

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty response to the Law Commission consultation – ‘Children: Their Non-Accidental Death or Serious injury (Criminal Trials)’

May 2003

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Introduction

Liberty is pleased to respond to The Law Commissions consultation on the non-accidental death of children. This is an important subject and we were particularly interested to look at the work undertaken by the NSPCC in preparing for their conference ‘Which of you did it?’ in November 2002. The NSPCC report and the Law Commissions initial consultation were considered by Liberty’s council in February 2003. In addition to our comments made in response to the current consultation, we are particularly keen to emphasise the positive duty of government and public authorities to take active steps to protect children and to recommend public inquiries following non-accidental deaths of children.

Evidential and Procedural recommendations

The recommendations apply to cases where a child has suffered death or serious injury, where the defendants are within a defined group, some or all of whom must be guilty, and at least one of them has responsibility for the child.

The recommendations may be summarised as follows:

1. The decision whether to withdraw the case from the jury “*on the basis that a conviction would be unsafe*” or “*the trial would otherwise be unfair*” must be postponed until the close of the defence case”.
2. The jury may draw adverse inferences “*as they think fit*” against a defendant “*who has not given an account to police and/or evidence at the trial*”.
3. “The jury should not be concerned with whether ... the prosecution has established a prima facie case ... but should consider only whether they are sure of guilt having regard to all the evidence and any inference they see fit to draw”.

General Observations

- a) We fully recognise that judicially directed acquittals in accordance with Lane & Lane can work stark injustice where it is clear that one or more defendants must have participated in a child's death or serious injury but it is not apparent on the prosecution evidence which of them it was.
- b) Equally, however, the reasoning in Lane v Lane cannot be faulted as an impeccable combination of general legal principle and common sense: the prosecution bear the burden of proving a prima facie case against each individual; they cannot discharge that burden if they cannot prove which of the defendants committed the crime.
- c) There are differences between the proposals for evidential and procedural change in the Informal Consultation Paper and those now contained in the Consultative Report. However, their common theme is the tacit recognition that the only way to avoid the logic of Lane is effectively to relieve the prosecution of the duty to provide evidence which amounts to a prima facie case to answer.

Accordingly, the original Consultation Paper contained suggestions that an adverse inference from silence could itself form part of the case to answer, and that a case to answer may be found against all defendants where the evidence shows that the offence must have been committed by at least one of them.

Having abandoned those ideas, the present Report now suggests the delaying of consideration of whether there exists a prima facie case until after the defence case and that a jury may draw an inference of guilt from silence and convict regardless of the absence of a prima facie case.

- d) The purported legal foundation for the latest constructs is the notion of the defendant's 'Responsibility to Give an Account'. The responsibility is, in turn, said to

flow implicitly from the state's duty of child protection under Articles 2 and 3 of the Convention. It is said that the proposals strike a proper balance with the fair trial guarantees of Article 6.

- e) Pausing there, the authors of the earlier paper suspected that their proposals might not be compatible with Article 6. The present suggestion that Article 6 must be balanced against Articles 2 and 3 also appears to recognise that some infringement of Article 6 is involved - otherwise there is no need for any balancing exercise.
- f) In our opinion, the level of infringement is profound. It is settled domestic and European law that an adverse inference as a component of guilt is only 'proper' and fair when it is the only rational/sensible conclusion from a failure to meet a case which calls for an answer (See the current JSB Guidelines). As we stated in our earlier response, Convention jurisprudence - **Murray, Condon, Beckles** et al - has been at pains to construct a framework of requirements for "proper" inferences within which a trial may be fair. These include that the circumstances are such as to call for an answer and that the only rational explanation for silence is guilt.
- g) There is a direct and logical relationship between the proper use of inference and the strength of the prosecution case.
- h) In our opinion, however attractively termed in the consultation, the substance of these well-intentioned reforms cannot be reconciled with the basic nature and necessary protections of the adversarial process. In particular, they effectively abolish the need for a prima facie case and allow for conviction on the basis of inference where there may not even be sufficient prosecution evidence to amount to a case to answer

Postponement of a Submission of 'no case'

The report states: "The change would remove from the defence a tactical advantage but we do not believe that it would do injustice".

We accept that, as most child assault occurs 'in private', these cases often present unusual difficulties of proof; plainly, the application of the principle in **Lane** allows some guilty persons to evade liability without giving evidence. Even so, these cases are also unusual in the degree of emotive hostility which they can arouse in juries.

