

CRIMEWATCH

Issue No. 21, December 1997/January 1998

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ARTICLES

Guidance for Prosecutors on use of answers obtained under compulsory powers

The New Law Journal, February 13 1998, reports that the UK Attorney-General issued in February a guidance note on use by the prosecution of answers obtained under compulsory powers in criminal proceedings. The Attorney-General's note (for prosecuting authorities in England, Wales and Northern Ireland) outlines the approach to be adopted towards evidence available to prosecutors as a result of the exercise of compulsory powers such as those contained in the Companies Act 1985. In issuing the note the AG took into account the decision of the European Court of Human Rights in *Saunders v. UK*, 1997 23 EHRR 313 (reported in Crimewatch Issue 15).

The guidelines define the expression "answers obtained under compulsory powers" in terms of answers given under compulsion by a person who is or subsequently becomes a defendant, being answers which may be used in evidence against that defendant under various sections of the Companies, Insurance Companies, Insolvency, Financial Services, Banking and Criminal Justice Acts. They also apply to any such answers obtained through other procedures in legislation concerned with the regulation of commercial or financial activities carried on by companies or individuals, or with the investigation of the financial affairs of companies or individuals which includes the power to compel answers.

The effective part of the guidelines provides that the prosecution shall not normally use in evidence as part of its case or in cross examination answers obtained under compulsory powers. There is a discretion to use such answers where:

- (i) the defendant who provided the answers introduces them into evidence; and
- (ii) where the defendant was under a statutory duty to provide truthful answers in the course of an administrative or regulatory procedure, or has been required in judicial proceedings to answer truthfully, and the subsequent prosecution is founded on:
 - (a) refusal or failure to answer;
 - (b) omission to disclose a material fact which should have been disclosed; or
 - (c) the giving of an untruthful answer.

Cybercrime - Internet Gambling

In October 1997 the United States Senate Judiciary Committee approved a bill to criminalise gambling on the Internet.

The bill seeks to ban Internet gambling operations in the U.S. It provides that a person convicted of operating Internet gambling operations would face up to four years imprisonment and a \$20,000 fine or a fine equivalent to the amount of wagers made, whichever is the greater. A player convicted of Internet betting would be subject to up to six months in prison and a fine of up to \$2,500 or the amount of the bet, whichever is the greater. The bill would allow federal and state authorities to obtain a court order to require Internet service providers to block service to gambling sites. Various free speech and free market organisations are opposing the bill.

With the majority of the gaming sites being located outside the U.S., the bill, if enacted, will result in a variety of jurisdictional and international law enforcement issues, some of which surfaced in a 1997 US case where a Minnesota court ruled that an Internet gaming service based in Belize had to answer criminal charges in Minnesota arising from online advertising available in that state and telephone contact between a Minnesota resident and the company operating the Belize operation.

(Drawn from articles appearing in International Enforcement Law Reporter, Volume 13, Issues 10 and 12 of 1997.)

Maximising Disclosure under the Criminal Procedure and Investigations Act 1996 (UK), by David Corker: New Law Journal, June 13, June 27 and July 18 1997.

This series of three articles examines, from a defence point of view, the disclosure provisions of the UK Criminal Procedure and Investigations Act 1996 which came into force in 1997. The Act is supplemented by a subordinate Code of Practice. The author opens with the statement that the new provisions "reflect and underlying official concern that the balance of justice in the realm of disclosure had swayed too far in favour of the defence" and that the Act is designed as a "corrective measure".

The objective of the author's commentary is to consider defence opportunities for applying the disclosure provisions of the Act in order to maximise disclosure of unused material and to hold to account action or inaction by the prosecution. The first part of the article looks

at the opportunities presented to the defence by the Code of Practice which is described as imposing a series of quality standards on the investigator relating to the investigation of offences and the use of investigatory material. Defence opportunities to take advantage of duties imposed on investigators are considered in relation to the duties to record and retain relevant materials and prepare schedules. The second instalment deals with the primary duties of disclosure imposed by the Act on the prosecution and the defence and considers the possibility of the defence failing to disclose its defence and the inferences which may be drawn by the court from such failure. The third instalment deals with the cases where defence disclosure is compulsory, for example where the defence is alibi and considers the possible form and content of defence disclosure statements.

The series of articles is interesting both from the perspective of its provision of a practitioners view of the new statutory regime and its implications for the defence as well as its insight into new issues for defence consideration.

