# Serious Crime Bulletin No. 4

## March 2024

*The Serious Crime Bulletin is a quarterly brief providing a snapshot of prominent decisions and news with implications for general crime practitioners.*

## *In the news*

According to the *ONS publication* (8 February 2024): There were 590 homicides recorded in the year ending March 2023, 14% lower than the previous year (684 offences). There were 51 homicide victims aged 13 to 19 years in the year ending March 2023. Teenage victims were far more likely to be killed by a knife or a sharp instrument (82% of homicides) than for victims of all ages (41%). Women were more likely to be killed by someone they knew than men, for example, of the 100 domestic homicide victims in the year ending March 2023, 70 were women.

The Sentencing Council has published a consultation paper on draft guidelines for offences of blackmail, kidnap, and false imprisonment.

The Government announced on 14 February 2024 that it intends to build upon action taken in the Domestic Abuse Act 2021 to clarify in law that there is no such thing as the 'rough sex defence'. This comes as the government publishes its latest *Rape Review progress report*.

Convictions in rape cases lower when section 28 cross-examination is used.

- A study by Professor Cheryl Thomas KC has revealed that, over a 7-year period (June 2016-June 2023), section 28 recordings were used in 4,392 cases, involving 4,645 defendants and 28,793 charges.

- The existence of a section 28 recording does not lead to more guilty pleas. In fact, such a recording is associated with fewer guilty pleas. The guilty plea rate in section 28 cases in 2016-2023 was approximately 10%. This represents the percentage of guilty pleas on all charges in all section 28 cases and is the lowest guilty plea rate in the Crown Court.

- Where section 28 evidence was used, the overall jury conviction rate in respect of charges where section 28 evidence was used is 61%. Juries, therefore, convict more often than acquit when section 28 evidence is used.



By Michael Goodwin KC, Jack Talbot, Anita Clifford & Alex Benn

- The jury conviction rate was almost 10% lower when section 28 evidence was used (61%), compared to when it was not used (70%). The hung jury rate was 3 times higher with s28 (2.3%) than without s28 (0.7%).

- This lower conviction rate is regardless of (1) whether the section 28 witness is a child/vulnerable or an adult/intimidated, (2) the gender of the section 28 witness, or (3) whether the offence alleged is sexual or non-sexual.

- Jury conviction rates when section 28 evidence is used in rape cases are substantially lower for all types of rape allegations (whether adult or child rape allegations).

## *Nottingham stabbings and the conviction of Valdo Calocane*

Valdo Calcoane pleaded guilty to (voluntary) manslaughter on the basis of diminished responsibility. The Crown Prosecution Service deemed those pleas acceptable, rather than proceeding to a trial for murder, stating that it had considered the evidence of four psychiatrists, all of whom had agreed on the issue of diminished responsibility.

Some members of the victims' families subsequently complained of the decision and of the handling of the process. The Attorney General has ordered a review into the decision (and is, apparently, considering a review into Mr Calocane's sentence). It is expected to be completed by April 2024.

## *Murder and loss of control*

### Drake [2023] EWCA Crim 1454

*Headline: The court reviewed the guidance on when a trial judge in a murder trial should put the partial defence of loss of control to a jury, and noted the importance of the non-exhaustive list of relevant factors set out in R. v Goodwin (Anthony Gerard) [2018] EWCA Crim 2287, [2018] 4 W.L.R. 165, [2018] 10 WLUK 120.*

## *Facts*

The appellants D and X were convicted of the murder of V. D and X (and another) had attended V's home due to a supply of drugs issue, and with a common intention that V would be (at least) seriously harmed. In evidence the appellants had said there had been an argument and V had threatened and poked X with a kitchen knife before putting the knife down. X picked up the knife. There was a struggle. D said that X appeared emotional, and X said that he was scared and did not remember the struggle. H had "awoken" afterwards. V's injuries consisted

of three stab wounds to his back, a fatal stab wound to his neck and various other incised wounds, cuts and bruises.

D and X relied on the partial defence of loss of control. The judge had concluded that there was insufficient evidence, especially from X himself, to put the defence to the jury. D and X were convicted of murder.

The CACD dismissed the appeal. On the evidence taken at its highest, there was no sufficient evidence of a loss of self-control.

## *Judgment*

This latest case follows a line of cases in which the Court of Appeal has upheld findings that there was insufficient evidence of a loss of control.

The Court provides a helpful review of the statutory framework and relevant authorities, setting out the key principles to be applied:

The three-part statutory test for the partial defence of loss of control is set out in the Coroners and Justice Act 2009 s.54 and s.55.

Section 54(5) states that if sufficient evidence was adduced to raise the defence, the burden shifted to the prosecution to disprove it.

The question of sufficient evidence was one for the trial judge: s.54(6).

The proper approach was set out by Lord Judge CJ in R v Clinton [2012] EWCA Crim 2. The court is required to make "a common sense judgment based on an analysis of all the evidence" [46].

