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Crime Case Law and Criminal Justice Policy Update

September 2007

Introduction

Welcome to the fourth of our criminal updates which we hope that you will find informative. Please feel free to forward it to colleagues and if they wish to be added to our mailing list they just need to send an email to clerks@4kbw.co.uk.

Our next edition will be circulated in **December 2007**

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CHAMBERS NEWS

** NEW Website **

Our new website is now available online at www.4kbw.co.uk. There is a great deal of useful information including barrister profiles which can be downloaded.

CJIT - Secure Email

Chambers is now linked to the **CJIT Secure Email System**. If you are linked to CJIT and wish to email our members or clerks using the system just use the normal 4kbw email address for the person and add after the .co.uk the following .cjsm.net We suggest if you send urgent mail that it should also be sent to the clerks to ensure a prompt response.

If you require any further help in this area please contact Lee Cook our Principal Clerk.



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General Case Law Update

R v Taylor (July 7, 2006) Court of Appeal, [2006] EWCA Crim 3132

If a judge reached the conclusion that it was unnecessary to hold a Newton hearing because a defendant's basis of plea was absurd or manifestly untenable, he should only do so having given advocates an opportunity to make submissions followed by an explanation as to why he had reached that conclusion so as to remove any doubt as to the proper basis for mitigation.

R v Paul Passmore (June 18, 2007) Court of Appeal, [2007] EWCA Crim 2053

It was held that the judge had erred in his interpretation of the Social Security Administration Act 1992 s.111A by directing that it was an offence to fail to disclose a change in circumstance if it was capable of affecting a person's entitlement, whether or not the change made any difference to the amount a person could claim.

R v John Kepple (June 13, 2007) Court of Appeal, [2007] EWCA Crim 1339

Although a judge had correctly ruled that a trial could proceed in the absence of a defendant, the conviction was unsafe as the judge had made a ruling curtailing the defendant's right through counsel to challenge the evidence against him and he was therefore denied a right to a fair trial. In these circumstances, an advocate acting on instructions should not be prevented from putting the full extent of those instructions (while respecting professional boundaries) due to the fact that the defendant will not give evidence in support.

R v (1) Jerry Stephens (2) Sandra Mujuru (May 25, 2007) Court of Appeal, [2007] EWCA Crim 1249

This was the first prosecution under section 5 Domestic Violence, Crime and Victims Act 2004 (*see below under Legislation and Policy update*), and provides useful guidance on the applicability of section 5 of the Act and the Act in general.

R v Ibrahim Musone (May 23, 2007) Court of Appeal, [2007] EWCA Crim 1237

A Judge had no express power to exclude evidence sought to be relied upon by a defendant of a co-defendant's bad character on the grounds of unfairness or by placing reliance on the co-defendant's right to a fair trial as the evidence was of substantial probative value and deemed admissible under s.101(1)(e) of the Criminal Justice Act 2003. The court could in limited circumstances exclude such evidence, however, where there had been failure to comply with the requirements of Part 35 of the Criminal Procedure Rules 2005.



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R v Ian Jones (May 15, 2007) Court of Appeal, [2007] EWCA Crim 1118

The police were not guilty of entrapment with regards to an attempt to commit offences under the Sexual Offences Act 2003 where they posed as a 12-year old girl to gather evidence against the offender. The police did not incite or instigate a crime but merely provided the opportunity for the defendant to commit an offence and provide evidence for a conviction. The officer did no more than pretend to be a child of a particular age, it was the defendant who thereafter went on to incite penetrative sexual activity.

R v Shwan Faraj (May 4, 2007) Court of Appeal, [2007] EWCA Crim 1033

The Court held that the principle of defence of property as a defence to a charge of false imprisonment was not dependent upon whether the defendant had reasonable grounds for suspecting that the complainant was burglar. Such defence depended only on whether the defendant in fact believed that the complainant was a burglar.

R v IK & Ors (April 27, 2007) Court of Appeal, [2007] EWCA Crim 971

The Court held that it was inappropriate for the principles of double jeopardy to be extended and applied to a situation where a defendant was being prosecuted for offences under the Terrorism Act 2000 having previously appealed to the Special Immigration Appeals Commission against a certificate issued under the Anti-terrorism, Crime and Security Act 2001 s.21(1)- the latter proceedings were not criminal and, as he was not being prosecuted, he was never at risk of conviction. The SIAC was not a "competent" court for the purposes of criminal proceedings, just as the family court was not a "competent" court.

