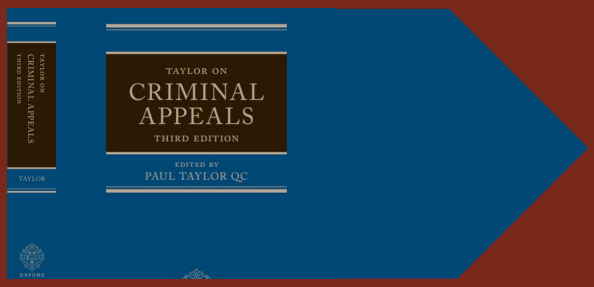
Issue 2

SEPTEMBER 2024

THE APPEAL BRIEF

The 5KBW Criminal Appeals Unit Newsletter



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Welcome to the latest edition of *The Appeal Brief,* the 5KBW Criminal Appeals Unit Newsletter

Paul Taylor KC, the General Editor of *Taylor on Criminal Appeals*, heads our team of contributors who are specialist criminal barristers from 5KBW; a set renowned for its expertise in both defence / appellant and prosecution / respondent work.

In this edition there are summaries and expert commentary on recent judgments from the Court of Appeal (Criminal Division) (on conviction, sentence, AG references, prosecution appeals, and financial crime), High Court (Administrative) (judicial review of prosecution decisions) and the Court of Appeal in Northern Ireland.

The featured article is "Potential Grounds of Appeal (2): Fresh evidence." This is the second in a series of articles analysing the approach of the CACD to particular grounds of appeal.

There is also a separate newsletter – *The Appellate Brief* - covering appeal cases from the Caribbean and the Privy Council.

To sign up for either or both newsletters click here.

Visit the Criminal Appeals section of our website for more information on our Criminal Appeals Unit.

If you would like to discuss instructing the barristers at 5KBW, please contact our Senior clerk, Lee Hughes-Gage.

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Latest News from 5KBW

5KBW shortlisted for 2 awards at the Chambers UK Bar Awards 2024

Chambers are delighted to announce that we have again been shortlisted for Crime Set of the Year and that Louise Oakley has been shortlisted for Crime Junior of the Year, at the Chamber UK Bar Awards 2024.

The shortlist is the result of extensive research with thousands of interviews conducted by a dedicated team of over 250 analysts. We would like to take this opportunity to thank everyone who provided feedback on our behalf.

The awards ceremony will take place on the 14th November at Old Billingsgate. We wish all nominees the best of luck!

5KBW Criminal Appeals Resources

Visit the resources section on our website for links to articles and external websites containing procedural rules, guidance and research relating to criminal appeals.
Click here.

Newsletters - Archive

The Appeal Brief- Issue 1
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Articles

Horizon, the Post Office and free pardons: Is the issuing of a free pardon a potential remedy to the Horizon / post office scandal.

Renewed Applications for Leave to Appeal and Loss of Time Orders: Renewed Applications for Leave to Appeal and Loss of Time Orders: Paul Taylor KC analyses the CACD's guidance on advising on renewing an application for leave, the risk of loss of time orders and whether the time has come to abolish them.

Potential grounds of appeal (1): Criticism of Trial Lawyers. Paul Taylor KC analyses the approach of the CACD generally to complaints against trial lawyers.

Andrew Malkinson, the CCRC, the Henley Report and public funding: "The test of a country's justice is not the blunders which are sometimes made, but the zeal with which they are put right." (Cyril Connolly). Paul Taylor KC considers the Henley Report into the CCRC's handling of Mr. Malkinson's applications, and the need for a properly funded criminal justice system.

AppealCast 5KBW: Listen on Spotify

This is an occasional podcast from the 5KBW Criminal Appeals Unit discussing appellate topics from England, Wales, Northern Ireland and the Caribbean.

Seminars:

The Inaugural 5KBW Criminal Appeal Unit seminar

On 22nd May 2024 we were delighted to host the first in a series of seminars on criminal appellate issues introduced by Mark Heywood KC.

The Criminal Appeal Office and Court of Appeal (Criminal Division) [CACD]: A practical approach to CACD procedure: **Master Alix Beldam KC**, Registrar of Criminal Appeals discussed the work of the Criminal Appeal Office and the CACD, the procedural framework for launching and pursuing an appeal and the practical issues that often arise.

