Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Annual Report of the UK's Biometric's Commissioner highlights, among other things, a decline in the annual upload of fingerprint records and DNA profiles to the national databases, and a general lack of democratic governance and scrutiny over the police use of "second-generation" biometrics.**

- **The decision of the Canadian Supreme Court in R v Goldfinch [2019] SCC 38 sets a high bar for the admissibility of evidence of the complainant's sexual history in rape prosecutions.**

Police Retention and Use of Biometric Data

Policy issues

The taking, retention and use of fingerprints in the investigation and detection of crime can be traced at least to the early years of the 20th century. With the development of DNA technology, DNA profiles of individuals are also playing an increasingly important role in this context. Nevertheless, primarily due to cost and the ease with which fingerprints can be taken and scanned against the database, the police still consider that they are of greater investigative value than DNA profiles. The attractions of both, however, are now being rivalled by a whole new generation of biometric identification data, such as digital facial images and behavioural biometrics (second-generation biometrics).

Obviously, the taking, retention and use of such intimately personal data for police identification purposes raise acute issues for privacy and the presumption of innocence, especially where the prints, profiles and images taken and retained include a very large number of persons who have no criminal record. The current police fingerprint database in England and Wales, established in 2001, holds the prints of over 8 million identified persons. The DNA database in England and Wales, established in 1995 holds the profiles of over 5,800,000 persons. Arguably, the manner in which these databases have been constructed and maintained is such that they are dominated by communities targeted by the police as 'suspect'. This, in turn, raises the concern that they are operating as an instrument for 'criminalising' whole communities on the basis of factors such as ethnic origin, immigrant status, socio-economic status and address.

In *S & Marker v UK* (2008), the European Court of Human Rights found that the "blanket and indiscriminate nature" of the retention of fingerprint and DNA data on the databases, especially from persons who were arrested and not charged, constituted a disproportionate interference with the right to privacy, as guaranteed by Art.8 of the European Convention on Human Rights. The Westminster government

responded eventually with the Protection of Freedoms Act 2012 which, among other things, introduced a range of limits on the length of time that fingerprints and DNA profiles can be retained. The retention periods differ depending on matters such as the offence classification, and whether the person concerned was arrested and released with no further action taken, was charged with a criminal offence or was convicted of a criminal offence. There are stricter rules for the retention of the more sensitive DNA samples from which the DNA profiles are extracted. A sample contains the entirety of a person's genetic information, while a profile is more limited to material that will enable a person to be identified if they leave their DNA at a crime scene.

Biometric Commissioner's Report for 2018

The 2012 Act also established the office of Commissioner for the Retention and Use of Biometrics (Biometrics Commissioner) with the remit to provide independent oversight of the retention and use of fingerprints and DNA samples and profiles in England and Wales. The Commissioner's role extends to, among other things, the retention and use of such data by the police on national security grounds across the UK, and to the UK's exchange of such data with the EU and internationally. The Commissioner's annual report for 2018 (fifth annual report) was published a few days ago. Its 131 pages offer a wealth of detail and insights on a wide range of issues, challenges and concerns presented by the statutory regime and the rapidly changing environment in which it is operating. This note will comment on two of them, namely: 1. The reasons for a significant decline in the number of fingerprint records and DNA profiles held on the databases; 2. The lack of coherent, comprehensive, national governance and democratic scrutiny of the police trialling and use of second-generation biometrics.

Significant decline in the databases

The introduction of the new regime under the 2012 Act resulted in the destruction of more than 7,750,000 DNA samples, more than 1,760,000 DNA profiles and more than 1,670,000 fingerprint records. Nevertheless, the prints and/or DNA profiles of some 12.5% of men and 3% of women in the UK were still retained on the databases. Since then, however, the number of prints and profiles added annually to the databases have declined significantly. DNA profiles uploaded annually have actually declined from almost 600,000 in 2007/08 to just over 250,000 in 2017/18. The Biometrics Commissioner considers that this development diminishes the future utility of the databases and constitutes "a fundamental threat to the police use of [prints and profiles data] for investigative purposes."

