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Criminal Law News

SALLY RAMAGE®

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ALI DESAI- UNFAIR TREATMENT IN PRISON

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Senior Metropolitan Police Commander

Metropolitan Police Commander Ali Desai, aged 47 was sentenced to four years imprisonment in February 2010 for misconduct in office. This incident followed a long and harrowing period of police investigation, costing £7 million, and accusations, eventually leading to charges brought in 2003 of corruption, taking bribes, use of drugs and prostitutes and spying for Iran. At a long trial at the Old Bailey, Ali Desai was cleared of all charges. Then in this relatively minor incident, he had sought the services of a website designer who charged him £600, which amount Ali Desai refused to pay, instead, framing the man for a minor criminal offence. It was this for which he was convicted and sentenced.

At Wandsworth prison, he received death threats and was moved to HMP Edmunds Hill in Suffolk. It was at HMP Edmunds Hill Suffolk that another prisoner intentionally poured a bucketful of faeces and urine over Ali Desai's head and proceeded to punch his face and render him unconscious in prison. Ali Desai is a very senior police officer who was given a seriously long prison sentence for misconduct, by dint of his seniority.

Assaults common in UK prisons

However, many criminal assaults on certain prisoners in prison by fellow prisoners are driven by media frenzied reporting. In February the prisoner defendant in the Baby Peter murder case was attacked with boiling water thrown over him by fellow prisoner at Wakefield Prison in Yorkshire. More recently, a prison officer was serious injured by a prisoner at Armley Prison in Leeds and two prisoners were arrested and in police custody. Another case was that of the murderer Ian Huntley whose throat was slashed in March 2010 by a weapon used against him by fellow prisoner Damien Fowles. Prisoner Huntley has suffered a string of attacks and in 2005 another prisoner poured boiling water over him. In 2006 he was attacked by another prisoner who used a sharpened plastic knife.

Prison violence

At Frandland Prison, near Durham, England, a prisoner attacked three prison guards with broken glass in April 2010 and one of the victims has lost the use of his arm. One newspaper reported that violence among adult prisoners has risen by 50 per cent since 2002 while attacks by younger prisoners have doubled. Assaults on prison officers in 2008 rose by more than a third since 2002- in Young Offender Institutions and by 14 per cent in adult prisons. It is thought that criminals will become more violent because of the overcrowding in British prisons. Statistically, one prisoner in the UK is attacked every 30 minutes.

Criminal offences committed in prison

Very few offences are particular to prisons. The vast majority of offences committed in prison and referred to the police for prosecution are assaults on prisoners by prisoners. These range from a very few cases of murder and false imprisonment (hostage-taking), and many reported offences of grievous bodily harm (Offences Against the Person Act 1861, ss 18 and 20) and actual bodily harm (Offences Against the Person Act 1861, s.47). Different police forces take different approaches with regard to interview arrangements. In practice, the majority of police interviews will take place in legal visiting rooms in prison, although in some cases prisoners may be taken to a police station. The 'spirit of' the Police and Criminal Evidence Act 1984 and Codes of Practice apply to all police interviews which take place in prison (see CI 10/89). However, police officers can be particularly unaccommodating when it comes to the time constraints imposed by the prison regime, as the usual period for legal visits tends to be two or two-and-a-half hours long. Thus, if a solicitor meets police officers to obtain disclosure at the beginning of the visiting period, the police will often interrupt private consultation if they are of a view that the solicitor has been with the client so long that there will not be enough time

left for the interview afterwards. In view of this, it is worth considering whether to meet the police to obtain disclosure before being taken to the legal visiting room in the prison, or booking two legal visits in succession.

Police interview of the defendant

Prisoners can be subjected to a 'compulsory' interview by the police (CI 10/88). Any prisoner who is to be interviewed by the police should be given an information notice (F2042) advising them that if the police consider that there are reasonable grounds for suspecting that they have committed an arrestable offence they must remain in an interview room whilst questions are put to them. The notice also advises prisoners that they have a right to have a solicitor of their choice present at interview and that legal aid should be available for this purpose. In view of this, prisoners cannot avoid the possibility of adverse inferences being drawn against them (under the Criminal Justice and Public Order Act 1994, s.34) by refusing to see the police at interview.

Different police forces have different practices. In some geographical areas prisoners are almost always informed that they will be reported for summons, and they will then experience a period of uncertainty before a decision as to whether to summons them is made. Summonses are often used for serious offences such as prison mutiny, GBH under s 18 of the Offences against the Person Act 1861, and attempted murder. In other geographical areas the police will attend the prison and charge a prisoner in the normal way. Prisoners are entitled to have a solicitor with them when they are charged, and procedures are the same as outlined above for interviews.

