



Albion Chambers CRIME TEAM NEWSLETTER

Penalising the young for being young?

recently represented a 17-year old who had pleaded guilty to Possessing a Disguised Firearm. The firearm was a taser which was very convincingly disguised as a torch. He had bought it with ease on the internet, and thought it was terribly cool. As you will no doubt be aware

however, this offence carries a mandatory minimum sentence of five years for those aged 18 or over at the time of the offence, and three years for those aged 16 or 17.

For very obvious policy reasons, the law is rigid in this area. Parliament drafted the legislation so that only if there are 'exceptional circumstances' should that mandatory minimum term be departed from. And a quick glance through Banks on Sentence, confirms that when Parliament says exceptional, it means exceptional, and that the courts have been reluctant to depart from that. Unsurprisingly, given that it is a factor that has already been accounted for in the reduction from five years to three, age doesn't cut it as an 'exceptional' factor. However, for the 17-year old who I represented, I was able to successfully argue that he was one of the (un)lucky few who could be deemed 'exceptional', and whose particularly traumatic life experiences led the court to find that immediate detention could be avoided.

His case was on any view exceptional, although given those we deal with on a daily basis, was sadly far from unique. He had been subjected to violent sexual assault a year or so earlier by another young man who was ultimately convicted of that offence. But the trauma of the offence itself and the fact that the perpetrator had been part of a group known to the 17-year old, meant that he had begun, unsurprisingly, to fear for his own safety and to carry the weapon, which as he

was able to purchase it so openly he didn't think was an offence. Ironically, had he just bought a knife, given that it was his first offence, as detailed below, he would have found himself in a far better situation. The judge who was to sentence my client for the taser offence, having read an unusually full PSR, wanted to know more about the sexual offence because he thought he recognised the circumstances of that offence and so asked the prosecution to provide details of that previous matter. For obvious reasons, my client was not initially forthcoming about either the sexual assault or the trauma that had affected him and which had led to his carrying the weapon. But without that link, the other factors of his having been of previous good character, the fact that he had committed no offences since, and had, in fact, been positively engaging with his education and those involved in his care would not have been enough to amount to 'exceptional circumstances'. However as a consequence of a very diligent judge and a prosecutor able and willing in the course of a busy PTPH list to find and disclose the previous matter, the judge found that there were 'exceptional circumstances' which enabled him not only to impose the mandatory minimum term, but to impose a sentence that avoided the immediate detention of my client.

But as I was preparing the case, it became immediately evident that the firearm's legislation (and the absence of a definitive sentencing guideline) does so little to protect young people, and, as such, runs contrary to the principles set out in the overarching Youth Sentencing Guidelines. Section 1.1 of the YSGs stipulates that when sentencing children or young people, a court must have regard to the principle aim of the youth justice system, and the welfare of the child, a principle that clearly

doesn't apply in cases where there is a mandatory sentence. Despite this, as evidenced by my recent experience, many judges can and do nonetheless, have regard to this clearly laudable overarching principle.

That is not to suggest that young people and weapons is not an increasingly serious issue, or that deterrent sentences are not appropriate. But it is equally plain that the sentencing provisions in respect of those who carry weapons, fail to take account of the realities of being a young person and, arguably, impose an arbitrary sentence on an individual who, in all other respects, is still deemed to be a child, while at the same time providing those charged with mitigating the sentence precious little wiggle room.

The guidelines for those in possession of bladed articles are slightly better, providing a targeted youth guideline which addresses the principles and characteristics unique to young people. In respect of a bladed article, the mandatory minimum of four months applies only for those convicted of an offence of threatening with the bladed article, or, for those convicted of the simple possession offence, if it is a second relevant offence. In addition, the test for departing from the mandatory minimum term is 'that there are particular circumstances... which make it unjust to do so in all the circumstances'. That is clearly a lower threshold than the exceptional-circumstances test, giving those seeking to argue that it would be "unjust" greater lassitude than those attempting to meet the high bar of 'exceptional'.