It would be tempting to think that the relative contraction of the databases is a direct consequence of compliance with the human rights criteria expounded in *S & Marper*. A more sinister possibility is that the police are avoiding the stricter controls by turning their attention to other forms of biometric identification data which are comparatively unregulated. More will be said of that below. The Commissioner, however, has linked the decline to unintended consequences of changes in other aspects of policing. These relate primarily to changes in police arrest and detention practices.

Arrest and detention provides a lawful (and the standard) basis for taking prints and DNA samples/profiles. Changes to

Code G (guidance on the exercise of the statutory power of arrest) have resulted in more use of 'voluntary attendance' (VA) interviews of suspects, rather than arrest and detention. Since there is no legal power to take prints or DNA samples at the outset of VA interviews (in contrast with arrests), the number of prints and DNA profiles added to the databases have declined. It would appear that this decline has also been fuelled by financial cutbacks which have led to some police forces reducing their arrests and associated use of expensive custody suites.

Another contributor to the decline is statutory changes to the police practice of releasing arrested suspects on bail for further investigation. This practice has diminished substantially as a result of legislative changes aimed at protecting individuals from the experience of languishing on police bail for lengthy periods. Under the new measures, the police are encouraged to release arrested suspects unconditionally while they pursue further investigations. It seems that this change is also contributing to the greater use of VA interviews and a consequent drop in arrests.

The Commissioner has formed the view that there may be excessive use of VA interviews in cases where arrests would have been more appropriate. He attributes this partly to a lack of national policy and guidance on the use of the option, together with insufficient training and support for officers on its use in many forces. The problem is compounded by confusion and a lack of consistency and guidance on when prints and samples can (or should) be taken post VA interviews. Similar problems have affected the roll-out of the change to the release of arrested suspects on bail. It seems that one adverse consequence of the change for suspects is that they tend to remain under investigation for a longer period than would have been the case had they been released on police bail. This, in turn, has had the insidious effect that the prints and profiles of those for whom the investigation is eventually closed without charge are often retained on the databases for far longer than is necessary or lawful.

The Commissioner considers that the unintended consequences for the operation of the biometrics databases could have been avoided through greater engagement and advance planning between the Home Office and the police. This seems part of a larger problem in which policy and planning on these matters are beset with procrastination and a lack of leadership. So, for example, despite repeated recommendations from the Commissioner, there is still no national guidance on the appropriate use of the power to retain DNA samples beyond the statutory six months cut-off point in certain limited circumstances.

Quite separately, it is worth noting that errors in DNA sampling by police forces are generally low. It is a concern, however that the Biometrics Commissioner found that errors discovered thought integrity monitoring had doubled from 2017 to 2018. There is also significant room for improvement in individual force policies and practices on re-sampling in such cases.

Second-generation biometric data

Digital facial images are now routinely collected and stored by the police, and they are experimenting with live facial image matching in public places. Developments in machine learning, automated intelligence and digital photography offer the prospects of identification for policing and criminal

justice purposes being established using algorithms and a national database of facial images. These new technologies offer many benefits to more effective law enforcement. In the absence of proper verification, regulation and scrutiny, however, they pose immense threats to individual privacy and to the requirements of transparency and proof in criminal justice. They also evoke the prospects of a society where the movements of selected individuals in public places are under constant police technological surveillance just in case they engage in crime or other behaviour unacceptable to establishment interests. The parallels with George Orwell's dystopian vision of a totalitarian society are uncomfortably close.

Given the scale of the inherent benefits and risks presented by the new biometrics, it is vital that their development and deployment are the subject of coherent planning, transparent regulation and democratic scrutiny. One of the unsettling features to emerge from the Commissioner's report is the extent to which the government appears to have conceded the field to the police themselves.

Even though the police have already established and are using a national database of digital custody facial images of arrestees, none of the second-generation biometrics are covered by the current statutory regime which is still limited to fingerprints and DNA profiles. There is no specific statutory framework, other than data protection legislation, to provide governance for the police use of them. The legislature and government are playing catch-up. They have not kept pace with the speed of technical developments in biometric capabilities. The police themselves have moved to occupy the pitch by developing their own guidelines.

