Guildhall CHAMBERS

Newsletter

CRIME NEWS SPRING 2012

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CHAMBERS BAR AWARDS 2011 WINNER REGIONAL SET OF THE YEAR

The LEGAL 500 UNITED KINGDOM TOP TIER 2011

TOP RANKED CHAMBERS UK BAR 2012 Leading Set

Spring is in the air: trees heave with blossom, doves take their duffle coats off, and the Court of Appeal has sexual infidelity on its mind. The recent case of *R v Clinton* gave the Lord Chief Justice an opportunity to explore the practical difficulties associated with the new, statutory, partial defence of "loss of self-control", which replaces the doctrine of provocation. These provisions were designed to ensure that injured machismo never operated as a defence, but their likely unintended consequences are wryly dissected by Lord Judge LCJ. Those of you who saw the March edition of a rival publication will need no introduction to the author of our article about *Clinton*: he was the subject of a profile interview in Counsel Magazine, with the interview focusing on his sports law practice. Christopher Quinlan QC analyses this important judgment in *'Hi Fidelity,'* in this edition of our newsletter.

The Court of Appeal dealt with matters sexual once more in the recent case of *R v MC*, in which Kerry Barker appeared for the prosecution. Kerry examines this case concerning an application to cross examine a complainant about her sexual history against the background of recent appellate decisions, noting the increasingly firm evidential basis courts require before permitting cross examination suggesting that previous allegations made by a complainant were false.

Kerry was accompanied on another trip to the Court of Appeal by Caighli Taylor, our crime team pupil who is now 'on her feet' and able to receive instructions. Having grown up and attended school in Lancashire, Caighli graduated from New College, Oxford in 2008 and thereafter moved to Manchester where she completed her BVC. Since joining us in September under the supervision of Brendon Moorhouse, she has accompanied members to Magistrates', Crown and appellate courts, and is delighted to be part of the Chambers of the Year (an award made shortly after she joined and the editor of this newsletter left to go on sabbatical – coincidence?).

Kerry also prosecuted a recent case of child cruelty against Peter Blair QC and Anna Vigars, with Rosie Collins co-defending. In their 'Child Cruelty Update', Peter and Anna analyse the meaning of 'exposes' in the Protection of Children Act 1933. From the old to the modern - the law, not the lawyers – James Bennett provides a further update to Sue Cavender's article in our last edition, concerning the new drugs Sentencing Guidelines. James demonstrates that a considered reading of these guidelines will repay defence advocates seeking room to mitigate in the grids.

Other recent developments include the arrival of Tara Leigh-Davies, our new crime administration assistant. Tara joins Lucy, Grant and Elena as part of the dedicated criminal clerking team: we wish her a very warm welcome. I am looking forward to returning to our expanded and recently awarded team in July of this year after completing (fingers crossed) an MPhil in Criminology at St Catharine's College, Cambridge, but until then, I hope you enjoy this edition of our newsletter.

Your comments and suggestions about current and future articles are very welcome. Please email me at mary.cowe@guildhallchambers.co.uk. Our aim is to make these newsletters as topical and relevant as we can – some of our contributors also seek to entertain, but that I cannot guarantee.

Mary Cowe, Editor

Keeping it light, keeping it right, all night[1]

With effect from 4 October 2010 the defence of provocation, reducing murder to manslaughter, was abolished. It was replaced by sections 54 and 55 of the Coroners and Justice Act 2009 ('the 2009 Act') which created a new partial defence to murder, namely "loss of control". This statutory defence is self-contained: the ingredients are set out in section 54 and expanded in section 55. Its common law legacy is irrelevant. In January of this year the Court of Appeal gave its first interpretation of sections 54 and 55. In three conjoined appeals a court presided over by the Lord Chief Justice (Lord Judge) subjected the defence to close and perceptive analysis (*R v Clinton, R v Parker, R v Evans* [2012] EWCA Crim 2 ['*Clinton*']). The judgment is as entertaining as its informative; it is (dare I say it) compulsory reading. This article seeks to summarise that decision[2].

The legislation

Section 54 of the 2009 Act provides:

(1) Where a person ("D") kills or is party to the killing of another ("V"), D is not to be convicted of murder if:

(a) D's acts and omissions in doing or being a party to the killing resulted from D's 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.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3) In subsection 1(c) the reference to "the circumstances of D" is a 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.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Section 55 provides:

"Meaning of "qualifying trigger"

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which:

(a) constituted circumstances of an extremely grave character; and

(b) caused D to have a justifiable sense of being seriously wronged.

"Not any trigger will do. It (that which caused the loss of self-control) must be a qualifying trigger. This is the second component and is defined in section 55. "

[1] Fame, Bruno Martelli. Please don't email or write: I know the last word should read 'right'.

