



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, including the latest CJA 2008 provisions in force;

PLUS,

James Bide-Thomas on the complexities of remand day calculations.

Apology and Correction: In the last newsletter I said that the new rules on the contents of defence statements applied to cases where the investigation was begun on or after 3rd November. I was wrong. In fact the new rules apply to all cases in which the investigation was begun on or after 4 April 2005 and the defendant is committed, transferred or sent for trial (or pleads Not Guilty if he is to undergo summary trial) on or after 3rd November 2008. The new rules will therefore apply to most cases committed or sent to the Crown court since 3rd November. My apologies for the confusion.

Criminal Justice and Immigration Act: Commencement Order 4 has now been published. The following provisions will come in to force as of 1 December 2008:

Section 61: Compensation for miscarriages of justice. A man who has been wrongly convicted and has his conviction overturned must now apply for compensation within 2 years of the quashing of his conviction unless there are exceptional circumstances justifying a later application. Compensation is limited to £1m for defendants who have been imprisoned for 10 years or more or £500,000 for those who have been imprisoned for less than 10 years. Compensation for a year's loss of earnings is limited to 1.5 times the national average annual income.

Section 118 and Schedule 20: Closure Orders. Schedule 20 inserts a new Part 1A into the

Anti-Social Behaviour Act 2003. The new legislation effectively mirrors the old 'crack house' closure order legislation but applies to all anti-social behaviour.

The first stage – a closure notice. If a police officer (superintendent or higher) or the Local Authority has reasonable grounds for believing that a person has engaged in anti-social behaviour in a premises within the last 3 months AND that those premises are associated with persistent disorder or persistent serious nuisance to members of the public, that police officer or Local Authority may issue a closure notice. That notice prohibits anyone except the habitual occupier of the premises from having access to the premises. The closure notice must state the time and day on which the application for a closure order will be made.

The second stage – the application. Once the police or Local Authority have issued a closure notice they MUST apply for a closure order. The application MUST be heard in the Magistrates' Court within 48 hours of the service of the closure notice, BUT the Magistrates MAY adjourn the application for up to 14 days to allow those with an interest in the premises an opportunity to oppose the order NB: there is no power to adjourn the hearing to allow the applicant police force or Local Authority to put its case in order. The Magistrates MAY make a closure order if they are satisfied:

1. A person has engaged in anti-social behaviour on the premises; AND
2. The use of the premises is associated with significant and persistent disorder or persistent serious nuisance to members of the public; AND
3. The making of the order is necessary to prevent the occurrence of such disorder or nuisance for the period specified in the order.

The third stage – The order and its enforcement. The order issued by the Magistrates is that the premises are closed to all persons for a period up to 3 months. If the premises form part of a larger building, the Magistrates may make orders in relation to access to the rest of the building and the Magistrates may conclude that the order needs only to be made in respect of part of the building for which the closure notice was issued. Beyond that, the only discretion the Magistrates have is in the time for which the order remains in force, up to the 3 month maximum.

The applicant police force or Local Authority may enter the premises and do anything reasonably necessary to secure the premises.

Anyone remaining on or entering the premises in breach of the order is committing an

offence punishable with 6 months imprisonment.

The fourth stage – extension and discharge. The Police Force or Local Authority may apply, before the order expires, to extend the order up to a maximum of 6 months. People with an interest in the premises may apply to the Magistrates' Court to have the order discharged.

Appeals. An appeal lies from the Magistrates' Court to the Crown Court. Notice of appeal must be lodged within 21 days. Both the applicant and the respondent are entitled to appeal the Magistrates' decision.

The following provisions will come in to force as of 26th January 2009:

Sections 63-67: Possession of extreme pornographic images. This section makes possession of extreme pornographic images an offence. An extreme pornographic image is one which is produced for the purposes of sexual arousal and which portrays, in an explicit and realistic way, one of the following:

- An act that threatens a person's life;
- An act that results, or is likely to result in serious injuries to a person's anus, breasts or genitals;
- An act that involved sexual interference with a human corpse; or
- A person performing an act of intercourse or oral sex with an animal (whether dead or alive).

Defences:

1. The defendant had a legitimate reason for being in possession of the image.
2. The defendant had not seen the image and did not know or have cause to suspect that it was an extreme pornographic image.
3. The defendant was sent the image without having requested it and did not keep it for an unreasonable period of time.
4. The defendant participated directly in the act portrayed in the image and the act did not involve the infliction of any non-consensual harm (including harm to which one, in law, cannot consent).
5. If the image portrays what appears to be a human corpse, that it is not, in fact, a human corpse.