Fresh evidence as a ground of appeal (now and in the future): Paul Taylor KC, analysed the CACD's current approach to grounds of appeal based on fresh evidence, and considered potential changes in this area that may follow the recommendations of the Law Commission's Criminal Appeal Project (expected in 2025.).

The video presentations are available here

Statutory Interpretation and Criminal Appeals: Daniel Greenberg CB

On 6th June 2024 5KBW were privileged to have an in-house training session from Daniel Greenberg CB, looking at the principles of statutory interpretation. Listen here. Daniel Greenberg CB took up appointment as Parliamentary Commissioner for Standards on 1 January 2023. He is a lawyer specialising in legislation and the legislative process. He served in the Lord Chancellor's Department (1988-1991), as Parliamentary Counsel (1991-2010), as a consultant at Berwin Leighton Paisner LLP (2010-2016) and as Counsel for Domestic Legislation in the House of Commons (2016-2022). He was appointed Companion of the Order of the Bath (CB) in the New Year Honours List 2021, for services to Parliament. He also serves as the General Editor of Westlaw UK Annotated Statutes and Topics Encyclopaedia. From 2010 to 2022 he provided drafting and training services on legislation in the UK and around the world. He is the Editor of Craies on Legislation, Stroud's Judicial Dictionary and Jowitt's Dictionary of English Law. His book Laying Down the Law was published by Thomson Reuters in 2011. He holds a number of academic appointments and interests.

Witness:

This is a free weekly collection of criminal law links - for practitioners, law students, and anyone with an interest in the criminal justice system of England and Wales. *Click here.*
Curated by Sam Willis

POTENTIAL GROUNDS OF APPEAL (2):

FRESH EVIDENCE

By Paul Taylor KC

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]

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.

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[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

[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

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 (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

[13] S.23(2) CAA 1968
[14] See for example *Sajid* [2023] EWCA Crim 1346
[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".

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."]

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

[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
[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

> 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. ..
>
> (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.

CASE SUMMARIES AND COMMENT

CONVICTION APPEALS

Conviction – manslaughter – necessary elements of unlawful act manslaughter

Grey v. R
[2024] EWCA Crim. 487

By Mark Heywood KC

The appellant, aged 46 years and with right sided weakness, right sided restricted vision and cognitive impairment as a result of cerebral palsy and brain surgery, was convicted after a retrial of manslaughter. She had shouted "Get the fuck off the pavement" and gesticulated with her left arm at an oncoming cyclist, travelling at 4.7 miles per hour, a woman of 77 years who tended to ride on pavements or cycle paths owing to her impaired hearing. There was no evidence that the appellant had struck or made physical contact with the deceased. The evidence at trial did not establish whether the pavement was formally restricted to pedestrians or whether cycling was permitted. The cyclist fell off her bicycle and tumbled into the carriageway. She was then run over by a car whose driver had no chance to stop, suffering catastrophic injury leading to death. When interviewed the appellant said that she had "flinched out" left arm to protect herself and could not remember what she had said. The Crown's case at trial was that the arm movement and the words amounted to a hostile reaction to the deceased's riding on the pavement, was unlawful and had caused the cyclist to fall from her bicycle and sustain her fatal

injuries. The defence case was accident and/or self-defence. The appellant did not give evidence at trial.

The Ground of Appeal

The essential ground of appeal was that the judge's directions to the jury and route to verdict failed to identify and so require a decision as to the relevant unlawful act, or base offence, alleged to have been committed by the appellant which then resulted in death. No base offence was therefore established and the factual elements left to the jury were insufficient in law for a conviction for manslaughter.

The appeal

The appellant relied on the written directions and route to verdict to demonstrate that the four questions left involved accident, self-defence and whether a sane (*sic*) and reasonable person would realise that the act(s) would expose the cyclist to the risk of some harm.

The respondent contended that the base offence was common assault and that, although the directions did not specifically require a decision as to the elements of that offence, the terms of the directions meant that the jury must have been satisfied of the commission of such an offence.

