SWEET & MAXWELL

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Archbold Review

Cases in Brief

Murder—gang shoot-out—whether agreement to shoot and be shot at to be inferred—application of Gnango

SEED [2024] EWCA Crim 650

13 June 2024

S, his co-accused and the deceased drove into or towards the territory of a hostile gang, with whom there was a history of violent, sometimes murderous, conflict. A gun fight with unidentified members of the opposing gang took place during which the deceased was killed by bullets from a gun associated with the opposing gang. S and his co-accused were convicted (inter alia) of the murder of the deceased. S and his co-accused argued on appeal that the judge had wrongly rejected their submissions of no case to answer.

Held, dismissing the appeals,

The approach taken in S's case was not an extension of the principle set out in *Gnango* [2011] UKSC 59; [2012] 1 A.C. 827. The decision in *Gnango* had been the subject of much academic discussion and must obviously now be read in the light of the principles as to joint offending in *Jogee* [2016] UKSC 8; [2017] A.C. 387. The court agreed with the approach in *Morgan* [2021] EWCA Crim 895 (those engaging in a shoot-out, intending to kill or inflict really serious injury, would be guilty of the murder of those who die, whichever side they are on). Applying the principles in *Gnango* and *Jogee* to circumstances such as arose in S's case, the necessary agreement to shoot and be shot at may properly be inferred where two or more persons engage in, or assist or encourage, shooting at each other, each knowing that it was a virtual certainty that the other(s) would be armed and would either open or return fire, and each intended to kill or to cause really serious injury. It may or may not be helpful to refer to such a situation as a "shoot out": at best, that may be a convenient but imprecise shorthand description of a situation which would have to be analysed with care by a jury before the necessary agreement to shoot and be shot at could be inferred. It may be thought that the term implied the reciprocity which was a feature of the agreement which must be proved. The whole purpose of each party shooting in such a situation was to kill or to cause serious injury, and it could be no defence for one party to say that the victim of the shooting was a member of his own side. Nor could there be any question of self-defence on the part of someone whose intention in such a situation was to shoot to kill (or to cause serious injury) and to be shot at in return.

Evidence—res gestae—whether an abuse of process to admit res gestae evidence and not call available witness—prosecution duty in respect of calling witnesses—Police and Criminal Evidence Act 1984 s.78—whether general rule that res gestae to be excluded where witness available—domestic violence as context—general approach in context of domestic violence

DPP v BARTON [2024] EWHC 1350 (Admin)

7 June 2024

The prosecution appealed by way of case stated against a ruling by the district judge that proceedings against B for common assault of his wife were an abuse of process. The prosecution sought to admit evidence of the recording of Mrs B's 999 call alleging assault by B, and of evidence from the police officer's body worn video of her repeating the allegation, and showing her distress and an injury. Some months later, Mrs B wrote a letter retracting her complaint and giving an alternative explanation of events. The prosecution had never taken a statement from Mrs B and did not seek to rely on her as a witness at trial, considering that any evidence she would give would be unworthy of belief. The district judge, having invited the prosecution to take a statement from Mrs B, declined to deal with the issue on an application to exclude the

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res gestae evidence under Police and Criminal Evidence Act 1984 s.78, but stayed proceedings on the basis that B could not have a fair trial. (The district judge also took account of a disclosure failure, which was also to be rejected by the court.)
Held, allowing the appeal,

(1) The starting point was that the prosecution was only obliged to call those witnesses whose statements have been served as witnesses on whom the prosecution intended to rely. The prosecution was not obliged to call a witness where it was anticipated, with good reason, that their evidence would be untruthful. Where the witness's evidence was capable of belief, it was the prosecutor's duty to call the witness even though their evidence may be inconsistent with the prosecution case: *Oliva* [1965] 1 W.L.R. 1028 CCA at 1035H. The prosecution has a wide discretion however in deciding whether or not a witness was capable of belief. On the facts, it was not unfair for the prosecution to decline the district judge's invitation to take a witness statement from Mrs B. No prejudice could conceivably have been caused to B if she had been called by the defence (or by the court). She was not a witness who would have been called "blind", as the letter identified what her evidence was likely to be. Mrs B had made it clear that the only evidence she would give would be in support of her husband. There was no basis for concluding that the prosecution was obliged to take a statement from her, or for inferring it had manipulated the process, or was guilty of malpractice, because it refused to do so. The prosecution stance was not improper and did not prevent B having a fair trial. Whether the inability to cross-examine a witness placed the defence at a disadvantage, and was contrary to the interests of justice, was always a fact-sensitive issue: *Haringey Justices Ex p. DPP* [1996] Q.B. 351 (QBD) (a case in which the form of questioning required in respect of police witnesses was cross-examination—see also *Wellingborough Justices Ex p. Francois* (1994) 158 J.P. 813 (QBD)). There was no basis in B's case for concluding that the defence would have been placed at an illegitimate disadvantage if they could only ask non-leading questions of B. It would have been consistent with the general rule of practice that a witness was to be called by the party who wished to adduce their evidence for the defence to call Mrs B, given the evidence it was anticipated she would give, and for the prosecution to have cross-examined her. It could not be a valid objection that this would have been unfair simply because it might have undermined her evidence in support of B. Finally, the district judge might have called Mrs B himself. It was apparent that from the case stated that this possibility was not mentioned below; however, the district judge relied on *Russell-Jones* [1995] 1 Cr. App. R. 538 CA, which referred to the possibility (at 543F, citing *Oliva* [1965] 1 W.L.R. 1028 CCA). If, contrary to the court's finding, there had been some unfairness in the prosecution not calling Mrs B, *Haringey* established that it was not open to the district judge to take the exceptional course of staying the proceedings. Instead, any unfairness could have been cured by the district judge calling the witness, giving both parties the opportunity to cross-examine.

