SWEET & MAXWELL

Issue 5 29 June 2020

Archbold Review

Cases in Brief

Actus reus—causation—causing death/serious injury by dangerous driving—novus actus interveniens—foreseeability at time of D's act

R v A [2020] EWCA Crim 407; 17 March 2020

A stopped a car on the hard shoulder of a motorway at 4.30 am as a result of disagreements with others in the car, and remained in the driving seat. At some point, another motorist took evasive action and sounded his horn at the car because the driver's door was obstructing the slow lane. The door was closed. Subsequently, a lorry overtook a car in the fast lane at about 70 mph, then swerved across the other lanes into the hard shoulder, and collided with A's car, possibly due to the driver being asleep. One passenger in A's car was killed and another, and A, seriously injured. Allowing a prosecution appeal, the court concluded that the judge had been wrong to allow a submisison of no case to answer on charges of causing death and serious injury by dangerous driving against A. The judge had misinterpreted what was meant in *Girdler* [2009] EWCA Crim 2666, [2010] R.T.R. 28 [43] (a second collision case) by a suggested direction that "a defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur". The law did not require that the *particular* circumstances in which a collision occurred should be foreseeable. The court quoted with approval the Canadian Supreme Court case of *Maybin* [2012] 2 SCR 30 to the effect that the chain of causation should not be broken when the specific potentially intervening act was not reasonably foreseeable, because the time to assess reasonable foreseeability was that of the initial event, not the time of the intervening act: "it is too restrictive to require that the precise details of the event be objectively foreseeable". The court noted that this passage was quoted in *Wallace (Berlinah)* [2018] EWCA Crim 690, [2018] 2 Cr.App.R. 22 and was consistent with the direction proposed in that case at [60], question 3(b). In A's case, what had to be sensibly anticipated was that another vehicle might leave the carriageway and collide with the respondent's parked car. It was not necessary for the jury to be sure that the particular circumstances of the collision or the exact form of the subsequent act was reasonably foreseeable.

Magistrates' courts procedure—insufficiency of information in informations—effect on summons issued thereon; presumption of mens rea in statutory offences—nature of authorities; whether mens rea element in definition of offence in Housing Act 2004 s.72(1)

R (MOHAMED) v LONDON BOROUGH OF WALTHAM FOREST AND CONJOINED APPLICATIONS [2020] EWHC 1083 (Admin); 7 May 2020

(1) If, in breach of the Magistrates' Court Act 1980, the Magistrates Court Rules and the Criminal Procedure Rules, insufficient information had been provided by a prosecutor to a magistrate to justify the issue of a summons, but a summons had in fact been issued, the subsequent criminal proceedings do not become a nullity where the subsequent provision of sufficient information remedied the earlier deficiency of information so that the criminal proceedings were fair: *Nash v Birmingham Crown Court* [2005] EWHC 338 (Admin). However, if sufficient information could never be provided to the magistrates, the Divisional Court may quash the decision to issue a summons based on the insufficient information: *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin); [2019] 1 W.L.R 6238.

(2) Although some of the phrases used in the authorities relevant to the proper approach to construing a statutory offence to determine what, if any, mens rea element it required (the court referred to *Warner* [1969] 2 AC 256;

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Sweet v Parsley [1970] AC 132; *Gammon v Attorney General of Hong Kong* [1985] AC 1; and *Muhamad* [2002] EWCA Crim 1856; [2003] QB 1031) were criticised as circular or unhelpful (e.g "criminal in nature", relating to an issue of "social concern"), the effect of the authorities was clear. The presumption that there would be a mental element to a statutory offence subsisted, but was less strong in regulatory licensing offences such as those under consideration, relating to the licences of houses in multiple occupation (HMOs) under the Housing Act 2004.
(3) The offence of having control of or managing a house in multiple occupation which was required to be licensed but which was not so licensed, contrary to s.72(1) of the Housing Act 2004, did not require the prosecution to prove that the defendant knew that he had control of, or managed, a property which was an HMO, and was therefore required to be licenced.

Mens rea—presumption of mens rea in statutory offences—approach of the courts; terrorism—Terrorism Act 2000 s.13(1)—whether offence of strict liability—whether compatible with European Convention on Human Rights Art.10

PWR AND OTHERS v DPP [2020] EWHC 798 (Admin); 3 April 2020

(1) The common law presumption that mens rea was an ingredient of a statutory offence unless it had clearly been excluded by Parliament was a strong one and could not be lightly be displaced. It was however also clear that the court must consider the words of the statute and other relevant circumstances, and must ascertain whether Parliament – by express words or by necessary implication – had made clear its intention to create an offence lacking mens rea. The case law revealed differences of opinion as to whether the question should be approached by starting with the presumption and then looking to see if it had been excluded, or by starting with the statutory wording and other indications of Parliamentary intent and then applying the presumption if there were no clear intention to exclude. It mattered not which approach was adopted: the terms of the statute and all other relevant factors and circumstances – conveniently encapsulated *B (a minor) v DPP* [2000] 2 AC 428, 463H-464A, per Lord Nicholls – must be considered; and if there were no clear Parliamentary intention to create an offence which did not require mens rea, then the presumption would apply.
(2) The offence in the Terrorism Act 2000 s.13(1) did not require mens rea. A person committed the offence if he or she wore clothes or wore, carried or displayed an article in such a way or in such circumstances as to arouse a reasonable suspicion that he or she supported a prescribed organisation. This did require that the person must act deliberately in the sense that he or she must know that he or she was wearing, carrying or displaying that item or article: e.g, if a person had a backpack on his or her back, and unbeknown to him or her someone had attached an image or a banner to it, he or she could not be said to be wearing, carrying or displaying that image or banner. It further required that the wearer was in fact wearing, carrying or displaying the item or article in question in a way, or in circumstances, capable of arousing the necessary reasonable suspicion: if, e.g, a police officer had seized a flag or banner, and was carrying it towards a police vehicle with the item furled or folded and pointing towards the ground, the officer could not be said to be carrying or displaying it in the requisite manner. But nothing in the section required any knowledge on the part of the wearer of the import of the item or article, or of its capacity to arouse the requisite suspicion.
(3) The section engaged European Convention on Human Rights Art.10, in that it restricted freedom of expression by wearing, carrying or displaying certain items. It was, however, justified under Art.10(2). It reached the requisite level of certainty to satisfy the requirement of legality; it pursued a legitimate aimed, and it was proportionate.
The court considered *Sweet v Parsley* [1970] AC 132; *B (a minor) v DPP* [2000] 2 AC 428; *Muhamad* [2002] EWCA Crim 1856, [2003] QB 1031; *Brown* [2013] UKSC 43, [2013] 4 All E.R. 860; *Lane and Letts* [2018] UKSC 36, [2018] 1 W.L.R 3647; and *O'Moran and Whelan* [1975] 1 QB 864 on mens rea and *Zana v Turkey* (1999) 27 EHRR 667; *Shayler* [2002] UKHL 11, [2003] 1 AC 247; *Gul v Turkey* (2011) 52 EHRR 38; *Tas v Turkey (no 2)* (Application No. 6813/09; *Alekhina v Russia* (2019) 68 EHRR 14; *Choudary and Rahman* [2016] EWCA Crim 1436, [2018] 1 W.L.R 695; *Arslan v Turkey* (2001) 31 EHRR 9; *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700; and *Tasdemir v Turkey* (Application No. 38841/07) on Art.10.

