POTENTIAL GROUNDS OF APPEAL (2): FRESH EVIDENCE APPEALS

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This is the second in a series of articles analysing the approach of the CACD to particular grounds of appeal.
This article looks at grounds based on fresh evidence, lists some practical tips for preparing this ground, and identifies some of the factors that may determine the outcome.
[For a detailed analysis of this ground see Taylor on Criminal Appeals paras 6.268-6.337.]

The starting points

Section 23 Criminal Appeal Act 1968 (as amended)[1] sets out the statutory framework for the admission of fresh evidence in an appeal against conviction and sentence[2].

Although the term "fresh evidence" does not appear in the statute, it has become shorthand for "any evidence which was not adduced in the proceedings from which the appeal lies".[3]

[1] In Northern Ireland, the admission of fresh evidence is governed by s.25 Criminal Appeal (NI) Act 1980. The wording is similar to s.23 CAA 1968

[2] For examples of the CACD's approach to fresh evidence in sentencing appeals see *Vowles* [2015] EWCA Crim 45 (fresh evidence relating to mental disorder); *Bassaragh* [2024] EWCA Crim 20 (Fresh evidence showing that was pregnant at the sentencing hearing but that this was unknown to anyone at the time. "The fresh evidence also provided detailed information about the particular impact and risks of this pregnancy, upon and for this appellant and her unborn baby.")

[3] S.23(1)(c) CAA 1968

Fresh evidence can include "any document, exhibit or other thing connected with the proceedings". This has been held to include: Psychiatric reports;[4] Expert forensic science reports;[5] Judgments in civil proceedings;[6] Subsequent criminal convictions or disciplinary findings;[7] Tribunal / Home Office decisions (relating to modern slavery).[8]
The CACD can also "order any witness to attend for examination"[9]
Fresh evidence can be relied upon by the appellant and the respondent (prosecution).[10]
A statement from the defendant's solicitor should be obtained to explain why the evidence was not available at trial and the circumstances in which the new evidence came about.[11]

The approach of the CACD

The overriding question for the CACD in fresh evidence cases is to ask itself whether "they think it necessary or expedient in the interests of justice"[12] to admit the proposed new evidence.

The CACD "shall, in considering whether to receive any evidence, have regard in particular to[13]—

(a) whether the evidence appears to the Court to be capable of belief[14];
(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

Consideration (a) is determinative of a fresh evidence appeal (ie. If it is incapable of belief it will not be admitted). Consideration (b) is determinative for the appellant

[4] *Challen* [2019] EWCA Crim 916; *Samuels* [2023] EWCA Crim 1103
[5] *Malkinson* [2023] EWCA Crim 954 (DNA); *Lescene Edwards v The Queen (Jamaica)* [2022] UKPC 11 (ballistics, GSR, blood spattering.)
[6] *Dorling* [2016] EWCA Crim 1750
[7] *Edwards* [1996] 2 Cr App R 345; *Peterkin* [2024] EWCA Crim 309; *Thompson* [2024] NICA 30
[8] See *AAB* [2024] EWCA Crim 880
[9] S.23(1)(b) CAA 1968
[10] *Hanratty* [2002] 2 Cr App R 419 (30) [94]
[11] *Gogana* 12 July 1999 *The Times*.
[12] S.23(1) CAA 1968
[13] S.23(2) CAA 1968
[14] See for example *Sajid* [2023] EWCA Crim 1346

(but not the Crown). Consideration (c) *may* be determinative. Consideration (d) is not determinative (unless, potentially, it affects (a) or (b)[15].]
The ultimate question for the CACD in an appeal based on fresh evidence is the same as in any other conviction appeal – Does the CACD think that the conviction is safe?[16] But the route to the answer to this question has been the subject of debate in the authorities.

Where the CACD considers that the appeal raises clear issues – such as where the fresh evidence is found to be irrelevant to the live issues at trial, or incapable of belief - the CACD can evaluate the importance of the fresh evidence "in the context of the remainder of the evidence in the case"[17], without reference to the potential impact it may have had on the jury (who, of course, did not hear and consider the fresh evidence).
However, in other cases - where it is not clear what the jury may have made of the fresh evidence "...it will usually be wise for the Court of Appeal, **in a case of any difficulty**, to test their own provisional view by asking **whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe**."[18] This approach has become known as "the jury impact test".