[2] It does not claim to be entertaining.

"Clinton's appeal was allowed, conviction for murder quashed and a retrial ordered. He killed his wife against a background of a failing marriage after a bitter row..."

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger:

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence; and

(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to "D" and "V" are to be construed in accordance with section 54."

The first feature of section 54 is that it identifies three statutory ingredients (or "components" *per Clinton*) to the defence. Each is essential to it and the approach sequential. If one is absent, the defence fails (*Clinton*, para 9[3]). The burden of disproof is on the prosecution (s54(5)). The Court looked at each in turn.

Loss of self-control

The first component is straightforward: the killing must have resulted from the loss of self-control (s54(1)(a)). The loss of control need not be sudden (s54(2)). It is at this stage that section 55(1)(4) comes into play: the defendant must not have killed in a "considered" desire for revenge. "Considered" is not defined. *Clinton* offers this assistance: *"the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self control"* (para.10). It is worth noting that in dismissing the appeal of Evans the Court found that there was no requirement upon the trial judge to elucidate on the meaning of the word "considered".

The qualifying trigger

Not any trigger will do. It (that which caused the loss of self-control) must be a qualifying trigger. This is the second component and is defined in section 55. It is not without its challenges or as Lord Judge put it: *"there is no point in pretending that the practical application of this provision will not create considerable difficulties"* (para 11).

Sections 55(3) and (4) define the circumstances in which a qualifying trigger may be present. The bar has been raised from the days of provocation. By section 55(3) the defendant must be fearful of *serious* violence. In subsection (4)(a) the circumstances must be *extremely* grave. In subsection (4)(b) it is not enough that the defendant has been caused by the circumstances to feel a sense of grievance. It must arise from a *justifiable* sense not merely that he has been wronged, but that he has been *seriously* wronged. These are fact specific questions. The defendant's subjective assessment of and reaction to the circumstances alone is not sufficient. As the Court observed *"the questions whether the circumstances were extremely grave, and whether the Defendant's sense of grievance was justifiable, indeed all the requirements of section 55(4)(a) and (b), require objective evaluation"* (para 12, 38).

This process of objective evaluation is "hugely complicated" (para 13) by the exclusionary provisions of section 55(6). It is here we find the "most critical problem…of sexual infidelity" (*ibid*). Notwithstanding that *"it has been recognised for centuries that sexual infidelity may produce a loss of self control"* (para 36) in men and women, by virtue of subsection (6)(c) it is to be disregarded as a qualifying trigger. In deciding Clinton's appeal, the Court was required to *"make sense of this provision"* (para 26). The judgment contains an interesting discussion of some of the potential problems which might arise (para 15-29).

The 2009 Act does not define sexual infidelity. It is not as simple a concept as at first blush it might seem. Infidelity: what does it mean? In general terms and in common parlance we might use the term to mean (or to include) unfaithfulness in the context of a relationship, for example a spouse or partner. It involves a breach of trust or shared understanding of loyalty. That is straightforward where the parties are married or cohabiting as sexual partners. When does the concept of fidelity arise in a relationship? What if the 'relationship' is very new, perhaps measured in days and not months or years? What if the day before the discovery, the 'unfaithful partner' told the alleged murderer that their relationship was over: is that an expression of sexual freedom such that the prohibition would not then bite?

Sexual: again, not (you might think) the most difficult concept to grasp[4]. Find your wife/husband in *flagrante delicto*, (and you might well think that sufficient to provoke a modest fit of pique) which causes you to lose self-control and kill him/her and the provision will bite: the sexual activity you discovered (and indeed interrupted) would be excluded as a qualifying trigger and so, without more, the defence would fail. That remains the law, post-Clinton (para 35).

We need to return to the words of section 55(6)(c): the fact that a thing done or said *constituted* sexual infidelity is to be disregarded (emphasis added). A thing done is clear; what of a thing said? You do not stumble upon infidelity but it is revealed to you, by way of a confession: "I have been having regular (and very agreeable) sex with a marketing executive". Would those words *constitute* sexual infidelity? If it was a spiteful but untrue boast, then it could not *constitute* sexual infidelity. So the killer can rely upon a lie (in his/her defence) but not the truth? That would be irrational. The Court determined that *"things 'said' includes admissions of sexual infidelity (even if untrue) as well as reports (by others) of sexual infidelity"* (para 26).

What of words and conduct? In the example above, upon your discovery your partner defends the conduct blaming and taunting you, delivering a glowing assessment of the lover's performance (on both grounds of technical merit and artistic impression) contrasted with your own lamentable efforts. If the taunts or some of them did not constitute sexual infidelity, they would fall outside section 55(6)(c) and so potentially qualify. But the sexual act would be excluded. Most people would (rightly) think that a nonsense, not least because the piquancy of the words comes (in large measure) from the circumstances.

