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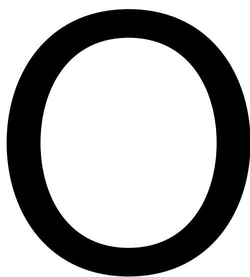
Albion Chambers CRIME TEAM NEWSLETTER

What the F?[1]

Abuse by any other name



Once upon a time, applications to stay an indictment for abuse of process on the grounds of delay rendering a fair trial impossible were commonplace. Occasionally they were successful.

A line of cases had developed since the genesis of the jurisdiction in 1964, which made the principle in such applications pretty clear: even very long delay in reporting could be tolerated; a degree of prejudice had to be endured by the defence in such cases; the trial process would usually suffice to redress the balance and a stay would only be granted in exceptional cases where the degree of prejudice was so great that the accused could not receive a fair trial. Despite the miniscule size of the aperture this left, for some years, at first instance many submissions passed through the eye of the needle, and cases were stopped.

However, the advent of interlocutory appeals against terminatory rulings had a major effect upon such cases. The Court of Appeal began to get its hands on cases which had been stayed for abuse, and Judges and Counsel were recalled from the golf-course to continue trials. The Court of Appeal's rulings became steadily more robust, and first instance judges began to be less inclined to accede to such submissions. In more recent times, abuse arguments generally have been discouraged by ever more demanding procedural requirements.

In 2005 came Smolinski [2]. It was seen by many as authority for the proposition that in historic sex cases, the evidence should be heard before any submission to stay the indictment. Many judges insisted on this procedure. The rationale being that the trial judge could not properly assess the extent to which prejudice existed by virtue of delay until the degree to which the defence were hampered by missing material became evident through cross-examination.

In February of this year, came the appeal of TBF [3]. The Court quashed a conviction and opined that: whilst cases where a stay would be granted in such circumstances would be rare, that proposition presupposed that the prosecution would root out many cases where a fair trial could not occur; in a case where there was no justifiable reason for the delay in making a complaint to police, that had a bearing on whether to grant a stay; whilst in some cases such applications should be made after the Crown's case, that approach would stultify the Court's power to limit prejudice by excluding evidence; having analysed what material had been lost to the defence by virtue of delay, the trial judge should consider its importance to the case, and whether any direction to the jury could really adequately compensate for it.

This decision, on the face of it, breathed a little new life into abuse applications in historic sex cases. That prospect was not lost on the senior judiciary and in July the Court of Appeal reconvened with a vengeance in F [4].

An impressively strong five-judge Court of Appeal, led by the Lord Chief Justice, drowned the celebrations. In a coruscating judgment, the Court reviewed the authorities, including *en passant* TBF, and laid down the law: (1) henceforth, the principles articulated in Attorney-General's ref. (no1 of 90) [5], the case of Stephen Paul S [6], and the current case of F should be the only cases referred to at first instance, all other cases to be regarded as unhelpful or fact specific. On Appeal only *R v Bell* [7] and *Smolinski* may legitimately be cited in addition; (2) an application to stay should not be confused with a submission of no case, and nor should the Galbraith test be confused with the test in the Court of Appeal (ie at first instance, 'is there sufficient evidence for a jury to convict?' as opposed to the Appeal test, 'is the resulting conviction unsafe'?); (3) There is no difference between the test in historic sexual cases and in other cases; (4) 'justification' for the delay was a question of fact, which might impact upon credibility (a matter 'constitutionally' for the jury) and was relevant to the question of abuse of process only insofar as it affected the capacity for a fair trial (to hold otherwise, as the Court had in TBF, trespasses on the jury's province); (5) Applications for a stay would often most appropriately be made at the start of the trial, unless there was a specific reason for deferment.

Comment

In reviewing the authorities, Lord Judge CJ came to the conclusion that once AG Ref No 1 of 90 was properly understood, no other save Stephen Paul S should darken the doors of a lower court ever again. The latter case, said the Lord Chief, "in short represented the practical application of the sensible rule that.....it is never wise to say never. In reality (stays) are likely to be vanishingly rare".

