



King Street Chambers
The Chambers of Mrs Nancy Hillier

Criminal Team News

This month...

John-James Hallissey identifies updates to the criminal law reported since the last newsletter;

PLUS,

Paul Prior investigates the Vagrancy Act and its application in the 21st century.

Witness Anonymity:

The Criminal Evidence (Witness Anonymity) Act 2008 has now been published.

The key points are:

1. A Witness Anonymity Order may be made if three conditions are satisfied:
 - a. The order is necessary to protect the safety of the witness or another person, to prevent serious damage to property or to prevent real harm to the public interest; and,
 - b. The order is consistent with the defendant receiving a fair trial; and,
 - c. The order is necessary in the interests of justice because it is important that that witness should testify and that witness would not testify without the order.

2. The Act confers a general power, if an order is made, to specify such measures as are necessary to conceal the identity of the witness; the Act specifically envisages:
 - a. Withholding the witness' name and other details;
 - b. Using a pseudonym;

- c. Prohibiting the asking of questions of that witness that might identify him;
 - d. Screening the witness;
 - e. Disguising the witness' voice with voice modulation equipment.
3. Application may be made by the Crown, to conceal the identity of a Crown witness from the defendant(s) or by a defendant to conceal the identity of a defence witness from any co-defendants. The Act does not allow a defendant to conceal the identity of a defence witness from the Crown.
 4. The Act came into force on 21st July 2008 and applies to all proceedings in which the trial had not yet begun AND all proceedings in which the trial had begun but not finished.
 5. The power to make orders under this Act will expire on 31 December 2009, unless extended by order. We can look forward, in the next session of Parliament, to the Law Reform, Victims and Witnesses Bill. It is anticipated that the power to make witness anonymity orders will then be included in that Bill.

Identification:

Code D applies to a police officer identifying a defendant by watching CCTV as it does to a witness asked to make an identification. The officer's initial reactions should be recorded, including whether he failed to recognise anyone on the first viewing, what words he used by way of recognition, whether he recognised anyone else, whether he expressed any doubt, what it is about the image that triggered the recognition, and so on. *R v Smith [2008] EWCA Crim 1342*.

Confiscation – Valuation of pensions:

The defendant had a pension with a fund value (the value of funds in the pension) of £80,000, a surrender value (the amount of cash he would get if he

surrendered the funds) of £17,500 and a transfer value (the amount at which he could sell the fund) of £0, since the funds could not be assigned to any other person, the relevant value for the purposes of a confiscation order was £80,000. The Court of Appeal came to the conclusion that if the value of £17,500 was taken then the defendant could raise £17,500, discharge the confiscation order and then have a nest egg waiting for him when the pension fund matured.

Confiscation – Assessment of benefit:

Where a defendant was convicted of 2 counts of theft of £15,000 on the basis that he stole 2 cheques, each made out for £15,000 and each made out to other people, then delivered those cheques to the people to whom they were made out and received goods to the value of £10,000 in return for one cheque and £7,000 cash in return for the other, the defendant's benefit, so far as confiscation was concerned, was £30,000. *R v Newman [2008] EWCA Crim 816*. Beware though; this case was decided before *R v May*

Sarah's law?:

Those of you who attended one of our Criminal Justice and Immigration Act 2008 seminars won't have been surprised to see this story:

<http://news.bbc.co.uk/1/hi/uk/7612315.stm>

Watch this space for the results of the pilots...

Consecutive Sentences:

Where a defendant who is serving an indeterminate sentence falls to be sentenced again for another offence there is nothing wrong in principle with the court using the power in section 154 of the PCC(S)A to direct that the new sentence should start when the minimum term under the indeterminate sentence finished. *R v Hills and others [2008] EWCA Crim 1871*

Chambers News:

Don't forget that chambers offers a free seminar every month, accredited for one hour of CPD. Look out for flyers or email cpd@kingstreetchambers.com for more details.

**THE VAGRANCY ACT-A CHALLENGE TO THE PROSECUTOR'S LAST
RESORT**
BY PAUL PRIOR

The Vagrancy Act 1824 is rapidly becoming something of an anachronism on the statute books. Many Commonwealth countries have repealed it, realising that the threat posed by marauding ex-servicemen from the Napoleonic wars is probably over. The Nineteenth Century tale is a common one; men fight overseas for years on end and return to an economy in recession, a lack of jobs and a Government that has little further use for them. Don't try and vote your way out of it either. The Great Reform Act is still 8 years away. To add insult to injury, the returning man will probably return to find that the shoe-maker from down the road has told the girlfriend/wife that there is "little hope of him coming back" and been offered a shoulder to cry on...So the soldier wanders the countryside, sleeping in outhouses and stables and causing much mischief for all those Landowners, who happen to be the law-makers in Parliament. It is not long before legislation is passed – the Vagrancy Act 1824.

In 2008, s.4 of the Vagrancy Act is still in force. It is an offence to be on prescribed property for an unlawful purpose. The culprit must be "found" for the purposes of the Act and, upon discovery, be engaged in an unlawful act. A recent case at Leicester Magistrates' Court dealt with two men, A and B, being found in an old Office block that was being converted into flats. The Crown's case, *inter*

alia, was that A and B were found upon or in a “dwelling house under construction” for an unlawful purpose.

Counsel provided a Skeleton Argument submitting that, for the purposes of the Act, a “dwelling house under construction” does not come within the definition of “dwelling house”. Further or alternatively, if a dwelling house under construction is capable of coming within the meaning of dwelling house, on the facts of the particular case, the building was not capable of facilitating the major activities of residential life and as such could not be described as a dwelling house.

