36 CRIME

36 Crime Criminal Updates

Winter 2020-2021

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Welcome to the 36 Crime Criminal Updates: Winter 2020

Christopher Donnellan Q.C.

Head of 36 Crime

Happy New Year.

2021 will, in the end, be better than 2020. There is light at the end of the tunnel. Vaccines are being rolled out to protect us from the coronavirus. Crown Courts are now kitted out with screens to separate the jurors, and in some courts, to separate Counsel. More multi-handed cases are being tried. More courts are sitting. More sitting days are being funded. Slow progress. The backlog is still rising.

Developments in Criminal Justice have barely taken a pause for the pandemic. This Winter Edition of the Newsletter brings you commentary on some of the most significant. The Sentencing Code came into force on 1st December 2020 and applies to all convicted from that date onwards. **Sebastian Walker,** while working with the Law Commission, was the lead lawyer on the Sentencing Code project. He is currently the 36 Crime pupil. In his article he provides us with an overview of the Code, and explains how it has been drafted to be the single point of contact for sentencing provisions. He is also a co-author of the new specialist sentencing text for practitioners, ***Sentencing Principles, Procedure and Practice 2021***. The choice for criminals of mobile devices for secure communication with end-to-end encryption has been an Encrochat enabled device. No longer. The interception of the material on the devices by European law enforcement agencies has been of considerable interest in the UK. **Arthur Kendrick** reflects on the High Court decision in *R (on the application of C) v DPP* [2020] EWHC 2967 (Admin), and the admissibility of evidence obtained from the devices. **Nadeem Holland** has kept a close eye on the constant flow of cases through the Court of Appeal thrown up by the application of the Proceeds of Crime legislation. He provides an excellent summary of recent decisions. We are grateful, as ever, to **Mary Prior Q.C.** for her comprehensive digest of decisions of practical importance in criminal law.

Although there is much to forget about 2020, the same cannot be said for the Women in Law Awards 2020. Congratulations to **Mary Prior Q.C.** Woman of the Year.

At the same awards we were also proud to have **Catherine Rose** shortlisted for "Rising Star – Barrister/ Advocate of the Year" and **Michelle Simpson** shortlisted as "Unsung hero".

I am pleased to announce that **Diana Wilson** has joined **36 Crime**. Welcome!

And finally, we are delighted and proud to announce Her Majesty The Queen has approved the appointment of **Simon Ash** as one of her new Queen's Counsel.

An Introduction to the New Sentencing Code

Sebastian Walker

Pupil Barrister

With effect from 1 December 2020,[1] the Sentencing Act 2020 ('the Act') repealed and replaced most of the existing primary legislation on sentencing. The purpose of the Act is to consolidate the law of sentencing, a body of law that has become increasingly disparate and complex, into a single statute. In doing so, the Act consolidates provisions from over 70 different Acts of Parliament.

Parts 2 to 13 of the Act make up a code called "the Sentencing Code". By virtue of sections 2 and 416 of the Act, the Sentencing Code applies to all offences of which an offender was convicted on or after 1 December 2020, no matter when the offence was committed. In relation to any offence for which the offender was convicted before that date, the old law continues to apply.

What is the Sentencing Code?

The Sentencing Code consolidates the vast majority of the primary legislation relating to sentencing procedure: the law relating to the procedure to be followed from conviction to the disposal of the case and the disposals available to the court. The Code has been structured in a manner which follows the sentencing process and its drafting was subject to detailed consultation.

It is comprised principally of four Groups of Parts:

- *Powers exercisable before sentencing* – Part 2 (deferment, committal and remission)
- *Principles governing sentencing* – Parts 3 (procedure) and 4 (exercise of discretion)
- *Disposals* – Parts 5 (discharges), 6 (referral and reparation orders), 7 (financial orders), 8 (driving disqualification), 9 (community orders), 10 (custodial sentences), 11 (behaviour orders)
- *General provisions* – Parts 12 (parental payment orders, review of sentence) and 13 (interpretation)

The Act does not contain the maximum sentences for individual offences – those remain in the offence creating provisions. Nor does it include a number of sentencing-adjacent topics such as confiscation (which remains in the Proceeds of Crime Act 2002), the disposals available when a defendant has been found unfit to plead (which remain in the Criminal Procedure (Insanity) Act 1964), or the provisions relating to the release and recall of custodial sentences (which can be found in the Crime (Sentences) Act 1997 and the Criminal Justice Act 2003).

Further, whilst it does contain the provisions relating to all the principal disposals available to a court – such as the various custodial sentences and community penalties a court may impose – there are inevitably disposals which are not included. Where the inclusion of a specific disposal or penalty would have further

complicated the law by disrupting the operation of an Act that comprised a coherent code or would have given rise to a risk of future legislative disparity that could not be justified it has not been included in the Sentencing Code. The most notable examples of these are the provisions relating to the sentencing of driving offences in the Road Traffic Offenders Act 1988 – which will continue to be found in that Act – and other provisions relating to certain secondary disposals such as serious crime prevention orders or company director disqualification orders.

