

CRIMEWATCH

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ARTICLES

A Study of the Impact of the Revised Code for Crown Prosecutors, by Allan Hoyano, Laura Hoyano, Gwynn Davis and Shelagh Goldie, [1997] Criminal Law Review 556

Section 10 of the Prosecution of Offences Act 1985 (UK) requires the Director of Public Prosecutions to issue a Code for Crown Prosecutors "giving guidance on the general principles to be applied" in making prosecution decisions. In 1994 a revised Code came into effect and the authors of this article were commissioned by the CPS to carry out a study of the impact of the revised Code upon case decisions, and specifically to discover whether the evidential and the public interest tests were being implemented in line with the guidance contained in the Code.

The article considers the impact of the code in three areas. The first is the evidential test which requires that the Crown Prosecutor must be satisfied that there is enough evidence to provide a "realistic prospect of conviction". The second is the public interest test and the third deals with "perceived local views of the bench or juries. In an interesting analysis of responses of prosecutors to the impact of the revised code the authors conclude that its impact on prosecutors' decisions appears to have been marginal. While their view is that changes in decision making are better achieved through specific directives, the Code is useful as a training instrument for new prosecutors.

British Virgin Islands action against Money Laundering

The BVI Government is formulating a Code of Conduct for its offshore practitioners and is in the process of finalising a new Proceeds of Criminal Conduct Bill 1997 which will widen the predicate offences for money laundering from drug-related matters to most serious crimes. The Code will provide general guidance for the conduct of offshore practitioners and is meant to strengthen regulatory vigilance. The Code requires BVI-licensed service providers to ensure that all business referred to them by overseas professionals has been subject to due diligence and "know your client" principles, under a code of conduct that meets the BVI Code of Conduct. The Code will ensure that while legitimate privacy is protected, the practitioner will cooperate with any proper criminal investigation. The Code will acquire actual legal status

this year when it is enacted in legislation. To ensure compliance with its Code of Conduct, the BVI Government will start due diligence audits in 1997 with independent auditors reviewing BVI-licensed service providers to ensure that they are fulfilling the "know your client" procedures. (From a report in 13 International Enforcement Law Reporter, Issue 6, June 1997)

Pre Trial Hearings - Extract from an Article entitled Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996: Mike Redmayne (1977) 60 Modern Law Review 79

Parts III and IV of the United Kingdom Criminal Procedure and Investigations Act 1996 are examined in this article. Designed to reduce the number of contested issues in trials on indictment the provisions give judges more power to decide issues during pre-trial hearings. The author helpfully outlines the operation of the provisions which will be of interest to practitioners and legal policy makers in various Commonwealth jurisdictions. The essence of the article is set out below.

Crown court trials in serious fraud cases now fall within the provisions relating to pre-trial hearings with judges being given power to order such hearings "in any case where an examination of the indictment suggests that the trial is likely to be so long or complex that substantial benefits are likely to accrue from a hearing." An order may be made either of the court's own motion or upon application of either party. The judge's powers during the hearing are wide and include the making of rulings on questions of law including admissibility issues, ordering prosecution case statements, imposing time limits and commenting on departures from disclosed cases. Judges are also given powers to make binding pre-trial rulings in any other Crown Court case. In non-complex cases such rulings can only be on questions of law and admissibility and are not subject to interlocutory appeal.

The author considers where the machinery will be effective and suggests that "the omens are not good". He bases this conclusion on an examination of studies conducted and on parts of the Report of the 1993 Royal Commission on Criminal Justice. He notes that the pre-trial hearings in the first Guinness case took three months and points to problems with "pass the parcel briefs" and the effects of having a different judge hearing the case from the judge who conducted pre-trial hearings. It is, however, suggested that giving judges "managerial powers" in complex or lengthy cases may bring substantial benefit. In an interesting conclusion the author suggests that the changes may "auger a significant shift in the adversarial system" if judges play a more interventionist role but he equally suggests that there may be judicial reluctance to take on such a role in criminal litigation.