CASE NOTES

Anonymous jury - validity of trial - whether violation of common law or statutory rights

C was convicted of attempting to possess cocaine with intent to supply. At the trial, the Crown had made a public interest immunity application to the trial judge in chambers in the presence only of the prosecuting counsel and two Customs and Excise officers. The judge heard sworn evidence from one of the officials and there was a discussion with counsel. Later, the judge, without any prior indication to the defence, discharged the jury without giving any reasons. The Crown then applied for police protection for the fresh jury, giving no reasons and calling no evidence in support. The jury members were then given numbers and their names were not announced in open court. No challenges were made and the jury was sworn. C appealed.

The main issues in this case were whether the judge was justified in his decision to discharge the jury and to order the protection of the fresh jury and whether the omission to name the jurors in open court rendered the trial a nullity.

Held:

1. Withholding of the jurors' names in order to avoid the risk of the jury being influenced by unlawful means was justified if it could be shown that the defendant's right of challenge was preserved.
2. Where the jury was called to the jury box by numbers allocated to them by the court clerk, rather than by name, but provided the defendant's right of challenge was preserved, he suffered no violation of his common law or statutory rights. It was clear that the defendant's right of challenge was unaffected.
3. Applications by the Crown for jury protection, should, wherever possible, take place in the presence of the defence and be supported by reasons and by evidence which was open to cross-examination. Any departure from this would have to be fully considered and only sanctioned where the judge was satisfied that it was necessary and would not render the trial process less than completely fair to the defendant.
4. It was highly desirable that all possible information should be disclosed to the defence and that all exchanges with the judge should as far as possible take place openly in the presence of the defence.

Regina v Comerford (Thomas), The Times, November 3 1997 (Court of Appeal, UK)

Evidence - DNA - Bayes Theorem - whether evidence of theorem would cause confusion

A had been convicted of rape in 1994, had successfully appealed and had been retried. He appealed the conviction recorded at the retrial. An expert witness called by the defence at trial had explained and applied the Bayes Theorem. This theorem was a method by which non-DNA evidence, could, in the expert witness's view be expressed as a mathematical probability and so could more readily be applied to the DNA figures so as to reduce the probabilities if the jury judged it appropriate. The expert witness had given a lengthy, detailed explanation of how the theorem operated and had introduced the jury in considerable detail to a questionnaire which had been prepared to help them to make the appropriate calculations. This document contained instructions for use, which were further elaborated by the expert witness to the jury.

Held:

1. Although there was no objection to the prosecution presenting DNA evidence based on statistical data, reliance on evidence of the Bayes Theorem in relation to non-scientific evidence would result in confusion and misjudgment, possibly among counsel, probably among judges and almost certainly among juries.
2. This case was properly to be approached by the jury along conventional lines. Juries would not be assisted in their task by reference to a complex approach which they were unlikely to understand and even more unlikely to apply accurately.
3. In cases of this nature, in the absence of special features, expert evidence should not be admitted to induce juries to attach mathematical values to probabilities arising from non-scientific evidence adduced at the trial. Accordingly Bayes Theorem evidence generally should not be admitted.

Regina v Adams (No.2), The Times, November 3, 1997 (Court of Appeal, UK)

Evidence - computer printout - admissibility - Evidence Act 1950, s. 90 A, (Malaysia)

The appellant was charged with two counts of criminal breach of trust arising from his handling of monies received on trust from a client. The prosecution led documentary and oral evidence of the opening of bank accounts by the appellant and the movement of money therein. Oral evidence was provided by Z, who was in charge of operations of current accounts of the bank. Documents relied on, included computerized records generated by the bank's computers. The sessions court convicted the appellant. The appellant appealed and argued that Z's evidence was inadmissible because s. 90A of the Evidence Act required that in the case of computerized records, a certificate had to be produced to authenticate the records.

Section 90A provides:

" (1) In any criminal or civil proceeding, a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section, it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used."

Subsection (6) provides that a document produced by a computer shall be deemed to be produced by a computer in the course of its ordinary use.

Held, dismissing the appeal:

1. Section 3 of the Act (defining "document") provides that both the display on the video display unit and the printout qualify as documents.

2. Section 90A of the Act makes computerized records admissible if the following is proven, i.e. that: (1) the documents were produced by a computer; and (2) the computer records are produced in the course of its ordinary use. Proof can be either by a certificate signed by someone solely in charge of the computer which produced the printout as required by s. 90A (2) or by an officer of the bank.