(2) B argued that had the district judge dealt with the issue as an application under s.78, he would have inevitably excluded the evidence. B argued that there was a general principle that, apart from a case where the witness was in fear, a defendant would not receive a fair trial where the prosecution was relying on the complainant's res gestae evidence, unless the prosecution either called or tendered the witness. The issue did not arise, but the court, having received argument, concluded that there was no such principle. The dicta of Lord Ackner in *Andrews (D)* [1987] A.C. 281 HL at 302D, deprecating attempts to use res gestae to avoid calling a witness, were made on the basis of a completely different factual basis; the conditional reference in *Attorney General's Reference (No.1 of 2003)* [2003] EWCA Crim 1286; [2003] 2 Cr. App. R. 29 to the possibility of exclusion of res gestae evidence under s.78 did not indicate that allowing res gestae would always be unfair; and it was no part of the ratio of *Barnaby v DPP* [2015] EWHC 232 (Admin); [2015] 2 Cr. App. R. 4 that a court was always obliged to exclude res gestae evidence if the available declarant was not in fear of giving evidence and the prosecution did not propose to call her as one of its witnesses. On the contrary, in the sensitive and specific context of domestic abuse, it would often not be unfair to allow the prosecution to adduce the res gestae evidence of a complainant where they were not called as a witness, and there was an absence of fear. As was now well understood, it was not uncommon in such cases for there to be sufficient evidence to prosecute the alleged perpetrator of the abuse even where the complainant did not want to support the prosecution. In such cases, the public interest may often demand the use of res gestae evidence, particularly recorded evidence, regardless of the cooperation of the complainant: the court referred to *C* [2007] EWCA Crim 3463; *McGuinness v Northern Ireland Public Prosecution Service* [2017] NICA 30; and *Sinfield* [2021] EWCA Crim 1227.

Non-attendance of prosecution counsel—whether abuse of process—Crown Court ability to manage shortage of counsel—approaches to management by Crown Court
NG [2024] EWCA Crim 493
9 May 2024

The judge stayed proceedings as an abuse of process on the application of N and his co-accused when, after what the judge thought were three previous adjournments because no counsel or advocate was available to prosecute the case, a further adjournment was requested. The judge had adverted to the regularity of trials not going ahead for similar reasons and the current backlog, and concluded that unless and until a judge was willing to declare the situation unacceptable the situation in which trials regularly failed as a result of the fault of the state would not be remedied. To allow the prosecution to continue offended the judge's sense of justice and propriety, and condoning the circumstances would undermine public confidence in the criminal justice system. The prosecution sought to leave to appeal the ruling.
Held, allowing the prosecution's appeal,

(1) The court sympathised with the judge's understandable frustration at the non-attendance of prosecuting counsel. The current pressures to reduce the backlog of cases and delays in the Crown Court were immense. Judges were working day in and day out to alleviate the problems, not least through pro-active case management and long working hours, both in and out of court. However, as a matter of principle there was no prosecutorial conduct in the case that could justify a stay under the second limb of the abuse of process jurisdiction,

which the judge had purported to apply. The court also noted that the judge's characterisation of the procedural history of the case was inaccurate.

(2) But to hold that the failure of the CPS to field a prosecutor was not capable of amounting to an abuse of process was not to accept that the court was powerless. The court retained the ability to manage proceedings but must do so in the interests of justice. The shortage of advocates to conduct criminal work in the Crown Court was not a problem which the court could solve. It was for the professions to recruit, train and retain members and it was for the executive, and other agencies, to ensure that the need for Crown Court advocacy were met. In the meantime, the court must manage its work so that the system functioned in the best way possible. The court identified the following ways in which that might be achieved.

(3) Listing, case management and remote access: listing was a judicial function. The court drew attention to the listing advice published by the Senior Presiding Judge in January 2023, specifically para.6, which expressed concern at the use of long, particularly two-week, warned lists, and suggested they only be used in smaller court centres. The court noted that it was not necessary that all cases were given fixed dates at PTPH, except in very serious cases. There were listing systems in which cases were allocated at PTPH to a particular week, but then given a fixed date two or three weeks before that week. If a date could be fixed in consultation with clerks in this way, the chances that advocates would be able to attend or return the case elsewhere would be higher. If there was a significant risk that the advocate would not be available, there should be prompt communication with the court and with those instructing. The courts also had a role to play in ensuring that lists were drawn up with the interests of advocates in mind, particularly given the current shortage of advocates, while acknowledging that they could not always be the determining factor. At whatever stage a date was given for a trial everyone concerned must operate on the basis that that was when the trial would be, and all parties must give the court timely information of any threat to it (the court referred to Crim PR 3.3, para.(2) (d)). Courts should also ensure that local practices were aligned with the LCJ's guidance on remote hearings. More consistent practices across the courts would enable the available counsel to be more efficiently used and increase the productivity of advocates. PTPH, trial and sentencing should generally be in person, but a great deal of other work could be done remotely.

(4) Options when counsel was absent: a PTPH or sentencing case could, in appropriate cases, proceed without the prosecution. If defence counsel was absent then obviously a PTPH or trial could not proceed. If the court has full information about a defendant and was proposing to impose a non-custodial sentence it may be possible to sentence in the absence of a defence advocate (while observing Sentencing Code s.226 on custodial sentences on unrepresented persons).

(5) The power of the court when the prosecution was not represented at trial: Where a trial could not proceed because of the absence of prosecuting counsel the court may often have no choice but to re-fix it. It was strongly in the public interest that criminal proceedings should reach a conclusion on the merits. The court should prevent that from happening only as a last resort, and only when the interests of justice, properly balanced, required that outcome. There was a route by which a judge could terminate proceedings in which the prosecution were not represented at trial by an advocate. There would usually be some form of application for an adjournment, and even if one had not been articulated, the absence of an advocate would require the court to consider whether to adjourn. In so doing, the court was required to consider the interests of justice and to deal with the case justly in the sense in Crim PR 1. Each limb of Crim PR 1.1 would need to be considered, including the public interest in criminal allegations being decided, the seriousness of the case and prejudice to the defendant. The interests of witnesses and complainants and any impact on public safety would be taken into account. In most cases an adjournment would be the right answer. The more serious the case was, the more likely this was to be true—failure to attend by advocates in the most serious cases should be rare and usually explicable by things like sudden illness rather than double booking. It was almost inconceivable that such cases would be terminated by the refusal of an adjournment because there was no prosecution advocate. A refusal to adjourn would also involve the entry of a verdict of not guilty under Criminal Justice Act 1967 s.17. Where the prosecution required an adjournment because it could not prosecute the case unless one were granted, there was an implied proposal to offer no evidence if that adjournment was refused. There were some instances in past cases where s.17 has been considered in broadly similar circumstances: see *Clarke* [2007] EWCA Crim 2532; [2008] 1 Cr. App. R. 33; *B* [2014] EWCA Crim 2078; and *Buttigieg* [2015] EWCA Crim 837; [2016] 1 Cr. App. R. 18. These authorities were supportive of this approach, not inconsistent with it.