CONFERENCES

SECOND ANNUAL CONFERENCE OF THE INTERNATIONAL ASSOCIATION OF PROSECUTORS

Meeting in Ottawa, Canada, the International Association of Prosecutors had as the theme of its second annual conference the topic "International Co-operation in the Global Village". Following a stimulating series of presentations and workshops, the conference adopted four resolutions. The first commits the Association to take positive steps to overcome practical barriers to the prosecution of serious crime and international organised crime through the promotion of effective, fair, impartial and efficient prosecution of criminal offences and the promotion of international co-operation. The second commits the Association to the promotion of effective and efficient international co-operation through the creation of prosecutors' networks, the development of common understanding of legal terminology and the facilitation of better knowledge of differing legal systems. Consultation and co-operation with other international and juridical organisations is the aim of the third resolution while the final resolution embodies a commitment to the promotion and enhancement of standards and principles recognised internationally as necessary for the proper and independent prosecution of offences through training, encouraging contacts among prosecutors and furthering the use of treaties, conventions and arrangements in the pursuit of justice.

Those interested in joining this very worthwhile association can do so, either individually or through organisational membership. Inquiries should be sent to the Secretary-General at:

International Association of Prosecutors, Heresingel 11, 9711 ER Groningen, The Netherlands:
Phone 31-50-311-15-92: Fax 31-50-311-25 33

LAW REFORM

The Law Reform Commission of Hong Kong Report on the Year and Day Rule in Homicide - June 1997

With a view to considering whether the existing "year and a day rule" should be abolished, this Report examines the common law rule that a person cannot be convicted of any type of homicide where the victim does not die within a year and a day after the injury was inflicted. The rule applies to murder, manslaughter, infanticide and aiding and abetting suicide.

The Report looks at the historical background of the rule, its present scope, its shortcomings, arguments against its abolition, safeguards against late or repeated prosecutions and the rule as it exists in other jurisdictions. There is a brief study of the application of the rule in other jurisdictions, including Canada, Australia and New Zealand. It is mentioned that the rule has never applied in South Africa, Scotland, France, Italy, Germany, Austria, Greece, Turkey or Poland.

The LRC view is that the rule, which has survived through the centuries despite the criticism it has received, has long outlived its usefulness and is neither necessary nor appropriate given the present state of medical knowledge and the widespread use of life support machines.

In conclusion, the Report states that the rule ought to be abolished in relation to all offences involving death and suicide. The issue of what safeguards are required in order to ensure that the abolition of the rule does not result in unfairness to those accused of homicide either long after the initiating injury was inflicted or after a previous conviction is also discussed and some of the existing mechanisms which protect defendants from late prosecution are outlined. It also concludes that there should be no equivalent in Hong Kong of the provision of UK law which requires the Attorney-General's consent to prosecution in certain cases.

LEGISLATION

Australia - The Financial Transaction Reports Amendment Act 1997

The Financial Transaction Reports Amendment Act 1997 makes the following amendments to the Financial Transactions Reports Act 1988, so as to:

- allow the revenue authorities of the states and territories to have access to "financial transactions reports" information;
- expand the definition of "transaction" (in the context of provisions dealing with suspicious transaction reports only) to include preliminary negotiations or proposals which do not proceed to a transaction;
- increase the reporting threshold for imported and exported currency (from \$5, 000 to \$10, 000);
- require that bullion sellers should identify their customers in much the same way that cash dealers are required to; and
- require solicitors to report significant cash transactions and reports of cash transactions involving Australian or foreign currency of \$10 000 or more in value.

Cyprus - Crime Suppression (Controlled Delivery and Other Special Provisions) Law of 1995

The Crime Suppression (Controlled Delivery and Other Special Provisions) Law of 1995 enacts special measures to facilitate Cyprus' implementation of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and to assist in the investigation of offences connected with the unlawful import, export, possession, use, trading, carrying or trafficking of firearms and explosive substances and offences in connection with import, export, possession, use, trading, carrying or trafficking of stolen articles and any other prescribed offence.

Controlled delivery is defined in the legislation with the definition including detention and/or

destruction of prohibited imports, importation, export, possession of substances or articles under supervision and control within Cyprus and agreement or co-operation with persons involved in the commission of prescribed offences. The use of these techniques in co-operation with other countries is dependent upon the existence of mutual agreements or arrangements relating to the identification of persons involved in prescribed offences and such countries are to be notified by the Minister in the Official Gazette. The Minister may also enter into ad hoc agreement with other countries on the basis of a model of terms of mutual co-operation or upon the basis of mutual assistance between Customs Services. Decisions on controlled delivery are taken on a case by case basis by the Chief of Police and/or the Director of the Department of Customs.

Those who participate in authorised controlled deliveries are not liable for any damage that may be caused to any person or property by reason of bona fide mistake in the transmission of information.