3. Z was in charge of all the current account operations of the bank. He gave evidence that the statement of accounts was a computer printout and accordingly the matter referred to in sub-section (1) was proved. It would be superfluous to issue a certificate under sub-section (2) when firsthand evidence was given. A certificate is only needed if an officer like Z is not called to testify.

4. Section 90A is an updating of the "best evidence rule" with the realities of the electronic age, and now it is no longer necessary to call the actual teller or bank clerk who keyed in the data provided he did so in the course of the ordinary use of the computer.

Gnanasegaran a/l Pararajasingam v Public Prosecutor, [1997] 3 MLJ 1 (Malayan Law Journal), Court of Appeal (Kuala Lumpur)

Proceeds of crime - Confiscation orders - assessment of benefit from drug trafficking - appeal against assessment - Drug Trafficking Offences Act 1986 (UK)

The defendant pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug. Their counsel invited the sentencing judge to make agreed confiscation orders. Following the making of the confiscation orders the defendants appealed on the ground that they had acted under a mistaken view of the law in accepting prosecution statements as to the proceeds of their crime. The Court of Appeal quashed the confiscation orders and the Crown appealed on the ground that the general right of the respondents to appeal had been excluded by s. 3(1) of the 1986 Act. Section 3(1) provides that:

" Where - (a) there is tendered.....by the prosecutor a statement as to any matters relevant to the determination whether the defendant has benefited from drug trafficking or to the assessment of the value of his proceeds of drug trafficking, and (b) the defendant accepts to any extent any allegation in the statement, the court may, for the purposes of that determination and assessment, treat his acceptance as conclusive of the matters to which it relates."

The issues certified by the House of Lords in granting leave to appeal were whether:

- (a) it is open to a defendant to appeal against a determination of an amount to be recovered under a confiscation order on either the ground that acceptance of the allegation by the Crown was based on a mistake of law or on a mistake of fact; and
- (b) if appeal was open:
 - (i) what is the legal or evidential burden on the defendant to prove the mistake

- of law or of fact; and
- (ii) can the Court of Appeal vary or quash the determination before receiving and considering evidence from the defendant as to the reasons for accepting the allegation.

The House of Lords, *held*, allowing the Crown appeal:

1. The provision in s. 3(1) of the 1986 Act that the court might treat the defendant's acceptance of a statement tendered to the court by the prosecutor under s. 3(1)(a) as conclusive of the matters to which it related, did not, on its true construction, exclude the general right to appeal against a confiscation order.

2. A defendant was entitled to argue on appeal that his acceptance of a s. 3(1) statement had been based on a mistake of law or fact, the question being not what mistake his counsel had made but what mistake he had made.

3. The burden rested on the appellant who asserted that his acceptance of any allegation in a s.3(1) statement was the result of a mistake of law or fact, to persuade the Court of Appeal that his assertion is correct. The defendants had not established that they had agreed to the confiscation orders as a result of a mistaken view of the law. The confiscation orders were justified on the state of the evidence. (*R v Tredwen* (1993) 99 Cr. App. R.154, C.A. overruled.)

4. The Court of Appeal had power to consider an argument that an unequivocal and informed plea of guilty had been induced by a fundamental mistake of law or fact and it was difficult to see what rational basis there could be for excluding such a right of appeal under s. 3(1).

R v Emmett and Another, [1997] 3 WLR 1119 (House of Lords)

Corruption - test for corruption - whether horse owner guilty of corruption when rewarding jockeys for winning races - evidence - Prevention of Corruption Act (Cap 241, 1993 Ed), (Singapore)s. 5(b)(i),

The appellant, a horse owner registered with the Malayan Racing Association (MRA), was charged and convicted of two counts of contravening s. 5(b)(i) of the Prevention of Corruption Act by giving gratifications to two jockeys as rewards for riding his winning racing horse. Section 5(b)(i) provides:

"Any person who shall by himself or in conjunction with any other person -
.....

(b) corruptly give, promise, or offer to any person whether for the benefit of that person or of another person, any gratification as an inducement to or reward for, or otherwise on account of -

- (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed;.....shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both."

The prosecution case alleged a breach of the rules of the Malayan Racing Association and that the appellant knew of these rules and that a breach thereof amounted to corruption.

There were two main issues in this case:

- whether there was a *corrupt element in the transaction* when the appellant gave money to his winning jockeys. To decide this objective question the court had to consider the effect of any contravention of the rules and must draw inferences as to the intention of the appellant when the gifts were made.
- if a corrupt element was found to exist, then it would be necessary to ask whether there was a corrupt intent on the part of the giver in the sense of whether he knew or realised what he did was corrupt according to the ordinary and objective standard. In other words, was there *guilty knowledge*?

