**Racial Stereotyping and Body Worn Video, the experience of Dr Mahamed Hashi**
**"Change through Engagement"**

On Thursday, the 16th July 2020, Radio 4 broadcasted another episode of their "FOUR THOUGHT" series, entitled 'Change Through Engagement'. It raised some very interesting social and legal issues in relation to the operation of policing in London, which is such an important topic at present. [The programme is still available still easily available via the BBC Sounds App]. It lasts only 25 minutes.

The programme was primarily the narrative reflections of Dr Mahamed Hashi, in relation to his contacts with the police over a long period of time, followed by a short discussion with the presenter. We learned of Dr Hashi's background, as a Somali immigrant, being brought up in Stockwell, London, in very disadvantaged circumstances. However, despite these difficulties, Dr Hashi managed, firstly, to get himself to university, to undertake a degree in biomedical sciences, he then attained a Masters Degree in Forensic Science, before being awarded an honorary Doctorate. Outside of his academic success, Dr Hashi went on to co-found the 'Brixton Soup Kitchen', and to become the first Somali councillor on Lambeth Council.

Dr Hashi provided a very important insight into the issue of racial stereotyping and bias, in the context of policing he experienced, having been stopped and searched around sixty times. He reported that in the course of his 'routine' contacts with the police, when he was stopped and searched, he was told by officers that the police had intel 'markers' on his vehicle for 'drugs and/or violent crime'. His reality, however, was that in 1999, when he was 15 years of age, he was stabbed, and then in 2008, he was accidentally shot, when he was hit by a ricocheting bullet.

In addition to the issue of racial prejudice and bias, he also raised, tangentially, two very interesting and important issues in relation how such arguably systemic conduct can impact on the criminal justice system. Firstly, the need for a new approach by the police when seeking to persuade witnesses, who are victims of serious knife crime, to cooperate with the prosecution, when they are usually, and understandably fearful of reprisals. This issue, he recognised, remains a difficult an intractable problem in some areas in London. Each side of the divide failing to understand how the other side sees the situation created by such violence. Dr Hashi advocated such change might be achieved by engagement, hence the title of the R4 piece. He cited the example of 'drill music', and how this is perceived by many, who perhaps do not understand the distinction to be made in relation to those who advocate violence, and those who witness and/or who are affected by such violence within their

community. Secondly, the very real disclosure and admissibility issue, in relation the increasing use of police 'body worn video' [BWVs] footage in evidence, in both criminal and civil proceedings.

What is the evidential status of such captured footage? And how might it be deployed, and for what legal and/or other social or political purposes, in order to effect social and or legal changes?

Dr Hashi referenced one situation when he was stopped and searched. He asked the officers the basis of the search, which they then gave him, at the time. However, when Dr Hashi was able to obtain disclosure of the contemporaneous police BWV footage of this incident, sometime later, it revealed that prior to his stop, the same officers had been at the police van discussing what reason they were going to give (to Dr Hashi) when they stopped him to search him.

By way of an aside, I recently represented a man charged with causing death by careless driving whilst OPL. The man who died was lying asleep in the road, late at night, and the defendant driver failed to see him, drove over him and tragically killed him. He also failed to stop. The deceased turned out to be the son of a retired road traffic police inspector. When officers attended at the defendant's home address, about half an hour after the accident, the arresting officers were already aware of the antecedents of the deceased, and it was possible to hear an officer, recorded on his BWV audio, calling the then suspect a *'f….ing bastard'.* This comment was made as the officers went to knock on the suspect's front door, to arrest, and then breathalyse the suspect.

What links these two disparate incidents is that they were both made because there is a duty on police officers to record such 'incidents'. The police must always record 'Stop and Search' incidents [1]. If officers fail to record such incidents, or selectively 'edit' such incidents by their conduct, then they may face misconduct proceedings. [2]

These examples underline the potential crucial importance of the use of BWV evidence in the context of formal disclosure issues, however, there is also the parallel, and equally important issue, of the increasing use of BWV by the prosecution, and in particular, where there may be little, or even no other independent evidence, particularly in cases where the complainant and the defendant are closely related, or connected.

**THE LAW:**

There is a clear jurisprudential pathway which permits the use of *'res gestae'* evidence, which 'survives' the passing of the Criminal Justice Act 2003. The leading authority, before the Act, is the House of Lords decision in R v Andrews [1987] AC 281. The key question which Lord Ackner identified for a trial judge to answer is: *Can the possibility of concoction or distortion be disregarded?*' His Lordship then set out the necessary antecedent considerations that were required of the trial judge, before he or she could properly determine that issue.