The term loss of control is not defined in the statute. A careful analysis of the evidence is required [54]

An assertion of loss of control is not sufficient evidence, R v Tabarhosseini [2022] EWCA Crim 850.[55]

In Gurpinar [2015] EWCA Crim 178 Lord Thomas CJ described the role of the judge as being required to "undertake a much more rigorous evaluation of the evidence" in deciding whether the defence can properly be left to the jury. [47]

All three components of the defence need to be established. If one is absent the defence cannot be left to the jury [48].

The court had previously established a useful non-exhaustive list of factors for trial judges to consider; the guidance was useful and any judge faced with the issue should follow it, R. v Goodwin (Anthony Gerard) [2018] EWCA Crim 2287, [2018] 4 W.L.R. 165, [2018] 10 WLUK 120 applied.

Sufficient evidence could arise from any part of the evidence, even if not foreshadowed by the accused in interview or a defence statement, and could arise from the evidence of the prosecution or a co-defendant, R. v Gurpinar (Mustafa) [2015] EWCA Crim 178, [2015] 1 W.L.R. 3442, [2015] 2 WLUK 647 applied [52]

An accused may not necessarily be able to articulate his conduct as arising from a loss of control but those who conduct his defence can. It may only arise in the course of evidence and it could arise from the prosecution case or from the evidence of a witness, including a co-accused [53].

The nature of the attack is relevant but not determinative.[56]

A jury can sensibly be asked to consider both self-defence, as a full defence, and loss of control, as a partial defence. It requires a considered and careful approach to the directions required. The jury must be directed to consider self-defence first, and only if they reject that, to go on to consider loss of control [59].

An inability to recall a traumatic incident did not establish sufficient evidence in itself [46-59].

## *Rape and allegations of jury racial bias*

**_Abdul_ [2023] EWCA Crim 1477**

*Headline: the curtain shrouding jury deliberations was brushed back for a brief moment. The Court of Appeal had to consider the proper approach when allegations of racial bias were made against members of the jury. After the decision, much will turn on the specificity of the allegations.*

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## *Facts*

The appellant, of minority ethnic background, was convicted of rape involving two complainants after a trial in Birmingham. Following more than a day of jury deliberation, a note was forwarded from one juror expressing concern that other members were engaging in racial profiling "without even considering the evidence". The note disclosed that eleven had decided "within 15 minutes". Unsurprisingly, defence counsel called for further inquiries to be made of the juror. The trial judge declined on the basis that the jury note was insufficiently specific. The note had not referred to an inappropriate racial comment or any overt racial overtone to the deliberations so far. Applying Skeete [2022] EWCA Crim 1511, which did not concern race but dealt with the approach after a juror alleged that others had been influenced by their own personal experiences of sexual assault, the trial judge proposed to ask each juror questions in writing about whether they had followed the legal directions, were able to continue upholding the oath without racial bias and whether they could reach a verdict based solely on the evidence.

Over defence counsel's objection that jurors would not answer truthfully the questions were posed. All of the jurors answered affirmatively although one, presumably the note-writer, stated that they did not feel comfortable deliberating further. In a further note they requested to be discharged. The request was met and the appellant was unanimously convicted by the remaining eleven shortly after.

## *Judgment*

The case brings into focus the very high bar that must be crossed before an inquiry into jury deliberations can take place. On appeal it was argued that there should have been an inquiry into the matters raised by the jury note or the entire jury should have been discharged. The Court of Appeal strongly disagreed. The note was said to be "equivocal" and it is only in the "most exceptional circumstances" that there can be inquiry into jury discussions. The fact that post-conviction the same juror had written to the court expressing discomfort with the outcome and had particularised racist remarks made by jurors during the trial and alleged that certain jury members had pressured others and that eleven appeared to have decided on a verdict at an early stage made no difference. There was said to be no basis to refer the case to the Criminal Cases Review Commission ("CCRC").

Few jurors will recognise the need for specificity if they are to raise concerns of jury bias. A general complaint, even about a matter as troubling as racial prejudice, will be insufficient for an inquiry. Explicit reference to remarks and jokes made by other jury members, however, may lead to scrutiny. In Sander v UK (2001) 31 EHRR 44 the European Court of Human Rights found there had been a violation of the fair trial right enshrined in Article 6(1) when a juror alleged that two other members had made "racist remarks and jokes" and the trial judge had

not taken sufficient steps to dispel concerns of bias. The Court of Appeal had earlier decided differently. There are clear reasons why jury deliberations are behind a curtain but the rule is not absolute and Strasbourg is an option. Whether a complaint about bias truly goes anywhere however will depend on the level of detail a juror thinks to place in their note.

## *Factors relevant to sentencing women*

***Foster* [2023] EWCA Crim 1196**

*Headline: the appellant's sentence for procuring her own abortion was quashed and substituted for a shorter term that enabled her immediate release, is an essential authority when mitigating on behalf of women at risk of prison.*

## *Facts*

A high-profile case of the appellant had been sentenced to immediate imprisonment for procuring her own abortion.

