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Albion Chambers CRIME TEAM NEWSLETTER

Getting it right the first time

Proposals for the implementation of pre-recorded cross examination

The treatment of children and vulnerable persons in the trial process is the current hot topic. Recent notorious cases have attracted the attention of not just the popular press but the Ministry of Justice resulting, in the announcement in June of a pilot scheme to implement and assess section 28 of the Youth Justice & Criminal Evidence Act1999. This section, which allows for the pre-trial video recording of cross-examination and re-examination of a witness, has never been brought into force. It has been resisted on the basis that it is unworkable and within the current system would result in unfairness to the defendant. However many working within the criminal justice system recognise that the way we use the current system frequently does a disservice to those who most require assistance and as a result their voices are not heard. Is it time for us to all try a new approach?

The Court of Appeal in cases such as *Barker [2010] EWCA Crim 4, Wills [2011] EWCA Crim 1938* and *E [2011] EWCA Crim 3028* critiqued the place of traditional methods of cross-examination in cases involving child witnesses. In particular, the Court has highlighted the use of "tag" or leading questions which have been deemed an inappropriate forensic tool with which to challenge the evidence of children and that the use of such questions can reduce the quality of the witness' evidence.

In *Barker* (ante), the Lord Chief Justice at paragraph 42, said that "the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources..." This was addressed again in *Wills* (ante) where the Court of Appeal stated, at paragraph 37, ...for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate or by the judge, after the necessary discussion with advocates.

The same logic was applied in *R v E* (ante) in which the complainant, aged five at the time of the trial alleged child cruelty against the defendant.Before cross-examination of the complainant began, the trial judge indicated to defence counsel that, in light of the child's young age and the presence of a defence statement, defence counsel was neither required, nor should he in any event, put the defence case to the witness. During the trial, defence counsel attempted to ask various leading questions of the complainant and was interrupted by the trial judge in doing so. Having appealed the conviction on the basis that the defence was prevented from putting their case and as such that amounted to the deprivation of a fair trial. The Court of Appeal said the following in discussing the appeal:

The real complaint here, in our view, is that the defence was deprived of the opportunity to confront C in what we might venture to call "the traditional way". It is common, in the trial of an adult, to hear, once the nursery slopes of cross-examination have been skied, the assertion: "You were never punched, hit, kicked as you have suggested, were you? It was precisely that the judge was anxious to avoid and, in our view, rightly. It would have risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how it could have been helpful. Putting the same thing a different way, we struggle to understand how the defendant's right to a fair trial was in any way compromised simply because Mr Whitehead was not allowed to ask: "Simon did not punch you in the tummy, did he?"

But, I have to put my case. Surely not to do so is a breach of my professional duty? Rule 708(i) of the Bar Code of Conduct states:

A barrister when conducting proceedings in Court must not by assertion in a speech impugn a witness whom he has had an opportunity to cross-examine unless in cross-examination he has given the witness an opportunity to respond.

The obligation to put the case is known by many as the "rule in *Browne v Dunne*". The rule is deemed to have its first pronouncement in a civil case of *Browne v Dunne (1894) 6 R. 67 (Archbold 8-217)*. The first mention in a criminal case is in *Harte [1932] 23 Cr. App. R. 202*, which made it clear that the duty is owed to the witness rather than to the defendant. Subsequent cases have reinforced this approach. If an essential part of the evidence of a witness is challenged then that witness must have an opportunity to answer that challenge.

However, neither Rule 708(i) nor *Browne v Dunne*, are authority for the

proposition that the "case" can only be put via the tagged question (you're lying aren't you/ he never hit you did he). If the rule is designed to ensure the fair treatment of the witness, then the recent developments in how we treat vulnerable witnesses do not fly in the face of it. If the witness can't understand what you're putting, then it's not fair and you mustn't put it to that witness.

The CBA have produced a film, "A Question of Practice", to train advocates in the questioning of vulnerable witnesses (www.criminalbar.com).

