

# CRIMEWATCH

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## ARTICLES

### **Juries in Fraud Trials, by Robert Rhodes, QC, New Law Journal, February 20 1998, pages 239-240**

The announcement by the UK Government that it is considering abolishing juries in certain fraud trial and replacing them with trial by judge and assessors is discussed in this article. The writer notes the 800 year history of jury trial in England and explains how the role of a jury has become increasingly sophisticated over the passage of time. The main purposes of the jury are stated to be that first it does justice and decides whether the prosecution has proved its case against the defendant whom it is considering; second it helps to ensure the independence and quality of the judges; third it gives protection against the laws which an ordinary man or woman might find oppressive; and finally the jury system helps to uphold the maintenance of proper behaviour by investigating officers.

The author argues that he has never come across a fraud trial in which he could not "understand" the jury's verdict and although he may not personally have agreed with it.

In discussing the proposal that juries be replaced with a judge and two assessors, the author asks whether it would be regarded as acceptable that a person might be sent to prison by the decision of just two people? What if one very strong overbearing person persuades a colleague on the tribunal to convict? Another problem raised is what is the cut-off point as regards length or complexity where a case is not to be decided by jury? In conclusion, the author accepts that jury trial is both inconvenient as well as expensive, but he feels strongly that jury trial, no matter how expensive or inconvenient should remain as it is the "very touchstone of our liberties."

**The European Convention on Human Rights and the Criminal Lawyer: An Introduction, by Clare Ovey, legal officer in the Registry of the European Court of Human Rights, [1998] Criminal Law Review 4**

This article examines the type of issues in criminal proceedings which fall within the scope of the European Convention on Human Rights (the "Convention") and of the general approach taken by the European Court in such cases.

Basically, the Convention system provides a forum to individuals "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention." The kinds of acts or omissions which can be attributed to the State and therefore form the subject-matter of a complaint include acts of executive and administrative bodies such as government departments etc...but only if the applicant has suffered a detriment as a result of it. Judgments of the Court have the effect of law and States which have ratified the Convention are bound to observe them. The author states that no article in the Convention is without implications for criminal law, if only to the extent that the existence or non-existence of criminal sanctions may give rise to a violation of the right safeguarded.

The author outlines "general principles" which have emerged from the jurisprudence in relation to criminal justice issues and concludes that the Strasbourg organs interpret the terms "offence" and "criminal charge" autonomously and in so doing will classify as "criminal" matters which may be dealt with a civil in a member country where the severity of penalty and the nature of the proceedings. The second general principle is stated to be that provided the end result does not violate the Convention the Strasbourg organs do not require contracting states to adopt identical laws or procedures and the third general principle is that it is primarily for the national courts to interpret and apply national laws.

The article considers the right to a fair trial enshrined in Article 6 of the Convention and examines various cases which raised questions of the impartiality of jury members in a case where one member of the jury knew a witness and the independence of courts martial where the officer responsible for the prosecution was also responsible for convening the court martial and appointing officers as judges. The author examines the decision of the European Court in a case involving the right to silence in the context of the provisions of the English Criminal Justice and Public Order Act 1994 which allows the court to draw inferences from an accused's failure to disclose in response to questioning anything which he subsequently relies on in his defence. The court held that while the right to remain silent was not absolute it would never be permissible to take into account the accused's silence in assessing the persuasiveness of the evidence adduced by the prosecution but stated that determinations of whether Article 6 had been infringed must be determined on a case by case basis.

The question of anonymous witnesses is examined in the context first of a case where the accused has not been able to confront protected witnesses but his counsel had the opportunity to question them. In this case the Court found that it was justifiable to protect the rights of the witnesses to respect for their life, liberty and security of person by preserving their anonymity but it also held that it would never be acceptable for a conviction to be based solely or to a decisive extent on anonymous statements. The second case described involved police officers who refused to be identified and were examined by defence counsel only through sound links between the rooms in which the witnesses and the counsel were located. In this case the Court found that the domestic court had made insufficient effort to assess the seriousness of the threats of reprisal made to the witnesses and found a violation of Article 6.

To conclude, the article emphasises that there are various other areas touched on by the Convention and its case law which are likely to be of interest to criminal lawyers - for instance in relation to the permissibility of telephone tapping by the police in the light of Article 8's guarantee of the rights to respect for private life and correspondence. In addition, the writer anticipates that soon English courts and tribunals will begin interpreting and applying the Convention and also predicts many significant changes to the Convention system in the not too distant future, including the introduction of a new single Court (in Strasbourg).