Necessary to collect these documents

In addition to the usual documents created in the course of a criminal enquiry: the Prison Service will also have a large amount of documentation in its possession.

Whether or not the police have seized this documentation will depend upon their diligence and/or their familiarity with prosecuting offences that have occurred within the confines of a prison.

Records of segregation of the defendant (or prisoner witnesses/victims.

Medical records of the victim or the defendant if he was injured in the incident: it is common for prison staff to be attended by a prison doctor in the first instance, and so it is worth asking for the records of prison officer victims as well as prisoners.

Prison history sheets.

Report of Injury to Inmate/Prison Staff.

Serious Incident Reports completed by prison officers who are prosecution witnesses.

Security Intelligence Reports completed by prison officers who are prosecution witnesses.

Disciplinary findings against prison officer witnesses.

Records of sick leave taken by prison officer victims.

CICA (Criminal Injuries Compensation Authority) claims completed by victims.

Reports of any internal enquiries conducted by the Prison Service in the aftermath of the incident: the presence of these will depend upon the seriousness of the incident.

Control and Restraint records.

Use of Special Cell forms: if it is not clear whether a prisoner was held in a special cell, the Cell Certificate, indicating type of cell.

Audio tapes of relevant telephone calls made by prisoners.

Video tapes from any CCTV cameras in the vicinity of the incident.

A list of all prisoners who were in the prison/on the wing at the time of the incident, and an up-to-date list: of their locations. This information is held on computer at each prison and can be invaluable in tracking down witnesses.

Emergency Control Room logs are created in the course of more serious incidents or where incidents last for a protracted period of time, and should provide a contemporaneous record of the actions of prison staff involved in managing the incident, and information coming into the control room from other sources.

Photographs/plans of the area of the prison in which the incident took place.

Where the police have not already seized those items, in some circumstances the CPS will instruct them to approach the prison in order to ask for disclosure.

At other times, the CPS will refer requests for disclosure to the Treasury Solicitor. In such cases the Treasury Solicitor will consider the rules on third party disclosure and may ask lawyers to address them on materiality and relevance before making any decision. If the Treasury Solicitor refuses to disclose the documentation, then an application for a third party witness summons should be considered.

Internal disciplinary proceedings

Any internal disciplinary proceedings against a prisoner should be opened and then adjourned whilst a police investigation is ongoing (Prison Discipline Manual, para 4.15).
Where an offence is reported to the police, but this does not result in a prosecution, the governor must decide whether or not to proceed with the adjudication. Governors are advised that, where the CPS has decided not to pursue a prosecution on the basis that there is insufficient evidence against the prisoner, they must dismiss the disciplinary charge. However, in other cases the governor may decide to proceed with the charge (Prison Discipline Manual, para.11.6). Likewise, governors may re-open adjudications where criminal proceedings are discontinued, or it is directed that the charge should lie on file (para 11.7). In cases where prisoners are cautioned by the police, governors are advised that they may still go ahead and hear an adjudication, on the basis that 'no formal proceedings will have taken place and no evidence will formally have been presented' (Prison Discipline Manual, para 11.8).

Criminal prosecution

In any case where the CPS proceed with a prosecution and present evidence in court, the adjudication must not be continued (Prison Discipline Manual, para 11.10).
There appear to be a small number of cases where these rules were not followed, and prisoners were found guilty at adjudication and found guilty again at court. In such circumstances, the Prison Service would generally quash the finding of guilt at adjudication and remit any additional days awarded.
Anecdotal evidence also suggests that prisoners who have been found guilty at adjudication before the criminal proceedings have commenced have successfully run the special plea in bar, *autrefois convict*.

The crime scene in prison

The Prison Service is usually amenable to allowing defence lawyers to attend a prison to view the scene of the incident and to take photographs of it. Whilst it is generally appropriate to liaise with the police in relation to this, security governors at establishments can also be approached in order to arrange access. Views of prisons tend to take place over the lunch time

'bang up' period. If it is important to see any area of the prison other than the one in which the incident took place (eg the segregation block, any sterile areas, sight lines from cells or from the grounds of the prison into the prison) it is advisable to make a written request to the governor beforehand in order that any security arrangements can be made. Juries are sometimes taken to view the prison during the course of the trial. In such cases it can be invaluable to have advance knowledge of the layout of the jail, as this will enable informed discussion with the prosecution as to which areas of the prison it would be useful for the jury to see. Applications to witness summons serving prisoners should be made in the usual way. However, the summons should be directed to the governor of the relevant prison, and should ask him to produce a named prisoner at court. Prison governors will usually accept service of a summons by fax.

Criminal convictions of prisoner and prison officer witnesses

In large trials involving several prisoners it is likely that the prison will appoint a court/prison liaison officer. S/he will be responsible for ensuring that all prisoner witnesses are brought to court in good time to give their evidence.