So will the implementation of Section 28 YJCE 1999 assist the witness but still protect the fairness of the trial? Inevitably the process will be less intimidating for a witness and has the advantage of them being cross-examined much closer in time to the events of which they complain. The evidence they give is therefore likely to be more reliable. The witness will not have to wait at court, will not be inconvenienced by an adjournment and will not have to return on re-trial.

The concerns about implementation of section 28 largely focus on lack of prompt disclosure by the prosecution and the late service of additional evidence. Both might give rise to further questions being asked of a witness. Implementation will require the prosecution to get its disclosure house in order and comply with its disclosure obligations.

However it must be remembered that Barker and Wills, both made it clear that it is unlikely to be appropriate to cross-examine a child witness on the basis of records, rather than adducing the evidence a different way. In the event that something must and can be put to the child, a further recording can take place.

A further concern with section 28, is how to guarantee that the same advocate appears at trial as conducted the recorded cross-examination? That is something that the Listing office will need to be alive to. However, it is to likely that if the difference is simply one of style as opposed to the nature of the defence, a Court will not allow the unavailability of the advocate to stand in the way of a timely trial. The advantage to the advocate who is unable to conduct the trial, will be not having to watch themselves cross-examine!

Has pre-recorded cross-examination been successful elsewhere? It was implemented in Western Australia in 1991 where its success led to implementation in five other Australian States. The Australia Law Reform Commission reviewed this and other measures in 2010 and identified the following benefits:

- Improvements in the quality and reliability of evidence
- Facilitating pre-trial decisions by the prosecution and defence
- Helping with the scheduling and conduct of the trial
- Minimising systematic abuse of child witnesses.

The ALRC recommended that both child and adult witnesses be permitted to give the whole of their evidence by way of pre-recording. The same concerns we hear were raised there by the Bar but in practice almost never arise. That a child's evidence is heard this way in Australia is now an "everyday and unremarkable experience" (Associate Professor Annie Cossins, School of Law, University of South Wales, Sydney: "Cross-examining the child complainant: rights, innovations and unfounded fears in the Australian context").

The pilot scheme will run in Kingston upon Thames, Leeds and Liverpool.

Fiona Elder

What's a bit of Baksheesh between friends?

Dissecting The Bribery Act 2010

The Bribery Act, 2010, was heralded onto the statute book with much fanfare. Ministers standing in front of Parliament proclaimed that the Act would variously stop organised crime, increase efficiencies in large contracts, ensure a level playing field and turn base metals into gold (I may have made up the last one).

Others involved at the coal face of the Criminal Justice system scratched their heads a little, wondering why the same offending couldn't be pursued through existing legislative and common law framework. This question was never properly answered.

However, what was apparent from the drafting of the act was its supranational intent. Not since Victorian England has a small state had such designs on the rest of the world. The Act was drafted to apply to almost anyone or anything that had even the most tenuous connection to the United Kingdom.

The Bribery Act, 2010, has been up and running since 1st July 2011, having previously been slated to come into force in April 2010. Therefore the Act having now been in force for over two years, it seems an opportune moment to see how, and how often, it has been used, to summarise any case law created and how the courts have interpreted the intentionally wide terminology.

Background

I'm not going to teach granny to suck eggs, we all know what bribery is. Sections 1 to 5 of the Act are termed 'general bribery offences' and encompass the payment of and receipt of bribes, in return for some illicit or improper service or advantage of one form or another, in breach of that individual's position of trust, good faith or perceived impartiality.

However, it is the effect of s. 5 that is interesting as it essentially sets the 'moral standard' to be applied where an action takes place in another jurisdiction. The section is explicit in rejecting any assessment or influence of local custom or practice (except 'written law') in the assessment of what is legal or illegal, proper or improper. Therefore the 'facilitation payment' (the payment of a sum to an official to do an act that the official should have done in any event); a payment integral to the smooth working of many societies, is clearly banned. It is clear from the Act there is no distinction between Baksheesh and Bribery. In other words in that fine Victorian tradition, Nanny knows best.