**India: Telephone Tapping and the Right to Privacy: Ramni Taneja: International Legal Practitioner, March 1998, p. 24**

In a significant decision in the case of *People's Union for Civil Liberties v. Union of India and another* (1997) 1 Supreme Court Cases 301, the Supreme Court of India determined that the right to hold a telephone conversation in the privacy of one's home or office without interference can be claimed as a "right to privacy" and accordingly telephone tapping would contravene Article 21 of the Constitution unless permitted under procedures established by law.

In reaching this decision the court ruled that Article 21 of the Constitution, which provides that no person shall be deprived of his life or liberty except according to procedure established by law, must be interpreted in conformity with international law and as the International Covenant on Civil and Political Rights and the Universal Declaration of Human rights both provides for the right of privacy, Article 21 must be read as protecting this right. The case at hand did not fall within the terms of the Telegraph Act 1885 because there was no public emergency and public safety was not at issue.

## LEGISLATION

### New Zealand

The **Crimes Amendment Act (No 2) 1997**, introduces the offence of participation in a criminal gang. Section 98A defines a "criminal gang" as a group of three or more persons where at least three members of the group have each been convicted of a serious offence being an offence listed in sub-section (1). The basic elements of the offence are:

- (i) participating in any criminal gang knowing that it is a criminal gang; and
- (ii) intentionally promoting or furthering any conduct by any member of that gang that amounts to an offence or offences punishable by imprisonment.

The prosecution does not have to prove that the accused had knowledge of, intended or promoted the commission of a particular offence. The accused is deemed to know that a gang was a "criminal gang" if the accused has been warned on at least two occasions that the gang is a "criminal gang." The penalty for the offence is three years' imprisonment. Section 98A came into force on January 1, 1998.

Other new provisions introduced into the Crimes Act include power for the police seeking to locate stolen property of property obtained by a crime involving dishonesty, to search vehicles without warrant. Police must identify themselves to any person in or on the vehicle and, before searching, must have reasonable grounds for believing that such property is in or on the vehicle. A new provision specifically permits police to stop vehicles for the purpose of searching them and establishes preconditions for the exercise of the power to stop vehicles for the purpose of searching them.

The **Harassment Act 1997** is amended to create the offence of criminal harassment. The person must intend to cause the victim to fear for their safety or the safety of a person with whom they have a family relationship. The level of mens rea required is lowered to recklessness - the offender must know that the behaviour would be likely to have the effect of creating reasonable fear and the courts must take into account the victim's particular circumstances.

### Trinidad and Tobago

The Administration of Justice (Miscellaneous Provisions) Act 1996 (No. 28 of 1996) amends the **Evidence Act** to make admissible in criminal proceedings a photograph of any object as prima facie proof of the identity of that object provided the photograph is supported by a certificate signed by the photographer before a JP authenticating the photograph. The provision also requires the photographer to give evidence of the procedure adopted to produce the photograph.

The amendments also deals with the admissibility of **computer records** by providing that a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated therein

provided it is shown that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer. It must also be shown that the computer was operating properly or, if not, that any improper operation would not affect the production of the document or the accuracy of its contents. Statements produced by computers must be accompanied by a certificate identifying the document and describing its manner of production and giving particulars of the device used for its production. The certificate must be signed by a person occupying a responsible position in relation to the operation of the computer. The provision also deals with the weight to be attached to a computer statement and refers to the issue of contemporaneous supply of information to the computer and the issue of whether the person operating the computer had any incentive to conceal or misrepresent facts.

## CASE NOTES

**Drug Trafficking - admissibility of evidence - heroin found in accused's abdomen - whether accused had the necessary knowledge of the presence of foreign bodies containing heroin in his abdomen - Malaysian Dangerous Drugs Act 1952, s. 39B(1)(a) (the "Act")**

The three appellants had been jointly tried on separate charges of trafficking in dangerous drugs, namely heroin, an offence under s. 39B(1)(a) of the Act. They had been arrested and taken to a hospital where they underwent a per rectum examination. Small packages were discharged into their bedpans and were found to contain heroin. The number of packages thus retrieved was 22 from the first appellant, 44 from the second and 50 from the third. The trial judge had held that the prosecution had proven all the ingredients of the respective charges against each of the accused and had established a prima facie case beyond all reasonable doubt which if unrebutted would warrant the conviction of the first, second and third accused.

