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Criminal Law Update

May 2008

Introduction

Welcome to the sixth 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 **September 2008**

Content

- Pg 1.** Introduction
- Pg 2-4.** General Case Law Update
- Pg 4-5.** Prison Law Update
- Pg 5-6.** Sentencing Update
- Pg 7-8.** Hearsay Update
- Pg 8-9.** Legislation & Policy Update



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General Case Law Update

R v T [2008] EWCA Crim 815, April 16, 2008

The concept of *doli incapax* as a defence was not separate from the rebuttable presumption, which was abolished by the Crime and Disorder Act 1998 s.34. Accordingly, it was not possible for a child over 10 years of age to raise the issue of his capacity to know that criminal acts were wrong.

R v Khan & ORS [2008] EWCA Crim 531, March 14, 2008

The mere fact that jurors in separate trials had been serving police officers, prison officers at prisons at which defendants had been held, or members of the Crown Prosecution Service, did not render them biased to the prosecution case and therefore impartial. The Court further held that knowledge of a defendant's bad character did not automatically result in the juror ceasing to qualify as independent and impartial. The mere suspicion that a juror might, by reason of having been employed as a prison officer in a prison where the defendant was held, have acquired knowledge of that defendant's bad character could not, of itself, lead an objective observer to conclude that the juror had an appearance of bias. And lastly, the Court held that it was essential that a trial judge was aware at the stage of jury selection if any juror in waiting was, or had been, a police officer or a member of the prosecuting authority, or was a serving prison officer.

R (Sayer) v Secretary of State for the Home Department [2008] EWHC 467 (Admin), March 13, 2008

An offender who had pleaded guilty to offences, and was held on remand to await sentence, was a "convicted prisoner" for the purposes of the Prison Rules 1999 r.2(1). The definition of convicted prisoner in rule 2(1) of the Rules referred to a conviction in the narrow sense, namely a verdict of guilty or acceptance of a plea of guilty. The words used in rule 2(1) focused on the actual finding of guilt rather than on the final disposal of the case. Whilst the loss of status as an unconvicted prisoner might discourage early pleas of guilty, that was likely in practice to be outweighed by the credit that was given to an early plea in the sentencing process.

DPP v (1) Beaumont (2) Dowling [2008] EWHC 523 (Admin), March 4, 2008

A relevant offence that justified the imposition of a football banning order pursuant to the Football Spectators Act 1989, namely an offence "related to football matches", did not have a temporal limitation of being an offence that occurred within one hour of the end of a football match.



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General Case Law Update Continued

R v AS [2008] EWCA Crim 138, February 8, 2008

It was within the judge's discretion to deal with an allegation that a defendant had intimidated a prosecution witness as a contempt of court. The relevant factors to the exercise of a judge's discretion were considered: (i) the importance of ensuring that anyone who attempted to interfere with or intimidate a witness during the course of the trial within the vicinity of the court was dealt with promptly; (ii) the necessity for the matter to be dealt with quickly so that no similar incidents would occur during the trial or pending the retrial; (iii) the proportionate nature of the course followed; (iv) the clarity of the allegation against the accused; (v) whether there was ample time for the accused to prepare a defence properly; and (vi) the level of punishment was unlikely to be high; and (h) the position of the judge; it was not a case where the judge had seen what had happened.

Piggott v Director of Public Prosecutions [2008] EWHC 305 (Admin), February 8, 2008

There was no legal requirement that a motorist accused of driving while under the influence of alcohol should inform the police officer conducting a breath test of any medical conditions from which she suffered that might prevent her from providing sufficient breath for a specimen. Nevertheless, it was noted that, in the majority of cases, the failure to inform the officer result in the court to make an evidential find that any medical excuse belatedly volunteered was not acceptable and indicated a wilful failure to provide a specimen.

R v Clarke and McDaid [2008] UKHL 8, February 6, 2008

The requirement that a bill of indictment be signed by a proper officer of the court was not merely a technicality, and where a trial had taken place without satisfying that requirement it was a nullity and the ensuing convictions were quashed. The House of Lords reasoned that Parliament clearly intended when it enacted s.1 and s.2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 that if a bill of indictment was preferred but not signed by the proper officer that the bill should not become an indictment unless and until it was duly signed by a proper officer. Based on the language of the legislation and consistent judicial interpretation, Parliament intended the consequence of that to be that there could be no valid trial on indictment if there was no indictment.