However, whenever such a provision has not been included in the Sentencing Code a cross-reference to it has been included. Here the Sentencing Code uses a novel legislative device called "signposts": non-operative provisions which alert readers to relevant provisions in other legislation so as to ensure that users are aware of the alternative sentencing powers available.

How does the Sentencing Code change the law?

The Sentencing Code is a consolidation Act and therefore does not itself make any changes to the effect of the law. Unlike the Criminal Justice Act 2003, this is not a sea change. Practitioners will be familiar with the effect of its provisions if not their structure. If there is a previous authority applicable to a provision (such as *Attorney General's Reference (No.27 of 2013) (R. v Burinskas)*[2] on the approach to sentencing offenders under the "dangerousness provisions") that authority will continue to apply to the new version of the legislation subject to any amendment.[3] Practitioner texts such as *Archbold* which have been re-drafted for the Code (see Chapter 5ASC) will be helpful in clarifying the continuing effect of the case law.

Practitioners will, however, need to acquaint themselves with the new structure of the law. The Sentencing Code is not simply a reshuffling exercise. Provisions have not merely been cut and pasted into the Code and given new section numbers. They have been significantly re-drafted in order to be easier to understand and apply. A single section in the old law may now be split over a number of sections in the Sentencing Code, or vice-versa. Luckily a Table of Origins (explaining where a provision in the Sentencing Code has come from) and a Table of Destinations (explaining where a provision in the old law has gone) have been produced. Reference to both will be invaluable.

Further, whilst the Code is a consolidation it does give effect to the amendments to the law made by the Sentencing (Pre-Consolidation Amendments) Act 2020. These amendments are principally technical and minor changes that are desirable in connection with the consolidation of the law.

The notable exception is the implementation of the Law Commission's proposed "clean sweep"[4] which removes the need to make reference to historic sentencing legislation by applying the modern law to all cases, except for a few limited exceptions necessary to protect offender's human rights.[5] The effect of this is that the Sentencing Code applies to any conviction on or after 1 December 2020, no matter when the offence was committed. Where an exception has been made to the clean sweep, such that the effect of the law differs depending on the date on which the offence was committed, that will be clear in the relevant provision in the Sentencing Code itself. There is no need to make reference to separate historic

legislation or to transitional provisions in secondary legislation. The approach taken to exceptions has been a defensive one; an exception has been made wherever it would be possible that applying the modern law would breach Article 7 of the ECHR. Practitioners can therefore be confident they can apply the Sentencing Code without needing to consider Article 7 separately.

Who does it apply to?

The Sentencing Code applies to all offences of which an offender was convicted on or after 1 December 2020. Where an offender has been convicted of an offence before that date, the old law (i.e. the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003) will continue to apply, and has been saved for that purpose. There will therefore, for at least a few months, be a need to make reference to both sets of laws: an offender may be being sentenced for offences of which they were convicted before and after that date, or some offenders may have been convicted before that date and some after.

For a while longer the issue will continue to arise in relation to breaches of pre-existing orders. Wherever a conviction for an offence pre-dates 1 December 2020 and the order was therefore imposed under the old law, any proceedings for breach, including re-sentencing, are to be conducted under the law as it applied prior to the introduction of the Sentencing Code. If an offender is convicted of a new offence on 1 December 2020 in breach of an existing community order the new conviction is to be sentenced under the Sentencing Code and the breach of the community order is to be dealt with under the Criminal Justice Act 2003. Practitioners will therefore want to hang onto their 2021 copies of *Archbold* and *Blackstone's* for a few years yet.

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[1] Sentencing Act 2020 (Commencement No. 1) Regulations 2020 (SI 2020/1236).

[2] [2014] EWCA Crim 334; [2014] 2 Cr. App. R. (S.) 45.

[3] *Farrell v Alexander* [1977] A.C. 59, HL.

[4] See, section 1 of the Sentencing (Pre-Consolidation Amendments) Act 2020.

[5] These being where the offender would be subject to a greater penalty than that available at the time of the offence, or subject to a minimum or mandatory sentence that did not apply at the time of the offence.

Sebastian is the current first six pupil at 36 Crime. Prior to coming to the bar he worked for four years at the Law Commission and the Attorney General's Office. At the Law Commission Sebastian was the lead lawyer on the Law Commission's Sentencing Code project. Sebastian is also the author of a number of practitioner-texts and journal articles, and his academic work has previously been cited by the Court of Appeal (Criminal Division).

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The Admissibility of EncroChat Evidence

Arthur Kendrick

Barrister

Case Note: R (on the application of C) v DPP [2020] EWHC 2967 (Admin)

Summary

In this case the High Court declined to declare that EncroChat evidence provided to the UK authorities had been unlawfully obtained. However, this judgment only applies to the validity of the underlying European Investigation Order. The High Court has explicitly left the door open for defendants to argue in the Crown Court that Encrochat evidence should be excluded pursuant to s78 PACE.

