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Albion Chambers CRIME TEAM NEWSLETTER

MISSION IMPOSSIBLE?

Everyone will be familiar with the cases of *Anderton and Ryan (1985) A.C. 567* and *Shivpuri (1987) A.C. 1 HL* dealing with the rather philosophical question of whether it is possible to attempt the impossible. In the former case A bought a video recorder wrongly believing it to have been stolen. She was convicted of attempting to handle stolen goods but the conviction was overturned on appeal.

In *Shivpuri* S received a suitcase from India which he believed to contain either heroin or cannabis. In fact it contained neither; the material turned out to be nothing but harmless vegetable matter. Despite that, he was convicted of attempting to be knowingly concerned in dealing with and harbouring *diamorphine.* The House of Lords upheld that conviction establishing the principle that in law at least, it is possible to attempt the impossible.

The circumstances of *Anderton and Ryan* will not I suspect arise too often; it would surely be a rare day that a suspect admits to buying goods they believe to be stolen let alone when in fact, they are not. But the situation highlighted in *Shivpuri* is a far more common one. An admission as to a belief that what a defendant is found in possession of is one type of drug when in reality it is another are commonplace, unsurprisingly if a defendant believes that a plea to a lesser class of drug will attract a lower sentence. Indeed, the cases that follow *Shivpuri* reflect the attitude of the courts in relation to drugs cases in particular and perhaps adopting the paternalistic approach to such offences have held that it is no answer to a charge of importation to claim that the importer believed the substance to be a drug of a different class. If a willing importer believes that he is importing heroin into the country the fact that it transpires to be harmless powder would not provide him with a defence, he would still be guilty of attempting to import heroin. Likewise, if he imported cocaine in the belief it was cannabis he would none the less be guilty of importing cocaine.

The rationale for what is on the face of it a rather draconian use of the law is clear; the defendant has the *mens rea* for the offence, he acted in the belief that he was engaged in bringing an illegal drug into the country and the fact that he was wrong as to the nature and quality of that drug provides no defence.

However, in *Shivpuri* and *Anderton and Ryan* both defendants made admissions as to their belief, something which was, one might think, crucial to a successful prosecution. The situation may be very different if a defendant declined to answer questions put to them in interview or to give evidence at trial. In such circumstances it is likely that the issue of knowledge or belief would be much harder for the prosecution to establish, particularly if all of the surrounding circumstances could lead to a number of equally compelling conclusions.

Two recent cases have confirmed that such uncertainty can provide the Crown with an uphill struggle in attempting to secure a conviction. In the first, Khan was charged with attempting to import 10.1kg of cocaine. In fact, as in *Shivpuri,* the powder was harmless but unlike *Shivpuri* K made no admissions as to his belief as to the nature and quality of the powder. At the close of the prosecution case his counsel successfully argued that the Crown had no case to answer. The basis of the submission was that if there are a number of equally possible inferences to be drawn it is for the Crown to prove that only the inference they prefer is the correct one. Given the burden of proof, if there are a number of inferences which can be drawn, none of which are more persuasive than others, the case should not be left to the jury. In the above case it was submitted that K could have been acting as a decoy for some other activity or taking part in a scam against a third party who was to be induced into believing the powder contained drugs. The judge acceded to that submission and directed the jury to acquit.

In a second, a recent case in which Chambers was involved, T was one of eight defendants charged with conspiracy to defraud the Ministry of Defence. The precise sum involved was in dispute but the lowest figure at the start of the trial was said to be about £350,000 and the most likely was somewhere just short of one million pounds. T had received £35,000 from M who at the start of the trial pleaded guilty to his part in the conspiracy. In fact M was the main conspirator and beneficiary of the fraud and the Crown alleged that he had paid T the £35,000 for his part in the fraud. In interview T denied knowledge of or participation in the fraud. He admitted receiving the money from M but said that it had been given to him for introducing M to other, legitimate, contracts.

Adopting a similar argument to that raised in the case of Khan Counsel submitted that the Crown's case – that the money must have been given to T to secure his participation in the fraud – was only one possible explanation, and in fact was an explanation that had been shown throughout the trial to be wrong.

