THE LONDON ADVOCATE

Journal of the London Criminal Courts Solicitors' Association

Number 106 Spring 2025

A warm welcome to your latest issue of The London Advocate which I very much hope you will enjoy.

We have gathered a most interesting selection of articles including an update on important developments in the youth sector by our President Casey Jenkins (below).

On Page 2 Sarah Vine KC describes her struggles with the LAA over the "ludicrous" volume of pages in a case and asks: when is a schedule not a schedule?

Next up is a look at the challenges of ensuring the reliability of witness evidence in ICC proceedings by international lawyer Dr Mahsa Rezagholi.

We then examine how relevant authorities are increasingly turning to civil recovery orders under the Proceeds of Crime Act to retrieve criminal property as an alternative to instigating criminal proceedings.

On Page 6 you'll find out how National Security Legislation is being revamped for modern times.

Then Edward Grange lets the cat out of the bag about whether s.34 in appeals can be relied upon by a co-accused in circumstances where the prosecution does not seek to rely upon it.

Last but not least, Laura Collier discusses the principles of trials in absentia.

Happy reading!

Piers Desser, Editor

Investment in criminal legal aid biggest step forward in many years

By Casey Jenkins, LCCSA President

Dear All, I hope that you are well as we move into this next season.

At the end of last year, the government announced a £24 million injection into police station and youth court fees. A separate youth court fee scheme was also introduced into which £5.1 million has been invested.

Children are the most vulnerable members of our society, so the investment in youth court legal aid is hugely positive. Those of you who know me, know that something very close to my heart is youth justice and reducing the trauma children experience whilst in police detention and the criminal justice system as a whole.

I am so pleased to be involved in a pilot with the Mayor's Office for Policing & Crime (MOPAC) to embed Child First practices in police custody suites to decrease detention of children, increase the use of diversion and improve outcomes for children.

My belief is that through education, holistic support and diversion away from the criminal justice system the trajectory of so many lives can be changed. I am working with MOPAC to tackle ethnic disproportionality in the youth justice system and am very much looking forward to the evaluation of the pilot.

A further announcement by the government finally acknowledged that criminal solicitors need more money. Criminal legal aid solicitors will receive up to £92 million more a year to help address the ongoing challenges in the criminal justice system.

This is the biggest step forward in many years. It is heartening that there has been recognition of the crucial role criminal legal aid solicitors play in our justice system and that this will be the first step to support the sustainability of the criminal legal aid sector, albeit with the focus on fees outside London despite the widely acknowledged issue that professionals, particularly those at the more junior end have with the affordability of living around the city.

Whilst much more investment is required to remedy the recruitment and retention crisis faced by the criminal legal aid sector, the announcement was a promising sign. I continue to work closely with the Ministry of Justice and the Legal Aid Agency to ensure the promised investment reaches you in meaningful ways.

You will be aware that Sir Brian Leveson is conducting an Independent Review of the Criminal Courts. The LCCSA is of the view that underfunding by successive governments has led to the current crisis in the criminal justice system, and any proposal to reduce the

right to jury trial is extremely concerning.

We have responded proposing alternative solutions, which are less headline grabbing, but will have more traction and have more respect for the rights of our clients.

We propose increased diversion, early and better prosecutorial decision making, a reversal of sentence inflation, better funded and resourced investigators, prosecutors, defence lawyers, court staff and probation officers taking advantage of the streamlining which good standardised technology should allow.

I would also like to take this opportunity to thank the Committee for all their hard work. Special thanks to Bartholomew Dalton and Claire Bostock, for their contributions to the consultation response to the Blackmail, kidnap and false imprisonment guidelines.

Their responses in relation to double counting and sentence inflation were taken on board, leading to some amended wording, reductions in some of the ranges and community orders being included at the bottom end of the sentencing range for the guidelines for false imprisonment and kidnap.

We so often feel powerless in this industry, along with those we represent, however this demonstrates that it is possible to make a positive impact. The LCCSA will continue to contribute to these important discussions.

Finally, when I had the privilege of taking on this role, I said that I would very much like to advocate for a culture where we make time and space to reflect. The work we do is strenuous.

Recognising the risks and signs of becoming vicariously traumatised is so important. There is a great deal of trust placed in lawyers who are expected to always act in their clients' best interests.

We can only be effective if we know when it is time to take a step back and look after ourselves. I would like to work towards the vicarious trauma we experience as lawyers being recognised, with a greater focus on our health and wellbeing, so that we can build sustainable practices and continue to do the best for our clients.

The LCCSA will be hosting a well-being event in the spring. Further information will follow and we very much hope to see you there.

Best wishes, Casey Jenkins, LCCSA President

When is a schedule not a schedule?