Despite the intention of Parliament, it is clear that the deterrent mandatory minimum isn't working. The rise of violent crime and knife crime, although keeping those of us who practice in crime in work, is one of the primary issues (the B-word aside) that MPs are seeking daily to grapple with.

Sajid Javid's already highly controversial solution, is to impose Knife Crime Prevention Orders. According to the proposed amendments to the Offensive Weapons Bill 2017, these

orders will be available both pre- and post-conviction where:

'The court is satisfied on the balance of probabilities that, on at least two occasions in the relevant period (last two years), the defendant had a bladed article with them without good reason or lawful authority:

(a) in a public place in England and Wales;

(b) on school premises; or

(c) on further education premises.'

Orders can be made in respect of young people as young as twelve. Twelve. Victoria Atkins MP, speaking in the House of Commons, suggested that these orders are to deal with those who are 'at risk of engaging with knife crime' or who are 'habitual knife carriers'.

But, looking at the legal test for the making of an order, and the fact that it is to be retrospective in its application, how are the courts going to measure whether, on the balance of probabilities, someone had a bladed article on them? Either they were seen with a bladed article or they weren't. The alternative and the implication from the proposed amendment, is that courts are to be asked to find that a young person was 'more likely than not' to have been carrying a bladed article based on who they hang around with, any criminal history, and their socio-economic background.

The proposed legislation specifies that a breach could result in a period of detention of up to two years. On summary conviction, that maximum period of detention decreases to a term not exceeding 12 months, a fine, or both. The Association of YOT Managers (who were incidentally not consulted prior to the amendment) responded to the proposed orders by describing them as likely to fast-track children into custody', and to result in a disproportionate number of BAME children entering custody. So whilst the aim of the YSGs is clear, and that it is important to avoid criminalising children and young people unnecessarily, these proposals will have the effect of doing just that.

As a consequence, in cases which involve youths, it is more important than ever to remind the courts of the principles of the YSGs, especially those which involve weapons or where a mandatory minimum applies. Because if you're not 'exceptional', if it wouldn't be 'unjust' but instead if you are trying to show off, or you are scared, or, as is often the case, you are just plain stupid, Parliament says that you belong in a detention centre in the interests of 'detering' other young idiots from doing a similar thing. And that simply can't be just.

Emily Heggadon

Editorial

Welcome to the spring edition of the Newsletter. This time last year, we welcomed the appointment of HHJ Cook and HHJ Taylor QC and, unbelievably, this year we are going one better by announcing that three members of the Albion Chambers Crime Team have recently been appointed to sit as one of Her Majesty's Judges: Edward Burgess QC, Stephen Mooney and Kirsty Real.

That is not only a cause for celebration but a moment to consider just how lucky we are that under our system judges are appointed from those who have practised in and have extensive experience of, those that they are to sit in judgement of. And a cursory examination of the selection process in France and America, demonstrates why our system is seen as the envy of the world.

In France, the emphasis is on judicial education, something which begins before appointment with potential judges selected through competitive examinations. The successful few go on to attend the *École nationale de la magistrature* in Bordeaux, the first step in a life-long civil service career. The crucial tenet of our system is the independence of our judiciary, unlike in France where judges and prosecutors are part of the same professional body transferring from one position to the other throughout their career. Where the Magistrates find themselves serving their first appointment depends entirely upon how well they did in their final examination. The examination ranks them by order of merit so although they are, in theory, able to choose their first posting, whether they are successful or not depends on their rank in that final examination.

Whilst a system that trains judges for the job they are to do and ranks them according to how well they fared in a single examination, may fill many of us with horror, I suspect that is nothing to what many experienced watching the debacle surrounding the selection of the most recent Justice of the State Supreme Court of America. Yet it isn't only their selection for the highest judicial office that differs so wildly from our own selection process. In America, a judge with the power, in some states to hand out a death sentence, only reaches that position by being elected in an election much like any other in America; seeking endorsements, raising funds and embarking upon an election campaign, not once but each term they wish to serve.

