



King Street Chambers
The Chambers of Mrs Nancy Hillier

Criminal Team News

This month...

John-James Hallissey identifies updates to the criminal law reported over the last few weeks;

PLUS,

Diana Cottrell on Bad Character

Excess Alcohol:

After having completed a station breath-test procedure, the officer conducting the procedure asked the defendant whether he had brought anything up from his stomach during the procedure (as he was required to do so by the MG DD/A form he was using). The defendant indicated that he had burped and the officer noted on the MG DD/A that the defendant may have brought something up from his stomach. The form, in those circumstances, required the officer to conduct a blood/urine test; the officer did so and the defendant was convicted on the basis of his blood test. The High Court, in this case, concluded that the officer had no legal right to require a sample of blood and so a conviction on the basis of that sample could not stand.

Following *Zafar* and *Woolfe* Mr Justice Underhill held that any reflux or regurgitation from the stomach, including burping (or as his Lordship called it, 'eructation') is simply to be treated as 'breath' for the purposes of the legislation and so cannot be treated as rendering the sample unreliable. There being no reasonable cause to believe the sample was unreliable there was no power to require a blood or urine test.

Question A17 on the MG DD/A was specifically criticised as having been drafted on a basis that has now been shown to be wrong in law. The form has not, however, been amended.

Keep an eye out for cases in which a blood or urine test is taken in reliance on A17! *McNeil v DPP [2008] EWHC 1254 (Admin)*.

New Magistrates' Courts Sentencing Guidelines issued:

Don't forget, these guidelines are available FOR FREE on the Sentencing Guidelines Council's website at www.sentencing-guidelines.gov.uk

The sentencing quagmire:

"The situation at which I have arrived and which I will explain in a moment is one of despair. It is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to discern from statutory provisions what a sentence means in practice. That is the effect here."

So says Mr Justice Mitting. The full judgement of this case is well worth reading, if only for the satisfaction that comes from seeing a High Court Judge expressing the same frustrations experienced by those of us who practise in criminal law.

Under the 1991 sentencing regime a prisoner is entitled to be considered for Home Detention Curfew 75 days before his release date. Under the 2003 regime a prisoner is entitled to be considered for Home Detention Curfew 135 days before his release date. Problems arise where the 2 regimes are running at the same time for the same prisoner. In particular, sentences of less than 12 months are still subject to the 1991 regime. If a sentence of less than 12 months is made consecutive to a sentence of more than 12 months (which is subject to the 2003 regime) the question arises as to how the Home Detention Curfew date is to be calculated. If the less than 12 month sentence (1991 regime) is served first, followed by the more than 12 month sentence (2003 regime), then, at the time the prison comes to consider HDC the prisoner will be eligible for release 135

days early (under the 2003 regime). If the sentences are served the other way around then, at the time the prison comes to consider HDC, the prisoner will be eligible for release 75 days early (under the 1991 regime).

The Home Secretary's policy has been to look at the order in which a judge announces the sentences and treat the first sentence to be announced as the first sentence to be served. Mr Justice Mitting has now declared that policy to be unlawful and is of the view that the shortest sentence should be served first. His declaration has, however, been suspended pending the outcome of the Secretary of State's appeal to the Court of Appeal. Watch this space...

R (Noone) v Governor of HMP Drake Hall [2008] EWHC 207 (Admin)

Early release of long-term prisoners:

Section 26 of the Criminal Justice and Immigration Act 2008 is now in force. See the King Street Chambers CJIA updater email for full details.

Goodyear indications:

R v Ashley James Brown [2008] EWCA Crim 1137 emphasises the need for clarity in Goodyear directions and the need for advocates to ensure that they seek such clarification from the judge as is necessary. HHJ Hamilton, sitting at Derby Crown Court, was asked to give a Goodyear indication in respect of a fairly straightforward ABH. His Honour's indication was, "I would be minded to either suspend the sentence or impose a community order combined with costs and compensation."

The Court of Appeal was left with the impression that His Honour had not realised that if he suspended the sentence he would be required to impose conditions.

In due course the defendant was sentenced to a suspended sentence order with 2 conditions; unpaid work and a curfew. The Court of Appeal quashed the curfew element of the order on the grounds that "it played no part in what the judge had to say in his Goodyear indication."

The lesson for advocates appears to be that, unless the judge specifies in his Goodyear direction that he intends to impose several requirements, he may be stuck with just one.

Bad Character:

Last month's Criminal Team News summarised the Court of Appeal's latest foray into Bad Character; *R v McKenzie*. Diana Cottrell considers the implications of the case in more detail, below.

Reprehensible behaviour as bad character under the CJA 2003
by Diana Cottrell, Barrister, LLB (Hons)

Three years after the introduction of the new rules on Bad Character how are the courts dealing with applications which do not rely upon the admission of previous convictions? This article examines the history in light of the recent case of *R v McKenzie* [2008] EWCA Crim 758.