What is EncroChat?

EncroChat is an end-to-end encrypted communications system that relies on the use of specially adapted devices to "ensure" privacy of messaging sent between users. It is believed by the NCA that these devices are used "exclusively by criminals engaged in serious organised crime" [3].

The French/Dutch Investigation

In early 2020, French and Dutch law enforcement agencies formed a Joint Investigation Team ("JIT") to investigate the EncroChat system. As a consequence of the UK's imminent departure from the EU, UK investigators were unable to join the JIT.

The JIT developed the capability to obtain data from EncroChat devices, which involved implanting a piece of malware onto EncroChat phones via an update server that had been located in France. That malware would first extract historic data from infected devices ("Stage 1"), and thereafter continue to transmit messages to French/Dutch law enforcement ("Stage 2"). The NCA/DPP decided to obtain this data using an European Investigation Order ("EIO").

The Law

The procedure and requirements for making an EIO are contained in the Criminal Justice (European Investigation Order) Regulations 2017. Of most relevance to this case is Regulation 7(1), which provides that an EIO may be made:

> "if it appears to a designated public prosecutor… that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and… the offence in question … is being investigated"

The Application

The claimant (C) was a defendant in a case where the evidence against C was based significantly on EncroChat messaging. The proceedings before the High Court were an application for permission to judicially review the lawfulness of the EIO.

The EIO requested access to "data obtained by the French authorities in respect of all EncroChat devices identified as located in the UK". The grounds for the request were that users of EncroChat (approximately 9,000 in the UK) were engaged in serious and organised crime and that access to the data will provide "investigative opportunities" relating to the users of EncroChat devices and "to prosecute offences under a range of legislation" (Misuse of Drugs Act 1971, Proceeds of Crime Act 2002, Firearms Act 1968, Customs and Excise Management Act 1979).

The first ground advanced by the claimant was that the statutory criteria for issuing an EIO had not been met. The claimant argued that the prosecutor did not know about, nor did they have reasonable grounds for suspecting, the offence he was now alleged to have committed. At the time the request was made, the circumstances of the allegations he faced were entirely unknown to law enforcement.

The EIO did not refer specifically to any suspected offence or offences by particular persons. It was argued that the Regulations required a specific suspected offence or set of facts justifying suspicion, and the lack thereof rendered the EIO unlawful.[1]

The Judgment

The Court rejected that argument, stating that the purpose of an investigation is sometimes to determine whether an offence has been committed at all [53]. The Court set out four reasons:

1. There can be an investigation into an offence even if it turns out that no offence has been committed, so it does not need to be established that the investigator knew about the offence [54].
2. No significance attaches to use of the words "an offence" or "the offence" [55].
3. It is not necessary at the investigation stage to set out who is suspected of having committed the offence, that may well be the purpose of the investigation [56].
4. A broad interpretation of the Regulations is appropriate to give effect to their purpose [57].

Discussion

It is perhaps unsurprising that the High Court refused to make a finding that would have called into question the admissibility of EncroChat evidence generally, but the Court's reasoning may be open to challenge. In reaching its decision, the Court considered that the EIO when "read fairly and as a whole" did set out certain offences which it was reasonably suspected had been committed [59]. However, as noted above, the EIO alleges serious and organised crime followed by a bare assertion that it is "reasonably expected"

that this will include: almost all drugs offences, almost all money laundering offences, almost all firearms offences and a broad range of offences committed by bringing prohibited items into the UK. A less generous reading of the EIO is that it does little more than state the rather obvious fact that serious crime in general is occurring in the UK.

Turning to the Court's reasoning at paragraphs 53, 54 and 56. While it is undoubtedly true that an investigator may investigate an offence without *knowing* that an offence has been committed, it is submitted that in order to be conducting an investigation (rather than musing on the nature of crime in general), the investigator must be acting on knowledge of some facts or circumstances that suggest a particular offence (or range of similar offences) has been committed.

It is also true that an investigator may have grounds to suspect the commission of an offence, without knowing who might have committed it.

However, the difficulty with the High Court's reasoning is that the concept of "investigation" relied on is so broad as to cover the situation where the investigator does not have any information about an alleged offence at all, neither what the offence might be nor who committed it (beyond a very general understanding that serious crime is happening in their country).

It is submitted that this interpretation is so wide as to negate the safeguard in Regulation 7(1) limiting the exercise of investigatory powers to situations where there are grounds for suspecting an offence.

It will be interesting to see what is made of this reasoning in the future.

For ongoing criminal cases involving EncroChat evidence, the upshot of the above is that collateral challenge to the underlying EIO is unlikely to be successful for now. However, this judgment does not preclude other challenges to EncroChat evidence. Indeed, the Court specified that the claimant had an adequate alternative remedy to judicial review, namely the discretion to exclude evidence pursuant to s78 PACE.