Bell was to be regarded as a perfectly respectable decision, so long as one realized that when Lord Woolf CJ found that the appellant had been put into an 'impossible position' by delay, he nevertheless quashed the conviction 'in the interests of justice' because 'the conviction was unsafe'. So, the lower Courts are not to import this appellate test into Galbraith or stay applications (translation: let juries convict and leave the question of 'safety' to the CA if necessary). The Court

expressed intellectual disdain for the notion that the complainant's lack of justification for delay be part of the mix because it was part of the factual matrix (whilst, oddly, approving Stephen Paul S, which said that stay would be very rare if there was no fault on the part of the complainant or prosecution: see Catch 22).

'Unjustified' delay in making a complaint is capable, apparently, only of making the judge 'more certain of prejudice' (difficult to see how certainty can be added to). Smolinski [8] should henceforth be regarded as misunderstood. When the Court said in that case that 'on the whole it is preferable for the evidence to be called' before a decision as to whether the trial should proceed, this was actually a reference to *Galbraith* submissions, not to stay applications. (So that's why we call them half-time submissions then).

The exercise of the Court's inherent power to stay proceedings where no fair trial is possible due to delay is no child of statute. It is a power developed entirely by the courts, over a relatively short period. It is manifestly a fact and case specific exercise which properly justifies a return to first principles and a blanket ban on citing cases which apply them in one direction or another. However, where such a powerfully constituted Court of Appeal on the one hand reverses a decision to stay, describing the cases appropriate for stay as 'vanishingly rare' and on the other reminds the lower courts that a properly directed jury may, during the course of a fair trial, deliver a guilty verdict which may nevertheless be unsafe, and that that question is for the appellate jurisdiction only, it rather looks as though Aladdin wishes he had never un-bottled the Genie.

Ignatius Hughes QC

1. See footnote 4
2. [2004] 2 Cr app R 40
3. [2011] EWCA Crim 726
4. [2011] EWCA Crim 1844
5. [1992] Crim LR 910
6. [2006] EWCA Crim 29
7. [2003] 2 Cr App R 13
8. plaudits to Paul Grumbar of Albion who appeared in that case.

R they hrsy or not?

Txts, technology and the Criminal Justice Act 2003

Earlier this year, the Court of Appeal's judgment in *Twist & Ors*[1] provided welcome clarification as to the admissibility of text messages; the subject of a number of tortuous previous judgments as the Court attempted to grapple with hearsay in the context of modern forms of communication. More than that, however, the judgment in *Twist* most clearly and simply sets out the definition of hearsay under the CJA 2003 and the good news is we can forget all about implied assertions.

Identifying hearsay

The Court held that the definition of hearsay is contained completely within sections 114 and 115 of the 2003 Act. Putting the words of section 114(1) *"In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated..."* together with the words of section 115(3) *"A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement, appears to the court to have been (a) to cause another person to believe the matter or (b) to cause another person to act or a machine to operate on the basis that the matter is as stated"*, the court said the correct approach to the hearsay rules is as follows:

i. Identify what relevant fact (matter) it is sought to prove;

ii. Ask whether there is a statement of *that matter* in the communication. If no, then no question of hearsay arises (whatever other matters may be contained in the communication);

iii. If yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe *that matter* or act upon it as true? If yes, it is hearsay. If no, it is not[2].

