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Albion Chambers CRIME TEAM NEWSLETTER

Robert Duval

Most readers of the Newsletter will know that on Tuesday, 13 February 2018 Chambers was dealt a devastating blow when we learned of the death of Robert Duval. Although he started off life in St John's, such was his character that we call him ours and did so from his first day here. For those of us fortunate enough to have heard him in court over the years, and in particular when mitigating, we were provided with a masterclass in the art of advocacy and that is a memory that we will always cherish.

Opening a brief only this week that was returned to me from Robert, out fell his trademark pieces of paper. Amongst his notes about the case was a smaller note upon which he had worked out the various stages to be set at the PTPH. Dutifully noted was the fact that it was a bail case, followed by the date it was sent and then the stage 1 and 2 dates, with the number of weeks endorsed after them. Then stage 3, beside which was endorsed 'NB Xmas, New Year > 3 weeks = 2/1.' That meticulous attention to detail, not only realising that the festive holidays would require an extended period of time for service at stage 3, but the fact that he made a note of it will strike a chord in anyone who has opened one of Robert's briefs smile. That fact that he did so in these days of digital working will, I hope, make that smile all the more broad.

Robert was not someone who ever provided an article for the newsletter. I very much fear that he did not even know of its existence, or if he did, regarded it as something to be ignored. But unlike many who practice law he was someone who could never be ignored. Valedictory speeches were heard at Bristol Crown Court on Friday, 16 February by a packed courtroom. But many were unable to attend and others wished to have the opportunity to read them so below are a few extracts from the speeches from HHJ Longman, Edward Burgess QC and Tony Miles.

HHJ Longman: No stretched-a-bit compliments are needed for Robert Duval because we all know that he was one of the best advocates at the Bristol Bar and on the Western Circuit, and one of the best loved by his colleagues and by those he worked with. He commanded the affection of everyone whose lives he touched.

The Bristol Bar was, particularly after the relative anonymity of London, enormously welcoming but some individuals stand out and Rob was one of them. One of the strengths of being in a set of Chambers, as so many of us here know, is that there's always someone you can ask about absolutely anything and Robert was one of those I would turn to.

If ever there was some knotty or abstruse legal problem with which I needed help, well… there was usually someone else around! But if you wanted sound practical advice, common sense and a good natter, Rob was your man.

What can we say of Rob as a practitioner? Where do we look for a clue to his ability as a barrister? Not by looking for letters after his name. Silks are an elite group, Mr Burgess, but one from which Rob excluded himself when everyone else realised that it would have been his for the asking.

He never applied to sit either, that was more understandable. He wasn't one to be comfortable sitting in judgement on others, but how valuable an asset on the bench that benign understanding and sympathy with human nature would have been.

If one had a return from Rob, the brief came in the then familiar tape which will be removed and out would spring the usual papers, statements, exhibits, maybe even a proof of evidence. And always, always a big sheaf of lined paper with handwriting on, Rob's copious notes. They were of course written in that familiar style, a mixture of capitals and lower case, always idiosyncratically spelt and everything was there. Whatever the nature of the hearing, there it would all be; the submissions, the speech all written out, the points to be made and the mitigation. He wouldn't wait for the verdicts, the mitigation. Who has ever listened to Rob delivering a plea in mitigation without learning something about how to do it properly?

I certainly learnt from him, he had mastered the art. He absolutely owned it. He'd say the obvious things but things too that you'd never have thought of and all delivered with just the right amount

Editorial

The spring newsletter comes on the back of changing times for Albion.

Jason Taylor and Paul Cook were appointed as Her Majesty's judges, HHJ Cook in Taunton and HHJ Taylor QC in Swindon. Paul Cook was called to the Bar in 1992 and Jason Taylor three years later, in 1995. Both undertook their pupillage at Albion and were well known across the Western Circuit and beyond. For good measure, before heading east, Jason was also appointed Queen's Counsel in this year's list.

We also had two new members joining chambers, David Sapiecha moving from Colleton Chambers and Rupert Russell from Carmelite Chambers.

of emotion, so the points were made as effectively as could be and importantly, the client always knew he'd had his best shot. The delivery was always throughout his long years of practice accompanied by the same enthusiasm and commitment, never just going through the motions. He took his role seriously and his clients and the Court benefitted from that.

