

CRIMEWATCH

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CONTENTS

Recent Publications	1
Legislative Developments	2
Proceeds of Crime - Restraint Orders	3
Case Notes	
Evidence	4
Abuse of Process	4
Procedure	5
Post Charge Compulsory Disclosure	5
Proceeds of Crime	6
Constitutional Law - Capital Punishment	6

RECENT PUBLICATIONS

I Royal Commission on Criminal Justice

Viscount Runciman of Doxford was appointed Chairman of the Royal Commission in June 1991. The report which was presented in June 1993 covers vast ground and will be of interest to Commonwealth governments.

The recommendations made by the Royal Commission deal with such subjects as the impact of the criminal justice system on ethnic minorities, police investigations, safeguards for suspects, the right of silence and confession evidence, the conduct of prosecutions, pre-trial procedures, forensic science and expert evidence, appeals and remedying miscarriages of justice.

A very large part of the report is devoted to trials and deals with issues including opening speeches, the adducing of evidence, hearsay evidence, looking after witnesses, the selection and guidance of juries, the training of barristers and judges and the cost of legal aid (and means of reducing it).

The 261 page report is available from HMSO, P.O. Box 276, London SW8 5DT, Fax 4-71-873-8200 and costs £stg 21.50

II DNA Analysis and the Criminal Justice System

The Committee of Ministers of the Council of Europe in 1992 recommended that governments of member states be guided in their legislation and policy by principles and recommendations relating to the collection of samples and information derived therefrom for purposes related to criminal justice.

The recommendations and explanatory memoranda cover the following issues:

- recourse to DNA analysis
- accreditation of laboratories
- data protection and storage of samples and data
- transborder exchange of information
- access by the defence to DNA analysis as means of proof

III Sexual Exploitation of Children - Recommendations for national legislation

Also in 1992, The Committee of Ministers of the Council of Europe recommended measures relating to the prevention and detection of all forms of sexual exploitation of children and young adults in the following areas:

- pornography
- prostitution
- trafficking

Governments seeking copies of either of these Council of Europe reports should write to the Editor of Crimewatch.

LEGISLATIVE DEVELOPMENTS

British Virgin Islands

The Drugs Trafficking Offences Act received the Governor's assent in June 1992. The Act, which complements the Drugs (Prevention of Misuse) Act 1988, deals with the recovery of the proceeds of drug trafficking and includes sections on, inter alia, confiscation orders; restraint orders; charging orders and the enforcement of external orders.

New Zealand

Following evidence of money laundering through financial institutions the Minister of Justice announced on 30 August 1993 that the New Zealand Government is considering further legislation to deal with the problem. Measures being considered include requiring financial institutions to identify customers and report transactions that give rise to the suspicion of moneylaundering.

United Kingdom

Proceeds of Crime - The Criminal Justice Act 1993 (the CJA 1993)

The CJA 1993 makes important changes to various provisions in the laws of the United Kingdom relating to the confiscation of proceeds of crime.

(a) Assumptions as to source of property

In the first issue of Crimewatch we reported the two cases of *R. v. Redbourne* and *R. v. Rose* in which the Court of Appeal (comprised of different judges) reached different decisions about when the court should apply the statutory assumptions as to the source and value of property held by a person convicted of drug trafficking.

The United Kingdom Government has removed the doubt surrounding the application of the assumptions, which, by section 9 of the CJA 1993, amends section 2 of the DTOA 1986 (being the provision which gave rise to the differing opinions of the Court of Appeal).

Section 2 of the DTOA now **requires** the court to make the assumptions listed in the section. Readers will recall that the section previously allowed the courts to make the assumptions unless they were shown to be incorrect, but gave no further guidance on when they were to be used. Although the provision now states that the court **shall** apply the "required assumptions" is still leaves to the judge some statutory discretion in the matter. Subsection 2(2A) now provides that the court shall not make any required assumption if the defendant shows the assumption to be incorrect or if the court is satisfied that the making of the assumption would result in a serious risk of injustice. Where the court exercises its power not to apply one or more of the assumptions it is required to state the reasons for its decision so to do.

(b) New Money Laundering Offences

The Government has extended the existing drug money laundering offences to those crimes covered by the Criminal Justice Act 1988 - that is to all indictable offences and certain lucrative summary offences. Taken together with the pre-existing package of measures available to counter drug money laundering the new provisions create a comprehensive armoury against criminal money laundering. Confiscation provisions in the Criminal Justice Act operate when the offender has benefited by over £10,000 from offences before the court and only the benefit from specific offences is confiscated. There is no obligation on the court to make a confiscation order and, indeed, the court is required to consider the relationship between the confiscation order and any compensation order it may make. Unlike the confiscation provisions of the Drug Trafficking Offences Act 1986, the Criminal Justice Act has no reference to 'assumptions' being made as to the source or value of the convicted person's property.

