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Archbold Review

Cases in Brief

Breach of Public Spaces Protection Order—Anti-social Behaviour Crime and Policing Act 2014 ss.68 and 63(6)

WYCOMBE DISTRICT COUNCIL v SNOWBALL [2020] EWHC 1656 (Admin); 29 June 2020

S, being in a Public Spaces Protection Order in which consuming alcohol or having an open container for alcohol was prohibited, was holding and drinking from a can marked "Foster's Lager". A police officer told S that he reasonably believed that the can contained alcohol. S refused to surrender the can or explain what it was. The officer issued a fixed penalty (Anti-social Behaviour Crime and Policing Act 2014 s.68) in respect of S's failure to surrender the can, contrary to s.63(2)(b) of the 2014 Act. At this point, S showed the officer that the can did not contain alcohol by pouring out the orange coloured drink it contained. S was charged with the offence when he declined to pay the fixed penalty notice. The district judge had been wrong to dismiss the summons. The district judge had found that the officer had a reasonable belief that the can contained alcohol, thus satisfying s.63(1) and entitling him to require the surrender of the can, and (as the district judge found as a fact) the officer had informed S that failing to surrender the can without a reasonable excuse would constitute an offence (s.63(3)). Accordingly, all of the elements of the offence were present at the point that the officer issued the fixed penalty notice. The core of the offence related to the subjective, but reasonable, belief of the officer, not whether, objectively, the can did contain alcohol. The events after the service of the notice were not capable of casting a retrospective light on whether the offence had been committed.

Disclosure—material held on witness' digital devices—obligations on investigators—approach to be taken to examination of devices—reassurances to witnesses—refusal of access and applications to stay

CB; MOHAMMED [2020] EWCA Crim 790; 23 June 2020

The two unrelated cases were listed together to allow the court to consider various issues relating to the retention, inspection, copying, disclosure and deletion of the electronic records held by prosecution witnesses. The issues often arose in connection with mobile phones in the possession of complainants in sexual offences, but also occurred in respect of other witnesses ("witness" hereafter includes complainant).

(1) There was no obligation on investigators to seek to review a witness's digital material without good cause. The request to inspect digital material, in every case, must have a proper basis, usually that there were reasonable grounds to believe that it might reveal material relevant to the investigation or the likely issues at trial ("a reasonable line of inquiry": Criminal Procedure and Investigations Act 1996 s.3; Code of Practice to that Act, para.3.5). It was not a "reasonable" line of inquiry if the investigator pursued fanciful or inherently speculative researches. Instead, there needed to be an identifiable basis that justified taking steps. This did not depend on formal evidence in the sense of witness statements or documentary material, but there must be a reasonable foundation (*H and C* [2004] UKHL 3, [2004] 2 AC 134, [35]), which would depend on the facts/issues in the case, including any potential defence. Investigators should not pursue fishing expeditions, and courts should not grant such applications if they did (see Supplementary Guidelines on Digitally Stored Material (2011), replaced by, but annexed to, the current Attorney General's Guidelines on Disclosure (2013) ("the 2011/13 Guidance"), at A40). Digital material was no different from any other information or record. Although a single device now frequently contained a wide range of information previously kept in distinct hard copy forms, the ease with which it was now

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accessible did not make it more susceptible to scrutiny. It was necessary to state this obvious point because there was a misconception that certain types of criminal allegations – most particularly of sexual offences – *ipso facto* resulted in the right to automatic and unfettered access by investigators to the complainant's digital information (see *McPartland* [2019] EWCA Crim 1782; [2020] 1 Cr.App.R. (S.) 51, [44]; and *R v E* [2018] EWCA Crim 2426, [2019] Crim LR 151, [24]; Guide to "reasonable lines of the enquiry" and communications evidence (July 2018) ("the DPP's Guide"), [13]). Mobile telephones or other devices should not be obtained as a matter of routine.

(2) If there were a reasonable line of enquiry, investigators should take an incremental approach. Consideration should be given to whether there were ways of readily accessing the information that did not involve taking possession of the complainant's mobile phone or other device. If a reasonable line of inquiry were established and showed there was need to examine, e.g., communications between a witness and a suspect, the material might be obtainable from the suspect's device, or by accessing social media posts, if the witness provided a password. If a further review were needed, it might be accomplished by focused questioning and e.g. screen-shots of the device, without surrender. If detailed examination of a digital download were necessary, and the material was voluminous (see the DPP's Guide, [16]), it might proceed by use of search terms (see the 2011/13 Guidance, A41 to A44; *Pearson and Cadman* [2006] EWCA Crim 3366; *R and others Practice Note* [2015] EWCA Crim 1941, [2016] 1 W.L.R 1872), or, increasingly, by the use of data parameters. Material on a device that was disclosable could be redacted as necessary to avoid revealing irrelevant personal information. Timely engagement by the defence with the Prosecution Disclosure Management Document was critical as part of advancing the defendant's interests.

(3) To provide reassurance to a witness there should be a short and straightforward explanation that (a) the defendant did not have a general right to examine a witness's digital device; (b) the police would only seek to examine a devices when it was in pursuit of a reasonable line of inquiry; (c) the witness was not obliged to cooperate with a police request, but if they did not, there was a risk that it would be impossible to pursue the investigation, a witness summons might be issued or the resulting trial might be halted; (d) the witness's device would only be examined to the extent necessary to pursue the reasonable line of inquiry (and, in the first instance, by focussed search terms), and other content would not be looked at; (e) only material which might reasonably be considered capable of undermining the prosecution case or assisting the defence case would be disclosed, and any unnecessary personal details or irrelevant information would be redacted; and (f) the witness would be consulted as to the regularity and extent of any contact by the investigators regarding the disclosure process. If the witness declined access, it might be advisable to warn the witness that potentially relevant material should not be deleted as this also might impede a fair investigation of the case.