(6) When refusing an adjournment in circumstances where that would be terminating, the court must take steps to ensure that the prosecution was able to consider an appeal to the Court of Appeal. Fairness required that, in such circumstances, the refusal should be communicated to the prosecution in such a way that it could give notice of its intention to appeal immediately after the ruling, or to seek an adjournment to allow it to consider doing so (Crim PR 38.2). If the prosecution did not give such notice (and the acquittal undertaking), that would be the moment for the court to enter not guilty verdicts under s.17.

Causing or allowing serious physical harm to a child—Domestic Violence, Crime and Victims Act 2004 s.5—"significant risk of serious physical harm"—whether pre-existing significant risk required where D was the person causing death or serious physical harm constituting the offence—observations in respect of s.5(2)

ATT [2024] EWCA Crim 460
18 April 2024

A was the mother and her co-defendant B was the father of their baby, H (three months old at the relevant time). On arrival at hospital following a call by another person, H was found to have various relatively minor marks or injuries, and catastrophic brain bleeding, probably caused by severe shaking. At their trial (four years later) for causing or allowing serious physical harm to a child, contrary to Domestic Violence, Crime and Victims Act 2004 s.5, the judge allowed submissions of no case to answer by both defendants, on the basis that the evidence was not such as to allow a reasonable jury

to conclude that there was a risk of serious injury to H before the point at which the trauma giving rise to the brain injury occurred, and that was what s.5(1)(c) ("at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person") required. The prosecution appealed and argued that the significant risk of serious physical harm did not have to be a pre-existing risk if the defendant was the person who caused the serious physical harm that constituted the offence.

Held, dismissing the prosecution's appeal,

(1) The offence had previously applied only to the death of V (before amendment by Domestic Violence, Crime and Victims (Amendment) Act 2012), and it was clear that, at that time, the significant risk must have existed before the death. The offence was intended to capture both those who caused death and those who allowed death by failing to take steps to protect V, having actual or constructive knowledge of the risk of substantial injury (i.e. s.5(1)(d)(i) and (ii), which proceeded by reference back to s.5(1)(c)). Since the prosecution did not have to prove that D was the person killing V or the person not protecting them (s.5(2)), it was clear (then) that the meaning of s.5(1)(c) could not change depending on the role of D. The court noted that the explanatory notes to both the original s.5 and that amended in 2012 stated that the offence would not apply in the absence of a previous history of abuse or reason to suspect a risk of serious physical harm, and that the risk would be likely to be demonstrated by a history of violence. Section 5(1) was only amended so as to add serious physical harm to V. No other changes were made to the substance of the section. The meaning of s.5(1)(c) did not alter. Its proper interpretation remained the same. Each element had to be proved whether the allegation was causing or allowing a death or causing or allowing serious physical harm.

(2) The prosecution relied on passages in *Blackstone's Criminal Practice 2024*, at B1.102 and B1.93. To the extent that those stated that the significant risk of serious physical harm could arise from the unlawful act constituting the offence, they were wrong.

(3) The provision which might be thought to create a challenge for the prosecution, and a jury, was s.5(2). The provision was a function of the purpose of the legislation, introduced to cater for situations where someone (usually a very young child) had been unlawfully killed or seriously injured and the two adults in the house were silent or blamed each other. The prosecution was not required to prove who killed or seriously injured the victim. Were it otherwise, the purpose of the legislation would be frustrated. The prosecution could present the case on the basis that someone must have unlawfully killed the victim, that it had to have been one of the two adults and that the adult not directly responsible for the killing allowed it. Whether the jury would be in a position to identify the person who caused the death or the serious injury would depend on the evidence, but it would not matter if the evidence did not permit them to do so.

(4) The judge had been entitled to come to the conclusion that there was no pre-existing significant risk of serious physical harm on the evidence.

(5) *Ikram* [2008] EWCA Crim 586; [2009] 1 W.L.R. 1419; *Bollom* [2003] EWCA Crim 2846; [2004] 2 Cr. App. R. 6; and *Stephens* [2007] EWCA Crim 1249; [2007] 2 Cr. App. R. 26 considered.

SENTENCING CASE

Sentencing—administrative amendment

LEITCH [2024] EWCA Crim 563

22 MAY 2024

The six cases had been listed together to allow the court to consider issues relating to administrative amendment of a sentence pronounced in court. This note sets out the general principles set out by the court. The individual appeals are considered at [17] to [167] of the judgment.

Held, that the sentence imposed on a defendant in the Crown Court is the sentence pronounced in open court. If there is a discrepancy between what appears from the transcript of the proceedings and the order recorded by the Crown Court, the former takes precedence.

(1) The statutory power to alter a sentence or order is contained in s.385 of the Sentencing Code. Rule 28.4 of the Criminal Procedure Rules 2020 sets out the current procedural regime governing the exercise of the power. It may be exercised on application by the prosecution or the defence in which event the application must be in writing and must be served both on the court and on all other parties. It may also be exercised by the court acting of its own motion. The power may be exercised at a hearing in public or a private hearing or without a hearing at all. The judge may not exercise the power in the defendant's absence unless the defence have proposed the variation, or the variation will not lead to the defendant being more severely dealt with than before, or the defendant has had an opportunity to make representations at a hearing. Whatever the decision is and howsoever it is made, it must be announced at a hearing in public along with the reasons for the decision. Although the decision must be made by the judge who imposed the original sentence, it may be announced by another judge. This provision is directed particularly at instances of a fee-paid judge altering their sentence.