Prosecution—CPS decision making—Victim's Right to Review—whether right to make representations

R (FNM) v DPP [2020] EWHC 870 (Admin); 8 April 2020

Following the unsuccessful conclusion of a first review under the Victims' Right to Review, FNM was granted a further review, which she asked to be put "on hold" while she consulted her lawyers. An email reply led her to believe that the completion of the second review would not take place for some weeks, and she arranged a meeting with her representatives. Before the meeting took place, the result (again unsuccessful) of the review was communicated to her. On her application for judicial review, she argued that the decision on the second review was taken without her being afforded a fair opportunity to make representations, and that accordingly the decision was unlawful. The application was refused. The Victims' Right to Review scheme was set out in the current guidance, dated July 2016. That provided that where a victim had given reasons for requesting a review, the issues raised would be addressed in the decision letter (para.42). That paragraph gave the complainant a fair opportunity to make representations and to have them taken into account by the decision-maker, in accordance with the authorities relied on by FNM (*R v Home Secretary ex p Doody* [1994] 1 AC 531, 559-560; *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] AC 700, [179]; *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, [67], [68] and [71]). That was all that was required. There was no duty on the DPP positively to invite representations from complainants seeking a review. Complainants have no right to make representations before the original decision was taken on whether or not to charge the suspect, and it would be curious if they had any such right on review, greater than the opportunity given by para.42. Still less did a complainant have the right to hold up the review process for any significant period of time to enable her to consult lawyers and formulate a detailed case as though the review were an appeal to a higher court. FNM contended not for such a right, but that complainants were entitled to a fair opportunity to make representations.

No doubt, unless the case were one of particular urgency, where an application for a review contained a request for, say, a further seven or 14 days in which to give reasons in support, that request would be sympathetically considered, at least where the request was made well before the expiry of the three month time limit provided for in the guidance. But it went no further than that.

Dishonesty—test; stare decisis—precedential status of Supreme Court obiter dicta

BARTON AND BOOTH [2020] EWCA Crim 575; 29 April 2020

A five-judge court presided over by the LCJ (and including the PQBD and VCCACD) considered the effect of *Ivey v Genting Casinos (UK) (trading as Cockfords Club)* [2017] UKSC 67; [2018] AC 391. The test for dishonesty in all criminal cases was that set out by the Supreme Court in *Ivey*. That test was strictly obiter dicta. However, where the Supreme Court directed that an otherwise binding decision of the Court of Appeal should no longer be followed and proposed an alternative test that it said must be adopted (as Lord Hughes did, with the unanimous agreement of the other members of the Supreme Court), the Court of Appeal was bound to follow that direction even though it was strictly *obiter*. To that limited extent the ordinary rules of precedent (or *stare decisis*) had been modified.

[*Comment: The next issue of* Archbold Review *will include an article by Professor David Ormerod QC and Karl Laird on the substantive issues raised by this case in relation to the test for dishonesty. The following comment deals only with the issue of precedent.*

The decision takes us into a baffling analytical thicket – how could the Supreme Court (as the Court of Appeal, Criminal Division clearly thinks it did) change the legal status of obiter dicta by means of obiter dicta, which, at the time they were uttered, did not change the law?[1] *But then, if we identify the CACD as changing the law of precedent (which is clearly open to it), the fiction that new law declares an unchanging common law back-dates the changes – in which case, the SC's obiter dicta* did *change the law, but only once the CACD had changed the law about the effect of obiter dicta.*

The use made by the CACD in Barton *of the approach in* James; Karimi *[2006] EWCA Crim 14, [2006] QB 588 to adopting the reasoning of the Privy Council in* Jersey v Holley *[2005] UKPC 23, [2005] 2 AC 580 is also open to the criticism because it appears to be contrary to the way that the relationship between the PC and the law England and Wales was set out in the* SC in Willers v Joyce *[2016] UKSC 44, [2018] AC 843, albeit that the SC in that case did not overrule* James. *But all that said, it is clear that the law has changed. So more important is to establish the criteria which determine which obiter dicta count as binding. The Court in* Barton *identifies two. The first is that the SC must be seen as directing that the obiter dicta should have precedential effect. That this was so in* Ivey *is clear from the words used by Lord Hughes – that* Ghosh *was not good law and the direction should no longer be used in the lower courts. The second, derived, it appears, from the* Holley *model used by the CACD, is that the SC should be unanimous in this directive intent (although, presumably, as in* Holley*, the unanimity does not have to extend to the substance of that which is directed).*