(4) The current document entitled "Digital device extraction – information for complainants and witnesses" and the consent form "Digital Processing Notice" were densely and sometimes technically drafted. The matters set out in (3) above should be more clearly communicated, and these documents redrafted or replaced.

(5) If the witness refused to permit access, it was important to consider the reasons and to furnish the witness with an explanation and reassurance as to the procedure if the device were made available. If it were suggested that the proceedings should be stayed (*Warren v A-G for Jersey* [2011] UKPC 10, [2011] 1 AC 22, [22]; *R v RD* [2013] EWCA Crim 1592, [15]; and a lost evidence case also relevant to deleted material, *R v PR* [2019] EWCA Crim 1225, [2019] 2 Cr.App.R 22), the court must assess the impact of the absence of the missing evidence and whether the trial process would ensure fairness to the defendant, particularly by way of cross-examination and judicial directions. The court should not be drawn into guessing at the content and significance of the unavailable material. An application could be made for a witness summons for the device to be produced (see *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin); [2007] 1 W.L.R 1524). If the proceedings were not stayed, the uncooperative stance by the witness, investigated by appropriate questioning, would be an important factor that the jury should be directed to take into account when deciding whether to accept the evidence of the witness and whether they were sure of the defendant's guilt (see *PR* [65]).

Evidence—bad character—misconduct which "has to do with the alleged facts of the offence"—Criminal Justice Act 2003 s.98(a)—messages up to four days before the alleged offence—whether "has to do with"—whether otherwise admissible

HEPBURN [2020] EWCA Crim 820; 30 June 2020

H was convicted of rape, which took place four days after H and two others started a "game" involving having sex with as many women as possible before a certain date. The judge admitted WhatsApp messages between them from up to four days before the rape, in which the rules of the game were set out and H exhibited his "lackadaisical or uncaring attitude on the question of sexual consent". The judge had admitted the messages as relevant, and as being "to do with" the events of the rape itself, and thus not covered by the bad character provisions of the Criminal Justice Act 2003 – see s.98(a). In the alternative, they were admissible as bad character constituting important explanatory evidence under s.101(1)(c), and/or an important matter in issue between the defendant and the prosecution, namely his attitude towards sexual consent, under s.101(1)(d). The court doubted that the messages were admissible under s.98(a), but they were plainly admissible under the combination of ss.101(1)(c) and 102, and also under s.101(1)(d).

Evidence—inferences from silence in interview—Criminal Justice and Public Order Act 1994 s.34—sufficiency of prosecution case at interview—evidence as to at trial—evidential sufficiency established in cross-examination of defendant

BLACK [2020] EWCA Crim 915; 17 July 2020

B with other defendants was convicted of fraud in connection with the running of a company over a number of years. B made no comment in interview. On appeal, he argued that the judge should not have directed the jury that they could draw adverse inferences as a result of his silence in interview under the Criminal Justice and Public Order Act 1994 s.34, on the basis that there was insufficient evidence at trial of the strength of the prosecution case at the time

of the interview to justify the drawing of inferences. As finally served, the prosecution case consisted of about 75,000 pages of evidence. At interview, B had been provided with a "bundle" which defence counsel at trial said comprised two pages. B submitted that the prosecution had failed to adduce evidence of what was asked in interview, or what disclosure had been made, and that therefore there was no basis on which the jury could consider that the prosecution case called for an answer, and a direction under s.34 should not have been given. The court rejected the submissions. There was sufficient evidence about the strength of the prosecution case because B confirmed in cross-examination that he had lived through the relevant events and he had been given disclosure before the interview. Living through events meant that B was at the centre of a scheme to sell solar panels on the basis that customers would be reimbursed all of their costs, the repayment to be funded by investments, and failing that, by insurance. Only £270,000 had been invested from receipts of £13 million, and no insurance was secured. These were matters which were readily understood by an intelligent and articulate man such a B acknowledged himself to be. In those circumstances there was a basis for the jury to consider whether, if it were true, B would have mentioned in interview that he had been told by a co-defendant that insurance cover was in place at the time; and that the investment scheme had solid backing. The court noted that B adduced no evidence at trial to show that the prosecution case at the time of the interview was insufficient to call for an answer. B did not say in evidence that the prosecution disclosure was insufficient, nor (as he maintained at trial) that he had received legal advice not to answer questions. While there was no burden on B to give such evidence, its absence meant that there was nothing to rebut the proper inferences to be drawn about the strength of the prosecution case at the time of interview, as set out above.

Possessing a prohibited weapon—possession

JENKINS v CPS [2020] EWHC 1307 (Admin); 22 May 2020

J was properly convicted of possession of a weapon designed or adapted for the discharge of electrical current for incapacitation contrary to the Firearms Act 1968 s.5(1)(b) and Sch.6. His evidence was that his passenger produced a stun gun, which it was accepted that she owned, at which he said: "get that thing away from me!" She put it in the glove compartment. Some minutes later he was stopped by police who found the stun gun there. Possession was a matter of fact. The magistrates' finding went beyond mere knowledge of the existence of the stun gun. Even on the basis that they wholly accepted J's evidence, J had, despite initially objecting to its presence, allowed the stun gun to be placed in and remain in his car which he then drove away (for some minutes), controlling its location. He could have insisted his passenger leave the car with the stun gun; he could have left the car in the event that she refused. This amounted to more than the "barest custody" (the sufficiency of which as a concept for the purpose of establishing possession the court in *Sullivan v Earl of Caithness* [1976] Q.B. 966 in any event did not have to determine) and was more than the fleeting encounter of the defendant in *Taylor* [2011] EWCA Crim 1646 with the gun in that case. The fact that the period of possession was short- lived did not afford J any defence (*Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 and *Hall v Cotton* [1987] QB 504 applied).