**Update: Since the time of writing, arguments relating to EncroChat evidence have been considered by Mr Justice Dove at Liverpool Crown Court following a 14 day preparatory hearing. Mr Justice Dove's decision is being appealed and is due to be considered by the Court of Appeal later this month.*

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[1] The second ground advanced by the claimant was found to add "nothing of substance" [45], so is not dealt with in this article.

Arthur accepts instructions both prosecuting (grade 2) and defending. He joined The 36 Group having completed an 18-month pupillage at 25 Bedford Row, where he gained extensive experience defending in a wide range of criminal proceedings including: violence, public order, drugs, financial crime, driving and weapons offences. He is known for his attention to detail, and has an excellent record defending cases involving difficult questions of law.

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POCA Update

Nadeem Holland

Barrister

Notwithstanding the impact of the Covid-19 pandemic, 2020 has seen the Court of Appeal deal with a number of cases arising from the making of confiscation orders. Some which may be of interest are summarised below:

R. v James Newhall

[2020] EWCA Crim 224

This case involved the importation of 10kg of class A drugs. The appellant was linked with the onward supply of 1kg. At the Crown Court, the prosecution argued for a benefit figure based on the street value of 10kg. The defendant argued for the benefit figure to be calculated on the basis of the wholesale value of 1kg. The Crown Court judge took a different course and determined the benefit figure on the basis of the street value of 1kg. There was no evidence of the defendant being involved in supplying drugs to users. The Court of Appeal said the benefit figure ought to have been calculated with reference to the wholesale value of 1kg.

R. v William Godley

[2020] EWCA Crim 413

A property in Portugal had been purchased with tainted gifts.

The gifts were named on the schedule of assets which formed part of the confiscation order. The property in Portugal was not.

The prosecution obtained a certificate under Reg.11 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 requiring the relevant Portuguese authority to enforce the confiscation order against the property in Portugal.

The applicant appealed against the granting of the certificate. The applicant's case was that as the property in Portugal was not named on the schedule of assets in the confiscation order, the certificate ought not to have been granted. The Court of Appeal dismissed the application. In doing so they referred to the case of *Moss* [2019] EWCA Crim 501 which clarifies that enforcement can be made against assets up to the value of the order even if they are not named in the schedule.

R. v Ashok Thakor

[2020] EWCA Crim 541

The appellant challenged a finding that £52,000 held in his wife's bank account was a tainted gift. The money had been transferred into his wife's account from an account held jointly by the defendant and his

wife. The appellant relied on his wife assuming control of the funds. The Court of Appeal found that the funds constituted a tainted gift. The Court went on to find that the Crown Court judge had erred by applying a 50% reduction to the £52,000 in the interests of "*proportionality*".

Dines v DPP

[2020] EWCA Crim 552

The appellants had entered into a form of plea bargain in Italy known as a "*patteggiamento*". The Italian courts had then imposed confiscation orders. The appellants sought to overturn the decision of an English Crown Court to treat the Italian confiscation orders as registered and enforceable in the UK. The appellants argued that a "*patteggiamento*" was not equivalent to a conviction in the law of England and Wales. The Court of Appeal demurred. A "*patteggiamento*" includes an admission of guilt. The procedural requirements and penalties associated with a "*patteggiamento*" are consistent with it being classed as a conviction for these purposes.

R. (on the application of Haringey LBC) v Roth

[2020] EWCA Crim 967

In 2007, the appellant obtained planning permission to convert a property into three flats. He proceeded to convert the property into twelve flats which he then rented out. In 2012, the Local Authority issued an enforcement notice requiring the defendant to stop renting the flats. In 2017, an enforcement officer visited the premises and discovered that the twelve flats were still being rented. The appellant was successfully prosecuted for breaching an enforcement notice. The sentencing judge imposed a confiscation order of just over £528,000. This reflected the gross rental income of the properties in the period since the enforcement notice was issued. The appellant advanced three grounds of appeal: (i) that the charge referred to single day and not the entire period since the issuing of the notice, (ii) that there was no causal link between the receipt of rents and the issuing of the notice, and, (iii) that the order should reflect net profit as opposed to gross profit. The Court of Appeal found against the appellant on all three grounds.

R. v Graham Blackledge

[2020] EWCA Crim 1108

The appellant had agreed to the making of a confiscation order with an available amount of approximately £15,500. The vast bulk of that figure was said to be made up of hidden assets. He had been incorrectly advised that he could apply to vary the order if he were subsequently able to produce evidence of the funds having been dissipated. When imposing the order, the judge referred to a possible future variation. There is in fact no mechanism by which the Crown Court can vary a finding that a defendant has hidden assets. A report was subsequently obtained from a forensic accountant. That report provided compelling evidence that the appellant had dissipated the relevant funds and not hidden them. In the light of the error of law at the Crown Court, the Court of Appeal allowed the appeal.