Where an application is made under s101(1)(d) to adduce evidence of propensity as a matter in issue between prosecution and defence, the prosecution need not rely on previous convictions. They can rely upon evidence of a defendant's misconduct or disposition to misconduct. Misconduct means not only the commission of an offence but also reprehensible behaviour (see 112(1) CJA 2003).

Specifically in relation to s101(1)(d) the act provides a further definition of the type of evidence admissible under this section:

"103...

(2)...a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of –

(a) an offence of the same description as the one with which he is charged,

or

(b) an offence of the same category as the one with which he is charged."

At first sight one may be forgiven for thinking that the purpose of this section was to ensure that only evidence of convictions could be used to establish propensity. That would, however, be the wrong interpretation. The phrase in the parenthesis is the most important element of this section. It simply allows any other way of

establishing the defendant's propensity to commit the offences of the same description or category. It could include, for example, a witness coming to court to give evidence of facts which would lead to the conclusion that he had such a propensity.

The leading case in this area is *R v Hanson* [2005] EWCA Crim 824. That was a case which dealt with the admission of previous convictions. Nevertheless, the principles are universally applicable. The court set out some guidance in establishing propensity:

"9. There is no minimum number of events necessary to demonstrate such propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged..."

The recent case of *R v McKenzie* [2008] EWCA Crim 758 is arguably as important as *Hanson* where the Crown seek to adduce bad character other than convictions.

McKenzie was convicted of causing death by dangerous driving. He was seen by two independent witnesses to pull out from a side road directly into the path of an oncoming motorcycle. The Crown's case was that he failed to stop or look at the junction before pulling out onto a main road. The forensic evidence showed that he had cut the corner. McKenzie denied driving dangerously but admitted being careless. The Crown applied to adduce evidence from 10 witnesses about past bad driving. The Judge allowed a driving instructor and McKenzie's ex-girlfriend to give evidence as to the defendant's propensity to drive in a chancy way. The last allegation dated 3 years prior to the accident. The Court of Appeal held that the evidence from the driving instructor was inadmissible and they criticised the

judge for admitting the evidence of both because of the risk of the trial and summing up becoming unduly complicated by collateral issues. Following *Hanson*, the court would not interfere with a ruling unless the capacity of prior events to establish propensity is plainly wrong or the discretion has been exercised unreasonably in the *Wednesbury* sense.

The court made it clear that the principle in *Hanson* equally applies to cases where the Crown do not rely on the defendant's convictions. They correctly observed that this is where the dilemma arises:

"24....If the allegations of previous misconduct are few in number, they may well fail to show propensity even if they are true, but the greater the plethora of collateral allegations, the greater the risk of the trial losing its proper focus."

This is just one of the reasons why seeking to prove propensity by evidence other than previous convictions presents particular difficulties. The court in *McKenzie* identified a number other of dangers, they can be summarised thus:

- (a) making the trial unnecessarily and undesirably complex,
 - (b) taking the jury or bench's focus away from the most important issues
- and,
- (c) introducing allegations which the defendant will find difficult to respond to because of the lapse of time.

I would suggest that there is yet another danger which wasn't specifically addressed in *McKenzie*. The judge hearing the application must decide whether the allegations are capable of proving a propensity to commit the same kind of

offence. Where the allegation is reprehensible behaviour rather than previous convictions the evidence will not have been tested. The judge will have to make the decision based on the witness statement. However, the witness may not come up to proof or may be discredited in cross-examination. The nature of the evidence may change to such extent that it is no longer capable of establishing propensity. It follows that merits of the application may disappear after the jury has heard about it. Therefore the decision to admit must be much harder to make than with conviction cases. In my submission this could lead to potential unfairness at trial.

Although the case of *R v Osbourne* [2007] EWCA Crim 481 related to the s101(1)(c) gateway, it is submitted that it illustrates the danger of this kind of evidence. Osbourne was charged with the murder of a friend. It was the Crown's case that Osbourne had argued with his friend, lost his temper and stabbed his friend. Osbourne suffered from Schizophrenia. He admitted to police that he had not taken his medication for some months prior to the murder. An application was heard by the judge to admit evidence from the ex-girlfriend that when Osbourne failed to take his medication, he was liable to snap (although never violent towards her) together with evidence from a doctor about his condition. The Judge allowed the application on the grounds that it was important explanatory evidence. The ex-girlfriend gave evidence that Osbourne shouted unnecessarily at her when she reprimanded their child. Her evidence as cited in the Court of Appeal judgment appears vague. It illustrates no more than a domestic argument and certainly did not amount to important explanatory evidence. The Court of Appeal ruled that the evidence ought not to have been admitted but that the conviction was safe.

Even though the Court of Appeal took the view that the conviction in *Osbourne* was safe, I would argue that this will not always be true. The potential is there for a jury or bench to hear about matters which prejudice them against the defendant

even though, on the evidence before the court, it could not possibly amount to a propensity to commit this kind of offence.

McKenzie illustrates some of the problems where the Crown seeks to adduce evidence of bad character if the application is not based on previous convictions. Could this be the tip of the iceberg?

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