The Court concluded, *"where there is no other potential trigger the prohibition must…be applied"* (para 35). However, context is fundamental: in the criminal courts (as in life) events cannot be isolated from their context. Sexual infidelity cannot fairly be compartmentalised and excluded when it is *"integral to the facts as a whole"*. Therefore *"where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of section 55(3) and*

[3] Paragraph references hereafter are to the *Clinton* judgment.

[4] Even in the sense understood by the former US President who shares the surname of the first appellant.

(4), the prohibition in section 55(6)(c) does not operate to exclude it" (para 39). In reaching that conclusion the Court was influenced not only by *"the assumption that legislation is not enacted with the intent or purpose that the criminal justice system should operate so as to create injustice"* (para 40) but also by (1) the fact that there is no prohibition on the defendant telling the whole story so the evidence of the fact and impact of sexual infidelity will be heard and evaluated by the jury and (2) it is "plainly relevant" to any questions which arise in the context of the third component (para 28).

Clinton's appeal was allowed, conviction for murder quashed and a retrial ordered. He killed his wife against a background of a failing marriage after a bitter row in which she taunted him that he did not have the courage to commit suicide and (when challenged about her infidelity) that she had allegedly had intercourse with five different men. The Court ruled that the trial judge (who did not have the *"advantage of careful and detailed submissions made… by leading counsel on behalf of the appellant and the Crown"*) misdirected herself about the possible relevance of the wife's infidelity and accordingly should not have withdrawn the defence from the jury.

The third component

The defendant's reaction to the qualifying trigger is to be assessed against that of a person of his sex and age with a normal degree of tolerance and self-restraint. Put another way, might another person in the defendant's situation and in the circumstances in which the defendant found himself, have reacted in the same or similar way? The third component is concerned with the way in which the defendant has reacted (para 31). By virtue of subsection 54(3), account may be taken of sexual infidelity (ibid). As the Court identified, on one view of the legislation the jury would be required to disregard the evidence of sexual infidelity when considering the second competent but would be directed to consider that very same evidence when assessing the third component. The Court observed that such an approach would be "counter intuitive"[5].

Diminished responsibility

The issue of sexual infidelity can also arise where the defendant is running diminished responsibility (as Clinton was). One of the psychiatrists suggested that if Clinton was telling the truth, the effect of his "depressed state" would have been that he would have been more likely to lose self control following his wife's graphic account of sexual activity with other men and her taunts that he lacked the courage to commit suicide. As the court observed, *"sexual infidelity may therefore require consideration when the jury is examining the diminished responsibility defence even when it has been excluded from consideration as a qualifying trigger for the purposes of the loss of control defence"* (para 33).

Trial

The Court also commented upon the responsibilities of the judge, both at the conclusion of the evidence and in the summing up. It is clear from section 54 that the judge must withdraw the defence from the jury's consideration unless there is "sufficient evidence to raise the issue of loss of control". As to what amounts to "sufficient evidence" subsection 54(6) provides a familiar standard. When deciding, the judge is required to address each of the three components.

As for the summing up, the Court held that if the only potential qualifying trigger was sexual infidelity then the judge must *"act accordingly"*. If it provided the "appropriate context" for an admissible trigger(s) then the jury should be directed (1) as to the statutory prohibition against it (on its own) constituting a qualifying trigger but (2) if they found an admissible trigger(s) may be present then (3) the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate the trigger(s) (para 49).

Conclusion

As one criminal law commentator observed the Court *"did little to disguise its view as to the unsatisfactory nature of the legislation"*[6]. He also opined that the effect of the decision is that there will be few cases where it will prove impossible to argue that sexual infidelity was merely part of the context and so should be excluded from the jury's consideration. The provision, designed to prohibit the misuse of sexual infidelity as a potential trigger for loss of control and fatal violence, was capable of causing injustice. The Court's interpretation provides a (welcome) way through. But we can be confident that Clinton will not be the last say on the matter.

Christopher Quinlan QC

"Infidelity: what does it mean? In general terms and in common parlance we might use the term to mean (or to include) unfaithfulness in the context of a relationship, for example a spouse or partner. It involves a breach of trust or shared understanding of loyalty."

[5] The less deferential might use an appropriate noun to describe that approach.

[6] James Richardson QC, CLW 12/03/05

Child cruelty update

Section 1 of the Children and Young Persons Act 1933 refers to five ways in which the offence of 'Child Cruelty' can be committed, namely by a person who wilfully: "assaults, ill-treats, neglects, abandons or exposes" a child in a manner likely to cause unnecessary suffering or injury to health.

