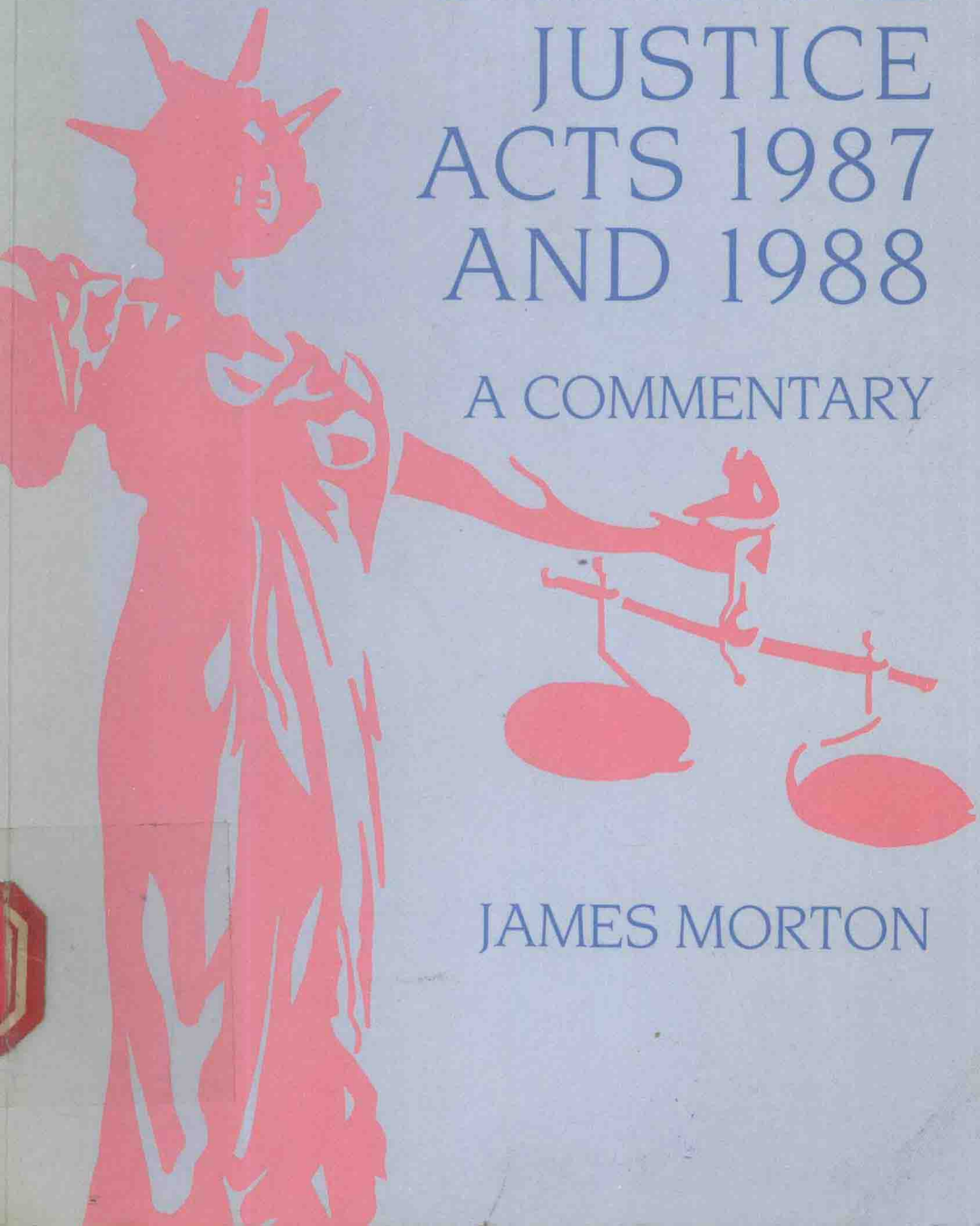
CRIMINAL · LAW · COMMENTARIES

THE CRIMINAL JUSTICE ACTS 1987 AND 1988

A COMMENTARY



JAMES MORTON

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The Criminal Justice Acts 1987 and 1988:
A commentary

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Introduction

When Mr Douglas Hurd introduced the Criminal Justice Bill 1986 to the House of Commons on its second reading he began:

> "The Bill is the fifth in a series of major reforms of the powers of the police and the courts that we have brought before the House during the past five years. The Criminal Justice Act 1982 established a new structure for dealing with young offenders. The Police and Criminal Evidence Act 1984 set out a clear framework for the exercise of police powers. The Prosecution of Offences Act 1985 established the Crown Prosecution Service to provide for greater consistency in prosecution decisions. The Public Order Act 1986 provided the police with strong powers to avert disorder and to protect citizens as they go about their lawful business."