Prosecution—private prosecution—Offences Against the Person Act 1861 s.23—territorial jurisdiction—prima facie evidence of elements of the offence—whether application vexatious

R (DEFENDING ARAB CHRISTIANS) v GUILDFORD MAGISTRATES' COURT AND TONY BLAIR [2020] EWHC 1850 (Admin); 10 July 2020

The court refused the renewed application for judicial review of the refusal by a district judge of an application to issue a summons against Tony Blair for an offence of administering a noxious substance contrary to the Offences Against the Person Act 1861 s.23, on the basis of the allegation that he ordered UK armed forces to use depleted uranium munitions in Southern Iraq in 2003, thereby administering poison over a large area, which resulted in J, an inhabitant on whose behalf the application was made, developing lung cancer.

(1) The general rule that the criminal law of England and Wales did not extend beyond the realm was only subject to specific exceptions (*Harden* [1963] 1 QB 8; *Cox v Army Council* [1963] AC 48). Criminal Justice Act 1948 s.31 (extra-territorial jurisdiction over those employed in the service of the Crown) did not apply. The Prime Minister was not a person "employed under Her Majesty's Government in the service of the Crown" who, in the course of armed conflict approved by Parliament, was "acting or purporting to act in the course of his employment." He was an office holder, not an employee. The Victim's Rights Directive (2012/29/EU), which the applicant argued conferred jurisdiction, applied only within the EU, or where EU members states otherwise incorporated extra-territorial jurisdiction. The applicant did not seek a summons in relation to an international offence for which there existed a universal jurisdiction.

(2) When deciding whether or not to issue the summons, the magistrate was required to review whether there was prima facie evidence of the ingredients of the offence alleged. In so doing he or she must conduct a "rigorous analysis of the legal framework": *R (DPP) v Sunderland* [2014] EWHC 613. As *Johnson v Westminster Magistrates Court* [2019] EWHC 1709, [2019] 1 W.L.R 6238 made clear, the threshold test for the issuance of a summons was not a low one. This level of analysis was particularly important now that indictable offences, including s.23 of the 1861 Act, were sent direct to the Crown Court. A closer analysis of the evidence conducted by the district judge would clearly not have yielded prima facie evidence of the offence: (a) there was no evidence that B ordered the use of the relevant munitions; (b) even if B did order their use, the prosecutor would have the difficulty of establishing that he administered it to, caused it to be administered to or caused it to be taken by J, applying *Kennedy (no 2)* [2007] UKHL 38, [2008] 1 AC 269; and (c) it would have to be proved that it was the use of the munitions that caused J to suffer lung cancer 16 years later.

(3) Had the district judge considered whether the application was vexatious, he would have concluded that it was improper by reason of delay and the ulterior motive, the application and grounds for appeal (refused) clearly showing that the real objective was to seek to try B for war crimes.

SENTENCING CASE

Fresh evidence; hospital/restriction order

CLELAND [2020] EWCA Crim 906 (16 July 2020)

In 2013, when he was 16, the appellant was convicted of attempted murder and sentenced to detention for life, with a minimum term of seven years. On a reference from the Criminal Cases Review Commission the Court of Appeal gave leave to admit fresh evidence from two psychiatrists that at the time of the offence the appellant suffered from Autism Spectrum Disorder (ASD), a mental disorder within the meaning of the MHA 1983; that this mental disorder was of a nature and degree which made it appropriate for him to be detained in hospital for treatment; that appropriate treatment was available; and that the appropriate sentence was therefore a hospital order and a restriction order under ss.37 and 41 of the Mental Health Act 1983.

The Court first examined the principles governing the admission of fresh evidence in this sort of case (see [43]–[45]). Then analysing the facts of the present case in the light of the factors mentioned in *Vowles* [2015] EWCA Crim 45 as relevant to the imposition of a s.37/41 order, it concluded that:

(1) The appellant continued to need treatment for his ASD, which would endure throughout his life.

(2) His offending was in significant part, though certainly not wholly, attributable to his ASD.

(3) A serious premeditated crime such as this required punishment. But as the appellant had now served almost all of the minimum term of seven years imposed, the need for punishment now carried little weight. In the light of this, the life sentence should be quashed and the appellant sentenced differently.

(4) The protection of the public is very important. This raised five issues:

(i) Treatment for the appellant's disorder was available, but it could not be said that once treated, he would not be dangerous.

(ii) The imposition of a life sentence is not a bar to receiving appropriate medical treatment in hospital. Whichever form of sentence is imposed, the appellant will only be released when it is considered that the risk he poses can be safely be managed. The focus must therefore be on which of the two possible regimes provides greater public protection following release from prison or discharge from hospital.

(iii) A transfer from hospital to adult prison might have an adverse effect on the appellant's treatment. However, such a transfer is not inevitable, even were the appellant to remain subject to a life sentence.

(iv) Whichever regime is in place, the appellant would remain in hospital for a considerable period.

(v) The s.37/s41 regime would result in better monitoring of the appellant and would increase the prospect of an early identification of any signs of a potential increase in risk. However, those supervising of the appellant under a s.37/s41 regime would assess him from a mental health perspective rather than looking at issues which would be of concern to those supervising him if he were released on life licence.

The competing considerations were finely balanced, but the Court concluded that a s.37/s41 order would be more likely to reduce the relevant risk (at [63]). The appeal was therefore allowed, the sentence of detention for life quashed and replaced with a s.37/41 order.

Features

Tainted gifts and Confiscation

By Polly Dyer and HHJ. Michael Hopmeier[1]

Confiscation under the Proceeds of Crime Act 2002 ("POCA") is well known as being a severe regime. The application of the Act in relation to what are termed "tainted gifts" is no different and deliberately so – to try to combat the ease with which criminal property may be concealed by being passed to others. As Edis J said: [2]

> the tainted gifts regime operates by the imposition of an order on the convicted person as an incentive for him to recover the proceeds of his crime from persons to whom he has passed them by whatever means are available to him; what those persons have done with them, or whether they received them knowing of their criminal origin, are likely to be largely irrelevant factors.