The court emphasised that firstly, the fact that 'a communication is evidence of a fact (i.e. tends to prove it) is not the same as saying that that fact is the matter stated in the communication for the purposes of the Act'[3]. Secondly, that it is important to distinguish between 'the speaker wishing the hearer to act upon his message', and 'the speaker wishing the hearer to act upon the basis that a matter stated in the message is as stated (i.e. true)'[4]. So, where a text message is sent which tends to prove that someone is a drug dealer because it contains a comment on a previous supply of drugs ("that gear was crap – gimme my £10 back"), this does not fall within the hearsay rules because, even if it can be said to amount to an implied statement that the recipient is a drug dealer, and even though the sender intends the recipient to act on the basis of the text message, the sender does not have any purpose to cause the recipient to believe that fact, or to act upon the basis that that fact is true. Rather, that fact – that the recipient of the text is a drug dealer – 'is the common basis of their communication' [5].

Looking back; the end of implied assertions

Those who feel a fond nostalgia for arguments concerning implied assertions may wonder how the Court swept them away in *Twist*. It was pointed out that the intention of the CJA 2003 was to reverse the effect of *R v Kearley* [1992] 2 AC 228, i.e. the intention was to render admissible inferences which may be drawn from words – the 'implied assertion'. So, if I send a text message asking for drugs, you may infer from my words 'Got any gear?' a number of things: that I am a drug user; that the recipient of my text is my dealer. The intention of the 2003 Act was to exclude such inferences from the scope of the hearsay rules. In order to do so, the "matter stated" referred to in section 114, must be limited to the words themselves. An inference is not a "matter stated" for the purposes of the Act.

All this makes much more sense, the Court reminded us, when placed in the context of the rationale for excluding hearsay, as set out in the Law Commission's report which preceded the 2003 Act. There is a substantial risk that an out-of-court assertion may have been deliberately fabricated where the maker of a statement intends to give the impression that a particular fact is true – as is the case with the express assertion "U r a drug dealer" – and so the hearsay rule should extend to cover such statements (where the intention is to prove

that fact). However, that risk of fabrication is not present where 'the person from whose conduct a fact is to be inferred can safely be assumed to have believed that fact to be true... And if that person did not intend anyone to infer it, it follows that a person cannot have been seeking to mislead'[6] – as is the case with the implied assertion which may be drawn from the words "that gear was crap", that the recipient of a text is a drug dealer.

In future, there will be no need to grapple with these issues. The Court was quite clear in saying 'we would strongly recommend avoidance of the difficult concept of the implied assertion'[7], and the three step test set out above renders it redundant.

Previous authorities

The Court reviewed previous authorities, and observed that a number had followed the analysis set out above (and got it right): *R v Chrysostomou*[8] (texts apparently ordering drugs were not hearsay as the Crown was not seeking to prove the contents of the texts, but the relationship between the sender and recipient); *R v MK*[9] (telephone call to D asking for price of amphetamine not hearsay as there was no statement that D was dealer); *R v Elliot*[10] (letters sent to D in prison containing references to gang and gang symbols not hearsay as the purpose of the authors of the letters was not to cause D to believe/act on contents of letters rather that a common membership of gang was simply shared basis of the communication).

The confusion caused by the decision in *R v Leonard* [2009] EWCA Crim 1251 was, the Court said, a result of the Crown's argument that the fact it sought to prove was the matter stated – e.g. that the "joey was a £5 joey" – from which the jury would then be asked to infer that the defendant was a drug dealer. The Court was kind to its brethren and said that the effect of *Leonard* had not been to render such texts inadmissible hearsay – it depended upon what the Crown was seeking to prove. Clearly, the relevant fact which it is sought to prove is not the quality of any of the defendant's previous deals, but his status as a drug dealer, and in light of the decision in Twist, it can safely be said that this is not the matter stated and so the text is not hearsay.

Admissibility

Although from a defence perspective this looks alarmingly like 'anything goes', the Court was keen to emphasise that even where communications are not relied upon for their hearsay content, that does not relieve the court of applying the usual tests of admissibility: is the matter which it is sought to prove a relevant one, and if so, is that fact a legitimate conclusion to be drawn from the evidence? Therefore, whereas defence efforts have hitherto been addressed to arguing that such evidence is hearsay, the focus will now be on these latter questions which will require careful scrutiny of the content of the communication as well as the circumstances in which it was made, as against the fact it is sought to prove.