Additional provisions in the legislation facilitate international co-operation, proof of foreign convictions and the admission of certain foreign evidence.

BOOK REVIEW

Computer Evidence: A Forensic Investigations Handbook, by Edward Wilding, Sweet & Maxwell, 1997, ISBN 0 421 57990 0

The expansion of computer technology has given fraudsters, hackers and other would-be criminals plenty of new opportunities and methods to commit a variety of offences including forgery, data manipulation, extortion, sabotage and theft. The author of this publication seeks to provide an outline of the various legal issues involved in obtaining and presenting computer evidence. Detailed explanations are offered on collating and analysing evidential data, along with instructions on the use of investigative software and hardware. An examination is presented of the ways in which computers can be used to defraud, and on how to investigate computer misuse.

Essentially, this book is written for investigators, lawyers, technicians and auditors who come across computers upon which potential evidence may reside. The book is divided into eight chapters. The first three chapters, for example, focus on computer fraud, elementary computer crime and basic investigative techniques. Interestingly, the book points out that the investigation of computer misuse is never purely a technical matter; it will always involve people.

The book examines legal technicalities governing the admissibility of computer evidence and conducting investigations. The forensic examination of documents and other data is also considered.

Other important features of the book include explanations of the investigative methodology employed to identify network abuse and detailed information on examining personal computers. A useful glossary of terms; lists of diagnostic software, consultants and agencies relevant to the computer investigator and guidelines on preparing for Anton Pillar Orders are also included.

The author describes the material contained in this book as an "*introduction*" to computer forensics and investigation and he writes, somewhat modestly that it was never his intention to compile an encyclopedia on the subject, but merely to provide a guide. This is certainly an underestimate of the contribution the book makes to this field.

CASE NOTES

Banks - corrupt and dishonest employer's breach of implied term of trust and confidence - whether damages recoverable.

The employees were formerly employed by the Bank of Credit and Commerce International (BCCI) in London. They were dismissed by the provisional liquidators, on the ground of redundancy. They sought to prove damages in the winding up of BCCI and claimed that their association with BCCI had placed them at a serious disadvantage in finding new jobs. The liquidators rejected their claim.

On appeal the court decided as a preliminary issue that the employees' evidence did not disclose a reasonable cause of action or sustainable claim for damages. That decision was upheld by the Court of Appeal. The employees appealed.

Held:

For the purpose of determining the preliminary issue it is being assumed that the bank operated in a corrupt and dishonest manner and that the employees were innocent of any involvement. When the corruption and dishonesty of BCCI became widely known employees were at a handicap on the labour market and suffered loss as a consequence. The contracts of employment of these two employees each contained an implied term to the effect that the bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust between employer and employee. The employee may treat the bank's conduct as a repudiatory breach entitling him to leave. The extent to which staying on would be a waiver of the breach for all purposes depends on the circumstances. If the employee does not discover the facts while his employment is still continuing this does not mean he has no remedy.

Where an employer breaches the implied obligation to its employees an employee may recover damages for financial loss caused as a result. Such damages may compensate financial loss resulting from the employee's diminished future employment prospects provided that loss is reasonably foreseeable and is sustained in consequence of the employer's breach of the implied trust and confidence term.

Malik and another v Bank of Credit and Commerce International SA (in compulsory liquidation)
House of Lords, 12 June 1997, NLJ June 20 1997

Computer crime - police officer's access to Police National Computer for unauthorised purpose - statutory interpretation

Police Officers were convicted under the Computer Misuse Act 1990 (UK) for obtaining, for private purposes, details from the Police National Computer relating to two motor cars. Their convictions were overturned and the DPP appealed by way of case stated. The DPP maintained that the Commissioner of Police, who controlled access to the computer, gave authority to police officers to access information only for police purposes and the respondents' use of the computer to gain material for non-police purposes was therefore unauthorised. The respondents distinguished between the gaining of access, which was said to be authorised, and the admittedly unauthorised purpose for which they gained access.

Held, dismissing the appeal:

Police officers with authorised access to computer information could not be convicted under the Computer Misuse Act 1990, as this Act was concerned with the protection of computer systems and criminalised the "hacking" or unauthorised access to computer material. It was not aimed at protecting the integrity of information stored on computers, which was the purpose behind the Data Protection Act 1984 (UK). There was not a gap in the law since unauthorised use could be dealt with under the Data Protection Act 1984.

DPP v Bignell, The Times, June 6, 1997 (QBD).