His last appearance in the Court of Appeal was in January. Robert had persuaded HHJ Tabor QC in Gloucester to pass a merciful sentence that the Attorney General felt was unduly lenient and it was referred for consideration as to whether it ought to be increased. The Court of Appeal, including our own Judge Picton thought not. HHJ Tabor's thoughts on that, and I quote him, and I hope he won't mind 'I doubt whether any other advocate on the Circuit could have persuaded me to pass such a lenient sentence. It is a great testimony to his ability that he not only persuaded me but the Court of Appeal as well. Sometimes when he mitigated I felt I needed to put wax in my ears to avoid going on to the judicial rocks, such was his power. He was a very hardworking and effective advocate of great integrity. The Circuit has lost one of its best.'

Ed Burgess QC: I arrived in his little room in St John's Chambers when we were then just over the road from this Court. A room that was dominated by that enormous antique desk of his, an aircraft carrier, he used to call it; the very desk that sits in his room now in Albion nearly 25 years later. Many days I'd spend sitting on the other side of that desk from him, constantly burning my legs on that wretched electric bar fire he never switched off.

Watching him write his lengthy advices in his inimitable handwriting, always chomping his way through those ghastly Melton Mowbray pork pies he so loved, the ones he would smother in salt from that Saxa salt cellar that was a permanent fixture in the top drawer. I recall as I walked in that first day, before I'd even sat down he chucked an album of particularly grisly photographs in a murder case at me, 'Have a look at those. They're fantastic.'

And so it began the relationship between the two of us which stood the test of time for more than 24 years and two sets of Chambers. Although our relationship matured into one of genuine friendship, the kind one comes to take for granted in the very best sense of that expression, until it is so cruelly snatched away. There was undoubtedly part of him that continued always to think of me as his Grasshopper, as he used to call me in deference to the 1970s television series starring David Carradine, called Kung Fu.

I cannot pretend my pupillage with Robert was always easy. He worked as he always did throughout his career phenomenally hard. He was meticulously well prepared for every conference and every Court appearance, and he expected no less of me.

He was a brilliant teacher and an utterly brilliant advocate, as has already been said. His consummate skill as a mitigator is already the stuff of legend across our Circuit and I suspect far beyond. I've never heard his equal and I honestly do not think I ever shall. I'm not ashamed to say that more than once he brought tears to my eyes through his pleas in mitigation. It wasn't just the brilliant content, points he would make that would never occur to me and I suspect to any of us in this room, but it was also the passion and the conviction with which he spoke in Court. The level of preparation that went into every word of his advocacy was always astounding.

But Robert was much more than just an exceptional mitigator, he was a fabulous trial advocate as well, and his ability to eviscerate a lying defendant in cross-examination was wonderful, if also very painful if you were defending against him. His speeches to Juries could be quite sublime. He was always finding cheeky, yet tactically, sound and effective ways of currying favour with the Jury, to the inevitable detriment of the other side, and often frankly, the Judge as well. He was a master at it. I've often asked myself what it was that made him so good at this job that we do. I don't think there's a simple answer to that, but I do think it had a lot to do with his remarkable insight into the intricacies and complexities of human character and human nature. He was genuinely fascinated by people and what made them tick.

But above all else he hated unfairness. He hated it in every area of life. He particularly hated it, if I may say so, in Judges. He was always courteous and appropriately deferential to the bench, but he would do everything in his very considerable power as an advocate to stop Judges from acting unfairly.

Tony Miles: What you got with Robert was consistency. Robert was always the same and inevitably always the same because that was Robert. And there was a very soft spot for Robert in so many people's hearts, and that is what you get whenever you speak to anybody about Robert Duval. Consistency, it's always the same. It's been a horrible week, the sense of deep, deep sadness and when we shared this as a team in my office, there was that sense but immediately our hearts and our minds and our thoughts and yes our prayers, went out to those who are much more profoundly affected by this, the immediate family and all those that have been mentioned this morning.

And our thoughts remain, and sympathies remain very much with them. We are so grateful that he'd been part of our lives. Our lives have been the richer for his presence and everything he's brought to them. As a legal community and the whole community, we all have the utmost respect for Robert and admiration for him.