The Court was critical of the suggestion that it doesn't matter whether a communication is categorised as hearsay or not, because if it is hearsay the interests of justice and section 114(1) (d) provide a gateway for admissibility (the approach used by the Court in *Bains*[11] to get around the apparent effect of Leonard). The Court held that admission through s114 (1)(d) is not routine or a matter of 'mere form'. Instead careful thought must be given to reliability and the opportunity to test the evidence, and if the maker/s of the communication are unknown, that will be very relevant to whether their hearsay evidence ought to be admitted[12].

Communications by the Defendant

The appeal in *Lowe's* case decided in *Twist* was based upon text messages sent by the defendant himself, which the Crown submitted amounted either to admissions of rape or at the least tended to indicate that contrary to the defence case, there had been a row prior to intercourse rather than the other way round. The Court held that such communications were not hearsay as being confessions and/or statements contrary to interest, one of the common law exceptions preserved under s118. Similarly, where the appellant *Boothman* had sent texts to potential drug purchasers, the Court observed that the defence had rightly not taken objection to their admissibility; they were advertisements by the appellant and thus admissible it is suggested on the basis that they too are statements adverse to the appellant, via s118(5).

Modern technology and hearsay

At the outset, the Court emphasised that text messages have the same status as any other communication, including letters, emails and so on. Facebook entries are often said to pose an apparent dilemma. However, the three step test identified may be simply and effectively applied to such entries in order to determine whether they too are hearsay.

The real difficulty with Facebook entries lies not in determining whether they are hearsay, but in proving their content and identifying the sender. Early consideration must be given by the defence to whether the defendant accepts/the Crown can prove authorship of entries attributed to him and, where the entry is that of a Crown's witness, whether it is accepted that the Facebook page on which the entry appears was used/seen by the defendant. Where it is hoped to put a Facebook entry to a witness during cross examination, it can be difficult for the defence to prove that the entry was made by that witness; the photograph alongside the entry may assist, and cross examination which begins by compelling the witness to accept that that photograph is of them, and that the relevant user name is theirs, will lay the groundwork before the full entry can then be placed in front of them. Where the issue is of sufficient importance, consideration should be given to a computer expert's report establishing the IP address used by the author of the entry and the like.

Subject to questions of proof, *Twist* renders consideration of hearsay in the context of the brave new world of communication a great deal simpler!

Anna Midgley

1. [2011] EWCA Crim 1143
2. ibid para 17
3. ibid para 12
4. ibid para 16
5. ibid para 15
6. ibid para 8, quoting para 7.20 of the Law 7. Commission's report
7. ibid para 19
8. [2010] EWCA Crim 1403
9. [2007] EWCA Crim 3150
10. [2010] EWCA Crim 2378
11. [2010] EWCA Crim 873
12. See para 22

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.

To propensity and beyond!

Bad character revisited

Many of those practising in the criminal courts will recall the pre Criminal Justice Act 2003 days with a degree of sepia tinged nostalgia. Tactical questions about the likely effect of a line of cross examination leading to the "throwing away of the defendant's shield" abounded. Many hours were spent considering how to put a case in a way that would not involve the prosecution making an application to "put in" a defendant's "form". Sometimes a case was run in a way which would have resulted in the defendant being asked about his previous convictions had he chosen to go into the witness box and as a result he was not called (a course which was, with some justification, frowned on by the Court of Appeal).

These tactical decisions became obsolete with the advent of the CJA 2003 and in particular S. 101 (1) (d) which makes the defendant's bad character admissible (subject to S. 101 (1) (4)) if it is; *"relevant to an important matter in issue between the defendant and prosecution".*

S.103 makes it clear that the matters in issue between the defendant and the prosecution include "whether or not the defendant has a propensity to commit offences of he kind with which he is charged".