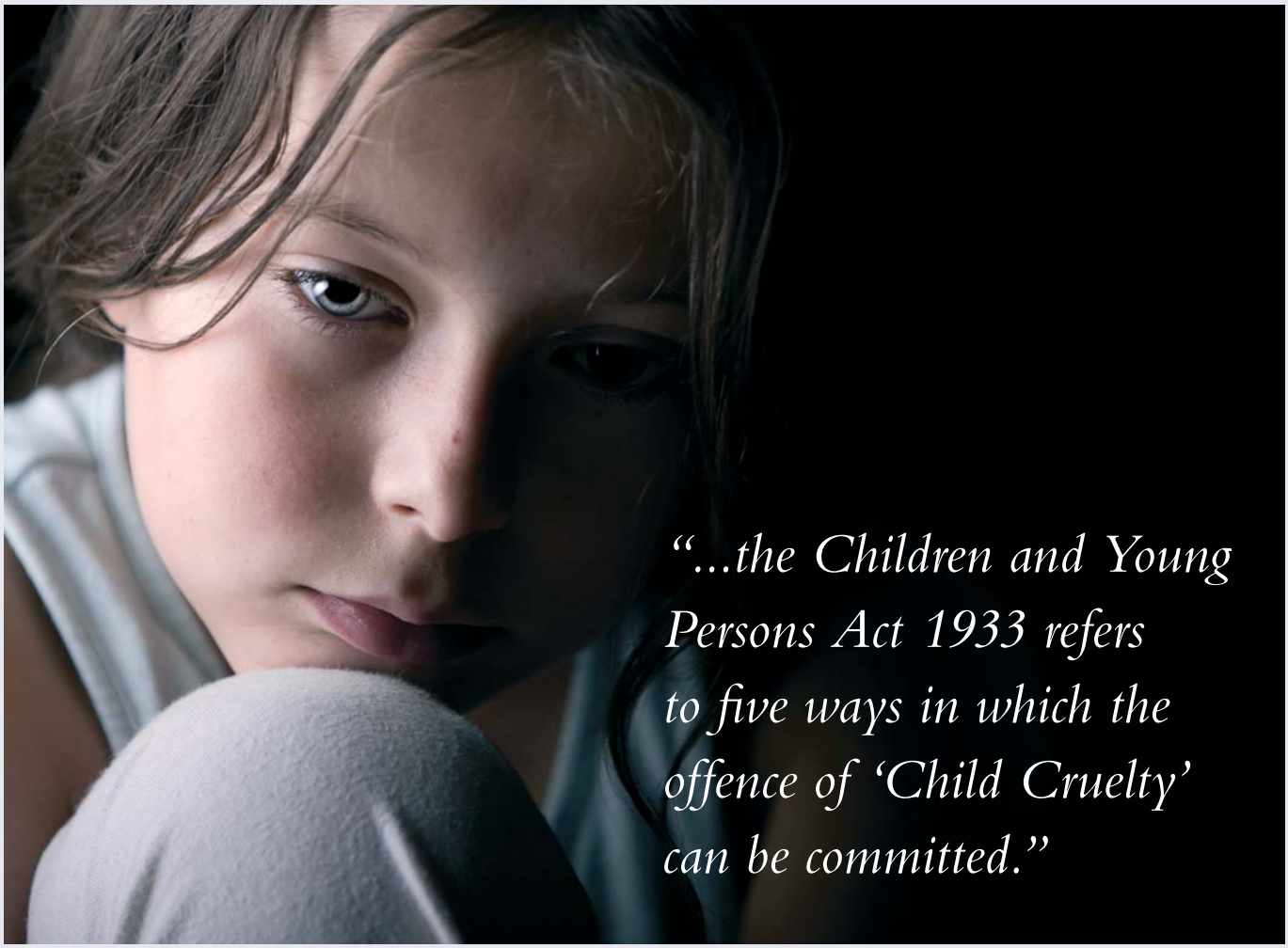
In a recent case at Bristol Crown Court (prosecuted by Guildhall Chambers' Kerry Barker; defended by Peter Blair QC and Anna Vigars, instructed by Julie Barnes of Allen Hoole & Co, and with Rosie Collins co-defending) the question arose as to the meaning of the word "exposes".

Research reveals that it appeared in the predecessors to the 1933 Act – the Prevention of Cruelty to, and Protection of, Children Act 1889 and the Children Act 1908, as well as in s.27 Offences against the Person Act 1861.

