36 CRIME

36 Crime Criminal Updates

Summer 2020

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Welcome to the 36 Crime Criminal Updates: Summer 2020

Christopher Donnellan Q.C.

Head of 36 Crime

When introducing the Spring Newsletter we anticipated working in a virtual court world, but with no real idea of when that would end. Jury trials had ground to a halt, although one trial with William Harbage Q.C. and Kevin Barry carried on to a conclusion with embryo social distancing provisions in place; a basic template for what we are now seeing across the court estate. Although many courts remained open, some with in-person hearings and most with virtual or hybrid hearings, we have all experienced various difficulties with the technology. The Common Video Platform (CVP) is being rolled out, and we have become used to different platforms being used at the Courts. There are many glitches, and insufficient capacity for video links to prisons to enable conferences to take place in a way that is productive for court hearings. However, with a lot of co-operation we have been able to get through a great deal of non-jury Court work. Well done to all. Jury trials have, at last, restarted and many of the 36 Crime team have been adjusting their advocacy skills to address juries in re-organised courtrooms, with the jury retiring to deliberate into a separate court room (as most jury rooms and corridors are too small for socially distanced safety) along with cleaning breaks and lots of alcohol based hand gel. It may soon be considered necessary to wear masks to limit the risk of aerosol based dispersal of the virus. We are now promised that the "Nightingale Courts" will be operational from this month, although few for Crime and not for custody cases. The trial backlog, which was already severe before the pandemic arrived, is ever increasing. The most difficult part of the backlog to clear will be the multi-handed cases with defendants in custody.

In addition to the social quizzes and other relief from the difficulties of managing life through the pandemic, we have had some excellent training seminars delivered to 36 Crime. The areas covered include experts on forensic pathology, latest cell site and mobile 'phone technology, and interpretation of footwear marks. 36 Crime has also delivered seminars, webinars and podcasts and you can find the links on the website.

This summer Newsletter has, as always, a range of articles. For those of us who, just, knew a time before the dishonesty test in *Ghosh*, it is disturbing that it has been described as a wrong turn, and **Arthur Kendrick** analyses for us the consequences of the recent judgment of the Court of Appeal in *Barton and Booth.* The pandemic may be the result of the mis-handling of food sources, and **Dharmendra Toor** reflects on a decision from the early days of the pandemic that highlights the importance for us of the compliance with food safety regulations by food manufacturers, restaurants and supermarkets. **Sally Hobson** provides a helpful analysis and some guidance when dealing with cases following extradition to the UK for offences for which the individual was not specifically extradited. We are grateful to **Mary Prior Q.C.** for another summary of important and instructive cases recently decided across the broad range of practice and procedure in the criminal courts.

And finally, we are delighted to announce that we have been joined at **36 Crime** by **Wayne Cleaver.**

Casenote: Ghosh, a Dishonest Mistake - *R v Barton and Booth* [2020] EWCA Crim 525

Arthur Kendrick

Barrister

In this judgment, the Court of Appeal have put to bed any lingering doubts as to whether the test for dishonesty articulated in *Ivey v Genting Casinos* [2017] UKSC 67 applies to criminal proceedings. As anticipated (by LJ Leveson in the High Court[1] and LJ Gross in the Court of Appeal[2]) *Ivey* is binding on criminal courts, and *Ghosh* is to be considered a "wrong turn".

Whether this is desirable when the major consequences for the criminal law have not been the subject of detailed argument before the Supreme Court is a matter for debate.

The Competing Tests and Lingering Doubt

Ghosh [1982] QB 1053 concerned a surgeon who was claiming payment for procedures he had not done. In that case, the Court of Appeal provided a test of dishonesty with two parts. First, the jury must decide whether what was done was dishonest "by the ordinary standards of reasonable and honest people". Second, if it was dishonest by those standards, "whether the defendant himself must have realised that what he was doing was by those standards dishonest".

Ivey involved a Baccarat player who exploited a technique called "edge-sorting" to win £7.7 million in a single night. The casino refused to pay out, saying that Mr Ivey had breached an implied term not to cheat. The trial judge found that while Mr Ivey was genuinely convinced that he was not cheating, he had cheated and could not therefore recover his winnings. Mr Ivey appealed, on the basis that "cheating" required dishonesty, and the trial judge had not found him to be dishonest in the *Ghosh* sense. The Supreme Court held that it was unnecessary to resolve whether Mr Ivey's conduct was dishonest, as dishonesty was not a component of "cheating". By "fixing the deck" Mr Ivey had clearly cheated, and his appeal failed.

Despite its being unnecessary to resolve the appeal, the Supreme Court in *Ivey* then went on to consider dishonesty. Hughes LJ stated that tribunals should first ascertain what the defendant genuinely believed the facts to be and then only apply the first part of the *Ghosh* test. Namely, whether the individual's conduct, given the facts as the defendant believed them to be, was dishonest by the (objective) standards of ordinary, decent people.

As *Ivey* was a civil case, and the comments around dishonesty clearly *obiter,* the question remained as to whether the *Ghosh* test was still applicable in criminal proceedings.

