

# Criminal Law Update

*Paul Prior*

In this update we will consider 4 recent cases.

## Plackett v DPP<sup>1</sup>

The appellant (A) appealed by way of case stated against his conviction for failing to provide a specimen of breath contrary to the Road Traffic Act 1988 s.7(6). A had been found by a police officer sitting alone in his car in a car park. The Officer formed the opinion that A was drunk and requested that he take a breath test. A refused and he was taken to the police station where the prescribed procedure started. Once operated, the device began a three minute cycle during which a specimen had to be provided. A again refused to provide a breath sample and left the room to speak to the duty solicitor. While he was out of the room, the Officer commenced the operating cycle of the device. On returning, A indicated that he wished to provide a specimen. The Officer agreed and A attempted to give a sample. However there remained only one minute of the three minute cycle. During that time A's first attempt failed because the mouthpiece fell off and his second attempt failed because of insufficient breath. The device then stopped and the Officer refused to commence another cycle. A was charged with failing to provide a specimen. The magistrates found that A had been given an expectation by the Officer that he would be allowed to give a sample, but held that that expectation had been satisfied and that A had not been obliged to commence another cycle. The questions posed by the magistrates for the consideration of the High Court were whether they were entitled to convict A where the officer had begun the operation of the device in A's absence and whether they were right to find that A had had an opportunity to provide a specimen when he was only given one minute of the device's cycle as opposed to three.

---

<sup>1</sup> LTL 15/5/2008

It is established law that an Officer need not wait for an unknown amount of time for legal assistance to be sought<sup>2</sup>, but in this case legal advice was on hand and A decided to have a brief consultation. The Court made it clear that the Officer starting the machine in the absence of A would not be a bar to conviction (presumably on the basis of A's earlier refusal). However, when A returned and the Officer agreed to let him take the test, A should have been given a full opportunity to provide the sample (assuming the Magistrates did not come to the conclusion that A was deliberately frustrating the test).

### Gearing v DPP<sup>3</sup>

The appellant was observed at about 12.30 in the morning on 15th March 2005 driving erratically. She was stopped by the police and failed a roadside breath test. The transcript of the video and the video itself, as appears from the case stated, shows that the roadside breath test revealed a figure of 53, whereas the limit was 35. The appellant was arrested. She was taken to Staines Police Station and she arrived at the police station at 1.15 am.

Following a discussion with the custody officer, she indicated at 1.31 am that she wished to speak to a solicitor and that she wished the police to contact one for her. She declined to sign the custody record pending speaking to a solicitor. At the same time she indicated that she wanted to wait until she had spoken to a solicitor before taking a breath test. The Officer made it clear that the breath test would not be delayed. In response to the appellant's further request to delay the test until she had spoken to a solicitor, the custody officer pointed out that the notice of legal rights that she had previously been given advised that the breath test would not be delayed. The appellant, having looked at the form, said "I have never done this before so if you are going to do it, do it, and just get it out of the way".

---

<sup>2</sup> Kennedy v CPS [2002] EWHC 2297

<sup>3</sup> [2008] EWHC 1695 (Admin)

Before that test procedure which then followed took place it is said that she asked for advice, legal or otherwise, on some seven or eight occasions; sometimes expressly for legal advice, others asking advice of the police officers in a manner which indicated that it was legal advice which she was seeking. The call could have been made here at any time after it had been requested and events that shortly afterwards transpired demonstrated that that advice, at least in the sense of the solicitor responding to it, was available within some seven minutes. It was submitted that there had been a breach of the rights to legal advice under section 58(4) of the Police and Criminal Evidence Act 1984 and the Codes of Practice and the evidence of the breath test procedure should be consequently excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984.

The police should ask if the solicitor is in the charge room or find out whether there is one at the end of a telephone. Had the appellant been given the advice which she wished to seek, she would in fact not have committed the offence because she would have done what she subsequently did, namely follow the advice that she was given and then in fact agree to undergo a test. There was, therefore, as a result of her requests and the failure to contact the call centre, been a breach of section 58.