Each of the appellants testified that he did not know that the foreign bodies they swallowed contained heroin and that he believed that the pellets they had swallowed contained raw gold. The foreign bodies were being "shipped" from Nigeria to Thailand.

The judge found them all guilty and sentenced them to death. The appellants appealed. The appellants claimed that the drug exhibits were inadmissible as they were forcibly taken from them; that the investigation was unfair; that samples taken for analysis were not representative of the whole and that there was a failure to produce the three bedpans.

*Held, dismissing the appeal:*

1. Evidence of knowledge of the custody or control of the dangerous drug is required to supplement evidence of physical custody or control. In this case, the accused's bodies were the "things containing" the dangerous drugs and there was ample evidence that each accused had the necessary knowledge of the presence of foreign bodies in their respective abdomens and the presence of the foreign bodies in the abdomen of each accused could not have been accidental. Each accused had exclusive custody and control of the drugs in their bodies. They had knowledge of the custody and control and they were therefore in possession of the drugs.

2. The legislation permits, where there are reasonable grounds for believing that an examination of a person arrested will afford evidence as to the commission of an offence against the Act, it is lawful for a medical practitioner acting at the request of a police officer to make such examination as may be reasonably necessary in order to ascertain the facts. In this case the per rectum examination, X-rays and insertion of an enema were all reasonably necessary in the circumstances and the exhibits recovered with minimum force were therefore admissible.

3. The allegation that the investigation was unfairly conducted because the investigating officer was a witness with an active role in the recovery of the drug exhibits and gave evidence at trial did not result in injustice or prejudice nor amount to unfair investigation. The reports prepared by the police officer were not fundamental to the evidence of the arresting officers as the case depended on the evidence of the hospital.

4. The fact that the analyst used a domestic blender to blend the substances recovered so as to produce an homogenized substance which was representative of the whole could not have affected his findings to such an extent that a reasonable doubt could have been raised about the heroin content being less than 15g. There is no need to prove the weight of drugs is exactly and precisely that weight stated in the charge if it can be proved beyond all reasonable doubt that the weight of the drug content in the exhibit is above 15g.

5. The non production of the pans had not weakened the prosecution case because the contents of each pan was dealt with separately. The bedpan was merely a tool in the recovery of the foreign bodies and were not indispensable bits needed to complete the prof of the offence.

6. The court had dutifully deliberated on the same considerations as the trial judge and there was no reason to alter the findings of the trial judge.

*Adekunle Johnson Oshodi v Public Prosecutor; Tunde Apatira v Public Prosecutor and another appeal*, [1997] 3 MLJ (Malayan Law Journal) 644

**Evidence - jury - risk of injustice over inference from failure to testify - standard directions to juries - UK Criminal Justice and Public Order Act 1994 (the "Act")**

This case concerned an appeal by B against his conviction for murder. Section 35 of the Act requires that the jury had to be satisfied that the prosecution had established a case to answer before drawing any inference from a defendant's failure to testify. The Crown accepted that the judge had omitted to direct the jury on this precondition it contended that the omission was immaterial because there was plainly a prima facie case.

*Held*, allowing the appeal:

1. Direction of the jury did not necessarily mean the stating of a series of mandatory formulae and departure by a trial judge from a prescribed form of words would by no means always justify the upsetting of a jury's verdict. Standard directions were essentially formulated to serve the purposes of justice and the court had to ensure that those ends were not jeopardised by failure to give directions where they were required.

2. The drawing of inferences from silence has always been a delicate area. Logically, a jury should not start to consider whether to draw inferences from a defendant's failure to give oral evidence at his trial until they had concluded that the Crown's case against him was compelling enough to call for an answer by him.

3. The requirement that the jury had to be satisfied that the prosecution had established a case to answer was an essential precondition to their drawing any inference from a defendant's failure to testify under s. 35 of the Act and where a judge failed to direct a jury either on that precondition or in similar terms, a clear risk of injustice arose.

4. The risk that failure to carefully frame directions to the jury on s.35 could result in decisions adverse to the United Kingdom at Strasbourg under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had to be recognised.