As part of a confiscation hearing, the Court will make a finding on the "benefit" obtained by a defendant as a result of or in connection with his criminal conduct and the amount the defendant has "available" to repay that sum. The value of a "tainted gift" may be included in the assessment of the available amount. Section 77 of POCA addresses "tainted gifts". Where the court has decided that the defendant has a criminal lifestyle[3], any gift made by the defendant to any person in the period beginning six years before the commencement of proceedings is caught, together with any gift made at any time out of the proceeds of crime[4]. If the court decides that the defendant does not have a criminal

1 Polly Dyer is a barrister at QEB Hollis Whiteman. HHJ Hopmeier is a Circuit Judge at Southwark Crown Court & Honorary Professor of Law at City, University of London.

2 In *Box* [2018] EWCA Crim 542, considered further below.

3 Pursuant to s.75.

4 Sections 77(1)(b), (2) & (3) and as set out in POCA's Explanatory Notes; this wider interpretation also applies if a decision is yet to be made e.g. if the matter is only at the restraint stage.

lifestyle, only gifts made since the beginning of the earliest of the offences committed are caught.[5]

The Act does not provide for a definition of "gift" but case law[6] has made clear the term is to be given its normal legal meaning: there is a transfer of property (both legal and beneficial interest); which is voluntary and gratuitous, that is to say made without consideration; the donor must intend that gift will not be returned to him (although in the context of "tainted gifts" he may have a hope and expectation that it will be); the donee must accept the gift.[7] Section 78 then expands the meaning to make it clear that a gift in this context includes a transaction for consideration which is significantly less than the value of the gift at the time of the transfer.[8]

In this article, the authors examine some of the key principles that can be determined on this topic from cases since 2018.

Husbands & wives

Hayes[9] was convicted of conspiring to rig the Libor benchmark interest rate. At the confiscation hearing, included in the available amount was the value of a property which had been purchased in the joint names of the appellant and his wife, with money provided solely by the appellant. The judge found that the acquisition of the property, whereby a joint legal and beneficial interest was obtained by the wife in circumstances where she made no financial contribution to the purchase, constituted a tainted gift. In appealing the confiscation order, Hayes argued

a. at the time the property was transferred into the joint names of himself and his wife, he did not hold any interest in it; the vendors did. Consequently, at that time, he had no interest to transfer to his wife;[10]

b. there was no reason why consideration, for the purposes of s.78(1), should be limited to direct financial contributions. His wife's contributions as a housewife and mother should have been valued.[11]

The Court of Appeal held that when the money was transferred from Hayes's own bank accounts to the bank account of the solicitors acting in the purchase for onward transmission to the vendors' solicitors, it would have been held on behalf of the appellant and his wife as the joint purchasers. His wife thereby had an interest in it. Therefore, at that stage, there had been a transfer by the appellant of a half-interest in those monies for the purpose of enabling the transfer of property to be completed.[12]

In relation to consideration, the tainted gift provisions were drafted in terms of money or money's worth. His wife had made no financial contributions, directly or indirectly, towards the purchase of the property, and their marriage and subsequent birth of their son could not of itself involve "consideration" of "value" within s.78(1). Although the purchase of the property had been a joint, mutually agreed decision made in good faith, the word "gift" had to be placed in the context of the whole statutory scheme (against a background of criminal conduct) relating to tainted gifts, as contained in the 2002 Act.[13]

Cracknell[14] concerned a finding that equity in a property was a tainted gift by way of deed executed between the appellant and his wife.[15] Amongst other things, it was argued that the Judge had failed to give adequate weight to "family services" constituting consideration. The Court of Appeal referred to the decision in *Hayes,*[16] and the rigour needed when examining such a claim. A linguistic argument was also made on the basis that in a criminal lifestyle case the relevant statutory provisions had no application where the alleged gift was made after the date when the proceedings for the offence were started against the defendant.[17] The Court held that the relevant governing provision is s.77(2) of POCA, and the words "at any time after" mean just that. Section 77(9) just makes clear that the "relevant day" is the day six years prior to the commencement of proceedings. It does not mean that the provisions cease to apply at the date of such commencement.

Thakor[18] was an appeal relating to monies held in a sole account of the defendant's wife (and co-defendant), which had been determined to be a tainted gift. There was no dispute that this money had originally come from a joint account in the names of both defendants. It was argued that it was not a gift at all; it was simply being transferred by a person who had an entire right to it and after the transfer, the appellant had no right to the balance in his wife's account. In the Court's judgment, it did amount to a tainted gift: any movement by the appellant's wife of their jointly held money into her sole name was properly interpreted as being with his assent; the result of the transfer into her sole name was removal of his ability to access the balance and use it himself without recourse to her; and he received no consideration for the transfer. The court also observed that the total value of the transfer could properly be considered the value of the gift as the appellant lost control of the entirety of the balance transferred (as opposed to simply half of it which the Crown Court judge had included, making an adjustment for proportionality). It observed that there is a distinction in the cases between the concept of proportionality[19] and wider questions of potential hardship.