R. v Andrewes (Jon)

[2020] EWCA Crim 1055

The appellant had made dishonest representations to obtain positions of employment. He was convicted of obtaining a pecuniary advantage by deception and fraud by false representation. A confiscation order was made in the sum of the net pay he received in the positions of employment. The Court of Appeal found that the confiscation order was disproportionate and quashed it.

Islington LBC v Bajaj

[2020] EWCA Crim 1111

The respondent was a landlord who had operated an overcrowded house of multiple occupancy. Twenty people were living in a house suitable for eight. The appellant Local Authority sought a confiscation order with a benefit figure equivalent to the cost of housing the twelve additional occupants of the property. The Court of Appeal declined to make such an order. The appropriate figure was the rental income. The Court warned Local Authorities not to proceed on this erroneous basis when calculating benefit figures in similar cases.

R. v Westbrook (Caron); R. v Richardson (Martin)

[2020] EWCA Crim 1243

In the absence of any prejudice to the appellants, procedural and technical errors in the making of confiscation orders did not render those orders a nullity.

Mirchandani v Lord Chancellor

[2020] EWCA Civ 1260

A private prosecutor is entitled to recover from central funds the costs incurred in enforcing a confiscation order.

R. v Bevan (Jeffrey Carlton)

[2020] EWCA Crim 1345

The Court of Appeal held that the sentencing judge had erred in ruling that the defendant's wife should be deprived of her full share of the marital home and other assets held in her name. The Crown had not asserted that the property in question was made up of tainted gifts. As such, the defendant's wife was entitled to her property.

R. v Munir (Mohammed Zia)

[2020] EWCA Crim 1549

Storing drugs for another defendant did not amount to a proprietary interest for the purposes of confiscation proceedings.

Nadeem's practice focuses on cases of financial wrongdoing, asset recovery and serious organised crime. Nadeem is highly sought after by both defence solicitors and prosecution agencies. Nadeem is ranked as a leading junior in the 2020 Edition of the Legal 500.

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Crime Bulletin

Mary Prior QC

Barrister

ABUSE OF PROCESS

(1) FRESH EVIDENCE – SECOND SET OF PROCEEDINGS ARISING OUT OF THE SAME INCIDENT

R v Wangige [2020} EWCA Crim 1319

W when driving a car knocked a pedestrian down in a 30 mph speed limit in 2017. He pleaded guilty to failing to stop and report in 2017. Examination of the CCTV at the time indicated that W was travelling at 30mph. After the inquest the CPS obtained an expert report which indicated that W was travelling at 46 mph. W was charged with causing death by dangerous driving in July 2019. The Crown Court Judge rejected a submission that the proceedings should be stayed as an abuse of process on the basis that the charges of failing to stop and report referred to conduct after the incident and the dangerous driving referred to conduct before the incident. The Judge also ruled that if she was wrong about that then the new expert report amounted to fresh evidence. W then pleaded guilty and appealed.

The CACD quashed the conviction. The offences arose out of the same incident. It was unfair and oppressive for W to face a second conviction for the same incident. The prosecution cannot be put at an advantage by reinvestigating offences because of their own failure to properly investigate in the first place. The fresh evidence could reasonably have been available at the first trial. No-one should be punished twice for events which are encapsulated in the same set of facts. Davis LJ said "If this is a right approach, the implications are potentially disconcerting. One, no doubt simplistic, example was put in argument. Suppose an incident of domestic violence where a victim with a painfully bruised jaw is taken to hospital. A radiographer examining the X-rays erroneously concludes there is bruising but no fracture. The assailant is speedily charged with common assault, pleads guilty and is sentenced. If the victim thereafter complains of ongoing pain and further examination of the same X-rays by a different radiographer then indicates the existence of a fracture, then on the argument of Mr McGuinness a new charge of assault occasioning actual bodily harm could potentially be brought on the basis that the facts were not substantially the same. That is hard to credit. One can readily think of other examples: which might, indeed, not even involve new expert evidence, as such, at all. It is a troubling proposition that subsequent correction of errors or failures or oversights in an initial investigation and charging decision can of itself give rise to an assertion that the incident was not the same."

(2) DELAY

R v Hewitt [2020] EWCA 1247

H, aged 80, managed a home. He was convicted of rape of a resident of the home that occurred 37 years before. The allegations were made in 2014. H had convictions from 1995 for sexual offences at the home in the 1970s. H was indicted with rape against C, a second count of other rapes against her, rape of another female and sexual offences against three boys at the home. Unused material was served in August 2018. Medical and social services records were not provided and in December it was confirmed that such records could not be provided. C alleged incidents started at Easter. The only Easter at which they would both have been in the home was one month before H left.

The judge decided to deal with the abuse of process application at the close of the prosecution case. During the trial it transpired that C had made a similar allegation against another at the time and may have been mixing events up. C and others were recalled and cross-examined again in light of the new material. The judge refused the application for a stay. H was convicted of the single count of rape against C but acquitted of the multiple count. Other matters are to be re-tried as the jury failed to reach a verdict.