A lovely man, a real human being with a caring spirit, an awesome advocate, professional, tactically astute, incredibly hard working, humble and self-effacing, a skilful practitioner and a master craftsman. A very human barrister with a proper concern for the client, he always saw beyond the facts, beyond the legal framework and saw the bigger human picture with all its complexities and frailties as it unfolded in whatever case he was dealing with. Robert practised the art of advocacy. He was a master and retained an approach that recognised that there was always a bigger story at play on the human stage.

Loss of control and mental disorders

The conjoined appeals of *Rejmanski* and *Gassman* ([2017] EWCA Crim 2061) have recently considered the extent to which a mental disorder can be relevant to an assessment of "the circumstances of the defendant" when considering the partial defence of loss of control provided by Section 54(1) of the Coroners and Justice Act 2009 (CAJA 2009). Both appellants argued that the trial judge's directions to the jury had effectively deprived them of the defence, where they suffered from PTSD and Emotionally Unstable Personality Disorder (EUPD).

Section 54(1) of the CAJA provides that a defendant who kills or is party to a killing

is not to be convicted of murder if (a) their acts/omissions resulted from their loss of self-control; (b) the loss of self-control had a qualifying trigger; and (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

The issue in both cases was whether the trial judge had been wrong to direct the jury so as to exclude evidence of PTSD and EUPD from their consideration of s54(1)(c) of the CAJA.

The Court of Appeal began with a consideration of the old law of provocation, because the conflicting authorities in relation to it had led to a clear recommendation from the Law Commission as to what reform in this area should achieve. In *R v Smith* [2001] 1 AC it was held by a majority that D's characteristics could be taken into account at the second stage of assessing whether a person having ordinary powers of self-control would have acted as he/she did. The hypothetical reasonable person could be imbued with D's characteristics. The minority view was that there is no flexibility in the objective assessment, so that particular characteristics which affected D's ability to control him/herself could not be attributed to the reasonable person (e.g. short temper, mental disorder, or intoxication). Those characteristics could only be taken into account at the earlier stage of assessing the gravity of the provocation.

That decision was then considered by the Privy Council in AG for *Jersey v Holley* 2005 UKPC 23, and the Board held by a majority that Smith was wrongly decided, being contrary to the rulings in *Luc Thiet Thuan v The Queen* [1997] AC 131 and *Camplin* [1978] AC 705. The Board preferred the minority view. When the law was reformed, through the enactment of the CAJA, the Law Commission recommended that that view be given statutory effect.

Accordingly, section 54(3) of CAJA expressly provides that "in ss1(c) reference to the circumstances of D is reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint".

The Court emphasised that the potential relevance of a mental disorder to each of the components in section 54 is fact specific, and depends on the nature of D's disorder, the effect it has on D, and the facts of the case. The Court held that the wording of s54(1)(c) is clear: "D is to be judged against the standard of a person with a normal degree, and not an abnormal degree, of tolerance and self-restraint". If, and in so far as, a personality disorder reduced a defendant's general capacity for tolerance or self-restraint, it is not a relevant consideration.

This would appear to be very clear, but the areas of argument in the appeals highlighted some more subtle points. The residual question in Rejmanski's appeal was, if there is a circumstance (mental disorder) which bears on both the gravity of the trigger and is therefore admissible, once admitted is it admissible for all purposes (i.e. the jury can also consider it in relation to D's ability to exercise tolerance and self-restraint)? The Court said no: expert evidence about the impact of a disorder which was relevant to the gravity of the trigger would be irrelevant and inadmissible on the issue of whether it reduced D's capacity for tolerance and self-restraint. Rejmanski was an ex-Polish soldier, suffering from PTSD according to defence experts, who was taunted by the deceased about having taken part in atrocities in Afghanistan, and using derogatory and diminutive expressions. His army background (which was also the cause of his PTSD) was relevant to the gravity of the trigger. However, his PTSD was not admissible at the third stage. The conviction was considered safe as the judge had correctly directed the jury to take account of D's background in the army at the stage of considering the gravity of the trigger event.

