

CRIMEWATCH

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RECENT PUBLICATIONS

Proposals to amend the hearsay rule

The Scottish Law Commission in its Report entitled *Evidence: Report on Hearsay Evidence in Criminal Proceedings* recommends the retention of the rule itself but proposes "new categories of exceptions which would allow hearsay evidence of a statement to be admitted if there were truly insurmountable difficulties in the way of obtaining the evidence of the maker of the statement from the maker personally". Of particular interest is the fact that in developing its recommendations, account was taken of the European Convention on Human Rights. The Report (Scot Law Com No.149) is available from: HMSO, P.O. Box 276, London SW8 5DT. Fax: 44 171 873 8200 and costs £12.65.

The "Year and a Day" Rule

The Law Commission has published a Report on *The Year and a Day Rule in Homicide* and recommends that:-

1. The rule should be abolished for all purposes with prospective effect;
2. The consent of the Attorney General should be required in order to bring a prosecution for murder, manslaughter, infanticide, aiding and abetting, counselling or procuring a person's suicide, or any other offence of which one of the elements is

causing the death of any person ("a fatal offence") where a period of three years has elapsed since the act or omission which allegedly caused the death;

3. The consent of the Attorney General should be required in order to bring a prosecution for any fatal offence where in the course of the prosecution it is proposed to allege that the death was caused by an act or omission which constituted the whole or part of the facts alleged in any previous proceedings against the accused for an offence for which a custodial sentence for a term of two years or more was imposed on him.

The Report (Law Com No.230) is available from: HMSO, P.O. Box 276, London SW8 5DT. Fax: 44 171 873 8200 and costs £9.95.

Official Records of the Vienna Convention

Volume I (E/CONF.82/16) of the Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances has recently been published. It contains, *inter alia*, organizational and preparatory documents, the Conference documents and reports, United Nations Convention and the resolutions. Volume II (E/CONF.82/16/Add.1) will contain the summary records of the plenary meetings and of the Committees of the Whole.

LEGISLATIVE DEVELOPMENTS

United Kingdom

The *Criminal Justice and Public Order Act 1994* has made several minor amendments to the *Extradition Act 1989*.

CASE NOTES

Right to a Fair Trial

European Convention on Human Rights - Police press conference - Claim that the applicant guilty of criminal offences - Whether action contravened Articles 6 and 10 of the Convention

Senior police officers investigating a criminal matter involving the applicant, held a press conference at which it was claimed that the applicant, who was then in detention on remand, was guilty of criminal offences. The applicant claimed that her rights under Articles 6 and 10 of the European Convention on Human Rights had been infringed.

Held: Claim upheld

1. The right to receive and impart information guaranteed by Article 10 entitled the authorities to hold press conferences on the case in order to inform the public about its progress. However, this had to be done in such a way as to preserve the accused's right to be presumed innocent.
2. The remarks of the police officers were linked so closely to the proceedings as to bring Article 6(2) into play. (Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law).

Allenet de Ribemont v France, European Court of Human Rights, Series A, No. 308

Corruption

Public servant - Charges alleging acceptance of gratification for reward or favour - Burden of proof - Whether prosecution required to prove that accused acted with corrupt motive - Whether "consideration" included payments made on behalf of accused

The appellant, a public servant, was charged with offences under section 6(2)(a) of the Prevention of Corruption Act (PCA) and section 165 of the Penal Code. He had received an air ticket and part of his hotel expenses to go to an air show in Singapore from consultants who were parties to a government contract, everybody assuming that the expenses would be recovered from the government.

The magistrate decided that there was no evidence of corrupt motive and acquitted the appellant of all charges under the PCA but convicted him of four charges under the Penal Code.

The appellant appealed against the convictions on the ground that it was necessary for the prosecution to prove that he had possessed a corrupt or improper motive as a public servant before he could be convicted. The Public Prosecutor cross-appealed against the acquittals.

Held: In allowing the appellants appeal and quashing his convictions and dismissing the cross-appeal,

1. Section 165 of the Penal Code penalised the acceptance, without consideration, of any valuable thing by a public servant from someone with whom he might have official business. However, there was no requirement in the section that such consideration had to be provided by the public servant himself. The word "consideration" was to be given a broad interpretation, and included payments made on the public servant's behalf by another including his employer. In this

case, the appellant's visit to Singapore and the right to claim expenses from the government could amount to consideration under section 165 of the Code.

2. Section 6(2)(a) of the PCA required the prosecution to prove that the agent had accepted the gratification as an inducement or reward whereupon the burden shifted to the accused to show that he had not corruptly received the gratification as alleged. The fact that the accused had not subsequently shown any favour to the giver of the gratification had disproved corrupt intent and the magistrate had not acted unreasonably in concluding that the appellant had not acted with corrupt intent.