R v Croydon Crown Court, ex parte Trinity Mirror PLC [2008] EWCA Crim 50, February 1, 2008

The Court considered the issue of reporting restrictions put in place to protect children from the effects of a parent facing charges of possessing indecent material. In doing so, the Court balanced the conflicting principles of the protection and welfare of children and open justice in courts exercising criminal jurisdiction. It was held that the Crown Court had no jurisdiction to make an order restraining the identification of an individual convicted of child pornography offences in order to protect his children because such an order was not incidental to its jurisdiction as it did not relate to his trial, conviction or sentence and therefore was not within the ambit of the Supreme Court Act 1981 s.45(4).



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General Case Law Update Continued

R v Massey [2007] EWCA Crim 2664, October 19, 2007

This case was concerned with the meaning of "control" within the context of the Sexual Offences Act 2003 s.53. It was held that "control" should be given its ordinary dictionary meaning of directing a relevant activity and included, but was not limited to, individuals that used force on another to make them carry out a relevant activity. There had therefore been no need to prove that a complainant had been forced, coerced or compelled to work as a prostitute, merely that she had been directed to do so.

R (Kalonji) v Wood Green Crown Court [2007] EWHC 2804 (Admin), October 19, 2007; R (Polat) v Wood Green Crown Court [2007] EWHC 2885 (Admin), November 19, 2007

In considering whether to extend custody time limits a judge was entitled to consider that pressures on a court in relation to its availability to hear a trial (occasioned through court closures and judicial vacancies) were exceptional circumstances that amounted to a good and sufficient cause to extend a remand prisoner's custody time limits under the Prosecution of Offences Act 1985 s.22(3). In the case of *Polat* [2007] EWHC 2885 (Admin) the court held that the decision in *Kalonji* ought to govern the position for now and for the immediate future bearing in mind that, if these exceptional circumstances do not change, the Court would plainly reconsider whether it was appropriate for applications to be brought.

Prison Law Update

Davies v Secretary of State for Justice [2008] EWHC 397 (Admin), March 5, 2008

A life-sentence prisoner who complained of being moved from open to closed conditions did not have a sustainable claim for damages for false imprisonment, negligence or a breach of the European Convention on Human Rights 1950 Art.5. As regards the claim in negligence, the relevant statutory regime did not give rise to a cause of action for the negligent performance of the relevant statutory duty.

R (Noone) v (1) Governor of HMP Drake Hall (2) Secretary of State for Justice [2008] EWHC 207 (Admin), January 31, 2008

In the case of offenders sentenced to consecutive terms of imprisonment for offences committed after April 4, 2005, a Home Office policy of treating the first sentence pronounced by the court as the lead sentence for calculating release dates was unlawful. The Home Office ought to have treated the shortest sentence as being served first for the purpose of calculating release dates.



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Prison Law Update Continued

Secretary of State for Justice v (1) James (2) Walker [2008] EWCA Civ 30, February 1, 2008

The Secretary of State for Justice was in breach of his public law duty by failing to provide relevant offending behaviour courses to allow prisoners serving indeterminate sentences for public protection to demonstrate to the Parole Board by the time of the expiry of their minimum terms that their detention was no longer necessary for the protection of the public. The direct consequence of the breach was that a proportion of such prisoners would avoidably be kept in prison for longer than was necessary either for punishment or for protection of the public, contrary to the intention of Parliament. If this situation continued, it was likely to result in a breach of Art.5(4). Further, the detention of such prisoners would cease to be justified under Art.5(1)(a) when the stage was reached that it was no longer necessary for the protection of the public or if such a long time elapsed without a meaningful review that their detention became disproportionate or arbitrary. That stage had not yet been reached in this case.

R (Robson) v (1) Parole Board (2) Secretary of State for Home Department [2008] EWHC 248 (Admin), January 28, 2008

In determining whether the Parole Board had dealt speedily with the lawfulness of a prisoner's continuing detention, the circumstances which needed to be considered in deciding whether the lawfulness of a prisoner's detention had been dealt with speedily would vary, but included the diligence shown by the authorities, the complexity of the issue, and other factors bearing on when it could properly be considered and the actual time period involved. It was possible that a lawful decision to detain could be transformed into an arbitrary detention in breach of Art.5 (1) ECHR if the link between it and the later decision not to release were broken. However, there was nothing in this case which transformed it into that type of very exceptional case and Art.5 (1) was not engaged.