In *Gassman* it was argued that there is a distinction between "general" capacity for self-restraint and the ability to exercise self-control in particular circumstances. Where a particularly traumatic event befell D the day before the killing (the death of her sexually abusive grandfather) leaving her in a distressed state, there was no dispute that this was a relevant "circumstance" for the jury's consideration at the third stage. It was argued, however, that her EUPD remained relevant at that third stage because it had a bearing upon D's reaction to that traumatic event. The Court rejected that argument, though noted its ingenuity, and held that the only relevance of EUPD to D's circumstances, for the purposes of the third component of the defence, was that it bore on her general capacity for tolerance and self-restraint. By definition EUPD affects a person's ability to respond to events without losing control. The qualifying trigger was a head butt – nothing that was said or done related to D's personality disorder, or the death of her abusive grandfather the day before. The Judge had correctly directed the jury to take account of his death, the breakdown of D's relationship and the prospect of eviction at the third stage, and so the conviction was safe.

The Court helpfully cited two examples of where mental disorders do have a bearing on the gravity of the qualifying trigger. Evidence that D was suffering from Battered Woman's Syndrome was relevant to the gravity of the provocation/qualifying trigger which resulted in the killing in *Holley*. In *Wilcocks* ([2016] EWCA Crim 2043), evidence of D's personality disorder was not excluded by ss3 where it caused him to attempt suicide, and he was then taunted about killing himself. The personality disorder was a relevant consideration in assessing the gravity of the trigger.

The Court was keen to emphasise that this interpretation of Section 54 does not produce an unduly harsh result. Where a condition has a sufficiently severe effect upon D's capacity for self-restraint, the appropriate defence is that of diminished responsibility (often pleaded alongside loss of control). Section 52 of CAJA expressly encompasses a mental disorder which substantially impairs D's ability, inter alia, to exercise self-control.

Anna Midgley

Not who, what, where.

More a case of when, what, who?

A case, in which Adam Vaitilingam QC recently defended one of Wales' largest recycling companies, again raises questions about prosecutions brought by the Environment Agency (EA) and its Welsh counterpart Natural Resources Wales (NRW).

The trial at Cardiff Crown Court arose after a succession of fires at two of the company's sites. The fires caused some pollution from smoke and, as alleged by NRW, additional pollution from firewater runoff. The prosecution case was that the company's failure to comply with the conditions of its permit had contributed to the fires and the consequent pollution, and that it had neglected to learn its lesson in handling waste after the fires. NRW also

alleged that the offences were, in part, the fault of the company's sole director. However, during the second week of the trial, eight of the nine charges faced by the company and the director were withdrawn from the jury, following a submission of no case to answer. So what lessons can be learned for those defending regulatory cases from the failure of this and other similar prosecutions?

A decision to prosecute must be in the public interest

The first question is: when should a prosecution be commenced at all? In the case of a regulatory authority such as the EA or NRW, when should it change hats from regulating a company to prosecuting a charge against it?

For environmental cases, under the Environmental Permitting Regulations, the regulator is entitled to prosecute any company that fails to comply with one of the conditions of its environmental permit. However, permit conditions are frequently repeatedly, and even deliberately, breached, and yet no prosecution results. So at what point does the EA (or NRW) decide that the threshold for prosecution has been reached?

The answer should be: only when the two-stage test that applies to every prosecution brought by the Crown Prosecution Service (CPS) has been met. Namely, that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on the charge and, if that test is satisfied, whether a prosecution is required in the public interest. So if the evidential case is met, when is it genuinely in the public interest for an environmental prosecution to be brought?

The general principle detailed within the Code for Crown Prosecutors (2:1) stipulates that 'the decision to prosecute or recommend an out-of-court disposal is a serious step that affects suspects, victims, witnesses and the public at large and must be taken with the utmost care'. Yet, it is strongly arguable that the regulators are less adept at applying this test than the CPS. Of course, in cases where there has been a significant polluting event, improper conduct that obtains an advantage over a competitor or a blatant ignoring and undermining of the regulatory regime, both elements of the test may easily be satisfied. However, in cases where a company is acting responsibly but, as in this case, it sometimes struggles with compliance, it must surely be rare that a prosecution can truly be said to be in the public interest. And if it isn't then, as cases regularly show, juries (and as in this case, judges) are unlikely to be sympathetic to the prosecution.

The EA and NRW have other options available to them, such as the use of warnings and Enforcement Undertakings. These options have the advantage for both sides of reducing cost and preserving the relationship between company and regulator, and so they should be strongly encouraged as an alternative to a heavy-handed prosecution.

