Members of Chambers

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David Sawtell

Principal Clerk
Lee Cook

Chambers of Timothy Raggatt QC
4 King's Bench Walk, Temple, London EC4Y 7DL

Crime Team Case Law and Criminal Justice Policy Update

January 2007

Introduction

Welcome to the Second 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 **April 2007.**

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Telephone: 020 7822 7000 **Fax:** 0870 803 1901 **Email:** clerks@4kbw.co.uk DX: 1050 London/Chancery Lane

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Crime Team Case Law and Criminal Justice Policy Update

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Chambers News

Nicholas Jarman QC

Chambers held a dinner for former head of chambers and founder member Nicholas Jarman QC on Friday 19th of January in the Inner Temple to mark his retirement from the bar. 65 past and present members of chambers attended including the Honourable Mr Justice Gibbs, Master David Prebble and HH Christopher Hordern QC.

Marathon Runners

Two of the 4 KBW clerks are again running marathons. **Ria Gregory** is deep in training for the Paris marathon which is scheduled for 15th April and **Tom Priest** is running the London marathon in aid of The Multiple Sclerosis Resource Centre Charity Registration No 1033731. If any one wishes to sponsor Tom just click on the link below.

http://www.justgiving.com/tompriest

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Lee Cook

Chambers of Timothy Raggatt QC
4 King's Bench Walk, Temple, London EC4Y 7DL

Profiles

Simon Heptonstall

Call: 1999

Simon came to the Bar after studying mathematics, spending a year supporting a golf tour and five years in industry where he worked in analysis, training and marketing. He converted to law at Manchester Metropolitan University, then took the BVC there, coming first in his year.

After being called to the Bar by Inner Temple in November 1999 he worked in competition law for BT before spending a year as a Justices' clerk at Kingston and Croydon.

Having joined 4KBW from an exclusively defence set, Simon's criminal practice is equally divided between prosecution and defence work. His other areas of practice include general common law, regulatory & professional conduct, personal injury and landlord & tenant.

Simon's criminal practice is exclusively in the Crown Court, with regular appearances for appellants and the Crown in the Court of Appeal. His work encompasses the entire calendar of criminal offences, with a special interest in sexual offences, serious violence and dishonesty as well as technical cases and the proceeds of crime.

He is a member of the Criminal Bar Association, the South-Eastern Circuit and the Personal Injuries Bar Association. He acts a mentor for law students and occasionally assists with advocacy tuition for BVC students. Away from chambers Simon enjoys cycling, golf and rugby.

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David Sawtell

Principal Clerk
Lee Cook

Chambers of Timothy Raggatt QC
4 King's Bench Walk, Temple, London EC4Y 7DL

Profiles

David Bennett

Call: 2005

David obtained an LL.B (Hons) from the London School of Economics and completed the BVC at the Inns of Court School of Law, London.

Prior to coming to the Bar David gained legal experience at HM Customs and Excise Solicitors Office, London, assisting in the preparation of large drugs trafficking prosecutions. David also spent four months working very closely with patients at an NHS Mental Health Hospital on the secure Psychiatric Intensive Care and Forensic units, developing an understanding of various mental health conditions.

David was called to the Bar in 2005 and his areas of practice include Criminal Law, Prison Law, Personal Injury Law, Family Law and Landlord and Tenant Law.

David's criminal practice comprises both Prosecution and Defence work in the Crown Court, Magistrates' Court and Youth Court. He practices in a wide range of criminal cases, generally encompassing violent offence, drugs offences, public disorder offences, child care offences and dishonesty offences. David has also represented a number of prisoners in Parole Board hearings and Disciplinary hearings.

David is a member of the Criminal Bar Association.

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Crime Team Case Law and Criminal Justice Policy Update January 2007 Continued

R v Andrew Adams
(January 12, 2007) Court of Appeal, [2007] EWCA Crim 1

The Court held that a conviction for murder was unsafe where the appellant's legal representatives had failed to carry out essential pre-trial preparation, which resulted in a failure to adduce evidence (available unused material) that would have assisted the appellant's case. This oversight was found to have been caused principally by the late return of their instructions by counsel who had originally been instructed and the underestimation of the time needed to complete the work by the new defence team. Although it was difficult to conclude that the individual criticisms and failures were on their own sufficient to render the verdict unsafe, the Court held that, cumulatively, they were sufficient to do so.

Coombes v Director of Public Prosecution
(December 14, 2006) QB Divisional Court, *The Times* December 29, 2006
For a motorist to be convicted of speeding contrary to sections 81(1) and 89(1) of the Road Traffic Regulation Act 1984, the Court held that it was a requirement that the relevant road signs could reasonably be expected to indicate the limit to an approaching driver in sufficient time for him to reduce from a previous lawful speed to a speed within the new limit. The Court found that the objective of section 85(4) of the 1984 Act was plainly that motorists should not be convicted in the absence of adequate guidance in the form of traffic signs indicating speed restrictions.