(2) The procedure mandated by the Criminal Procedure Rules has been designed to allow the court and the parties to discuss potential alteration of sentence after the hearing other than in open court. After the day of the hearing, such discussion is likely to be by email or some other digital means. When the alteration is limited or technical in nature and it is non-controversial, the hearing will not require the attendance of any party. The announcement of the varied sentence in court at a public hearing will ensure the lawfulness of the sentence.

(3) There will be instances where there is some controversy involved in the proposed alteration of the sentence, such as where the altered sentence will lead to the defendant being dealt with more severely than before. A sentence may be made more onerous via an exercise of the statutory power.

(4) The statutory power in s.385 of the Sentencing Code can only be exercised within 56 days of the imposition of the sentence, counting the day of sentence. This period

cannot be extended. If an error in the sentencing process is identified after that time, the sentence may only be varied by the Court of Appeal. Any such variation cannot involve the offender being dealt with more severely than the sentence pronounced in the Crown Court (s.11(3) Criminal Appeal Act 1968). Where an application for leave to appeal is necessary but it appears to the Registrar that all that is sought is a technical adjustment to a sentence, there does not need to be a full appeal hearing. The Registrar will refer the case to the full court, and the decision will be made in open court by reference to the papers with no representation order.

(5) There is a residual common law power which can be exercised outside s.385 of the Sentencing Code. The common law power is not subject to the time limit of 56 days. This power is very limited, being restricted to correcting the court record so that it corresponds to the sentence pronounced in court.

(6) Failing to announce an alteration of a sentence in open court will mean that the alteration is of no effect and the sentence remains as originally pronounced. That may mean that an offender's sentence ought to be more onerous than as originally pronounced but that nothing can be done to remedy the position, creating injustice.

Feature

How to prosecute a spy: the National Security Act 2023 in context

Barnaby Jameson KC and Theo Burges[1]

London, 1909. According to the posters ("Don't Talk, Spies Are Listening"), German spies are everywhere. Paranoia leads to the creation of the Secret Service Bureau with a staff of just two: a Royal Navy commander, Mansfield Cumming, and an army captain, Vernon Kell. The Bureau would later divide into MI5 and MI6, with Kell, a multilinguist, heading MI5 and Mansfield Cumming (who spoke only English!) heading the global MI6. By 1911 the Anglo-German naval arms race is in full swing and the Official Secrets Act 1911 receives Royal Assent. Within three years, Britain and Germany are at war. MI5 already had such an accurate picture of German spy rings operating in the United Kingdom that Kell was able to wrap up most of the network within the first 24 hours of the declaration of war. It led to the arrest of 22 German spies.

Espionage since WWI has changed dramatically, though it retains its fascination. Headlines are blazing with stories about alleged spies from the dramatic escape of Daniel Khalife and the activities of Christine Lee and Chris Cash in Parliament to the arrest of an alleged Bulgarian spy ring working on behalf of Russian Intelligence.[2] Spies are again, it seems, everywhere. MI5 retains its remit for counter-espionage, but what current legal tools does it have at its disposal and how are they changing?

In short, fundamentally. The National Security Act 2023 represents a once-in-a-generation legislative development with far-reaching consequences. To assess the impact of the new legislation, this article will look at the development of espionage legislation from the Official Secrets Act 1911 via successive Acts to the reform of the existing framework under the National Security Act 2023 (NSA 2023). The legislative tour will take in the Security Service Act 1989 (SSA 1989) which put MI5 onto a statutory footing for the first time following the "Spycatcher" scandal, discussed below. As for the NSA 2023, this article will examine new offences that the 2023 Act brings into force to deal with "hostile activity" previously outside the scope of existing legislation.

The impact of the NSA 2023 is already evident; Dylan Earl and Jake Reeves have been charged under the Act.[3] Mr Earl is accused of conduct that would benefit Russia and of endangering life or creating a serious risk to the safety of the public and acting for the Wagner Group. Mr Reeves is accused of obtaining a material benefit from a foreign intelligence service. Even more recently, we have seen three men charged with agreeing to undertake information gathering, surveillance and acts of deception that were likely to materially assist the Hong Kong intelligence service.[4]

Why was there a need for such an expansive change to espionage law? After all, there was extensive legislation already in place: the Official Secrets Act of 1889, 1911, 1920, 1939, 1989 and the SSA of 1989. This might seem ample. However, the Intelligence and Security Committee argued[5] in 2020 that:

> "…the Official Secrets Act regime is not fit for purpose and the longer this goes unrectified, the longer the security and intelligence community's hands are tied. It is essential that there is a clear commitment to bring forward new legislation to replace it."

To understand the position of the Intelligence and Security Committee, it's worth defining what the Official Secrets Act regime provided in terms of the means with which MI5 could limit hostile espionage activity on UK soil.

The Official Secrets Act regime

The first Official Secrets Act was Victorian. The Official Secrets Act 1889 (OSA 1889) emerged in response to un-

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2 Daniel Khalife has, at the time of writing, pleaded Not Guilty. Christine Lee is yet to be charged.

3 Fiona Hamilton and Ali Mitib, "Two Britons charged with helping Russian intelligence" (26 April 2024), *The Times*, *https://www.thetimes.co.uk/article/wagner-group-operative-charged-under-new-uk-security-law-lczmkj59q*.

4 Ruth Comerford, "Three charged with aiding Hong Kong intelligence service" (13 May 2024), *BBC News*, *https://www.bbc.co.uk/news/uk-67977207*.

5 National Security Bill Explanatory Notes.

authorised leaks of governmental information. Primarily, it looked to manage the divulgence of military and naval secrets which was happening with worrying regularity. Notably, the OSA 1889 exclusively applied to Crown Servants and government contractors, a distinction from its 1911 successor. An offence occurred only when it could be proved that information had been shared with an unauthorised party, contrary to the public interest. Widely perceived—even at the time—as flawed and operationally challenging within governmental circles, the OSA 1889 faced criticism for its shortcomings. Attempts to refine and strengthen this legislation ensued in 1896 and 1908, yet these proved unsuccessful.