CPS v P (April 27, 2007) High Court, [2007] EWHC 946 (Admin)

(1) If the youth court decided to halt the trial of a child on the ground that he lacked the mental capacity to take an effective part in the proceedings it should consider whether to switch to a fact-finding process. The proceedings should be stayed as an abuse of process before fact-finding only if no useful purpose at all could be served by finding the facts. (2) (Obiter) The [Crime and Disorder Act 1998 s.34](#) had removed the rebuttable presumption that a child aged 10 or over was incapable of committing an offence, but it had not abolished the defence of doli incapax itself. The defence would be a common law defence as opposed to a statutory one as a matter of general principle the burden of proof remained on the Crown to prove that the child had the requisite understanding, and the standard of proof was the usual criminal standard.



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[R v Jason Gowan](#) **(April 19, 2007) Court of Appeal, [2007] EWCA Crim 1360**

The Crime and Disorder Act 1998 s.1C(2) was plainly directed at protecting members of the general public from an offender's conduct. It was clear from the terms of s.1C(2) that it was never intended that an ASBO should be made in circumstances to protect a wife with whom an offender had been and would in the future be cohabiting such as occurred in the instant case.

[R v Benjamin Bree](#) **(March 26, 2007) Court of Appeal, [2007] EWCA Crim 804**

The proper construction of the [Sexual Offences Act 2003 s.74](#), which defined consent, was that if, through drink, or for any other reason, the complainant had temporarily lost her capacity to choose whether to have sexual intercourse on the relevant occasion, she was not consenting, and subject to questions about the defendant's state of mind, if intercourse took place, that would be rape. However, where the complainant had voluntarily consumed substantial quantities of alcohol, but nevertheless remained capable of choosing whether to have intercourse, and agreed to do so, that would not be rape. The Act provided a clear definition of consent for the purposes of the law of rape, and by defining it with reference to "capacity to make that choice" sufficiently addressed the issue of consent in the context of voluntary consumption of alcohol by the complainant.

[Sentencing Update](#)

[R v Z](#) **(June 26, 2007) Court of Appeal, [2007] EWCA Crim 1473**

A defendant had received the appropriate discount in sentence for the provision of information to police officers concerning a major drugs conspiracy since the information had been provided at low personal risk to the defendant and, although it had disrupted serious organised crime, it had not enabled the authorities to apprehend those involved or halt serious criminal activity. On the other hand, where a defendant provided accurate information that was unknown to the authorities and enabled them to halt serious criminal activity, a substantial discount in the sentence imposed on that defendant would be appropriate.

[R v Michael Harries](#) **(June 7, 2007) Court of Appeal, [2007] EWCA Crim 1622**

The court considered the dangerous offender provisions contained in the Criminal Justice Act 2003 in relation to offences that straddled the commencement date of the provisions. Where offences were committed after April 4, 2005, the provisions should be applied and any other offences, including those committed prior to the commencement date, could be considered by the sentencing judge in making an assessment of dangerousness under s.229 of the 2003 Act. Such offences committed before the relevant date might have some bearing on the assessment of dangerousness and did not cease to be relevant just because the dangerous offender sentencing provisions did not apply directly to them.



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R v Lawrence Considine **(June 6, 2006) Court of Appeal, [2007] EWCA Crim 1166**

In making an assessment of the offender's dangerousness under the Criminal Justice Act 2003 s.229, the court could take into account any information about the offender relating to any pattern of behaviour of which the offence formed part and the nature and circumstances of the offence. An assessment based on "information" was not restricted to "evidence". The information to be taken into account was not limited to the offender's previous convictions or a pattern of behaviour established by them, or indeed information about the offender which was limited to them. Information bearing on the assessment of dangerousness could take the form of material adverse to the offender which was not substantiated or proved by criminal convictions.