Held:

1. In order to find that the appellant had given corruptly, there first had to be a corrupt element in the transaction according to the ordinary and objective standard, followed by the accused's guilty knowledge that what he was doing was, by that standard, corrupt. Both aspects had to be established beyond a reasonable doubt.
2. Illegality alone is not always conclusive as to the existence of a corrupt element. There was no reason why genuine tokens of appreciation or tipping for performing well, even though in breach of some rules, had to necessarily infect the transaction with a corrupt element.
3. The rules of the racing association were unclear as to whether gifts could be given to jockeys. This undermines the contention that there was a corrupt element.
4. In this case it was unnecessary to ask whether the appellant knew what he did was corrupt.
5. If rules or laws were knowingly breached it would be easier for a court to infer that an accused knew what he did was corrupt according to the ordinary and objective standard.

Chan Wing Seng v PP [1997] 2 SLR 426 (Singapore Law Reports) High Court of Singapore

Evidence - admissibility - foreign telephone intercept

Three defendants were charged with conspiracy to bring illegal immigrants into the UK. They submitted that admission into evidence of the terms of a telephone conversation between a person in the United Kingdom and another in The Netherlands, which was intercepted in the Netherlands under judicial authority was contrary to the spirit of the Interception of Communications Act 1985 (UK) and contrary to Article 8 of the European Convention on Human Rights and Freedoms.

Note: The UK Interception of Communications Act permits the interception of a communication where a warrant has been issued but limits the power to issue warrants to, inter alia, issue for purposes of preventing or detecting serious crime. The word "preventing" does **not** extend to the prosecution of serious crime hence wire tap evidence is not generally admissible in UK criminal proceedings.

Held:

The 1985 Act did not bar the use of material obtained by foreign telephone tapping as evidence in proceedings in the UK. There had been no infringement of the appellants' rights under article 8 of the Convention, nor could the judge's exercise of his discretion under s. 78 of the Police and Criminal Evidence Act to admit the evidence be criticised. There was no abuse of process and in any case there was no basis for the proposition that the principles of abuse of process could be used to exclude evidence. The terms of the telephone conversations were admissible in evidence.

R v. Aujla, The Times, November 24, 1997 (Court of Appeal)

Drugs - scientific evidence - plea of guilty - Appeal by Prosecution Malaysian Dangerous Drugs Act 1952 (the "Act")

The respondents had been charged with trafficking in 1,689.68 grams of heroin. The trial judge had found that the evidence of the chemist was unreliable and doubted the accuracy of the weight of the heroin analysed and held that the chemist had not complied with the provisions of the Act in carrying out the chemical analysis on the drugs recovered. At the close of the case for the prosecution, the trial judge amended the charges to possession and both respondents pleaded guilty. They were sentenced to imprisonment and strokes. The prosecution appealed.

There were in essence, two issues before the court - (i) whether the evidence of the chemist was properly rejected; and (ii) whether, in view of s. 305 of the Criminal Procedure Code (FMS Cap 6), the prosecution could appeal against conviction in a matter where the respondents had pleaded guilty to an amended charge, in which case the appeal should only be against sentence as provided for under s. 305.

Section 305 provides:

"When an accused person has pleaded guilty and been convicted by a Magistrate on such a plea, there shall be no appeal except as to the extent or legality of the sentence....."

Held, allowing the appeal:

1. The judge had erred when he rejected the chemist's evidence for not having complied with the provisions of the Act in conducting the chemical analysis on the drugs recovered. Unless chemists' evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, the chemist is not required to give details of what he did in the laboratory. The judge, concluded that the drug was heroin and that the prosecution's case was overwhelming, and having specified the same amount of drugs in the amended charge as that appearing in the original charge, ought not to have rejected the scientific evidence.

2. The prosecution could appeal against conviction in a matter where the respondents had pleaded guilty to an amended charge even though s. 305 of the Criminal Procedure Code provides that the appeal should only be against sentence because in view of s. 303A, s. 305 only applies to proceedings in a sessions court and a magistrate's court. In addition, s. 50 of the Courts of Judicature Act 1964 states that the court has jurisdiction to hear and determine any appeal against any decision made by the High Court.

Public Prosecutor v Tang Kheng Teong & Anor, [1997] 3 MLJ 637