The reality of that system is perhaps best highlighted by the 2008 election for a justice on the Wisconsin Supreme Court. That was an election which even by American standards was extraordinarily hard-fought and included caustic television advertisements from both sides, in a campaign that cost \$5 million.

Michael Gableman, the 'winning' justice, ran a television advertisement falsely alleging that the only black justice on the State Supreme Court had helped to free a black rapist. But prior to his elevation to the Supreme Court, Michael Gableman had been a county court judge for only six years, a position he was given by the republican Governor Scott McCallum. And in a twist that sounds like a plot line from *House of Cards*, Michael Gableman was appointed by Mr McCallum, over two candidates proposed by his own advisory council on judicial selection. But I suspect the two unsuccessful candidates probably hadn't donated \$2,500 to his campaign fund.

So despite the continuing underfunding of our entire justice system and the other problems with which we battle daily, the appointment of judges who have experienced a professional career in both defence and prosecution, who are independent and who have not paid someone to get to where they are, is something that we can be proud of and we offer all three of them our heartfelt congratulations.

Turning to the Newsletter itself, this edition contains three very interesting articles, all of which have been written or co-written by new(ish) members to the Albion Crime Team. The issue of knife crime and the fear that that gives rise to, has been the subject of much recent debate. The fact that most of those convicted of such offences are young themselves, has often been missed in much of that discourse, especially in the proposals for the controversial Knife Crime Prevention Orders, a subject that is touched upon in Emily Heggadon's article.

Perhaps those young men who feel disenfranchised and alienated from their communities should take to the streets rather than take up their weapons and use their right to protest, the subject of which is the article by Charley Pattison.

The final article from Kate Brunner QC and Clare Fear deals with the complexities of the defence of insanity and perhaps, as with the issue of youths and offensive weapons, this is an area which needs to take account of the reality of those to whom exceptionally, this defence would apply.

Sarah Regan, Head of the Albion Crime Team

The right to protest

The correct charges and available defences

Freedom of peaceful assembly and association, and freedom of expression

The right to peaceful assembly is a central tenet of any civilised, democratic society, but it is also such a fundamental right that it is also enshrined in Article 11 of the Human Rights Act

1998. Peaceful assembly often involves groups participating in protests which enable the participants to individually and collectively express dissent in an attempt to seek to influence the Government. And whilst it is often regarded a tool of last resort, it is nonetheless a vital and powerful one, and one that separates democracy from dictatorship.

In *DPP v Ziegler & Others*¹ the Court considered the application of Articles 10 and 11 citing *Steel v United Kingdom* (1999)² in which that Court stated that ‘the first and second applicants were arrested while protesting against a grouse shoot and the extension of a motorway respectively. It is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers, nonetheless, that they constituted expressions of opinion within the meaning of Article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression.’³

For decades, groups of people have been exercising their right to peaceful assembly and it is necessarily the case, as Laws LJ highlighted in *Tabernacle v SSD*⁴, that ‘rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them’. It is the balance of facilitating these rights and protecting the public that the State (through the police and the relevant charging authorities) must strike. In exercising that balance, it is essential that those accused of committing a crime are charged appropriately and proportionately.

Fruit-cake-eating grandma or domestic extremist?

There are, of course, those for whom activism is a way of life, but there is also an emerging trend of people for whom attending a protest is a single act of civil disobedience, governed by an issue that is important to them. Examples of the sorts of activist groups that have been considered domestic extremists include:

- The Kingsnorth Six: a group of activists who in 2008 protested against a power station and were acquitted of charges of criminal damage (£30k) at Maidstone Crown Court, having argued climate necessity as a defence;

- The Nanas: a group of grandmothers who gather with fruit cake and tea to protest against fracking in Lancashire;

- The Heathrow 13: a group of academics and professionals aged between 22 and 67;

- The Stansted 15: teachers, professionals and students;

- Schools Strike for Climate: school children of all ages, independently organised by 16-year old Greta Thunberg;

- Extinction Rebellion: a new climate-change-campaign group mobilising those from different age groups, socio-economic backgrounds and geographic locations.