Management systems

Having looked at the question of when to charge, the regulator then needs to address the question of what to charge. In this case, the investigators looking for evidence of firewater pollution made significant errors in collecting water samples, errors which resulted in the exclusion of that evidence. With that evidence excluded, the Prosecution, rather than being able to demonstrate that there had been pollution, were left in the difficult position of trying to prove that the company had breached the conditions of its permit.

The problem with being reliant upon that limb is that the limit of a permit is not always easy to interpret. If it stipulates, as it often does, that the permitted activity is 'to be operated in accordance with a management system', that begs the question, what is the extent of that management system? Waste management systems tend to be dynamic and organic, adapting to changing conditions which make it difficult for the conditions of a permit to remain relevant and workable.

In the current case, the company had been through numerous iterations of its fire-risk prevention plan. For their purposes at trial, the Prosecution extracted only those sections that suited its narrative, ignoring those that appeared to be contradictory. They argued that those sections had (perhaps unintentionally) been incorporated into the company's management system and that their breach therefore amounted to a breach of permit. However, that lack of clarity, fortunately for the company, resulted in a ruling by the judge that any ambiguity had to be resolved in the defendant's favour.

The corresponding lesson for companies, in terms of conditions, is not to promise something that is unrealistic; don't create unnecessary documents and procedures that may end up being incorporated into your management system, but which, in reality, are unworkable. If they do, adopting the logic deployed by the NRW in this case, that could result not only in a breach of the permit but also a criminal prosecution.

A director's liability

The final issue for the regulator is who to charge. In this case, the company's sole director was charged alongside the company, the allegation being that the offences were attributable to his neglect (EPR regulation 41).

In fact, the prosecution was not able to provide evidence of any specific failure on the part of the director. The regulators who visited site had never met him and confirmed that their dealings were overwhelmingly with the commercial and compliance manager. In addition, NRW failed to adduce any evidence at all about the structure or hierarchy of the company.

Significantly, having overlooked those fundamental points, they sought to adduce bad character evidence, in an attempt to demonstrate that the company had a history of being prosecuted for non-compliance, arguing that this should have put the director on notice to ensure that the company upped its game and complied with all future requirements. Their case in respect of the director specifically being that any failure thereafter must have been in part attributable to his neglect.

This approach, however, was not one that found favour with the judge, who ruled that in the absence of any evidence linking neglect by the director to the specific failings for which the company was being prosecuted there was no evidence at all to support the charges against him.

That practice of adding a director or other manager to the indictment, almost as an afterthought, has been a growing trend on the part of regulatory prosecutions in recent years. In many cases, where there is a clear individual failing, such a course would be entirely legitimate. But to use it simply as a makeweight charge, or as a bargaining chip, is an abdication of prosecutorial responsibility to charge only what is in the public interest, and it is very much to be hoped that this tendency will diminish.

Adam Vaitilingam QC

Reclaiming the streets

Gang culture and the criminal activity associated with it is a very real problem on the streets of the UK today. In Bristol and Gloucester, cities that have become hubs for drug dealing partly as a consequence of their easy road access to London and Birmingham,

knife crime linked to gang membership has escalated. It is easy to argue that the violence metred out by these gangs is almost invariably committed only against other gang members and doesn't impact upon society as a whole. However, it has been recognised that while the violence may be aimed primarily at a rival gang, the effect it has radiates out to the community at large. In addition, the time taken to investigate and police continuous gang-related incidents, not to mention the cost of medical intervention, is a huge drain on already hard pressed finances. And so, while one means of tackling the very heart of the gangs; identifying and disrupting their membership has been available since 2008, this legislation was added to in 2011 and again in 2014, it has only recently started to be used by the police in any great numbers. In recent months successful applications have been made for orders restricting the behaviour of gang members in both Bristol and Gloucester. This means that practitioners, both prosecuting and defending, need to be aware of the different types of order. They would need to be aware of what is lawful within what may appear to be draconian measures, and how those subject to such orders can vary or oppose them.

Serious Crime Prevention Orders

The Serious Crime Prevention Order, enacted by the Serious Crime Prevention Order Act 2007, came into force on 6 April 2008. This is available for offences committed on or after 6 April 2008 or, in respect of an offence committed before that date, offences where conviction and sentence post date the 6 April 2008 implementation date. As an order that affects those convicted of drugs offences, its aim is to disrupt those who launder the proceeds of such offending, and a SCPO can be made in addition to other orders or sentences, including an absolute or conditional discharge. In addition, because of the nature of the sale of drugs and the laundering of the profits, the order can also be made not only against an individual but a corporation, a partnership or an unincorporated association.