By Sarah Vine KC

An argument over fees is unlikely to be the battle from which you emerge with the sense that you have finally righted a terrible injustice but, unless you have a private income, it is probably inevitable.

My own heroic struggle was a case involving the now common feature of a ludicrous amount of digital material. Twelve defendants, a conspiracy across 18 months between two OCGs, divers bit-part players.

The electronic evidence exceeded 100,000 pages and was so voluminous that the LAA granted funding for the instruction of an expert to strip the material of anything other than the obviously relevant, meaningful information.

He reduced the data into schedules which showed patterns of contact, movement and location according to different participants, time-frames, etc.

The expert's schedules amounted to 26,000 pages. We used them constantly during the case, in preparation and at two trials.

The hours of work which he spared me are difficult to calculate, but anyone who has worked from raw data without the aid of pre-prepared schedules will know that it takes much, much longer.

Fewer pages, less time wasted (at court and in preparation), less money claimed. Everyone is happy, surely? Apparently not. In fact, this was where the problems started. The claim for Special Preparation was met with a series of obstacles and refusals.

Because I had used the expert's schedules, the decision maker ignored my work log and went about making a speculative assessment of the hours which would reasonably be spent if I had worked on the raw material.

This was on the basis of the LAA's Guidance, which derives from the cases of *R v Nazir and R v Starynskyj*, the principle being that "time cannot be claimed for preparing working documents such as schedules and chronologies."

Of the other objections (including the "absence" of a work log and the suggestion that time spent on the material would be reduced by the use of search and filter functions) none was quite as misconceived as our use of the expert's schedules.

The successful argument was a simple one of substance over form. The expert had used all available technical assistance to distil and reformat the prosecution evidence into the most time-efficient form for the purposes of litigating the case.

Put shortly, I had been working from a schedule, not on a schedule.

Sarah Vine KC is a barrister at Doughty Street Chambers and Wellbeing Director of the Criminal Bar Association.

Ensuring the reliability of witnesses in ICC proceedings

Challenges and practical considerations

By Dr Mahsa Rezagholi

The International Criminal Court (ICC) relies heavily on witness testimony to prosecute crimes of genocide, war crimes, and crimes against humanity. However, ensuring the reliability of witnesses remains one of the most formidable challenges in ICC proceedings.

Testimonial evidence, while crucial, is often subject to intimidation, trauma-related distortions, and political manipulation, undermining the effectiveness of prosecutions. This note examines key practical challenges affecting witness reliability and explores potential measures to enhance testimonial integrity.

Witness Intimidation and Security Risks

One of the most significant obstacles to witness reliability at the ICC is intimidation and coercion. In politically charged cases, witnesses often face threats from state and non-state actors seeking to obstruct justice.

The collapse of the prosecution's case against Kenyan President Uhuru Kenyatta in *Prosecutor v. Uhuru Kenyatta (International Criminal Court [ICC], 2014)* exemplifies this issue. Multiple witnesses recanted their testimonies or refused to testify due to threats, ultimately forcing the ICC to withdraw the charges.

Similarly, in *Prosecutor v. William Ruto and Joshua Sang (ICC, 2016)*, witness interference severely undermined the prosecution's ability to present a solid case. Despite the existence of ICC witness protection programs, limited enforcement power and logistical constraints hinder their effectiveness (ICC, 2020).

Psychological and Emotional Trauma

Many witnesses in ICC cases are survivors of extreme violence, including war crimes and sexual violence. Trauma can affect memory recall, perception, and coherence, leading to inconsistencies in testimonies (Brown, 2018).

Studies in forensic psychology indicate that post-traumatic stress disorder (PTSD) can cause fragmented or distorted recollections (Williams & Porter, 2019). In *Prosecutor v. Dominic Ongwen (ICC, 2021)*, where testimonies from child soldiers and sexual violence survivors were central, inconsistencies in witness accounts due to trauma were evident.

While the ICC recognises these challenges and provides psychological support, the need for enhanced trauma-informed questioning techniques remains paramount (ICC, 2022).

Inconsistencies and Memory Distortion

Memory distortion over time presents another challenge in witness reliability. The extended duration of ICC investigations and trials—often spanning years—can lead to recall issues, inconsistencies, and external influence on testimonies (Loftus, 2017).

Witnesses may unknowingly incorporate misinformation, whether through repeated questioning, exposure to media narratives, or community expectations. Defence teams often exploit such inconsistencies to challenge the credibility of key testimonies, as seen in *Prosecutor v. Jean-Pierre Bemba (ICC, 2018)*, where contradictions in witness statements were a key factor in the appeals process that led to his acquittal.

False Testimonies and Political Manipulation

Political actors or personal motivations sometimes drive individuals to provide false testimony. Some witnesses fabricate or exaggerate events due to political pressure, financial incentives, or personal grievances (Smith, 2020).

