Waste - Prosecutions

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a presentation by
Rory Dunlop
INTRODUCTION

1. I am going to talk about 2 statutes:
   (1) the Criminal Justice Act 2003 (“the CJA”);
   (2) the Proceeds of Crime Act 2002 (“POCA”).

(1) CRIMINAL JUSTICE ACT 2003

2. Perhaps the two most important changes, for present purposes at least, brought about by the CJA were the changes to the law on evidence of bad character and hearsay.

(a) Bad character

3. It used to be the case that bad character could only be introduced in certain exceptional circumstances, i.e.:
   (a) under the similar facts rule;
   (b) under certain statutes (e.g. s.1(2) of the Official Secrets Act 1911);
   (c) where, without it the account of the background to the offence would be incomplete and incomprehensible;
   (d) where the defendant has adduced evidence of good character;
   (e) where the defendant has imputed the character of the prosecution or one of the witnesses;
   (f) where the defendant has given evidence against another defendant.

4. The common law rules as to bad character were abolished by the CJA. There are now seven gateways for the admissibility of evidence of bad character (cf. s. 101 of the CJA):
   (1) all parties agree that it is admissible;
   (2) the evidence is adduced by the defendant himself or is given in answer to a question asked in cross-examination;
   (3) it is important explanatory evidence (i.e. evidence without which the court would find it impossible or difficult to understand the evidence in the case);
   (4) it is relevant to an important matter in issue between the defendant and the
prosecution (i.e. the question of whether the defendant has a propensity to commit
offences of the kind with which he was charged, except where his having the
propensity makes it no more likely that he was guilty of the offence and the question
whether the defendant has a propensity to be untruthful, except where it is not
suggested that the defendant’s case is untruthful in any respect);
(5) it has substantial probative value in relation to an important matter in issue
between the defendant and a co-defendant;
(6) it is evidence to correct a false impression given by the defendant (this can include
evidence given by a defence witness or any other evidence adopted by the defendant);
(7) the defendant has made an attack on another person’s character.

5. The court must not admit evidence under (4) or (6) above, if on an application by the
defendant to exclude it, it appears to the court that the admission of the evidence
would have such an adverse effect on the fairness of the proceedings that the court
ought not to admit it (s. 101(3) of the CJA).

6. An application to admit such evidence should be made at the same time as primary
disclosure. The Court of Appeal repeated, in R v Bovell [2005] EWCA Crim 1091,
the importance of complying with these provisions in order to ensure fairness to the
accused. Having said that, in R v Lawson, the Court of Appeal dismissed an appeal
by a defendant who had been convicted after bad character evidence had been
adduced at his trial, without any notice, by his co-defendant. The Court strongly
criticised the advocate for failing to give notice but refused to quash the conviction.
It is important to bear in mind that this was evidence adduced by a co-defendant. It is
doubtful that the court would have been so lenient if it had been introduced by the
prosecution.

7. The leading case on this provision is still probably R v Hanson, R v Pickstone, R v
Gilmore [2005] AER (D) 380 (Mar). The Court of Appeal said the following:
(1) the starting point is that the legislation was to assist evidence-based conviction of
the guilty, without putting those who are not guilty at risk. Applications to adduce
such evidence should not be routine.
(2) Where propensity to commit the offence is relied on, there are three questions to
be considered: (i) whether the history of conviction(s) establishes a propensity to
commit offences of the kind charged; (ii) whether the propensity makes it more likely
that the defendant committed the offence charged; and (iii) whether the proceedings
will be unfair if they are admitted.
(3) propensity to untruthfulness is not the same as propensity to dishonesty: i.e. it is
not enough to show that the defendant committed an offence of dishonesty; it is necessary to show either that there was a plea of not guilty and the defendant gave an account which was not believed; or that the offence consisted of making false representations.

(4) the Court of Appeal will only interfere with judge’s rulings on admissibility when they are plainly wrong;

(5) At the time of giving notice, it is necessary to specify whether the prosecution is intending to rely on the conviction alone or also on the circumstances of it.

8. It is interesting to see how this guidance has been applied in practice. *R v Hanson* can be seen as an attempt to close the floodgates, at least to some extent, on the admission of bad character evidence. However, it remains the case that bad character evidence has been admitted in a number of cases where it would not have been previously.