In the Vagrancy Act, Parliament provided an extensive list of locations in which a person (with the requisite unlawful purpose) could commit the offence. Had Parliament’s intention been to include premises that were under construction or part finished, then Parliament would have included such premises in the Act. By charging the Defendant with being in a place that does not appear in the list, the Crown’s case was unsustainable.

In Talbot v DPP [2000] 1 WLR 1102 (a case dealing with “enclosed area” under s.4 of the Act) the Crown sought to describe a room in an office building as an “enclosed area”. The Divisional Court held that as the list of premises “dwelling house, warehouse, coach-house, stable or outhouse” did not include “office building”, it was unacceptable to allow the Crown to pursue a charge under s.4 of the Act where a room in such a building was being described as an “enclosed area”. Rather, an enclosed area was to be read as being more akin to a garden or an excavation of some kind.

In A and B’s case, the Crown appeared to be suggesting that as the intention of the developer was that the building will (one day in the future) be a dwelling house and because the developer had planning permission, then those circumstances were sufficient to qualify the building as a dwelling house. The Defence submitted that the Crown were seeking to extend the ambit of the Act

beyond that which Parliament provided for and intended. There were a number of difficulties in law with the Crown's proposition:

- 1) There is the difficulty of what would happen if the developer later changed his mind and installed offices rather than flats – that way, the building would never have become a dwelling.
- 2) Such a position cannot sit with the established case law of Talbot. In a situation where a developer purchased an old office block with the intention of turning it into residential flats, the developer's intention and planning permission would mean a person on the said premises could be convicted of s.4 even if the circumstances were identical to those in Talbot.

The final nail in the coffin was that the decision of the Court in Talbot required that a restrictive interpretation of s.4 should be preferred. Indeed, previous restrictive decisions in s.4 cases were referred to in Talbot and approved of.

In L v CPS [2007] EWHC 1843 (Admin), Lord Justice Auld stated:

*"It is and should be a choice of last resort for a prosecutor when seeking to mark suspicious conduct and to prevent it developing into more serious mainstream criminal offences. And, because of the snapshot view that courts have to take as to criminal intent at the time the suspected person is found, should be resorted to with caution."*¹

However, what if the "dwelling house under construction" was capable of constituting a dwelling house? What makes a building a dwelling house? The Concise Oxford English dictionary (1991 edition) defines a dwelling house as "a house used as a residence, not as an Office, etc."

¹ Para. 36, page 8

In Curl v Angelo [1948] 2 ALL ER 189² a dwelling house was defined as premises which are suitable for all the major activities of residential life, particularly sleeping, cooking³ and eating, and which are actually used for those purposes. “Actual use” for the purposes of A and B was dealt with in Hollyhomes v Hind [1944] 1 KB 571, where Croom-Johnson J. stated:

*“It is no part of this offence to show that the premises were occupied or unoccupied”*⁴

Hollyhomes has the benefit of being a decision made in respect of s.4 of the Act. Regrettably it was not cited in argument in Curl. The case of Hollyhomes turned on whether an entrance hall to a block of flats (which were agreed to be established dwellings) came within the “dwelling boundary” of the flats. None of the tenants in the flats owned the entrance hall and were not in possession of it. Humphreys J. dealt with the matter in the following way:

*“Whatever may be said from the point of view of rating law, the whole building...is clearly a dwelling house. It may be said to contain three dwelling houses, but that does not prevent it being itself a dwelling house. It is used as a dwelling house and it is occupied as a dwelling house...It is not without interest to see how wide are the words of s.4...I cannot think that any Court of Justice would take the view that it was necessary to describe the offence...[with reference to]...either the name of the occupant or the details of occupancy of the person outside whose door the man was found.”*⁵

Humphreys J. further pointed out that any post sent to any of the flats would have been addressed with reference to the building itself. In dealing with the issue Croom-Johnson J. stated that:

² Relying in part on Wright v Howell (1947) 204 L.T. Jo. 299

³ Cooking facilities, on their own, are not a prerequisite in order for premises to constitute a dwelling .Uratemp Ventures Ltd v Collins [2001] UKHL 43.

⁴ At p. 575

⁵ At pp. 573-574

“I cannot see that there is any departure from...[the offence being in relation to a dwelling house]...when, the facts being stated, it turns out that part of the premises on which the offence is alleged to have been committed might, for the purposes of rating, be said to be in the occupation of some other person.”⁶

In Curl, the Court set out a test to identify whether a premises was a dwelling. The test was whether the said major activities of life were in fact carried out on the premises. If all or most of the said activities are undertaken on the premises in a residential fashion, then it is more likely that the premises in question are a dwelling. For the purposes of A and B (bearing in mind the decision in Hollyhomes), the Defence submitted that the test be modified to “...where the major activities of life are *capable* of being carried out”. The Defence submitted that the entrance hall in Hollyhomes properly falls within the meaning of “dwelling” as a result of the following factors:

- a. The character of the building as a whole is that of a dwelling and the building was capable of facilitating the major activities of residential life;
- b. A person dwelling in the building must use the entrance hall in order to get to that part of the building where he carries out the major activities of residential life.

Having identified the test, the cases of A and B had to be considered. The building was little more than a concrete shell. The building was a 3-storey building site, surrounded entirely by scaffolding. Furthermore,

1. Some windows were fitted and were boarded with wood; other window openings had no windows and simply had plastic sheet coverings. Windows that had been fitted were regularly removed for building purposes.
2. There were no doors in the building.
3. There was no main power to the building after 16.45 – only a sensor and alarm bell were left “live”.

⁶ At p. 575

4. The roof was incomplete.
5. There were no partitioning walls to define each flat.

The Defence submitted that, as a result of the facts above, the building was incapable of being described as a dwelling within the test set out by earlier case law. Put simply, no person could or would reside in the building, and no person does so. Hence there was no charge in law and the case dismissed.