The first criterion seems clearly right – it would be absurd to suppose that anything at all said about the law in the course of a SC judgment should automatically be binding. Requiring the SC to direct that the dicta are binding both distinguishes those from the rest and demonstrates the level of significance that the SC attaches to them. But why the requirement for unanimity? We have always accepted a bare majority as determinative of even the most fundamental principles of our law. Why should there be a judicial super-majority for this particular feature of the law, when everything else, including the other rules of stare decisis themselves, do not? Furthermore, while the directive intent of the SC can readily be discerned in Ivey*, there is nothing to suggest that the (as it happens) unanimous agreement of the justices with Lord Hughes was seen as being a distinct and separate requirement. It is certainly something introduced by the CACD.*

Finally, one obvious possible criterion is missing – that the point had been argued before the court. It has been accepted as a general principle that a court is not bound by a proposition of law which was not argued in what would otherwise be an authoritative statement of the law, because it was not disputed or was assumed.[2] *More recently, the question of whether an issue was in dispute/argued was characterised (obiter) as one of a number of factors to be taken into account by a later court in determining the extent of the ratio decidendi of an earlier judgment.*[3] *It seems surprising that full argument is either required for a proposition to be a binding part of the ratio of a judgment, or at least to be an important factor in its delineation, but is not a criterion for binding obiter dicta, under the* Ivey/Barton *principle. Unfortunately, it appears that the correctness or otherwise of* Ghosh *was not argued in* Ivey*, so it seems that this is currently the state of the law. In an earlier comment in* Archbold Review *4 [2018] 3, it was suggested here that recognition of the precedential value of some SC obiter dicta would be desirable, and suggested that the criteria should include a precedential direction and full argument; but that comment appears to have been incorrect in suggesting that the* Ghosh *point had, in fact, been argued.* [RP]

SENTENCING CASE

Suspended sentences; impact; COVID-19 emergency

MANNING [2020] EWCA Crim 592, 30 April 2020

The Solicitor General sought leave to refer a sentence as unduly lenient The appellant had pleaded guilty to four counts of sexual activity with a child and to one count of causing/inciting a child to engage in sexual activity. A suspended sentence was imposed, comprising 12 months' imprisonment, suspended for 24 months. The sentence included a tagged curfew for nine months between 9pm and 6am, a Rehabilitation Activity Requirement of 30 days and a requirement that the offender undertake a treatment programme. A Restraining Order and Sexual Harm Prevention Order were also imposed.

The sentencing judge placed the four contact offences in cat-

1 Rules of precedent are, indeed, rules of law: *Davis v Johnson* [1979] AC 264, HL. For an argument that they are a higher, or different, form of rule, see R Cross "The House of Lords and the Rules of Precedent" in Hacker and Raz (eds) Law, Morality and Society (OUP 1977). For a lower form, see the unsuccessful argument of Lord Denning, *Davis v Johnson* [1979] AC 264, 281, CA.

2 *Re Hetherington (Deceased)* [1990] Ch 1, for an e.g of recent application, see *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] 2 W.L.R 429. For a criminal context, *Baker v The Queen* [1975] AC 774.

3 *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2020] QB 387, [48] to [59], per Leggatt LJ.

egory 3A of the Sexual Offences definitive Sentencing Guideline. The incitement offence was also placed within category 3A (see paras [5]–[11] of the judgment). The starting point for a category 3A offence is six months' custody. The sentencing range is a high-level community order to three years' custody. The court accepted that the 15-month starting point was unduly lenient, and that the proper starting point should have been in the region of 30 months' imprisonment.

The real issue identified by the court was whether it was open to the judge to suspend the sentence. The Court concluded that having regard to the guideline on the imposition of community and custodial sentences, consideration of a suspended sentence was not wrong in principle; it being recognised that there was a realistic prospect of rehabilitation in this case.

The ancillary orders attached to the suspended sentence were significant and the curfew was recognised as a significant restriction on the offender's liberty (noting that the national lock-down would in any event inhibit his movements).

The court referred to the fact that the reference was being heard at the end of April 2020, during the lock-down imposed as a result of the Covid-19 emergency as "one other factor of relevance". The current conditions in prisons can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, courts will take into account the likely impact of a custodial sentence upon the offender and, where appropriate, upon others. Judges and magistrates can and should keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be (the Court here referred to the fact that those in custody are now confined to their cells for much longer periods – at the time of the judgment, 23 hours a day, they are unable to receive visits and both they and their families are likely to be anxious about the risk of the transmission of Covid-19).

Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the decision as to its length and whether it can be suspended. Sentencers also can and should bear in mind the Reduction in Sentence Guideline, which emphasises that a guilty plea may result in a different type of sentence or enable a magistrates' court to retain jurisdiction, rather than committing for sentence.

The Court therefore allowed the Solicitor General's application to the extent that the custodial term of 12 months was replaced with a custodial term of 24 months – as before, suspended.

Features

Defending Private Prosecutions

By Robert Hanratty[1]

Introduction

Judicial opinion on the merits of private prosecutions in the criminal justice system could scarcely be more polarised. Forty years ago, in *Gouriet v Attorney General*,[2] Lord Wilberforce said that the right of private prosecution remained "a valuable constitutional safeguard against inertia or partiality on the part of authority," and Lord Diplock spoke of it as "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of … authorities to prosecute offenders." This view was shared in recent times most ardently by Lord Mance.[3]

By contrast, Lord Bingham said of the surviving right of private prosecution:

> There are … respected commentators who are of opinion that with the establishment of an independent, professional prosecuting service, with consent required to prosecute in some more serious classes of case, with the prosecution of some cases reserved to the Director, and with power in the Director to take over and discontinue private prosecutions, the surviving right is one of little, or even no, value…

Lord Bingham went on to state that not only was the right of questionable value, but also that it could be exercised in a way damaging to the public interest.[4]

In a recent article in the Criminal Law Review,[5] Claire de Than and Jesse Elvin argued that in light of recent English cases concerning the right of individuals to bring private prosecutions, the right should be circumscribed. They point out that those who wish to challenge prosecutorial decisions may do so via judicial review and, moreover, that recent developments such as the creation of the Victims' Right to Review (VRR) scheme in 2013[6] have taken this point even further. The authors go on to show that private prosecutions are usually brought – sometimes oppressively – by well-funded organisations, not down-trodden individuals. They also point out that the diversion of funds away from the CPS, to private prosecutions, may harm the public interest, and that a device that only allows for prosecutions by wealthy private prosecutors is potentially unfair to defendants if those cases would not ordinarily have been prosecuted by the state.