9. The *Lawson* case is a good example. This was a horrible case involving a group of youths who pushed a mentally handicapped man into a lake, even though he had told them that he could not swim. L and K were co-defendants who sought to incriminate each other. At trial, K raised the fact that L had been convicted previously of unlawful wounding. The Court of Appeal supported the trial judge’s decision to admit this evidence as evidence of L’s propensity for untruthfulness.

10. So, to bring it back to s. 33 prosecutions, if the defendant had a string of previous convictions to which he had pleaded not guilty and he was pleading not guilty at trial and his truthfulness was in issue, there is every justification for making an application to adduce the evidence of previous convictions as evidence of his untruthfulness.

(b) Hearsay

11. The other significant change made by the CJA was in relation to hearsay evidence (i.e. evidence given by a witness as to an oral or written statement made by someone else).

12. There used to be a general rule against the admission of hearsay evidence to prove the truth of the statement (as opposed to the proving that the statement was made). That rule was subject to a series of complex exceptions, e.g.:

(a) confessions;
(b) statements by people who are now deceased;
(c) statements connected with and made at the same time as the facts in issue (‘res
gestae’);
(d) acts and declarations of co-accesed in furtherance of a common design;
(e) statements in public documents;
(f) certain statutory exceptions.

13. Now, as a result of section 114 of the CJA, there are four categories of admissible
hearsay evidence:
(a) anything evidence admissible by reason of Chapter 2 of Part 111 of the CJA;
(b) any of the common law rules preserved by section 118 of the CJA;
(c) where all parties to the proceedings agree;
(d) where the court is satisfied that it is in the interests of justice for it to be
admissible.

(a) Admissible under Chapter 2

14. There are two important categories of hearsay evidence made admissible by Chapter
2: evidence when a witness is unavailable (s. 116); and documents created in the
course of business (s. 117).

15. A statement made by a witness who is not present at the proceedings is admissible if:
(a) oral evidence by the maker of the statement would have been permissible;
(b) the relevant person is identified to the court’s satisfaction;
(c) any of the following is satisfied:
(i) the person is dead;
(ii) the person is unfit to be a witness because of his bodily or mental condition;
(iii) the person is outside the UK and it is not reasonably practicable to secure his
attendance;
(iv) the person cannot be found after reasonable steps have been taken;
(v) through fear, the person does not give oral evidence in the proceedings and the
court gives leave for the statement to be given in evidence.

16. Before leave can be given under (c)(v), the court must take into account the risk of
unfairness, whether special measures could be taken to allow the witness to give
evidence at trial and any other relevant circumstances.

17. The second category is ‘course of business’ documents. Documents are admissible
when:
(a) the document was created or received by a person in the course of a trade
business, profession or other occupation, or as the holder of an office;
(b) the supplier of the information might reasonably be supposed to have first hand
knowledge of the matters dealt with;
(c) each person through whom the statement passed, received it in the course of their
business or trade etc.

18. When the statement is a document prepared for the purpose of criminal proceedings,
there are two additional requirements:
either (a) one of the five conditions set out above for unavailable witnesses is
fulfilled; or
(b) the person cannot reasonably be expected to remember the matters dealt with in
the statement.

(b) Preserved common law rules

19. Section 118 preserves many of the old common law exceptions that I mentioned
earlier, e.g. confessions, res gestae, statements in public documents etc.

(d) Interests of Justice

20. In addition to the other categories, there is a very broad category, which is simply
when the interests of justice weigh in favour of its admission.

21. In assessing the interests of justice it is necessary to take into account a number of
factors:
(a) the probative value of the statement in relation to a matter in issue in the
proceedings, or how valuable it is for the understanding of other evidence in the case;
(b) what other evidence has been or can be given as to the matter in (a);
(c) how important the matter in (a) is;
(d) the circumstances in which the statement was made;
(e) how reliable the maker of the statement is;
(f) how reliable the evidence of the making of the statement appears to be;
(g) whether oral evidence of the matter stated can be given and, if not, why not;
(h) the amount of difficulty involved in challenging the statement;
(i) the extent to which that difficult would be likely to prejudice the party facing it.

22. Maher v DPP [2006] EWHC 1271 Admin is an interesting example of how these
provisions tie together. The defendant was accused of failing to stop at the scene of
an accident or report the matter to the police. The DPP alleged that, while reversing in a car park, she had hit another car, belonging to X. She admitted being in the car park but denied making any contact with the other car.

23. The key evidence was a note which had been left on X’s car by an anonymous stranger, who claimed to have seen the accident and left Ms Maher’s registration details. X’s girlfriend found this note and called the police. The note was subsequently lost but the prosecution sought to rely on the police log created when X called the police. The magistrates’ court held that this log was admissible by virtue of the ‘course of business’ documents rule (s. 117).