The perceived limitations of the Official Secrets Act of 1889 prompted the drafting of a new Official Secrets Bill in 1909. Heightened worries about the naval arms race with Germany led the government to prioritise the exclusion of spies from British dockyards. Despite this urgency, it took nearly two years for the Bill to be introduced in Parliament, indicating that it was not until public concern over German espionage had reached a fever pitch that the measure was proposed.

The Official Secrets Act 1911 (OSA 1911) was therefore enacted to manage the challenges that hostile espionage presented. To understand the changes made by the NSA 2023, the key provisions need to be appreciated. Crucially, s.1 OSA 1911 meant that the prosecution simply had to show that the actions of the defendant were prejudicial to national security, not that the purpose of their actions was prejudicial.[6] By virtue of s.1 OSA 1911 (penalties for spying), there were three primary offences (now all repealed by the NSA 2023):

Section 1 OSA 1911: penalties for spying

(1) Approaching, entering, inspecting, passing over or being in the neighbourhood of any prohibited place.

(2) Making any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

(3) Obtaining, collecting, recording, publishing or communicating to any other person any secret official code word, password, any sketch, plan, model, article, note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

The difficulties with s.1 OSA 1911 are plain. First, it envisages a clear "enemy" yet leaves the term undefined. In *Parrott*,[7] Phillimore J stated (at 192):

> "When the statute uses the word 'enemy' it does not mean necessarily someone with whom this country is at war, but a potential enemy with whom we might someday be at war."

Whilst this might assist in narrowing down some cases today—perhaps most clearly those involving Russia or Iran—wrangling over whether China constitutes a current threat[8] highlights the problem with the term "enemy". If an individual passed intelligence to China, would that fulfil the "enemy" element of the offence? Prosecuting authorities would be loath, for obvious reasons, to have to substantiate their arguments regarding a potential "enemy" if it required the disclosure of classified documents, sources or tradecraft. Understandably, many intelligence organisations would rather forgo prosecution than reveal their sources. As a result, the term "enemy" was problematic.

Second, terms such as "sketch, plan, model, or note" are clearly outdated. Does a photo or electronic data fall within these definitions? One can easily imagine the legal arguments going back and forth on either side. This again highlights the key issue, that intelligence organisations are reluctant to reveal their sources. Consequently, evidence that prosecuting authorities are willing to use in national security cases is limited. As a result, it was rare to see a suspect charged under s.1 OSA 1911.

Originally, s.2 OSA 1911 made it an offence for any individual to communicate official information without authorisation. It was later described as a "catch all" section[9] and the *Franks Report*, published in 1972, considered that the section caught all Crown servants as well as all official information. Due to its exceptionally wide scope, s.2 OSA 1911 was eventually repealed and replaced by the OSA 1989.

Finally, s.7 OSA 1911 (penalty for harbouring spies) is also of note. Again, it indicates the *type* of espionage that concerned the State. Section 7 OSA 1911 made it an offence for anyone to knowingly harbour:

> "…any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under this Act."

One can imagine individuals covertly meeting in a smog-filled London in 1911 against the background of an international dreadnought arms race. However, now, s.7 OSA 1911 seems almost quaint in the 21st century where spies more often meet on LinkedIn[10] than in person. However, the most interesting aspect of s.7 OSA 1911 is the preparatory element, as the section applies to individuals who are "about to commit" an offence. Section 7 OSA 1911 therefore planted the seed that eventually germinated in the form of s.18 NSA 2023—Preparatory Conduct—and reflects the ambition of Parliament to limit the threat of espionage before it actualises.

The Official Secrets Act 1920

The OSA 1920 enacted various minor updates to the OSA 1911, most of which are outside the scope of this article. Of interest though is s.1 OSA 1920, which made it an offence to falsify reports or impersonate an individual to gain access to a prohibited place. Also, s.6 OSA 1920 made it an offence to not give information to a police officer above the rank of inspector, if the officer suspected that *any* offence under s.1 OSA 1911 was being/had been committed. Whilst these two provisions are interesting, the OSA 1920 was hardly ground-breaking.

The Official Secrets Act 1939

The OSA 1939 is the least important iteration of the OSAs and was enacted due to the Sandys Affair. The Sandys Af-

6 Gail Bartlett and Michael Everett, *The Official Secrets Acts and Official Secrecy* (May 2017), House of Commons Library.

7 *Parrott* (1913) 8 Cr. App. R. 186 CA.

8 Jasmine Andersson, "Truss urges Sunak to class China as 'threat' to UK security" (May 2023), *BBC News*, *https://www.bbc.co.uk/news/uk-politics-65617948*.

9 Bartlett and Everett, *The Official Secrets Acts and Official Secrecy* (May 2017), House of Commons Library.

10 Gordon Corera, "MI5 warns of spies using LinkedIn to trick staff into spilling secrets" (April 2021), *BBC News*, *https://www.bbc.co.uk/news/technology-56812746*.

fair is a largely forgotten episode in British political history. Duncan Sandys was the Conservative MP for Norwood in 1937 and held a commission in the 51st (London) Anti-Aircraft Brigade, Royal Artillery, of the Territorial Army whilst working as an MP. His experience in the 51st Anti-Aircraft Brigade led him to ask questions in Parliament about the state of anti-aircraft batteries, disclosing matters of national security in the process. He reported that he was later approached by two unidentified individuals and was threatened with prosecution under s.6 of the OSA 1920, despite parliamentary privilege. Sandys referred the matter to the Commons Privileges Committee which confirmed that parliamentary privilege held, even in circumstances involving national security. As a result of the Sandys affair, Parliament enacted the OSA 1939 which limited the scope of s.6 OSA 1920 only to operate where there was suspicion of a s.1 OSA 1911 offence being committed.