Proportionality

The case law demonstrates that it may be deemed disproportionate pursuant to s.6(5) of POCA to include a "tainted gift" in the available amount if the making of the order will not recover the proceeds of crime and will simply lead to a defendant serving a default sentence, which is inconsistent with the Act's purpose. Further, arguments may be advanced on this basis that the default sentence should be shortened. However, what is clear is that these cases will be exceptional and the determinations fact-specific. In *Dale Walker*[20], Davies LJ stated:

5 Sections 77(4) & (5).
6 In relation to this Act and its predecessor legislation.
7 *Re Somaia* [2017] EWHC 2554 (QB).
8 The example is given in the Explanatory Notes of the defendant who sells a car worth £10,000 at the time of the transfer for £2,000.
9 [2018] EWCA Crim 682.
10 At [30].
11 At [31].
12 At [37]-[38].
13 At [34], [46]-[47], [59]-[61].
14 [2020] EWCA Crim 132.
15 Pursuant to s. 22 of POCA.
16 [2018] EWCA Crim 682.
17 Section 77(2) is phrased as follows: "A gift is tainted if it was made by the defendant at any time after the relevant day". Section 77(9) defines the relevant day as "the first day of the period of six years ending with the day when proceedings for the offence concerned were started against the defendant".
18 [2020] EWCA Crim 541.
19 In s.6(5)(b) of POCA.
20 [2020] EWCA Crime 289 at [23].

> ..it must be borne in mind in the context of confiscation proceedings that proportionality is not simply to be equated with a residual judicial discretion.

In *Box*[21] it was held had there would have to be clear, complete and unassailable evidence that a tainted gift given to a third party could not be recovered[22] before the order could be found to be disproportionate. This would inevitably have to involve hearing oral evidence from the defendant and full disclosure of documents concerning the financial circumstances of all relevant persons. Such an approach should be taken because the court is dealing with convicted criminals and mere assertions are unlikely to carry much weight. In addition, the Court emphasised that the restriction in s.6(5) is not to be conflated with the duty to avoid a serious risk of injustice under s.10(6) – they are different tests.[23]
Applying *Box*, *Morrison*[24] reviewed previous decisions and distilled principles on proportionality and tainted gifts. The defendant had provided monies to his partner enabling her to purchase a property. The lower court was found to have erred in holding that it would be disproportionate to include the tainted gift[25] in the available amount, having done so on the basis that the defendant had no right or power to force a sale and his partner was not in a position to sell the house.[26]
The Court of Appeal reiterated that

a. Criminals must not be able to defeat confiscation proceedings by making gifts of assets which cannot be recovered, as this would undermine the efficacy of the scheme. That is why Parliament has included the tainted gifts regime in the 2002 Act;

b. The exception concerning proportionality in section 6(5)(b) is not to be equated with a general discretion in the court; nor even with a provision requiring or permitting the court to avoid the risk of serious injustice. It does not call for, nor does it permit, a general balancing exercise, in which various interests are weighed on each side, including the potential hardship or injustice which may be caused to third parties by the making of an order which includes a tainted gift. The proportionality exception in section 6(5)(b), although important, has a more limited scope;

c. It is neither appropriate nor helpful to seek to set out an exhaustive list of circumstances in which the proportionality exception may be satisfied; any enquiry is highly fact-specific.

The Court also reiterated that the confiscation order is made *in personam*. Therefore, the gifted money itself did not necessarily have to be recovered. A defendant could meet the terms of the order by raising a loan, obtaining assistance from friends or family, or by earning and using other income.
In *Hulland,*[27] the defendant appealed against a confiscation order following a guilty plea to burglary. He did so on the basis that the finding that a transfer of stolen watches (products of the burglary) amounted to a "tainted gift" was disproportionate – because these were now in the hands of his drug dealer in satisfaction of a drug debt. This appeal was dismissed on the ground that there was no affirmative finding that enforcement of the order was impossible; the judge had noted that the defendant appeared unable to pay but she concluded that she did not know if others might pay on his behalf.

Enforcement abroad
In *Godley,*[28] the applicant's realisable assets included gifts made to his wife, including the purchase price of a property in Portugal. The prosecution had been granted a Certificate under Reg.11 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014, enjoining the relevant foreign authority to enforce confiscation orders against property that had been included in the realisable amount, which was held in the foreign jurisdiction. Dismissing the appeal, the Court considered the case of *Moss*[29] and reminded the applicant of Reg.3;[30] enforcement can be made against assets that are the equivalent to the value of property which directly or indirectly represented the proceeds of an offence.
The outcome of this group of cases shows how apposite was the comment from Edis J with which this short article began.

21 [2018] EWCA Crim 542.
22 Reference was also made to the case of *Johnson* [2016] EWCA Crim 10, which provided guidance on the approach judges should take where the value of a tainted gift appears to be worthless at the date of the making of the confiscation order. It emphasised that the orders are *in personam* money orders.
23 Concerning the application of the assumptions in a lifestyle case.
24 [2019] EWCA Crim 351.
25 The monies to his partner.
26 As it would lead to her children being homeless and a monetary repayment to the council.
27 [2018] EWCA Crim 691.
28 [2020] EWCA Crim 413.
29 [2019] EWCA Crim 501.
30 Of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014.

Not exclusively a family affair

By Paul Jarvis[1]

There are times when the same set of circumstances can have repercussions for those caught up in them that are felt in different jurisdictions of the court system. Where those circumstances concern members of the same family then in different ways the criminal courts and the family courts can be "engaged". If the circumstances are said to involve the commission of an offence by one partner against another then a criminal prosecution is likely to ensue and if there are children of the family then proceedings in the family jurisdiction are likely too, whether to remove the child from the care of the parents altogether or to restrict the ability of the perpetrator parent to have contact with the child owing to their behaviour towards the victim parent. Although it is possible for related criminal and family proceedings to run entirely in tandem, generally a final resolution of the family proceedings will await the outcome of the criminal prosecution. The reason why family proceedings tend to pay deference to criminal prosecutions is because the jury's verdict

1 Barrister, 6KBW College Hill, and Junior Treasury Counsel at the Central Criminal Court.

could be determinative of the factual issues that the family court would otherwise need to decide for itself.