In the event the Bill aborted with the General Election of 1987. The Criminal Justice Act 1987 was a truncated version of the original Bill, dealing with the establishment of the Serious Fraud Office and setting out its powers of investigation (ss. 1–3); the transfer of serious fraud cases to the Crown Court abolishing committal proceedings for them (ss. 4–6); and the establishment of the preparatory hearing (ss. 7–10) designed to put some beef into the much-ignored pre-trial directions which have been ineffectively used for so long. There were also provisions regarding reporting restrictions (s. 11) and the re-incarnation of the offence of conspiracy to defraud together with a maximum penalty for the offence. The Serious Fraud Office came into being in the spring of 1988, but the transfer provisions and consequent preparatory hearing provisions are, at the time of writing (August 1988), still not in effect although it is anticipated they will have been introduced by the end of October.

The remainder of the Bill, with amendments and, hopefully, improvements, was re-introduced in the House of Lords in July 1987. The new 1988 Act concentrates in Part I on new extradition procedures. The intention is to do away with the rules which foreign governments have thought unduly restrictive whilst lawyers here have looked on as safeguards for the alleged fugitive offender. The requirement of *prima facie* evidence which can be tested by the defence is no longer necessary in cases where an Order in Council exists.

Part II reconstructs the rules regarding documentary evidence in criminal proceedings much along the lines of suggestions in the Roskill Committee's report and the report of four research studies conducted by

the MRC Applied Psychology Unit at Cambridge, and provision is made in Part III for the use of video links to lessen the traumas of children giving evidence. Experiments have already been announced which will no doubt lead to the general use of video-linked techniques.

There has been considerable cause for concern amongst both the press and public that senior judges are not handing out stiff enough sentences, particularly in rape cases. The 1986 Bill proposed that the Attorney General could in suitable cases apply to the Court of Appeal for what amounted to a public chastisement of the trial judge in such a case. Part IV of the Act has toughened things up. The Court of Appeal may now review sentences referred to them by the Attorney General and increase them in suitable instances. If this proves to be a success there are provisions for the power to be extended to all indictable cases, an oblique way of giving the prosecution more of a say in the sentencing process and an effective appeal against the supposedly inadequate sentence.

The Crown Courts are almost bursting at the seams with cases and so once more there is a band of cases downgraded to the status of those triable only by magistrates' courts, in Part V. These include the offences of taking a motor vehicle without the consent of the owner, and driving whilst disqualified. At the same time the Act provides that one court shall, if possible, deal with all charges in a case instead of, at present, some matters which are triable summarily having to await the outcome of the trial on indictment on similar facts.

There are increased maximum sentences in the cases of corruption, and particularly for cruelty to children, again the result of public lobbying and media attention.

Part VI introduces confiscation of the proceeds of what could be described as organised crime, so the criminal does not return to luxury at the end of his sentence. Broadly this is in line with the confiscation of assets in cases of drug trafficking.

The Criminal Injuries Compensation Scheme is placed on a statutory basis under Part VII. However the provisions are broadly in line with the workings of the present scheme and the change should have little effect in practice.

The recent crop of acquittals in sensitive cases has resulted in the abolition of the defence's right of peremptory challenge as well as the increase in the age of eligibility of jurors to 70, designed, no doubt, to counteract the impetuosity of youth and to ballast the number of jurors thought to be more inclined to favour the prosecution. These provisions are dealt with in Part VIII.

Part IX enacts new provisions for dealing with young offenders and the powers of the courts are increasingly limited in ordering custodial penalties. There are also provisions relating to numerous miscellaneous

items such as the remanding in custody of prisoners for more than eight days. This is an effort to economise on the weekly production of prisoners merely to see they are still alive and well.

As with much legislation nowadays, there is a good deal of cosmetology. Many of the provisions have no fixed date for implementation and it may be months and possibly years before they come into effect; and it is by no means clear why many of the sections are not to have immediate effect. There are also considerable and wide-ranging provisions which may be made by subordinate legislation.

It is to be hoped that this is the final Act in the government's programme for streamlining the criminal jurisdiction but it is doubtful if this will be the case. Already there are murmurs of further reducing the offences for which a defendant may elect trial by jury, and the government is by no means committed to retaining the jury in serious fraud cases.