R v Abu Hamza
(November 30, 2006) Court of Appeal, [2006] EWCA Crim 2918
The Court reviewed the general principle at common law that an inchoate offence cannot be committed unless the conduct planned or incited would, if carried out, be indictable in England (*Board of Trade v Owen* (1957) AC 602 considered), and held that section 4 of The Offences against the Person Act 1861 provides an exception to that principle. In their reasons their Lordships stated that nothing in the wording of section 4 suggested that the conspirators or the person incited should be British subjects nor was the common law so clear that that should have been implied. The motivation for the enactment of s.4 appeared to have been the activities of aliens in England conducive to murders or attempts to murder outside the jurisdiction. As such, it did not make sense to restrict the offence to circumstances where the murderers were to be British subjects.

Carter v Director of Public Prosecutions
(November 8, 2006) High Court Admin, [2006] EWHC 3328 (Admin)
It was held that courts were entitled to presume that the procedure laid down for the preparation of kits used in the taking of blood samples from motorists suspected of driving having consumed an excess of alcohol had been carried out correctly, unless there was something in the matter before a court to suggest to the contrary. In this case, there was no evidence to support the allegation that the sample was anything other than in an alysable condition and untainted by foreign substances. It also had to be taken into consideration that the motorist had the opportunity to have a sample analysed himself and this would be the essence of any defence to any alleged errors or omissions.

Pittard
(July 27, 2006) Court of Appeal, [2006] EWCA Crim 2028
This case deals with the issue of admissions under Section 10 Criminal Justice Act 1967. The Court held that, where the parties have agreed facts to writing as admissions under this section, they should ordinarily be provided to the jury in writing rather than be read out.

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Jones v Whalley
(July 26, 2006) House of Lords, [2006] UKHL 41
The Court held that a private prosecution could be regarded as an abuse of the process of the magistrates' court where a defendant had agreed to be formally cautioned by the police on the assurance that, if he agreed, he would not have to go before a criminal court. *R v Croydon Justices, Ex p Dean* (1993) C0D 290 applied and *Hayter v L* (1999) 1 WLR 26 considered. The abuse complained of was not abuse impairing the fairness of the trial, since evidence of the admission and caution could be excluded, but went to the fairness of trying the defendant at all in the circumstances. The power to stay had to be used sparingly, but it would be an abuse where the magistrates were misled into regarding the caution as a conviction because that was what the form said.

Bates
(July 7, 2006) Court of Appeal, [2006] EWCA Crim 1395
After considering the technique of DNA profiling and the issues arising when it was not possible to provide a "full" profile, the Court concluded that there was no reason why the results of a partial DNA profile should not be admissible as long as the jury were properly directed in relation to its inherent limitations. A partial DNA profile was held to include a mixed partial profile- a profile from material containing the DNA of more than one person. The Court held that where the match probability in relation to all the samples tested was so great that its value was minimal, the Judge may exercise his discretion to exclude the evidence. However, in cases where the possibility of a "missing" allele in a partial profile may exculpate the accused altogether, this should not provide sufficient grounds for rejecting the admissibility of evidence of partial DNA, which should be evaluated by the jury with the appropriate direction.

R (Thomas) v Central Criminal Court; R (Stubbs) v Same
(July 7, 2006) High Court Admin, [2006] EWHC 2138 (Admin)
The Court considered section 22(3)(b) of The Prosecution of Offences Act 1985 and held that it did not permit a court considering a grant of a further extension of custody time limits to consider matters that were the root cause of an earlier application to extend custody time limits unless those matters were also the root cause of the later application for an extension of custody time limits.

R v H
(July 7, 2006) Court of Appeal, [2006] EWCA Crim 1975
The Court held that it had no jurisdiction to hear an appeal from a judge's ruling on disclosure made at a preparatory hearing ordered under the section 29 of the Criminal Procedure and Investigations Act 1996 because the ruling did not form part of the preparatory hearing. The fact that a preparatory hearing was taking place did not mean that every ruling made at that time technically formed part of the preparatory hearing, *R v Hedworth* (1997) 1 Cr App R 421 applied.

Caley-Knowles; Jones
(June 2, 2006) Court of Appeal [2006] EWCA Crim 1611
The Court looked at the general test for the safety of a conviction in which the defendant was clearly guilty and confirmed that it did not follow that the conviction would be unsafe in every case where the judge had directed the jury to convict. This principle was avowed in spite of *Wang* [2005] 1 WLR 661. The Court reiterated the Criminal Procedure Rules 2005, which include as an overriding objective the need to deal with the case efficiently and expeditiously. Further, the court's active management of the case under rule 3.2(1) encouraged a robust but reasonable use of the overriding objective to ensure that the trial did not become side-tracked into consideration of matters not as a matter of law relevant to the issues before the jury.