5. The conviction was unsafe and should be quashed.

*Regina v Birchall*, The Times, February 10, 1998

**Sentencing - fundamental rights - Constitution of Namibia - whether life imprisonment constitutionally sustainable**

The appellant was indicted on two counts of murder and one count of theft and was convicted on all three counts. On each of the counts of murder he was sentenced to life imprisonment and on the count of theft

he was sentenced to two years' imprisonment. The court recommended that the appellant ought not to be released on parole or probation until the expiry of at least 18 years from the date of sentence. The court dismissed his application for leave to appeal against sentence. On petition leave was granted to appeal to the Supreme Court against sentence only. The appellant argued that the sentence of life imprisonment was unconstitutional per se, on the grounds of Articles 6 (protecting the right to life); 7 (protecting against the deprivation of personal liberty); and 8 (guaranteeing the dignity of the person and protecting against torture or cruel, inhuman or degrading treatment or punishment.)

Three main issues arising were as follows:- (1) Is the imposition of a sentence of life imprisonment per se unconstitutional in Namibia? (2) If it is not per se unconstitutional, is such a sentence nevertheless unconstitutional in the circumstances of the present case? (3) Apart from the issue of the constitutionality of the sentence, is it a sentence of such harshness in the present case as to justify an interference by the Supreme Court pursuant to its ordinary appeal jurisdiction?

*Held:*

1. The sentence of life imprisonment is a discretionary sentence available for a court to impose should it believe that the circumstances of a particular case warrant the imposition of such a sentence. The fact that a person may be sentenced to imprisonment for life does not mean that the person is never able to regain his or her freedom. Life imprisonment does not terminate the life of the imprisoned - it invades his liberty. A sentence of life imprisonment does not offend Article 6 and is not therefore unconstitutional per se.

2. A sentence of life imprisonment is a punishment of distressing severity which is resorted to only in extreme cases where society legitimately needs to be protected against the risk of a repetition of such conduct by the offender or because the offence committed was so monstrous in its gravity as to legitimise the extreme degree of disapprobation. Such a sentence cannot be justified if it effectively amounts to irreversible locking of the prison gates without any lawful prospect of liberty for the rest of his or her natural life. The values expressed in the Constitution require society to continuously and consistently care for the condition of its prisoners and to reform and rehabilitate them. A sentence of life imprisonment cannot be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life. The crucial issue is whether this is the effect of a sentence of life imprisonment in Namibia. The Prisons Act expressly provides a mechanism for the appointment of a committee with the duty to make recommendations pertaining to the treatment of prisoners sentenced to life imprisonment. It also provides for a release board to make recommendations on release to the President. The relevant authorities entrusted with these functions must act in good faith and must properly apply their minds to each individual case.

3. If the circumstances of the case justify the conclusion that a life sentence is so grossly disproportionate to the severity of the crime committed that it constitutes cruel, inhuman or degrading punishment or impermissibly invades the dignity of the accused the sentence will be unconstitutional. On the facts of the case the offences committed by the appellant were vicious in the extreme and premeditated. The acts were brutal and merciless. There is nothing disproportionate between the gravity of the offence and the sentences imposed. The sentence imposed was not cruel, inhuman or degrading in contravention of art 8(2) but was instead a proper exercise of the discretion vested in the court of first instance and there were no adequate grounds for the court to interfere with that sentence.

*State v Tcoeib*, [1997] 1 LRC (Law Reports of the Commonwealth) 90

## **Drug trafficking - money laundering offences - meaning of "the value of proceeds of drug trafficking"**

The first appellant had made a number of trips to Ireland, carrying large amounts of cash which were proceeds of dealing in class A drugs. He pleaded guilty on the basis that he had made five trips, and had carried a total sum of about £2.5 million, in addition to the sum which was in his possession when he was arrested. He received between £25,000 and £30,000 for each trip. He was sentenced to 11 years' imprisonment, with a confiscation order in the amount of £948,662 and four years' imprisonment in default. The rest of the appellants were sentenced to terms of between 5 years' and 9 years' imprisonment.

One of the issues arising was whether the sentencer was wrong in determining the value of the appellants' proceeds of drug trafficking for the purpose of the Drug Trafficking Act 1994 on the basis of the whole of the money that had passed through their hands.

The UK Drug Trafficking Act 1994, s. 4(1) provides that the value of the defendant's proceeds of drug trafficking is the aggregate value of the payments or rewards received by a person in connection with drug trafficking. The sentencer assessed the value of the appellants' proceeds of drug trafficking as the total value of the drug deals, rather than the aggregate of the rewards paid for laundering the money.

### *Held:*

The definition of "proceeds" of drug trafficking was not limited to consideration received by one person from another person for drug trafficking carried out on the other's behalf. The word "proceeds" should have the same meaning in relation to money laundering as in relation to drug trafficking offences. The plain meaning of the Act was that proceeds meant the aggregate sum derived from drug trafficking. The sentencer had adopted the correct approach in his assessment of the proceeds of drug trafficking.