Sentencing Guidelines Council – Revised Definitive Guideline: Reduction in sentence for a Guilty Plea *(see below under Legislation and Policy Update)*

Character Evidence Update

R v James Wallace **(July 16, 2007) Court of Appeal, [2007] EWCA Crim 1760**

The Court held that where the case against the appellant was dependent on circumstantial evidence and that evidence was technically caught within the widely defined bad character provisions of the CJA 2003, there was no injustice in admitting that evidence even though no application had been made by the prosecution to admit it. This is because it was inevitable that the evidence would have been admitted if such an application had been made.

R v Mustafa Kulah **(July 13, 2007) Court of Appeal, [2007] EWCA Crim 1701**

A sentencing judge was not bound to impose a sentence previously indicated to the defendant in accordance with the procedure established in R. v Goodyear (Karl) [2005] EWCA Crim 888. Such an indication was a maximum and the sentencing judge was bound not to impose a more onerous sentence. It was for the sentencing judge to form his own view of whether the requirements of the Criminal Justice Act 2003 s.225(1)(b) were satisfied.



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[R v Kenneth Campbell](#) **(June 26, 2007) Court of Appeal, [2007] EWCA Crim 1472**

Where evidence of bad character was introduced, the jury should be given assistance as to its relevance that was tailored to the facts of the individual case. Once the evidence had been admitted through a gateway under s.101, it was open to the jury to attach significance to it in any respect in which it was relevant. It would be unsatisfactory to direct the jury only to have regard to it for a particular purpose and to disregard its relevance in other respects. It was also unhelpful for a trial judge to give to a jury the Judicial Studies Board's specimen directions in relation to bad character by reference to the terms of the Criminal Justice Act 2003 s.101 without relating them to the facts of the case, and to include a direction that referred to a person with bad character being less likely to tell the truth.

[R v Cornel Tirnaveanu](#) **(May 24, 2007) Court of Appeal, [2007] EWCA Crim 1239**

The Court held that evidence would be "to do with the alleged facts of the offence with which the defendant is charged" within the Criminal Justice Act 2003 s.98(a) where there was some nexus in time between the offence with which the defendant was charged and the evidence of misconduct which the prosecution sought to adduce.

[R v Edward Gyima](#) **(February 7, 2007) Court of Appeal, [2007] EWCA Crim 429**

Judges and practitioners should be astute to recognise that where it appeared that there might be weaknesses in the prosecution case, it was important to defer ruling on the admissibility of a defendant's previous convictions until the whole of the prosecution evidence had been adduced.

[Hearsay Update](#)

[R v Konrad Cole \(2\) Rocky Keet](#) **(July 30, 2007) Court of Appeal, [2007] EWCA 1924**

The Court held that there was no absolute embargo on the admission of hearsay evidence under the European Convention on Human Rights 1950 Art.6 and no rule that a statement could not be adduced in evidence unless a defendant had the opportunity to examine the witness. In the interests of justice the trial judges had been right to allow the prosecution to adduce witness statements in evidence under the CJA 2003 s.116. The only question with which Art.6 was concerned was whether the admission of the evidence was compatible with a fair trial. Hearsay evidence was not precluded even where it was the sole or decisive evidence against a defendant.



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[R v Malcolm Boulton](#) (April 26, 2007) Court of Appeal, [2007] EWCA 942

When considering whether a victim was refusing to give oral evidence through fear in accordance with the CJA 2003 s.116, the victim's state of mind had to be assessed against the history of the case which had involved allegations of rape and domestic violence. If the perpetrator had used threats against her and financial resources to try to stop her giving evidence, it was held that there was more than enough evidence of her continuing fear of giving evidence against him.

[Legislation & Policy Update](#)

[The Offender Management Act 2007](#) (Received Royal Assent on 26 July 2007)

"Under the current legislation the statutory duty to make arrangements for the provision of probation services rests exclusively with the local probation board. Probation services cannot currently be provided by any other organisation unless sub-contracted directly by probation boards themselves. This Act will transfer to the Secretary of State the statutory duty to make arrangements to provide probation services, so enabling him to commission services from providers in the public, private and voluntary sector. It will establish probation trusts, as public sector providers with whom he may make such arrangements." (Explanatory Notes to the Act)

The Act also:

- enables information to be shared between relevant bodies and persons for offender management purposes;
- removes some of the inconsistencies between the powers of staff in public and private custodial institutions;
- reforms existing offences of bringing articles into prison and taking articles out of prison;
- removes the requirement for the appointment of a prison medical officer;
- Changes the name of "Boards of Visitors" to "Independent Monitoring Boards" and removes the requirement for two magistrates to be members of a Board;
- makes technical amendments to enable more efficient management of juvenile offenders sentenced to custody; and
- introduces polygraph testing of sex offenders on licence from a sentence of imprisonment of 12 months or more.