At approximately 1.46 am the appellant indicated that she did not wish to take the test and was informed that, as the form that she had been given to read indicated, if she did not take the test she would be liable for prosecution for failing to provide a specimen, as failure to provide it was an offence. At 1.49 the appellant declined to provide two specimens of

breath for analysis and, subsequent to that refusal, some moments later at 1.53 am, an attempt was made to contact the duty solicitor. This was the first time that the duty solicitor call centre had in fact been called. Some seven minutes later at 2 am the duty solicitor spoke to the appellant on the telephone and at 2.16 am, some 23 minutes after the attempt was made to contact him, the duty solicitor spoke to an Officer and advised that the appellant was willing to provide a sample. No sample was in fact taken.

The Defendant lost in the Magistrates and on appeal to the Crown Court. The questions for the Divisional Court stated from the Crown Court were as follows.

*"(1) Was I entitled to conclude that there had been no breach of the applicant's rights under section 58 of the Police and Criminal Evidence Act 1984?"*

*"(2) Was I entitled to exercise my discretion to refuse to exclude the evidence of the breath test procedure pursuant to section 78 of the Act?"*

The Court held that Kennedy v DPP qualified the case of Billington<sup>4</sup> to some extent but did not overrule it, nor did it say that it was wrongly decided. In the Crown Court, the judge held that there were special reasons for saying that in cases of this sort it was not practicable to hold up proceedings for a solicitor to be obtained unless there may be some

---

<sup>4</sup> [1988] 1 WLR 535

exceptional circumstances such as those referred to in Kennedy (which was not the case here). The Court went further in seeking to reconcile Kennedy and Billington. Lord Justice Latham stated that:

*“The police, on the one hand, should, once a request for consultation with a solicitor is made, take appropriate steps to enable that to happen. If there is a solicitor present in the police station, that will involve notifying that solicitor. If an identified solicitor is indicated by the defendant, they should make contact with that identified solicitor. If there is no identified solicitor then they should make the appropriate call to the call centre. But that should not delay, in itself, the obligation of the police to carry on with the procedure. If it is apparent that the advice can be readily made available...in a couple of minutes or so then clearly it would be appropriate to balance the rights and the obligations in question by requiring the police to delay the breath test at least for that short time. If it is anything greater than that, it does not seem to me that it is a requirement that the police should delay the giving of the breath test simply for that reason. The exercise required by section 78 of the Police and Criminal Evidence Act seems to me to be one which can be encapsulated in that approach”.*

The Divisional Court found that, although there was a breach of s.58 (in that the Police should have notified the call centre when the claimant first made her request) there was still a “significant delay” of 23 minutes in the obtaining of legal advice when it was sought. Mr. Justice Nelson considered that was too long:

*“ It is a substantial period when set against the need for prompt testing in the public interest, and one which on these particular facts in the circumstance would certainly persuade me that it was the correct decision to say that the evidence of the breath test conclusion taken at the police station should not have been excluded. In so far as that part of the decision is concerned, my conclusion would be that the judge was right in coming to that conclusion.”*

#### B v DPP<sup>5</sup>

B was convicted by the West London Youth Court of the offences of obstructing a police constable in the execution of his duty, and using threatening or abusive words or behaviour contrary to section 4 of the Public Order Act. He appealed by way of case stated.

The justices found that on 5 May 2007 Police Constable Townsend was on plain clothed patrol in the company of two other police constables in the Shepherds Bush area, when he came across the appellant from whom there was a strong smell of cannabis and whose eyes were glazed. He had reasonable grounds to suspect that an offence under the Misuse of Drugs Act was being committed.

The justices found in their case stated that PC Townsend introduced himself and informed the appellant that a search under section 23 of the Misuse of Drugs Act would be carried out and the reason for so doing. It is common ground in this court that by "introduction" is meant the giving of his name and police station as required by statute. Equally, the justices found that he did not show the appellant, B, a warrant card or any other form of documentary evidence that he was a police constable. There was a suggestion that the

---

<sup>5</sup> [2008] EWHC 1655 (Admin)

appellant knew the police constable from previous experience.

The justices further found that the appellant immediately put his hands into his pockets. PC Townsend then grabbed the appellant's hands, fearing he was reaching for a weapon or about to conceal drugs. He searched him and told him what he was doing, and that he would be entitled to a copy of the search record. The appellant resisted physically and verbally. The case records that the appellant was continually shouting and making threats of violence to the officers. His left wrist was handcuffed. Another officer told him to remove his hand from his pocket. The officer refused, and he threatened to stab the officers present. He was handcuffed, arrested, cautioned for both offences and taken to the police station. No knife was in fact found in his possession.