It may be that rather than making a complaint to the police about the actions of the perpetrator parent, the victim parent chooses to take steps to protect herself or her children in the family courts and during the course of those proceedings she makes allegations that he committed criminal offences against her. Equally, there will be cases where a crime is committed in a family context but the police and the Crown Prosecution Service decide not to bring charges following an investigation and family proceedings then follow.[2] There will be yet further cases where a defendant is acquitted of criminal charges but then faces the prospect of the same allegations being raised in the family courts so a different judge can make determinations about the future welfare needs of his or her children.

By whatever route the family court comes to be seised of a case that bears the hallmarks of criminal wrongdoing one issue that could well arise is the extent to which the family court can and should import the substantive criminal law into its own proceedings in order to make factual findings that will enable it to resolve the application. That issue was brought into sharp focus by the recent high-profile case of *JH v MF*.[3] The parties had been in a relationship for a number of years. They moved in together in around 2013. They had a child, C, who was born in January 2015. Their relationship was punctuated with allegations of domestic violence made by JH against MF. The police arrested MF several times but no charges were ever brought. In late 2016, JH left the family home with C and moved into a refuge. In October 2018, MF applied to the family courts for an order allowing him to see C. JH was represented in those proceedings by counsel. MF was unrepresented. JH opposed MF's application. Part of her objection was based on an allegation she made that during their relationship MF had had sexual intercourse with her without her consent on two occasions.[4] MF denied those allegations. The judge, HHJ Tolson QC, set the case down for trial on 8 August 2019. One of the factual issues he resolved to determine was whether those particular incidents had taken place in the way JH described or not. In his conclusions he found for MF and against JH. JH appealed and, on 22 January 2020, Russell J allowed the appeal on a number of grounds, most of which have no bearing on the issue under consideration in this article.

The sixth and relevant ground of appeal[5] concerned the judge's rejection of the specific allegations from JH that MF had penetrated her vagina with his penis and without her consent. Russell J characterised those allegations in this way – "Ground (vi) was in respect of findings that the Appellant had not been subjected to sexual penetration without consent (raped) by the Respondent."[6] Pausing there, it is worth pointing out that sexual penetration without consent is not rape. It only becomes rape if at the time of the non-consensual penetration the defendant does not reasonably believe that the complainant is consenting.[7] In Russell J's view, the judge at first instance had expressed the opinion in his judgment that it was acceptable for JH to have continued to penetrate MF after she had said "no" and that in order to demonstrate a lack of consent a complainant must show that they tried to physically resist the act of penetration. These views were "manifestly at odds with current jurisprudence, concomitant sexual behaviour and what is currently acceptable socio-sexual conduct".[8] In these circumstances, the judge's reasons did not support his conclusion that MF had consented to the acts of penetration.

Russell J then turned to consider more generally the extent to which family courts should import criminal law principles when making findings of fact. She recognised that a trial in the family court can never replicate a trial in the criminal court, not least because the standard of proof is different[9] and so are the rules of evidence.[10] Moreover, the family courts should not as a matter of routine seek to transpose aspects of the substantive criminal law into their proceedings because that could over-complicate matters and distract family judges from their essential task which is to make findings of fact.[11] Nevertheless, as Russell J observed, where the factual issue the family court has to resolve turns on the meaning of a concept like consent, which has a specific meaning in criminal law, "it cannot be lawful or jurisprudentially apposite"[12] for the family courts to take a materially different approach to the meaning of that concept than would be the case in the criminal courts. In these circumstances, and for the future, it would be appropriate for family judges to peek behind the curtain and see how their counterparts would approach an issue like consent if it arose for consideration in a criminal case. Having reviewed s.74 of the Sexual Offences Act 2003,[13] and ss.B3.28[14] and B3.29[15] in the 2020 edition of *Blackstone's Criminal Practice*, Russell J held that there was no reason why the approach taken by the criminal courts to the issue of consent should not be followed in the family courts.[16] The approach taken by the criminal courts to the issue of consent emerges clear-

2 For a recent example, see *Re A (Children) (Findings of Fact) (No.2)* [2019] EWCA Civ 1947; [2020] 1 FLR 755, where a 10-year-old girl was found dead in her bedroom. She had died of strangulation and had suffered recent injuries to her genital area. She lived at the address with her parents, her three younger siblings and her two older brothers. The pathologist concluded that the girl's death had been a sexually-motivated homicide. Following a police investigation no charges were brought against anyone, presumably because it had not been possible to identify the culprit. In care proceedings in respect of the remaining children, the local authority alleged that the girl must have been killed by a member of her household, albeit it was not possible to say by whom. The family members contended that the girl's death had been a terrible accident.

3 [2020] EWHC 86 (Fam).

4 At [14].

5 From [32] onwards in the judgment.

6 At [32].

7 Section 1 of the Sexual Offences Act 2003. In [47] of her judgment, Russell J made the same error when she wrote this – "Non-consensual sexual intercourse was considered lawful within a marriage until as late as 1992…it has not been lawful in any other sphere for generations." Non-consensual sexual intercourse *might* be unlawful depending on the age and personal characteristics of those concerned in the act, but it would only constitute the offence of rape if the mental element was also present on the part of the defendant.

8 At [33].

9 In family proceedings the standard of proof is the balance of probabilities: *Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141.

10 Most obviously hearsay evidence is admissible in family proceedings without leave whereas in criminal proceedings the admissibility of hearsay evidence is governed by statute and certain types of hearsay evidence require the leave of the court before they can be adduced.

11 See *Re R (Children) (Care Proceedings: Fact Finding Hearings)* [2018] 1 W.L.R 1821; [2018] 2 FLR 718.

12 At [47].

13 "…a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

14 §B3.28 – "the definition in s74 with its emphasis on free agreement, is designed to focus upon the complainant's autonomy. It highlights the fact that a complainant who simply freezes with no protest or resistance may nevertheless not be consenting. Violence or the threat of violence is not a necessary ingredient. To have the freedom to make a choice a person must be free from physical pressure, but it remains a matter of fact for a jury as to what degree of coercion has to be exercised upon a person's mind before he or she is not agreeing by choice with the freedom to make that choice. Context is all-important."

