Criminal Law Updates

September 2022

**Case Law**

*R v Grant* [2021] EWCA Crim 1243

The Court of Appeal had to consider whether an overwhelming supervening act (OSA) was available in the circumstances of the case such that it either showed that D had not encouraged the principal offender to kill the victim in the manner he did, or alternatively that if the Principal was encouraged by D, the chain of causation was broken by the OSA.

Held: The appeal was dismissed. The Supreme Court's decision in *Jogee* [2016] UKSC 8 had expressly disavowed the suggestion that the secondary liability of someone who encouraged or assisted the crime was based on causation (at [12]). The decision in *Jogee* was concerned with the approach to be taken to an accessory of a crime. If the crime required a particular intent, foresight was not to be equated with intent to assist and was instead to be treated as evidence from which an intent to assist and encourage could be inferred.

Facts:

A car with five occupants drove into two pedestrians, one of whom died from his injuries. Grant was the front passenger. The occupants had been driving around looking for the pedestrians and intended to cause them serious harm upon finding them. Grant claimed that the agreement was to do this through face-to-face combat and claimed that the driver's decision to drive into them was a break from the agreed plan and constituted an overwhelming supervening act (OSA). As such, he argued that the OSA broke the chain of causation, meaning that the joint plan was not the cause of death because another event overtook it. The trial judge rejected this argument and Grant was convicted of murder alongside the driver of the car.

Decision:

Agreeing that the trial judge was correct, the Court of Appeal referred to the Supreme Court decision in *Jogee*. Applying that decision, the court said that the concept of OSA could not be viewed through the lens of causation. In cases of murder, following *Jogee*, the main focus of the court as regards OSA would be on whether there was a credible basis for suggesting that anything said or done by the accessory by way of encouragement or assistance "has failed to the point of mere background" or "has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed" and which "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history." In this case, Grant's encouragement was not "so distanced in time, place or circumstances" that the jury needed to be directed that they should consider whether it would be unrealistic to suggest that the driver had not been encouraged or assisted to kill by Grant.

The court did emphasise that there may be some cases where there is sufficient evidence to contend that the original encouragement or assistance provided by the accessory had lost material connection with what occurred. The decision highlights that *Jogee* now makes it extremely difficult for a defendant to successfully argue that there was a fundamental departure from a prior plan.

*R v Keal* [2022] EWCA Crim 341

The court considered the M'Naghten Rules and whether the final limb that required D to know that his actions were wrong could apply where he was psychotic and delusional, thereby being compelled to do the act, even though he knew it was wrong in law.

Held: The appeal was dismissed, as the M'Naghten Rules require D to both not know that his acts were contrary to the law and that he did not know his acts were morally wrong according to the standards of ordinary people.

Facts:

K was convicted of attempting to kill his parents and grandmother. He claimed that he did so during a psychotic episode that gave him a number of delusions, including a belief that he was possessed by the devil. The prosecution's expert evidence from two psychiatrists was that at the time of the attempted killings, he knew that what he was doing was wrong in law, whilst the defence experts took the opposing view. The trial judge directed the jury in accordance with the Crown Court Compendium and they clearly accepted the view of the prosecution's experts. Keal argued on appeal that the defence of insanity was available to him as a psychotic and deluded person, who whilst knowing his acts were illegal, felt compelled to do them because of his delusions.

Decision:

Following the decisions in *Windle* [1952] 2 All ER 1 and *Johnson (Dean)* [2007] EWCA Crim 1978 "wrong" requires that D did not know that his actions were contrary to law and that they were morally wrong. Therefore, as Keal did know that his actions were unlawful, he could not satisfy this limb of the M'Naghten Rules even though he felt compelled to act on account of his delusions. The defence of insanity was not available to him. Had the charges been for murder, diminished responsibility would have been available to Keal. The trial judge had not erred in the direction to the jury and the jury was entitled to conclude that Keal had known at the time of the offences that his actions were unlawful.

The effect of this decision supports arguments for the need to reform this area of law, as expressed by the Law Commission in its 2013 Discussion Paper, *Criminal Liability: Insanity and Automatism.* Such arguments state that the defence of insanity does not cover defendants with mental disorders that impair their capacity to exercise rational thought and self-control. Keal's symptoms were severe, given that he had attempted to commit suicide the day before, received invasive treatment after the incident and was too unwell to attend parts of his trial.

*R v Johnson* [2022] EWCA Crim 832

The court considered whether the current formulation of the defence of duress by threats adequately addressed the circumstances of a violent, coercive and controlling relationship.

Held: The court dismissed the application for leave to appeal against conviction and sentencing, taking the view that the defence of duress had been correctly presented at trial and the jury were entitled to conclude that the applicant had alternative routes to avoid committing the crime.