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Alan Conrad QC

****

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Crime Team Case Law and Criminal Justice Policy Update January 2007 Continued

Sentencing Update

R v Richardson
(December 18, 2006) Court of Appeal, [2006] EWCA Crim 3186
(1) The Court gave guidance on the impact of the Criminal Justice Act 2003 s.285, which increased the penalties for driving-related offences on the guidance offered to sentencers in *R v Cooksley (Robert Charles)* [2003] EWCA Crim 996. It was held that the primary object of the increase in the maximum sentence under section 285 was to address cases of the most serious gravity, so as to permit the sentence to be greater than before. However, it had not been the intention that the increase in sentence should reflect the consequences of the increase from 10 years to 14 years in a strictly mathematical proportion. Appropriate proportionality between the variety of driving-related offences led to the conclusion that if the sentence in the most serious cases was significantly increased, there should be some corresponding increase in sentences immediately below that level of gravity, continuing down the scale to cases where there were no aggravating features at all. The relevant starting points in *Cooksley* should be reassessed as follows: no aggravating circumstances - 12-24 months' imprisonment; intermediate culpability – 2-4 years six months' imprisonment; higher culpability - 4 years six months-7 years' imprisonment; most serious culpability - 7-14 years' imprisonment. (2) The approach of treating on an equal basis the offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs would shortly become open to question as, in the context of the Road Safety Act 2006, the difference in culpability between dangerous driving and careless driving assumed critical importance. When the 2006 Act comes into force it willlonger be appropriate for the difference between dangerous and careless driving to be overlooked.

***"Making Sentencing Clearer"-* Home Office Consultation Paper**
(November 9, 2006)
This document is a consultation issued by the Home Secretary, Lord Chancellor and Attorney General on a range of proposals intended to better protect the public and make sentencing clearer. It purports to expand and seek views on proposals first made in the paper "Rebalancing the criminal justice system in favour of the law-abiding majority – Cutting crime, reducing re-offending and protecting the public" and can be found at:
http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making_sentencing_clearer_consul?view=Binary

R v Richards
(October 27, 2006) Court of Appeal, [2006] EWCA Crim 2519
The Court held that it was not a pre-condition to the making of a sexual offences prevention order under the Sexual Offences Act 2003 s.104 that the judge should be satisfied that the offender would also qualify for an extended sentence under the Criminal Justice Act 2003 s.227. Nor was it a pre-condition that he should regard himself as deprived of the necessary justification if they did not. The Court determined that the schemes under the respective Acts were intended to be, and were, distinct**.**

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R v Johnson
(October 20, 2006) Court of Appeal, [2006] EWCA Crim 2486

The Court handed down further detailed guidance, summarised below, in relation to the dangerous offender provisions in ss. 224-229 CJA 2003:

(a) Just as the absence of previous convictions does not preclude a finding of dangerousness, the existence of previous convictions for specified offences does not compel such a finding: there is a presumption that it did so, which might be rebutted.

(b) If a finding of dangerousness could be made against an offender without previous specified convictions, it also follows that previous offences, not in fact specified for the purposes of s.229, are not disqualified from consideration.

(c) Where the facts of the offence, or indeed any specified offence for the purposes of s.229 (3) are examined, it may emerge that no harm actually occurred. However, the absence of harm may be entirely fortuitous. It does not automatically follow from the absence of actual harm caused by the offender to date that the risk that he will cause serious harm in the future is negligible.

(d) The offender's characteristics of inadequacy, suggestibility, or vulnerability may serve to mitigate his culpability, but they may also serve to produce or reinforce the conclusion that the offender is dangerous.

(e) While it is desirable, as suggested in *R v Lang,* that the prosecution should be in a position to describe the facts of previous specified offences, this would not always be practicable. There is no reason why the prosecutor's failure to comply with that good practice should either make an adjournment obligatory or preclude the imposition of the sentence when appropriate.

(f) A judge should not rely on a disputed fact in reaching a finding of dangerousness unless the dispute can be fairly resolved adversely to the defendant.

(g) The Court of Appeal will not normally interfere with the conclusions reached by a sentencer who has accurately identified the relevant principles and applied his mind to the relevant facts.

(h) These essential principles applied with equal force to references by the Attorney General. In such cases the question is whether the decision not to impose the sentence, in the circumstances, was unduly lenient. In particular, in cases to which s.229(3) applied, where the sentencer has applied the statutory assumption, to succeed the appellant should demonstrate that it would be unreasonable not to disapply it. Equally, where the Attorney General has referred such a case because the sentencer has decided to disapply the assumption, the reference would not succeed unless it was shown that the decision was one that the sentencer could not properly have reached.