The fraud involved employees on behalf of M clocking in workers who were not present (ghost workers) and inflating the hours claimed for legitimate workers. The Crown's case was that T was the person who authorised the false claims and that that was what he received the £35,000 for. However in cross examination Prosecution witnesses confirmed that although they had no knowledge of the money given to T he had secured a substantial amount of business for M and had arranged the finance for a deal in relation to the materials. In relation to the specific information provided by T in interview the Crown had done nothing to investigate the veracity of those claims despite having had five years to do so. It was therefore submitted on T's behalf that in order for the case to be left before the jury, the Crown, bearing the burden of proof, had to provide some positive

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evidence that the money he admitted receiving was given to him for his part in the fraud. The fact that it was suspicious took the case no further. He had provided an explanation for the money, an explanation which the Crown had failed to refute either through lack of investigation or by evidence provided by their witnesses. Therefore, the Crown's explanation for the money was no more persuasive than any other advanced on T's behalf. That left the jury with a shopping list of explanations, none more persuasive than any other and indeed, the Crown's less so than that advanced by T. In those circumstances it was submitted it would be dangerous to leave the case to the jury, a submission which was accepted by the judge who directed the jury to acquit T.

Those two cases reinforce the importance of examining that most basic principal, the burden of proof; if the Crown seeks to prefer an inference they should be able to point to sufficient evidence to support that inference. If they are merely asking a jury to accept their inference above a number of others, none of which are more persuasive than any other, they have not discharged that burden and the case should be withdrawn from the jury.

These two decisions, together with that in the following case of Smith, hold important messages for both those defending and prosecuting. S imported a large number of packages concealed in compartments in his car. Most of the packages contained 42Kg of cannabis but a few were found to contain cocaine. At trial S pleaded guilty to the importation of cannabis but not guilty to the cocaine alleging he had no knowledge that the cocaine parcels were amongst those containing cannabis. He was convicted but successfully appealed the conviction. The Crown relied upon the decision in *Bilinski (1987) Crim L.R. 782* a case following hard on the heels of *Shivpuri* which held that it was no answer to a charge of importation of a drug of Class A to argue that the importer believed it was a drug of Class B. S submitted that in fact *Bilinski* could be distinguished on the basis that he wasn't arguing a mistake as to the quality or nature of the packages but that he had no knowledge of their existence at all, a submission that was accepted by the Court in overturning his conviction.

Prosecutors more than ever need to be alert to ensure that they have the evidence to support their case. In the absence of an explanation from a defendant it may be that a number of alternatives could fall to be considered by a jury, alternatives which at least equal the inference the Crown ask the jury to draw. Alternatively, if an explanation has been provided it will be necessary to examine that explanation to ensure that it is possible to refute it or to at least put before the jury a conclusion that is one that is able to be made from the evidence advanced.

Likewise, those acting for defendants will have to consider their case at a much earlier stage. Whereas in the past pleas may have been entered on a particular basis in an attempt to mitigate an offence that was considered to be without a defence, it may now be possible not only to challenge the Crown's case but to do so successfully, making what previously seemed impossible all too possible.

Sarah Regan

Forty years on

There have been barristers in Bristol since the 1780s when their chambers were in the Corn Exchange. Albion Chambers itself has been a home to barristers since about 1820.

In the 1920s, Fred Weatherley, a local barrister, with a room in the East Block, wrote the words to *'Danny Boy'* and also composed *'Roses Are Blooming in Picardy'* among other popular songs.

I started my pupillage in Albion Chambers in autumn 1968. Timothy Hills and John Foley, now His Honour Judge Foley, followed in the spring of the following year.

At that time there were only three sets of chambers in Bristol totalling about 30 members.

What is now Guildhall Chambers occupied the East Block, the Lodge and part of the North block in the buildings of Albion Chambers. The rest of Albion Chambers was mainly occupied by accountants and solicitors.

The tenants of what is now Albion Chambers occupied the top two floors of the South Block and at that time there were only about 12 members. The ground floor rooms were occupied by a firm of solicitors called Bobbetts Brothers. Our present library, on the first floor, was the clerks' room and we also had a small annexe in Tailor's Court.