Facts:

The applicant had provided false statements to the police during a double murder investigation for which her partner was subsequently convicted. She was convicted of perverting the course of justice and making a false statement to the police. She claimed that she had committed the offences under duress from her partner, in the context of a relationship which was coercive and abusive. The relationship had a history of domestic abuse, and there was evidence of physical abuse as she had contacted the authorities on several occasions. When she committed the offences, she claimed that her partner had subjected her to death threats if she did not lie for him, threats that she believed would be carried out.

The decision:

The court dismissed the appeal, stating that the current law of duress did take into account the circumstances of a violent, coercive and controlling relationship. Applying *R v GAC* [2013] EWCA Crim 1472, Battered Woman's Syndrome may be a relevant factor to be taken into account when considering whether a person of reasonable fortitude would have done as the defendant did. The fact that the applicant had on previous occasions sought police support and advice about injunctions, but did not take up this support, indicated to the court that she was able to take evasive action but failed to do so.

The decision reflects the double-bind that victims of domestic abuse find themselves in when they have been subject to coercive control by their partners. Prior help-seeking corroborates the existence of the abuse, but it also suggests to the court a willingness to seek out alternatives to the abuse, which undermines their claims of duress. The realities faced by domestic abuse victims are far more complex than is generally understood, and the expectation for them to use the gold standard protective strategy of leaving an abusive relationship is ill-conceived. Leaving such relationships are dangerous for the victims and the abuse can in fact escalate at that stage.

The decision does follow precedent from *R v GAC*, however it means that a defendant, subject to duress by an intimate partner in a coercive and controlling relationship, is required to show both a medical condition – Battered Woman Syndrome – and that it completely dominated their will. The double-bind means that in many cases this will not be possible. Without a parliamentary statement, via law reform, concerning defences and

domestic abuse, this decision shows judicial interpretation is unlikely to evolve on the matter of duress.

*R v Paterson* [2022] EWCA Crim 456

The court was required to consider the operation of consent where the medical exemption applies in cases involving offences against the person. Specifically, the court was asked whether the medical exemption applied to consent where the patients were not told the true facts about their medical condition, where the medical procedure was not for a proper medical purpose, and where the doctor concerned knew this.

The second question for the court to consider was whether the issue of reasonableness had been incorrectly used in determinations about the *mens rea* for the offences.

Held: The court dismissed the application for leave to appeal against the conviction, which was out of time and not warrant an extension. The court, in *obiter dicta* comments on the consent issue, stated that "the patients were deceived about the true position by the applicant, who dishonestly and for an improper collateral purpose misrepresented the position to them, thus vitiating their purported consent to the procedures he carried out" (at [33]).

Facts:

The applicant was convicted of 17 counts of s. 18 Offences Against the Person Act (OAPA) 1861 and 3 counts of s. 20 OAPA. He was a consultant general surgeon who specialised in the diagnosis of breast conditions. Between 1997 and 201,1 the prosecution's case was that he deliberately misrepresented the contents of medical reports, exaggerated the complainants' risk of cancer, and advised and knowingly carried out unnecessary surgery including mastectomies. No reasonable surgeon would have considered the operations justified, even though there would normally be differences in medical opinion.

Following his conviction, he appealed on the basis that the complainants had consented to the medical procedures and therefore he was legally exempt from committing the offences. He claimed that consent could only be vitiated by fraud in respect of certain fundamental details such as the identity of the doctor or as to the nature and purpose of the act.

Decision:

The court dismissed his application to appeal against his conviction, which was made out of time and did not warrant an extension. On the matter of consent, the court did not assess the authorities on the issue but noted that they did not determine that a doctor could act with impunity from the criminal law in the circumstances presented by this case. The applicant's dishonesty vitiated the complainants' consent. In respect of the issue of reasonableness, the court said it had been raised at trial not to determine the applicant's *mens rea* for the offences but was directed to the issue of consent.

The decision was considered in M. Thomas and S. Pegg, '"Proper medical purpose": reviewing consent and the medical exemption to offences against the person' (2022) *Journal of Criminal Law*, 86(4), 281. They point out that the outcome could have been reached on a simpler basis. Firstly, it could be argued that the medical procedures carried out by the applicant were not for a valid medical purpose (as expressed in *R v M(B)* [2018] EWCA Crim 560 by Lord Burnett CJ at [42]). Alternatively, if it was for a proper medical purpose, informed consent was not provided as they had been deceived as to their risk of cancer and the necessity of the operation. Following *R v Konzani* [2005] EWCA Crim 706, per Judge LJ (at [42]), informed consent cannot be given to a fact of which the complainant is ignorant.

*Royal Mail Group Ltd v Watson* [2021] EWHC 2098 (Admin)

The court was asked to determine whether the offence under s. 3 Dangerous Dogs Act 1991 was a strict liability offence and whether the householder defence under s. 3(1A) Dangerous Dogs Act 1991 was available to D, where their dog had bitten a postal worker's finger off when they pushed mail through the letter box.