The ICC has mechanisms to address perjury, yet the complexity of international cases makes it difficult to detect and prevent deceptive testimonies effectively.

The use of intermediaries—who may influence witness statements—further complicates the issue, as seen in *Prosecutor v. Thomas Lubanga (ICC, 2012)*, where concerns were raised about the credibility of certain witness accounts due to intermediary involvement.

Strengthening Witness Reliability: Institutional and Procedural Improvements

To mitigate these challenges, the ICC has implemented various procedural safeguards, including:

- Enhanced Witness Protection Measures: Anonymity provisions, relocation programs, and secure communication channels help shield witnesses from threats (ICC, 2020).
- Corroborative Evidence and Forensic Support: To reduce overreliance on testimonies, the ICC increasingly integrates satellite imagery, digital forensics, and documentary evidence (Turner, 2021).
- Specialised Psychological Support: Providing trauma-informed support to witnesses improves the accuracy and coherence of testimonies (Brown, 2018).
- Stronger Safeguards Against False Testimonies: More rigorous vetting of intermediaries and cross-examination protocols help identify unreliable statements (Smith, 2020).

Conclusion

While witness testimony remains a cornerstone of ICC prosecutions, its reliability is frequently compromised by intimidation, trauma, memory distortion, and political interference. Strengthening witness protection mechanisms, integrating corroborative evidence, and adopting trauma-sensitive approaches are essential to improving testimonial integrity.

Addressing these challenges is vital not only for the ICC's credibility but also for ensuring justice for victims of the most serious crimes under international law.

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Dr Mahsa, an Iranian lawyer and university lecturer with a PhD in International Law, specialises in the intersection of justice and global policy. An accomplished author, her works delve into victims' rights within international criminal justice and the complexities of mediation in international investment law, contributing to the advancement of legal scholarship and practice.

Account freezing and forfeiture orders

By Kathryn Arnot Drummond and James Conroy

In the financial year ending March 2024, £107.3 million was recovered through forfeiture order receipts which was an 8% increase from the previous year [1].

A reflection of the fact that the relevant authorities are increasingly turning to civil recovery orders under the Proceeds of Crime Act 2002 ["POCA 2002"] to retrieve criminal property as an alternative to instigating criminal proceedings.

Although civil in nature, these proceedings are heard in the Magistrates' Court, usually by a District Judge and require an understanding of the law on money laundering. To assist criminal practitioners respond to such applications, this article outlines the relevant powers and some of the pitfalls to be wary of.

The relevant legislation is part 5 of POCA 2002 which 'enacts powers for the courts to [freeze and] forfeit the proceeds of crime *in civil proceedings* without there having been a prosecution or conviction (emphasis added).'[2]

These proceedings are brought 'against the property itself'[3] , rather than the individual. Account freezing ["AFr"] and forfeiture ["AFo"] orders are usually considered appropriate in cases 'where the public interest will be better served by using those powers rather than by seeking a criminal disposal.'[4]

The initial AFr application must be based on 'reasonable grounds for suspecting' that the money in the account is either 'recoverable property' or 'intended by any person for use in unlawful conduct.' [5]

The definition of recoverable property is provided at s304 POCA 2002. The court will make the order if it is satisfied of the same.[6] This is determined on the balance of probabilities and 'cogent evidence' [7] will be sought by the magistrates' court making the decision.

Any person affected by the order [8] can apply to the Court to set aside or vary the AFr.[9] Varying the order includes the 'power to make exclusions from the prohibition on making withdrawals or payments from the account.' [10]

These exclusions can be used for, amongst other things, living expenses or to carry on a business[11] and there is specific provision for 'reasonable legal expenses' to be released. [12]

Legal expenses will be allowed at the appropriate hourly rate as specified by the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005.

The court can make an exclusion in respect of work that will be done before the forfeiture hearing but it is only when that work is done and the expense is incurred that money can be released from the frozen account.

The magistrates' court deciding whether to make an exclusion for the purpose of enabling a person to meet legal expenses in respect of proceedings must have regard to the desirability of the person being represented in any proceedings.

Once the AFr has been obtained, the relevant authority will investigate the source of funds and decide whether to make an application for an account forfeiture order under s.303Z14, POCA 2002. If successful in that application, the funds in the account, or a portion of them, will be fully forfeit.

The test for the Court is whether it is 'satisfied' that the money or part is recoverable property or intended ... for use in unlawful conduct.' [13] Again, this is to the civil standard.

The respondent has a period of 30 days on receipt of the notice to object. If there is objection, the court will list the case for a full hearing to consider the evidence and submissions.