24. The Divisional Court, on appeal by way of case stated, held that the magistrates’ court had been wrong to admit the evidence under s. 117, because the statement had passed from the anonymous informant through X’s girlfriend to the police and X’s girlfriend had not received it in the course of business. However, the Divisional Court upheld the conviction on the basis that the evidence would have been admissible under s. 114(d) in the interests of justice.

25. This has potentially very large repercussions, which have not yet been exploited by all prosecutors. If, for example, an informant rings up the Environment Agency, or the local authority, to report on fly-tipping or other illegal depositing of waste but refuses to give their name, it is now possible to admit their statement, as a statement received in the course of business where the maker cannot be found and/or where the maker will not give evidence through fear. It is, at least, worth trying.

(2) PROCEEDS OF CRIME ACT 2002

26. This is another provision which is, at least arguably, underused. One of the problems with environmental prosecutions is that the fines awarded are often so low that they do not act as an effective deterrent.

27. One potential solution is to use the Proceeds of Crime Act 2002 (“POCA”). This can be of use in 2 situations: where an illegal depositor has been convicted; and where it has not been possible to convict them.

28. In the first case, assuming that the case is being heard in the magistrates’ court, it is necessary to make an application, after conviction, under s. 70 of POCA, for committal to the Crown Court. This is necessary because the magistrates’ court does
not have power to make confiscation orders. If such a request is made, the magistrates’ court must commit the case.

29. Once the proceedings are committed, the prosecutor then asks for an enquiry. He will be obliged under section 16 of POCA to provide a statement of information on which he bases his allegation that the defendant has benefited from crime. The court will then ordinarily order the defendant to respond and he has to admit or deny the allegations in the information.

30. The court must then consider:
   (a) whether the defendant has a criminal lifestyle;
   (b) if so, whether he has benefited from his general criminal conduct;
   (c) if the answer to (a) is no, it must decide whether he has benefited from his particular criminal conduct.

31. If the court considers that he has benefitted from the conduct referred to, it must:
   (a) decide the recoverable amount, and
   (b) make an order (a confiscation order) requiring him to pay that amount.

32. The recoverable amount is the amount that the defendant benefitted from the crime, unless the defendant is able to prove that only a lesser amount is available.

33. The onus of proof in these proceedings is the civil standard of responsibilities. This has been held to be compatible with Article 6 and Article 1 of Protocol 1 of the ECHR (cf. *R v Benjafieid; R v Rezvi* [2002] UKHL 1 and 2; *Philips v UK* [2001] Crim LR 817) because (a) the proceedings are not criminal; and (b) the confiscation orders are not deprivations of property but controls of use.

34. One may ask, why bother with POCA, when the benefits of crime can be taken into account in making the fine anyway? There are two potential advantages.

35. First, the magistrates’ court is obliged to commit the case to the Crown Court. If you are of the opinion that magistrates tend to be too lenient in such matters, this can be a convenient way of getting the matter heard by the Crown Court.

36. Secondly, there are a number of tools under POCA for investigating the defendant’s resources:
   (i) production orders (e.g. orders to produce bank statements etc.);
   (ii) search and seizure warrants;
   (iii) disclosure orders (i.e. orders compelling the defendant to answer certain
questions);
(iv) customer information orders (i.e. orders requiring third parties, such as banks, to release information);
(v) account monitoring orders (e.g. orders requiring details of all transactions in a certain account over a certain period of time).

37. The only problem with these orders is that they need to be made by an appropriate officer, i.e. a constable or an officer at the Assets Recovery Agency (“ARA”). Therefore, it will be well worth approaching the ARA if you are minded to go down this path.

38. The other way in which POCA can be used is where the defendant is acquitted or where it is not possible to prosecute. The lower standard of proof can make all the difference in these circumstances.

39. In this case, it is necessary to refer the case to the Director of the ARA who can then bring civil proceedings to obtain a confiscation order for “property obtained through unlawful conduct”. It will then be up to the ARA whether to bring such proceedings. Their criteria are as follows:
(a) the case was referred by a prosecuting authority;
(b) the prosecution failed or was impossible to complete;
(c) the property was at least £10,000;
(d) the property was not entirely cash;
(e) there is evidence of criminal conduct to the criminal standard of proof.

RORY DUNLOP

39 ESSEX STREET,

LONDON WC2R 3AT