HHJ Hagen upheld a defence submission that "exposes" must be interpreted as it was intended to be understood by Parliament when they legislated 78-150 years ago, and as revealed by the contemporary case law: *R v Falkingham & Falkingham* [1870] LR CCR 222 (mother concealed 5 week old baby in a hamper and asked her station booking office to deliver it to the baby's father via the next train); *R v White & White* [1871] LR CCR 311 (mother leaving poorly dressed 9 month old baby on its father's doorstep at night, where he deliberately ignored it for 6 hours); and *R v John Owen Williams* (1910) 4 Cr.App.R. 89 (father route-marching his children 30 miles through a stormy night across the Welsh countryside, having rejected a warm room to shelter them in).

The word "exposes" in these statutes probably derives from the Latin "*exponere*: to put out". Therefore, it does not mean "exposes to a particular risk or danger" as identified and alleged by a prosecutor, but instead means exposing a child to the effects of nature, by not providing adequate clothing or shelter. To this day we still refer to someone suffering from "exposure".

Peter Blair QC and Anna Vigars



The new drug sentencing Guidelines

The new sentencing Guideline applies to all Defendants **aged 18 and older** falling to be sentenced on or after 27 February 2012 regardless of the date of the offence.

The Guideline represents a more expansive and offender specific way of categorising an offence than previously was the position within the pre-Guideline authorities. This has unfairly resulted in headlines implying a more lenient approach by the courts to drug offending - *"drug runners to avoid prison under sentencing guidelines"* (The Telegraph, 17 February 2012). The reality is the Guideline allows courts more discretion to reflect the personal culpability of the offender, in particular those at the bottom end of the scale, whilst still suggesting significant sentences of imprisonment for serious offending. In some situations the suggested sentence is tougher than before the bite of the Guideline.

The Guideline covers seven offences, grouped into 5 categories:
1 Importation;
2 Supply/possession with intent to supply;
3 Production/cultivation of cannabis;
4 Permitting premises to be used; **and**
5 Simple possession.

Step 1
'Determining the offence category'

Common to all 5 categories within the Guideline are lists of factors to be considered to determine within which of the sentence ranges the offender falls.

This exercise is a strict assessment of the facts of the offence without regard to any personal mitigation, previous convictions or whether it was a guilty plea or conviction after trial.

Determining the *'offence category'* is more complicated for the first 3 (and most serious) groups of offences – importation, supply, production etc (see above). Part 1 requires the court to determine *'culpability'* by way of identifying the role played:

Leading Role

- Directing/organising; or
- Substantial links/influence on others in the chain; or
- Being close to the source; or
- Expects a high financial gain or a commercial dealer (e.g. with paraphernalia); or
- Has abused a position of trust (but note a prison officer/medical professional automatically go into this role).

Significant Role

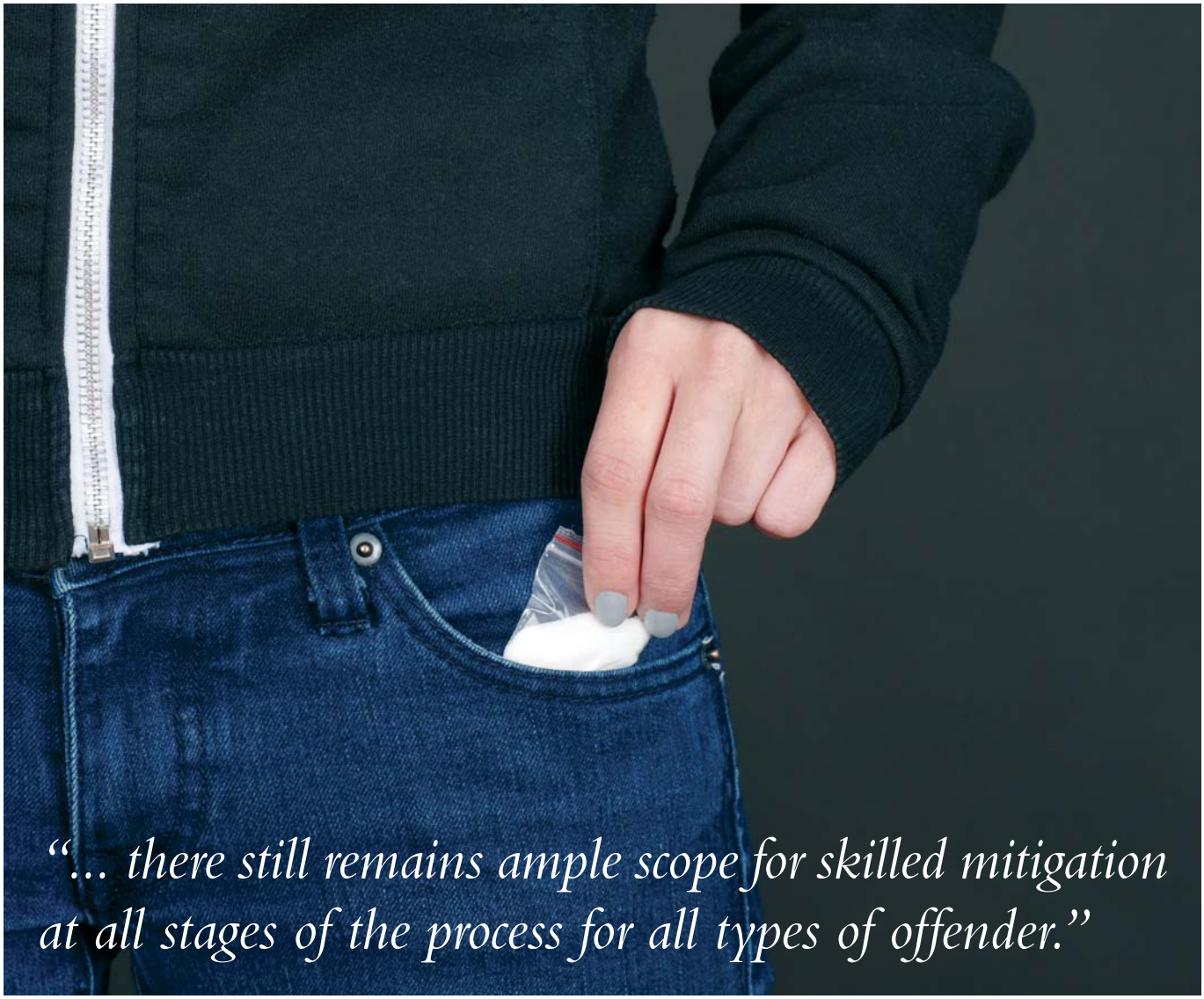
- Operational/management function; or
- Involves others in the operation; or
- Motivated by financial motive; or
- Some awareness of scale of operation; or
- Supply to a prisoner (other than a prison officer).