It is noted that applications for forfeiture cannot be made without notice, [14] nor can applications to set aside forfeiture orders. [15] In all cases, the court must fix a date for the hearing, 'which, unless otherwise directed, shall not be earlier than seven days from the date on which it is fixed.'

AFr and AFo proceedings are governed by their own set of procedural rules[16] but practitioners should be aware that civil rules of evidence will apply in relation to, for example, adopting witness statements as evidence in chief and hearsay.

There is an automatic right of appeal against an AFo to the Crown Court and the appeal 'must be made before the end of the period of 30 day starting with the day on which the court makes the order or decision.' [17] This will result in the Crown Court hearing the matter afresh.

These proceedings are draconian. Practitioners should be aware of the leading authorities to navigate any objection to the forfeiture of assets and ensure frozen funds are released if necessary to for legal representation.

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See footnotes on next page.

Footnotes

[1] https://www.gov.uk/government/statistics/asset-recovery-statistics-financial-years-ending-2019-to-2024/asset-recovery-statistical-bulletin-financial-years-ending-2019-to-2024

[2] *The King (on the application of Mileage Reclaim Limited (trading as Taxbuddi)) v North Somerset Magistrates' Court v Commissioners of His Majesty's Revenue and Customs [2024] EWHC 1531 (Admin)*, para. 5

[3] https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009

[4] Para. 1, https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009

[5] s.303Z1, POCA 2002

[6] s.303Z3, POCA 2002

[7] https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009

[8] s.303Z4, POCA 2002

[9] S.303Z4, POCA 2002

[10] s.303Z5, POCA 2002

[11] s.303Z5(3), POCA 2002

[12] s.303Z5(5)(b), POCA 2002

[13] s.303Z14(4), POCA 2002

[14] POCA Procedure, s.5(2)

[15] POCA Procedure, s.6

[16] The Magistrates'

[17] s.303Z16(2), POCA 2002

National Security Legislation: Revamped for a new age

By Sam Blom-Cooper and Adithi Shenava

For decades the Official Secrets Act 1911 (OSA) and its subsequent iterations of 1920, 1923,1939 and 1989 have been the centrepiece of the UK's legal apparatus for combatting the harmful activities of hostile foreign states.

The replacement of this aged legislative regime with the introduction of the National Security Act 2023 (NSA) marks a recognition that new and enhanced measures were needed to target the more sophisticated nature of state threat activities in a modern world.

The Law Commission's examination of the OSAs concluded that a wholesale update of those statutes was needed.

The urgency for this change, coming in the wake of the 2018 attempted assassination of Russian defector Sergei Skripal, was articulated in the 2020 Report on "Russia" of the Intelligence and Security Committee of Parliament, which concluded "it is very clear that the Official Secrets Act regime is not fit for purpose and the longer this goes unrectified, the longer the Intelligence Community's hands are tied."[1]

The NSA now directs renewed legal focus to the key theme of "state threats". This has developed in tandem with a new hybridisation approach to national security and terrorism – as much of the Act is informed by the experiences of counter-terrorism laws and policing since the early 2000s.

Steps towards hardening UK defences to "state threat" activity began with the powers (to stop, question and detain) introduced by s.22 and sch. 3 of the Counter-Terrorism and Border Security Act 2019, which were modelled on the port stop powers under Schedule 7 to the Terrorism Act 2000, and now find further expression in expansive "state threat prevention and investigation measures" (STPIMs), which are modelled on its terrorist-related predecessors (TPIMs) to address hostile state actors who cannot be prosecuted in the criminal courts.

The STPIMs in Part 2 of the NSA are impressively wide-ranging and include measures such as control over residency, international travel, movement, exclusions, movement directions, use of financial services and instruments, use of electronic devices, monitoring and reporting.

Alongside these powers, Part 1 of the NSA introduces a suite of new offences regulating espionage, sabotage

and activities undertaken at the behest of, or for the benefit of, foreign powers.

While prosecutions under the OSA were "rare - fewer than one a year", it is readily foreseeable that the deliberately broadly drafted terms of these provisions will drive an uptick in "state threat" prosecutions in the coming years.

Indeed, already the first few months of the NSA's infancy has seen significant prosecutions for, inter alia, arson-related activities of persons acting in concert with the mercenary terrorist organisation, the Wagner Group, for the benefit of Russia[2] , and allegations against individuals allegedly carrying out information gathering, surveillance and acts of deception likely to materially assist the Hong Kong intelligence service.[3]

New offences under the NSA regime

Espionage

Part 1 of the Act sets out familiar espionage-style offences akin to those of the OSA regime:

Section (1) obtaining or disclosing protected information prejudicial to the safety or interests of the UK
Section (2) obtaining or disclosing trade secrets
Section (3) assisting a foreign intelligence service (FIS)

Section 1 essentially reproduces the spying offence formerly contained within s.1 OSA 1911. However, against advice from the Joint Committee on Human Rights, the term "safety or interests of the UK" has been left undefined by the legislation. [4]

In keeping with the leading authority of Chandler, the objects of state policy should be left to be determined by the Crown on the advice of ministers, to ensure that it can evolve with the changing national interests. [5]

Section 2 builds upon the OSA and broadens the scope of 'information' that may be considered "sensitive" to account now for UK intellectual property interests.