At least however, section 5 pins its colours to the mast, something that cannot be said to apply to the rest of the Act. For instance, the 2010 Act defines the dodgy payment or the chose in action as a "financial or other advantage"

but with little guidance as to how wide 'other advantage' should be interpreted or applied. This appeared to industry, and still appears to industry, to be a very dangerous term indeed. When does hospitality cross the line? Indeed the concerns raised during the consultation and drafting stages have not been allayed through the passage of time. As was reported in August 2013, a recent report from the Institute of Directors warned of Small and Medium Enterprises choosing not to export, for fear of falling foul of the ambiguity and scope of the Bribery Act 2010.

'Corporate' liability

Where the Act departs wholesale from the previous framework is in the creation of a corporate, strict liability offence in failing to prevent bribery (section 7). However, this strict liability extends still further, not just to the corporate personality, but the real person, the employee, the director, the CEO.

The aspect of section 7 that seems most abrasive is the fact that a person can be guilty of failing to prevent bribery without having any requisite intent, or dishonest knowledge. A failure of internal (inadequate) systems that the prosecuted individual may not have had any day to day knowledge or involvement with, could be enough. Of course, the company can rely on the defence of 'adequate measures', but unusually, though not uniquely, the burden of proof is on the company to satisfy the court as to the adequacy of the measures in place.

Interpretation

After two years one would hope that the courts would have been in a position to provide some guidance as to interpretation. It is regrettable (and this may be supportive of the opinion of those individuals who asked why the new Act was required at all) that there has been very little criminal litigation under the not-so-new Act.

One of the first (and potentially only) cases to be heard was that of Mr Munir Patel, a Magistrates' Court Clerk, who took a bribe to make a speeding conviction 'go away'. He was charged under s.2 of the Bribery Act, alongside misconduct in public office. He was prosecuted by the CPS In November 2011 and he pleaded guilty. For this reason the case provides us with little guidance as to interpretation. However one stark feature of the case that does provide us with some guidance was the initial sentence; six years imprisonment handed down by Mr Justice McCreath at Southwark Crown Court. This was later reduced to four years on appeal. Whether £500 equates to four years or six years, the punitive and deterrent intent is clear.

Unfortunately, this is the extent to which the courts have given any sort of steer in Bribery Act cases. Nevertheless, there may be some dry land, some terra firma on the horizon; the Serious Fraud Office has finally, more than two years after the statute was enacted, brought a case under the Bribery Act 2010. On 14th August 2013, the SFO charged three individuals under the Act connected to a Bio-Fuels firm, domiciled in the UK. However, the offences seem to be part of a larger picture, where a total of four individuals have been charged with fraud and fraud related offences. As a result, it remains to be seen whether there will be a sufficient focus on the Bribery Act (and any subsequent litigation) to provide any useful guidance to lawyers and clients alike.

I will keep you updated.

Richard Shepherd

Is the certainty of the summer festival excesses drawing to a close?

When it comes to unwelcome but depressingly predictable phenomena associated with the Glastonbury Festival, traffic chaos and rain immediately spring to mind. But for criminal practitioners in Somerset, the festival brings with it an equally predictable but no less depressing phenomenon. That phenomenon is the stream of youngsters charged with class A drug supply, shell-shocked and unable to comprehend the depth of trouble they are in.

Of course, no two cases are ever the same, but they do tend to conform uncannily to a certain pattern. For some defendants it will be their first time at the festival. Many won't have realised that the festival site isn't actually in Glastonbury at all, while some won't even have realised that 'Glastonbury' is actually a place, let alone that Jesus Christ supposedly went there once! Typically they have no significant record. Many will have had no dealings with the law in their lives. They will often be engaged in education or work. Many will have started dabbling in drugs by smoking a 'bit of weed' with their mates when they were in their mid teens and will, in the following years, have used other drugs on a recreational basis. They will have shared drugs with friends, and then with friends of friends. One person may buy larger amounts and then sell on to friends. The 'supply of drugs among users', whether or not they think of it in those terms, will be something that they have come think little of. Few, it seems, will have applied their minds to quite how seriously such conduct could be taken.

