



Lecture to the Medway Law Society – 12th July 2007

Evidence up date – Focusing on Magistrates' Court cases & Generally

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Purpose

To look at recent (roughly since January of this year) developments in the following areas of evidence:

- Hearsay
- Bad Character
- Adverse Inferences

The emphasis is on the Magistrates' Court. What is the difference between Magistrates' and Crown Court? None. But due to the nature of magistrates roles as triers of fact and law, the principles that rulings should be determined in advance is of even greater importance than in the Crown Court (**Robinson v Sutton Coldfield Magistrates' Court [2006] EWCA 307 (Admin)**).

Also, in the Crown Court there tends to be more time for argument, greater cooperation from the CPS and, from a defence point of view at least, a more friendly tribunal.

Procedural Matters

One very important case that was recently decided is: **Musone [2007] EWCA Crim 1237**.

This has potentially far-reaching ramifications. It was a murder case which became a cut-throat defence. There is a useful discussion on admissibility of hearsay and bad character evidence, but the main point related to M's attempt (during the trial) to put in a confession allegedly made by his co-Defendant.

The trial Judge excluded it under Art 6 and (to a lesser extent) the CPR, as it was an 'ambush'. The Court of Appeal dismissed the appeal, concluding that Art 6 was not the real issue, but that Courts must be vigilant in ensuring compliance with the CPR and particularly that the overriding objective is met.

Selected extracts are set out below:

“(56) Notwithstanding the absence of any such specific provision within section 111, we take the view that the rules made under section 111, in relation to bad character evidence, do confer power on a court to exclude such evidence in circumstances where there has been a breach of a prescribed requirement. The appellant was under an obligation to give notice of the evidence he wished to give of the confession or of his intention to cross-examine Chaudry about it not more than 14 days after the prosecutor had complied with his primary disclosure obligation (see rule 35.5 of the 2005 Rules). The judge concluded that his failure to do so was not due to an oversight but because of a deliberate intention to ambush his co-defendant. There was no other explanation for not raising the issue earlier. In our judgment the judge was entitled to exclude that evidence in circumstances where he concluded that the appellant had deliberately manipulated the trial process so as to give his co-defendant no opportunity of dealing properly with the allegation.

(59) In our view it is not possible to see how the overriding objective can be achieved if a court has no power to prevent a deliberate manipulation of the rules by refusing to admit evidence which it is sought to adduce in deliberate breach of those rules.

(60) We emphasise that cases in which a breach of the procedural rules will entitle a court to exclude evidence of substantial probative value will be rare. A court should be most reluctant to exclude evidence of that quality by reason of a breach of the procedural code. Nonetheless, there will be cases, of which the instant appeal is an example, where the only way in which the court can ensure fairness is by excluding evidence, even when it reaches the quality described in section 101(1)(e). It should be remembered that the court was compelled to assume the truth of the evidence that Chaudry confessed to murder. Section 109 gives rise to a stark choice between either an assumption that the evidence is true or rejection of its truth on the grounds that no court or jury could reasonably find it to be true. But in reality, as the judge himself remarked in his ruling, there will be evidence which, although capable of belief, is improbable and unlikely to be believed. Whilst the judge is compelled to assume the truth of such evidence for the purposes of section 101(1)(e), he need not take so extreme a view when considering whether to prevent the unfair effect of a breach of the procedural rules by excluding the evidence. The more credible the evidence, the less likely it is that the judge will exclude it on grounds of a breach of a procedural requirement. But where, as in the instant case, the evidence is improbable, the judge is entitled to take that factor into account in deciding whether to exclude it, in circumstances where the rules have been deliberately breached.

(63) It is true that the judge relied only on the rules in case, as he put it, "I am wrong about Article 6". He referred to the breach of the Rules as being a narrowly technical point. It is not. It is through the medium of the Rules that fairness to defendants can be ensured in circumstances such as these. The judge correctly appreciated that through Part 1 of the Rules the rights of the co-defendant, enshrined in Article 6, could be recognised. We commend his approach, even though it represented his "fall-back" position"

There was also a useful reminder (para 36) that by virtue of s132 CJA 2003, the Court can make an ‘adverse inference’ against any party (presumably including the CPS) where hearsay evidence is adduced and the requirements have not been complied with.

It may be argued that if the Crown can have adverse inferences against them on hearsay, then why not on other matters such as bad character, disclosure etc? Even if there is no formal inference as such, there should be greater scope for comment.

Bad Character

The case law on this area of evidence is continuing to evolve at a constant rate. The decisions are not always consistent, but the one common feature seems to be that the appeal is dismissed...

Some recent 'highlights' include (in reverse chronological order):

Campbell [2007] EWCA Crim 1472 - *Directions in relation to bad character* – Criticises the JSB Specimen Directions. Juries (and magistrates) should be directed in a 'common sense' manner. It is unhelpful to draw distinctions between propensity and credibility. Propensity to be untruthful doesn't go a great way towards establishing guilt.