Section 3 may prove a polemical provision of the NSA. It is widely drawn and has all the hallmarks of a 'catch-all' offence designed to sweep up a broad array of conduct not otherwise covered by Sections 1 and 2.

This section does not require information to have been successfully obtained or passed to a FIS, but merely that an accused intended to engage in conduct "likely to materially assist" a FIS.

The potential scope of the offence is evident from the limited constraints, (save perhaps for Attorney General consent to prosecute), it would appear to place on investigators and prosecutors given that they are not even compelled to identify the particular FIS said to be assisted.

Sabotage & Preparatory Conduct

Alongside the more classic spying offences of the public's imagination, the NSA also now caters for new offences of state-linked sabotage (section 12) and Preparatory Conduct (section 18), both of which attract life sentences.

The section 12 offence (which is committed if a person engages in conduct that they know, or ought to know, is detrimental to the safety or interests of the UK, resulting in damag) is geared towards the protection of important UK assets, and (once again) is a widely drawn provision such that relevant 'conduct' may even encompass omissions and statements made.

The legislation's Explanatory Notes give by way of example of sabotage by omission, a contractor working for a nuclear energy company failing to implement compulsory safety protocols which result in loss of electrical power.

Section 18 – Preparatory Conduct

Despite its novelty, the new "Preparatory Conduct" offence (Section 18) will look familiar to terrorism practitioners with its strong echoes of the spirit and form of the "Preparation of terrorist acts" offence (s.5 Terrorism Act 2006), and similarly aims to criminalise conduct which would otherwise fall short of a criminal attempt, so that the activities of hostile states may be disrupted at the earliest opportunity and before serious and potentially irremediable harms occur.

Although the s.18 NSA offence is somewhat narrower in scope than its predecessor (s.7 OSA 1920) as it requires "intention", not a broader "recklessness", s.18 (2) NSA, nevertheless, does extend its application to allow for the prosecution of individuals whose specific intentions are not entirely clear, or not yet fully crystallised.

This expansive approach to the framing of s.18 is further evident in the fact that "preparation" is not merely confined to actions more obviously linked to espionage (such as those contained in sections 1, 2, 4 and 12), but also includes the following acts (s.18(4)), provided the FPC is also met: "(1) actions involving serious violence against a person in the UK; (2) actions that endanger the life of a person in the UK; (3) actions creating a serious risk to the health or safety of the public, or a section of the public, in the UK."

These wider conduct features are perhaps the clearest examples of the departure beyond the historical confines of the OSA regime to deal with the contemporary threat from hostile state activity, and would now cover incidents such as the Salisbury poisoning, where Dawn Sturgess, a member of the public became an unintended

victim. It is conceivable that prosecuting authorities may look in future to deploy either the NSA or counter-terrorism provisions, or even both in tandem, to tackle a single threat.

The "Foreign Power Condition" ("FPC")

Central to establishing liability for a number of the new NSA offences is fulfilment of the foreign power condition ("FPC", (s.31 NSA)), which provides the link between the various forms of conduct described in Part 1 of the Act and a foreign state.

In answer to the Law Commission's criticisms, this condition marks a break-away from references in s.1 OSA 1911 to an "enemy", acknowledging that present-day espionage can be conducted by "foreign powers" whether they are "enemy" states, or not.[6] The FPC is an element of the offences of both s.12 and s.18, but not required in the s.3.

Section 31 states that the FPC is met in relation to a person's conduct if:

"1) (a) the conduct in question, or a course of conduct of which it forms part, is carried out for or on behalf of a foreign power, and

(b) the person knows, or having regard to other matters known to them ought reasonably to know, that to be the case.

2) The conduct in question, or a course of conduct of which it forms part, is in particular to be treated as carried out for or on behalf of a foreign power if— (a) it is instigated by a foreign power, (b) it is under the direction or control of a foreign power, (c) it is carried out with financial or other assistance provided by a foreign power for that purpose, or (d) it is carried out in collaboration with, or with the agreement of, a foreign power."