Clearly, the majority of these groups are not professional activists but are comprised of people leading pro-social lives and who have no previous experience of the criminal justice system. Many of them will understand the risks of having a trial, and although they will undoubtedly be terrified of the consequences of losing, a consequence which may include imprisonment, they will nonetheless want their day in court.

Crime and punishment

As set out above, States are obliged to respect the right to protest and should not prevent, hinder or restrict that right except in such circumstances as are lawfully limited. However, the State is required to do more than just passively allow protests to take place and is obliged to protect an individual's right to protest which may involve undertaking reasonable steps to protect

those who exercise their right as well as facilitating an enabling environment.

Arguably, the intervention by the State in respect of the Stansted 15 could be said to be an attempt to stifle the rights of those protestors. In addition, the decision to bring charges against them in respect of terror-related offences could potentially give rise to an abuse of process or inconsistent charging argument. The facts of that case from 2018, involved the defendants breaking into Stansted Airport in an attempt to prevent the deportation of foreign nationals. Their actions were almost identical to those of the Heathrow 13 who, in 2015, cut through the perimeter fence and occupied the runway arm-locked together, except that the Stansted 15 arguably went further by connecting themselves to the aeroplane containing the detainees due to be deported.

The Heathrow 13 were arrested on suspicion of Aviation Act Offences but were ultimately charged with and convicted of, offences of aggravated trespass under s.68 of the Criminal Justice and Public Order Act 1994. The maximum sentence for offences of aggravated trespass is three months' imprisonment or a Level-4 fine (or both). In contrast, the Stansted 15 were charged with offences of endangering safety at aerodromes under the Aviation and Maritime Security Act 1990. The maximum sentence in respect of that legislation is imprisonment for life and was passed in response to the Lockerbie bombings in 1988, where the acts of those who perpetrated them resulted in the death of hundreds. It could be argued that to charge the Stansted 15 with the same offence as those responsible for the Lockerbie bombing is unreasonable, or even draconian, when considering not only the intention but, more specifically, the peaceful actions of the Stansted 15, particularly when there are clearly more proportional and appropriate charges available.

The Stansted 15 were convicted and are currently in the process of appealing their convictions but, in a bizarre turn of events, after they had been sentenced, and in advance of the hearing in their appeal, they received notice that they are to be charged with aggravated trespass. Without even considering the abuse issues that that course of events raises, it is undoubtedly a belated indication of an acceptance by the State that the terror-related charges were disproportionate to the criminality involved and an abuse of process.

However, the vast majority of protestors are not charged terror offences but with Obstructing the Highway under s.137(1) of the Highways Act 1980 and

in *Hurst and Agu v The Chief Constable for West Yorkshire*⁵ the court set out that the correct approach to the question of whether the highway had in fact been obstructed namely:

- Whether there was an obstruction of the highway, which included any occupation, unless de minimis, of part of a road thus interfering with people having the use of the whole road;

- Whether the obstruction was wilful in the sense of deliberate; and

- Whether the obstruction was without lawful authority or excuse, which covered activities otherwise lawful in themselves which might or might not be reasonable depending on all the circumstances.

- In *Westminster City Council v Brian Haw* [2002] EWHC 2073 (QB) [11] the Court found that the prosecution '...must establish not only the fact of obstruction but also that it is, in all the circumstances, unreasonable Obstruction of the highway'.

Therefore, anyone defending a protester can and should rely on Articles 10 and 11 of the ECHR to argue that their actions were reasonable, and in light of the successful argument of the 'Kingsnorth Six', albeit in the Crown Court, also deploy arguments based on necessity, i.e. that the action taken was necessary to prevent a greater harm occurring.