Tirnaveanu [2007] EWCA Crim 1239 - *Clarification of s98* – Evidence is "to do with the alleged facts of the offence with which the defendant is charged" if there is a nexus in time. It's not entirely clear how much that helps...

Osbourne [2007] EWCA Crim 481 - *What is reprehensible behaviour?* – Shouting at a partner and their child (with no accompanying violence) is not 'reprehensible behaviour'. There is a minimum threshold to cross before something can become reprehensible.

Gyima [2007] EWCA Crim 429 - *Timing of ruling* – Where there are apparent weaknesses in the Prosecution case, a ruling on the admissibility should be deferred to half-time. This should only apply in the Crown Court for obvious reasons. However, in the Magistrates' Court, presumably the Court should be alive to s107 CJA (stopping a case where evidence is 'contaminated'). This only applies to the Crown Court, but the principle that if there has been a shift in the case, the bench should review whether the decision to admit the bad character was wrong and consider discharging themselves,

should apply equally in the Magistrates' Court. Whether this would ever happen in real life is another question.

Magistrates' Court

There is, to my knowledge, only one decided case from the Magistrates' Court since **Robinson v Sutton Coldfield Magistrates' Court [2006] EWCA 307 (Admin)**. This is **DPP v Chand [2007] EWHC 90 (Admin)**. This doesn't contain anything particularly exciting by way of new law. It was a Prosecution appeal from a DJ's decision to exclude bad character evidence (in advance of a trial by a lay bench). The Divisional Court confirmed the **Hanson** principle that a Court should only interfere with a Judge's (or bench's) discretion if it is *Wednesbury* unreasonable applies in the Divisional Court (and on Prosecution appeals).

Hearsay

There is surprisingly little authority on this area of law. And as opposed to the bad character provisions, there is a healthy amount of authority from the Magistrates' Court.

McEwan v DPP [2007] EWCA 740 (Admin) – *Absent witnesses* – The crucial evidence against Mr McEwan was in a witness statement from a youth who did not attend Court for the trial due to a bowel complaint. There was something from his doctor suggesting that attending Court would have caused him stress. P applied to adjourn which was refused. The Prosecution then applied to read the statement as hearsay which was granted.

The Divisional Court quashed the conviction as the magistrates had not given any proper attention to the application and the medical evidence was questionable.

R (CPS) v Uxbridge Magistrates' Court [2007] EWCA 205 (Admin) - *Absent witnesses* – Domestic violence case. The complainant did not attend and an application to read the statement was made. This was refused (the defence arguing that this was an attempt to undermine the application to adjourn) and the Prosecution offered no evidence.

The Divisional Court quashed the acquittal as whilst the decision to not adjourn was surprising, it was within the magistrates discretion. However, the hearsay application was not properly dealt with.

R (Meredith) v Harwich Magistrates' Court [2006] EWCA 3336 (Admin) - *Absent witnesses (again)* – Mr Meredith was charged with careless driving and Failing to Stop. There was a trial on the latter charge and it was one person's word against the other. There was an independent witness who backed up the Prosecution case. Before the trial,

she indicated that she was unwilling to attend and her doctor gave a statement saying that she had a stress related illness and it would be preferable for her not to attend court. The statement was read.

The conviction was quashed as the medical evidence was not sufficient and no consideration was given to special measures etc.

Interestingly, in this case, the application was unopposed by the defence, but in the circumstances of the case, this was not seen as a particularly relevant factor.

Maher v DPP [2006] EWCA 1271 (Admin) – *Admissibility of hearsay* – Not strictly a new case, but one of the first cases on hearsay and contains a very good summary on the routes to admissibility and how the procedures should be applied. It also shows how the Divisional Court can bale out the Magistrates' Court when they get it wrong.

The Court of Appeal has not been particularly troubled by the hearsay provisions. Apart from implied assertions (see below), the only case of any significance is **Finch [2007] EWCA Crim 36**. Mr Finch was charged with possession of a firearm that was found in a car in which he was a passenger. His co-Defendant (the driver) pleaded Guilty to the same charge after having given an interview that was exculpatory of Mr Finch. Mr Finch wished to adduce that interview under the new s76A PACE (inserted by CJA).

The appeal was dismissed. The reasoning was that his co-Defendant was no longer 'charged' with Mr Finch and he could therefore be called as a witness. This follows straight from the words of the legislation.

Implied Assertions

This has frequently caused problems in that past and the conclusion (with **Kearley**) was that they were inadmissible hearsay.

Parliament set out to correct that as part of the CJA to 'simplify' matters.