Thus when festival time comes along, the mindset, conscious or subconscious, seems to be that anything goes. They will have heard that recreational drug taking is commonplace; that everyone's doing it and nobody cares. Drugs are brought to the festival and bought at the festival. In a haze of intoxication and lost inhibitions they are shared, passed around and sold. For the undercover police officers who go to the stone circle (and it always does seem to be in the stone circle, doesn't it?), it's like shooting fish in a barrel compared to undercover street operations.

It is often in the temporary cells at the Bath and West Showground that a lawyer points out the gravity of the situation. This is reinforced by the first appearance at Yeovil or Bath Magistrates Court where guilty pleas are entered or indicated and the case is committed or sent to the Crown Court. It is often here too, that the parents, who have driven from distant parts of the country, hear the news that their child faces prison and a long time in prison at that.

However, when the case reaches the Crown Court the reality is, or certainly has been, that things become less predictable. Of course, there are the glowing character references and the inevitable submissions about 'salutary lessons' and that the client is 'never likely to come before a court again'. But the slightly uncomfortable reality is that when it comes to the fundamental question of whether there should be an immediate custodial sentence, experience shows that it really can go either way.

Due to the festival not being held last year, it is interesting to look back to the previous one in 2011 and the sentencing landscape as it was then. The drug sentencing guidelines were not then in force; that did not happen until the end of February 2012. Of course there were authoritative cases, but in truth there was also plenty of scope for the exercise of judicial discretion. With the introduction of the guidelines and the way in which 'category 3' harm is defined, the scope for sentences under 12 months effectively

disappeared. However, nine months after the introduction of the guidelines, along came LASPO and with it the power to suspend sentences of up to two years. Any practitioner who is familiar with the guidelines will know that on a guilty plea, it is perfectly possible and commonplace for judges to interpret the guidelines in a way that brings the sentence down to two years or less.

So, with all the personal mitigation that there is bound to be in such cases, there is at least as much scope for avoiding immediate custody in 2013 and in years to come as there was in 2011 isn't there? Well, actually, it's not as simple as that. The Court of Appeal has spoken!

The appeal in *R v Bush [2013] EWCA Crim 1164* was heard on 20th June 2013, one week before this year's Glastonbury. The case involved a young man found at a music festival with 55 deals of ecstasy. Twenty-one years of age at sentence and described by police officers as seeming naive, he pleaded guilty on the basis of holding them for someone else to whom he was going to return them. He had no intention of selling them himself. The basis was accepted. He received two years immediate custody.

The Appeal was allowed by reducing the sentence to 14 months. The process by which the court, with reference to the guidelines, arrived at that figure is interesting in itself but the important point for the purpose of this article is that the sentence was not suspended. In deciding that suspension was not appropriate, the court made the following statement:

"The circumstances of this offending offer a very strong reason not to suspend the sentence. They constitute a significant aggravating factor. Summer music festivals in the UK are an increasingly important part of the popular culture. Teenagers go to them in groups. Very often it is the first time that they have been away from direct parental control. They are particularly vulnerable to those trying to sell them drugs. Anyone who is involved in such an enterprise, even on a relatively low-level basis such as this appellant, must expect an immediate custodial sentence".