There is also a concern that the police are conducting trials of the new technologies in their own interests and without adequate oversight or evaluation of the scientific standards on which they are based. These include the mass camera-scanning of people in public places in live-time (using public-facing CCTV systems) to test capacity to pick up individuals whose digital images are held on the national database. Such trials raise obvious concerns over how, or the extent to which, an appropriate balance is being struck between police and privacy interests in the conduct of these trials.

The Biometrics Commissioner recommends strongly that policy governing the use, and the conduct of trials on the use, of these technologies should really be a matter for parliament. Leaving it by default to the police invites the risk that it will be developed to reflect narrow police and security interests at the expense of wider interests such as privacy, transparency, the rights of suspects in the criminal process and ultimately, public trust and confidence in the police.

It is hardly surprising, perhaps, that some police leaders reject the argument that retention and use of digital facial images should be governed by the same regime applicable to fingerprints and DNA. They assert that fingerprints and DNA profiles are used for the purposes of identification in the criminal justice system, while the digital images are used as an element of police intelligence to manage the risk presented by individuals beyond the criminal justice system. Accordingly, they argue, that governance should come from a police-led process rather than a legislative framework based on the outcome of legal process. This police perspective will do little to dampen concerns over the threat posed by the use

of the new technologies. As the Biometrics Commissioner observes:

> "Governance based on the outcome of a legal process is easily turned into rules that are objective, publicly visible and subject to oversight. Governance in relation to police risk judgments is less amenable to producing objective rules which are publicly visible and subject to oversight."

The Commissioner argues that achieving public trust in the deployment of the new technologies, and in the police as a whole, will require a process in which it is clear that the balance between the benefits and risks is being properly managed. The current approach is too complex, opaque, fragmented and police dominated. It requires the adoption of governance principles for the trialling and use of the new technologies, and those principles need to be decided by parliament and expressed in law. Accordingly, the Commissioner recommends the adoption of governance and oversight legislation that is flexible enough to cope with the rapid development of technical capabilities in biometrics. He notes, with some frustration, that there is no sign of such legislation, and wonders whether that is attributable to Home Office disagreement with the need for such legislation or Brexit paralysis.

The Biometrics Commissioner also identifies an urgent need for the development of clear policy and rules governing inter-governmental access to Home Office biometric databases, especially as some of these databases will be moved to generic biometric data platforms. Moving them to such platforms increases the risk of the police databases being improperly accessed by other government departments or agencies. An example of this is provided by the former practice of the Ministry of Defence searching the police national fingerprints database without a clearly evidenced lawful basis for doing so. This was possible because the MoD were allowed to add their fingerprint database, albeit as a separate cache, to the police fingerprint database. The adoption of clear rules on access are urgent and essential to guard against such risk.

On a more positive note, the Home Office, after several years of failed promises, finally published its strategy for the police use of biometrics last year. Disappointingly, however, it maps out the work that will need to be done and merely proposes that a review of governance and oversight will be undertaken over the following 12 months. This still leaves a vacuum in which policy and practice will continue to be developed by the police themselves on a piecemeal and ad hoc basis in the service of their own interests.

Admissibility of sexual history in rape cases

Introduction

It is generally accepted that prosecutions for rape and similar sexual offences present complex difficulties. Where, as is often the case, the core issue centres on consent, the complainant will find herself the focus of critical attention to a degree that is unparalleled in the trial of most other criminal offences. In some cases, the most intimate aspects of her private life, including her sexual history, can be scrutinised in excruciating detail as if she was on trial. She may also be exposed to the prejudicial effects of 'rape myths'

operating on the minds of jurors so that, for example, evidence of previous consensual sexual activity in similar circumstances will be interpreted as confirmation of the accused's defence that the complainant was consenting on the occasion that gave rise to the charge. Equally she may suffer from a related rape myth that her sexual history with multiple partners suggests that she is not worthy of belief or deserving of the protection of the law when she complains of rape. Not only have these realities contributed to a high rate of attrition for complainants in prosecutions, but it is also believed that they have deterred very large numbers of victims from coming forward.