The CACD upheld the conviction. There were significant failures in disclosure. The judgment is lengthy and worth reading for the review of authorities on abuse of process *(F(S)* [2011] EWCA Crim 1844) where there is lost documentation (*RD* [2013] EWCA Crim 1592, *PR* [2019] EWCA Crim 1225; *S(D) and S(T)* [2015] EWCA Crim 662 and *R* (Practice Note) [2015] EWCA Crim 1941).

The Court held that the trial judge was ideally placed to assess whether the trial was fair. He was wise to determine the application at the close of the prosecution case and he was entitled to conclude that the trial process could compensate for any prejudice arising from the delay.

In R v RD [2013] EWCA Crim 1592 Treacy LJ said at [15]:

"In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

BAD CHARACTER EVIDENCE

R v Hepburn [2020] EWCA Crim 820

H, a professional cricketer, was convicted of oral rape of his friend's girlfriend. The Crown were permitted to adduce WhatsApp messages indicating that H and his friend were in a competition to see how many women they could have sexual activity with. This was reprehensible behaviour and the Judge was right to admit it under s101(c) and s101 (d).

R v Pierce [2020] EWCA Crim 855

The Judge was right to permit the Crown to adduce evidence of a caution against P in 2005 for indecent texts and images sent to the complainant between 2002-2004 when the allegations at trial were that he had indecently assaulted her and attempted to rape her between 1996 and 2000. This was important explanatory evidence and evidence of propensity. The fact that the caution had subsequently been deleted did not alter that position.

VACATING AN EQUIVOCAL PLEA

R v Tierney – Campbell [2020] EWCA Crim 1194

In 2015 D pleaded guilty to grievous bodily harm. Whilst drunk D had repeatedly kicked and punched the victim until the victim leaving the victim in a persistent vegetative state. The victim subsequently died. D was charged with murder. Four years later D applied to vacate his guilty. He waived privilege. D was represented after his arrest by experienced solicitors and was seen on a regular basis by them. There was no contemporaneous record of the advice and no written proof was obtained. D wrote a letter to the victim's family taking full responsibility but saying that he did not intend to cause the degree of harm that he did. D argued that the plea was entered without full knowledge and that he had never agreed that he had intended to cause serious harm. He said that he had never been advised that he might face a murder charge if the victim died and said that he was advised that he would receive six years imprisonment. The CACD dismissed the application having heard evidence from the solicitor and D.

Carr LJ explained the principles on which a defendant may be permitted to go behind a plea of guilty. A defendant who has admitted facts which constitute an offence by an unambiguous and deliberately intended plea of guilty cannot ordinarily appeal against conviction, since there is nothing unsafe about a conviction based on his own voluntary confession in open court. A defendant will not normally be permitted on appeal to say that he has changed his mind and now wishes to deny what he has previously admitted in the Crown Court. Where a defendant enters a guilty plea and subsequently appeals on the basis that the plea was entered following erroneous legal advice, the facts must be so strong as to show that the plea of guilty was not a true acknowledgement of guilt. The court will only intervene if it believes that, with the benefit of correct advice, there would probably have been an acquittal and that therefore an injustice has been done.

IDENTIFICATION EVIDENCE

(1) SOCIAL MEDIA

R v Crampton [2020] EWCA Crim 1334

C was convicted of assault of a child aged 4-6 which occurred in 1996/1997. The child told others at the time but the family did not report the matter to protect her from the ordeal of a court case. The matter was raised in 2014 by the family and the victim searched on Facebook to look for the person whose name she was given by the family. She recognised the image she saw as the person who had sexually assaulted her. She showed her mother the image and her mother also immediately recognised him as the offender. The defence case was that C did not know the victim or her family and he asked for an identification procedure. The police did not carry this out because the victim and her mother had identified C from a Facebook image. This was a plain breach of Code C but the evidence was not excluded under s78 of Police and Criminal Evidence Act 1984 because the victim told the jury that at the time of the offence C had blonde curly hair. He did not have this in the Facebook image but agreed that he had indeed had that hair in 1996. The CACD upheld the conviction and agreed that the judge was right not to exclude the evidence of the Facebook identification. The Court of Appeal is reluctant to interfere in the exercise of judicial power to exclude evidence.

(2) CCTV

R v Yaryare and others [2020] EWCA Crim 1314

There were three incidents of violence between rival groups. The first was a fight in a shopping centre. Eleven of the group were charged with violent disorder. There were up to thirty people involved in subsequent violence. A police officer watched the CCTV footage and provided a statement of recognition of the participants. A facial mapping expert and mobile phone tracking supported that evidence. At trial, the defence applied to exclude the recognition evidence under section 78 of the Police and Criminal Evidence Act 1984 because the officer had failed to keep viewing logs and follow ACPO guidance. The CACD dismissed the appeal and identified several principles:

1. There should be a contemporaneous record of viewing of footage following code D.
2. Whether any failure to follow code D was fatal to a case depended upon the extent and significance of the breaches and the unfairness caused as a result.
3. There are generally two types of failure to comply with Code D. Cases where no records were kept contemporaneously and the recognition evidence is inherently poor and cases where there is a detailed basis for the recognition and the jury are able to view the footage.