The Act can be found at: <http://www.opsi.gov.uk/acts/acts2007/20070021.htm>



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The Mental Health Act 2007 (Received Royal Assent on 19 July 2007)

The main purpose of the 2007 Act is to amend the Mental Health Act 1983. It is also being used to introduce "deprivation of liberty safeguards" through amending the Mental Capacity Act 2005 (MCA); and to extend the rights of victims by amending the Domestic Violence, Crime and Victims Act 2004.

The changes in relation to the MCA are in response to the 2004 European Court of Human Rights judgment (*HL v UK (Application No.45508/99)*) involving an autistic man who was kept at Bournwood Hospital by doctors against the wishes of his carers. The European Court of Human Rights found that admission to and retention in hospital of HL under the common law of necessity amounted to a breach of Article 5(1) ECHR (deprivation of liberty) and of Article 5(4) (right to have lawfulness of detention reviewed by a court).

The following are the main changes to the 1983 Act made by the 2007 Act:

- A single definition of a mental disorder:
- Statutory advocacy for detained patients
- Introduces a requirement that patients under the age of 18 are accommodated in an age appropriate setting, subject to their needs.
- A new "appropriate medical treatment" test which will apply to all the longer term powers of detention.
- Broadening the group of practitioners who can take on the functions currently performed by the Approved Social Worker (ASW) and Responsible Medical Officer (RSO).
- Gives patients the right to make an application to displace their Nearest Relative.
- The introduction of Supervised Community Treatment for patients following a period of detention in hospital.
- A single Mental Health Review Tribunal for England
- Introduces new safeguards for the use of Electro-convulsive Therapy.

The Act can be found at: <http://www.opsi.gov.uk/acts/en2007/2007en12.htm>

Domestic Violence Crime and Victims Act 2004 (Received Royal Assent on 15 November 2004)

The Act plans to strengthen the rights of victims and witnesses, ensuring they receive the help, support and protection they need and contains the following measures intended to close legal loopholes that allow escape of punishment through:

- parents, co-accused of their child's murder, being unable to be prosecuted by remaining silent, or by blaming each other.



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- criminals, who commit many crimes that cannot be dealt with in one trial, will receive full punishment - a particular problem for theft, fraud, child pornography etc.

Further measures include:

- New police powers to deal with domestic violence including making a breach of a non-molestation order a criminal offence, with a 5 year prison penalty.
- Making common assault an arrestable offence.
- Stronger legal protection for victims by extending the use of restraining orders - giving courts power to impose a restraining order where the defendant has been acquitted but the court believes an order is necessary to protect the victim.
- Providing a code of practice, binding on all criminal justice agencies, so that all victims receive the support, protection, information and advice they need.
- Amending the [Harassment Act 1997](#) to ensure that victims have their say if an application is made to change a restraining order that is protecting them from abuse or harassment.
- Strengthening the civil law on Domestic Violence so that cohabiting same-sex couples have the same protection as heterosexual couples, and extending the availability of non-molestation orders to couples who have never lived together or have never been married.
- Creating a new offence of familial homicide for causing or allowing the death of child or vulnerable adult.
- Bringing in the Law Commission recommendation for a two stage court trial to ensure that high volume crimes like fraud and internet child pornography can be punished in full.
- Reform to defences to homicide - including provocation.