In the end, whilst the Act has far-reaching provisions, it may be that its main contribution is that it is yet another step on the road to curtailment of what those of us who are middle-aged have seen to be civil liberties. If some of the more restrictive provisions are deemed to work, then in three or four years' time they will be cited as examples of good husbandry so that there may be further encroachment on what have been our basic rights in the judicial process.

I am grateful to all those who have advised and helped me with the preparation of this commentary. The responsibility for comments and arguments in it is, of course, mine. I am particularly grateful to Dock Bateson for her help. It is true to say that without her organisation, encouragement, and, from time to time, chastisement it would never have been finished. To misquote, this poor thing is not mine own but hers as well.

CRIMINAL JUSTICE ACT 1987 (C. 38)

". . . the Committee is united across all parties in wishing to ensure that the Serious Fraud Office is established, that it has teeth and that it can stamp out serious fraud and counter it with the most effective measures, whenever it occurs."

Mr Chris Smith Tuesday 20 January 1987

PART I

Serious Frauds

Background – the Serious Fraud Office

The terms of reference of the Roskill Committee on Fraud Trials were:

> "to consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings."

The Committee reported that there had been public concern at the effectiveness of the methods of combating serious commercial crime, although it might have been better to have quantified the word "public". The interested public in this instance is not the man in the street but the man in Lombard Street. The report went on:

> "There was also a general feeling at the time of our appointment that since much serious fraud appeared to escape detection or successful prosecution, this served only to encourage its growth, with potentially harmful consequences, not only for the unfortunate victims of fraud, but also for the reputation of the nation, and in particular the City of London, as one of the world's great financial centres."

The Committee saw delays in investigation as well as the increasing length and complexity of trials which led "many people" to call into question the appropriateness of trial by jury for this type of case, although this recommendation was subsequently rejected after almost unanimous disapproval. There was also, the Committee found, the question of sentencing. Even if the defendants were convicted, they could, rightly, plead in mitigation the length of time between crime and punishment. The Committee found that many "could receive hopelessly inadequate sentences" on the basis of pleas along those lines.

The Committee reviewed the currently fragmented structure of those concerned in investigation. The police had 43 separate fraud squads, one for each of the police forces in England and Wales. The Metropolitan Police Fraud Squad, with the first squad formed in 1946 with twelve officers, had grown by 1985 to just over 200, but some of those outside London had only a tiny organisation. Hertfordshire, for example, had 7 officers, whilst Surrey had 2 and Northamptonshire 3. Cambridgeshire, which in the 1960s had had some major fraud trials, had 5 officers.

In addition to the police, investigations could be undertaken by the Department of Trade and Industry, the Inland Revenue and by the Customs and Excise. Prosecution was undertaken by either prosecuting solicitors (the report was made before the Prosecution of Offences Act 1985 introduced the Crown Prosecution Service) or the Director of Public Prosecutions. Additionally, and most important, there was the little known Fraud Investigation Group (FIG), conceived in 1978 when the Attorney General set up a working party to review the arrangements for investigating company fraud in particular and to examine the various roles of and co-ordination possible between the various interested authorities.

The FIG became a permanent department within the Directorate of Public Prosecutions in January 1985 and a Home Office circular was published the next month and sent to Chief Constables identifying the FIG's objectives and the role of local police participation in investigations. The cases deemed suitable for FIG treatment included:

> "frauds upon Government Departments or local authorities, frauds involving large-scale corruption, shipping and currency offences, and frauds discovered in the course of investigations by DTI inspectors appointed under the Companies Act."

The Roskill Committee did not see the FIG as sufficient for the purposes of investigating serious fraud of the type set out above. They suggested that the

> "need for a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud cases should be examined forthwith."

It was out of the embryo of the FIG that the Serious Fraud Office was born.

The Serious Fraud Office

1.—(1) A Serious Fraud Office shall be constituted for England and Wales and Northern Ireland.

(2) The Attorney General shall appoint a person to be the Director of the Serious Fraud Office (referred to in this Part of this Act as "the Director"), and he shall discharge his functions under the superintendence of the Attorney General.

Comment

Whilst the Opposition in the form of Mr Tony Lloyd (Stretford) made it clear in the first minutes of the committee stage of the Bill that they had no complaints about the establishment of a serious fraud office, they raised at once the question of the supervision of the Attorney General.