Subordinate Role

- Performs a limited function; or
- Engaged by pressure; or
- Has been exploited; or
- No influence in the chain; or
- Little or no awareness of the scale of the operation; or
- No financial gain (e.g. joint purchase for not profit).

Part 2 requires the court to determine the *'harm'* caused by identifying the *'category of harm'*. Harm translates as weight of the drugs. The Guideline specifically states weight should not be confused with purity or quality – this is irrelevant (unless to be considered later as an aggravating or mitigating factor i.e. high purity = close to source,

"During the consultation process the 'categories of harm' were discussed in terms of 'very large', 'large', 'medium', 'small' and 'very small' quantities of drugs. These five (helpful) labels have not been used in the final Guideline."



low purity = far down the chain). Weight rather than purity/quality represents a change in approach for class A drugs such as cocaine and heroin and the class B drug ecstasy to that previously required within the pre-Guideline authorities. Now by definition the greater the weight the greater the harm.

During the consultation process the *'categories of harm'* were discussed in terms of 'very large', 'large', 'medium', 'small' and 'very small' quantities of drugs. These five (helpful) labels have not been used in the final Guideline. Instead four categories labeled 1 to 4 - three common drugs:

	Heroin/Cocaine	Ecstasy	Cannabis
Category 1	5kg	10,000 tablets	200kg For 'cultivation' – the potential for industrial quantities
Category 2	1kg	2,000 tablets	40kg For 'cultivation' – the potential for significant quanitites
Category 3	150g or street dealing/ prison employee	300 tablets or street dealing/ prison employee	6kg For 'cultivation' – 28 plants or street dealing/prison employee
Category 4	5g or street dealing	20 tablets or street dealing	100g For 'cultivation' – 9 plants (domestic operation) or street dealing

Two prescribed exceptions to the harm/weight assessment are *'street dealing'* and *'supply of drugs in prison by a prison employee'*. Here, the court has more discretion, being told to look at a wider assessment of harm as *"quantity of the product is less indicative of harm"*. But the suggested category is category 3 for a prison employee and category 3 or 4 for street dealing.

Step 2
'Starting point and category range'

For the 3 most serious groups of offending – importation, supply, production (see above) - it requires no more than a tabulated approach finding the sentence *starting point* and also the wider sentence ('category') *'range'* by applying the now determined *'role'* played by the offender (see above) and the *'harm'* caused (see above).

The possibilities are too numerous to set out here. An example:

An offender is seen supplying in a nightclub. He is in possession of a small number of wraps of cocaine (4g) and £50 cash. A further bag of cocaine (20g) is found in his home together with scales, bags, a small dealers list and £200 etc.

A *leading role (because of his 'directing or organizing and selling on a commercial scale') combined with category 3* (150g – 5g cocaine or 'street dealing') results in a *starting point* of 8 years 6 months imprisonment with a *category range* of 6 years 6 months – 10 years imprisonment.