The Court of Appeal again made clear [19] that a person commits unlawful act manslaughter only if he or she carries out an act that itself contravenes the criminal law, which results in death. All elements of the base offence are required to be proved. The jury had not been provided with any directions as to the base offence. They were simply not asked to deal with the factual elements of it. The elements which should have been identified were the conduct element, namely that the actions of the appellant caused the deceased to apprehend the immediate infliction of unlawful force, and the mental element, namely that the appellant's threat of force was intentional or reckless. A further direction as to the requirements of proof of recklessness had also been necessary. In failing to deal with these and also in directing the jury that if they rejected self-defence that meant that the jury would have found that the appellant had used unlawful force, the judge had misdirected the jury. The difficulties appeared to have arisen from the approach of the prosecution that hostility on the part of the appellant was sufficient to establish that her actions were unlawful. On one possible view of the CCTV and the other evidence, the deceased had altered her course to avoid the appellant and lost her balance. There was no basis on which to conclude to the criminal standard that the deceased apprehended immediate unlawful force. Additionally, a proper direction as to the mental element should have factored in the appellant's difficulties of cognition and her physical impairments. The conviction was clearly unsafe in all the circumstances.

Comment

Unlawful act manslaughter 101. The decision, with the history of the case, is an object lesson for all of those contemplating or dealing with cases of unlawful act manslaughter: the elements of the offence include not only those of the indicted offence but also those of the base offence

as well. Case assembly and presentation must necessarily be fashioned with those firmly in mind. Defences need to be articulated so as to address all of these necessary elements. Directions are likely to have to be compendious and stepped so as to ensure that the jury has determined all necessary issues. Nothing less should be required before a conviction for homicide results from an offence which may otherwise not have been charged or might well have led to a non-custodial sentence.

Jury Tampering – ss.46 and 47 CJA 2003 – Decision of Judge to discharge jury and to continue with Judge alone — Fresh Evidence – Judicial Bias

R v Sartin

[2024] EWCA Crim 764 and [2024] EWCA Crim 766

By Jonathan Polnay KC

Summary

Following an episode of jury tampering, the Judge discharged the jury and continued the trial with the Judge returning the verdict. In refusing an appeal against those orders, the CACD agreed that perceived bias by the Judge (on account of earlier adverse rulings and comments about the credibility of the appellant) would amount to an exception to the usual rule that following jury tampering that 'save in unusual circumstances, the normal approach is that… the case should continue' with a Judge alone. However, on a careful analysis, bias was not present in this case.

The background

The defendant, S, together with others, stood trial for very serious drug offences. It was contended he was unfit to plead. Having heard evidence, the Judge rejected the submission. In doing so, he found S had 'somewhat overplayed' his symptoms. S was not produced on the first day of this trial as the prison had reported that he had attempted suicide. The Judge expressed some cynicism. When referring to the fitness to plead hearing, he said:

> "It did appear to me that he was really trying to swing the lead…"

And so far as the reported suicide attempt:

> "…a cynic might look at those facts and think, hmmm, sounds like it is a bit of manipulation going on."

S attended court the following day and the trial proceeded. The jury retired to consider their verdict around a month later. Whilst in retirement a juror was leaving court, when a person repeatedly shouted at them in an aggressive tone 'You're in court 1 aren't you? You're in court 1". The incident was witnessed by other jurors. The juror was upset and shaken.

The person who shouted the abuse had been in Court for part of the trial and had been seen to hug S. The person had been ejected from the Court on an earlier occasions and had then been abusive to the Judge.

When giving evidence, S asserted that he had changed his case due to pressure from the public gallery.

The prosecution and the defence agreed that the jury should be discharged. The defence submitted there should be a fresh trial. The prosecution submitted the trial should continue without a jury. The Judge agreed that the trial should continue.

The Grounds of Appeal

The core ground of appeal was that the Judge should not have continued the trial due to the perception of bias based upon:

(1) The fact he had presided over a linked trial and, when sentencing one of those Defendants, made a finding of a link to the Appellant.
(2) The Judge's findings in the fitness to plead hearing.
(3) The Judge's remark regarding the reported suicide.
(4) The fact the Judge had refused the Defendant bail as potential flight risk.

The Application to call fresh evidence

Shortly before the appeal was heard, S, now the Appellant, sought an adjournment as the man who had triggered the discharge of the jury was 'prepared to assist' the appellant. He was willing to give evidence that he had not sought to frighten the jury or influence their deliberations. The CACD refused the application on the basis that it was not relevant whether or not appellant was in any way responsible for, or involved in, the jury tampering. (*McManaman* [2016] EWCA Crim 3). Neither was the intention of the person who had tampered with the jury. All had agreed that it was necessary to discharge the jury because jury tampering had taken place and there was ample evidence for the Judge to reach that conclusion.