Having set out their objections, de Than and Elvin propose a set of three reforms to the current system, which for them constitute a "middle ground" between leaving the legal system unchanged and removing the right of private prosecution altogether. In this article I will not address those proposed reforms but will argue, instead, that a number of recent cases have illustrated the concerns they raise, and show that the courts are well apprised of such issues, are prepared to rigorously scrutinise private prosecutions and

1 CorkerBinning Solicitors. I am grateful to John Spencer for his comments on an earlier draft.

2 *Gouriet v Attorney-General* [1978] AC 435.

3 *Jones v Whalley* [2007] 1 AC 63 and *R (on the application of Gujra) v CPS* [2012] UKSC 52, [2013] 1 AC 484.

4 *Jones v Whalley* [2007] 1 AC 63, at [9] and [16].

5 Claire de Than and Jesse Elvin, "Private prosecution: a useful constitutional safeguard or potentially dangerous historical anomaly?," [2019] 8 Crim.L.R, 656-683.

6 https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme.

to impose exacting standards on how they are pursued. The courts are therefore already seized of the potentially objectionable aspects of private prosecutions and are developing a series of checks and balances to counter their worst effects. This may undercut calls for reform.

This article will now consider the effect of the court's scrutiny in the area of costs, the conduct of the private prosecutor, the motive of the private prosecutor and routes of appeal, and outline the potential consequences for those defending a private prosecution.

Costs Considerations

Costs Orders against the Private Prosecutor

Section 17(1) of the Prosecution of Offences Act 1985 (POA 1985) and Pt.III of the Costs in Criminal Cases (General) Regulations 1986 (the Regulations) empower the court to

> order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

A "reasonable" sum in this respect can be a significant amount, and in May 2019 a judge made a costs order estimated to be in the region of £1m to Mr Ashok Patel, even though the private prosecution he had brought against his two former business partners ultimately resulted in their acquittals.[7] By contrast, although an acquitted defendant in a private prosecution may also have their reasonable legal costs reimbursed from central funds, that amount is capped at legal aid rates,[8] which would in most cases be far less than the amount spent on a privately funded defence.

Although at first sight this regime seems a perverse incentive to would-be private prosecutors, it is tempered by reg.3 of the Regulations, which empowers the court to order a party to criminal proceedings to pay the costs of another party if satisfied that their costs were incurred "as a result of an unnecessary or improper act or omission."

In *R (Holloway) v Harrow Crown Court*[9] the issue of what constituted an "improper act" for the purposes of determining a costs award came before the Divisional Court on judicial review, when a private prosecutor challenged an order made by the Crown Court requiring him to pay the costs incurred by the defendants up to the point at which the Director of Public Prosecutions (DPP) had taken over and discontinued the proceedings under s.6(2) of the POA 1985. In upholding the decision of the Crown Court and finding against the private prosecutor, the Divisional Court was particularly unimpressed with two aspects of how the private prosecutor had conducted himself: first, he had failed in his duties of disclosure by virtue of withholding an important email, which in the court's estimation "presented a picture flatly contradictory to the prosecution case." This exposed him at the very least to charges of "selectivity and of suppressing unhelpful material"; and secondly, he had failed to carry out an independent and objective analysis of the evidence before commencing proceedings in order to determine whether there was a realistic prospect of conviction. Had such an assessment been carried out, the only possible conclusion would have been that there was no possibility of a conviction.

The commencement and continuation of the prosecution was, under those circumstances, an "improper act" within the meaning of the Regulations and had caused the defendants to incur costs in defending the proceedings. The word "improper", moreover,

> …does not necessarily connote some grave impropriety … it is intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly.

The Court therefore found it appropriate for a costs order to be made in favour of the defendants. The case was remitted to the Crown Court to determine quantum, the defendants' application having been for a sum of approximately £23,000. Whilst recognising that the discretion was a matter for the Crown Court, and that not every improper act would lead to an order for costs, the Divisional Court stated that the only proper exercise of discretion would be for an order to be made in favour of the defendants. This was justified on two grounds: first, despite the high threshold test for impropriety being one of a clear and stark error, the facts in *Holloway* were very clear; and secondly, the defendants had warned at the outset that if a summons was issued, they would not only invite the DPP to take over the case and discontinue it, but also that they would seek an order for costs. The claimant, nevertheless, chose to proceed with the prosecution and did so in full knowledge of the potential consequences.

Holloway is a warning to would-be private prosecutors that any prospective prosecution they intend to pursue must be conducted to the same standard and with the same diligence as that expected from any public prosecutor. Failure to properly conduct the process is likely to result in a finding of impropriety, thus potentially justifying the exercise of the court's discretion to make an adverse costs order. For a prospective defendant, the guidance from the bench is that engagement with the process at the pre-summons stage can have positive results. Putting the prosecutor on notice as to the defendant's objections and future course of action if the prosecution is commenced will create a favourable position in respect of determining costs, should the prosecution be later discontinued.

Costs Orders in Confiscation and Enforcement proceedings

In *R (Virgin Media Limited) v Zinga*,[10] the Court of Appeal decided that a private prosecutor was entitled to bring proceedings for confiscation under the Proceeds of Crime Act 2002 (POCA), despite their having no financial or other personal interest in the outcome. For the Court, it

> [could not] be questioned that sentencing is part of the criminal proceedings instituted against a defendant. It is also well established that confiscation proceedings are part of the sentencing procedures.

Furthermore, "it must follow that confiscation proceedings are also part of criminal proceedings and within the scope of s.6 of the Prosecution of Offences Act 1985" (the statutory provision under which the right of private prosecution is maintained).[11] There was nothing in POCA, the court said, limiting such confiscations to proceedings instituted

7 https://www.thetimes.co.uk/article/public-to-pay-1m-bill-for-failed-private-prosecution-zrvnsxnhd.