Conclusion

The problem of rising violence in the British prison population will not disappear until it has been resolved.

Extradition of alleged terrorists to US

The US terrorist problem that lingers is the issue of Guantánamo and the many dozens of prisoners there; prisoners such as Khalid Sheikh Mohammed and four others accused of the being involved in the September 2001 air crashes in New York's World Trade Centre.
The issue is whether there men should strand trial in a military commission or in a federal court. Some officials favour a military trial, thus treating these men as soldiers at war, whilst others favour civilian criminal trials for these persons suspected of involvement in terrorism. This all depends on whether they are extradited to the United States or not.

In 2009, the new US administration decided that Khalid Sheikh Mohammed and the others would be tried in the New York federal district court in Manhattan; and that six alleged terrorists would face a military commissions in a place yet to be decided; and 48 others would be held indefinitely without charge. This decision was made between the President and the Attorney General. The separate issue of the Guantánamo Bay detention facility lingers since President Obama promised its expiration.

Recently, the European Court of Human Rights in Strasbourg stated that no suspect should ever be extradited to the US if there were any risk that he might face non-civilian trials and the fight against extradition to the US will reveal the inconsistencies in the American Federal Criminal Justice system, besides which there is a third issue of the cruel and inhuman practices in everyday US prisons, notwithstanding the death penalty in many of its states.

Of the Guantanamo arrestees, some British alleged terrorists held there have since discovered that the United States had been carrying out covert surveillance on then for years before the 9/11 terrorist outrage. Two such individuals, Babar Ahmad and Syed Talha Ahsan, discovered the US had had them under surveillance whilst they were at home in the UK. They had contributed some comments in the UK to a website and that the US officials viewed that as terrorist behaviour. A third British man, Haroon Aswat, had holidayed for two weeks on a farm in Oregon in 1999. The US officials viewed that as Muslim military training. Another two British men Adel Abdel Bary and Khalid al-Fawwaz, one of whom had in 1998 received faxes in an Islamic information office in London which mentioned the news that two US embassies in East Africa had been bombed that day. These two men were charged by the US government with conspiring to cause those explosions.

For these reasons the United States wanted the six men to be extradited to the US post haste. In each case, the extradition court, at Bow Street, London, decided that the extradite met the criteria which would permit the president of the United States to make an order designating each defendant as an 'enemy combatant', and thereby extraditable to the US. Were it not such a very serious matter, it would be seen as a laughable farce.

The Bow Street court decided that any individual who ran a serious risk of being designated as an enemy combatant would lose his rights to a fair trial before an independent tribunal. If a man could be detained indefinitely 'subject to Military Order No. 1', it meant he would be 'deprived of his European Convention rights and extradition would be barred'. in its recent decision of *Boumediene v. Bush* [2009] the Supreme Court invalidated the collective effort of the President and Congress to limit the ability of alleged terrorists imprisoned by the United States to challenge the legality of their detention. The opinion focused on the scope of the constitutional *habeas* Guarantee. The US government keeps the alleged terrorists in Guantanamo because the US claims that these men are enemy combatants and not ordinary civilian *The Boumediene* case decision has provided the impetus for the government to finally reconcile it's assertion of detention authority with the law upon which it purports to apply the law of armed conflict. Ironically, by limiting its analysis to the "narrow" category of captured battlefield belligerents, the Court set the stage for future battles between the government and detainees falling outside that definition. The majority obviously understood this possibility and the significance and necessity of a more comprehensive definition of the critical term *enemy combatant* but expected that such a definition would emerge from subsequent litigation:

Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The lower courts did not provide clarity in the years following the *Hamdi v. Rusmfeld,* 542 U.S. 507, 516 (2004) decision. This was in large measure the result of efforts by the political branches to prevent judicial interference in the President's definitional prerogative.15 Instead, detainees and the government waged an ongoing battle over whether these lower courts could even entertain challenges to detention. These battles ultimately culminated in the Supreme Court's opinion in *Boumediene v. Bush.*

The US officials later changed this to mean that the requested extraditions were for the purpose of normal court trials for terrorism. The cases went to the Appeal Court and then to the European Court of Human Rights. These cases and others have now been stalled for nearly three years. Could an unenforceable diplomatic promise hold good, in law or in practice, after the men have been extradited? And what action, if the men were tried before a jury and acquitted, might the US take if it nonetheless believed the defendants constituted a threat? Firstly, the United States has never recognised the International Criminal Court.
The US is, however, a party to the UN Convention against Torture, but has never ratified the treaty's optional protocol, and does not recognise the right of individual petition to the Committee for the Prevention of Torture. The extraditees through their lawyers have argued, first before the UK courts and then in Strasbourg, that there was strong jurisprudential doubt whether any diplomatic note could bind any future US commander-in-chief if its national security were perceived to be at stake. No assurances against the threat that any or all of these possibilities might induce guilty pleas from the innocent as well as a promise to 'co-operate' in providing evidence with which to prosecute others. More than one extraditee still in the UK has been visited by a US prosecutor armed with a copy of the *Federal Sentencing Guidelines*. These sentences are for longer o than a man's natural life expectancy.