The increasing prevalence of social media as a means of organising civil disobedience,

may well result in ever more activists brought before the courts, and it is therefore important, as with any case, to consider making early arguments as to abuse of process and whether novel defences such as climate necessity are also available to those wishing to exercise their right to peaceful assembly.

Charley Pattison

¹ *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, at para. 28

² 28 EHRR 603, at para. 92

³ *DPP v Ziegler & Ors* [2019] EWHC 71 (Admin) [2009] EWCA Civ 23

⁵ [1986] Cr App R 143

Insanity

A rare and risky defence

The defence of insanity is engaged in cases where a defendant is so severely mentally ill that they do not know what they are doing. Moral responsibility is not just diminished: it is absent. The present form of insanity defence dates from 1843, and has been criticised for being unfair, out of date, and failing to reflect advances made in medicine and psychiatry. It is rarely used.

Cases where the insanity defence succeeds tend to be where a defendant is plainly extremely mentally ill, and where there is no dispute between psychiatrists. In a survey of 161 psychiatric reports in cases between 1997 and 2001 where the insanity defence succeeded it was found that there were only six reports (in six cases) which said that the defendant was not insane at the time of the offence¹. Despite the frequency of agreement, each of those cases would have involved a trial: one oddity of the insanity defence is that a case cannot be resolved between the parties. The prosecution cannot agree to the insanity verdict, and case law suggests that a judge cannot direct the jury to return such a verdict². Even if the prosecution agrees that all of the elements of insanity are met, it can only be a jury which returns the verdict of 'not guilty by reason of insanity'.

This procedure lay behind the unusual

trial of Harris, defended by Kate Brunner QC and Clare Fear. The tragic case involved a mother who drowned and then set fire to her four-year-old daughter. Psychiatrists for the Crown and defence agreed that she had been suffering from an overwhelming psychosis, which led her to believe that killing her daughter was the only way to protect her from harm, and that her daughter would be resurrected a few days later. Both psychiatrists agreed that all of the elements of insanity were present, as were all of the elements of diminished responsibility.

The indictment bore two counts: murder, and manslaughter. A plea to manslaughter by diminished responsibility would have resolved the case. While that outcome would have given certainty, it would also have led to a criminal conviction (whereas the special insanity verdict is a modified acquittal), and would have led to the risk of a prison term in the event of the defendant becoming well enough to leave hospital.

Facing a trial on the two-count indictment carried, on the face of it, the ultimate risk for the defendant: a conviction for murder. That risk was removed.

The learned judge acceded to a defence application, without opposition from the Crown, that the route to verdict should not permit the jury to convict of murder. The route to verdict at the end of the trial allowed the jury to consider

only two options of (i) not guilty to murder by reason of insanity or (ii) guilty to manslaughter on the grounds of diminished responsibility.

There was no previous case law dealing with the precise point. However, previous case law established that it would be proper for a judge to withdraw murder from a jury and leave only manslaughter by diminished responsibility, where there was undisputed psychiatric evidence that all of the elements of diminished responsibility were present. In the case of *R v Brennan* [2014] EWCA Crim 2387, it was agreed that the defendant suffered from a schizotypal disorder, was obsessed with witchcraft and Satanist killings and had planned and executed a ritualistic killing. Despite the agreed medical evidence the jury convicted of murder. The Court of Appeal held that the jury should not have had that opportunity: diminished responsibility was the only one possible rational outcome on the facts, there was no basis for a verdict of murder, and so the judge ought not to have left murder to the jury.

Davis LJ said this [66]:

'The judge will assess the position in the light of the uncontradicted expert evidence and in the light of any other evidence. It at all events seems unprincipled in cases of this type, where an application to withdraw is made, that murder should be left to the jury simply and solely because the prosecution wants it to be. A charge of murder should not be left to the jury if the trial judge's considered view is that on the evidence taken as a whole no properly directed jury could properly convict of murder.'