(c) The standard of proof

Section 7(2) of the CJA 1993 (which amends s.1 of the Drug Trafficking Offences Act 1986) overcomes the problems posed by the decision of the Court of Appeal in *R.v. Dickens* [1990] 2 All ER 626 by providing that when the court determines whether a convicted person has benefited from drug trafficking it shall do so on the balance of probabilities.

PROCEEDS OF CRIME - RESTRAINT ORDERS

Varying restraint orders to allow payment of legal and general living expenses

Section 13(2) Drug Trafficking Offences Act (DTOA) and Section 82(2) Criminal Justice Act (UK) require a Court when considering applications for restraint orders to be varied to exercise its powers with a view to making available for satisfying the confiscation order, or any confiscation order that may be in the Defendant's case, the value for the time being of realisable property held by any person by the realisation of such property. Courts have recognised that the defendant, at this time, is presumed innocent, needs to meet general living and legal expenses. Courts in the United Kingdom expect all pre-conviction restraint orders to contain provisions releasing a sum of £ 150 per week for general living expenses (if the defendant is on bail) and £500 for legal fees. As a general rule variations will be agreed, or granted by the court, to meet existing essential household expenses for the defendant and his immediate family and moneys will be released for the reasonable and properly incurred legal costs of defending the criminal charge against him.

Two cases have come before the British courts which deal with applications to make available from restrained moneys funds for legal expenses. In *Commissioners of Customs and Excise v Norris* [1993] 2 All ER 395 the Court of Appeal ruled that it would be inappropriate for a restraint order to have the effect of forcing a defendant who wished to fund his own defence to seek legal aid.

The second case makes an inroad into the rule in *Norris*. In *re W.* (1992 unreported) the High Court refused to vary a restraint order to permit a defendant to privately fund his legal expenses in circumstances where, prior to the serving of the original order, the defendant had been granted legal aid subject to his paying a contribution of £5000.

Where restrained funds are made available for legal expenses HM Customs and Excise require that the moneys are paid by cheque or bank draft drawn in favour of the solicitor who is then required to undertake that the monies released to him are to be used only in respect of the reasonable legal expenses of the defendant actually and properly incurred.

CASE NOTES

Evidence - Signed statements by accused - Court's right to test

At trial on drug trafficking the respondent denied having made statements adduced in evidence and assented he had signed them under duress. On appeal counsel for the Crown conceded that the statement could not have been recorded in the time it was said to have been taken by the police. Counsel for the Crown had demonstrated at the request of the court the time taken to handwrite part of the statement.

Held: It was a matter of common sense and not a matter of legal presumption or judicial notice that the statement could not be taken down from and read back to the accused in the time testified to by the police witness. The court is not bound to abandon common sense when deciding on credibility and its request that counsel time the time the writing of a page merely underlined what was clear from the beginning.

In this case there was no experiment and the court was not relying on its own impression rather than relying on the evidence. Counsel for the Crown was not giving expert evidence of the time taken to write the statement and need not, therefore, be tendered for cross-examination.

Counsel for the Crown was right to concede that without the statement, which was the bedrock of the case, the conviction could not stand.

✓ *Police v. Rajandah Coomar Kristnamah.* Judgment of the Privy Council delivered 12 July 1993.

Criminal evidence - Admission obtained by secretly tape recorded conversation with co-accused - Whether tape recording admissible as evidence of admission

Two accused were remanded in custody and kept in the same cell in which listening devices had been installed. During conversations the accused made damaging admissions which were recorded by the police. The police had deliberately placed the appellants in a cell together and had the cell bugged. The tapes were admitted in evidence at trial. An appeal against conviction was lodged, the ground being that the evidence of the taped conversations was wrongly admitted.

Held: Dismissing the appeal, that notwithstanding that the police were not entitled to question the appellants after they had been charged, the method used to obtain more evidence in this case was not found to be contrary to the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers under the Police and Criminal Evidence Act 1984. The police had no "positive duty to inform them of their plan to bug the accuseds' cell".

R v Bailey and another [1993] 3 All ER 513

Abuse of Process - Stay of proceedings - Applicant receiving promise from police that he would not be prosecuted - Whether decision to prosecute reviewable - Whether prosecution capable of being an abuse of process

The applicant, arrested with two other men for suspicion of murder, was interviewed by the police and made statements containing potentially important evidence against the principal offender who was subsequently charged with murder. The applicant agreed to be a prosecution witness and was then released. Prior to his release he had admitted doing acts with intent to impede the apprehension of the other defendants but was nevertheless not charged at that stage. In a subsequent interview the police officers interviewing him stated that he was a prosecution witness and had the protection of the police. The Crown Prosecution Service, after a conference with the police, decided that the applicant should be charged with intent to impede the apprehension or prosecution of the other defendants knowing or believing that they were guilty of murder or some other arrestable offence. The applicant continued to assist the police even after the decision to prosecute him and was not informed of the intended prosecution until just before the trial. He applied for judicial review to quash his committal to the Crown Court.