Was he the right person to supervise? Why not take the matter out of the hands of the Attorney General and place it in the hands of the Lord Chancellor? This, of course, was mere political sparring. There has been some discontent in recent years with the whole concept of the Lord Chancellor, who alone of ministers is not accountable to the House of Commons and who, instead, sends the Attorney General to account for him. This course of conduct had come increasingly under attack by both the Labour Party and Liberal/SDP Alliance. Some form of Ministry of Justice had been suggested by the latter, and there is support for this from various legal organisations such as the British Legal Association and the Legal Action Group. It was pointed out that substitution of the Attorney General by the Lord Chancellor would result in the head of the judiciary also being responsible – however remotely – for prosecutions.

What is, perhaps, more interesting is the immediate shift in attitude away from the concept of the Crown Prosecution Service and the conflicting roles of the investigator and prosecutor as envisaged by the Prosecution of Offences Act 1985. It will be remembered that the split in roles provided by the Act would be facilitated by the removal from police stations of any trace of prosecution. Here, within a year, we have a complete reversal of that attitude, albeit in one type of case.

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1 (3) The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.

(4) The Director may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.

Comment

Clearly it is envisaged that only serious frauds of the kind already outlined will be investigated by the Director. If the guidelines in the Home Office Circular to the FIG are continued, then it is likely the initial complaint will be made sometimes directly to the Director, less often to the Director of Public Prosecutions, but in many cases via the police.

If there is any doubt about whether the case is suitable for the Director to consider, then the head of the police Fraud Squad should have the opportunity of considering the matter before it is referred and in the case of continuing doubt, this should be resolved in favour of referring the matter to the Director. It is likely that further guidelines will be circulated to the various Chief Constables in the near future.

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1 (5) The Director may—

(a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and

(b) take over the conduct of any such proceedings at any stage.

Comment

It is clear from Schedule 1 to the Act and from the responses in committee by the Solicitor General that the Director is to be regarded as an equal to the Director of Public Prosecutions. Indeed since his office staffed the FIG and it was under the DPP's control, the establishment of the Serious Fraud Office and its own Director can be seen as a hiving off from the DPP of this particular aspect of his functions.

What, it was asked, would be the standards applied by this new Director to prosecutions? Would the so-called 51% rule on probability of success apply? The Solicitor General was clear on the matter.

> "The standards applied by the Director of Public Prosecutions are those laid down by the guidelines for all prosecutions that were promulgated by my Right Honourable and Learned Friend the Attorney-General three or four years ago . . .
> The same criteria would be expected to be applied by the Director of the Serious Fraud Office. The better than 50% rule is only one of a number of signposts that are set out in the Attorney-General's document, and it is an important one.
> For my part, I would not expect any special deviation from those guidelines – that one in particular – to be applied to the Director of the Serious Fraud Office."

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1 (6) The Director shall discharge such other functions in relation to fraud as may from time to time be assigned to him by the Attorney General.

Comment

Exactly what these functions may be is not yet clearly defined but it may be that the Director will be obliged to carry out research into various aspects of serious fraud. What is clear is who is to be the master. In answer to a question from Mrs Llin Golding during the committee stage of the Bill, the Solicitor General replied:

> "The legislation controlling the Director of Public Prosecutions contains a power for the Attorney General to give the Director a direction. The present Attorney General has not done so and I know of no occasion when the Director of Public Prosecutions has been given a direction. I am not saying that it has never happened but if so it is unusual."

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1 (7) The Director may designate for the purposes of subsection (5) above any member of the Serious Fraud Office who is –

(a) a barrister in England and Wales or Northern Ireland;

(b) a solicitor of the Supreme Court; or

(c) a solicitor of the Supreme Court of Judicature of Northern Ireland.

(8) Any member so designated shall, without prejudice to any functions which may have been assigned to him in his capacity as a member of that Office, have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director.

Comment
Subs. (7) gives further delegatory powers – this time the Director may designate for the purposes of the section any member of the Serious Fraud Office who is a barrister or solicitor; whilst (8) gives such a member all the powers of the Director as to the institution and conduct of proceedings, but he is to exercise them under the direction of the Director. Presumably the degree of autonomy of each member will follow that of members of the staff of the Director of Public Prosecutions.

1 (9) Any member so designated who is a barrister in England and Wales or a solicitor of the Supreme Court shall have, in any court, the rights of audience enjoyed by solicitors holding practising certificates and shall have such additional rights of audience in the Crown Court in England and Wales as may be given by virtue of subsection (11) below.