Facts of Barton

Mr Barton ran a high-end residential care home for the elderly ("Barton Park"). Ms Booth assisted him as the General Manager. Mr Barton pursued a series of high value predatory frauds upon childless and wealthy persons in his care with Ms Booth's assistance, and obtained approximately £4m in the process. Examples of these frauds include: convincing the victims to include him in their wills;

selling them cars at vastly inflated prices; charging care fees many times the appropriate amount; and convincing them to purchase houses, for which he would receive a kickback. It is perhaps unsurprising that the sentencing judge called it: "one of the most serious cases of abuse of trust that I suspect has ever come before the courts in this country".

The Grounds of Appeal

Both Mr Barton and Ms Booth appealed on various grounds. Of most general importance is the first ground, namely whether the judge erred in directing the jury in accordance with *Ivey* rather than *Ghosh*.

Counsel for the appellants submitted that, notwithstanding the express statement of Lord Hughes in *Ivey* [at 74] that directions based upon *Ghosh* "should no longer be given", a direction adopted in the Crown Court Compendium, Blackstones and Archbold, the trial judge had erred in directing the jury in accordance with *Ivey*. The relevant sections of the judgment in *Ivey* were *obiter* and *Ghosh* remained the binding authority.

The Decision in Barton

The Court of Appeal first considered whether it was bound to follow *Ghosh* or whether it could prefer the *obiter* comments in *Ivey*. A number of previous authorities suggesting a looser approach to precedent in the Criminal Division of the Court of Appeal were cited (see [95-96]).

The Court then considered the case of *James* [2006] EWCA Crim 14, where the Court of Appeal considered whether it was bound by a decision of the House of Lords, or a later decision of the Privy Council. In *James*, the Court concluded that the Privy Council had altered the rules of precedent in overruling the House of Lords, and the Court of Appeal was therefore bound to follow the Privy Council.

Applying *James*, the Court of Appeal in *Barton* concluded that the Supreme Court in *Ivey*, when it issued the instructions to criminal courts [*Ivey* at 74], had altered the rules of precedent, and it was not for the Court of Appeal to say whether this was beyond the Supreme Court's powers [*Barton* at 102].

The Court referred to the fact that any appeal to the Supreme Court would be a foregone conclusion, just as an appeal to the House of Lords would have been in *James* [see *Barton* at 101, 104]. No doubt the fact that a strict application of precedent would have had the result of temporarily invalidating hundreds of jury directions, also lies behind this emphasis on flexibility.

The Court of Appeal explained that this sort of modification of the rules of precedent "is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision" [*Barton* at 104, emphasis added], thus limiting the application of flexible precedent.

Having found that they were bound to follow *Ivey,* the Court rejected this ground of appeal.

Discussion

While the result of this appeal is perhaps unsurprising, the enthusiasm of the Court of Appeal in abandoning the subjective limb of the *Ghosh* test might be [see 106].

After the judgment in *Ivey* David Ormerod QC, together with Karl Laird, penned a lengthy and

detailed article for the Supreme Court Yearbook.[3] In that article, numerous issues with the judgment in *Ivey* were identified, not least of which was that, being a civil matter, the Supreme Court had not heard detailed argument as to the possible consequences for the criminal law of abolishing the second limb of the *Ghosh* test. These problems include broadening the scope of a number of criminal offences, issues with certainty and compliance with Article 7 ECHR, and changing law that had been the subject of parliamentary approval in the passing of the Fraud Act 2006.

It is perhaps surprising that the Court of Appeal Criminal Division chose not to meaningfully grapple with any of these issues, dismissing them to be dealt with on another day in three sentences at paragraph 109.

It is also slightly worrying that the reasoning of Hughes LJ in *Ivey* was endorsed wholesale by the Court of Appeal. As pointed out by Ormerod and Laird, Hughes LJ's reasoning incorporated a mischaracterisation of the *Ghosh* test, namely that "the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour" [*Ivey* at 59]. This is not quite correct, as the second limb of the *Ghosh* test does not depend on the *accused's* assessment of his own conduct, it depends on whether they knew that the *community's* assessment of their conduct would find it dishonest.

The test that replaces *Ghosh* certainly isn't without its issues. What "ordinary, decent people" find dishonest is not a readily identifiable standard, and different tribunals will come up with inconsistent answers to that question. In dropping the latter element of the *Ghosh* test, the Supreme Court might have opened up a large class of persons to convictions, to guard against the one or two acquittals that might be achieved by completely delusional but convincing defendants.

Given the various difficulties that may result from such a significant recasting of the law, it might be desirable for the Supreme Court to consider the question of dishonesty with the benefit of full argument from both sides as to the consequences for criminal law generally.

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[1] *Patterson* [2017] EWHC 2820 [at 16]

[2] *Pabon* [2018] EWCA Crim 420 [at 23]

[3] UK Supreme Court Yearbook 2018 Volume 9 pages 1 – 24

Arthur prosecutes and defends in complex and serious matters at the Crown Court. He has significant experience in white-collar crime and is currently instructed as a led junior in complex fraud and money-laundering trials. He also has experience in regulatory matters, having recently completed a secondment with the Financial Conduct Authority.