8 See Prosecution of Offences Act 1985, s.16(2)(b) (as amended by Sc.7 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012) and reg.7(7) of the Costs in Criminal Cases (General) Regulations 1986, as inserted by reg.6 of the Costs in Criminal Cases (General) (Amendment) Regulations 2012.

9 [2019] EWHC 1731 (Admin).

10 [2014] EWCA Crim 52, [2014] 1 W.L.R 2228.

11 [2014] EWCA Crim 52, at [17].

by a state prosecutor: "the prosecutor" for the purposes of POCA "must include all prosecutors including a private prosecutor."[12] As per s.17(1) of the POA 1985, the private prosecutor may also have sought "reasonable" costs incurred in any such proceedings. In *Somaia*,[13] the Court of Appeal reaffirmed the principle in *Zinga* and confirmed that a private prosecutor could institute confiscation proceedings both under POCA and the Criminal Justice Act 1988 (the CJA 1988).

In a subsequent hearing in *Re Somaia*,[14] the High Court refused, however, to allow an award of costs in proceedings brought for enforcement of a confiscation order. In that application, the private prosecutor sought to enforce a confiscation order through proceedings in the High Court for the appointment of a receiver over the defendant's assets – brought under s.80 of the CJA 1988. Following an order that the prosecutor's costs were payable out of central funds, the Lord Chancellor applied for that order to be set aside on the basis that s.17(1) did not apply to High Court enforcement proceedings because they were purely civil in nature.

A costs order is made under s.17(1)(a) in relation to "any proceedings in respect of an indictable offence." It was argued by the private prosecutor that although the enforcement proceedings were not criminal proceedings, they were the means by which a confiscation order – itself a part of the sentencing process – was to be enforced, and so the two sets of proceedings could not be isolated from one another. The prosecutor argued that the wording of s.17(1)(a) was wide enough to encompass civil enforcement proceedings and the section was therefore not limited to circumstances in which the prosecutor conducts criminal proceedings.

The Court held that neither the Regulations, Practice Direction (Costs in Criminal Proceedings) 2015 (the Practice Direction)[15] nor the Criminal Procedure Rules 2015 appeared to contemplate that proceedings in the High Court (other than in the Divisional Court) could result in an order for payment of costs out of central funds under s.17. The Court also rejected the prosecutor's further submission that the answer to those difficulties was that the costs regime under the Civil Procedure Rules co-exists with the jurisdiction under s.17. The Lord Chancellor was therefore right to say that s.17 was not intended to apply to civil proceedings in the High Court even if they were consequential on criminal proceedings. In so finding the court demonstrated an inclination to read s.17 narrowly in order to circumscribe the ability of a private prosecutor to recoup their costs.[16]

The Conduct of the Private Prosecution

In *Holloway,* the Court also appeared to question whether an individual private prosecutor could ever carry out an independent evaluation of the evidence:

> [B]ecause a private prosecutor will often have a private interest in the proceedings, he may lack the objectivity required to undertake such an analysis.[17]

Whilst not a legal stipulation, the court thought it prudent for a private prosecutor to bring a proposed prosecution to the attention of the police or prosecution authorities and to take legal advice before commencing. Failure to do so may give rise to an inference that a private prosecutor was determined to proceed with the prosecution regardless of the prospects of success or, more mundanely, may indicate that no proper analysis of evidential sufficiency had been carried out, in breach of the standards required of a "Minister of Justice."

The Motive of the Private Prosecutor

In *Holloway,* the defendants argued that the improper act for the purpose of determining costs was "bringing the prosecution without the skill and calibre to adequately do so, as well as without adequate evidence to establish the offences complained of." The defendants did not argue that these acts were improper in themselves, but rather that they existed "to such an extent that an ulterior motive was present other than to administer justice." The court, however, proceeded on the basis that they were in and of themselves foundational of impropriety. This is a signal to would-be defendants that in scrutinising the merits of a private prosecution, the court is content, where possible, to assess the conduct of the proceedings in broad terms and does not necessarily require a highly forensic evaluation of the motivation of the private prosecutor.

This approach is echoed by the decision in *Westminster Magistrates Court, ex p Johnson*,[18] where the claimant in judicial review proceedings (the defendant in the private prosecution) challenged the District Judge's decision to issue a summons against him for three offences of misconduct in public office. The claimant put forward a detailed submission suggesting that the political motive for the private prosecution was apparent from as far back as the preceding three years and that the prosecution was therefore vexatious. The material put forward outlined the private prosecutor's avowed pro-Remain stance and his strategy to engage the criminal law in order to attain his desired political outcome of forcing a second referendum on Brexit and ultimately having the UK remain in the European Union.

The Divisional Court quashed the decision of the District Judge to issue the summons, on the basis that a fundamental element of the test for issuing a summons as set out in *R (Kay) v Leeds Magistrates' Court*[19] was not made out – namely that the essential ingredients of the offence were not *prima facie* present.[20] But the Court also stated that, had it been necessary, it would have reached the same decision on the basis that the District Judge's finding that the prosecution was not vexatious was flawed.[21] The District Judge had accepted that the prosecutor may have had a political purpose three years earlier but had held that by the time the information was laid in February 2019 that argument "was no longer pertinent."