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Crime Team Case Law and Criminal Justice Policy Update January 2007 Continued

Character Evidence Update

R v Leszek Kordansinki
(November 7, 2006) Court of Appeal, [2006] EWCA Crim 2984

The Court held that the trial judge had been correct to allow the Crown to adduce evidence of a defendant's bad character and propensity through authenticated evidence of previous convictions from another jurisdiction (obtained under sections 7 and 8 of the Crime (International Co-operation) Act 2003), for offences of a similar type. Further s.99 (1) of the CJA 2003 had repealed common law rules in *Hollington v Hewthorn* concerning the admissibility of bad character evidence.

Payton
(May 26, 2006) Court of Appeal, [2006] EWCA Crim 1226

Once a judge has formed the view that the defendant's previous convictions admitted in evidence were such that the jury should be directed not to hold them against him, the defendant was entitled at least to a direction to the effect that his credibility was intact and undamaged either by the convictions or otherwise. Further, the jury should take that into account in assessing the credibility of his evidence and the explanations he had given. The failure to give the appropriate direction in these circumstances amounted to a fatal misdirection and the conviction was quashed, *R v Vye* (1993) 1 WLR 471 considered.

ASBO Update

Bucknell v DPP
(July 10, 1006) High Court Admin, [2006] EWHC 1888 (Admin)

Before issuing a dispersal direction under the Anti-Social Behaviour Act 2003 s.30, a police officer had to have reasonable grounds for believing that the public would be harassed, alarmed, intimidated or distressed, and such a belief had normally to depend in part at least on some behaviour by a group, rather than their mere presence. Failure to establish such reasonable grounds would, in the absence of exceptional circumstances, render a dispersal order an illegitimate intrusion of the rights of people to go where they please in public.

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Legislation & Policy Update

The Misuse of Drugs Act 1971 (Amendment) Order 2006
This Order came into force on January 18, 2007 and *reclassifies methylamphetamine*, previously a Class B drug, as a Class A drug by moving it from Part 2 of Schedule 2 to the Misuse of Drugs Act 1971 to Part 1 of that Schedule.

Fraud Act 2006 (Commencement) Order 2006
This Order came into force on January 15, 2007 and introduces *sections 1 to 14* of and *Schedules 1 to 3 to* the *Fraud Act 2006*. Sections 15 and 16 came into force on Royal Assent on November 8, 2006.

Crime (International Cooperation) Act 2003 (Commencement No3) Order 2006
This Order brought into force on November 1, 2006 the provisions of the *Crime (International Cooperation) Act 2003* specified in articles 2 and 3. These provisions implement the *2001 Protocol on the Convention on Mutual Assistance in Criminal Matters*, which requires participating countries to respond to requests for assistance with locating bank accounts and to provide banking information relating to criminal investigations.

Criminal Procedure (Amendment No 2) Rules 2006 [SI 2006/2636]
These rules came into force on November 6, 2006 and add the following new provisions to the *Criminal Procedure Rules 2005*:

A new Part 33 (expert evidence), which sets out the duty of an expert to the court, the required content of an expert's report, and gives the Court the power to direct that defence evidence be given by a single joint expert. A new rule 2.1 explains when the new expert evidence rules will apply.
A new Part 36 (evidence about a complainant's sexual behaviour) is added simplifying the rules about applications under *section 41 of the Youth Justice and Criminal Evidence Act 1999.*
Part 4 (service of documents) is extended to govern the service of a requisition issued by a public prosecutor under *section 29 of the CJA 2003.*
Part 7 (commencing proceedings in magistrates' courts) is extended to govern the form and content of a requisition and written charge issued by a public prosecutor under *section 29 of the CJA 2003*.
Part 15 (preparatory hearings in cases of serious fraud and other complex and lengthy cases in the Crown Court) is extended to govern applications under *section 17 of the Domestic Violence, Crime and Victims Act 2004* for trial of some counts in an indictment without a jury.

Draft Sexual Offences Act 2003 (Amendment of Schedules 3 and 5) Order 2007
This Order (laid before Parliament October 4, 2006 but yet to come into force) amends *Schedules 3 and 5 to the Sexual Offences Act 2003*. A person convicted or cautioned or made subject to a finding for an offence listed in Schedule 3 becomes subject to the notification requirements under Part 2 of the Act. A Schedule 3 offence may also lead to a person becoming subject to a foreign travel order. An offence under Schedule 3 or 5 may lead to a person becoming subject to a sexual offences prevention order. For a discussion of the policy background to this Order, see the Explanatory Memorandum to the Act prepared by the Home Office:
http://www.opsi.gov.uk/si/si2007/draft/em/uksidem_0110755057_en.pdf