The offences to which it applies are a *serious offence*, which is one specified within schedule 1 of the SCA 2007, or for an offence treated as if it were a serious offence, which means it has to be an offence that is *sufficiently serious*. An SCPO can be made where a person over 18 is convicted before the Crown Court or has been committed to the Crown Court to be dealt with in respect of that offence.

Even though the proceedings are in the Crown Court, they are civil in nature and so are governed by the civil standard of proof. This means that the court is not restricted to considering only evidence that would have been admissible in the criminal proceedings in which the person subject to the order was convicted.

The test is whether the court has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.

In terms of any prohibited or required behaviour stipulated within the order, the ambit of a SCPO is wide and can include restrictions on an individual's financial, property or business dealings, working arrangements, those they are able to associate with and even their travel arrangements. The order cannot exceed a specified term of five years.

An application to vary the order can be made only if the variation would not alter the protection to the public. Any breach of the order will not only carry a sentence or discharge, but will also enable the court to vary or replace the order and, in some circumstances, allow the court to extend an existing order until a trial or sentencing for the breach takes place.

Criminal Behaviour Orders

The second gun in the arsenal of those seeking to protect the public from gangs is the Criminal Behaviour Order, ushered in by the Anti-Social Behaviour, Crime and Policing Act 2014.

This, like the SCPO, is available only after conviction, but the CBO is less restrictive in its application being available where a person is convicted of an offence. However, unlike the SCPO it is a criminal sanction and the test to be applied is that the court must be satisfied beyond reasonable doubt that: i) the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person; and ii) making the order will help to prevent the offender from engaging in such behaviour.

The fact that the first part of the test is satisfied by behaviour covered by sections 4 and 5 of the Public Order Act 1986 is an indication of just how low the bar is set. In a case in which I recently prosecuted, although the behaviour was solely directed at one gang member by another, the fact that it was carried out in a public place allowed it to be deemed to be likely to cause harassment, alarm or distress and for the order to be made.

The order must run for a fixed period of not less than two years in the case of an offender over the age of 18, and not less than a year for those aged under 18. For the latter, the length of the order must not exceed three years, while for those over 18 it can be indefinite.

Unlike an SCPO, the requirements or prohibitions of a CBO, while clearly aimed at preventing the offender from engaging in behaviour likely to cause harassment, alarm or distress, must not interfere with the times at which the offender usually works, attends an educational establishment or, importantly, conflict with any other court orders.

That means that anyone defending such applications must scrutinise the draft order carefully, to ensure there is no risk of interference with the civil liberties of the defendant, which go beyond what is necessary to achieve the aim of the order. In another case that I recently prosecuted, the application, drafted by the police, was so widely drawn that it sought not only to prevent communication between siblings and other family members, but to prevent those made subject of the order, from entering an area marked on a map that included, in one case, the defendant's own address. Those conditions were very obviously not made, but a CBO can include prohibitions from hiring vehicles (because those dealing drugs commonly use rental vehicles to avoid detection), owning or possessing a phone not registered in the defendant's name with a service provider, owning more than one phone or even, as in the case that I prosecuted, attending the emergency department of named hospitals (used in gang cases where stab victims taken to hospital are often followed by supporters and members of opposing gangs causing disorder on a massive scale). These examples illustrate that each order will have to be scrutinised with the defendant to ensure that the prohibition or requirement is not only necessary but workable, and not an infringement upon his or her home or private life.

A CBO is subject to review periods every 12 months and can be made as an interim order pending a final hearing, and can be varied or discharged on the application of the prosecution or the offender. If breached, the maximum penalty is five years imprisonment.

Gang Injunctions

Finally, the third type of order is perhaps the most draconian of all of the measures as it doesn't require a conviction for the order to be made and is a gang injunction

under the Policing and Crime Act 2009. Like the SCPO it is a civil order, but unlike that order, with the exception of orders made in respect of 14- to 17-year olds, can only be made in the civil courts, which has enormous implication for criminal firms.