12 [2014] EWCA Crim 52, at [21].
13 [2017] EWCA Crim 741.
14 [2019] EWHC 1227 (QB).
15 [2015] EWCA Crim 1568 (as amended by Amendment No.1 [2016] EWCA Crim 98 in April 2016).
16 The decisions in *Holloway* and *Re Somaia*, must, however, be considered alongside the favourable judicial treatment of would-be private prosecutors' costs following the decision in *Fuseon Limited v Senior Courts Costs Office* [2019] EWHC 126 (Admin). In that case, the High Court considered the application of what has become known as the "*Singh* reduction" (*R v Supreme Court Taxing Office ex parte John Singh and Co* [1997] 1 Costs LR 49), which for the purposes of determining costs, posits, "the necessity of standing back from the total hours claimed on each class of work done to assess whether globally it was reasonable." In *Fuseon*, the court held it was reasonable for the private prosecutor to have instructed an expensive firm of specialist solicitors in London, and, that for the purposes of applying the *Singh* reduction, CPS billing rates were not the appropriate comparator when deciding upon the extent of costs recoverable by a private prosecutor from central funds.
17 [2019] EWHC 1731 (Admin), at [20].
18 [2019] EWHC 1709 (Admin).
19 [2018] EWHC 1233 (Admin), [2018] 4 W.L.R 91.
20 For a detailed evaluation of the scope of the offence and the court's construction of it see: Jonathan Rogers, "Misconduct in Public Office and Prosecuting Boris Johnson", [2019] 10 *Archbold Review* 4-6.
21 [2019] EWHC 1709 (Admin), at [46].

For the Divisional Court

> the passage of time since 2016 was no answer to the Claimant's detailed submission that the political motive for the prosecution is apparent from evidence as far back as July 2016 and up to the institution of the prosecution in February 2019.[22]

If the District Judge's consideration of this point was rather cursory, the Divisional Court's own examination of the private prosecutor's motive was also far from exhaustive, being based (as the court itself accepted) on "limited extracts" of the material put forward by the claimant. In a sense, this is a positive development for would-be defendants, as it suggests that a limited evaluation of an issue may suffice to support a finding that a private prosecutor's motive is vexatious. The court, however, failed to offer any guidance as to why the presence of a political motive automatically equated to the prosecution being vexatious. Some of the material put before the court, for instance, pointed to the private prosecutor feeling genuinely aggrieved by Mr Johnson's conduct during the referendum campaign and a feeling that he ought to be held criminally responsible. As mixed motives do not automatically defeat private prosecutions,[23] the court may have had in mind this dictum in *R (G) v S*:

> mixed motives are to be distinguished from an oblique motive which is so dominant and so unrelated to the proceedings that it renders them an abuse of process.[24]

It would have been helpful, however, if the Court in *Johnson* had offered further guidance as to when an oblique motive becomes so dominant as to negate all other motives present.

Finality and Routes of Appeal

If the DPP takes over and discontinues a private prosecution, the aggrieved private prosecutor's redress is by way of an application for judicial review to the Divisional Court in the Queen's Bench Division.

In *Thakrar v Crown Prosecution Service*[25] the claimant brought judicial review proceedings challenging the DPP's decision to discontinue the private prosecution he had commenced. Permission to apply for judicial review was refused by the Divisional Court, initially on the papers and then later at an oral hearing. The claimant then sought permission to appeal the second of those refusals to the Court of Appeal. The case raised an important question as to the terminatory effect of refusal of leave to apply for judicial review and thus the depth of the appeal process a defendant could potentially face following a decision to discontinue.

In order to decide the substance of the claim, the Court of Appeal first had to determine whether it had jurisdiction to do so. Section 18(1) of the Senior Courts Act 1981 states that no appeal shall lie to the Court of Appeal "except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter." As there was nothing in the Administration of Justice Act 1960 that otherwise provided, the Court of Appeal ruled that no appeal could lie because the judgment in the Divisional Court was in a "criminal cause or matter." In so holding, the Court refused to divorce the civil claim in judicial review from the underlying subject matter of the proceedings. In doing so it followed an approach consistently followed since the late nineteenth century,[26] and recently endorsed in *Belhaj v Director of Public Prosecutions*,[27] where Lord Sumption said:

> … in its ordinary and natural meaning "proceedings in a criminal cause or matter" include proceedings by way of judicial review of a decision made in a criminal cause … It follows that judicial review as such cannot be regarded as an inherently civil proceeding. It may or may not be, depending on the subject matter.

The judgment in *Thakrar* bolsters prospective defendants in private prosecutions in respect of strategic decisions during their case. It means, for example, that writing to the DPP with representations as to why a private prosecution should be discontinued on grounds of evidential insufficiency is a worthwhile course, because the DPP's evaluation is made under the Full Code Test, wherein "a finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely."[28] This contrasts with the process of challenging the sufficiency of evidence when the case actually comes before the court – by applying to the court to dismiss the case – where the court simply considers the strength of the prosecution evidence in accordance with the test in *Galbraith*,[29] namely "that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it." Thus in this second situation the court only evaluates the evidence presented by the private prosecutor.

Because the DPP can consider a broad range of material, including that which undermines the case put forward by the private prosecutor, he or she is more likely than the court to stop a private prosecution continuing. With *Thakrar* the defendant can now be confident in the terminating effect of any subsequent decision of the Divisional Court upholding a decision of the DPP to discontinue, so avoiding the unattractive prospect of a subsequent series of appeals to the superior courts.

Conclusion

For each opinion of deference to the right of private prosecution as an important safeguard founded on the "fundamental constitutional principle of individual liberty based on the rule of law,"[30] there is a counter-argument that the right now exists only as a potentially malign relic of the common law. Developments in the case law over the past 12 months demonstrate that the courts are imposing increasingly exacting standards on the conduct of private prosecutions. In the areas of objective evidential analysis, disclosure obligations, costs, finality on appeal, as well as the conduct and motive of the prosecution, the latest cases provide welcome safeguards to ensure that private prosecutors comply fully with their obligations.

22 [2019] EWHC 1709 (Admin), at [44].
23 *Bow Street Metropolitan Stipendiary Magistrate ex p. South Coast Shipping Co. Ltd.* [1993] QB 645.
24 [2017] EWCA Crim 2119, at [27].
25 [2019] EWCA Civ 874.
26 See *ex parte Woodhall* (1888) 20 QBD 832.
27 [2018] UKSC 33, [2019] AC 593.
28 The Code for Crown Prosecutors, par.4.7: https://www.cps.gov.uk/publication/code-crown-prosecutors
29 [1981] 2 All ER 1060.
30 See Lord Simon of Glaisdale, speaking extra-judicially on the second reading of the Bill leading to the POA 1985 (Hansard (HL Debates), 29 November 1984, col 1068).