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Coronavirus: The Need for Food Safety

Dharmendra Toor

Barrister

It is understood by many that the coronavirus pandemic likely originated from a seafood market in Wuhan, China. The novel coronavirus known as Covid-19 had likely mutated and then spread rapidly inflicting countless deaths; 580,286 deaths at time of writing[1].

The investigation of its origin is vital; to not only defeat the deadly virus, but to avoid any similar future catastrophe. For this reason, the current pandemic has placed a spotlight on the need for global food regulation, particularly of Asian 'wet markets'; selling live fish, chickens and wildlife. The outbreak was first reported on 31 December 2019 with a cluster of pneumonia-like cases in Wuhan's "South China Seafood Market". It was clear, despite its name, the market also illicitly peddled wild animals for onward consumption. It is believed that the disease emerged in a bat[2], and made a leap to humans via other wild animal(s) that infected an initial small number of market stall vendors.

In mainland China and elsewhere 'wet markets' feature prominently, even in large areas such as Wuhan (with a population of more than 11 million). The situation is not novel. For decades scientists have been warning of similar outbreaks based on animal and human interaction[3]. In 2003 Sars appeared in wildlife markets in Southern China and ended 7 months later with 8,000 reported infections and 800 deaths, spread across 32 countries[4].

Domestic Approach: The Legislative Framework

With this in mind, it is important to pause and consider food safety regulation in the UK. Now more than ever there is a strong public interest to ensure that all 'Food Business Operators' (FBOs)[5], such as Food Manufacturers, Restaurants and Supermarkets, are aware of and adhere to their duties and responsibilities under food safety legislation.

Regulation 19 of The Food Safety and Hygiene (England) Regulations 2013 ("the 2013 Regulations") makes it an offence to contravene or fail to comply with "any of the specified EU provisions", set out in Schedule 2. The relevant EU food safety provisions are contained in Regulation (EC) No 178/2002 ("the Food Safety Regulation"). In particular, Article 14 (1) requires that **"Food shall not be placed on the market if it is unsafe**". Article 14(2) deems food to be unsafe if it is injurious to health or unfit for human consumption. Article 14 must be read alongside Article 24 of "the Food Information Regulation" which states that food must have a 'use by date', and that after such date **"a food shall be deemed to be unsafe".**

The Food Safety Act 1990 provides a framework for all food safety legislation. The key offences are:

- Section 7 – rendering food injurious to health by means of adding any article or substance; using any article or substance as an ingredient; abstracting any constituent; or subjecting it to any other process or treatment, with the intent that it shall be sold for human consumption.
- Section 8 – selling food not complying with food safety requirements (deemed to be unsafe within the meaning of Article 14 of the Food Safety Regulation).

It is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid commission of an offence either by himself or by any person under his control ("the due diligence defence").

Breaches of Food Safety Regulations are addressed in the Definitive Sentencing Guideline for Health and Safety Offences, with effect from February 2016. Large corporations are subject to unlimited fines; the guideline provides a range of up to £3 million in serious cases.

Recent caselaw: *R (on the application of Tesco Stores Ltd) v Birmingham Magistrates' Court* [2020] EWHC 799 (Admin)

On 6 April 2020 judgment was handed down by the Court of Appeal. The case has profound ramifications in the context of liability under food safety law.

The facts can be stated succinctly: Tesco was charged with 22 offences under Regulation 19 of the 2013 Regulations whereby they had allegedly displayed for sale items of food with an expired used by date (deemed unsafe in breach of Article 14(1) of the Food Safety Regulation). Tesco judicially reviewed a District Judge's preliminary ruling in favour of the local council of there being an "absolute/irrebuttable presumption" that food displayed for sale after the use by date is unsafe. The sole issue for the Court of Appeal was whether it is a criminal offence for a shop to offer food for sale after its labelled "use by" date.

Tesco, whilst accepting the food was placed on the market in such circumstances, sought to present evidence from a microbiological expert to support their contention that the food items were not unsafe. Thus, it was argued that the presumption was rebuttable.

Lord Justice Hickinbottom found that, subject to any due diligence offence, it is a criminal offence for a shop to offer food for sale (or otherwise place it on the market), after its labelled use by date. Thus, this decision creates an "irrebuttable presumption" that food displayed for sale after its use by date is unsafe. No evidence, expert or otherwise, can be presented to counter that. The Court found there to be no ambiguity in the legislative provisions, designed **"to afford a "high level of protection of human life and health and the protection of consumers' interests…", and the safety of consumers is considered to be "of paramount importance"** (para 54 of judgment).

The decision, combined with an awakened concern surrounding food safety in light of Covid-19, provides a salutary warning to supermarkets and the like of the need to comply with food safety law.

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[1] Information from the Centre for Systems Science and Engineering at John Hopkins University.