Sentencing Update

R v Farquhar [2008] EWCA Crim 806, March 11, 2008

Where a defendant, who had admitted obtaining benefit over a period of eight years, made a voluntary payment of the whole amount of the benefit obtained, the voluntary repayment left his liability to a confiscation order untouched as the court had no discretion to refrain from making a confiscation order under the Criminal Justice Act 1998 if the prosecution served the required notice under section 71(1) and the other requirements of the Act are satisfied. It was therefore not unjust for the court to make a confiscation order in the same amount of the benefit obtained, although it meant that the defendant would repay the amount obtained twice over.



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Sentencing Update Continued

R v Sheppard [2008] EWCA Crim 799, February 28, 2008

The [Criminal Justice Act 2003 Sch.12 para.8](#) envisages a two-stage test regarding the activation of suspended sentences: first, where there had been a breach the court had to order that the suspended sentence take effect either in whole or in part unless it would be unjust to do so; second, if it was not unjust to activate the suspended sentence, then the court had to decide whether or not to impose the original sentence or to modify the term. It was clear that either of those options was available to the court and in the instant case, it was clear that it was not unjust to impose a custodial sentence following the defendant's breaches of the original order, and that such compliance as there had been had been dilatory, spasmodic and grudging. He had repeatedly breached the terms of the order.

CPS v Rose [2008] EWCA Crim 239, February 21, 2008

Where a defendant had been convicted of possession of criminal property (some of which was subsequently restored to its owners), the benefit from criminal conduct under the Proceeds of Crime Act 2002 s.6(4)(c), for the purposes of making a confiscation order, was the full value of all the items stolen. The fact that stolen property had been restored to its true owner was irrelevant. The legislation was concerned with confiscating the value of the defendant's benefit and was not limited to the actual proceeds of his crime or his profit.

R v Xu & 6 Ors [2007] EWCA Crim 3129, December 12, 2007

The court indicated the appropriate sentencing bracket to achieve consistency in sentencing for those involved in the commercial cultivation or production of cannabis. For those involved at the lowest level the starting point should be three years, before taking into account any plea of guilty and personal mitigation applied. For the organisers, who set up and controlled individual operations, the starting point should be *six to seven years* depending on the quantity of cannabis involved, and before taking into account guilty pleas and personal mitigation. The starting point for managers would be between *three and seven years*, depending on the level of their involvement and the value of the cannabis being produced. More severe sentences might be appropriate for those who controlled a larger number or network of such operations.

R v Phipps [2007] EWCA Crim 2923, November 7, 2007

Where there is a breach of a community requirement attached to a suspended sentence order, the court may deal with the offender by ordering the suspended sentence to take effect with the original term unaltered or with a lesser term, or by amending the order by imposing more onerous community requirements, extending the supervision period or extending the operational period. When dealing with a breach of a requirement of a community order that is not attached to a suspended sentence, the court may deal with the offender in any way in which he could have been dealt with for the offence by the court that made the order and may impose a custodial sentence of more than twelve months if appropriate.



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Bad Character Update

R v Ngyuen [2008] EWCA Crim 585, March 18, 2008

In a trial for murder, there had been no unfairness to a defendant where a judge ruled as admissible, under the Criminal Justice Act 2003 s.101(1)(d), evidence of assaults the Crown had chosen not to prosecute but had chosen to rely on as evidence that the defendant had a propensity to commit offences of the kind with which he was charged. Where there was no evidence of bad faith the reason why the Crown decided to adopt the s.101(1)(d) route rather than to prosecute was of no relevance.

R v Kirk [2008] EWCA Crim 434, March 4, 2008

Appeals against convictions for numerous and various sexual offences were dismissed where the judge had correctly admitted evidence of the making of complaints under the Criminal Justice Act 2003 s.120(2) and evidence as to bad character, and had not misled the jury in his directions.