As is inferred by the name, gang injunctions are aimed at preventing specific and serious gang-related violence and gang-related drug dealing, and they came into force in January 2011. An application can be made to the county or high court, or, in the case of those aged 14 to 17, to the youth court.

The order, as the other two, can impose requirements or prohibitions upon the respondent in an attempt to prevent them from engaging in, encouraging or assisting in gang-related violence or gang-related drug dealing and/or to protect them from such activity.

The longer-term aim is to break down the violent gang culture which is notoriously hard to penetrate, to prevent the escalation of violence which accompanies gang culture and to try to engage members of the gangs in positive activities, in an attempt to help them to leave the gang. They can also be used as a measure to protect younger children from getting caught up in escalating criminal activity.

Although a conviction is not a necessary requirement for an order to be sought, an application can only be made if the evidence supporting it demonstrates that the respondent has engaged in, encouraged or assisted gang-related violence or gang-related drug dealing. That will usually take the form of previous criminal convictions, but it can be founded upon intelligence.

As a civil application, the proof is on the civil burden with the applicant being required to demonstrate that the injunction is necessary to prevent the respondent from being involved in gang-related violence or drug dealing, and/or to protect the respondent from such activity.

Gang-related violence is defined by s.34(5) as 'violence or a threat of violence which occurs in the course of, or is otherwise related to, the activities of a group that (a) consists of at least three people and (b) has one or more characteristics that enable its members to be identified by others as a group.' Gang-related drug dealing is defined in the same section as 'the unlawful production, supply, importation or exportation of a controlled drug which occurs in the course of, or is otherwise related to, the activities of a group that: a) consists of at least three people; and, b) has one or more characteristics that enable its members to be identified by others as a group.'

However, although it has been defined by statute, the nature of gang-related violence varies from area to area, and so it is essential that those making such applications have evidence to inform the court of the problem posed by specific gangs in that court area, in order to satisfy the requirement that the respondent has participated, encouraged or assisted in such violence.

The application can be made with or without notice, although the latter course should be used sparingly and, if the hearing is without notice, the court is only able to dismiss or adjourn it to an on-notice hearing. A full injunction cannot be granted at a without-notice hearing. Importantly, such hearings should only be used in response to specific threats of violence or drug dealing and in situations where the applicant is unlikely to have sufficient time to be able to provide a full evidence package for the court.

Because of the fear of intimidation, and very real threat of violence associated with gangs, hearsay evidence is admissible in support of an application and, like the other orders, its ambit can be wide and can include any reasonable prohibition or requirement, as long as they are necessary either to prevent the respondent from engaging in gang activity and/or protect the respondent from such activity. Examples of prohibitions include non-association, exclusion from certain areas, the keeping of dangerous dogs (often associated with gangs) or the use of technology.

At the heart of each of the three types of order is the desire to disrupt the behaviour and lifestyle of those who associate themselves with gang activity. At present, in Bristol alone, there are known to be between 35-40 organised-crime groups or gangs operating within the City. That creates tensions for the local communities in which the gangs operate, with incidents taking place in bars and nightclubs but also openly on the streets. The violence they engage in poses a significant risk to members of the public, the emergency services and the police, who are required to deal with these situations. People who live in the communities in which the gangs operate speak of no-go areas, of being afraid to go out after dark and of being intimidated by gang members. That, in turn, means that rather than being willing to assist the police, the fear and intimidation those in the communities suffer has the opposite effect, which further impacts the ability of the police to deal effectively with the gangs. So very obviously, these measures are designed to restrict the behaviour of those against whom the orders are made. However, the nature of that restriction means that both those applying for the orders and those responding to them need to be vigilant to ensure that the prohibitions and requirements sought do not infringe upon religious beliefs, attendance at educational establishments or the right to a family or home life.

Sarah Regan

Joint enterprise and causation

One of the ways in which the seminal case of *Jogee* achieved clarity was to affirm there are only two routes to criminal liability: being a principal or being a secondary party. It is, of course, possible for the Crown to say that a participant in a joint attack may be either a principal or a secondary party, but that does not create a third fudged route to conviction.

A recent Crown Court manslaughter case where the judge acceded to a no-case submission, launched on behalf of my client and other co-defendants, highlighted the value of stepping back and considering afresh the basic principles of joint enterprise and causation.

