Keeping pace with crime

Jaime Hamilton explores the subtle but significant developments in criminal law at home and in Europe

Criminal practitioners are used to a fast-changing legal landscape. There was a time it seemed that criminal justice Acts came faster than the changes in the seasons. These days the legislators have seemingly calmed down a little, focusing more on wholesale changes to fees than legal tinkering. However, significant developments still happen in the criminal law and the criminal practitioner occasionally has to divert his attention away from the bank manager and the taxman to try to keep abreast of the subtle shifts that sometimes occur.

Delayed rulings

One such gentle shift has been brought about by *CPS v F (Rev 2)* [2011] EWCA Crim 1844 in relation to applications for a stay, due to an abuse of process based upon delay in criminal proceedings. A common practice had developed of judges postponing arguments or rulings in respect of such applications until the close of the prosecution case. The Court of Appeal in *CPS v F* made it clear that such a practice was an incorrect approach. Leaving the argument or the ruling until this point in the case blurred the lines between abuse of process and submissions of no case. An application for a stay was not concerned with the quality of the evidence but with the question of prejudice. The court went on to outline the principles by which such an application should be judged.

A further feature of *CPS v F* was that the court denigrated the proliferation of cases cited in the course of such applications. They considered the case of *R v MacKreth* [2009] EWCA Crim 1849 as the high point as far as the number of authorities relied upon (27 in the lower court), and therefore a low point in the presentation of such arguments. The court make it clear in *CPS v F* that from this point onwards there need only be reference made to three cases during submissions advanced in this area. Those cases are *Attorney General's Reference (No.1 of 1990)* [1992] 95 Cr App R 296; *R v Stephen Paul S* [2006] EWCA Crim 756; and *CPS v F*.

Judges seem to give one feature of the authorities a weight that is unjustified. The Oxford English Dictionary describes 'exceptional' as an adjective meaning "unusual" or "not typical". Perhaps the judiciary needs reminding that it is a common misconception that it means

'never'. The proposition that the granting of a stay should be rare or exceptional is an observation not guidance. The court should examine the circumstances of each case and ask itself three questions: has there been delay? Is there prejudice to the defendant caused by the delay? Is that prejudice such that the defendant can no longer receive a fair trial? The cases where there are answers in the affirmative in respect of each of those questions will be few and far between and therefore truly exceptional. 'Exceptional' simply describes the category of cases that should be the subject of a stay, not the benchmark by which the court tests whether there should be a stay.

Absent witnesses

Moving away from decisions of the domestic courts to European jurisprudence the decision of the Grand Chamber of the European Court of Human Rights (ECHR) in *Al-Khawaja and Tahery v UK* (15 December 2011) has the potential to have a significant impact upon those cases where the prosecution relies on the evidence of an absent witness. Section 114 of the Criminal Justice Act 2003 allows for the admission of hearsay evidence with the criteria governing the position of absent witnesses being dealt with by section 116 of the Act.

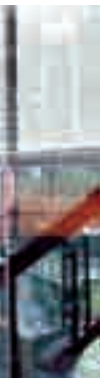
There had been arguments raised in the domestic courts that the right to have the witnesses present and questioned was a distinct and separate right protected by article 6 of the European Convention on Human Rights. The Court of Appeal had ruled that the right to a fair trial was the protected right and that the other guarantees enshrined in the convention were factors that bear upon the overall question as to whether a fair trial had taken place. This was the rationale of the Court of Appeal in *R v Sellick and Sellick* [2005] EWCA Crim 651, *R v Tahery* [2006] EWCA Crim 529 and *R v Al-Khawaja* [2006] EWCA Crim 2697.

Tahery and *Khawaja* both came before the ECHR where it was held that the provisions of article 6(3) constituted express guarantees and were not simply illustrative of whether a fair trial had been conducted. They went further to state that the untested

statements of absent witnesses where they were the sole or decisive evidence against a defendant could not be admitted in a way that was consistent with article 6.

Balancing act

The game of judicial ping-pong continued with the Court of Appeal considering the question in *R v Horncastle* [2009] EWCA Crim 964. Notwithstanding the decisions in *Khawaja* and *Tahery*, the court found that there were sufficient counterbalancing measures in the Act and the general trial process for the admission of such evidence



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to be compatible with the general right to a fair trial. The court indicated that there was nothing wrong with the admission of evidence that was demonstrably reliable or that was capable of being tested and assessed.

And so the position was considered by the Grand Chamber of the ECHR during its reconsideration of *Khawaja* and *Tahery*. It found that the guarantees of article 6(3) are specific aspects of the right to a fair hearing; however, the primary concern is to evaluate the overall fairness of the proceedings. They identified the two crucial questions to be asked in respect of absent witnesses: is there a good reason for the non-attendance of the witness? And, is the evidence the sole or decisive evidence?

The Grand Chamber went on to state that where a hearsay statement is the sole or decisive evidence against a defendant its admission will not automatically result in a breach of article 6. At the same time where a conviction is based solely or decisively on the evidence of an absent witness, the court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place. They considered that the safeguards put in place by the Act and by the trial process itself were strong safeguards. It is particularly interesting that in relation to the factual situation of *Tahery* the Grand Chamber indicated that the fact that the defendant may be able to give evidence about the circumstances of which the witness speaks or may be able to call other witnesses is not a sufficient safeguard in itself.

The position of domestic law seems to be that the defendant's opportunity to give evidence or to potentially call witnesses is a protective factor. The Grand Chamber seems to disagree. At some stage in the near future this tension between these two views will need to be resolved. Perhaps the argument is coming to a Crown Court near you soon!

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