HEARSAY

(1) EXPERT EVIDENCE

R v T and M [2020] EWCA Crim 1343

T and M were convicted of several counts of indecent assault against T's two nephews. One nephew sadly committed suicide shortly before the trial. His ABE interview was played at trial. The second nephew gave evidence. Some counts on the indictment related to acts recorded on a video, including M masturbating a male who was motionless. The prosecution allegation that the male was the deceased nephew altered when evidence of the date stamp on the images showed it that it could not be the deceased nephew. The count was amended to read "an unknown male under the age of 16." The defence case was that the video showed an adult participant. The Crown were permitted to call expert evidence that it was a child. The ABE video was admitted under s.116(2)(a) of the Criminal Justice Act 2003. The grounds of appeal included that the evidence of the deceased was so unconvincing that the judge should have directed the jury to acquit under s.125 of the 2003 Act. The judge, applying the guidance in *Riat* [2012] EWCA Crim 1509, ruled that the evidence was admissible. It was not the sole evidence in the case. T had previous convictions for sexual offences. He had photographs of the deceased bare chested, there were chatroom exchanges of "confessions" by T. The deceased had complained to a doctor and a social worker, T had an admitted sexual interest in young boys. There was physical evidence in the property of a hole in the wall as the deceased had alleged. The CACD refused the application. The exercise arising on a section 125 application is different from an ordinary "half time" submission of no case to answer.

(2) WITNESS IN FEAR

R v Barnes [2020] EWCA Crim 989

It is sufficient for a judge to be able to determine whether a witness is in fear or otherwise to the requisite standard of proof if the witness statement makes the fear plain. Here an important witness indicated that she was in fear when she made her statement and then disappeared three weeks before trial. The police could not find her. Her evidence was not decisive but important and the application to adduce it as hearsay was correctly granted.

EVIDENCE – CREDIBILITY

R v Ferati [2020] EWCA Crim 1313

F was convicted of five offences of fraudulent evasion of tax. The prosecution's case was that he had deliberately provided false accounts which suggested that he was not making a profit and therefore not liable to pay income tax. F said that his accountant dealt with all his tax affairs and that he would produce his day books to the police to show that he had not been dishonest. F did not produce the books. At trial it was agreed that insufficient tax had been paid. F called an expert. The judge asked the expert to calculate the annual percentage of undeclared profits between 2013 and 2016. The expert said that the profits

declared to HMRC were 41%, 56% and 28% of the estimated actual profits. In summing up, the judge reminded the jury of F's offer to provide the daybooks and subsequent refusal to do so and advised them that the failure might affect his credibility. F appealed arguing that the judge had erred in asking the expert to provide the percentages and in suggesting that F and his accountant might have colluded in committing offences. F also alleged that the judge erred in directing the jury the failure to produce the day books might adversely affected F's credibility. The CACD upheld the conviction. The judge should have avoided asking for specific percentages but the extent of the failure to properly account for tax was a pertinent issue. In advising that F had not produced the daybooks the judge had not reversed the burden of proof.

EVIDENCE - DNA

R v Jones [2020] EWCA Crim 1021

The evidence against J was that his DNA was part of a mixed profile found on a hand grenade which had been left on a rival drug dealer's driveway. There was no other evidence against J and crucially there was no expert evidence to suggest that it was improbable that the DNA had been left there by secondary transfer. There was insufficient evidence to be left to the jury. The Court of Appeal indicated that scientists should not make agreed facts that it was not realistic to expect anyone to account for the ways DNA could transfer by indirect methods. They should confine themselves simply to scientific detail and leave factual issues alone.

CELL SITE EVIDENCE – EXPERT EVIDENCE

R v Turner [2020] EWCA Crim 1241

T was convicted of conspiring to supply Class A drugs and to transfer criminal property. Nine telephones were attributed to T by a mobile telephone analyst. Shortly before the trial T accepted that three of the numbers were attributable to him. The analyst then considered surveillance evidence of T against the telephones that he did accept and those he did not. An application to exclude the new evidence on the basis that the analyst was now giving expert evidence when she was not an expert was rejected as was the contention that the surveillance evidence was hearsay evidence. The CACD upheld the conviction. Although the analyst was referred to as an expert in front of the jury it was not expert evidence. In her evidence, she said that she was not an expert witness. She should not have given evidence that locations were certainly covered by a particular mast as she was not entitled to do so. There was evidence in a radio frequency propagation survey technician's report who could have been called for cross-examination. In *R v Calland* [2017] EWCA Crim 2308, different conclusions were reached. *Calland* was not cited in this case.

