questioning for what could be as long as 96 hours, and the power, without obtaining a search-warrant, to search the arrested person's property. Arrests also carry the grave risk of injuring the arrested person's reputation. In our system the identity of suspects is not legally protected, and if the press discover the fact that a given person has been "nicked", this is likely to be given the same sort of publicity as if he had been convicted. And an arrest is potentially damaging in other ways as well. Some countries even more contemptuous of the presumption of innocence than we are here – like the USA – ask would-be visitors, "Have you ever been arrested?", and if the answer is "yes", refuse to let them in.

You would therefore think that, as an instrument for investigating past offences rather than a means of stopping current crimes from happening here and now, the power of the police to arrest a suspect without warrant would be limited to serious crimes. That two years ago Parliament was willing, at a nod from the Home Secretary, to extend it to even the most trivial of offences, seems utterly astonishing. It brings to mind a recent cartoon in *Private Eye* in which one uniformed figure is saying to another: "Actually, establishing a tyranny turned out to be quite a lot easier than we expected."

Given that this extension has now happened, it surely behoves the courts to interpret the restrictions that Parliament has imposed on it – feeble as they are – with strictness.

If a suspect is willing to be questioned voluntarily, arresting him for questioning cannot possibly be necessary for the "prompt and efficient investigation of the offence". The real reason why the police like to arrest co-operative suspects is, I suspect, that it enables them to tell the press that they have "arrested X for questioning" – and so to give the world the impression that they are acting promptly and efficiently, even if the truth is that they are not.

J. R. SPENCER

## HOLDING PROCEDURAL ERRORS AT BAY

WHEN does a procedural or jurisdictional failure affect the proper course of criminal proceedings so as to entail that, irrespective of the factual merits, the conviction must be set aside on appeal? An answer to this question was attempted by the Court of Appeal, Criminal Division in *R.* v. *Ashton, Draz and O'Reilly* [2006] EWCA Crim 794, [2006] 2 Cr. App. R. 15, where the court was confronted with three cases in which the common denominator was some form of procedural irregularity.

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In the case of Ashton, proceedings for a child pornography offence had (allegedly) been instituted without the consent of the D.P.P., as required by the legislation creating the offence. In Draz's case, a prosecution for an "either-way offence" had been sent directly from the Magistrates' Court to the Crown Court without "mode of trial" proceedings being held along the way, as the Magistrates' Courts Act 1980 required. In both cases action had been taken by the trial court with the aim of putting the initial blunder right. And in O'Reilly's case, the Crown Court, which has extremely limited powers to deal with summary offences, had convicted the defendant of a summary offence outside the limit of its statutory powers.

In dealing with these cases, the Court of Appeal first drew a distinction between questions of jurisdiction and questions of procedure. A jurisdictional defect arises when a court acts outside its powers to deal with the case in question. In such cases, what it has done is of necessity a legal nullity. A procedural defect, on the other hand, arises where a court, which in principle has the power to deal with the instant case, fails to respect the procedural rules which it is required to follow. Procedural defects, unlike jurisdictional defects, are not necessarily fatal to the resulting conviction: some are and some are not. The error in O'Reilly's case, the Court held, amounted to a jurisdictional defect, and his conviction was therefore quashed. The errors in the other two cases, however, amounted to procedural defects – neither of which was sufficiently fundamental to require the conviction to be quashed.

In deciding Ashton's and Draz's cases, the Court of Appeal took the opportunity to formulate some general principles as to which procedural errors will automatically lead to criminal convictions being quashed, and which will have this effect only where the appeal court believes that they caused the defendant some identifiable prejudice. Traditionally, the courts have approached this question by classifying procedural rules as either "mandatory" or "directory". But the Court of Appeal rejected these terms as having "outlived their usefulness". Instead, it applied by analogy what the House of Lords had said in *R.* v. *Soneji* [2005] UKHL 49, [2006] 1 A.C. 340 when dealing with the validity of a confiscation order. According to the new approach, the consequence of a failure to observe procedural rules must be determined by looking at the intention of the legislature. A procedural failure will render void the proceedings only if Parliament clearly intended to provide so. If not, a flaw in the procedural sequence may cause the conviction to be quashed only if it caused prejudice to the defendant.

To justify the extension of such a principle from confiscations to the proceedings for determining the issue of guilt, the Court of Appeal

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stressed that criminal litigation should not be decided on technicalities and it expressly linked this thought to the "overriding objective" set out in the new Criminal Procedure Rules 2005. These impose a requirement that cases should be dealt with justly: and as ingredients in "justice" they list, *inter alia*, the need for cases to be managed in an efficient and expeditious way, with due care for the defendant's rights and bearing in mind that the criminal justice system should acquit the innocent as well as convict the guilty. The consequence of these directives is that disregard of certain formalities (*e.g.* the omission to sign the indictment) should not impede the criminal process from giving an answer to the issue of guilt.

The practical consequence of dismissing the old dichotomy between mandatory and directory requirements is to set aside all the case law which has grown up around those concepts. The lower courts will no longer be bound by precedents stating that a certain requirement is mandatory. Evidently the Court of Appeal took this new approach because it believed that the existing state of the law often attributed a fundamental role to formalities, with the risk that convictions could be quashed simply because of trivial negligence or omission. The new approach should make it possible to overcome such difficulties and to maximise the impact of the "overriding objective", whose contents should guide the development of the new case law.

Some commentators have criticised the decision in that it over-emphasises the "overriding objective", which one of them has declared to be "incompatible with an adversarial system of justice" (Richardson, [2006] Criminal Law Week, no. 43, p. 4). This criticism appears to be too drastic. The "overriding objective" is susceptible of different interpretations, not all of them inconsistent with an adversary system, aimed at protecting the innocent from an unfair trial. The "overriding objective" need not lead to an excessively restrictive conclusion as to the consequences of procedural failures, at least as long as the courts will carefully evaluate any prejudice suffered by the parties and in particular are prepared to protect the defendant's rights.

However, the new principle is not fully persuasive. In particular, the adoption of the criterion of the intention of the legislature raises some doubts. First, there is the practical problem that, when seeking the intention of Parliament, the courts are often looking for something which in reality does not exist. When rules of criminal procedure are being enacted, often nobody gives any thought at all as to what the consequence of a breach will be. And secondly, the legislature's will is not completely sovereign in the subject of the criminal trial. Parliament's determinations are strongly bound by the European Convention on Human Rights. If the legislature departs from protecting the rules of a fair trial the interpreter has the obligation,

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according to section 3 of the Human Rights Act 1998, to read the legislation in a way which is consistent with the Convention rights. This may cause the courts to treat a procedural requirement as fundamental, although seeking to ascertain the will of the legislator might suggest the opposite. To similar effect, the "overriding objective" set out in the Criminal Procedure Rules also requires the courts to respect the defendant's rights under Article 6 of the European Convention on Human Rights.

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