

On yer bike

Our constitutional rights are slowly being eroded by an increasingly managerial approach to criminal cases, says David Rhodes

“WHAT DISTRESSES ME most about our times,” lamented the late Sir John Mortimer’s anti-hero Horace Rumpole in *Rumpole à la Carte*, “is the cheerful manner in which we seem to chuck away those blessed freedoms we have fought for, bled for and got banged up in chokey for down the centuries. We went to all that trouble with King John to get trial by our peers, and now a lot of lawyers with the minds of business consultants want to abolish juries. We struggled to get the presumption of innocence, that golden thread that runs through British justice, and no one seems to give a toss for it anymore. What must we do, I wonder? Go back to Runnymede every so often to get another Magna Carta and cut off King Charles’ head at regular intervals to ensure our constitutional rights?”

This month, thousands of people gathered across the country for the Convention on Modern Liberty, a clarion call to renew the spirit of Runnymede and to defend our ancient freedoms which are currently being chipped away by a thousand tiny blows.

One such blow came in *JL v DPP* [2009] EWHC 238 (Admin) – an everyday case in the Sunderland Youth Court, which is unlikely to be reported and yet represents the spirit of the managerial age.

Stolen bicycle

Early one morning, a bicycle belonging to an 11-year-old boy (JM) was stolen from a garden shed. The next day, JM’s father spotted another boy, the defendant (JL), sitting on a bike. The father was “almost certain” that he recognised this as his son’s stolen bicycle. The police were called to the scene. They arrested JL for handling stolen goods, to which he replied: “I’ve had the bike for ages.” A police officer seized the bicycle as an exhibit. Some time later, JM attended the police station and was shown a bicycle, which he identified as his property. The defendant was interviewed and exercised his right to silence.

At the trial in the Youth Court, the defence’s strategy was to ‘put the Crown to strict proof’ – to force the prosecution to prove its case, if it could. The defence had spotted a flaw in the Crown’s case – a fatal gap in continuity – and so allowed all their statements to be read without challenge – so

as not to permit the Crown a chance to rectify it. This was a respectable strategy to adopt.

Then, at ‘half-time’, the defence made a submission of no case to answer. The police had not recorded the journey of the bicycle from the street to the police station and thence to the identification procedure. Thus, the Crown had failed to prove that the bicycle taken from JL was the same bicycle shown to JM at the Police Station. JM’s father was only ‘almost certain’ that it was the same bicycle. Having failed to prove the continuity of the evidence, the Crown had failed to prove its case. The Youth Court did not agree and convicted.

Magna Carta spirit

Unfortunately for the defence, in a dispiriting judgment the Divisional Court (Maurice Kay LJ and Wyn Williams J) agreed with the Youth Court. The court invoked “the overriding objective” in rule 1.1 of the Criminal Procedure Rules 2005 – a document which is the epitome of managerialism and about as far removed from the rolling prose of Magna Carta as instructions for repairing a washing machine.

The blandness begins with rule 1.1(1): “The overriding objective of this new code is that criminal cases be dealt with justly. (2) Dealing with a criminal case justly includes – (a) acquitting the innocent and convicting the guilty; (b) dealing with the prosecution and defence fairly.” Rule 1.2 states that “each party” must prepare the case in accordance with the overriding objective.

The Divisional Court said that this overriding objective means that “a criminal trial is not a one-sided obstacle race. Of course the prosecution must prove its case if it is to secure a conviction, but there is more than one way in which that may be done.”

What does that mean? What other way is there than that the prosecution must prove its case? If they cannot, the defendant is enti-



tled to be acquitted. The presumption of innocence and the burden of proof are among our most cherished freedoms. A criminal trial is precisely a one-sided obstacle race. The defence have no duty to alert the prosecution to flaws in their case, thereby assisting them to a conviction. And yet rule 1.2 of the CPR seems to suggest that both the prosecution and the defence must work towards the overriding objective of convicting the guilty. The court said that if it was not the same bicycle, the logical possibilities seem to be limited to “underhand skulduggery” on the part of the police, and/or the family. “If this line of defence was to be pursued,” said Maurice Kay LJ, “it seems to me that it was incumbent upon the appellant’s advocate at trial to require the attendance of the witnesses so that the line of defence could be investigated.”

The court appears to be saying that firstly, in preparing for trial, the defence should have written to the CPS and the court alerting them to the fact that the defence would be relying on the continuity point. Then, secondly, during the trial the defence should have cross-examined witnesses to highlight the gap in continuity. But what would have been the result of that approach? The prosecution would simply have thanked the defence for pointing out their error and rectified it – thus ensuring the conviction of JL.

That seems to me to be a subversion of our ancient principles. The defendant has always been entitled to keep silent – only to say to the prosecution: “You bring this case, you point the finger of accusation, then you prove it, if you can – but don’t expect any help from me.” Yet according to this judgment, that defence strategy is now at an end. Dear old Horace Rumpole would be up on his hind legs and charging off to Runnymede.

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