The FPC condition is satisfied in situations where the relationship between the conduct and the foreign power is indirect, provided that the person knows or ought reasonably to know that they are carrying it out for or on behalf of a foreign power.[7]

Moreover, the FPC is even met if the person intends it to benefit a foreign power, without being commissioned to do so, or indeed where the person has no relationship whatsoever with a foreign power.[8]

This allows the Act to encompass "self-starters" who undertake this conduct for financial gain, or ideological sympathy or simply a desire to harm the UK, or any other motivation.[9] The burden upon prosecutors is eased yet further as prosecutors are not required to identify, (let alone prove the identity of), any particular foreign power. (s.31(6)).

This amorphous manner in which the FPC is crafted has triggered various concerns. While the OSA would have captured the more obvious "enemy" threats, the NSA can essentially treat any state as an effectively hostile actor.

Perhaps unsurprisingly, the Joint Committee on Human Rights viewed the effect of this definition as potentially stigmatising for certain communities,[10] and may render particular individuals more vulnerable to this categorisation than others.

Statutory Aggravating Factor

Despite the NSA's expansion of national security offences, the government considered that certain cases will remain difficult to prosecute, owing to the covert nature of the activities involved and the challenge of presenting admissible evidence to prove all elements of an offence.[11]

To accommodate for these types of cases, section 19 NSA now inserts s.69A into the Sentencing Act 2020, mandating that 'ordinary' criminal offences are now to be aggravated, where the FPC is met, to reflect the 'state threat' element.

There is, as yet, no guidance as to the practical effect of s.69A. Aside from the public acknowledgment of a 'state threat' element, s.69A would appear to be little more than a statement of the obvious: that the seriousness of 'ordinary' offences committed, where the FPC is met, will necessarily be aggravated.

Conclusion

The government's rationale behind the sprawling approach to the NSA is that it now properly accounts for the evolving nature of national security threats in the modern age, in a way that the OSA regime previously did not.

To the extent that the "Intelligence Community's hands [were ever] tied" prior to the enactment of the NSA 2023, such complaint would appear to now ring more hollow in light of the range of tools now available to investigators and prosecutors through the hybridisation of counter-terrorism and national security powers and measures.

The consequence of this evolution is that the courts will likely begin to entertain ever-increasing numbers of national security related cases, with the attendant complexities that often arise from sensitive investigations and prosecutions.

Sam Blom-Cooper is a barrister specialising in international criminal law at 25 Bedford Row where Adithi Shenava began her First Six Pupillage in October 2024 under the supervision of James Gray.

See footnotes on next page.

Footnotes

[1]Intelligence and Security Committee of Parliament, Russia (HC 632) para. 117

[2] https://www.bbc.co.uk/news/articles/cvgexrw3x2xo

[3] https://www.bbc.co.uk/news/uk-67977207

[4] First Report of Session 2022– 23 (n. 29), para. 28.

[5] Chandler v Director Public Prosecutions (1964) AC 763

[6]Law Commission Final Report (n. 5), paras 3.12 (citing the Intelligence and Security Committee: Annual Report 2003-04 (Cm. 6240, 2004), p. 43), 3.32.

[7] S.31 (3) NSA 2023

[8] S.31 (5) NSA

[9] Robert Ward KC, David Blundell KC: "National Security: Law, Procedure, and Practice 2nd edition" [2024], p.677, 19.79

[10] First Report of Session 2022– 23 (19 October 2022), paras 14, 18.

[11] Hansard, HC, Public Bill Committee, 14 July 2022, col. 153 (Minister for Security, Stephen McPartland MP)

Friend or foe: the cat out of the bag

By Edward Grange

Those familiar with criminal trials will be all too aware of the dangers of a co-defendant instigating a 'cut-throat defence', where that co-defendant gives evidence on his or her own behalf in order to strengthen the prosecution case against a fellow accused.

But as the old adage goes, 'there is more than one way to skin a cat' – and this is equally true for defendants seeking to strengthen the case against others and in turn move the spotlight away from themselves.

In *R v Marsden*[1], in what appears to be a legal first, Mr Carter (who was acquitted at trial) sought to invoke a s.34[2] adverse inference from a co-accused Mr Marsden's failure to mention, when questioned during interview, certain facts upon which he subsequently relied at trial.

The novel aspect of this was that the Crown – responsible for prosecuting the case – had not sought such an inference against Mr Marsden (who was subsequently convicted).

This raised the point of law on appeal as to whether s.34 can be relied upon by a co- accused in circumstances where the prosecution does not seek to rely upon it.

S.34, where relevant, states:

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed.

(2) (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper. Disappointingly for practitioners, the Court of Appeal deferred determination of this interesting question until another case comes along permitting detailed submissions on the point.