In the A-G's Reference (No.1 of 2003) [2003] EWCA Crim 1286, 2 Cr App R 453, the Court of Appeal stated:

> "…… As a general principle, it cannot be right that the Crown should be permitted to rely only on such part of a victim's evidence as they consider reliable, without being prepared to tender the victim to the defence, so that the defence can challenge that part of a victim's evidence on which the Crown seeks to rely, and if so advised elicit that part of her evidence on which the defence might seek to rely."

However, in Barnaby v DPP [2015] EWHC 232 (Admin); [2015] 2 Cr. App. R. 4, Fulford LJ, at §32 of his judgment observed:

> "In my judgment, it follows that the evidence of the telephone calls, together with the conversations with the police officers that occurred shortly afterwards, fell well within the 'res gestae' principle. *[For reasons he detailed in the previous paragraph of his judgment.*) The only issue that has given me cause to hesitate is that the prosecution did not seek to call Ms Gibb to give evidence, nor did they attempt to tender her for cross-examination. As Lord Ackner observed, this is an important consideration and it will often be the case that if the prosecution are not prepared to tender an available witness for questioning by the defence, the court will more readily exercise its discretion against admitting the hearsay evidence (see, for instance, *Attorney General's Reference (No.1 of 2003)* [2003] EWCA Crim 1286; [2003] 2 Cr. App. R. 29 (p.453)).

These perhaps contrasting decisions, made on their individual facts, have been followed, more recently, by three cases in 2016, the first of which was Ibrahim v CPS [2016] EWHC 1750, in which Cranston J. upheld the admission in evidence of a '999' call made by the complainant, where the court was satisfied that there was a risk of harm if the complainant was found to have cooperated with the police. This decision is perhaps notable, in that the Court had particular regard to the possible impact of a 'delay', of a one and half hours, between the relevant incident occurring, and the '999' call being made. This was plainly relevant to the issue of 'spontaneity, concoction and distortion', in the context of a s78 application.

This decision was followed, soon after, by the case of Wills v CPS [2016] EWHC 3779, in which Collins J, at §6 of his judgment, put the common law principle of 'res gestae' into the context of the statutory framework of the 2003 Act:

> "The admissibility of what is called "res gestae" evidence depends upon the Criminal Justice Act 2003 Section 118(1)4(a). That provides by (1) that the following rules of law are preserved which include:
>
> "4 Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if-
>
> (a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded..."

At §18 of his judgment, his Lordship addressed the key issue of the failure of the prosecution to make any enquiries of the complainant's whereabouts, and her willingness (or otherwise) to give evidence, and how this impacted on the court's discretion to exclude such evidence as being 'unfair', under s78 of PACE. In the event, the appeal(s) were allowed.

Lastly, in 2016, is the decision in Morgan v DPP [2016] EWHC 3414 of Treacy LJ; a decision focussing on the admissibility of BWV footage. The court admitted the footage, noting that this evidence did not stand alone, in that it was supported by the evidence of the attending police officers, who could speak as to the complainant's demeanour on their arrival, together with evidence of her injuries. His Lordship also addressed the issue how the trial judge should approach an application that he or she should exercise their discretion to exclude such evidence, under s78, because of the perceived lack of opportunity to cross-examine the complainant.

Applying his distinctive logical line of reasoning, his Lordship observed, at §31:

> "This brings me to the closely linked argument that nonetheless the judge should have excluded the evidence pursuant to his powers under section 78. True it is that admission of the evidence meant that the complainant could not be cross-examined on her account. There was, however, by reason of the finding of admissibility, which was a primary finding, that a possibility of concoction or distortion could be excluded."

Lastly, in 2017, the Northern Ireland Court of Appeal case of Gerard McGuiness v The Public Prosecution Service for Northern Ireland [2017] NICA 30. As with the earlier cited cases, this decision again focuses on a 'domestic violence' incident, a common feature of which is a refusal on the part of the victim to testify, whether on the basis of fear of the assailant, or because the two have become reconciled. Here, however, the complainant made clear to the prosecuting authorities that she and the defendant were reconciled, and that she did not wish to participate in a prosecution. It was again of note that there was a 'delay' of some twenty minutes between the incident and the police attendance, with an intervening '999' call. Also of note was that the BWV footage confirmed that the police, on arrival, had asked the complainant questions, giving rise to possible concerns in relation to the 'spontaneity' of her account, in the context of an 'unfairness' submission, consequent upon Article 76 of the 1989 Order (akin to s78 of PACE).