[2] A team of virologists at the Wuhan Institute for Virology provided research showing that the new coronaviruses' genetic makeup is 96% identical to that of a coronavirus found in bats.

[3] More than 70% of emerging infections in humans are estimated to have come from animals, particularly wild animals.

[4] Severe Acute Respiratory Syndrome (Sars) and Middle East Respiratory Syndrome (Mers) are also thought to have originated in bats.

[5] Defined in Article 3(3) of the Food Safety Regulation as "the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control".

[6] Schedule 2 to the 2013 Regulations identifies the requirement in Article 14(1) as being a "Requirement that unsafe food must not be placed on the market".

[7] Regulation (EU) No 1169/2011.

[8] Food being "unsafe" is a European food law concept, first recognised and enforced in the UK by the General Food Regulations 2004 (SI 2004 No 3279), regulation 4 of which made it a criminal offence to act contrary to article 14.

[9] Article 24 of the Food Information Regulation is known as the deeming provision.

Dharmendra (Dee) defends and prosecutes cases of seriousness beyond his call. His has experience in a broad spectrum of serious criminal cases, with a focus on financial crime, serious organised crime and confiscation proceedings. He offers a proven record of hard work, meticulous preparation and persuasive and thoughtful advocacy.

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Possible Perils for Criminal Practitioners When a Defendant Appears Subsequent to Extradition

Sally Hobson

Barrister

Extradition is a discrete legal process operating within the context of other legal, political and international considerations. It allows for a person who is accused or convicted of a criminal offence to be returned from one country to another in order to be tried, sentenced or to serve a term of imprisonment. There are some essential principles which are fundamental to extradition law. The first is that extradition is a form of international cooperation in criminal matters, based on comity. Secondly, the purpose of extradition is to return the Requested Person to the Issuing State either to stand trial or, if already convicted, to serve a sentence - it is a gate keeping mechanism not a tool to be used to determine guilt or innocence.

It goes without saying that extradition plays a very important role within the Criminal Justice System but it is an area of law that seldom rears its head for most criminal practitioners. Consequently the need to ensure that within served evidence or disclosure, the Crown has provided a copy of the extradition request may be overlooked. In many cases it is assumed simply because a defendant appears before a Crown Court and there is evidence to support allegations, the offences he/she faces form part of a valid indictment. The Crown Prosecution Service website says this about disclosure, *"If extradition is ordered, arrangements will be made for the collection of the requested person by UK officers. Practices vary between countries as to whether, at the same time as the requested person is handed over into the custody of UK escort officers, (a) the EAW/extradition bundle (b) a copy of the order for extradition and / or (c) copies of any relevant judgments are also handed over. It will normally be necessary to schedule these documents as unused material because together they will show the basis upon which the foreign jurisdiction has agreed to the accused's extradition."*

The recent, and well publicised, case of *Jack Shepherd v. R.* [2019] EWCA Crim 1062, highlights the importance of obtaining full and proper disclosure (including a copy of the extradition request) and scrutinising such disclosure to ensure that a defendant is not facing proceedings for an offence or offences not lawfully before the court.

Extradition law does not allow a country to surrender individuals from one place to another without limitation: one such limitation is 'specialty protection'. This requires the requesting state to provide an undertaking **not to try or punish a requested person for any offence committed prior to extradition, save for the offences for which he or she has specifically been extradited.**

Shepherd was extradited from Georgia having fled the UK prior to his manslaughter trial (which proceeded to conviction in his absence). Upon his return to the UK, *Shepherd* admitted failing to surrender to bail, contrary to s.6 of the Bail Act 1976 (for which he was sentenced to 6 months' imprisonment consecutive to the term passed for manslaughter). *Shepherd* appealed against conviction (in respect of both manslaughter and bail offences) when it subsequently emerged that the extradition request made to authorities in

Georgia (where *Shepherd* was living) did not explicitly request extradition for the Bail Act offence. Thus, by reason of the rule of specialty, there was no jurisdiction to deal with this offence. On appeal, the Crown argued that within correspondence between the UK and Georgia, the Crown had sought consent from Georgia to prosecute *Shepherd* under the Bail Act and Georgia had given consent. The Court of Appeal rejected that submission finding that the proceedings under the Bail Act were a nullity - the conviction for failing to surrender was quashed. There is no mention within the judgment of any argument in respect of the proportionality bar - whether, in fact, this was an offence for which Shepherd could properly be extradited.

Is this the end of the Bail Act proceedings for Shepherd? Maybe, maybe not. Sir Brian Leveson had this to say, "*It is important to underline the consequence of this finding. It is beyond argument (and is not in issue) that the appellant failed to answer to his bail both in relation to the allegation of Manslaughter (which he admitted) and in respect of the proceedings for Wounding with Intent. This conviction and sentence is quashed as a nullity but it does not necessarily mean that the appellant is free of liability for his failure to attend. By s. 151A(2) of the 2003 [Extradition] Act, he may be dealt with in the UK for an offence committed before his extradition not only in the circumstances set out in s.151A(3) discussed above but also if the condition in s. 151A(4) is satisfied namely if he has returned to the territory from which he was extradited or he has been given an opportunity to leave the United Kingdom. That will probably mean waiting not only for the conclusion of the sentence but also the termination of any licence period (if a term of his licence is that he must not leave the UK). Whether the appellant may then arguably be pursued for this egregious breach of the provisions of the Bail Act is a matter for the authorities. The alternative (if there is a specialty bail offence in the requested jurisdiction) is to commence criminal proceedings for breach of bail and include that offence in the warrant.*" [para.76].