On the other hand, there is a concern that lowering standard due process protections for the accused in rape cases exposes the accused unfairly to the risk of conviction for a most heinous criminal offence. This risk can be acute where there is contemporary, or a history of, consensual sexual activity between the parties, and the conflict at the heart of the trial pitches the word of the complainant against that of the accused with respect to the former's consent. To explain his actions and support his version of events, the accused will want to show how the disputed sexual encounter was consistent with their consensual sexual activity in the past. As noted above, however, admitting such evidence can also be seriously detrimental to the complainant and rape victims generally.

In attempting to strike an appropriate balance between the rights of complainants and accused in these situations, many jurisdictions have introduced provisions clarifying the meaning of consent and/or imposing restrictions on the admissibility of evidence on the complainant's sexual history. So, for example, the meaning of consent in sexual assault cases has been clarified to establish unequivocally that even within the scope of an ongoing sexual relationship, consent cannot be assumed. It must be communicated affirmatively for each and every sexual act. To put it another way, ".. not only does no mean no, but only yes means yes." An example of restrictions on the admissibility of evidence of the complainant's sexual history is to be found in section 276 of the Canadian Criminal Code. A few days ago, it received a robust interpretation by a majority of six to one in the Canadian Supreme Court in *R v Goldfinch* [2019] SCC 38.

The facts

The accused and the complainant had been in a permanent relationship. Shortly after it broke up, they resumed a friendship which included having sex on an occasional basis. Both parties agreed that their relationship could be described as "friends with benefits". On the occasion that gave rise to the prosecution, they had gone to the accused's flat where they had sex. The accused claimed that it was entirely consensual and followed the pattern that had become established between them. While the complainant accepted that they often had sex in such circumstances, she claimed that, on this occasion, the accused proceeded to have sex with her against her expressed wish not to have sex.

At the trial, the judge ruled that evidence could be given of the "friends with benefits" relationship between the parties. She accepted that this was necessary to provide "context" that would enable the jury to appreciate and interpret the events, and some of the actions and words of the accused, leading to the alleged rape. Keeping such evidence from the jury would harm the accused's right to make a full defence, while allowing it to be introduced

would not prejudice the complainant's personal dignity, right to privacy or personal security. The judge made it clear that the evidence should not extend to details and frequency of their sexual encounters. In the event, evidence of the latter was given to the jury, essentially as a result of the strategy adopted by the prosecution.

In her direction to the jury, the judge made it clear that the evidence of the complainant's sexual history with the accused was for contextual understanding only. It must not be used to help decide whether the complainant is more likely to have consented on this occasion, or to decide whether she is less likely to be reliable or believable in this case. The jury acquitted the accused of the rape. The prosecution appealed on the basis that it was a breach of s.276 to allow evidence of the complainant's sexual history with the accused ("friends with benefits") to be introduced to the jury. The appeal made its way to the Supreme Court where the acquittal was set aside and a new trial ordered.

Section 276

In *Goldfinch* the Supreme Court explained that section 276 aims to protect the integrity of the trial process by striking a balance between the dignity and privacy of complainants and the right of the accused to make full answer and defence to the charge. It is divided into four subsections. The first of these, s.276(1), imposes an absolute bar on the admissibility of evidence that the complainant has engaged in sexual activity, whether with the accused or any other person, to support an inference that by reason of the sexual nature of that activity the complainant is (a) more likely to have consented to the sexual activity that forms the subject-matter of the charge, or (b) is less worthy of belief.

Section 276(1) is clearly aimed at countering the effects of the two rape myths associated with the complainant's sexual history. It imposes an absolute bar on evidence of the sexual nature of a relationship involving the complainant if it is being introduced to infer that she is more likely to have consented or is less worthy of belief in the instant case. Presumably, although it is not entirely clear from the wording of s.276, the bar might be avoided by the accused introducing the evidence for another purpose, even if an incidental effect is to raise an inference that the complainant is more likely to have consented or is less worthy of belief. The second subsection, however, imposes restrictions on the evidence of the complainant's sexual activity that the accused can introduce for any other reason at the trial.

Section 276(2) stipulates that the accused cannot introduce evidence that the complainant has engaged in sexual activity (other than that which forms the subject matter of the charge) with the accused or any other person, unless the judge determines that the evidence: (a) is of specific instances of sexual activity; (b) is relevant to an issue at the trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. If the accused fails to persuade the judge on these matters, the evidence of the sexual relationship between him and the complainant will be inadmissible. In other words, s.276(2) imposes a presumptive bar on the admissibility of evidence of the complainant's sexual history where that evidence might otherwise have avoided the absolute bar in s.276(1). To overcome the presumptive bar, however, the accused will

have to show that the evidence satisfies the three specified criteria.