The first case to deal with this area of law was Singh [2006] EWCA Crim 660. The Court of Appeal (unsurprisingly) dismissed an argument of Professor Uglow that implied assertions were inadmissible hearsay. They went on to determine that Kearley has been overturned by the CJA. It seems to me that this is a deeply unsatisfactory judgment. Whilst the conclusion that the appeal should be dismissed (the question was whether an entry in a mobile phone address book is hearsay) is correct, the Court gave only 2 paragraphs of consideration in overruling 200 years of common law provisions. More problematic, the Court concluded that the evidence was real evidence (and therefore not hearsay). In the same paragraph however, the Court of Appeal refer to the fact that they are also admissible under s118(1(vii)) and s114(2)(d) [presumably a misprint for s114(1)(d)] – both of which refer to hearsay evidence.

The definition of hearsay has changed from the common law and is set out in ss 114(1) and 115(1)-(3)

s114(1) – “In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if: [conditions set out]”

s115 (1) In this Chapter references to a statement or to a matter stated are to be read as follows:

(2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

(3) A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been-

(a) to cause another person to believe the matter, or

(b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

Example

Daniel is 16 and of good character. He was arrested with ten wraps of cocaine which he says is for his personal use and two mobile phones (A and B). A is demonstrably his and is innocuous. B is unregistered and certain incriminating text messages on it (eg “Hi Alan, it’s Brian, can I get some coke off you tonight” from a week age). In interview, Daniel states that phone B belongs to his dealer (who he is not prepared to name) and he was merely holding it for him. One entry in D’s phone book is for the name Daniel with phone A number attached to it.

The Defence want to adduce the entry in the address book to show that phone A is not Daniel’s. The Prosecution want to adduce the text messages to show Daniel’s connection with drug dealing.

Entry in the address book

Following Singh, this is real evidence and therefore admissible (and so no application is required). So far, so good. However, the Prosecution say that both phones are Daniels and the entry is a ruse by Daniel to pretend that phone B isn’t his. If the Prosecution are correct, then the entry was made “to cause another person [namely the police] to believe the matter”. In that case it is hearsay and so the Crown object to the admissibility of it.

The difficulty is that whether this is hearsay or not is determined by whether or not phone B is Daniel’s (which is the very fact in issue that the evidence is being called for) and so the entry in the phone book is evidence that it is not Daniel’s phone, if and only if it is not Daniel’s phone.

Text Messages

The situation becomes more complicated when these are considered. “Hi Alan, it’s Brian, can I get some coke off you tonight” can be broken down into three parts:

- (1) “*Hi Alan*” is real evidence that the owner of the phone is Alan if the owner of the phone is Alan (or arguably known as Alan). If he is not, then it is hearsay.
- (2) “*it’s Brian*” is again real evidence that the sender is Brian if the sender is Brian but hearsay if it is not.
- (3) “*can I get some coke off you tonight*” the critical part of the message. It seems to me that one approach is as follows:
 - (a) This is real evidence that Brian wants some ‘coke’. This is irrelevant to a fact in issue and therefore inadmissible
 - (b) It is also real evidence that Brian believes the owner of the phone can sell him coke. This is opinion evidence and inadmissible
 - (c) It is also an implied assertion that Alan is a drug dealer or is willing to deal in drugs. This is the **Kearley** point. It seems that after **Singh**, the evidence is admissible real evidence but may (if there was, for example, only one such message) be excluded under s78. Looking at s115, the situation may not be so clear.
A further problem is that this is presumably bad character evidence and requires a notice.

This is clearly all very unsatisfactory and in many cases can lead to something akin to a philosophy seminar. This stems from the new definition of hearsay that was passed and is bound to lead to confusion. It also means that there is a different definition of hearsay in the criminal and civil context which is undesirable.

The better approach may have been to kept the old definition of what is hearsay, but with the safeguard that it may be admissible in the interests of justice. It takes a certain amount of ingenuity to take what was already deeply confusing provisions and make them worse, but Parliament may have achieved this.

Apart from **Singh** and the cases dealing with absent witnesses, there are many issues that have yet to be determined and it may be a fertile hunting ground for defence lawyers in the years to come...

Adverse Inferences

This seems to rarely arise in practice (I have never had a trial in the Magistrates' Court where this has been raised and there's no recent authority from the Divisional Court).

In relation to driving matters, the Divisional Court seem to be getting more and more aggressive at dealing with 'technical defences'. For example, **Wellington v DPP [2007] EWHC 1061 (Admin)** was an identification case of Driving whilst Disqualified. The Magistrates' Court was entitled in those circumstances to draw an adverse inference from the failure to give evidence.

Generally speaking, the Court is taking a slightly more relaxed attitude to incorrect directions (see, for example, **Lowe [2007] EWCA Crim 833**) but given that the directions are so complicated, it may be that the Magistrates' Court are taking a pragmatic approach and steering away from the whole adverse inference issue.