Suppose, whilst subject to licence conditions prohibiting travel abroad without prior authority, you are under suspicion of murder in the UK and you decide, instead of hanging around waiting for the police to complete their enquiries, to flee to warmer climes in breach of license and police bail?

Back in 2016 it was widely reported in the national and international press that a 35 year old man ('*JW*'), who was on police bail in the UK for the murder in 1994 of a 6 year old child ('*R*'), had "fled the country without a passport and gone on 'holiday' to Portugal". At the time, *JW* was subject to an outstanding licence from a sentence imposed in 2009. An extradition request was sent by the UK authorities to Portugal requesting that *JW* be surrendered to the UK. The basis of that request was, 'breaching the terms of his licence'. No extradition request was made in respect of the murder - *JW* could not lawfully be extradited from Portugal for that murder because the age of criminal responsibility in Portugal is 16, thus prohibiting extradition for an offence said to have been committed by *JW* when he was 13.

In 2018, the police informed the press that no further action was being taken against *JW* in respect of the murder of *R*. In February 2020, *JW* was charged with the murder of *R*.

An interesting question here is whether the Home Office would have instigated the recall of *JW* for breaching his licence conditions and whether the CPS would have proceeded to apply for his

extradition if he had not been on bail for murder. Although the proportionality bar only applies to allegations and not serving sentences, it would be interesting to know how often and for what reasons the Home Office has taken such steps. Recent press reports in *JW's* case indicate that there will be preliminary legal argument to determine the 'extradition issue'. If the real purpose behind *JW's* extradition was because he was a suspect in a murder case, his 2016 extradition may fall foul of the specialty principle. If the indictment were to be quashed on that basis, JW would inevitably find himself in the same position as *Shepherd* - in jeopardy of facing future proceedings upon termination of his licence.

What is, then, the procedure to adopt should you discover that your lay client is facing proceedings that may fall foul of specialty protection? Once an indictment is before a court there are limited circumstances in which an accused may argue that he should not be arraigned and tried: The Indictments Act 1915, s.7 provides, "*Nothing in this Act shall prevent an indictment being open to objection if it contravenes or fails to comply with … any other enactment: ….*". It is settled law that objection may be taken to an indictment if it charges a person, who has been extradited or repatriated from abroad, with an offence that is not permitted by the relevant legislation: R. v. Central Criminal Court and Nadir, ex p. Director of Serious Fraud Office, 96 Cr.App.R. 248 at 252, DC. A motion to quash the indictment should be lodged prior to arraignment pursuant to Section 2(3) of the Administration of Justice (Miscellaneous Provisions) Act 1933 together with any application to stay the indictment on the grounds of abuse of process.

JW is represented by Ms Rebecca Keogh, Devas Keogh James, Peterborough and counsel Ms Jenni Dempster QC, and Ms Sally Hobson.

Sally is a senior criminal practitioner with extensive experience of homicide, rape and serious sexual allegations, fraud and money laundering, and large scale drug conspiracies. She is sought after for her substantial experience of difficult and serious sexual offence cases and is excellent at dealing with defendants and witnesses with mental health issues and other vulnerabilities.

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Crime Bulletin

Mary Prior Q.C.

Barrister, Queen's Counsel, Mediator, Recorder

Agreed Facts/Statements Read

***R v Drummond* (2020) EWCA Crim 267**: There is a distinction between agreed facts and evidence which is read by agreement. The reading of a statement under s9 gives it no different status than that of an account from the witness box. It can be accepted or rejected. *If evidence is agreed, reduce it to agreed facts.*

Appeals—Fresh Evidence

***R v Foy* (2020) EWCA Crim 270**: The Court of Appeal refused to admit fresh psychiatric evidence in a murder case as to whether or not the defendant had a psychotic episode when he stabbed a stranger in the street. The Court indicated that "expert shopping" was not to be permitted. The Court also provided a summary of the approach to be taken in cases of intoxication and diminished responsibility. If the defendant is in an acute state of voluntary intoxication and a psychotic episode results there is no recognised medical condition upon which to found a defence of diminished responsibility. If the intoxication is as a result of an addiction there may be a recognised medical condition which gives rise to diminished responsibility.