The magistrates found that the search of the appellant was lawful notwithstanding an admitted failure to comply with the Police and Criminal Evidence Act Code of Conduct. They concluded that PC Townsend had taken reasonable steps to comply with his duties under section 2(2)(b) of the Police and Criminal Evidence Act 1984. Naturally, they did not specify what those steps were or why they had not resulted in the production of the warrant card. It was common ground the provisions of section 2(2)(b) apply to a Misuse of Drugs Act search.

Section 2(2)(b) reads as follows:

"If a constable contemplates a search ...

...

it shall be his duty ... to take reasonable steps before he commences the search to bring to the attention of the appropriate person -

(i) if the constable is not in uniform, documentary evidence that he is a constable; and

(ii) whether he is in uniform or not, the matters specified in sub-section (3) below;

and the constable shall not commence the search until he has performed that duty."

The matters spelt out in sub-section (3), which apply to constables in uniform, include his name and police station, as previously indicated.

The Court held that the statutory provisions are mandatory without good reason not to perform them. Lord Justice Moses states at para. 12:

*"I reject (1) any submission that it can be inferred on the present facts that the officer was about to produce the warrant card but had been prevented from so doing, and (2) generally that performance of the duty for uniformed officers, namely informing a person to be searched of the name of the officer and police station concerned, was a sufficient part-performance of the separate and additional duty for plain clothed officers. In my judgment, that distinct duty is the*

*more important duty when an officer is in plain clothes. The uniformed officer has his uniform to speak for him or her as the source of his or her authority and status as a constable. The plain clothed officer needs to produce the warrant card to start in the same position as the uniformed officer.”*

The Officer was found to be beyond the execution of his duty and the Defendant's resistance lawful. The excessive nature of his resistance (references to the knife will not have helped) may amount to the s.4 offence. However, as the Magistrates based the conviction for the s.4 offence in part on the Defendant's resistance, that matter was quashed along with the Obstruction charge. The s.4 was remitted for redetermination.

#### Regina v B<sup>6</sup>

B was to be tried for offences of kidnapping and robbery. The evidence against her was essentially identification of her by the victim in the course of a video identification procedure. At the outset of the trial, counsel on behalf of B made an application to exclude that evidence pursuant to section 78 of the Police and Criminal Evidence Act 1984. Having heard submissions, the judge ruled that the evidence be so excluded. There being no other evidence upon which the prosecution could seek to prove its case, the ruling was a "terminating ruling". Thereafter the procedure under section 58 was properly followed.

The offences of kidnapping and robbery occurred on 16 May 2007. The victim was approached by a female who asked for the time. He crossed the road to a better lit area and told her. She then asked if he wanted to buy a mobile phone. At this stage they were approaching a jeep-like vehicle which was parked on a corner. Mr Singh declined the offer but was suddenly grabbed by two men who, together with the female, forced him into the

---

<sup>6</sup> [2008] EWCA Crim 1524

jeep which was driven off by one of the men. The female sat next to Mr Singh in the rear of the vehicle. She had an arm around his throat and she gave directions to the driver. Mr Singh was searched by the other man and various items were taken from him including £2,000 in cash, a mobile phone and a wallet containing bank cards. A gold ring was forcibly removed from his finger. The female then ordered him out of the vehicle. Arrangements were made for B to attend Southall Police Station on 22 May. When she attended on that day she was arrested and interviewed about the offences but she denied involvement and said that, at the material time, she had been in the house of a neighbour. On the following day, 23 May, Mr Singh attended Acton Police Station where he positively identified B in a video identification procedure.

The identification procedure was carried out by Inspector Winnett who completed a standard form document as the procedure progressed. Mr Singh was assisted by an interpreter. No complaint is made about the general arrangements. We have had the advantage of seeing a video recording of what transpired.