15 §B3.29 – "Consent covers a range of behaviour form whole-hearted enthusiastic agreement to reluctant acquiescence. Context is critical. Where the prosecution allegation of absence of consent is based on lack of agreement without evidence of violence or threats of violence, there will be circumstances, particularly where there has been a consensual sexual relationship between the parties, where a jury will require assistance with distinguishing lack of consent from reluctant but free exercise of choice."

16 At [49].

ly from the relevant sections of the Crown Court Compendium, Russell J said, which family court judges should inform themselves of whenever they have to decide on the balance of the probabilities whether a particular person consented to sexual activity with another person. In the penultimate paragraph of her judgment, Russell J suggested that family court judges who may hear cases involving allegations of serious sexual assault should "be given training based on that which is already provided to criminal judges".[17] The President of the Family Division endorsed that suggestion and he has approached the Judicial College with a view to making that training available to family judges.

Of course, some criminal law concepts lend themselves more easily to a process of transition into the family courts than others. In her judgment in *JH v MF*, Russell J referred to the earlier case of *Re R.*[18] The facts of that case were that the father (F) stabbed the mother (M) once to the neck in the kitchen of the family home. She died from the injury. Their two children, who were aged five and seven, were taken into foster care. F was charged with murdering M. He was acquitted at trial in the criminal courts on the basis that he had been defending himself at the time he stabbed M. The family judge went on to conduct a fact-finding hearing in the care proceedings and concluded that F had used "unreasonable force" and had "unlawfully killed" M. F appealed against that finding. The Court of Appeal allowed the appeal and remitted the case to be re-heard before a different family judge. In doing so, an interesting divergence of opinion emerged between the members of the Court of Appeal.[19]

At the fact-finding hearing, F had raised the same issue that he had raised in the criminal proceedings, namely self-defence. The parties, which included F, the local authority and the children's guardian, provided the judge with a legal framework document setting out the principles applicable to fact-finding in the family court and this document included an agreed summary of the current criminal law on self-defence. In her judgment, the judge borrowed heavily from that agreed summary. Her central conclusion was that F had probably stabbed M due to loss of control rather than in self-defence. On appeal, F contended that the judge's approach to self-defence had been flawed. He also challenged her conclusion that F had lost control. F sought to argue that because loss of control is a partial defence to murder in the criminal courts,[20] so the judge should have applied the framework for that partial defence as it exists in criminal proceedings before reaching a conclusion that F had lost control at the time he stabbed M. Through his counsel, F expressed concern to the Court of Appeal that the judge's determination potentially had enormous consequences for him. The abolition of the rule against double jeopardy meant that he was at risk of being re-prosecuted for M's murder and in that regard the police had applied for disclosure of the material generated in the family proceedings, probably with a view to considering that possibility.

In the course of argument, the Court of Appeal queried why it had been necessary for the family court to have concerned itself with detailed aspects of the criminal law at all, given that the ultimate task of the family judge had been to make factual findings for the sole purpose of determining issues as to the future welfare of the children. F submitted that it had been both unnecessary and impermissible for the judge to have found that he used unreasonable force and unlawfully killed M because those expressions were couched in the language of the criminal law and were not findings of fact *per se*. The emphasis of the family courts had to be on what F did as a matter of fact, and it was no concern of the family judge to place any moral blameworthiness on F by describing his actions as unreasonable or unlawful, it was submitted. By the time of the appeal, there was a degree of consensus between the parties that the family court should not have set out to make findings in accordance with the lexicon of the criminal law but the local authority and the children's guardian contended that beneath the veil of criminal law that cloaked the court's judgment there were "'rock solid" factual findings that should be upheld by the Court of Appeal in relation to how F had come to stab M.

McFarlane LJ concluded that the court process and the judge's evaluation of the evidence had been conducted in error because she had too readily accepted that she was bound to apply the structure and substance of the criminal law.[21] The purpose of a fact-finding hearing in the family court is "wholly different"[22] to a criminal prosecution. Following a criminal prosecution, the outcome will be binary – either "guilty" or "not guilty" – but in family proceedings the outcome of the fact-finding hearing will normally be a narrative account of what happened, the purpose of which is so the court can make a welfare evaluation with respect to the future care of the children.[23] Against that background McFarlane LJ held that "it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'"[24] but, worse than that, it could be positively unhelpful because the use of such expressions by family judges could easily be misunderstood by the public, the parties or the police and that would cause profound upset and harm. In McFarlane LJ's view

> it must be clear that criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court.[25]

To the extent that the family courts are required to make findings about the level of force used in a confrontation phrases such as "inappropriate force" or "proportionate force" should be used instead, he held.[26] Hickinbottom LJ essentially agreed with the judgment of McFarlane LJ.

Gloster LJ, whilst concurring in the result, adopted a different stance from the other judges in the Court of Appeal when it came to the application of the criminal law in the sphere of family law. In assessing whether F's actions were

17 At [59].
18 Fn.11.
19 Gloster LJ (the Vice-President of the Court of Appeal, Civil Division), McFarlane LJ (now McFarlane P, the President of the Family Division) and Hickinbottom LJ.
20 See s.54 of the Coroners and Justice Act 2009.
21 At [61].
22 At [62].
23 As Butler-Sloss P stated in *Re U (Serious Injury: Standard of Proof); Re B* [2004] EWCA Civ 567; [2005] Fam 134 at [28] – "…it by no means follows that an acquittal on a criminal charge or a successful appeal would lead to an absolution of the parent or carer in family or civil proceedings." In *A Local Authority v S, W and T* [2004] EWHC 1270 (Fam) at [8], Hedley J made much the same point in these terms – "It will be apparent then, however odd it may seem at first blush, that I could give a different answer to the one given by the jury yet both of us could have correctly answered the question actually posed to us. Truth is an absolute but elusive concept and the law, in recognising that, deals with it in terms of what can be proved. The fact that something cannot be proved does not mean it did not happen but only that it cannot be proved to the requisite standard that it did. That is the price society has to pay for human fallibility in the quest for truth."
24 At [65].
25 Ibid.
26 At [90].