Assault or Battery

***DPP v Jones* (2020) EWHC 859**: The prosecution should refrain from using the term common assault and say whether an offence is battery or assault. Here leave was granted for the Crown to amend an allegation to include the words "by beating" where J had spat and the spittle had landed. There had been three previous occasions when the case had been listed and no amendment made. The amendment was made after the six month time limit had expired. The Divisional Court indicated that the amendment was lawful. Section 127 Magistrates Courts Act 1980 permits amendment even to the extent of alleging a different offence *provided that the misdoing is the same as in the original offence and it is in the interests of justice to amend.* See Scunthorpe Justices ex parte McPhee and Gallagher (1998) EWHC 228

Autism

***R v Carter* (2020) EWCA Crim 105**: The defendant was tried and convicted in his absence for grievous bodily harm with intent. He had pleaded guilty to section 20. The defendant had autism. He was capable of forming the necessary intent. It was not an error to try him in his absence.

***R v Copeland* (2020) UKSC8**: The defendant had autism. He bought chemicals to make an explosive device in order he said to educate himself/experiment as to the principles. He was charged under s4 Explosive Substances Act 1883. The Supreme Court allowed the appeal by a majority. If the prosecution make out the first limb the defendant must identify the specific object he made the explosive device for. The burden lies on him. The Prosecution may then seek to prove that this was not his object or not his sole object or show that this involved such an obvious risk to others to give rise to the inference that the defendant's object was not wholly lawful. Experimentation or self-education could be objects for the purposes of section 4(4).

Bad Character

***R v Murphy* (2020) EWCA Crim 137**: D attacked C who had befriended him on his release from a 28 year sentence for sex offences. C made an immediate complaint supported by telephone evidence. D alleged that S, C's boyfriend at the time caused the injuries that the complainant suffered. A defence witness, M, said that he had seen C kiss and cuddle the defendant and C had said that she was not in a relationship. M had convictions for sex offences. The Crown sought to adduce M's convictions to demonstrate that two sex offenders (D and M) had put their heads together to lie. The Court indicated that the threshold under s100(1)(b) was high but that the evidence was admissible.

***Umo v Benjamine* (2020) EWCA Crim 284**: Evidence that

the complainant had made a false complaint in the past should have been admitted.

Bladed Article

***R v Szewczyk* (2019) EWCA Crim 1811**: Defendant was in possession of two knives, one in his waistband and one in a carrier bag. He had been seen by two witnesses to brandish them in a threatening manner. The defendant's case was that he had removed them from a man who was attacking him and that he was disposing of them. Held, s139 does not require any purpose for possession of the knives. There is no obligation that they are offensive per se.

Community Orders

LASPO ACT 2012 Commencement Order 14 Order 2020 SI2020/478 Brings into force Article 2 from 19th May 2020 which inserts section 212A into the Criminal Justice Act 2003. This permits alcohol abstinence and monitoring orders to be part of a community order or suspended sentence order. This order which can be for up to 120 days either prohibits alcohol entirely or limits alcohol intake and the intake will be monitored.

Contempt

***R v Warner* (2020) EWCA Crim 499:** W was asked in evidence to disclose the details of the outcome of a judicial committee of the Congregation of Jehovah Witnesses. He refused to do so. He was held in contempt of court and fined. The Court held that there had been serious procedural unfairness. The Judge did not explain the fact that privilege had been waived and had refused W's request to obtain legal advice before disclosing the information.

Conspiracy

***R v Horne* (2020) EWCA Crim 487**: Two defendants were charged with conspiracy to pervert the course of justice. Only two defendants were in the conspiracy. The first defendant pleaded guilty and the Crown sought to adduce his conviction under s74 PACE 1984 in the second defendant's trial. He was convicted and appealed. The appeal was allowed. Section 74 should be sparingly used as it cannot be tested in the trial of the subsequent defendant. The issue to determine is whether the admission of the guilty plea effectively closes off the defence for the defendant on trial. See also *Shirt v Shirt* (2018) 2486 EWCA Crim.

Dangerous Driving

***R v A* (2020) EWCA Crim 407**: At night A pulled over onto the hard shoulder of the motorway as A was fed up with her three passengers arguing. A lorry veered away and collided with the car killing A's passenger. It was held that A could be guilty of dangerous driving.

Disclosure

***R v Thomas* (2019) EWCA Crim 2491**: The prosecution were not permitted to use documents in order to cross-examine the defendant which they have not previously provided to the defence either as unused material or served evidence. The proper procedure is to provide the evidence before embarking on the questioning.

Evidence

***R v Nguyen* (2020) EWCA Crim 140**: TT gave evidence which contrasted from his police interview in which he inculpated Nguyen. No hearsay application was made to adduce the contents of the interview as hearsay and as evidence against N. The trial Judge ruled that the interview was admissible under s119 CJA 2003. Held- a co -defendant's interview should not be routinely admissible against other defendants in the same great majority of cases. The prosecution should have made the application to adduce this. A defendant who blames another defendant in interview will rarely attract the admission of bad character evidence under s101(1)(g).

Extended Sentences

***R v Baker, Richards* (2020) EWCA Crim 176**: Extended sentences imposed for robbery on B who was already subject to a sentence of IPP and had been recalled on it and R who was already subject to a life sentence and had been recalled on that. It was argued that it was not appropriate to impose an extended sentence where assessment as to future risk was to be undertaken by the parole board in any event. The Court held that was an irrelevant consideration. The ruling in R v Smith (2011) UKSC 37 is to be followed.

