What's New for Prisoners?

2 May 2012

In this article we hope to touch on some of the expected changes for the forthcoming year - we can't possibly hope to cover every topic or indeed any topic in depth - but this article should at least put you on notice of some of what may be in store for you this year.

Bail

Part II of the Criminal Justice Act 2003 makes substantial amendments to the Bail Act 1976. If you were thinking about appealing to the High Court against the Crown Court's refusal to grant you bail - think again - that right no longer exists. Further, section 17 of the Act widens the basis on which the prosecution can appeal successful bail applications. Given that, and the fact that the Magistrates' Court jurisdiction is to be doubled - they will be able to sentence a defendant to up to 12 months imprisonment for a single offence, it seems that prisons are only likely to get more and more crowded as the Act comes into force. There is also provision in the Act which purports to make it an exception to the right to bail where the current alleged offence is committed on bail. Human rights based challenges in the High Court against some of the new bail provisions can be expected. Watch this space.

Evidence: Bad Character

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On 15th December 2004 the 'character' provisions of the CJA 2003 came into force. Section 98 defines 'bad character'. The definition covers not just previous convictions but generally evidence of a propensity or disposition towards misconduct - this may include previous acquittals! Under the old rules a defendant could 'lose his shield' by attacking the character of a witness, or saying in evidence that he, the defendant, was some kind of saint like figure not capable of even thinking of committing a criminal offence - then the Judge would let the jury know about the previous convictions. This seemed fair and sensible -the decision was, generally, a matter for the defence. Now character evidence about a non-defendant witness may not be called without the leave of the Judge (s100). There is not enough room to go into the factors the Court must take into account in considering such an application but it is vital that defence teams are fully aware of the new regime and some of the ridiculous processes required in order for you to put your case the way you want it put - for example, if you are caught by the Act and you want to attack a prosecution witness's character, your solicitor will have to apply on a form to be sent to the Crown Court within 14 days of the prosecution serving disclosure!

In respect of your previous convictions the 'old' law was generally that such evidence was inadmissible in proving the current allegation. Now such evidence is regarded as admissible if the Court believes that your past is 'important explanatory evidence' or is 'relevant to an important issue between the defendant and prosecution' or it has 'substantial probative value in relation to an important issue between the defendant and a co-defendant.' Eventually your previous convictions may even be admissible in order to show that you have a 'propensity' to commit of the kind charged.

Hearsay evidence is also due for a radical overhaul under the Act - the changes will mean that the current general rule that hearsay is inadmissible unless it can be shown to fall within one of the exceptions to the rule against hearsay is to be abolished. It will all be up to the Judge.

Disclosure and Public Interest Immunity

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At the moment there is a 2 stage process of disclosure whereby the Crown disclose evidence, the defence draft a Defence Statement and then further disclosure may flow as a result. Any issues of Public Interest Immunity (PII) are resolved by the Judge - usually by seeing the prosecution privately. The new Act will bring in a single stage for disclosure - the Act however omits to do anything about the problems, and the sense of injustice, frequently caused by the PII procedure.

The authors of this article were involved in the leading case of R v H & C [2004] 2 AC 134 which involved a large scale drugs conspiracy allegation. In that case the defence relied on the Strasbourg case of Edwards and Lewis v UK to persuade the trial Judge that as he had to decide important factual issues in the PII hearing he should not see the prosecution alone. He should hear both sides of the story. The Judge agreed and asked for a 'special' or 'independent' counsel to assist him - this was like a 3rd party who put the defendant's case without revealing any sensitive material to the defence. The prosecution appealed this decision and the case went all the way to the House of Lords who ruled in February of last year. However, the case that started the whole process; Edwards and Lewis v UK is now being appealed by the Government to the Grand Chamber of the European Court of Human Rights - that appeal is likely to be heard this year and so there could be even more changes on the horizon.