Elsewhere in Tailor's Court was a sole practitioner, Michael Vyvyan-Jones, a former member of Guildhall. In time these became Assize Court chambers, from which Unity Street chambers were formed in more recent times.

Most members of the local Bar had mixed practices consisting of general common law, family and crime. It was three to four years before the Courts Act 1971 came into operation and there were no chambers west of Bristol.

All the superior court work was done in the old Guildhall in Broad Street. Two courts on the ground floor were allocated to crime. A third court belonged to the Registrar (a forerunner of the civil District Judge). The first floor had two further civil courts which heard divorce and County Court work; there were two County Court judges.

Lesser indictable offences were tried at Quarter Sessions, which normally sat four times annually. However, in Bristol the Sessions were every six weeks. The judges were the Recorder of Bristol, a QC, and an Assistant Recorder; a junior barrister. Unlike today all cases had to be ready for trial on the first day and the court sat, trying one case after another, sometimes until eight o'clock at night, until the list was exhausted.

Many other towns on the Western Circuit had their Borough or County Quarter Sessions. However, their hearing dates were staggered so that there would only be two Quarter Sessions sitting simultaneously. This allowed members of the Bar, mostly from London, to travel around the Western Circuit from one Sessions to another. It also meant that here were occasional dock briefs to be had for fortunate young barristers.

Bath and Bridgwater Sessions were favourites, because the Mayor entertained the Bar to lunch, which compensated for the absence of a dock brief!

The Assizes were held three times a year, trying the more serious indictable offences. There were usually two High Court judges, one to try civil cases & the other to try crime.

On the first day of Assizes there was a service in the Lord Mayor's Chapel.

Afterwards the judges continued in the Lord Mayor's horse-drawn coach to the Guildhall. They were greeted there by trumpeters and an escort of the six tallest policemen in Bristol, all carrying staves.

In Bristol, the High Court Judges only stayed for two to three weeks at a time and then moved on to the various County Assize towns on the circuit. So, for weeks at a time, the criminal courts in Bristol would be empty, but elsewhere on the

circuit Quarter Sessions or Assizes were sitting. The Bar followed the work around the circuit staying in one hotel after another.

When the Courts Act came into operation in 1972, the Assizes and Quarter Sessions were abolished. Crown Courts were substituted, which sat permanently. This meant that smaller towns, such as Bath, Bridgwater and Wells lost local jury trials, which were transferred to larger towns.

The effect of Crown Courts sitting permanently also led to the establishment of local Bars in the larger towns on the Western Circuit. In Bristol, the Bar grew and there were many changes.

Guildhall Chambers left the buildings of Albion Chambers and established themselves at the bottom of Broad Street and were renamed as Guildhall Chambers. In due course some of the members of Guildhall Chambers left to form St. John's Chambers. Paul Chadd QC, left Guildhall to form his own chambers, at first occupying the ground floor of the South block in Albion Chambers. However, with increasing numbers, he moved to All Saints' Court, becoming All Saints' Chambers which in turn moved to Queen Square.

So in 40 years Bristol has moved from being a small, occasional, legal centre to its present size. There are now about 200 members of the local Bar in six chambers with two annexes of chambers from elsewhere. Over the same period many solicitors' firms have grown from small two-three partner firms, with some now employing several hundred people.

Nicholas O'Brien

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.

Members of Albion Chambers may only provide advice to an individual on a specific case via a practising solicitor or a member of a recognised professional body as approved by the Bar Council.

How do I appeal a decision to extend custody time limits?

Hopefully you will never have to because it is not exactly straight forward, as I found out when I appealed the decision of a judge who extended Custody Time Limits (CTLs) for the second time in a case where delay had been caused by those acting for a co-accused and his expert.

The co-accused wanted a forensic examination to be conducted but only raised it as an issue for the first time a few weeks before the trial was to take place. As a result of that application the trial date was vacated and a CTL application was made and granted a month later. One more month elapsed and the day before the new trial fixture the co-defendant again made an application to vacate the trial because their expert had not provided a report, an application which succeeded. That led to a second application to extend CTLs; the *'good and sufficient cause'* being said to be that the application had become necessary because the Defence were being accommodated in the instruction of their expert.