(10) The reference in subsection (9) above to rights of audience enjoyed in any court by solicitors includes a reference to rights enjoyed in the Crown Court by virtue of any direction given by the Lord Chancellor under section 83 of the Supreme Court Act 1981.

(11) For the purpose of giving members so designated who are barristers in England and Wales or solicitors of the Supreme Court additional rights of audience in the Crown Court in England and Wales, the Lord Chancellor may give any such direction as respects such members as he could give under the said section 83.

Comment
Of the remaining subss., (9)–(14) deal with the rights of audience for the designated members. They are placed on a level with that of a solicitor holding a practising certificate. This means that any barrister member forfeits his automatic right of audience in the Crown Court or in the High Court. Provision is given (11) for designated members to be given additional rights of audience by the Lord Chancellor exercising his powers under the Supreme Court Act 1981 s.83, which provides that at any time he may direct that solicitors appear in, conduct, defend and address the court in any proceedings in the Crown Court, or proceedings in the Crown Court of any description specified in the direction.

Subss. (12)–(14) and (17) apply only to Northern Ireland. Subs. (15) gives effect to Schedule 1. Subs. (16) states that conduct of proceedings

includes their discontinuance and the taking of any necessary steps (applications for bail, appeals etc.)

Director's Investigation Powers

S. 2 was the clause which caused, during consideration of this part of the Bill at any rate, the most comment and complaint by, amongst others, the Law Society and the Haldane Society. It provides what have been seen as very wide-ranging powers of investigation by the Director, coupled with substantial penalties for disobedience. The Law Society saw three major problems, the wideness of the investigative powers, the abrogation of the right of silence, and the potential prejudice of certain legal and other privileges by the omission of safeguards contained in the Police and Criminal Evidence Act 1984, as well as the obligation on a lawyer (subsequently abandoned) to divulge the name and address of his client when called on to do so (see comments on S. 2(10) below).

2—(1) The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above [or, on request made by the Attorney General of the Isle of Man, Jersey or Guernsey, under legislation corresponding to that section and having effect in the Island whose Attorney General makes the request], in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.

Comment

It can be seen immediately that this is an enormously wide provision. There is no mention of the words serious or complex fraud. The Law Society suggested that those were the very words to be inserted. Is there any need for such wide powers and, as a corollary, will injustice be done if the Director has such powers?

The Minister of State, Mr David Mellor, considered there were adequate safeguards. He took the view that the power to require the production of documents was confined by ss. 2(3) and 1(3) to specified documents that are relevant to the investigation of a suspected offence of serious or complex fraud. Really, the argument goes, only a relative handful of cases are involved.

> "If we accept that the underpinning and basic reason for the creation of the office is to deal with serious fraud – in an example the Hon. Gentleman mentioned the sum of £20,000 – it would be inconceivable that the serious fraud office would be involved . . . rather it would cream off the top 50 or 100 cases each year to work on."

In that case it is difficult to see why objection was taken to the suggested limiting words. The amendment is by s. 143 of the 1988 Act.

2 (2) The Director may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person whom he has reason to believe has relevant information to [answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.]

(3) The Director may by notice in writing require the person under investigation or any other person to produce [at such place as may be specified in the notice and either forthwith or at such time as may be specified] any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified [description] which appear to him so to relate; and—

(a) if any such documents are produced, the Director may—

(i) take copies or extracts from them;

(ii) require the person producing them to provide an explanation of any of them;

(b) if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

Comment

The Law Society has rightly pointed out that there are precedents for the subsections. The Companies Act 1985 s. 447 allows the Secretary of State for Trade and Industry to give direction to a body "if he thinks there is good reason to do so". But this direction is far less wide than in s. 2. First it may extend only to the production of books or papers whilst s. 2(2) adds "to answer questions". Secondly, s. 447 requires only companies and other incorporated bodies to produce the books and papers. S. 2(2) extends to anybody, whether they are under investigation or not. S. 2(13) provides substantial penalties for non-compliance.

A careful look at the words "answer questions" and later in s. 2(3)(b) "the Director may require the person . . . to state to the best of his knowledge and belief where they are" brings us once again to the vexed question of the right of silence and cautioning. It is clear that the right of silence has been abolished by the present subsections so far as questioning by the Director is concerned. This is a very serious step taken along the road to a breach of the fundamental right of the suspect to decline to answer questions.

The arguments for the right of silence have been considered regularly, not least by the Royal Commission on Criminal Procedure under Sir Cyril Phillips:

> "There should be no duty on a suspect to answer questions. The majority of us thinks that there should be no modification to the right of silence. The