For now, s.34 will be available to co-defendants to invoke against a co-defendant. But unlike where the Crown seeks a s.34 inference, the Court of Appeal in Marsden held that in any direction to the jury, it will be essential to identify not only:

i)the precise matters which the defendant failed to mention but has relied on in his defence;

ii)the circumstances existing at the time of the questioning which are capable of leading the jury to the conclusion that the defendant could reasonably have been expected to mention those matters;

iii)the inference(s) which it is suggested might properly be drawn from the failure to mention the facts concerned; and

iv)any explanation put forward by the defendant as to why he did not mention those matters, but also the questions asked by the police which the defendant could reasonably have been expected to answer by mentioning the relevant fact(s).

This emphasised requirement was contrary to the dicta in *R v Harewood & Rehman*[3], where the Court of Appeal

considered whether a trial judge was right to give a jury a s.34 direction when prosecution counsel had not identified in the course of cross examination, the particular questions that had been asked but unanswered, which would have provided the opportunity to mention the facts relied upon in evidence at trial.

In making a number of observations about the operation of s.34, the Court of Appeal in Harewood & Rehman noted that the language of s.34 does not impose a requirement that the unmentioned fact must be one about which the accused has specifically been asked a question. Popplewell LJ observed that "there is no requirement that the unmentioned fact must be one about which the accused has specifically been asked a question". If the facts that an accused fails to mention in interview are central to his defence at trial, it is more likely that the jury may conclude that he could reasonably have been expected to have mentioned those facts when questioned, regardless of whether he was asked specifically about the facts in issue when questioned. Conversely, the less central the matter to a defendant's defence, the less likely a jury could conclude that the defendant should have mentioned the said fact unless it was shown that he had been directly asked about it when questioned under caution.

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In allowing the appeal in Marsden, the Court held that the jury should not be permitted to draw an adverse inference without any clear direction from the judge as to the evidential basis upon which they might properly do so.

It was therefore necessary for the direction to the jury to have identified the questions asked by the police which Marsden could reasonably have been expected to answer at the time, so that they could establish whether the facts that were not mentioned when questioned were indeed central to the defence advanced at trial.

In other words, that they were not just facts not mentioned at interview that were later raised at trial but rather were matters which he relied upon in his defence. The trial judge, according to the Court of Appeal, may not have been assisted in this task by counsel for Mr Carter who had not identified with any specificity the various points that Mr Marsden had failed to mention when questioned, submitting *"[he] did various other things [other than the wearing of gloves], forgive me, I'm just sort of spouting them off the top of my head"*. A s.34 direction was therefore inappropriately given.

Despite the Court of Appeal's recognition that there was strong evidence of guilt, the fact that allegations were made not only by the prosecution but also by the co-accused meant that Mr Marsden was unfairly disadvantaged and the (acquitted) co-accused was unfairly advantaged. The conviction was unsafe and quashed.

Until the Court of Appeal gets an opportunity to consider this issue again, as well as (or in the alternative to) instigating a cut-throat defence, a defendant seeking to distance himself from a co defendant may seek an adverse inference from his failure to mention, when questioned, a fact relied upon at trial even if the Crown does not seek such a direction.

However, unlike the situation where the Crown seeks to invoke s.34, that defendant will have to identify with specificity according to the Court of Appeal's guidance in Marsden.

The advantages of doing so, and doing so properly, may strengthen the case against a co-defendant whilst also weakening the case against the defendant seeking the adverse inference.

Admittedly, given the absence of case law addressing the situation whereby a defendant seeks an adverse inference direction relating to a co-defendant where the Crown does not do so, practitioners may be waiting a while for this novel point of law to be authoritatively determined.

However, now that the 'cat is out of the bag' practitioners may see more frequent use of s.34 adverse inferences against their clients from co defendants, as they turn into quasi-prosecutors seeking to strengthen the case against their co-defendant(s).

This will require solicitors to carefully consider, when representing clients at interview in multi-handed investigations, how a failure to mention a fact when questioned could be utilised at trial not only by the Crown but also a co-suspect. When backed into a corner, the seemingly friendly cat can quickly become the unexpected foe who seeks to save its own skin.

Edward Grange is a partner at Corker Binning who advises in a variety of complex and often high profile International law cases in addition to his advice and representation of individuals involved in criminal investigations and litigation in England and Wales.

Footnotes

[1] [2023] EWCA Crim 1610
[2] Criminal Justice and Public Order Act 1994
[3] [2021] EWCA Crim 1936

Trial in absence

By Laura Collier

As we hurtle through 2025, it is not lost on any criminal practitioner that court time is an increasingly precious commodity. It is perhaps unsurprising, therefore, that when defendants are absent from trial, the temptation to keep calm and carry on can seem irresistible. Pressures on sitting days are acute, backlogs are growing and, and, and . . .

It is important to remind ourselves of the principles that permit courts to push on, absent the defendant, to ensure that well-meaning pragmatism does not trump proper procedures.

