsendingmarch2008tomarch2018crimesurveyforenglandandwales.
4 Lord Neuberger, "The Future of the Bar" Conference Speech, Belfast, 2014. Available at: https://www.supremecourt.uk/docs/speech.
5 Lord Neuberger, ibid.
6 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf
7 https://www.bbc.co.uk/news/world-asia-china-40993550.
8 See: http://www.ejinsight.com/20180828-bar-association-suspends-legal-course-at-peking-university/
9 See "An Independent Bar – Public Good or Professional Vanity?" by Shen Yi Thio https://www.linkedin.com/pulse/independent-bar-public-good-professional-vanity-shen-yi-thio/
10 See http: www.malaysianbar.org.my/members_opinions_and_comments/restoring_the_rule_of_law.html
11 See: https://www.barcouncil.org.uk/media-centre/news-and-press-releases/2017/september/news-the-rule-of-law-is-not-merely-a-slogan/.

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