*R v Simpson*, [1998] Criminal Law Review 292

**Criminal procedure - drug trafficking - confiscation order - warrant of commitment to enforce order - failure of magistrate to issue warrant of commitment without inviting or receiving representations from prosecution and whether this is open to challenge - whether property realisable if difficult to realise whether applicant entitled to certificate of inadequacy - UK Drug Trafficking Offences Act 1986 (the "1986 Act")**

The applicant had been charged with transferring the proceeds of drug trafficking. In February 1995, the Crown Court convicted him and sentenced him to eight years' imprisonment. Following a financial enquiry, a confiscation order was made against him under the 1986 Act, in the sum of £15,000, providing that it had to be paid in full within 12 months, with 9 months' imprisonment in default of payment.

In August 1997, the applicant appeared before a stipendiary magistrate for failure to comply with the confiscation order. A means inquiry was conducted by the magistrate who found that the applicant was guilty of culpable neglect as a result of failure to comply with the confiscation order and not taking steps to reduce his liability. He was committed to nine months imprisonment to run consecutively to his existing sentence.

The applicant applied for a judicial review of the magistrate's decision on the grounds that the magistrate had not invited or received representations from the prosecution at the hearing. He also applied for a certificate of inadequacy, claiming that most of his realisable property was inadequate to pay the amount outstanding. It was agreed that at the date of the hearing of the application, that some £7,300 remained unpaid under the confiscation order.

*Held*, dismissing the application for judicial review:

1. It is certainly good practice that a magistrate conducting a means inquiry such as the one in this case, should give the prosecution the opportunity to make representations. Had the magistrate done so here, he would have been given certain information - some of which may have been favourable to the applicant; but some of it may not have been. Nevertheless, a failure by the magistrate to do so had not

resulted in any great injustice to the applicant. Therefore there were no legitimate grounds for challenging the magistrate's decision.

2. The fact that an asset might be difficult to realise, was irrelevant, for the purposes of the 1986 Act, as the definition of the term "realisable property" in s. 5(1) of the Act includes property held by the defendant, and s. 38(1) and (7) provide that property was held by a person if he held an interest in it and an "interest" in property included a right. Indeed, the definition of realisable property in the Act included gifts, and it is likely that situations may arise where such gifts were practically or legally impossible to recover, but were still to be considered as realisable property under the Act. Therefore, sums paid to an agent in Germany for the purchase of property which could not be recovered were sums to which he was entitled and were therefore "realisable". These sums added together were higher than the £7,300 which remained outstanding under the confiscation order thus the applicant had not succeeded in proving the conditions necessary in order for a certificate of inadequacy to be issued.

*R v Liverpool Magistrates' Court, Ex p Ansen*, [1998] 1 All ER 692

**Legal Professional Privilege - Whether remand order against solicitor retained by kidnapped person lawful - whether solicitor prime suspect or potential witness**

A young woman whose renunciation of her religion caused her parent to forcibly confine her disappeared from her parents home and a police report was made. She had consulted a solicitor to advise her on her intention to renounce Islam and following investigation the solicitor, who refused to reveal the whereabouts of his client, was arrested without warrant and remanded in custody on a charge of kidnapping. He sought an order setting aside of the remand order. Two issues were before the court for consideration:

- (i) whether the solicitor was a prime suspect or a witness in the kidnap case; and
- (ii) the lawfulness of the remand in custody.

*Held*

As the police were investigating a kidnapping case, the solicitor's refusal to inform police of the whereabouts of the missing woman made him a prime suspect. The Magistrate had complied with the provisions of the Criminal Procedure Code in authorising the remand in custody. He had perused the police investigation diary, satisfied himself that there were grounds for believing that the accusation against the Solicitor was well founded in that he was satisfied by the diary that the detainee knew the whereabouts of the missing woman. He was also satisfied that the remand was necessary for the purpose of investigation.

On the question of legal professional privilege it was clear that the solicitor was privy to certain privileged information. The veil of privilege may be set aside by the court on the application of a solicitor who suspects that a fraud or crime has been committed by his client. A solicitor may also be compelled to disclose communications made in furtherance of a criminal act. As the solicitor refused to answer police questions and was therefore a prime suspect in the case, the communications between him and his client were no longer privileged.

*Re the Detention of Leonard Teoh Hooi Leong* [1998] 1 MLJ (Malayan Law Journal) 757