The *Jones*[1] principles, which underpin the need for fairness to both prosecution and defence are still at the heart of the court's consideration of trial in absence. Those factors that the court must consider are set out herewith:

a) The nature and circumstances of the defendant's behaviour in absenting themselves from the trial or disrupting it, and in particular whether the behaviour was voluntary and so plainly waived the right to be present;

(b) Whether an adjournment would resolve the matter;

(c) The likely length of such an adjournment;

(d) Whether the defendant, though absent, wished to be represented or had waived his right to representation;

(e) Whether the defendant's representatives were able to receive instructions from them and the extent to which they could present his defence (and as to there being no distinction in principle between instructions received before and instructions received after the date on which a defendant absconded, see *Pomfrett [2009] EWCA Crim 1939; [2010] 2 Cr. App. R. 28* (undesirable to impose any artificial restriction on the instructions upon which counsel can act));

(f) The extent of the disadvantage to the defendant in not being able to present his account of events;

(g) The risk of the jury reaching an improper conclusion about the absence of the defendant;

(h) The general public interest that a trial should take place within a reasonable time;

(i) The effect of the delay on the memories of witnesses;

(j) Where there was more than one defendant, and not all had absconded, the undesirability of having separate trials.

Beyond *Jones* the Criminal Procedure Rules (CPR) adopt, and arguably extend, the protection for defendants, where the court is considering trial in absentia. CrimPR 25.2(1)(b) mandates that the court **must** not proceed unless the court is satisfied that the defendant has waived his/her right to attend, **and** that the trial will be fair despite the defendant's absence.

In other words, it is not enough for the court to be satisfied that the trial would be fair. It must also be satisfied that the defendant has waived their right to be present. The conjunctive in this sentence is significant. Both the forfeiture of the right and the fairness of the trial are given an equal footing. If the court is not satisfied of either one of these two limbs then the CPR dictates that the trial **must not** proceed.

The recent case of *R v Hanna*[2] restates the importance of working through the checklists in *Jones* and the framework provided by the CrimPR. In this case, the first defendant dispensed with his legal team on the second day of trial and D2's representatives also withdrew.

This was an EncroChat case in which there had been considerable delay due to preliminary litigation. Both defendants had been arrested, interviewed and charged in June 2020. Both came to be tried in March 2022, the delay caused by a background of legal arguments, both in the course of these proceedings and, for example, with a view to awaiting the outcome of the IPT proceedings.

An application to adjourn the March 2022 trial date was made by both defendants and refused by the learned judge.

Following the exit of both the legal team for D1 and the legal team for D2, the learned trial judge held as follows:

[...] on Monday, they both refused to attend. Yesterday, they both refused to attend and today, although Cavan Hanna is here downstairs, he refuses to come into court and Jamie Hanna has again refused to attend.

I was told this morning, as I have already indicated, that Cavan Hanna and Jamie Hanna have dispensed with legal representation. All of those counsel have been released.

The prosecution, as I say, now apply before me to try the appellants in their absence. I say absence, of course, they are free to attend court if they wish to do so. No-one has stopped them attending.

They have chosen to absent themselves. So, taking the case of Jones very much in mind, I have to consider whether or not the appellants are represented; whether they can have a fair trial; why they are not here; whether an adjournment would cure the concern and so forth. I take the view that the deliberate absenting themselves of both appellants is designed to either frustrate these proceedings or cause another adjournment to take place.

They have had many years to prepare for this case. They

have had the very best of representation throughout. They have chosen to dispense with representation by counsel and solicitors and have chosen not to come to court today. I can see no valid reason why a fair trial cannot take place.

I will act as amicus where necessary. The prosecution will prove through the calling of evidence that which they need, and the jury will be carefully directed.

It is clear that in this case the trial judge took the view that the defendants had attempted to engineer the adjournment of the trial, following the judge's refusal to acquiesce to applications for the same.

Having failed to derail the trial, the defendants were plainly found to have waived their right to attend. The judge properly considered the application of the *Jones* criteria and in those circumstances, it is perhaps not surprising that the Court of Appeal upheld the judge's ruling and ultimately the ensuing convictions.

Hanna was arguably not a case at the margins of the court's discretion given the powerful evidence that the defendants had chosen not to attend.

However, it stands as a reminder that on each occasion the issue arises, a proper and thorough application of the established principles of trial in absentia is essential.

Laura Collier is a barrister at 23 Bedford Row and in 2024 was appointed Recorder of the Crown Court (Western Circuit).

Footnotes

[1] *Jones (Anthony) [2002] UKHL 5; [2003] 1 A.C. 1*

[2] *Hanna* [2024] EWCA Crim 1315