Public Prosecutor v Rahman, High Court, Brunei Darussalam, [1993] 3 *Law Reports of the Commonwealth* 695

Evidence

Words and phrases - "Import" - Whether drugs "imported" if held in an airport in-flight area during transit

The appellant arrived at Changi Airport, Singapore from Bangkok and was due to fly out the same day en route for Lagos, Nigeria. He was detained by narcotics officers and two of his bags recovered from the in-flight area of the airport. The bags were found to contain drugs and the appellant was charged and convicted under section 7 of the Misuse of Drugs Act of importing drugs into Singapore. He appealed against conviction.

Held: Appeal dismissed

The word "import" in section 7 had the same meaning as that given by section 2 of the Interpretation Act namely "to bring or cause to be brought into Singapore by land, sea or air". An accused person had possession of a bag even though it would have normally remained in the in-flight area of the airport throughout the whole length of the transit in Singapore and the appellant could not ordinarily have retrieved it.

Ubaka v Public Prosecutor, Court of Appeal, Singapore, [1995] 1 SLR 267

Identification - DNA profiling - Hair plucked from scalp without consent - Whether a non-intimate sample - Whether a sample requiring authorization

Whilst being detained by the police, a sample of hair was pulled from the scalp of the appellant without his consent and used in DNA profiling. The trial judge ruled the evidence admissible. The appellant was convicted of rape and kidnapping. He appealed on the ground that the trial judge erred in ruling that the sample of hair was

a non-intimate sample in that it was plucked in order to obtain the sheath around it for DNA testing and not to obtain the hair itself.

Section 63(3) of the Police and Criminal Evidence Act 1984 (PACE) provides that a non-intimate sample may be taken from a person without the appropriate consent if he is in police detention and an officer of at least the rank of superintendent authorised it to be taken without the appropriate consent. A non-intimate sample is defined in section 65 as a sample of hair other than pubic hair.

Held: In dismissing the appeal,

1. The definition of hair was to include both the hair and sheath around it. Therefore, the hair plucked from the scalp of a suspect without his consent was a non-intimate sample under section 65 of PACE and was, accordingly, authorised by section 63(3) and admissible in evidence.
2. The evidence of DNA profile obtained from the hair root and sheath was very strong evidence of sexual intercourse between the appellant and the victim; even if the taking of the hair sample had not been authorised, the evidence resulting from it should properly have been admitted as evidence.

R v Cooke, Court of Appeal, U.K., *The Times* 10 August 1994

Exclusion of evidence - Evidence obtained by undercover police operation - Whether court has discretion to exclude evidence on the ground that had been unfairly obtained - Factors to be taken into account in exercising discretion whether to admit the evidence of undercover police officer

The appellant was convicted of soliciting a person to murder his wife. The person solicited was an undercover police officer who secretly made tape recordings of meetings held with the appellant. At his trial, the trial judge ruled that the evidence of the recorded conversations should be admitted.

On appeal it was contended that utilising powers under section 78 of the Police and Criminal Evidence Act 1984, the trial judge should have excluded prosecution evidence where that evidence has one or more of three features: (a) an element of entrapment; (b) it comes from an agent provocateur or (c) it was obtained by a trick.

Section 78(1) provides that "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

Held: Appeal dismissed

1. Section 78 had not altered the substantive rule of law that entrapment or the use of an agent provocateur does not per se afford a defence.
2. However if the trial judge felt that in all the circumstances the obtaining of the evidence in that way would have the adverse effect described in section 78 it would be excluded.
3. The court observed that in making the decision whether to exclude the evidence of an undercover officer, some of the factors that a judge may take into account are: Was the officer acting as an agent provocateur in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed? What was the nature of any entrapment? Does the evidence consist of admissions to a completed offence, or does it consist of the actual commission of an offence? How active or passive was the officer's role in obtaining the evidence? Is there an unassailable record of what occurred, or is it strongly corroborated?

Beyond mentioning these considerations, it was not possible to give more general guidance since each case is to be determined on its own facts.

R v Smurthwaite Court of Appeal, U.K., [1994] 1 All ER 898

Importation of drugs - Use of undercover officer and customs officer as courier - Enticement of defendants to United Kingdom - admissibility of evidence of undercover officer - Whether abuse of process

Section 170(2) of the Customs and Excise Management Act 1979 (the 1979 Act) provides: "...if any person is, in relation to goods, in any way knowingly concerned in any fraudulent evasion...(b) of any prohibition...for the time being in force with respect to the goods, he shall be guilty of an offence...".