## *Judgment*

Between paragraphs [39] and [41], the Court of Appeal expressly draws attention to Petherick [2012] EWCA Crim 2214 and passages of the Equal Treatment Bench Book dealing with the specific circumstances typically affecting women defendants. Notably, women account for just 5% of the prison population and more than half are themselves the victims of crime. Women are also far more likely to be primary caregivers and tend to be imprisoned further from home than men due to the small number and geographical spread of women's prisons. In Petherick, it was also made clear that sentencing defendants with children requires a consideration of not only whether the sentence is proportionate to the defendant's own Article 8 (private and family life) right but that of the dependent child.

After citing the above with approval, the Court goes on, at paragraph [42], to consider that there are two more points which are presently relevant to the sentencing of women. First, as there are few women prisons compared to men's prisons women may be held in custody far from their families which may add "adverse consequences" for them and children deprived of their care. The current overcrowding of the women's prison estate and circumstances of confinement are also matters that "can be properly taken into account in sentencing". (Practitioners will of course already be aware of similar points made in Manning [2020] EWCA Crim 592 and Ali [2023] EWCA Crim 232 but, when representing women at risk of immediate prison, Foster is likely to provide more assistance.)

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## *Mandatory minimum sentences for firearms and exceptional circumstances*

***Bassaragh* [2024] EWCA Crim 20**

*Headline: A five-year mandatory minimum sentence for possessing a prohibited firearm was quashed when the appellant's previously unknown pregnancy came to light. Two years' imprisonment suspended for two years substituted.*

## *Facts*

The appellant appealed against a sentence of 5 years' imprisonment for possessing a prohibited firearm (a loaded Zoraki self-loading pistol) where the sentencing Recorder found there were no exceptional circumstances to depart from the mandatory minimum sentence of five years' imprisonment. No one had been aware at the point of sentence that the appellant was pregnant which was only discovered after she had been imprisoned.

## *Judgment*

Pregnancy was not automatically to be treated by the sentencing court as an 'exceptional circumstance' but in this case there was a strong prospect of rehabilitation and a low risk of reconviction. The appellant's ethnicity and the risks of being in prison and giving birth in prison were also considered. Having considered the PSR and evidence in the case, the Court quashed the sentence imposed of 5 years' imprisonment and substituted a sentence of 2 years' imprisonment suspended for 2 years with a rehabilitation activity requirement of up to 20 days. A concurrent sentence for possessing ammunition was also dealt with by the Court.

## *Forms of privilege*

***Karam Salah al Din Awni al Sadeq v Dechert LLP and Ors* [2024] EWCA Civ 28**

*Headline: The Court of Appeal has given fresh guidance in relation to LPP: the scope of both legal advice privilege and litigation privilege and the 'iniquity exception'.*

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## *Facts*

The Claimant, Mr Al Sadeq, was a formal legal advisor and Deputy CEO for the Ras Al Khaimah Investment Authority ('**RAKIA**'), the sovereign wealth fund for the Emirate of Ras Al Khaimah ('RAK'). RAKIA discovered that its former Chairman and CEO had allegedly committed fraud against RAKIA and, with others, had allegedly misappropriated funds. He was arrested in Dubai and detained in RAK, convicted of fraud and imprisoned. He maintains his innocence and claims that his convictions were politically motivated. The Claimant issued proceedings against a law firm based in London, together with former partners of the firm, engaged to assist in investigating the activities of the former Chairman and CEO. The Claimant had previously made an unsuccessful claim to the High Court, challenging the Defendants' position on privilege following disclosure in the proceedings. The application failed and the Claimant appealed. The Claimant was unsuccessful on appeal on all points, save for the iniquity exception issue, leading to a revisitation of the disclosure exercise.

## *Judgment*

This appeal raises a number of important points of law about the scope of legal professional privilege, both litigation privilege and legal advice privilege, and the so called 'iniquity exception' which used to be referred to as the 'fraud exception'.

The judgment is highly complex but rehearses the relevant caselaw in this area and the principles to be applied by the courts.

The evidential test for the "iniquity exception" to privilege is that iniquity must be established on the balance of probabilities.

It reemphasised that non-parties can assert litigation privilege.

The restrictive approach laid down in Three Rivers District Council & others v Governor and Company of the Bank of England (No 5) [2003] EWCA Civ 474 that legal advice privilege only arises in respect of communications between a lawyer and a narrow subset of a company's employees or officers does not extend to litigation privilege even though the Court accepted that the principle had been the subject of some considerable criticism and not followed in other jurisdictions.

Legal advice privilege will apply to investigations by law firms (also involving non-lawyers), provided they bring their "*lawyers' skills*" to that process and "*conduct it through lawyers' eyes*".



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