Archbold Review

Issue 5 29 June 2020

Covid Coughing and the Criminal Law

By J.R. Spencer

It is a sad reflection on human nature that each new phenomenon, welcome or unwelcome, seems to generate a new type of crime. The internet, a welcome invention, has led to an explosion of fraud, child pornography and online abuse. And the Covid-19 pandemic, a deeply unwelcome arrival, has brought with it "Covid coughing": persons carrying the virus, or claiming to, deliberately coughing over other people in order to harm or scare them, or for other reasons unexplained.

In response to this the Director of Public Prosecutions has warned that those who do this will face "the full force of the law".[1] But how forceful in this case is the full force of the law? This article will discuss the possibilities.[2]

If the Covid cougher infects his victim by his doing so he could in principle be prosecuted under ss.18 or 20 of the Offences Against the Person Act 1861 for the offences of causing or inflicting grievous bodily harm. Although at one time it was questioned whether these offences covered causing injury by infection, it is now very clear they do. In *Rowe*[3] the Court of Appeal upheld a life sentence with a tariff period of 12 years on a man convicted of the s.18 offence who, finding himself HIV positive, took his revenge upon society by intentionally infecting as many other people as he could. In dismissing the appeal against sentence the Court also rejected his attempt to appeal against conviction, in which he had tried to argue that, on policy grounds, criminal liability should not attach to behaviour of this sort; an unsurprising outcome, given that the reckless infection of others had been held to constitute the lesser offence of maliciously inflicting grievous bodily harm under s.20 15 years before.[4] If the person so infected was (like the railway employee Ms Mujinga[5]) one of the three or four per cent of sufferers who die, the Covid cougher could face a charge of homicide: murder, if the act was done with intent to kill or make the victim gravely ill; if done with some less serious intent, constructive manslaughter, based on his initial commission of one or more of the offences which will be discussed below.

A problem in the use of ss.18 or 20 where the infection is transmitted is the requirement, common to both sections, that the bodily harm suffered should be "grievous". In most cases, fortunately, the illness caused is relatively mild and in such cases this requirement would clearly not be met. In the minority of cases where the victim (like the Prime Minister) becomes gravely ill, presumably it would be. If the infection led to "moderate symptoms"– for example, two weeks in bed with a high temperature and a period of convalescence – the position would be unclear. In *Golding*[6] the Court of Appeal held that for an illness to fall within the definition of grievous bodily harm "it need not be permanent or dangerous". In that case the defendant had, by unprotected sexual intercourse, infected his then girlfriend with genital herpes. In upholding his conviction under s.20 the Court of Appeal said that whether this unpleasant but not life-threatening condition amounts to grievous bodily harm "is for a jury to evaluate rather than the experts."[7] It would be the same, presumably, if the symptoms resulting from the Covid-19 infection were "moderate".

A further problem arising in a prosecution for any "result crime" is the need to demonstrate a causal link. The Crown would need to prove, to the criminal standard, that the victim contracted the disease as a result of the defendant's cough. The cases establishing that ss.18 or 20 of the OAPA cover injury by infection arose from sexually transmissible diseases, where proof of the necessary causal link is likely to be relatively easy. With an airborne virus, by contrast, proof would often be much harder – especially during an epidemic. Discussing this problem 350 years ago Sir Matthew Hale described sickness as "God's arrow". If that is not quite how the issue would be framed today, the basic problem is still with us[8].

The Crown Prosecution Service has said that Covid coughers will be prosecuted for "assault"[9]: meaning the common law offences of assault or battery. If this warning is well-founded then the offender will be guilty, irrespective of the medical consequences of the cough, if it has any.

This warning presupposes that deliberately coughing over someone constitutes a battery, and hence threatening to do so an assault. But the correctness of this analysis is not free from doubt. The usual definition of the actus reus of the offence of battery is "an act by which a person intentionally or recklessly applies unlawful force to the complainant"[10] and at first sight, deliberately coughing over someone seems some way removed from this. However, body to body contact is not required: the offence of battery unquestionably covers throwing a stone, or other object, at another with an accurate aim, or spitting on them[11]. It would doubtless also cover squirting water onto someone with a hose, or on a smaller scale with a water-pistol. It would also presumably cover squirting an unwanted jet of air at another from a pressure hose.[12] And if this would be a battery, why should it not equally be a battery to project a smaller quantity of unwanted air upon another from the human nose or mouth? In normal circumstances this would be too trivial an example of the offence to justify an arrest or prosecution, but – fortunately – pandemics are not normal circumstances. A glance at the case-law on the scope of the offence of battery suggests that borderline cases are invariably resolved against defendants[13]; so it seems probable that, if judicially tested, deliberately coughing over someone would be held to constitute a battery. But the issue is not free from doubt.

1 Dominic Casciani, BBC News, 26 March 2020.

2 My thoughts on this subject were stimulated by correspondence with colleagues in the Cambridge Law Faculty criminal law discussion group – whose help is gratefully acknowledged.

3 [2018] EWCA Crim 2688; [2019] 1 Cr.App.R. (S.) 38.

4 *Dica* [2004] EWCA Crim 1103, [2004] QB 1257; *Konzani* [2005] EWCA Crim 706, [2005] 2 Cr.App.R 14.

5 Who on April 5 died after being spat and coughed upon by a passenger at Victoria Station: https://www.theguardian.com/uk-news/2020/may/12/uk-rail-worker-dies-coronavirus-spat-belly-mujinga.

6 [2014] EWCA Crim 889.

7 At [77].

8 *History of the Pleas of the Crown* (Emlyn 1736), 432.

9 https://www.cps.gov.uk/cps/news/coronavirus-coughs-key-workers-will-be-charged-assault-cps-warns.

10 *Archbold*, main work, §19-22; citing *Williams* (1987) 78 Cr.App.R 276, at 279.

11 https://www.sentencingcouncil.org.uk/blog/post/assault-offences-explained/.