Evidence - analyst's certificate - accuracy

The appellant had been convicted of possession of cocaine. Evidence at trial included a statement by an analyst to the effect that the substance found in the possession of the appellant "appeared to contain cocaine of a high purity" which was read out to the jury. Schedule 5 to the Misuse of Drugs Regulations (SI 1985 No. 2066 - UK) applied when the concentration of cocaine was less than 0.1 per cent. The issue was whether the analyst's certificate was capable of discharging the burden on the prosecution to exclude the possibility that the substance was within the exception

contained in the Schedule.

Held:

As a matter of common sense the words "high purity" denoted something totally different from 0.1 percent. Nevertheless, the sooner prosecuting authorities took to heart observations of the court as to the desirability of clarity in an analyst's report the better.

Regina v Jones (Keith), The Times, 24 April 1997 (Court of Appeal - UK)

Evidence - Drugs paraphernalia - direction to jury

The appellant was convicted on two counts of possessing a class A drug with intent to supply and two counts of possessing a class B drug with intent to supply. Documentary evidence in the form of sheets of jottings was admitted.

Held, allowing the appeal:

The requirement for careful direction to the jury existed in cases where documentary material was admitted in evidence as drugs paraphernalia. The judge must direct the jury that before they used such material they must be sure that it was demonstrably relevant not only to past dealing in drugs but also as to a future intention to supply. The absence of such a direction was a material non-direction.

Regina v Lovelock, The Times, May 5 1997 (Court of Appeal - UK)

Disposal inquiry - forfeiture of vehicle used in commission of capital offence of drug trafficking - accused authorised driver of vehicle - whether statutory exemption from forfeiture applicable - Misuse of Drugs Act (Cap 185) (Singapore) - reckless disregard for consequences of use of vehicle - whether forfeiture appropriate

The petitioners were the legal and beneficial owners of a hire-purchase vehicle which had been used by the a person convicted of drug trafficking. The person who was the registered hirer of the vehicle was the wife of the convicted person and it was the convicted person who was the sole authorised driver of the vehicle. The prosecution sought to forfeit the vehicle, but the petitioners claimed to be entitled to possession. An order was made in the magistrates court forfeiting the vehicle, pursuant to s. 28 of Singapore Misuse of Drugs Act (MDA) which provides:

"Where a person has been convicted of an offence under this Act, the court may order to be forfeited to the Government any ship, hovercraft, aircraft or vehicle which has been proved to have been used in any manner in connection with the offence except that.....

(b) novehicle shall be forfeited under this section, if it is established by the owner thereof that the....vehicle....was unlawfully in the possession of another person without the owner's consent."

The petitioners sought revision of the magistrate's order, relying on s. 28(b) of the MDA. They maintained that the vehicle had been used in the commission of an offence and therefore had been in the unlawful possession of the accused. They also sought to rely on the "automatic termination" clauses within the hire-purchase agreement by which the hirer's right to possession was deemed to have terminated upon use of the vehicle for illegal purposes.

Alternatively, the petitioners argued that they were innocent claimants and that they had taken all reasonable steps to assess the credit risk and financial background of the hirer and the guarantor.

Held, dismissing the petition:

1. Section 28 of the MDA was a "special provision" providing for discretionary forfeiture. It was clear in s. 28 that a disposal inquiry would have to be convened if there were claims to the vehicle. Where a specific forfeiture provision is silent on the holding of an inquiry, an inquiry under the Criminal Procedure Code should be held.

2. From a plain reading of s.28(b) of the MDA, a vehicle was only "unlawfully in the possession" of the accused if the means by which it came into his possession were unlawful. Section 28(b) simply reflected Parliament's intention that vehicles which had come into the possession of accused persons through unlawful means should not be forfeited. However the section should not be taken to mean that forfeiture will have to be ordered where possession was obtained by lawful means - the court must consider the justice of each case.

3. The petitioners had actual or constructive notice of the convicted person's status as an "authorised driver." This could be taken to mean that the petitioners had impliedly consented to him being in possession of the vehicle and he was thus not in unlawful possession of it.

4. In addition to taking into account the view of the Magistrate who ordered forfeiture that the purpose of s.28 was to curb and impede offences under the MDA and exempting hire-purchase vehicles from forfeiture would enable the hirers to defeat the aim of the section by using such vehicles to commit drug offences it was necessary to show that the petitioners were so grossly negligent in the manner they conducted their business that they were tainted with complicity in showing reckless disregard for the consequences of the use of their vehicle.