The Security Service Act 1989

Finally, the Security Service Act 1989 (SSA 1989) was introduced in the wake of the "Spycatcher" Scandal, when Peter Wright, a former MI5 officer and Assistant Director, wrote widely of his clandestine experiences. It caused a national security crisis which led the then government to apply to block publication in England. However, it was published in Scotland and Australia. The court cases earned Wright significant coverage, increasing his earnings substantially. The SSA 1989 repealed the "catch-all" s.2 OSA 1911. In its place were six categories of official information which were subject to criminal sanctions if disclosed. It also removed the public interest defence that was detailed in s.2 OSA 1911. In essence, the SSA 1989 focused on ensuring that the State had the legal means to pursue those from the military and security services who leaked sensitive information.

The SSA 1989 created numerous offences that reflect MI5's legislatively defined functions, representing the first substantive attempt since 1911 by Parliament to legislate against the threat of espionage. Section 1(2) SSA 1989 defines MI5's functions as:

> "…the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means."

From the above, we can identify five key threats that MI5 is to protect against: espionage, terrorism, sabotage, the activities of agents of foreign powers and, finally, actions intended to overthrow or undermine parliamentary democracy.

Espionage under the NSA 2023

The NSA 2023 presents a step-change in MI5's ability to manage the threat of espionage in line with its legislatively defined function. The NSA 2023 has repealed the OSA 1911, 1920 and 1939 but not the OSA 1989. The Act creates three primary offences relating directly to espionage:

(1) Section 1: obtaining or disclosing protected information.
(2) Section 2: obtaining or disclosing trade secrets.
(3) Section 3: assisting a foreign intelligence service.

Sections 1 and 2 NSA 2023 are relatively straightforward. Section 1 concerns information that could be considered to protect the safety or interests of the UK and s.2 relates to trade secrets, which is defined as information not generally known to experts in the field and has commercial value. Whilst obtaining or disclosing protected government information was largely covered by s.1 OSA 1911, s.2 NSA 2023 broadens the scope of information considered to be sensitive. In this respect, s.2 takes account of the changing nature of the interaction between the State, academia and private enterprise. In today's world, dual-use technologies from microchips to AI can cross from civilian to military use in the blink of an eye. As such, protecting trade secrets is no longer simply a matter of protecting share prices, it is also a matter of protecting national security. Although trade secrets have been considered sensitive information for many years, the OSA 1911 did not provide MI5 with the means to protect them, despite the growing threat. Indeed, the threat to the UK is only growing:

> "MI5 is aware of more than 20 cases where Chinese companies have pursued 'obfuscated investment, imaginative company structures and/or circumvention of regulations' to gain access to sensitive technology developed by UK companies and universities."[11]

In summary, s.2 NSA 2023, together with the recently enacted National Security and Investment Act 2021, provide a comprehensive package of measures to limit espionage and protect UK intellectual property. In this respect, s.2 NSA 2023 is a major development in espionage law.

Of key importance for both ss.1 and 2 is a new condition termed the "foreign power condition", set out below:

Section 31 NSA 2023: the foreign power condition

> "(1) For the purposes of this Part the foreign power condition is met in relation to a person's conduct if—
>
> (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."

The foreign power condition is one of the major innovations of the NSA 2023. Gone are the ill-defined references to "enemy", discussed above, from s.1 OSA 1911. In its place, s.32 defines what constitutes a foreign power, on the face of it a low bar to meet. In essence, to qualify as a "foreign power", all that is necessary is that the body in question exercises some form of power as part of, or on behalf of, a foreign government. The government can be any foreign state. It is clear then, that the recent cases involving those acting on behalf of China, Russia and Iran appear to fall within the ambit of the foreign power condition. This is a substantial change from the OSA 1911 "enemy" prerequisite. Where previously one might have been able to justify Iran and Russia as enemies (although this would by no means be guaranteed), one would perhaps struggle to justify that China was an "enemy" given that it has not even been designated as a threat.[12] The foreign power condition is therefore a major advance in the arsenal of prosecuting authorities to target both

11 Fiona Hamilton, "China targets 20,000 officials in economic espionage surge" (18 October 2023), *The Times*, *https://www.thetimes.com/business-money/technology/article/china-targets-20-000-officials-in-economic-espionage-surge-hrncc2xkz*.

12 Jill Lawless, "UK resists calls to label China a threat following claims a Beijing spy worked in Parliament" (11 September 2023), *AP News*, *https://apnews.com/article/uk-china-spying-allegations-b0dc857b2903c93872558fab130d5fe0*.

the more obvious threats such as Russia and Iran and the more amorphous threats, particularly China. It is perhaps easy to see how Chris Cash, Christine Lee, Daniel Khalife and the Bulgarian spy ring fit into the "foreign power" condition. However, it is worth bearing in mind that Christine Lee has not been charged and is in fact taking legal action against MI5, and the other individuals all deny the charges against them.

Section 3 NSA 2023: assisting a foreign intelligence service

Finally, Parliament has sought to create a catch-all offence enabling MI5 to pursue "activity of concern" by virtue of s.3 NSA 2023. This section does not require information to be passed or obtained. Instead, it merely requires that an individual engages in conduct of any kind and intends that conduct to assist a foreign intelligence service. This section therefore covers a broad range of activity and whilst there is no need to fulfil the foreign power condition, there is also no need to identify the foreign intelligence service in question—a significant difference to ss.1 and 2 of the NSA 2023. It therefore seems that s.3 acts as a fallback offence, where there is evidence of engagement with a foreign intelligence service, but the exact nature of that engagement is not immediately obvious. In summary, ss.1 to 3 of the NSA 2023 have built upon ss.1(1)(b) and 1(1)(c) OSA 1911, and significantly broaden the scope of information and conduct considered.

A prohibited place

Sections 4 and 5 NSA 2023 mirror the provisions of s.1(1)(a) OSA 1911. However, there have been some significant updates detailed as follows.

Section 4 NSA 2023: entering etc a prohibited place for a purpose prejudicial to the UK

A person commits an offence under s.4 if they, or an unmanned vehicle under their control, accesses, enters, inspects, passes over or under, approaches, or is in the vicinity of a prohibited place with the intent to engage in conduct they either know, or reasonably ought to know, is detrimental to the safety or interests of the UK.