Held: Allowing the appeal, the High Court concluded that s. 3 was a strict liability offence. The householder defence was not available to D as the postal worker was not a trespasser, having remained within the scope of an implied licence to be on the property.

Facts:

When delivering mail to the home address of the respondent, a postal worker's finger was bitten off by the respondent's dog. It had occurred as the worker pushed the mail through the letter box with his hand. The Royal Mail brought a private prosecution against the respondent for an aggravated offence contrary to s. 3 Dangerous Dogs Act 1991, and the District Judge at the Magistrates' Court acquitted. The prosecution appealed against the acquittal.

Decision:

S. 3 in both its simple and aggravated form is a strict liability offence and is committed where D's act or omission caused or permitted the prohibited state of affairs to happen, to more than a minimal degree. The postal worker could have used a postal stick that his employer had provided to post the mail. If, however, it could be said that the postal worker's own actions had contributed to the outcome, it did not negate the respondent's responsibility under s. 3. He had allowed his dog to be unfettered in the house with access to the letter box and this caused or permitted the state of affairs that occurred.

The householder defence, s. 3(1A), was not applicable to these facts as the postal worker could not be regarded as a trespasser, given that they had implied permission to be on the property for the purposes of delivering mail. The postal worker had not departed from this purpose at the time of the incident. To avoid liability, dog owners should take "simple measures, such as the installation of a wire guard or adjustment to the height of the letter box itself" (at [36]).

Legislation

**Police, Crime, Sentencing and Courts Act 2022**

**s. 78 Police, Crime, Sentencing and Courts Act 2022** – Intentionally or recklessly causing a Public Nuisance

This provision creates a statutory offence of public nuisance, abolishing the common law form of it (s. 6). It can be charged either summarily on indictment (ss. 4) and is committed where D does an act, or omits to do an act required by law, which creates a risk of, or causes, serious harm to the public or a section of the public, or obstructs the public or a section of it in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and is done so with either the intention or recklessness to have that effect.

"Serious harm" is construed widely under s. 2 to include death, personal injury or disease; loss or damage to property; serious distress; serious annoyance; serious inconvenience; or serious loss of amenity. A person has a defence if they can show they had a reasonable excuse for the act or omission.

**S. 48 Police, Crime, Sentencing and Courts Act 2022** amends s. 67A Sexual Offences Act 2003

S. 48 introduces two new offences of breast-feeding voyeurism. They are committed when D operates equipment (ss. 2A) or records an image (ss. 2B) with the intention of enabling themselves or another to observe a person who is breast-feeding a child, without consent, or without reasonably believing that they have consent. For each offence the voyeurism must be for a purpose listed in s. 67A (3), which includes obtaining sexual gratification, humiliating, alarming or distressing the victim.

Breast-feeding a child includes the re-arranging of clothing during or after breast-feeding (ss. 3A). The offence will occur whether the breast-feeding takes place in public or private, and whether the breasts are exposed (ss. 3B(a) and (b). It is irrelevant what part of the breast-feeding person's body in intended to be visible in the recorded image or is intended to be observed (ss. 3B(c)).

**S. 47 Police, Crime, Sentencing and Courts Act 2022** inserts s. 22A into Sexual Offence Act 2003

This provision extends the scope of the term "positions of trust" in respect of the Sexual Offences Act 2003 to include additional roles such as sports coaches or people in religious roles.

**s. 83 Police, Crime, Sentencing and Courts Act 2022 –** inserts a s. 60C into the Criminal Justice and Public Order Act 1994

People who find the idea of Van Life appealing, especially during the course of lockdowns, will be dismayed by this new provision to create a criminal offence to reside on land without consent in or with a vehicle. It applies to a person over the age of 18 ("P") who is intentionally residing, or intends to reside, on land without the consent of the occupier of the land. Land includes common land to which the public has access, and the occupier is deemed to be the local authority (ss. 7(a)).

One of four conditions must exist listed in ss. 4: a) in a case where P is residing on the land, significant damage or significant disruption has been caused or is likely to be caused as a result of P's residence; (b) in a case where P is not yet residing on the land, it is likely that significant damage or significant disruption would be caused as a result of P's residence if P were to reside on the land; (c) that significant damage or significant disruption has been caused or is likely to be caused as a result of conduct carried on, or likely to be carried on, by P while P is on the land; (d) that significant distress has been caused or is likely to be caused as a result of offensive conduct carried on, or likely to be carried on, by P while P is on the land.

The offence occurs once the P fails to comply, as soon as reasonably practicable, with a request by the occupier of the land, their representative or a police officer, either that the vehicle be taken off the land or that P leaves the land. The offence is also committed should P re-enter the land with the intention to reside there without permission from the occupier.