The third subsection, s.276(3), sets out a list of matters that the judge must take into account in determining whether the evidence satisfies the three criteria. They broadly reflect an attempt to maintain a balance between the right of the accused to make a full and proper defence and the need to ensure that the evidence does not suppress the truth or operate to discourage the reporting of sexual offences. The specified matters are: the interests of justice (including the right of the accused to make a full answer and defence); society's interest in encouraging the reporting of sexual offences; whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; the need to remove from the fact-finding process any discriminatory belief or bias; the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; the potential prejudice to the complainant's personal dignity and right of privacy; the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and any other factor that the judge considers relevant.

Reasoning

The Supreme Court majority noted that the mischief Parliament intended to address in first enacting s.276 almost 40 years ago is very much with us today. In particular, they observed that sexual assault is still the most highly gendered and unreported crime. Moreover, the "harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone era". It was against that backdrop that the majority proceeded to interpret s.276 and apply it to the facts in *Goldfinch*.

The majority had no hesitation in finding that the obvious implication of the evidence of the ongoing sexual relationship between the complainant and the accused was that because the former had consented to sex with the latter in the past in similar circumstances, it was more likely that she consented on the night in question. In other words, evidence of the nature of the relationship raised an inference of consent consistent with one of the rape myths, contrary to s.276(1). Accordingly, the evidence was inadmissible unless the accused could establish some other purpose that satisfied the requirements of s.276(2).

The majority considered that s.276(2) must be interpreted together with s.276(1). The accused must propose a use for the evidence that does not invoke the rape myth inferences identified in s.276(1). It will not be sufficient, therefore, merely to present the evidence as relevant to context, narrative or credibility, especially where these operate as a cover for the prohibited rape myth inferences. The accused must provide detailed particulars that will allow the judge to engage meaningfully with the three criteria in s.276(2) in accordance with the matters listed in the s.276(3).

The majority were of the view that the first of the criteria, specific instances of sexual activity, must be interpreted in light of the scheme and its broader purposes. It is intended to avoid aimless or sweeping inquiries into the complainant's previous sexual history. The requirement for specificity in this case could be satisfied by evidence that the relationship was one of "friends with benefits" as that inherently encompasses specific instances of sexual activity. Requiring further details would unnecessarily invade the complainant's privacy, thereby defeating an important objective of s.276.

The second requirement is that the evidence of sexual history must be relevant to an issue at the trial (apart from either of the two rape myths). The majority cautioned that arguments for relevance must be scrutinised to ensure that "context" is not being used as a cover the rape myths. They further emphasised that, where the relationship is defined as including sexual activity, the relevance of the sexual nature of the relationship to an issue at the trial must be identified with precision.

In *Goldfinch*, the accused argued that evidence of the sexual nature of their relationship was necessary to provide context that the jury would need to appreciate the coherence of his account and, by extension, his credibility. While the majority accepted that there may be situations where such evidence is necessary, they must not lead the jury in to rape myth reasoning. General arguments that the sexual nature of a relationship is relevant to context, narrative or credibility will not satisfy the requirements of s.276(2). In the majority's view the accused did not manage to identify specific issues that made the sexual nature of their relationship critical to the jury's appreciation of his defence.

The third requirement entails balancing the probative value of the evidence against the risk of prejudicing the proper administration of justice. The majority emphasised that each of the two elements must receive heightened attention given the serious ramifications that use of the evidence can have for all parties. Balancing the factors listed in s.276(3) in this exercise will depend on the nature of the evidence being introduced and the factual matrix of the individual case. However, having found that the "friends with benefits" evidence was not relevant to an issue at the trial, the majority had no difficulty in concluding that it had no probative value. In their view, the evidence was relevant only to suggest that the complainant was more likely to have consented because she had done so in the past. Accordingly, the evidence did not satisfy the s.276(2) criteria and was prohibited by s.276(1).