At the outset the Inspector said to Mr Singh:

*"You have been asked here today to see if you can identify one of the persons you saw on Wednesday 16 May 2007 at 10.20pm ... who assaulted and robbed you."*

He then added (reading from the proforma):

*"In a moment I am going to show you a film of nine people. I want to make it clear to you that the person you saw may or may not be on the film. You*

*must view the film at least twice, but may see all or any part of it again if you so wish. You may also have an image 'frozen' to study. When you have finished I will ask you some questions. If you cannot make a positive identification then you should say so. Do you understand?"*

Mr Singh confirmed that he understood.

After Mr Singh had viewed the nine people once and prior to the second viewing, he volunteered:

*"Its number one."*

Number one was B. There was a brief exchange involving Mr Singh, the Inspector and the interpreter which took place whilst the early part of the second showing was underway. The Inspector told Mr Singh that he must watch the film a second time, expressing himself in similar terms to those used prior to the first showing. After the second showing, the Inspector asked Mr Singh whether he wanted to see the film or any individual images again. Mr Singh replied that he wanted to see number one. When that was replayed and the Inspector asked again whether Mr Singh wanted to see the film or any individual images, Mr Singh replied:

*"No. I suspect number one and my suspicions are one hundred per cent correct."*

The formalities required by the proforma were then completed.

Video identification procedures are covered by Annex A to Code D, Code of Practice for the Identification of Persons by Police Officers, issued pursuant to the Police and Criminal Evidence Act 1984. Paragraph D11 includes the following:

*"Furthermore, it should be pointed out to the witness that there is no limit on how many times they can view the whole set of images or any part of them. However they should be asked not to make any decision as to whether the person they saw is on the set of images until they have seen the whole set at least twice."*

Paragraph D12 then provides that once the witness has seen the whole set of images at least twice and has indicated that he does not wish to view them again, he "shall be asked to say whether the individual they saw in person on a specified earlier occasion has been shown and, if so, to identify them by number of the image". It is apparent from our description of the procedure which took place in the present case that, notwithstanding the final sentence of paragraph D11, Mr Singh was not asked not to make any decision as to whether the person he saw was on the set of images until after he had seen the whole set at least twice. The Inspector was working from the proforma and, unfortunately, the proforma did not take cognisance of the final sentence of paragraph D11. It was common ground that there was a breach of paragraph D11.

One curiosity that develops in this case is that the ruling of the judge was given by reference not to paragraph D11 of the Code but to paragraph D16, which applies to identification parades as opposed to video identification. The two provisions are expressed in different terms. Whereas D11 says that witnesses at a video *identification* "should be asked not to make any decision ... until they have seen the whole set at least twice", D16

states that the witness

*"must also be told that they should not make any decision about whether the person they saw is on the identification parade until after they have looked at each member at least twice."*

The trial Judge concluded that:

*"The true answer, it seems to me, to the question whether the witness may have given a different answer had he been properly instructed is that we simply cannot ever know. The fact is, though, that there is a possibility that he might have given a different answer had he been properly instructed."*

The judge further considered that any cross-examination of the witness directed to that question would be pointless because "almost inevitably, looking at the matter realistically, the so-called identifying witness would say that which amounted to a confirmation of this original identification". For these reasons

*"I withdraw or do not allow that evidence to be led because of the breach of Code D16 under the Police and Criminal Evidence Act."*

The Court of Appeal took the view that that the judge fell into error by concentrating on that point and the assumed answer to any question in cross-examination about it. When one speaks of a problem being cured or alleviated within the trial process, one is not simply referring to the possibility, however remote, that a controversial witness will contradict his previous identification or account. There are other ingredients of the process to be

considered. The Court continued:

*“If, having heard all the prosecution evidence, the judge concludes that a defence submission on the basis of Galbraith and Turnbull should succeed, he will stop the case at that stage. If he declines to do so, he will be obliged to give the jury cautionary directions drawing attention to shortcomings in the identification evidence, including reference to any breaches of the Code. By that stage, the defendant will also have had the opportunity to give and to call evidence and counsel will have been able to address the jury, again inviting consideration of the significance of breaches of the Code. This is not to say that a judge can never terminate a case in limine in the way that the judge did in this case. However, he will fall into legal error if he does so without considering the full potential of the trial process to enable fairness and justice to be assured.”<sup>7</sup>*

---

<sup>7</sup> Lord Justice Kay para.20