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In the meantime the guidance set down by the Lords provides opportunities to maximise possible disclosure points if the case is utilised correctly. When a Crown Court Judge hears a

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PII application now, he must ask himself a series of questions which are set out in the judgement - this includes the possibility of the prosecution being directed to admit what the defence 'seek to prove' by disclosure without actually ordering full disclosure - e.g. revealing to the defence in writing that 'there was an informant.' Thus in the right circumstances, the ruling, used properly, and with thought given to possible judicial alternatives to non-disclosure, can exert a pressure on the prosecution to reveal much more than it would ever have done prior to this judgement. This is because the case established that maximum disclosure of relevant material must be the 'Golden Rule'.

Sexual Offences

The Sexual Offences Act 2003 came into force on 1st May 2004 so many on remand facing sex charges are likely to be subject to this Act. Perhaps the most obvious radical change is the new definition of rape which now includes oral as well as vaginal or anal penetration (of a man or a woman) without consent. When it comes to 'consent' the law has changed there too. Now the perpetrator does not have to know he is acting without consent or be reckless as to whether he is or isn't. Now the law allows that he may be guilty if he acted negligently about the victim's state of mind - i.e. the jury will be directed that the test is whether or not the defendant had the belief in the victim's consent that a reasonable man would have held under the circumstances.

Sexual assault is also re-defined (ss78-79) and the Act also clarifies the old law on sexual offences against children expanding the law on sexual behaviour with children by those in a position of trust. The Act abolishes the old incest laws and replaces them with 4 new offences and the Act also creates a further 4 new offences in respect of the sexual exploitation of children for financial gain - these widen the old law by including the use of children in pornography and paying for sexual services from children.

Terrorism

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Following 11th September 2001 the Terrorism Act 2000 was amended by the Anti-terrorism, Crime and Security Act 2001. It is difficult to say what changes are in store in 2005 for those held on terrorism charges but the House of Lords in late 2004 struck 2 blows against the Government's infringements of human rights in the 2001 Act. The first, in October 2004, attacked the reversal of the burden of proof in respect of the offence of being a member of a proscribed organization. The second, in December, was in respect of s23 of the Act which allowed for foreign suspects who could not be removed because of asylum issues to be detained without trial indefinitely - the so-called 'British Guantanamo' law. This was found to be a disproportionate reaction to the problem of terrorism. Parliament however is still supreme over the Courts and whilst it would be exceptional for a Government to ignore such a powerful ruling, it would as a matter of law, be quite able to do so. At the time of going to press the new Home Secretary declared that was his position for the moment. In reality it is almost certainly the case that the men at the centre of this argument were suspected because of intercepted telephone calls. Of course such telephone traffic is unlikely to tell the whole story and can only rarely at the moment be used in criminal trials - their use is prohibited by the Regulation of Investigatory Powers Act 2000. The 'evidence' against the men could not then be used to prosecute them but nor could they de deported. For the Government that incorporated the European Convention into our law this is a formidable problem. It maybe that 2005 will see this problem with the suspected terrorists leading to a wider change about the use of intercept material. The ideal platform for such a change would be one of Blunkett's last Bills currently going through Parliament - the Serious and Organized Crime Bill. Many on remand would fear the use of such material - many would welcome it.

Disciplinary Hearings

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It is much more difficult to predict what will be in store in 2005. In the field of prison law as the law is virtually "Judge made" rather than from the annual flurry of legislation in respect of crime and criminal litigation. However, the hard won right for prisoners to be represented at disciplinary hearings where additional days are a possible sanction is now under some threat. The House of Lords is at the time of going to press considering its judgment in a case which may well decide that the fewer the number of days are likely to be awarded the less likely that representation at the hearing will be allowed. If the judgement does go that way then the Prison Rules 1999 will have to be amended and time given for the new rule to apply, so no change for a few months at least.

Recall Prisoners

Recall prisoners may have a better hope of release in 2005. Prisoners recalled to prison following an alleged breach of licence have their re-release decided by the Parole Board. In R (West) v Parole Board [2003] Prison Law Reports, 71 the Court of Appeal found there was no right to an oral hearing for recalled prisoners but where there was disputes of fact about the recall the Board ought to be prepared to hold an oral hearing in fairness to the prisoner. The case has went to the House of Lords (November 2004) and we await judgment. For the moment recall prisoners should always consider asking for an oral hearing where there is a dispute of fact about the recall.

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