Does this then mean that the hands of judges who would previously have been prepared to give such defendants a chance are now tied? On the face of it, it looks that way. However, while the task of the advocate who seeks to persuade the court not to imprison such a defendant is undoubtedly more difficult as a result of this ruling, one suspects that certain judges (and recorders,) may still find a way of exercising their discretion in favour of the young, naive defendant. At the time of writing, this year's 'batch' of Glastonbury cases is making its way through the courts. It is fair to say that most which involve class A supply have resulted in immediate custody, but the fact is that some defendants in these cases have left via the front door of the court rather than in a van. It seems that in spite of the guidance from above, some judicial discretion lives on.

Derek Perry

Hamlet without the Prince

Those representing a defendant at a plea and case management hearing will be all too familiar with the box ticking exercise that it has become. Some boxes are easier to tick than others, but I suspect one that requires the least thought is the question:

"Has the defendant been advised that if he does not attend, the trial may proceed in his absence?"

The answer is always yes, but what happens if the defendant does not attend at his trial, or never turns up in court at all?

The applicable principles are set out in the case of *Hayward [2001] QB 862*. The presumption is of course that the defendant will, as is his right, attend. This right can, however be waived if he, knowing or having the means of knowledge as to when and where his trial is to take place deliberately absents himself.

A defendant who has left a contact address to which correspondence has been directed is likely to have had the means of knowledge as to the time and date of his trial.

If it can be established that the only viable reason for the non-attendance of the defendant is a reluctance to attend, the judge has to exercise his discretion to ensure fairness to the defence and to the prosecution. In so doing the judge must have regard to all of the circumstances of the case including;

i. whether an adjournment will result in the defendant being caught and the likely length of such an adjournment

ii. whether the defendant wishes to be legally represented or has waived that right

iii. the extent to which an absent defendant's legal representative is able to present his defence

iv. the extent to which the defendant is disadvantaged in not being able to give an account

v. the risk of the jury reaching an improper conclusion from the defendant's absence

vi. the seriousness of the offence

vii. the effect on witnesses

viii. if there is more than one accused, the effect of the trial on the remaining defendant/defendants.

The Hayward principles were considered in the case of *Jones [2003] 1A.C* where Lord Bingham refined the approach to be taken; the seriousness of the offence is academic and the principles apply equally whether the offence is minor of serious and even if the defendant does abscond it is desirable that he should be represented.

There has been a tendency in the past for legal teams to withdraw from a case if the defendant does not attend. Such a course has the potential of assisting the defendant in his desire for the trial not to go ahead (if that is the reason for his absence). *Shaw [1980] 1 WLR 1526* makes it clear that the absence of the defendant does not automatically mean that solicitors and counsel have to withdraw from the case. Counsel can advance existing instructions and even fresh instructions provided by the defendant after he has absconded! Care should be taken by counsel who chooses to withdraw in the absence of the defendant. Careful consideration should be given to the Code of Conduct of the Bar as withdrawing in circumstances where the Hayward tests are satisfied is capable of leading to disciplinary action.

The most extreme example of proceeding to trial in the absence of a defendant occurs when he has never in fact appeared before the Crown Court to be arraigned and has lost contact with his legal team thereby compelling them to withdraw in the absence of any instructions.

In a recent case before the Recorder of Bristol a defendant charged with raping his granddaughter fled the jurisdiction having been charged and granted conditional bail by the crown court. His case was that all the allegations were false. A European arrest warrant was issued but not executed and Interpol had been alerted to the fact that he was wanted. At his trial the prosecution successfully argued that the trial should take place in his absence. The complainant needed certainty. An adjournment would have meant that she would have had to wait for an indeterminate time before the trial could take place. The court entered 'not guilty' pleas on behalf of the defendant and the Judge indicated that he would be obliged to explore points on behalf of the defence had the defendant been represented.

In the end the trial had to be adjourned half way through the complainant's evidence, but had it reached its conclusion the jury

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would have been directed that they should not hold the defendant's absence against him and would have received no directions in relation to the absence of an account. They would also have heard gentle but apparently partisan questioning by the judge who would have made points on behalf of the defence. The prosecution would not have been entitled to make a closing speech and the summing up would, inevitably have had to emphasise the defence case.