Section 5 NSA 2023: unauthorised entry etc to a prohibited place

Under s.5, an offence is committed when a person, or an unmanned vehicle under their control, accesses, enters, inspects, passes over or under, approaches, or is found in the vicinity of a prohibited place, and their conduct is unauthorised. The person must either know or reasonably ought to know that their conduct is unauthorised.

In contrast to s.1 OSA 1911, "entry", under the NSA 2023, now includes access via unmanned vehicles, perhaps the clearest signal of a change in the concept of access to prohibited places, reflecting the modernisation that the NSA 2023 brings. Interestingly, ss.4(3) and 5(4) NSA 2023 make specific mention of access to a prohibited place being made via electronic or remote means. This is clearly aimed at hostile states such as Russia, Iran and China who have large, sophisticated cyber capabilities. However, whilst ss.4 and 5 make remote access illegal, how the individuals would be brought to justice given that cyber activities often emanate from another state is an interesting question, which will no doubt be explored in future cases.

There has also been a substantial change to the definition of prohibited places. Section 3 of the old OSA 1911 defined 36 prohibited places, including railways, minefields and other installations. However, this was an inflexible approach that limited the operation of s.3 OSA 1911 largely to times of war and fixed installations, meaning that the definition of prohibited places could not change with the times, without amendment to the original Act. To remedy this, s.7 NSA 2023 has redefined prohibited places as essentially anywhere that is used for defence or intelligence purposes, including bases abroad and those of allies. This is a wider and simpler definition than s.1(1)(a) OSA 1911 and lowers the hurdle to secure a conviction for either s.4 or 5 NSA 2023.

It is worth bearing in mind that given the above, these provisions are not—on the face of it—meant to deter the acts of individuals such as Christine Lee or Chris Cash (as alleged), because a prohibited place applies to defence and intelligence installations and not, for example, to Parliament. Instead, these sections are aimed more at the likes of Daniel Khalife, who allegedly planted fake explosives at army bases. More broadly they, once again, are aimed at creating a more flexible, comprehensive legislative regime with regard to espionage law.

Terrorism

Given the relative plethora of terrorism legislation that already exists, the NSA 2023 makes relatively minor amendments to existing Acts, focusing on amending police powers in relation to arrest, seizure of material and the role of legal aid funding. The NSA 2023 recognises that MI5 already has existing legislative means at its disposal to manage terrorist threats.

Sabotage

Section 12 NSA 2023: sabotage

The NSA 2023 introduces a completely new offence in s.12, namely sabotage, which was not previously covered in any of the iterations of the OSA. An offence is committed under s.12 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 damage to any asset. The person must have intended to cause damage or acted recklessly regarding potential damage, and the foreign power condition—detailed above—must be met (i.e. that the individual's conduct is carried out on behalf of a foreign power).

Damage can range from "destruction" to mere "alteration" as per s.12(3)(a)–(f). In addition, an asset, as defined under s.12(3), can be both intangible or tangible and therefore includes installations such as power stations all the way to intangible assets such as electronic data. This would potentially include data stored remotely.

Arguably, s.12 goes the furthest in filling the legislative gap that existed under the OSA 1911. Prior to the NSA 2023, although the prevention of sabotage was a key function of MI5, there was no espionage-related statute that gave the organisation the power to fulfil this function. Now, however, s.12 clearly enables prosecut-

ing authorities to consider potential acts, such as those allegedly committed by Daniel Khalife, in the context of espionage. In this respect, whilst criminal damage would amply cover the type of behaviour above, the importance of s.12 is the addition of the foreign power condition, which links the conduct concerned so clearly to matters of espionage, marking a major point of innovation under the NSA 2023.

Section 18 NSA 2023: preparatory conduct

One of the most interesting elements of the NSA 2023 is s.18. This makes it an offence for an individual to intend to commit an offence under ss.1, 2, 4 or 12 NSA 2023. This, in and of itself though, is not particularly revolutionary. Indeed, s.7 OSA 1920 essentially implemented this, making it an offence to intend to commit an offence under s.1 OSA 1911. However, what is interesting is the addition of s.18(4), which means that the preparation of certain actions (not offences) will be an offence under s.18 if the foreign power condition can be met. Preparation for the following actions qualify:

(1) actions involving serious violence against a person in the UK;
(2) actions that endanger the life of a person in the UK; or
(3) actions creating a serious risk to the health or safety of the public, or a section of the public, in the UK.

Section 18(4) seems to have been specifically designed to deal with incidents such as the Salisbury poisoning, where Russian agents attempted to poison Sergei Skripal and his daughter, Yulia. An unintended victim, Dawn Sturgess, died.13 We can see therefore, that the NSA 2023 is alive to the reality that 21st century espionage applies well beyond the bounds of what the OSA 1911 considered to be the threat of espionage. Once again, we can see the influence of s.1(2) SSA 1989, in defining the scope of NSA 2023.

Interestingly, it seems possible that the "umbrella" s.5 of the Terrorism Act 2006 (TA 2006) has influenced the development of s.18 NSA 2023. Section 5 TA 2006 states that:

> **"Section 5 Preparation of terrorist acts**
>
> (1) A person commits an offence if, with the intention of—
>
> (a) committing acts of terrorism, or
>
> (b) assisting another to commit such acts,
>
> he engages in any conduct in preparation for giving effect to his intention.
>
> (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally."

Whilst s.18 NSA 2023 is more limited in scope than s.5 TA 2006—primarily in that it limits preparation to ss.1, 2, 4 or 12—both sections clearly focus on limiting harm before it becomes actualised, and s.18 has plainly borrowed from s.5 TA 2006. However, in contrast to s.5 TA 2006, s.18 NSA 2023 expands preparation to include actions that are not directly related to espionage. Interestingly, s.5 TA 2006 and s.18 NSA 2023 could potentially both cater for a single threat. Consider the example of Daniel Khalife who is accused of planting fake explosives at army bases. These actions would clearly fall under s.5 TA 2006 as well as s.18 NSA 2023. It is therefore possible that, in a similar future case, s.18 NSA 2023 and s.5 TA 2006 could apply together or in the alternative. Section 18 NSA 2023 is a fascinating development in linking the hydra-headed threats of espionage and terrorism together, ensuring that prosecuting authorities have myriad means with which to tackle complex threats.