When is the ground likely to succeed?
As stated above, the ultimate question for the CACD is: does the fresh evidence undermine the safety of the conviction? This will require an identification of the live issues at trial, and the way in which the proposed fresh evidence may have impacted on the presentation of the prosecution and defence[19]. An appeal based on this ground is most likely to succeed where it can be shown that the fresh evidence adds something significant to the evidence called at trial in relation to the live issues.[20] [In *Letby (Lucy)* [2024] EWCA Crim 748 the CACD concluded that the proposed fresh evidence did not provide a ground for allowing the appeal because [187] "the proposed fresh evidence cannot assist the applicant because it is aimed at a mistaken target....[It] is therefore irrelevant and inadmissible."]

[15] See *Richards* [2022] EWCA Crim 1470, [78]: "The absence of a reasonable explanation does not mean that the application must necessarily be rejected, although in the present case it is a very powerful factor."
[16] s.2(1)(a) CAA 1968
[17] See Lord Bingham: *Dial v State* [2005] UKPC 4 [31]
[18] *Pendleton* [2002] 1 WLR 72 HL, Lord Bingham (giving the judgment on behalf of the majority). See *Parrie Jacob* [2023] EWCA Crim 445: "...whether there is a realistic prospect that the jury would have reached a different conclusion".
[19] For a recent example of the CACD carrying out this analysis and rejecting the application to adduce the fresh evidence see *Brown* [2024] EWCA Crim 426
[20] *Kai-Whitewind* [2005] 2 Cr App R 457

The future of fresh evidence appeals

The Law Commission has been asked to review the law about appeals in criminal cases and has released an Issues paper[21]. One of the questions raised for discussion asks:

> "Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice?

The Bar Council submitted a response to this question (and others) and stated that:[22]

> *"…there is some evidence that the CACD has adopted rather too robust an approach to the "jury impact" test.*
> We recognise that appeals based on fresh evidence necessarily require the CACD to trespass into the territory of the jury…. The question is to what extent should the CACD be permitted to do so, and how should this task be undertaken.
> We respectfully note and emphasise the warnings set out by Lord Bingham in *Pendleton* [19], and we acknowledge the need for the "jury impact" test in some form.
> [T]he Law Commission might consider whether the CACD should ask itself something such as:
> *Might the new material (or removal of previously available material) reasonably have affected the decision of the trial jury to convict; or significantly affected the way in which the defence and/or prosecution cases were advanced at trial?*
> *If either applies, the Court should quash the conviction as unsafe and consider ordering a retrial*
>
> Such a formulation would capture:
> (a) cases in which the prosecution case was obviously and fundamentally weakened, albeit in a way that would not have affected the presentation of the case. Such cases would plainly be susceptible to a finding that the conviction was or may be unsafe. ..

[21] https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/07/Appeals-Issues-Paper-WEB-1.pdf

[22] https://www.barcouncil.org.uk/resource/bar-council-response-to-criminal-appeals-issues-paper.html

(b) cases in which the changed evidential picture may well have affected the way in which the trial as a whole was conducted.

In the latter instance, there is likely to be no reliable guide to what would have happened in such a circumstance, and it would therefore arguably be inappropriate for the CACD to speculate as to what an imaginary jury, trying what was in effect a completely different trial, may have made of matters.

The Law Commission is expected to release a consultation paper later in 2024.

Paul Taylor KC specialises in criminal appeals and has developed a particular expertise in cases involving fresh expert forensic evidence (including GSR/CDR, DNA, CCTV), homicide, and offenders with mental disorders. Paul has represented appellants before the CACD, Northern Ireland Court of Appeal, Privy Council, Eastern Caribbean Supreme Court, and the Court of Appeal of Trinidad and Tobago. He is frequently instructed to draft submissions to the Criminal Cases Review Commission. Paul is head of the 5KBW Criminal Appeals Unit and editor of Taylor on Criminal Appeals.
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