12 Conduct which, incidentally, can cause serious injury. For an example, see *Smith v Crossley Bros.* [1951] 10 WLUK 5, (1971) 95 SJ 655.

13 See for example *Simester and Sullivan's Criminal Law*, 7th ed (2019), 456-458.

The basic common law offence of assault and battery is summary only, with a maximum penalty of six months' imprisonment. But the consequences, or the circumstances, may transform it into one of the statutory aggravated versions which carry higher penalties. If the victim was infected and fell ill, even if not gravely so, s.47 of the OAPA would then turn the offence into "ABH", [14] an either-way offence potentially punishable with five years' imprisonment. If a tactic to resist arrest, s.38 would make the cough an either-way offence with a two-year penalty – rising, astonishingly, to a seven-year penalty if the officer assaulted was attempting to preserve a wreck.[15]

In 2018, Parliament created a new aggravated version of assault and battery: assault on an emergency worker[16], an either-way offence with a maximum penalty of two years' imprisonment. To most people the term "emergency worker" would suggest a fireman, a life-boatman, a paramedic, or the medical staff at a hospital accident and emergency department, rather than police or prison officers. But although firemen and so forth are included, the definition section[17] also includes constables, prison officers, prisoner escorts and (for good measure) the staff at immigrant removal centres[18]; and the Act is framed so that these persons count as "emergency workers" even when engaged on aspects of their work which are far removed from saving life and limb[19]. From newspaper accounts it seems that in practice the overwhelming majority of prosecutions for this offence involve defendants who use force against the police; and a side-effect of the Act has been to make redundant the classic offence of assaulting a constable in the execution of his duty – which in its current form is summary only, with a maximum sentence of six months.[20] Reports in the media suggest that it is assault on emergency workers for which most Covid coughers are at present brought before the courts.[21]

If it is questionable whether Covid coughing falls within the scope of assault and battery, it clearly falls within the scope of two other offences which are much more serious and carry penalties far more severe. These are s.23 of the OAPA, maliciously administering a noxious thing "so as thereby to endanger the life of [a] person"[22], and s.24 of the OAPA, maliciously administering a noxious thing "with intent to injure aggrieve or annoy"[23]; the first of which carries a maximum penalty of 10 years' imprisonment, and the second five.

The actus reus of these two offences has two key ingredients: (i) a substance that is "noxious" and (ii) "administration". Where a Covid-19 carrier deliberately coughs or sneezes over another person, both of these requirements are clearly met. The virus of a disease both dangerous and infectious is undoubtedly a "noxious thing". The meaning of this term was recently discussed at length in *Veysey*[24], where the point at issue was whether human urine fell within the definition. In deciding that urine is a noxious thing, although it is not dangerous to health, the Court (and everyone else) proceeded on the basis that a substance which *is* dangerous to health is unquestionably "noxious". From the case-law it seems equally clear that coughing over someone counts as "administering" the virus that is carried in the breath. In *Gillard*[25] the defendant sought to argue that CS gas was not "administered" to someone who was sprayed in the face with it because "administering" means causing the victim to ingest it. This argument was rejected

> In the view of this Court, the proper construction of "administer" in section 24 includes conduct which not being the application of direct force to the victim nevertheless brings the noxious thing into contact with his body.
>
> While such conduct might in law amount to an assault, this court considers that so to charge it would tend to mislead a jury.

Whereas the s.24 offence is only committed where the defendant acted with intent to "injure, aggrieve or annoy", there is – paradoxically – no such mens rea requirement for the more serious s.23 offence. A person commits the s.23 offence if the substance he administers is "noxious" and he knows it – provided he endangers someone's life by what he does. The Crown does not have to show that he intended to endanger life.[26] From this it seems to follow that a Covid cougher risks conviction for the graver of the two offences.

If the Covid cougher was not in fact infected but believed himself to be so, he or she would then be guilty of attempt.

What about the supposed Covid cougher who knows he is infection-free, and is faking, to give the person coughed upon a scare? If deliberately coughing onto someone really constitutes a battery he could be prosecuted for that offence. But even if this does not constitute a battery the law is not left powerless to deal with him. Under s.4A of the Public Order Act 1986 it is a summary offence, punishable with six months' imprisonment, to use "disorderly behaviour" with intent to cause another person "harassment, alarm or distress". The fake cougher who (for example) terrifies the customers in a supermarket by pretending to cough infectiously upon them would clearly be guilty of this offence.

14 I.e. assault occasioning actual bodily harm. "Actual bodily harm" is usually described as any hurt or injury calculated to interfere with the health of comfort of the victim" – a definition derived from *Donovan* [1934] 2 KB 498.
15 OAPA 1961 s.37.
16 Assaults on Emergency Workers (Offences) Act 2018.
17 Section 3.
18 Section 3 (3) (c): "a removal centre, a short-term holding facility or pre-departure accommodation, as defined by section 147 of the Immigration and Asylum Act 1999".
19 By s.1(a) the offence "applies to an offence of common assault, or battery, that is committed against an emergency worker acting in the exercise of functions as such a worker"; and by s.3 a person is an "emergency worker" if he holds any of a number listed positions or offices.
20 Police Act 1996 s.89. Earlier versions of the offence were originally either-way offences and punishable more severely. It was downgraded to summary offence in 1977; possibly in the belief that the police would be better protected by an offence for which the defendant could not opt for jury trial.
21 An example is *Lewis*: https://www.bbc.co.uk/news/uk-england-london-52133380.
22 "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment for any term not exceeding ten years."
23 "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to imprisonment for not more than five years."
24 [2019] EWCA Crim 1332, [2019] 2 Cr.App.R. 29.
25 (1988) 87 Cr.App.R. 189.
26 *Cato* [1976] 1 W.L.R 110.

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The views expressed are those of the authors and not of the editors or publishers.
Editorial inquiries: Victoria Smythe, House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.

Archbold Review is published in 2020 by Thomson Reuters, trading as Sweet & Maxwell.
Thomson Reuters is registered in England & Wales, company number 1679046.
Registered Office and address for service: 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

42672300