However, if his role is determined as a *significant role* (because of his 'operational function' or 'motivation for financial gain' but not within the 'commercial scale' envisaged in the more serious *leading role*) combined again with *category 3* (150g – 5g cocaine or 'street dealing') results in a *starting point* of 4 years 6 months imprisonment with a *category range* of 3 years 6 months – 7 years imprisonment. How an offender's role is determined can have a significant impact on the sentence he will receive.

Aggravating and Mitigating factors (excluding any credit for plea)

The Guideline states that the *"starting points apply to all offences within the corresponding category and are applicable to all offenders, in all cases"*. It will have been noted that the exercise so far has been solely an assessment of the facts of the offence.

Once the *starting point* has been established, the court should consider aggravating and mitigating factors to *"adjust the sentence within the range"*.

All 5 categories of offences list non-exhaustive and familiar factors to be considered:

Aggravating Factors

Including:

- Offence committed on bail;
- Previous convictions;
- Use of others under 18;
- Targeting vulnerable people and those under 18;
- Presence of children;
- High purity;
- Presence of weapon;
- Established evidence of community impact

Mitigating Factors

Including:

- Involvement due to pressure;
- Isolated offence;
- Low purity;
- Relevant good character;
- Remorse;
- Age;
- Mental disorder; and
- Responsible for dependants

The adjustment within the *category range* applies to all offenders *"whether they have pleaded guilty or been convicted after trial"*.

Steps 3 – 8

The most relevant of these six further steps includes taking into account any reduction for a guilty plea, consideration of time on remand, the totality principle and the need to consider a POCA order.

In conclusion:

Whilst at first blush the Guideline presents as a formulaic set of tables and lists there still remains ample scope for skilled mitigation at all stages of the process for all types of offender. The example set out above concerning a dealer in a nightclub demonstrates that a determination of a *significant role* rather than a *leading role* potentially halves the sentence from 8 years 6 months to 4 years 6 months. There will be many cases where the facts fall in-between categories. Here, the Guideline states *"where there are characteristics present which fall under different role categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability"*. Persuading a court that a Defendant falls within category 4 rather than category 3 opens up much greater possibilities of a community sentence. But for all offending there appears to be scope to mitigate on how a number of subjective and relative terms of art within the Guideline should be assessed.

It may also be tempting, given the format of the Guideline, to quickly glance at the tables and lists whilst avoiding reading the prose. This should be avoided as there are a number of nuggets for anyone mitigating set out within the prose. Perhaps the best example is *"where the Defendant is dependant on or has a propensity to misuse drugs and there is sufficient prospect of success"* a community order can be a proper alternative to a 'short or moderate' length custodial sentence. 'Short or moderate' is open to interpretation but potentially applies to many offenders. However, such a submission will require planning with thought given to how a drug dependency/misuse can be best evidenced in mitigation and perhaps more difficult, how a 'sufficient prospect of success' can be demonstrated.

James Bennett

Cross-examining complainants about their previous sexual history

Everyone knows by now that a complainant in a case cannot be asked questions about his or her previous sexual experiences without the permission of the court. In accordance with section 41(4) of the Youth Justice and Criminal Evidence Act 1999 such questions in cross-examination are not permitted if their purpose is to undermine the credibility of the witness. Yet everybody knows that is the precise purpose of these questions, because it is the credibility of the alleged rape victim or abused child that is at the core of such cases.

In *R v A* [2001] UKHL 25 the House of Lords ruled that if as a result of permission to ask such questions being refused, the Defendant could not have a fair trial in accordance with his human rights (Article 6 of the European Convention on Human Rights), then the legislation had to be read down so as to protect those rights. So, for example, questions were to be allowed which went to whether previous allegations made by the same complainant were false.

This placed a very onerous burden on the trial judge to uphold the purpose of the legislation whilst at the same time ensuring that the Defendant had a fair trial. A delicate balance.

To prevent an abuse of the freedom apparently given by the House of Lords the courts have introduced practical restrictions.

In *R v RT* and *R v MH* [2001] EWCA Crim 1872 at paragraph 41 Keene LJ said:

"However it is open to a judge to guard against abuse of the system. The defence, wishing to put questions about alleged previous false complaints, will need to seek a ruling from the judge that section 41 does not exclude them. It would be professionally improper for those representing the Defendant to put such questions in order to elicit evidence about the complainant's past sexual behaviour as such under the guise of previous false complaints. But in any case the defence must have a proper evidential basis for asserting that any such previous statement was (a) made and (b) untrue. If those requirements were not met, then the questions would not be about lies but would be "about the sexual behaviour of the complainant" within the meaning of section 41(1). The judge is entitled to seek assurances from the defence that it has a proper basis for asserting that the statement was made and was untrue. That may not provide a watertight guarantee that in every single case evidence about the complainant's past sexual behaviour will be excluded, but it would normally prevent the sort of danger to which we have been referred."