That case was considered by the Supreme Court in *R v Golds* [2016] UKSC 61. The Court held that it would usually be proper for diminished responsibility issue to be left to a jury, not least because it

was a multi-issue defence, and because the burden of proof was on the defence. However, it would be proper in some cases for murder to be withdrawn. Lord Hughes said [49]:

‘if the jury is to be invited to reject the expert opinion, some rational basis for doing so must at least be suggested, and none had been at trial nor was on appeal. It is not open to the Crown in this kind of situation simply to invite the jury to convict of murder without suggesting why the expert evidence ought not to be accepted.’

In our case of *Harris*, there was uncontradicted expert evidence. The prosecution did not identify any basis for the jury to convict of murder, and conceded that it would be a perverse verdict on the facts.

If the issue of insanity had not arisen in *Harris* then the position would be on all fours with previous case law, and murder would have been withdrawn from the jury, given that it was accepted that there was no evidential basis for rejecting the agreed expert evidence that diminished responsibility was made out. The learned judge agreed that the addition of the issue of insanity did not displace the obvious and fundamental principle expressed in *Brennan* that murder should not be left where there was no rational basis for rejecting expert opinion of diminished responsibility. Were the position otherwise, a defendant, who is so mentally ill that a psychiatrist considers that the verdict of insanity applies, would face the risk of having a murder conviction when a defendant who is not considered to be so ill (but ill enough that diminished responsibility applies) would not face that same risk.

The jury was therefore not permitted to convict of murder. Murder was not removed from the indictment: the charge remained on the indictment, although the jury were directed they could not convict on it. The course taken by the judge permitted the jury to attach the verdict of ‘not guilty by reason of insanity’ to the murder charge. That had a particular legal effect: where the insanity verdict is attached to a murder charge there is a requirement to add a restriction order to a hospital order. The judge held that the availability of another route to acquittal of murder, via the defence of diminished responsibility, did not make it inappropriate for the jury to attach the special verdict to the charge of murder. The jury returned that special verdict.

In the Law Commission’s Report: ‘Insanity, Fitness to plead and Automatism’ (2013) further complexities with the present law are identified. The term ‘defect of reason’ has been interpreted

to mean that for a defence of insanity to be successful the defendant’s ability to reason must be impaired at the time of the commission of the offence. The definition does not take into account an inability to control one’s emotions or compulsions. It has been argued, by leading academic Professor Ashworth, that this is too narrow an interpretation, and that “the power to control one’s emotions should be recognised as part of a reformed mental disorder defence.”

The M’Naghten test requires the accused to be suffering from a disease of the mind. This requirement is easily met when dealing with conditions such as schizophrenia, as was the case in *Harris*. However, this phraseology excludes a number of conditions which affect mental functioning such as epilepsy and diabetes. It also excludes mental ‘malfunctioning’ caused by an external factor such as brain injury or a drug. The Law Commission highlighted the oddity that behaviour caused by an internal factor may be classed as insanity, which then leads to a special verdict, whereas behaviour caused by an external factor may be classed as automatism, leading to a simple acquittal. Lord Justice Hughes recently noted that this approach ‘makes illogical, hair splitting distinctions inevitable, allowing some an outright acquittal while condemning others to plead guilty or take the risk of a special verdict.’

The Law Commission’s provisional proposal in a 2013 discussion paper was for a new defence and special verdict of ‘not criminally responsible by reason of recognised medical condition’. The definition of ‘recognised medical condition’ would be wider than the current ‘disease of the mind’. Nothing has changed, and there has been no further proposal from the Law Commission in the intervening six years. We can only hope that the 1843 defence is replaced with one which is fit for purpose before its 200th anniversary is reached.

Kate Brunner QC
Clare Fear

¹ R D Mackay, B J Mitchell and L Howe, “Yet More Facts About the Insanity Defence” [2006] *Criminal Law Review* 399, 405

² *R v Crown Court at Maidstone ex p Harrow LBC* [1999] 3 All ER 542

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