Non-terrorism- related extradition cases

Gary McKinnon is alleged to have hacked into t US defence computer systems and deleted many files. The US offered him the opportunity of a plea bargain. More than 90 per cent of trials in the US are resolved by guilty pleas, an extraordinary statistic that is undoubtedly a result of the defendants' apprehension of what lies ahead – not just for their desire to avoid, the risk of US law's most extreme application. For two of the six men awaiting extradition, Adel Abdel Bary and Khalid al-Fawwaz, there is an additional irony. They have watched with astonishment what has happened to their co-accused, Ahmed Ghailani, who, it is now

proposed, will be tried with them in Manhattan and whose pending trial is intended by the authorities establish this new precedent. A warrant for Ghailani's arrest was issued by the New York Federal District Court in 1998: he has been indicted for involvement in the East Africa bombings of US embassies in that year. He was held as a ghost prisoner in a secret prison run by the CIA, commonly known as rendition. He was tried before a military commission in Guantánamo Bay, where charges were filed by military prosecutors for the bombing of the US Embassy in Tanzania. In spring 2009 Ghailani was moved from Guantánamo into the civilian court system and transferred to New York to stand trial before the Federal District Court in Manhattan. Ghailani's lawyers in New York say that he was submitted more than a hundred times torture.

For the European Court of Human Rights, required to address cases from 40 Member States, each with a different system (some are inquisitorial, with an investigative *juge d'instruction*, others adversarial; some have lay juries, others professional judges), achieving a case law of precedent and setting minimum standards through its jurisprudence for Article 6 of the Convention (the right to a fair trial) is more problematic than meeting other minimum norms.

European courts have themselves often had to consider equally challenging cases. Abdullah Ocalan, the Kurdish leader of the PKK, kidnapped in Kenya by Turkish intelligence agents, was prized as a 'high-value detainee' by Turkey, just as Khalid Sheikh Mohammed is by the US. Once captured, Ocalan was held in complete isolation, and his first hearing was before a panel of three judges, one of them a Turkish military officer. At the full trial he was convicted and sentenced to death. The Strasbourg court found against Turkey: Ocalan's right to a fair trial, guaranteed by Article 6 of the European Convention, had been irretrievably violated by his being held in isolation before the trial and by the military presence at his first hearing, and that in turn vitiated all claims to legitimacy for the sentence of death. His conviction could not stand. American defence lawyers say that evidence obtained from a prosecution witness by coercion, cannot be excluded before a jury hears it. A senior counsel representing the United States in the High Court in London explained that US law permits the otherwise unlawful kidnapping of suspects elsewhere in the world, to bring them 'to justice' in the US.

The UK fails its citizens - no robust resistance

Capital punishment was abolished in the UK in 1965, but the UK continued to extradite to countries that retain the death penalty until *Soering v. UK* [1989]. A case in which a person might spend years awaiting execution while the legal process was exhausted, constituted inhuman and degrading treatment according to Article 3 of the Convention. Since 1989, no European state has been permitted to extradite in the absence of an assurance that conviction would not bring the death penalty.

Right to family life

Some of the men who currently await extradition are imprisoned in a small unit, where they are at least in the company of other human beings, and within the unit's limits can talk, argue, study, cook, write, paint or exercise outdoors in whatever sunlight imprisonment in Worcestershire may afford them. It is deprivation, of family life.

Solitary confinement inhuman

These men expect total isolation in the US. Each extraditee will be held under Special Administrative Measures until trial and then, on his anticipated conviction, in solitary confinement in a Supermax prison, ADX Florence in Colorado, potentially for life and without any prospect of parole. He will be confined in a cell 7 feet by 12 feet, with a moulded concrete bunk; his food will be delivered through a slot in the door; external communication, even with a doctor, will come via a closed-circuit television in his cell. For one hour in each day, he will be able to visit a small dark pit where he can exercise alone.

n *Madrid v. Gomez* [1995] the judge described conditions in a Supermax unit as pushing at 'the outer bounds of what most humans can psychologically tolerate' Solitary confinement could constitute torture contrary to Article3 of the Convention. It is possible for Strasbourg to

deliver a judgment to which the US, uniquely, must pay heed if it wishes extraditions to continue. Its granting of an interim freezing order on all extradition cases is exceptional and the length of time, now nearly three years constitutes a breach of the right to a fair trial.

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