Thus the issues in any case can now be summarised as; "did he do it, did he mean to do it and does he have a propensity to do it?".

As Ss.101 and 103 opened up a whole new landscape it is perhaps not surprising that that most obvious new landmark propensity, found itself at the forefront of lawyers' minds. Considerable time and effort was expended in defining what propensity was, how it could be established and how a jury should be directed to approach it (see *R v Hanson*, *R v Gilmore*; *R v P* [2005] Cr.App.21 et al).

Once those issues had been determined there followed a period during which prosecutors routinely sought to adduce a defendant's previous convictions often on no other basis than because they felt that they could. As a result little, if any, thought was put into the reasons why such applications were made. It is not necessary for the purposes of this article to explore the definition of propensity or to examine how a jury is to be directed in cases where such evidence is adduced. One very obvious example would be an application to adduce previous convictions relating to indecency with children in a case where the defendant, charged with indecency with a child, denied that he had a sexual interest in children.

Rather this article considers how the evidence of a defendant's bad character can be used for more than simply establishing a propensity to behave in a particular way.

Identification is an issue that is frequently raised in criminal trials and an illustration of the way in which bad character evidence can be used to support identification evidence can be found in the analysis of a relatively old authority *R v Eastlake (Nicky) and Eastlake (Kevin Scott)* (2007) 151 S.J. 258, C.A. This was a case involving street violence where the defence was one of mistaken identification. The prosecution sought to adduce evidence the appellant's convictions for street violence as "propensity" evidence. This may have been an argument that had some weight, but it demonstrates a misunderstanding of the provisions of S.101. The issue between the prosecution and the defence was one of identity. In those circumstances, where an individual has been picked out by a stranger in a properly conducted identification procedure, evidence that he has committed offences of a like kind in the past goes further than simply whether he has a propensity to commit such offences and directly to the issue of the correctness of the identification. Part of the consideration of the jury in such a case would be an assessment of the quality of the identification evidence. However, as part of that process, they would be entitled to ask themselves the likelihood of the witness by chance having picked out an innocent person who just happened to have a history of committing offences of the kind alleged. Where the effect of the bad character evidence, taken together with the other evidence in the case, is such that only an ultra-cautious jury would reject it as coincidence, it is misleading and unhelpful to say that it goes merely to propensity; it goes to the heart of the issue between prosecution and defendant.

This approach has been followed in a number or recent authorities[1] which, taken together, demonstrate that in many cases over emphasis on the issue of propensity per se is not always helpful. In *Chopra* a dentist was accused of the indecent assault of three teenage patients, on three separate occasions by touching or squeezing their breasts. His defence was that the touching was either accidental or did not happen. The Court held, first, that the evidence in relation to each incident amounted to bad character evidence for the purposes of s.98 in relation to each of the other counts. Secondly, in determining its admissibility, the common law rules relating to propensity and similar fact evidence no longer applied. The sole question was whether, in such a case, the bad character evidence met the criteria in s.101 (1) (d) and s.103 of the 2003 Act. The judgment dealt mainly with the question of whether the evidence was capable of establishing a propensity to commit such an offence. However, it is quite apparent from the way the court treated the evidence, that it concluded that each of the allegations was capable of making it more likely that the other allegations were true because of the similar nature of the evidence in each case. In other words, regardless of whether the incidents were capable of establishing a propensity, each was admissible as evidence to support truth of the other allegations.

In this context the issue for the jury was whether the offence had been committed. In determining that issue, the jury was entitled to consider whether or not the fact that allegations of a similar type, made by a number of independent complainants was capable of assisting them on the question of whether the touching was deliberate and sexual.

In *Wallace* the appellant was charged with a number of robberies and an attempted burglary. The evidence on each count was circumstantial and it was submitted that there was insufficient evidence for each count to be left to the jury. The Court held that the important matter in issue was not whether he had a propensity to commit offences or to be untruthful, but whether the circumstantial evidence linking him to the robberies, when viewed as a whole, pointed to his participation in and guilt of each offence. The purpose of the admission of the evidence was *not* to prove that he was of bad character in the sense that that expression was commonly understood but to prove that when viewed as a whole, the appellant was guilty of each of the offences.