"reasonable", "proportionate" or even "appropriate", by what standard was the family judge to make that assessment? – she wrote.[27] While Gloster LJ shared the concerns of the other judges "about the undesirability of introducing criminal concepts into trials in the family courts of welfare issues"[28] she saw real difficulty ahead for any family judge who had to assess the reasonableness of F's conduct without recourse to the "criminal law concepts of self-defence, reasonable force, and loss of control".[29]

In the context of the decision the family court had to take about the welfare of the children of the family of F and M it is understandable that the judge at first instance decided she needed to make factual findings about the circumstances in which F came to kill M. If she concluded that F had killed M in an unprovoked fit of rage then that would say something quite important about F's temperament and the risk he posed even to his own children. On the other hand, if the judge concluded that M had been the aggressor, that she had threatened the children with a knife and that in the course of a struggle, and in a desperate attempt to protect the children from M, F had disarmed her and lashed out with the knife to ward her off, that would be a quite different basis from which to consider what contact, if any, the children should have with F in the future. It is both possible and necessary to express those factual conclusions without recourse to concepts of the substantive criminal law, such as self-defence, because it is not for the family courts to decide, in effect, whether F should have a defence to a criminal charge. The jury had already made that determination in F's favour, although the family court was not bound to accept that conclusion because it had to assess the reasonableness of his conduct by reference to the civil standard of proof. As Gloster LJ pointed out, and as Russell J in *JH v MF* recognised, there will be times when the family court simply cannot avoid making a factual finding on an issue like consent in respect of which there is a healthy body of criminal law jurisprudence that would both inform and enhance the ability of the family court to make that finding. In such a case the family judge should not be reluctant to borrow concepts from the criminal law but in so doing the warning from McFarlane LJ in *Re R* needs to be heeded. It is one thing for the family courts to use criminal law concepts in reaching factual conclusions, but quite another to express those conclusions in ways that suggest, or could be taken to suggest, that a party to the family proceedings has committed a criminal offence. Of course, it is worth emphasising that however the court expresses its factual conclusions the key consideration for it when deciding what order to make in light of those conclusions is the welfare of the child. Nevertheless, as F's counsel alluded to in the course of submissions in *Re R*, an acquitted defendant has much to be wary of if the court in family proceedings makes findings against him that appear to undermine the safety of his acquittal.

27 At [120].
28 At [121].
29 Ibid.

An unappealing anomaly

At one time the judge's decision to stop a case was final, whether it was wise or foolish.[1] This unsatisfactory state of affairs sometimes led to public outcry[2] and Pt 9 of the Criminal Justice Act 2003 sought to correct it by giving the Crown a right of interlocutory appeal against a "terminating ruling",[3] so enabling cases to proceed that should proceed and punishment to be imposed on persons who deserve it. In some cases a further benefit of this new procedure is to secure an authoritative ruling on an important point of law, after full argument and debate.[4]

In *Thompson and Hanson*[5] this procedure was held to be inapplicable to the situation where ahead of trial the defence applies under the Crime and Disorder Act 1998 for dismissal of the charges,[6] and the application is granted. If correct as an exercise in statutory interpretation this decision produces bizarre practical results. If at trial the judge, having heard the prosecution evidence, wrongly rules it shows no case to answer, this can be appealed; but if the same erroneous ruling is made ahead of trial on the basis of the evidence the Crown intends to call, it cannot. Where this happens the prosecution can then apply to a different judge for a voluntary bill of indictment,[7] but this is a poor substitute for an appeal. First, unlike an appeal the grant of a voluntary bill is officially regarded as "an exceptional course"[8] – with an unspoken presumption against granting them. And secondly, the application is decided by another first-instance judge, not by the Court of Appeal sitting as a panel. In consequence, questionable decisions to dismiss are not always questioned as they should be.[9]

Parliament should amend the legislation to cure this strange anomaly by making dismissal rulings, like other rulings terminating prosecutions, subject to interlocutory appeal.

JRS

1 As in *Middlesex Quarter Sessions Ex p. DPP* [1952] 2 Q.B. 758, where a judge directed an acquittal in a drunken driving case because he disapproved of prosecutions for drunken driving (!).
2 For example, the decision to halt as an abuse of process the prosecution of the police officers accused of fabricating the confessions of the Birmingham Six: condemned by *The Independent* as "the final insult" (leading article, 8 October 1993).
3 See *Archbold*, main work, §7.247 onwards.
4 As in *R v Y* [2008] EWCA Crim 10; [2008] 1 W.L.R 1683.
5 [2006] EWCA Crim 2849; [2007] 1 Cr.App.R. 15.
6 *Archbold*, main work, §1-36.
7 Crime and Disorder Act 1998, Sch.3 para 2(6)(a).
8 Fulford J in *Serious Fraud Office v Evans* [2014] EWHC 3803 (QB), at [85].
9 In *Evans* [2014] 1 W.L.R 2817, for example, the judge dismissed charges of conspiracy to defraud on the basis of a narrow interpretation of "proprietary interest" and a second judge then dismissed the prosecutor's application for a voluntary bill. Then shortly afterwards, in H [2015] EWCA Crim 46, the Court of Appeal doubted the judge's interpretation of "proprietary interest" in *Evans*.

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