5. The highly suspicious circumstances surrounding the hiring of the vehicle (neither the hirer nor the guarantor had means to meet the ordinary payments due for the vehicle) should have caused any reasonably prudent hire-purchase company to have carried out further enquiries.

6. Forfeiture of the vehicle under s. 28 MDA was an appropriate order.

Tanglin Cars Pte Ltd v PP [1997] 1 Singapore Law Reports 428

Discovery - use of documents created in criminal investigations - defamation - abuse of process

The UK Serious Fraud Office investigated the activities of three men suspected of serious fraud. A lawyer from the SFO in the course of the investigation sought (by letter of request to the Isle of Man) to interview a solicitor who had invested client's money with two of the men being investigated and interviewed an employee of the Law Society concerning the compensation fund and its application to the inquiry. The SFO subsequently disclosed to the defendant's solicitors both the letter of request and the note of interview - neither of which were used in the criminal case. The Isle of Man solicitor was shown the letter of request by the defence solicitor and subsequently issued writs for defamation against the SFO, the officer, the Law Society and its employee. The solicitor argued that he was portrayed as a conspirator. The Queen's Bench Division struck out the actions for defamation and an appeal was lodged.

Held dismissing the appeal

1. There are three reasons for imposing and maintaining confidentiality in the criminal field. First to sustain and encourage the free flow of information to achieve progress with criminal inquiries. Second, that the material gathered in investigation and properly disclosed on discovery would often affect others and third was the need to enable those investigating crime to follow leads, consider suspects and record their thoughts without fear of parasitic litigation.

2. The interests of justice were best served if material which was disclosed to a defendant by the prosecution as part of the criminal process was subject to the restriction that it could only be used for the purposes of conducting the defence in those proceedings, at least until it entered the public domain by being referred to in open court.

3. Any action founded upon what a witness said in the witness box or upon what had been said or done in preparing evidence for a trial would be barred.

4. In criminal cases the immunity applied to prevent any form of parasitic litigation, other than an action like malicious prosecution which related directly to the criminal proceedings.

5. Documents seized by police or other prosecuting authority during a criminal investigation must be treated as confidential.

6. Where the needs of criminal justice involved invasion of privacy and confidentiality the extent of the invasion should be no greater than the needs of criminal justice in the instant case require. The only exceptions are where a document is used in a criminal court in such a way that the contents of the document become public knowledge and it is no longer practicable for the court to protect privacy or confidentiality or where the court was persuaded that the overall interests of justice require that the document be available for use in other proceedings.

7. Public policy required that documents coming into existence and discussions taking place in the context of an investigation of a suspected crime must be immune from suit. It was an abuse of process for a defamation suit to be brought in reliance on unused material.

Taylor & anor. v. SFO & ors. The Times, 27 August 1997 (Court of Appeal - UK)

Criminal Justice Act 1988 (UK) - evidence from abroad - perjury

The appellant was convicted of an offence involving the disposal of stolen property. She was the director of a non profit-making management company established to manage a settlement made in the Cayman Islands by Asil Nadir who was under investigation by the UK Serious Fraud Office. One of the grounds of appeal for the appellant was that the judge was wrong to reject the defence application for a witness in northern Cyprus to be allowed to give evidence by television link. The defence had sought to have Mr Nadir (who had removed himself from the UK) and other give evidence.

The application to have the evidence taken on video link was made under the Criminal Justice Act 1988 which provides that a witness who gives evidence on oath is deemed to have given evidence in the proceedings and may be prosecuted for deliberate lies. The judge ruled that he had no jurisdiction to permit the link because the witness could not be extradited from northern Cyprus to stand trial for perjury so that the ultimate sanction for perjury was not available. He also rejected the application on the ground that Mr Nadir was a fugitive from justice and ought not to be allowed to give evidence from the country in which he had sought refuge.

Held

The judge was in error in relying on the "ultimate sanction" ground of refusal. Parliament had not limited the places outside the UK where the taking of evidence on video link was permitted. Once it was shown that there was difficulty in obtaining the attendance of witnesses from abroad who could give relevant defence evidence the court should lean in favour of permitting video evidence to be given though in particular cases there may be other reasons for refusal of an application to permit such evidence.

R. v. Forsyth Court of Appeal (Criminal Division), March 17 1997 [1997] Crim. LR 581