Firearms

***Jenkins v DPP* (2020) EWHC 1307:** The defendant was

convicted of possession of a stun gun. The defence case was that the defendant was driving a car. The passenger got in and put a stun gun in the glove box of the car. The Court held that the offence under section 5(1)(b) Firearms Act 1968 was a deliberately draconian provision and was a strict liability offence. There was no need for the Crown to prove that the defendant had made a conscious decision to possess the item. What was required was words or action (even if only for a very short period) revealing power or control. The Crown must prove that the accused was knowingly in control of something he was assenting to be in control of.

***R v Bartell* (2020) EWCA Crim 625**: CACD considered an application by the Solicitor General that a sentence of 30 months imprisonment was unduly lenient for possession of firearms. The defendant had converted four blank firing pistols to firearms. His guilty plea was on the basis that he converted them as a hobby and that he had no criminal intent. The Court increased the sentence to 5 years imprisonment. They accepted that the sentence is harsh, particularly in circumstances where the defendant pleads guilty. Firearms are lethal. Had there been a burglary at the defendant's home the firearms would have had a ready purchaser. It was unfortunate that the Judge had not been referred to *R v Nancarrow* (2019) EWCA Crim 470.

Forensic Science

The Forensic Science Regulator has issued new guidance on Non-Expert Technical Statements and Expert Report Guidance. https://www.gov.uk/government/collections/fsr-legal-guidance

Fraud

***R v Smith* (2020) EWCA Crim 38:** An article created later to disguise or mask a fraud can be an article for use in or in connection with a fraud.

***R v Varley and others* (2019) EWCA Crim 1074:** There is no reason why a defence of innocent agency could not apply to section 2 of the Fraud Act 2006. Parliament did not intend to disapply it in this area.

Identification

***R v Phillips and Phillips* (2020) EWCA Crim 269**: The defendants were initially identified by a member of staff showing the two main witnesses a photograph of the defendant on social media. Although this weakened any subsequent identification it was not fatal. Directions would be given to the jury about it. The evidence of the VIPER parades was still admissible.

Intermediaries

***R v Thomas* (2020) EWCA Crim 117**: Intermediaries are not appointed on a "just in case" basis.

***R (TI) v Bromley Youth Court* (2020) EWHC Admin 1204:** A 15 year old child sought judicial review of the decision of a District Judge in the Youth Court to refuse to grant him an intermediary throughout his trial for criminal damage and breach of a Criminal Behaviour Order. He was assessed as functioning within the lowest 2% of the population. The District Judge's reasons for refusal were:

- The defendant had had a trial before without an intermediary.
- The DJ and the advocates were experienced in dealing with youths.
- The DJ and the advocates were experienced in dealing with vulnerable witnesses.
- The particular trial meant that the defendant was not able to contribute much to the proceedings.

Held: The conviction was quashed. Any defendant must have a fair trial. A fair trial means being able to effectively participate in the trial. The factors set out by the District Judge were not relevant to the fact that it is the defendant who needs to follow the proceedings. The appointment of an intermediary is rare and it does not follow that there is a high hurdle to overcome to grant an intermediary throughout so that the defendant can effectively participate in the trial process.

Knives

Knife Crime Prevention Orders Rules 2020 SI 2020/210 Into force in the Magistrates Court. Pilot scheme for 16 months from April 2020. See https://www.gov.uk/government/news/introduction-of-knife-crime-prevention-orders

Loss of Control

***R v Islam* (2019) EWCA Crim 2419:** There is no requirement for a frenzied attack before loss of control can be left to the jury.

Manslaughter

***R v Gordon* (2020) EWCA Crim 360:** The victim started a fight. B stabbed the victim five times. G joined in kicking and stamping the victim who was on top of B. G was convicted of manslaughter. B was convicted of murder. B was sentenced to 20 years. G was sentenced to 3 years and 6 months. This was lenient but not unduly so.

Rape—Section 41

***R v Kirkhan* (2020) EWCA Crim 197**: K (aged 40) was convicted of the rape of C aged 17. He had assisted C's boyfriend to put her to bed after she was drunk at a party. He returned to the bedroom and raped her assuming she was asleep. In fact she was awake but froze. The defence was consent. The defence made an application under section 41 to adduce the following:

- That the complainant had a sexual relationship with her boyfriend.
- That she was flirtatious (to others) at the party.

The reasons put forward were that it might explain reddening to the complainant and to avoid the risk that the jury felt that she was not sexually experienced. The application was refused. A further application was made by the Crown to adduce that the defendant touched the complainant's leg 12 months before on a sofa. The defendant denied it. This was admitted. The appeal was dismissed. This type of s 41 application should not be made.

Rape—Intoxication

***R v Mohamadi* (2020) EWCA Crim 327**: The defendant was 16 years old. He was convicted of rape. He said that he was very drunk when he and his three co-accused went to a flat with the victim. He said he fell asleep. There should have been a Sheehan direction. The mere fact that a defendant is drunk does not assist. A drunken intent is still an intent. The jury must ask if they are sure that the defendant had the necessary intent.