It was accepted by the Court that the Prosecution had acted with all due diligence and expedition. However, it was not accepted by the accused who had not instructed an expert that this amounted to a good and sufficient cause. That defendant had been in custody for a very straightforward matter, in a case that he had wanted to be tried long ago and where the delay was through no fault of his own or those he had instructed. In those circumstances it was said on his behalf that the delay was therefore significant and wholly unacceptable.

Despite that, CTLs were extended for 28 days which meant that an appeal against the decision had to be immediately.

Such appeal lies by way of Judicial Review to the Administrative Court and the process is as follows:

Firstly contact the Administrative Court to inform them of your intention to seek an expedited hearing.

In order to seek leave you then need to download two forms from www.hmcourts-service.gov.uk by clicking on 'Forms and Guidance' and selecting forms N461 (Judicial Review Claim Form) and N463 (Judicial Review Application for Urgent Consideration). There are also some guidance notes you may find helpful.

The forms are in PDF format and appear to be very user-friendly at first blush. However, although it is possible to save the form to your PC, you cannot store the insertions you have made, so once completed it has to be printed. A minor irritation only because in any event the Administrative Court will only accept a hard copy and one that is sent by post; a faxed or emailed copy will not be accepted.

However, be warned. Although during completion of the form, the boxes expand to accommodate everything you want to say; when the form is printed the second half is cut off. For the unwary (and by now much weary lawyer) this is potentially devastating. In my case, having completed the form online I read and re-read it before printing it off, blissfully unaware that the printed version was totally differently, so I signed it and sent it off.

As I was not permitted to save the form, I shut down the computer. When I received the inevitable phone call the next day informing me that my submissions ended mid way through, I had to re-invent what I thought I had said. So a tip for the wise, simply attach your grounds and submissions to the form.

As soon as the court receives the forms, they will leap into a frenzied buzz, informing you that you have failed to send half of what they require leaving you to spend the next day sending them dribs and drabs.

Along with the claim form, you need to complete the Judicial Review Application for urgent consideration to enable your application to be placed before a judge as a matter of urgency. The judge determines whether there is any merit in the application for interim relief which in this case would be bail. If the application is without merit leave is refused leaving you free to decide to renew the application before the Court. However, if the judge decides on the papers that it is an arguable case, you will be provided with an expedited hearing date.

Whether you succeed and are granted bail will provide an indication of the strength of your case. If you fail, that is probably the end of the matter, unless again, you want to test their lordships patience in a fully argued hearing. However by the time that happens, your client will in all likelihood have had their trial.

So if your client is ever in the unfortunate position of having his or her CTLs extended in circumstances which you consider do not amount to good and sufficient cause, you, unlike the Prosecution will have to act with all due diligence and set out upon the path of Judicial Review. But as this article seeks to spell out it is not a path for the faint of heart nor those who find bureaucracy frustrating, but for the determined it may provide justice and bail to a defendant who might otherwise spend unwarranted time in custody awaiting a trial he was ready for many months before.

Paul Cook

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Neil Ford QC Call 1976 QC 1997
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Recorder

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Timothy Hills Call 1968

Nicholas O'Brien Call 1968

Paul Grumbar Call 1974
Recorder

Nicholas Fridd Call 1975

Martin Steen Call 1976
Deputy District Judge (Crime)

William Hart Call 1979 Recorder

Ignatius Hughes Call 1986
Recorder

Robert Duvall Call 1979

Stephen Mooney Call 1987

Adam Vaitilingam Call 1987
Recorder

Fiona Elder Call 1988
Assistant Deputy Coroner for Avon

Virginia Cornwall Call 1990

Michael Cullum Call 1991
Recorder Immigration Judge

Simon Burns Call 1992

Paul Cook Call 1992

Ed Burgess Call 1993

Jonathan Stanniland Call 1993

Alan Fuller Call 1993

Giles Nelson Call 1995

Jason Taylor Call 1995

Kirsty Real Call 1996

Kate Brunner Call 1997

Sarah Regan Call 2000

David Chidgey Call 2000

Richard Shepherd Call 2001

Anna Midgley Call 2005

Gemma Borkowski Call 2005