Maximum sentence:

For possession of an image portraying an act that threatens a person's life or an act that results, or is likely to result in serious injuries to a person's anus, breasts or genitals: 3 years.

For possession of an image portraying an act that involved sexual interference with a human corpse or a person performing an act of intercourse or oral sex with an animal (whether dead or alive): 2 years

Section 71: Maximum Penalty for Publication of obscene articles. The maximum sentence on indictment is increased from 3 to 5 years.

Miscellaneous. Other sections touching upon police misconduct and taking action against the owners of foreign websites are also brought into force. The Commencement Order is online for those who are interested: http://www.opsi.gov.uk/si/si2008/uksi_20082993_en_1

Breach of Detention and Training Order: Section 104 (3) of the Powers of Criminal Courts (Sentencing) Act 2000 says that if it is proved to the satisfaction of a Youth Court that the defendant has breached the Supervision element of his Detention and Training Order then the Youth Court may order him to be detained 'for the remainder of the term of the Detention and Training Order'. That means, the amount of the order remaining, *at the time the breach is found proved*, not the amount of the order remaining at the time the breach was committed: *H v Doncaster Youth Court (Neutral citation not yet available)*

Unlawful arrest: A police constable was effectively directed by his superiors to arrest a man on suspicion of terrorism offences. The Constable had precious little on which to base a suspicion that the man he was arresting had committed any offence, beyond the fact that he believed his superior officers had reasonable grounds to suspect the man (although his superior officers never told the constable what it was they thought this man had done). The Court of Appeal concluded that it was not reasonable for the constable to infer that his superiors must have had reasonable grounds on which to suspect the man. Whether the constable had reasonable grounds depended on the information he had. The arrest was therefore unlawful: *Commissioner of Police of the Metropolis v Raissi [2008] EWCA Civ 1237*

King Street Chambers CPD: This is the last criminal law update for this year. The newsletter will return in January. Remember, King Street is committed to providing you with all your CPD points for free. The 2009 seminar programme will include a day seminar in May, a day seminar in October and a further 10 hours of CPD to be gained from evening seminars throughout the rest of the year.

If you would like our seminars delivered at your offices please email us at seminars@kingstreetchambers.com

Remand days

by James Bide-Thomas

As everyone is no doubt aware, days spent on remand prior to being sentenced to a term of imprisonment count towards the number of the days that must be served before a Defendant is eligible for release. The Court is required to make a direction under section 240 of the Criminal Justice Act 2003 to the effect that the remand days should be credited. The Court has a discretion to refuse to credit these days, but in the event of doing so must give reasons. It is clear from reading section 240 that a direction to credit days spent on remand can only be given towards the sentence for a conviction for which the Defendant has been remanded. If a Defendant is given consecutive sentences, then the remand days will only count against sentences for convictions for which the Defendant had previously been remanded.

One area in which this frequently cropped up was where the Defendant was subject to a suspended sentence order and then committed a further offence. The remand days would only count towards the new offence for which he was remanded and could not be redeemed against the suspended sentence. This has often led to the effective loss of remand days, if they total more than the sentence of the current offence. There is currently no remedy to this and this would frequently lead to no remand days being credited against a suspended sentence. However, three recent authorities of the Court of Appeal, *R v Barry James Fairbrother* [2007] EWCA Crim 3280, *R v Scott Byers* [2007] EWCA Crim 2039 and *R v Shabir Mohammed* [2008] EWCA Crim 2756 make it clear that where the Defendant has been remanded in custody prior to the imposition of a suspended sentence (as

opposed to prior to activation), those days can count towards the sentence of imprisonment when the suspended sentence is activated. *Mohammed* is a case under the old law that contrasts the situation prior to 2005 with the current situation. Under the old law, it was deemed that the judge would have taken into account the days spent on remand when imposing a suspended sentence. The current position is that the correct reading of section 240 is that the remand days should be taken into account upon activation.

It should also be noted that section 21 of the Criminal Justice and Immigration Act 2008 is now in force. This section inserts a new section 240A into the Criminal Justice Act 2003. The new section states that half the number of any days spent on bail while subject to an electronically monitored curfew must count as remand days, unless the Court considers that it would be just in the circumstances not to credit any days.