Thus when it is submitted that evidence in relation to one count is admissible in relation to another, it may not always be helpful to concentrate on the issue of propensity when the nature of the evidence is such that, in itself, it is capable of being

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Editor's note

The articles in this edition of the Newsletter, perhaps with the exception of the abuse article, all deal with the changing perceptions or interpretations of principles we have all learnt to deal with in recent years. The bad character update emphasises the need not only for thoroughness when making such an application but also for clarity of purpose. If you have both, the resulting application is not only one that is more likely to succeed but, in terms of fairness, is one that the defence can at least have a chance of understanding in the context of the case as a whole.

The clarification and resulting simplification of the hearsay principle in *Twist* will help anyone who has struggled to understand or explain that knotty concept.

It is only the issue of stays on the basis of abuse of process that breaks the trend of good news, especially for those of us dealing daily with cases involving historic sexual offences. In those cases it appears that unfairness is to become the sole preserve of the Court of Appeal leaving only the issue of prejudice for the trial judge. However, even there, the article does emphasise one area from which practitioners can take comfort because it confirms that the Court has advised in the majority of cases reverting to the pre-Smolinski position of arguing the issue of abuse at the start of the trial rather than at the half way point. That is clearly beneficial because at half time even the most sympathetic of judges would have been reluctant to stay an indictment having had the benefit (or perhaps not) of hearing the complainant being cross examined.

But perhaps more than highlighting what is new or simply clarified, what all of the articles emphasise is the need for thorough preparation in advance of a trial by both sides. That allows the issues to be identified so that only the relevant matters become the focus for the jury.

That focus on pre-trial preparation echoes the objective behind the Criminal Procedure Rules, that of dealing with all cases justly. Justly includes the acquittal of the innocent and the conviction of the guilty, dealing with the prosecution and defence fairly, recognising the rights of the defendant and dealing with the case efficiently and expeditiously. Though perhaps only enshrined in rules relatively recently, those concepts, much like those dealt with by the articles in this Newsletter, are not new but without them, unlike Aladdin, there will not be a happy ending for any modern criminal practitioner.

Sarah Regan

probative in relation to another count, in the sense that it makes it more likely, either that the offence was committed (Chopra) or that it was this defendant who committed the offence (Wallace).

Against the background of these authorities it is clear that the admissibility of bad character evidence under S.110 (d) can be sub-divided into two separate categories; the first is where the defendant's misconduct on other occasions is admissible to show "propensity", and the second category where the defendant's alleged misconduct on other occasions is advanced as corroborating evidence of an offence which, without it, would be regarded as weak but with it is strong.

The second category is, in reality, an update of the pre CJA 2003 position whereby evidence would have been admissible as "similar fact evidence", "evidence of mutual corroboration" or as being "cross-admissible". Under the "new" law this evidence is still admissible, but must now satisfy the procedural safeguards of S.101.

Once the issue is successfully identified and the safeguards are satisfied, it becomes easier to understand such evidence as having a clearly defined, evidential purpose. There will of course still be cases (in particular sexual offences) where the establishing of "pure" propensity is important as a free standing and important issue in the case. However, there will be many more where a more careful analysis of the issues in the case will call for a more targeted approach. In such cases a judge will be unimpressed by an ill thought out application which simply refers to S.101 without a careful analysis of the real issues in the case.

Stephen Mooney

1. R v Freeman; R, v Crawford [2009] 1 Cr.App.R.15 CA
   Chopra [2006] EWCA Crim 2133,
   Wallace [2007] EWCA Crim 1760,
   S [2008] EWCA Crim 544
   DM [2008] EWCA Crim 1544

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