An informer, H, employed in Pakistan by the United States drug enforcement agency, came to know suppliers of heroin. He was then introduced to the second appellant S who asked H to arrange for a quantity of heroin to be carried to London where either S or someone on his behalf would then collect the drugs. The drugs were carried to England by B, a British Customs and Excise officer, who was apparently acting with the knowledge and approval of his superiors. H came to England and was installed in a hotel by the Customs and Excise.

For some weeks he tried to persuade S to come to England to receive the heroin. Eventually S and the first appellant came to the hotel. They were both arrested when a customs officer delivered bags to them apparently containing heroin. They were convicted of contravening section 170(2).

On appeal, it was argued firstly that the section required there to be some fraudulent person bringing goods into the country and deceiving the Customs and Excise in the process and thus the trial judge should have accepted the submission that there was no case to answer; and secondly that there an abuse of process in that S was enticed into committing the offence and that the offence under section 170(2) of the Act was also committed by H and B, the prosecutors in the case.

Held: In dismissing the appeals:

1. The words "fraudulent evasion" included a good deal more than entering the United Kingdom with goods concealed and no intention of declaring them. They extended to any conduct which was directed and intended to lead to the importation of goods covertly, in breach of a prohibition on import. It followed that there was a case to answer.
2. As regards the abuse of process argument: (a) whilst it was true that section 170(2) on its literal wording dealt with knowingly being concerned in a fraudulent evasion, rather than knowingly and fraudulently being concerned, a "modest degree of purposive construction" was now permissible even in an English criminal statute, at all events in favour of the subject. It could not be the intention that an honest and innocent citizen be convicted because he was knowingly concerned in an evasion which was fraudulent on the part of someone else; (b) although S was prepared to supply heroin to somebody, the particular importation in question would not have happened when and how it did without the assistance of H and B. However it was established in *R v Smurthwaite* (see above) that entrapment, or the activity of an agent provocateur was not a defence to a criminal charge. Those who employed couriers took good care not to come into range of the courts and if on occasion they were enticed or lured to the United Kingdom and then arrested, there was no hint of abuse in that.

[Note: the court also held that the admission of H's evidence did not have such an adverse effect on the fairness of the proceedings that the judge ought not to have admitted it.]

R v Latif & Shahzad, Court of Appeal, U.K., *The Times* 17 March 1994

Documentary evidence - Previous conviction in foreign proceedings - Whether evidence admissible of a conviction in foreign proceedings

The defendants, directors of a company, were charged with drug trafficking offences. Another director of the company had been convicted of drugs trafficking offences by an American court and the prosecution tendered documentary evidence of this conviction. The defence objected on the ground that the evidence was inadmissible.

Held: refusing to admit the documents in evidence

The admissibility of evidence of a conviction in foreign proceedings was governed by the common law rule that a judgment *in personam* was no evidence of the truth either of the decision or its grounds between strangers, or a party and a stranger (following *Hollington v Hewthorn* [1943] KB 587; [1943] 2 All ER 35)

R v Ebanks, Grand Court, Cayman Islands, 1992-3 Cayman Islands Law Reports 263

Procedure

Serious fraud - Fairness of trial - Excessive length of trial - Whether duty of prosecution to consider and propose severance

The appellants were charged with 29 counts relating to the defrauding of creditors. Prior to the trial the prosecution successfully opposed a defence submission that some of the counts be severed. The trial lasted 17 months and resulted in the appellants being convicted on several counts. They appealed on the ground that, coupled with the complexity of the issues, the length of the trial rendered their convictions unsafe and unsatisfactory.

Held: In dismissing the appeals against conviction

1. In a potentially long criminal trial, both the judge and counsel had a responsibility to ensure that the trial remained manageable and that it was presented to the jury in a clear and simple manner.
2. In any large fraud case or any case of great complexity or potentially unusual length it was the duty of the prosecutor to consider before the preparatory hearing whether the case could be tried in parts rather than as a whole and to review the evidence and decide how much of it, even though relevant, could be withheld in the interest of time and clarity. In consultation with the defence counsel an agreed proposal for severance could be submitted to the trial judge. The prosecution counsel must be reconciled to the fact that their case might be weaker as a result of being split into a number of trials, but that was the price to be paid to avoid a trial of inordinate length.
3. The length of the trial was not in itself a sufficient ground for finding that convictions were unsafe and unsatisfactory. The correct approach was to consider whether the length of the trial created a situation in which a fair trial was impossible. In the circumstances of this case, the issues were clear, that is, whether the appellants in the particular matters had acted dishonestly and the question of dishonesty was one which a jury was particularly qualified to resolve. Therefore, notwithstanding the prejudice to the appellants caused by its length, the trial had been a fair one.

R v Kellard; R v Dwyer; R v Wright, Court of Appeal, U.K., *The Times* 5 August 1994