Held: On the issue whether judicial review proceedings were appropriate means of quashing a committal, that stays of proceedings should only be employed in exceptional circumstances and that the application should have been made at trial rather than by way of judicial review.

On the issue whether there had been an abuse of process such as would constitute exceptional circumstances warranting the quashing of the committal, Staughton LJ (with whom Buckley J. concurred) determined that:

- (a) if the Crown Prosecution Service find their powers are being usurped by the police, the remedy must be a greater degree of liaison at an early stage;
- (b) the prosecution of a person who had received a promise, undertaking or representation that he would not be prosecuted is capable of being an abuse of process; and
- (c) the applicant was given to understand over a considerable period that he was not to be prosecuted for any offence in connection with the murder and accordingly it was clearly an abuse of process which could be regarded as quite exceptional and warranting the quashing of the committal.

R. v. Croydon Justices, ex parte Dean [1993] 3 All ER 129

Procedure - Criminal Justice Act 1987 (UK) - Power of the Director of the Serious Fraud Office to re-interview witnesses

After delivery of the statement of the defence case the Serious Fraud Office re-interviewed several witnesses about issues arising out of that statement.

Held:

- (a) there was no judicial power which forbade the prosecution from re-interviewing witnesses;
- (b) the Director of the SFO is under a statutory duty to investigate relevant suspected offences. There is no power in the court to limit or supervise the director's access to witnesses.
- (c) if the Director of the SFO were to err in his conduct of an investigation the trial judge would have power to exclude evidence, either under the Police and Criminal Evidence Act 1984 or pursuant to general discretion.

R v Nadir, R v Turner The Times 2 July 1993. Court of Appeal

Serious Fraud Office Powers of Investigation - Post charge compulsory disclosure

As the result of an examination conducted pursuant to an order for private examination under s.236 of the Insolvency Act 1986 the accused was arrested and charged with theft and fraud offences. The Serious Fraud Office sought to obtain copies of the transcripts of the examination from office holders of the companies of which the accused was a director and in respect of which the s.236 examination had been conducted. The accused argued that the SFO had no right of access to the transcripts.

Held: It had never been the law that in a criminal case the prosecution had to go to trial on such evidence only as they had when the defendant was arrested and charged. Obtaining further evidence from third parties after a person had been charged in respect of matters which happened before charges were laid was not the same as compelling an accused person to answer further questions after charge. Section 2 of the Criminal Justice Act 1987 permitted the SFO to require the production of the documents.

Re Bishopgate Investment Management Ltd The Independent, 8 April 1993.

**Proceeds of Crime - Confiscation - Whether middlemen liable - Words and Phrases
"Payment"**

The deceased appellant was convicted of various offences of being knowingly concerned in the evasion of the prohibition on the importation and exportation of controlled drugs. The role of the appellant had been to pass payments from the seller to the purchaser. A confiscation order made on the basis that the entire payment was a benefit and not just the profit made by the middleman. (The matter was referred to the court by the Home Secretary under the Criminal Appeal Act).

Held: The purpose of the Drug Trafficking Offences Act was to deprive drug dealers of the proceeds of their sales, namely the payments made to them, not only profits made by them. Where there was a chain of contacts each purchase price was a payment and payments received in connection with drug trafficking are defined proceeds of drug trafficking.

R v Simons The Times 4 June 1993. Court of Appeal

Constitutional Law - Human rights - Death penalty - Delay

The appellants were convicted of murder and sentenced to death in January 1979. Since then they have been awaiting execution on "death row". On three separate occasions, the death warrant was read to them and they were removed to the condemned cells. On each occasion a stay was granted. Seriously delayed appeal procedures intervened as did appeals to international human rights bodies. The principal question facing the Board was whether the carrying out of the death penalty after 14 years would infringe section 17(1) of the Constitution of Jamaica which provides that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

Held:

- (a) the law in the UK has always required that executions be carried out expeditiously within a matter of weeks or, in the event of an appeal, within a matter of months. These rules and practices were adopted in the Colonies including Jamaica.
- (b) if delay is due entirely to the fault of the accused (sic) such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay.
- (c) a state which wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing reasonable time for appeal and consideration of a reprieve. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.
- (d) if respites in the carrying out of a death sentence cumulatively result in delay running into several years an execution will be likely to infringe section 17(1) of the Constitution and call for the commutation of the death sentence to life imprisonment.

The Board advised Her Majesty that the appeal ought to be allowed and the sentences of the appellants commuted to life imprisonment.

Pratt and another v Attorney-General for Jamaica and another. Judgment of the Privy Council delivered on 2 November 1993.