13 Gordon Corera, "Salisbury poisonings: Third man faces charges for Novichok attack" (21 September 2021), *BBC News*, *https://www.bbc.co.uk/news/uk-58635137*.

Activities of agents of foreign powers

Section 65 NSA 2023: requirement to register foreign activity arrangements

A new provision has been introduced in accordance with s.65 of the NSA 2023, mandating the registration of foreign activity arrangements. While this section falls beyond the scope of this article, in brief, the system establishes a dual-tier structure. The first tier, referred to as the "political tier", necessitates individuals to register "foreign influence arrangements" if they intend to engage in political influence activities directed by a foreign power. The second tier pertains to "designated individuals" who pose potential risks to the safety and interests of the UK. The Secretary of State holds the authority to designate these individuals through regulations, subject to approval by Parliament. This framework primarily targets individuals such as Christine Lee, who allegedly acted on behalf of another state with the intention of influencing UK policy. It represents a significant advancement in addressing the threat of state-sponsored espionage proactively.

Overthrowing parliamentary democracy

Perhaps the greatest innovation of the NSA 2023 is ss.13 to 16, which look to manage foreign interference. These sections also concern the activities of agents of foreign powers, however, sections 13 and 16 focus more on cure than prevention.

Section 13 NSA 2023: foreign interference—general

For an offence to be made out under s.13(1) a person must engage in prohibited conduct and that conduct satisfies the foreign power condition, and the person intends for that prohibited conduct[14] to have an interference effect.[15]

Most interesting though, is s.13(3) which looks to manage the threat of spymasters. Section 13(3) enables the prosecution of an individual who has, as part of a group, engaged in a course of conduct that has an interference effect, but that individual in question does not need to have actually engaged in prohibited conduct themselves. Section 13(3) therefore looks to manage the risk of group activity, such as the Bulgarian spy ring, but also the risk of an agent handler directing the activities of an agent but having no part in the conduct themselves. Again, we can see the comprehensive nature of the NSA 2023, which considers the wide array of espionage techniques that can be difficult to define. In this respect, s.13(3) aims, as much of the NSA 2023 does, to create clear definitions of espionage activity. In doing so, it creates more opportunities to pursue those suspected of espionage through the courts.

Section 16 NSA 2023: elections interference

Section 16 of the NSA 2023 creates the offence of foreign interference in elections. For this offence to be made out, a person must commit a relevant electoral offence and the for-

14 The National Security Act 2023 s.15.
15 The National Security Act 2023 s.14.

eign power condition must be met (i.e. that the individual's conduct is carried out on behalf of a foreign power and they ought reasonably to be aware). The relevant electoral offences are set out under NSA 2023 Sch.1, Pt 1 and constitute breaches of certain sections of the Political Parties, Elections and Referendums Act 2000, the Representation of the People Act 1983 and the Electoral Law Act (Northern Ireland) 1962.

Interference in UK elections is becoming increasingly likely and may, indeed, have already even happened. Elections in the United States give a clear indication of the existing threat. Given the UK's support for Ukraine and Taiwan, it is likely that there will be attempts to interfere in future elections. Section 16 anticipates this and places prosecuting authorities in a strong position to mitigate future threats.

Section 39 NSA 2023: prevention and investigation measures

Finally, pursuant to s.39 NSA 2023, the Secretary of State can impose a prevention and investigation measure if conditions A to E of s.40 NSA 2023 are met. A prevention and investigation measure (PIM) is similar in nature to a terrorism prevention and investigation measure (TPIM) and, like a TPIM, enables certain restrictions, detailed under Sch.7 NSA 2023, to be placed upon an individual. One interesting restriction/measure is Sch.7, para.12—the "Polygraph measure". This measure enables the Secretary of State to require an individual to participate in polygraph (lie detector) sessions conducted to monitor the individual's compliance with other specified measures, or to assess whether a variation of the PIM is necessary to prevent or restrict the individual's involvement in foreign power threat activity. Importantly though, as per to s.39(4) NSA 2023, no statement made by the individual, or physiological reaction during a polygraph session, may be used against them in any proceedings. However, anything disclosed during the session may be shared with the Secretary of State, law enforcement agencies and the intelligence services. This, in effect, continues the position in English and Welsh law that evidence produced via polygraph tests is inadmissible, but enables the security services to acquire further intelligence via a PIM.

Conclusion

In conclusion, the NSA 2023 is the largest step forward in espionage legislation since 1911. It fundamentally changes the legal landscape and enables prosecuting authorities to consider a whole host of charges with which to tackle hostile espionage. As a greater range of conduct has been included in the NSA 2023, behaviour that was previously outside the scope of OSA 1911 can now meet the test of a reasonable prospect of conviction. Indeed, the Director General of MI5 has recently stated that the organisation now intends to prosecute espionage cases in the same manner as it currently prosecutes terrorism cases.[16] This means that espionage law could well be a new legal growth sector, as the scope of the NSA 2023 will enable a greater range of conduct to be targeted, possibly leading to an increased number of espionage-related cases. Consequently, espionage-related law is undergoing a fascinating, once-in-a-generation, evolution. Understanding this evolution will pay dividends.

16 Hamilton, "China targets 20,000 officials in economic espionage surge" (2023), *The Times*.

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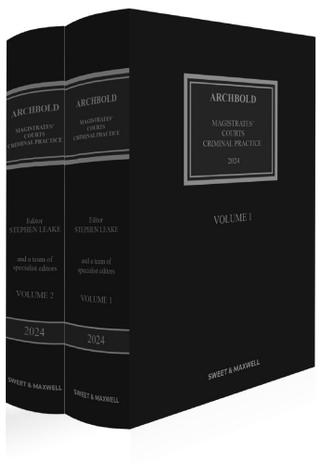

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