At §§s 17 & 18 of the Court's judgment, it was made clear that it was important not to focus on the issue of (perceived) delay in isolation, but rather to consider whether it was possible, on careful analysis, to find that there was 'spontaneity' in the complainant's account, by reference to other factors, for example: i) her lack of considered action in relation to the safety of herself, and her child, ii) her unfavourable comments made about her own behaviour, and iii) her statement that she loved the defendant.

The Court concluded, after careful analysis (of the parallel statutory regime in NI, (akin the 2003 Act), and having reviewed the case of law England & Wales, that the BWV footage evidence was admissible, provided that the court could exclude an improper motive, on the part of the prosecution, in not calling the witness.

**DISCUSSION**

Having reviewed the legal framework in relation to the admission of BMV footage, it is perhaps important to pause and reflect on to Dr Hashi's talk in relation to his and others' experience of being stopped and searched by the police. It is perhaps important to reflect on

the abuses identified by Dr Hashi, the impact on the individuals concerned, and our wider society. In other areas of the criminal justice system, juries regularly reach verdicts in relation to the conduct of a defendant which is found to amount to unlawful abuse, in one form or another. Few people need much persuading that the result of such abuse, in some cases may be long term, and damaging. However, the often unseen and unrecorded abuse, to which Dr Hashi refers, is perhaps rarely formally adjudicated upon when it occurs. What therefore is to be done? asks Dr Hashi. And it is in this context that Dr Hashi makes an important point that there are already democratic mechanisms whereby members of elected Boards can have an impact on reforming and changing the police policies, and these opportunities should not be ignored.

But, of course all this takes time. We have seen last week that Edward Enniful OBE, who has been Editor of Vogue for several years, raised the issue of racial profiling in the context of him being wrongly asked to use a different entrance to enter Condé Nast offices. And then in the last few days, graphic images of an arrest carried out in London, which appeared to have involved unauthorised restraint of a suspect, with the apparent use of knee on the suspect's neck, with the obvious parallels to the tragic death George Floyd, in America.

In his talk, Dr Hashi made reference to the fact that he sometimes advises people who may be stopped and searched, to consider filming such 'incidents' when they occur, if they are able to do so; whilst also advising them that they should first seek the police officers' permission before doing so, so as to avoid possible escalation of the incident.

**CONCLUSION**

This was a very interesting programme, which raised many questions, but one, in particular, comes to mind in these challenging times: Do those who are stopped and searched, and/or who are arrested by the police, derive more protection from police officers by them being required to properly adhere to the Home Office guidance, which governs the use of BWV, and the use of restraint procedures; or counter intuitively, does the deterrent effect of suspects, and/or onlookers, using their own video cameras to film the police, give suspects more protection? If the answer is the latter answer, then it would amount to a significant failure of the very systems designed to protect the public in these difficult and often dangerous situations.

SIMON JACKSON QC

20.07.2020

NEW PARK COURT CHAMBERS

LEEDS

LS1 2SJ

FOOTNOTE:

Readers may also find the appeal case of Magraw (Scott) v HM Advocate [2019] HCJAC 78, of interest, in which it was the Opinion of the Court, in relation to the admissibility of

WhatsApp messages, at §36, that: "…… They were capable of incriminating all of the accused, whether or not the particular accused sent or received the message. They were pieces of evidence which were capable of demonstrating what was going on and who was involved ….."

1. Page 2 of Wiltshire Police 'Body Worn Video Procedures': "Body Worn Video MUST be worn by officers & recording when: i) tasked by the CCC to any incident,
   ii) happening upon any incident or, iii) **conducting stop and search.**

2. Page 20 of the Home Office and Police College's "Guidance for the Police Use of Body-Worn Video Devices, which reads: "The conduct of any 'stop and search' or 'stop and account' process must comply with the relevant legislation and codes of practice. They must be carried out with due regard to the sensitivities of the person being stopped and any local community tensions surrounding the use of such powers by police. Recording of searches using video must not be carried out if the search is an 'intimate' or strip search and if the search requires removal of more than the outer clothing."

3. Then at Page 24: "If an officer attends an incident and is recording evidence using a BWV camera, the whole incident should be recorded in accordance with force procedures. Users must not intentionally fail to record an incident by, for example, turning away without good cause or deliberately obstructing the camera lens. Such calculated actions may render the BWV user liable to a misconduct investigation.