(the above summary of the provisions of the Act was obtained with reference to the following Home Office website <http://www.crimereduction.gov.uk/legislation37.htm>)

The Act can be found at <http://www.opsi.gov.uk/acts/acts2004/20040028.htm>

[The Criminal Justice Act 2003 \(Reviews of Sentencing\) \(Consequential and Supplementary Provisions\) Order 2007](#)

"This instrument modifies section 36 of the Criminal Justice Act 1988...to ensure that the Attorney General has power to refer all mandatory life sentence cases to the Court of Appeal as unduly lenient for judicial reconsideration of the minimum term to be served. Because of an unintended gap in the law, the Attorney General did not have power to refer certain cases, namely, those in which prisoners already sentenced for murder are awaiting the determination of a minimum term by the High Court. This instrument closes that gap." (Explanatory Notes to the Order)



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Sentencing Guidelines Council – Revised Definitive Guideline: Reduction in sentence for a Guilty Plea **(in force from 23 July 2007)**

These revised guidelines follow a recommendation to change the application of the principle of reduction in sentence for a guilty plea when the evidence against offenders is overwhelming. Two key changes have been adopted following advice from the Sentencing Advisory Panel:

- a. While a presumption remains that a reduction of one-third should be made for a guilty plea at the earliest opportunity, the Council has concluded that a lower reduction of 20 percent may be appropriate in certain circumstances.
- b. Additional guidance has been issued about when the “first reasonable opportunity” arises. While this includes the first time that a defendant appears before a court and had the opportunity to plead guilty, the guidelines state that “the court may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps under interview”.

The above information was set out in the Press Release for the guidelines. The full guidelines can be viewed at:

www.sentencing-guidelines.co.uk/docs/Reduction%20in%20Sentence-final.pdf

Sentencing Guidelines Council – Guidelines for Sexual Offences Act 2003 **(in force from 30 April 2007)**

The guidelines state that sentencers should identify a starting point using the categories of seriousness described for each of the offences and will move up or down from that to reflect the aggravating and mitigating factors present. Each guideline sets out specific factors which aggravate the offence committed and which should attract higher sentences, including:

- Extreme youth or old age of the victim. The guidelines suggest higher starting points in cases involving victims under 13.
- Where the victim has any form of mental disorder which impedes their choice
- Use of drugs, alcohol or other substance to facilitate the offence
- Threats to prevent the victim reporting the offence
- Abduction or detention of the victim

In addition, other aggravating factors that apply to a wide range of offences from the Council's guideline Overarching Principles: Seriousness may also be relevant:

- Offences carried out by offenders operating in groups or gangs
- Use of a weapon to frighten or injure the victim
- Vulnerability of a victim
- Additional degradation of the victim



Members of Chambers

Timothy Raggatt QC
Stephen Williamson QC
John Jenkins QC
Roger Thomas QC
Alan Conrad QC

Basil Hillman
Robert Spencer Bernard
Christopher Cousins
John Denniss
Moirá Pooley
Kate Mallison
Barnaby Evans
Michael Harrison
John Riley
Reginald Arkhurst
Peter Nightingale
Andrew Granville Stafford
Claire Jacobs
Paul Wakerley
Kate Mather
Michael Skelley
Kim Preston
Jillian Hurworth
Sanjay Lal
Iain Burnett
Brendan Davis
Jackie Bond
Kemi Ojutiku
Tamala McGee
Susan Monaghan
Amanda Millmore
Nadia Chbat
Olive Lycourgou
Tamia Tagon
Beverly Roberts
Cameron Brown
Gavin Holme
Sabina Khan
Simon Heptonstall
Justyn Turner
Justine Davidge
Alison Griffiths
Jerome Silva
Louise Robinson
Claire Van Overdijk
David Bennett
David Sawtell

Principal Clerk

Lee Cook

The starting points outlined in the guidelines already take account of the changed character of prison sentences following implementation of the Criminal Justice Act 2003. The provisions of the December 2004 guideline entitled New Sentences – Criminal Justice Act 2003 (that suggest a reduction in the region of 15 % in the sentence imposed to achieve the best match between a sentence under the new framework and its equivalent under the old framework) will not therefore apply to the offences which are the subject of this guideline.

The above information was set out in the Press Release for the guidelines. The full guidelines can be viewed at:

http://www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf

The Crime Team Newsletter is produced by Claire van Overdijk and Justine Davidge, members of 4 King's Bench Walk (4KBW). The content of the newsletter provides only a summary of the judgments, legislation and policy documents and it is important that reliance is not placed upon it as setting out the law. Readers are advised to consult the original sources in order to determine its scope and application.