In that case, the Crown had asserted that all three defendants were joint principals in the death of a man. A fourth man had been convicted of murder at a first trial where the jury had been unable to decide in relation to the other three. There was no dispute that the convicted man had delivered the fatal kick to the victim when he was on the ground. The Crown's case was that the other three had corralled the victim, punched him, and caused him to fall to the ground whereupon the convicted man kicked him to the head. They proceeded at retrial on a manslaughter charge against the three.

The Crown chose to put their case on the basis that all three had acted as joint principals with the convicted murderer. The Crown's approach was that because

all the men were violent they were 'in it together as joint principals' and, therefore, liable for anything that happened as a result of the group violence.

In that approach, the Crown sought to blur the edges of liability of principal offenders, in a way which was not supported by case law. Where a defendant is alleged to be a principal offender, the Crown must prove each and every element of the offence against that particular defendant, without considering the actions of any other. In that situation, it remains proper to indict all defendants together in a single joint charge, applying the principle that all people concerned in committing the same offence can appear on the same count. A joint charge does not mean that the concept of joint enterprise is engaged. Joint enterprise is not a concept which assists where all defendants are principals.

As summarised in the Judicial College's Crown Court Compendium, at Chapter 7-3, paragraph 2, the law requires the judge to direct the jury as follows:

"If the prosecution put their case on the sole basis that each of two or more Ds was a principal offender (i.e. that each carried out the actus reus of the offence concerned with the necessary mens rea) the jury should be directed to consider each D separately, that their verdict(s) on each may or may not be the same, and that they should convict the D whose case they are considering only if they are sure that all the elements of the offence have been proved against him".

Where the prosecution decides treat each defendant solely as a joint principal, it is not open to the prosecution to import any concept of shared liability, or guilt by participation in another's acts. The effect of that in a manslaughter case is:

1. the court has to consider the unlawful act and mens rea in relation to each defendant separately (as in R v Lewis and Marshall-Gunn [2017] EWCA Crim 1734 para 34, 37, 40);
2. the court has to consider causation in relation to each defendant separately: the Crown has to prove that a particular defendant's unlawful act caused or was a material cause of the death.

The case of *R v P* [2005] EWCA Crim 1960 (Archbold 19-115) is an example of an unlawful act manslaughter where each of the jointly-charged defendants was said to be a principal. The Crown's case was that both defendants picked a boy up and threw him off a bridge. The legal directions did not include any reference to joint enterprise, and did not need to. The legal directions required each of those joint principals to have committed the actus reus (assault i.e. application of pressure without consent), and to have materially contributed to the death (i.e. partly caused the fatal fall).

In the case of *R v Rafferty* [2007] All ER (D) 351 the court considered the issue of causation and how it related to both principals and secondary parties. The appellant was involved with others in attacking the victim in order to rob him. When he left the scene to use a debit card stolen from the victim, the others continued the assault. While the appellant was away, his co-defendants dragged the deceased across a beach, stripped him naked and took him out into the sea and left him to drown. The court rejected a submission that the appellant could be responsible as a principal on the basis that he had by his actions created the opportunity for the others to further assault the deceased. Although the appellant had committed some violence, the violence he meted out had not led to the death. He was not a principal. There was no need to invoke consideration of novus actus: if the prosecution cannot establish in the first place that a defendant's individual act as a principal contributed to the death in more than a minimal or trivial way, there is no need to embark on a consideration of whether there was a new or intervening act.

In the case in which I appeared, the trial judge stopped the case at half time. The judge found that the deceased's death was caused solely by the kicks he received from the convicted murderer. The fact that he was on the ground and that others may have put him to the ground did not make those others liable as principals. They may have been liable as secondary parties but that was not the way in which the Crown chose to prosecute the case, and the judge was clearly of the view that it would not be right to tell the Crown how to prosecute. That refreshingly non-interventionist approach is welcomed. It is an approach which the Court of Appeal has previously noted without criticism. In a similar case where the Court of Appeal upheld a trial judge's decision that there was no case to answer (*R v Lewis and Marshall-Gunn* [2017] EWCA Crim 1734) the Court of Appeal said: *'The case was not put against them on the footing of this being a joint enterprise involving encouragement or assistance by one or the other. As recorded by the judge, that remained the prosecution's case when the submission of no case was being debated. It remained the prosecution's case before us.'*

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