The judge's power to stop a weak case is more than "a rule of procedure" (para 6.15); it is the superimposition of a notional but objective standard of judgement ('the reasonable jury') and, to that extent, a necessary constitutional safeguard against arbitrary verdicts.

The "tactical advantage" which the proposal seeks to remove is the ability of a defendant to obtain an acquittal at the conclusion of a weak prosecution case. Our analysis of the combined effect of the proposals leads us to conclude that, in practice, postponement will effectively remove that safeguard whether or not the defendant gives evidence.

We consider the various alternatives in turn:

a) Defence Evidence

Most submissions made after the defendant has given evidence will be bound to fail. His evidence becomes evidence in the case. As a result, any submission can now be met with the irresistible argument that the state of the evidence has now changed since the close of the prosecution case.

If they wish, the jury are now able to treat it as additional support for the prosecution. Presumably, the question for the judge at this stage would be whether a reasonable jury *could* treat the defendant's evidence as supporting the prosecution - if so, there are few cases which would not pass that test.

It follows, therefore, that defendants who give evidence will generally become unable to make a submission on the facts.

b) No Defence Evidence

The problem here arises from the proposed requirement that, in deciding whether to withdraw the case from the jury at the end of the defence case, the judge must have express regard, not only to the evidence, but also to “any inference which it would be proper for the jury to draw”.

Accordingly, by the time a defendant who has not given evidence is permitted to make a submission, he will find that the case against him now *must* include the additional component of a possible inference of guilt.

It is to be noted that the *only* proposed test at this stage is not whether there is a prima facie case but whether “a conviction would be unsafe or the trial would otherwise be unfair”. It is difficult to see how in most cases a judge could so find.

It seems, therefore, that the judge will be obliged to proceed on the basis that an inference *of guilt* may be drawn from the defendant's silence. **Accordingly, it appears that those who do not give evidence will also be unable to make submissions in practice.**

Presumably, to be fully effective this proposal also requires the abolition of the right to apply for charges to be dismissed following transfer to the Crown Court on the basis that there is no case to answer. It does seem, therefore, that a case can proceed from automatic transfer to conviction without any necessity for a case to answer at any point in the process.

Conviction without a Case to Answer

The full implications of this proposal are not immediately apparent from the executive summary. It is only upon reading the detailed proposal in Part VI that one sees that the proposed change is fundamental and far reaching.

As formulated, the proposal allows a jury an entirely subjective approach to ‘any inference they see fit to draw’. This is to be contrasted with their power under ss.34/35 of the Criminal Justice and Public Order Act 1994 only to draw ‘proper’ inferences.

It is a matter of concern that this wider language is manifestly intended to ‘get round’ the conditions for fair adverse inference so carefully formulated by the European Court (see above) and, in particular, that an inference from silence is only logically probative (and, therefore, fair) where the case calls for an answer.

Secondly, the proposal appears to mean that a jury could legitimately convict a defendant who does not give evidence or who has remained silent in interview regardless of whether there is ever been a prima facie case – “the jury **should not be concerned with whether ... the prosecution has established a prima facie case ...**”.

That situation, taken together with the inability of the judge to stop most cases, means that there is a massive risk of miscarriages of justice.

Substantive Law

Offence of Aggravated Child Cruelty or Neglect

The modified proposal still requires a link between the defendant's conduct and the death: “where the child has died as a result of the occurrence of any ... injury ...

which the cruelty *of the defendant* has made it likely would be caused”. While we support the proposal in principle we would make two observations:

- a) whether the offence adds anything to the existing offence of manslaughter, and
- b) There is a risk of confusion when considering causation which arises from the use of the phrase: “*has died as a result of ... injury ... which the cruelty of the defendant has made it likely would be caused*”. We assume that it means that the defendant's cruelty has itself been a contributing cause of death. However, we are concerned that a jury may be confused by having to consider the defendant's conduct simultaneously as an actual and ‘likely’ cause of death

Offence of Failing, so far as is Reasonably Practicable, to Protect Child from Serious Harm Deriving from Ill Treatment

We consider that the proposal is a more preferable mechanism for relieving some of the difficulties arising from Lane. The imposition of a duty on a carer to prevent ill-treatment by others so far as is practicable in their personal circumstances is reasonable.

Edward Rees QC
Doughty Street Chambers