The majority proceeded to quash the acquittal and order a re-trial as the admission of evidence of the sexual nature of the relationship was an error of law which might reasonably be thought to have had a material bearing on the acquittal. It is worth noting, however, that much of the evidence of the sexual nature of the relationship was actually led by the prosecution. Although s.276 refers only to evidence introduced by the accused, the majority held, citing a recent decision of the Court in *R v Barton*, that prosecution-led evidence is governed by the same principles. They also said that the prosecution would not have led the evidence but for the trial judge's erroneous direction permitting the admission of evidence that the relationship was one of friends with benefits".

Dissent

The dissenting judge departed from the majority essentially on the application of s.276 to the facts of the instant case. The dissentient considered that the trial judge had dealt appropriately with the evidence of the "friends with benefits" relationship by allowing it to be introduced to inform the jury how the parties knew each other. The associated risks that s.276 were intended to guard against were minimised by a clear instruction to the parties that it could not extend to the particulars or frequency of the sexual relations, and clear instructions to the jury on the permissible and impermissible use of the

evidence. The dissenting judge felt that to omit the evidence of a "friends with benefits" relationship would leave the jury with a distorted representation of the factual circumstances surrounding the alleged rape. The dissentient also considered that ordering a new trial was fundamentally unfair as the prosecution were effectively trying to have it both ways. On the one hand they actually led and relied on most of the evidence of the past sexual relationship between the parties to advance their case. When the jury verdict went against them, however, they argued that the sexual history evidence should not have been admitted and that it must have infected the jury decision.

Comment

The facts of the *Goldfinch* case highlight quite vividly the strength of the conflicting interests that so frequently permeate rape prosecutions concerning a complainant and accused who were parties to a sexual relationship at the time of the alleged rape. In some respects, s.276 is attempting to reconcile the irreconcilable. Imposing restrictions on the admissibility of evidence of the complainant's sexual history (albeit for very legitimate reasons), carries with it the risk of weakening the capacity of the accused to mount a full defence. It will rarely be possible to satisfy both interests absolutely in individual cases. Perhaps the most that can be hoped for is a balance that confines the use of evidence of past sexual history to that which is no more than necessary (if at all) to enable an accused present his account of events on the occasion in question in a manner that is complete, coherent and comprehensible to the jury. It is submitted, however, that there is a sense in which the majority decision in *Goldfinch* may have set the bar too high for the accused on the facts of this case in their understandable concern to prevent rape myths continuing to affect the trial under the guise of context.

In their "final comments" on the interpretation and application of s.276, the majority said that where there is a risk that the jury may improperly speculate about the complainant's past sexual activity, it may be helpful to give an instruction (presumably to counsel) that the jury must not hear any evidence on whether the relationship included a sexual aspect. The instruction should explain that:

> ".. the details of previous sexual interactions are simply not relevant to the determination of whether the complainant consented to the act in question. No means no, and only yes means yes: even in the context of an established relationship, even part way through a sexual encounter, and even if the act is one the complainant has routinely consented to in the past. Giving such an instruction would both reinforce the principles which guide a proper analysis of consent and mitigate the risk that jurors will rely on their own conceptions of what sexual activity is "typical" in a given relationship."

While the substance of the instruction may be appropriate, and even necessary, to counter the insidious effects of rape myths, it may be questioned whether it should be delivered in such blunt terms. There will often be circumstances in which the accused's account of events will be distorted in the absence of evidence that carries the risk of improper jury speculation about the complainant's past sexual activity. In such cases, it may be possible to counter that risk by measures short of excluding the evidence altogether. Even in *Goldfinch*, two of the majority judges (as well as the dissentient judge) felt that the

evidence of the "friends with privileges" relationship could be relevant to an issue in the accused's defence quite separate from an inference of consent arising from the sexual nature of the relationship. Striking a fair and appropriate balance in such cases will require some very careful engineering.

Quite separately, it is disturbing that an acquittal was quashed and a new trial ordered on appeal by the prosecution, even though the appeal was based essentially on the unlawful admission of evidence that the prosecution had introduced and relied on (unsuccessfully) to advance its case at first instance. Discussion of the uncomfortable issues raised by such a strategy and outcome will have to await another occasion.