Lord Justice Keene returned to this subject in the more recent case of *R v RD* [2009] EWCA Crim 2137 in which the defence had suggested that there were such inconsistencies relating to the earlier allegation involving the complainant, and that these inconsistencies amounted to a proper basis for allowing questions as to the allegation's falsity. At paragraph 18 his Lordship said:

"The phrase in R v T and R v H "a proper evidential basis" was intended to require a much more solid foundation than the sort of cross examination as to inconsistencies being relied upon in the present case. It is significant that one of the authorities relied on by this court in that case of R v T and R v H, that of Cox (1986) 84 Cr App R 132, was itself a case where there had been evidence available of an admission by the complainant that her earlier accusation of rape against another man had been false – see page 135. In the case of V as was pointed out earlier, this court held that it was only in the instance where again there was evidence of an admission by the complainant that her earlier allegation had been false that cross-examination about it was allowable. This line of cases is not to be regarded as authorising the use of a trial as a vehicle for investigating the truth or falsity of an earlier allegation merely because there is some material which could be used

"The defence, wishing to put questions about alleged previous false complaints, will need to seek a ruling from the judge that section 41 does not exclude them. It would be professionally improper for those representing the Defendant to put such questions in order to elicit evidence about the complainant's past sexual behaviour as such under the guise of previous false complaints."

"The defence application to cross examine the complainant about these matters was refused. The Court of Appeal upheld that refusal pointing out that, following R v RD, inconsistencies between a complainant's witness statement, and other witness statements, and comments in a police report were not a sufficient evidential basis to justify allowing cross-examination about a previous complaint."

to try and persuade a jury that it was in fact false. As was pointed out in the case of E, if the cross-examination elicited assertions that the allegation had been true, the trial court would have been faced with the dilemma of either letting those assertions of criminal conduct on the part of a named third party stand unanswered, or "descending into factual enquiries with no obvious limit and wholly collateral to the issue in the case." We agree with those comments. Nor does the mere fact that the police decided that there was insufficient evidence to prosecute on the past complaint amount to evidence that the complaint was false."

That approach has now been strengthened in the recent case of *R v MC* [2012] EWCA Crim 213 (in which Kerry Barker appeared).

The complainant was the Defendant's adopted daughter. She accused her adoptive father of having sexually abused her between the ages of 6-9. His defence was that the allegations were false. In her teens the complainant had gone off the rails and had problems with drugs and alcohol. On one occasion she had been out drinking with friends and during the taxi ride home, whilst sat in the front passenger seat, she had been seen to allow the taxi driver to touch her sexually. Disgusted, one of the other passengers had made a formal complaint and when they investigated the police took a statement from the complainant which contained many inconsistencies when compared with those of the other passengers. The police decided to take no further action.

Then a couple of years later she had been out to a club and had gone home with the DJ. She said that she had passed out and that when she awoke in the morning she felt wet between her legs and felt that someone had had sex with her during the night. She accused the DJ of raping her and said that she must have been drugged. Forensic tests on her blood sample showed no presence of drugs or alcohol. The DJ when interviewed admitted having sexual intercourse with her but said it was consensual. The CPS decided not to prosecute.

The defence application to cross examine the complainant about these matters was refused. The Court of Appeal upheld that refusal pointing out that, following *R v RD*, inconsistencies between a complainant's witness statement, and other witness statements, and comments in a police report were not a sufficient evidential basis to justify allowing cross-examination about a previous complaint. The court said that a much more solid foundation was required than that, as, for example, where there had been an admission that the earlier complaint was false. Likewise the mere fact that the police or CPS decided that there was insufficient evidence to prosecute on the past complaint did not amount to evidence that the complaint was false.

The Defendant had submitted to the court that the judge had to look at fairness to the defence as well as to a complainant and the effect of the judge's refusal to allow cross-examination was to cause unfairness to him. Giving the judgment of the Court of Appeal, Lord Justice Richards said:

"In our view that argument gets nowhere. There is a balance to be struck, but it has been struck by the legislature in the provisions of section 41 as interpreted by the courts."

and

"Accordingly, the Judge was in our view entirely correct to reject the defence application under section 41. There was no proper basis for allowing the line of cross-examination sought, which would have led inevitably to a trial within a trial (in fact to two additional trials within the trial) and would have led to impermissible questioning of the complainant about her previous sexual behaviour."

So unless there is evidence that a previous sexual allegation was false, an application to cross-examine a complainant about a previous allegation should fail.

Kerry Barker

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