Release of Prisoners

Alteration of Relevant Proportion of Sentence Order (2020) SI 2020/158: Those prisoners aged 18 years or over serving a sentence a sentence of 7 years or more imprisonment for a violent or sexual offence will be released at the 2/3 stage. This came into force on 1st April 2020.

Criminal Justice Act 2003 Early Release on Licence Order 2020: Home Detention Curfew can be extended from 135 days to 180 days. In force 4th August 2020.

Sexual Activity With a Child

***R v Manning* (2020) EWCA Crim 592**. This case was referred to the Court as being an unduly lenient sentence. The defendant was aged 49 and pleaded guilty to three counts of sexual activity with a 15 years old child. He was sentenced to 12 months imprisonment suspended for 2 years with substantial community orders to run along side. The Court indicated that the starting point for the offences was 30 months imprisonment and that with credit for his plea this reduced the sentence to 2 years imprisonment. To that extent the application succeeded. It was not wrong to suspend the sentence. The current conditions in prison represented a factor which the Court can take account of in deciding to suspend a sentence. A sentence of imprisonment is a heavier burden than it was. Bear in mind that prisoners are currently confined to their cells for 23 hours per day. They are unable to have visits. Courts have previously considered conditions within prisons in the cases of R v Bibi (1980) 1 WLR 1193, R v Kefford (2002) EWCA Crim 519 and R v Mills (2002) EWCA Crim 26.

Sexual Offences Prevention Order

***R v Inches* (2020) EWCA Crim 373:** The defendant had been sentenced in 2009 following a guilty plea for possession of IIOC to 12 months imprisonment and made subject of a SOPO. The terms included a prohibition on having a telephone with a camera and on having a computer with internet access. The defendant was now aged 70 years. This should not be an appeal. The applicant should have applied to vary the SOPO when his circumstances changed. The applicant would need to provide evidence. The Court would need to be satisfied that the order was no longer necessary to protect the public form serious harm from him.

Slavery

***R v DS* (2020) EWCA Crim 285**: The Judge stayed proceedings as an abuse of process on the basis that the defendant was a homeless child recruited into county lines drug offences and therefore a victim of modern day slavery. The stay was overturned. Section 45 had

changed the landscape in these cases. Abuse of process would be inappropriate in such cases. Decisions on exploitation are now placed before the jury and the jury makes the determinations.

Terrorism

***Pwr v DPP* (2020) EWHC 798 (Admin):** Section 13 (1) Terrorism Act 2000 did not require mens rea. The prosecution did not need to prove that the flag of a proscribed organisation nor its capacity to arouse suspicion. There were sound reasons why the offence was one of strict liability. The law did restrict freedom of expression but the Court rejected the contention that the restriction was a disproportionate interference with Article 10. The defendant could show support for the people of the Turkish state of Arfin without carrying a flag.

Theft

***R v Barton and R v Booth* (2020) EWCA Crim 575**: The test for dishonesty is:

- What the defendant's actual state of knowledge or belief as to the facts and
- Was his conduct dishonest by the standards of ordinary decent people.

Witness Refusing to Continue

***R v RT and Stichfield* (2020) EWCA Crim 155**: RT and S were convicted of conspiracy to rob and received sentences of 14 and 19 years imprisonment respectively. RT's girlfriend gave evidence for the Crown. She had ADHD. After lengthy cross-examination by S's Counsel there was a 2 hour break. The girlfriend refused to return to the witness box. Cross-examination had not complied with the rules for questioning of a vulnerable witness. The appeal was dismissed. The Court reiterated the importance of complying with best practice for questioning of vulnerable witnesses. The Court reminded us of the power to limit cross-examination under Crim PD 3E-4.

Victims Right to Review

***R (on the application of FNM) V DPP* (2020) EWHC 870 (Admin):** C made an allegation that she was raped when aged 15 in 2017 and when vulnerable. The CPS wrote to the complainant saying that they were giving her an opportunity to make representations by a certain date and then failed to do so. Held that there is no positive duty on the CPS for the DPP to invite representations from complainants nor can the review process be delayed for complainants to obtain legal advice. Here, CPS had led the complainant to understand that the decision would be delayed until she had had time to make representations and in those circumstances the decision was overturned.

Victim Surcharge

***R v Abbott* (2020) EWCA Crim 516**: If the Court deals with more than one offence and the disposals are the same the surcharge is imposed on the total sentence rather than the highest individual sentence. If the Court imposes a sentence and activates a suspended sentence or a breach of community order there is no need to impose a new surcharge on the sentences imposed for the second occasion.

Mary prosecutes and defends in equal measure and has a reputation for being a powerful, persuasive advocate who gets results. She has particular expertise in dealing with vulnerable witnesses and defendants, and serious sexual offences. Mary runs the RASSO training programme for the Midland Circuit and is often instructed in complex, historic sexual offences.

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36 CRIME

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