In those circumstances it is, in my view, far from a foregone conclusion that the jury would convict and if an analysis is carried out by a sophisticated defendant who has a case simply of denial, he may come to the conclusion that his interests are best served by watching his trial unfold from afar.

Stephen Mooney

Intoxication and rape

A step too far?

Consent is probably the defence that features most frequently in rape trials. All too often one or both of the parties have been drinking. It is the interrelationship between intoxication and issues of consent that all too often causes confusion.

From the perspective of the defendant intoxication is less of a problem. If a man forms the intention to commit rape when drunk and goes on to commit the offence then the fact that his intention was formed whilst drunk offers no defence. A drunken intent is still an intent (*R v Sheehan and Moore [1975] 60 CAR 308 at 312*)

The significance of intoxication on the part of a complainant is, however rather more problematic. The law of consent and intoxication was fully explored in the important authority of *R v Bree 2007 EWCA 2007.*

The facts were that the defendant and complainant had both been drinking to excess. The complainant gave evidence that she had drunk so much that she had vomited. She then remembered the defendant having sex with her against her will. In the course of the trial she agreed that there were periods during the incident of which she had no recollection, and so she could not say whether she was responding to the appellant's advances or giving him encouragement. Her case remained that she was not consenting to sexual activity with him.

The defendant on the other hand said that he at all times believed that the complainant was consenting.

It was formally admitted by the prosecution that *"excessive alcohol consumption can produce marked sedation and may also impair memory, which may result in 'blackout' "*.

The court reviewed how the definition of consent in S.74 of the Sexual Offences Act 2003 ("The Act") was to be applied against the background of an intoxicated complainant:

"In our judgment, the proper construction of section 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion."

The import of this reasoning is of course to delineate between a complainant who drunkenly consents to activity that she would not consent to when sober and a complainant who in fact does not consent because she has no capacity to do so.

What is the position, however if a complainant is rendered unconscious as a result of the consumption of alcohol (or, indeed any other reason)?

As a matter of common sense it would be difficult to argue that a sleeping complainant could ever consent to sexual contact. It may, however be that a defendant could seek to argue that the fact that there was no obvious opposition to his sexual advances led him to believe that the complainant did in fact consent.

S. 75 of "the Act" creates a rebuttable presumption of the absence of consent. The relevant subsection applicable is S.75 (2) (d) which establishes that if at the time of the penetration the complainant was *"asleep or otherwise unconscious at the time of the relevant act"* and *"that the defendant knew that those circumstances existed"* then the complainant is to be taken not to have consented and the defendant is taken not to have reasonably believed that she consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed that the complainant was consenting. This is a section that has achieved prominence in recent years as it has been sought to be applied in decisions to prosecute.

In a recent case the prosecution sought to rely upon the evidence of a complainant who as a result of drinking had no recollection of engaging in any sexual activity at all. She became aware that she had been penetrated only when she discovered the physical signs of having had sex. DNA analysis showed that it was the defendant who had had sex with her. He too had been drinking and had no recollection of having had sex with the complainant.

The prosecution sought to rely upon S.75 saying that the complainant must have been unconscious at the time she was penetrated by the defendant. He must have known that she was asleep and accordingly he could not rebut the presumption and was guilty of rape.

Put another way, the complainant didn't know what happened, the defendant didn't know what happened but a jury could be sure that rape had been committed.

This would seem to amount to legal alchemy using S. 75 to transmute the base metal of an unsustainable case into the gold of a conviction for rape. This was also the view of the trial judge who allowed an application to dismiss the case.

The moral of the story is that most issues of consent and intoxication can be understood and applied by reference to Bree. There will be occasions when S. 75 will properly be applied such as when a defendant videos himself as he rapes an obviously unconscious victim. These occasions will, however be rare and S. 75 should never be used to try and create a case where in reality no case exists.

Stephen Mooney

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.

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