R v Lamaletie & Royce [2008] EWCA Crim 314, February 28, 2008

The Court considered the detail of convictions that was needed where the Crown wished to rely, pursuant to the Criminal Justice Act 2003 s.101(1)(d), on previous convictions as evidence of a person's propensity to violence. The Court recognised that, although there was no rule that full details were necessary in every case, where the Crown sought to rely on previous convictions as demonstrating propensity it was good practice for details of the convictions to be made available, but full details were not required in every case. A mere list of convictions was sufficient for the purposes of s.101(1)(g) of the Act because what was relevant was "character" in a broad general sense.

Hearsay Update

R v RL [2008] EWCA Crim 973, May 7, 2008

There were no grounds for finding that convictions of rape and indecent assault were unsafe where a statement given by the appellant's wife, implicating her husband, was admitted under the Criminal Justice Act 2003 s.114 after the trial judge had ruled that the wife was not a compellable witness against her husband under the Police and Criminal Evidence Act 1984 s.80.



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Hearsay Update Continued

R v Y [2008] EWCA Crim 10, January 25, 2008

Section 114(1)(d) Criminal Justice Act 2003 was available in law for all types of hearsay, and on application by any party to a criminal trial. In the case of an out-of-court statement contained in, or associated with, a confession, s.118(1) para.5 did not exclude the application of s.114(1)(d). The greatest care had to be taken, before admitting an out-of-court statement under s.114(1)(d), to ensure that the s.114(2) factors were fully considered and that overall it was genuinely in the interests of justice that the jury should be asked to rely on the statement without seeing its maker and without any question being addressed to him about it.

Legislation and Policy Update

Criminal Justice and Immigration Act 2008 (expected receive Royal Assent on 08 May 2008)

The Bill is designed to make further provision about criminal justice (including provision about the police) and dealing with offenders and defaulters; to provide for the establishment and functions of Her Majesty's Commissioner for Offender Management and Prisons and to make further provision about the management of offenders; to amend the criminal law; to make further provision for combating crime and disorder; to make provision about the mutual recognition of financial penalties; to make provision for a new immigration status in certain cases involving criminality; and for connected purposes.

An explanatory note to the Bill can be found at:

http://www.publications.parliament.uk/pa/cm200708/cmbills/001/en/index_001.htm

The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2008 (No. 947);

The Proceeds of Crime Act 2002 (Investigations in England, Wales and Northern Ireland: Code of Practice) ORDER 2008 (No. 946)

These two Orders are made under the Proceeds of Crime Act 2002. They provide that two revised Codes of Practice providing guidance on powers under the 2002 Act shall come into operation. One code provides guidance for the exercise of a search power under section 289 of the 2002 Act and the second provides guidance on exercising the investigation powers provided under Part 8 of the 2002 Act.



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Legislation and Policy Update Continued

The Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008 (No. 167)

This order brings into effect the following revised Police and Criminal Evidence Act 1984 Codes of Practice (Codes A to E). The changes primarily clarify stop and search powers under section 60 of the Criminal Justice and Public Order Act 1994, implement Lord Carter's review of legal aid procurement, enable the police to caution suspects directly in Welsh where appropriate and enable the audio recording of interviews on secure digital network to be piloted. They also reflect other minor legislative changes and make other minor corrections to the previous Codes of Practice (*excerpt from published explanatory memorandum to the order*)

The Criminal Justice Act 1988 (Offensive Weapons) (Amendment) Order 2008 (No. 973)

This instrument adds certain swords, commonly known as "samurai swords", to the Criminal Justice Act 1988 Act. The effect of this is to make it an offence to manufacture, sell, hire (etc) these swords and to prohibit their importation, subject to an exemption for antique swords and certain defences. The instrument is being made to restrict the availability of these weapons for use in violent crime (*excerpt from explanatory memorandum to the order*).

The Early Removal of Fixed-Term Prisoners (Amendment of Eligibility Period) Order 2008 (No. 978)

This statutory instrument amends the Criminal Justice Act 2003 to expand the ERS ["Early Removal Scheme"] so as to enable foreign national prisoners to be removed from prison, and hence the UK, at an earlier point in their sentence. The instrument doubles the maximum number of days from which a prisoner may be removed from prison under the ERS, from 135 days before the halfway point of the sentence to 270 days before the halfway point of the sentence (*excerpt from explanatory memorandum to the order*).

The Criminal Justice Act 2003 (Commencement No. 19 and Transitional Provisions) Order 2007