POSSESSION OF EXPLOSIVES – EDUCATIONAL ACTIVITES

R v Flint and Holmes [2020] EWCA Crim 1266

F and H were convicted before the decision in *R v Copeland* [2020] UKSC 8 and sought leave to appeal out of time on the basis that they should have been able to put forward a defence of educational activities. Given the obvious risks of using explosive substances to other people or to property it would be extremely difficult to succeed in a defence of educational activity. If a defendant has a mixed motive it is an unlawful motive.

INDECENT PHOTOGRAPHS OF CHILDREN

R v Bateman [2020] EWCA Crim 1333

B had a pornographic image in which a child's face had been superimposed on an adult's face. He pleaded guilty to producing indecent images of a child and was sentenced to four years' imprisonment. The CACD dismissed the appeal indicating that superimposing a child's face onto an adult's face in a pornographic image could amount to production, rather than possession of an indecent image of a child.

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MANSLAUGHTER – GROSS NEGLIGENCE

R v Broughton [2020] EWCA Crim 1139

D gave his girlfriend drugs which had been "spiced up." She became ill. He telephoned for an ambulance but was not clear where they were. By the time aid arrived she was very ill and subsequently died. Medical evidence showed that if she had not received medical attention there was a 10% chance that she would have lived. CACD quashed the conviction. The prosecution must prove that the act of the offender was a significant contributory cause of death and must exclude the realistic or plausible possibility that she would die anyway. Here there was a 10% possibility of life regardless of any act of his.

MENS REA – EU LAW – REGULATORY OFFENCES

R (on the application of Highbury Poultry Farm Produce Ltd) v Crown Prosecution Service [2020] UKSC 39

A slaughterhouse sought to judicially review a decision that offences under regulation 30(1)(g) of the Welfare of Animals at the Time of Killing (England) Regulations 2015 were offences of strict liability. On three occasions in 2016, the slaughterhouse had placed a live chicken into a scalding tank because its neck had not been properly cut. The Supreme Court held that the 2015 Regulations were merely the mechanism for giving effect to the EU Regulation in domestic law. Domestic law cases on the presumption of mens rea were not directly relevant. The 2015 Regulations imposed penalties, making infringements criminal offences. Member States had no discretion to lower the standards required by the EU Regulation and article 23 was not to be interpreted as allowing them to do so. As the EU Regulation imposed strict liability, the 2015 Regulations could not impose a lower standard of negligence. Imposing strict liability in a criminal context was not contrary to EU law, the Article 15(1) offence imposed strict liability. The Article 3 offence also imposed strict liability. Domestic offences which give effect to EU law fall to be determined with reference to EU law principles.

SENTENCING

The new sentencing guidelines for sentencing offenders with mental disorders came into force on 1 October 2020. It applies to adults who at the time of the offence and/or at the time of sentencing have any mental disorder, neurological impairment or developmental disorder.

(1) CLASS A DRUG TRAFFICKING – MINIMUM SENTENCE – REDUCTION FOR GUILTY PLEA

Winton [2020] EWCA Crim 1321

D pleaded guilty to possession of heroin and cocaine with intent to supply after the PTPH but before trial. He had more than sufficient previous convictions for the supply of drugs so that this was his third relevant conviction for the purposes of s.110 of the PCC(S)A 2000 so that the minimum sentence of seven years applied. The judge stated that no credit could be given for the pleas of guilty. Sentences of seven years imprisonment concurrent on each offence were imposed. The Court of Appeal were surprised that no-one at Court spotted this error. The Judge had failed to appreciate the impact of s.144 of the 2003 Act (reduction for a guilty plea) on s.110 of the 2000 Act (minimum sentence for third Class A drug trafficking offence). Appropriate credit for plea should be given, but always remembering that the final sentence must not fall below 80 per cent of the seven year minimum sentence. The Court reduced the sentence to one of five years and eight months.

(3) SUSPENDED SENTENCES

R v Randhawa [200] EWCA Crim 1071

R was sentenced to 28 months imprisonment for making false claims for payment for children who she said had attended her nursery when they had not. The total value was £20,000. R was the primary carer for her two children aged 12 and 7 who both had medical difficulties and was the primary care assistant for her elderly parents who both had serious medical problems. The sentence should have been reduced to take account of the additional mitigating factors and the effect upon the children and elderly relatives of R's incarceration meant that the sentence should have been suspended. Reduced to 24 months imprisonment suspended. As R was sentenced before the Covid pandemic the case of *Manning* had no bearing on the sentence.

(4) VICTIM PERSONAL STATEMENTS

R v Jones [2020] EWCA Crim 1139

We must follow the Practice Direction CPD V11 F2 and the case of *R v Chall* [2019] EWCA Crim 865. Victim personal statements must be in writing. The court cannot rely on a note on the DCS system added by counsel which indicates that the victim has failed his A levels and continues to live in fear as evidence of serious psychological harm for the purposes of categorisation of offences.

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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