The Court of Appeal's Decision

The CACD (Carr LCJ, Cutts J and Hilliard J) refused the appeal. The Court approved and applied the principle set out in Mohammed (Shahid) [2024] EWCA Crim 34 that 'save in unusual circumstances, the normal approach is that… the case should continue'. However the Court accepted that a *disqualifying* perception of bias would amount to 'unusual circumstances'. Applying the standard test as set out in *Porter v Magill* [2001] UKHL 67 (Actual bias exists where a judge is actually prejudiced in favour of or against a party. Apparent bias will be made out where 'the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility the Judge was biased') the Court of Appeal considered none of the matters demonstrated actual or perceived bias.

Comment

Fortunately, most practitioners are unlikely to have practical experience of the provisions of Part 7 of the Criminal Justice Act 2003. When first introduced, these were perhaps the most controversial provisions of that Act as they allowed for Judge-alone trials. Section 43, which allowed for juryless trial in complex fraud cases was never brought into force and was eventually repealed ten years later by the Protection of Freedoms Act 2012. However, sections 44 and 46, which allow a trial to start or continue without a jury remain in force. Whilst applications under those

sections remain rare, there is undoubtedly a constant trickle of such cases. As a result of the decision in *Mohammed* (ante), where a jury is discharged due to tampering, counsel should expect the trial to continue with a Judge returning the verdict. In this instant case, the Court of Appeal has made clear that the mere fact a Judge has made rulings adverse to a Defendant, including as to his credibility, will not a preclude continuing a trial without a jury.

Though not addressed by the Court of Appeal, it might be considered that if there were sufficient evidence a Judge had displayed perceived bias, he ought to recuse himself from trying the case in any event, whether or not a jury had been discharged and the Judge had the additional responsibility of deciding on the verdict.

[See generally Taylor on Criminal Appeals, Chapter 8, on Prosecution Appeals.]

Joint enterprise - Gnango liability

R v Seed and others
[2024] EWCA Crim 650

By Jonathan Higgs KC

This appeal confirmed an increasingly important point in relation to criminal liability for injuries caused by others in a joint fight, and one important technical point in relation to passing indeterminate sentences i.e. life sentences. (See Sentence Appeals section below.)

Summary

The case involved a familiar picture; longstanding rivalry between two North London gangs, conveniently described as the "Blues" and the "Reds". The appellants were all said to be members of the Reds, and they set off in the early hours of the morning in a stolen Land Rover, at least one of them armed with a handgun. They drove into Blues territory on a classic rideout, and shortly after their arrival there was an exchange of gunfire between the two gangs. The deceased was a "Red" who was in the Land Rover with the appellants, and he was fatally wounded by a shot fired by an unidentified Blue.

The Appellants, themselves all "Reds", were charged with a number of offences including, count two, the murder of their fellow gang member, in line with the familiar principles established in *R v Gnango [2011] UKSC 59.*

Several of the grounds of appeal against conviction related to fact specific rulings on materials said to establish gang loyalties. The appeals were unsuccessful on all those grounds, on familiar principals. As those rulings were so fact specific, they will not have any application in other cases.

Of much more importance was the courts firm endorsement of the *Gnango* principles, at least at the level of the Court of Appeal. The following statement of principle was approved:

> "Where there are two opposing sides to a violent conflict, all those who share the same common

> purpose to use unlawful violence against each other may be criminally liable for injuries caused by the mutual, unlawful violence in which they intentionally participate…This is irrespective of whether the victim happens to be someone "on the other side", or someone "on his side" or an innocent passer by. The court approved the statement of principle from an earlier case, R v *Morgan [2021] EWCA Crim 895*, in which it was said that the principal remained "subject to any further consideration by this court or by the Supreme Court".

Comment

It is important for practitioners to fully understand the limitation to that basis of liability: it would have been insufficient to establish *Gnango* liability if the prosecution had only been able to prove that the members of the Reds were carrying out a rideout intending to ambush one of the Blues. The prosecution need to go much further and establish either that there was an intention to have a joint shootout, or at the very least that each member of the attacking group knew that it was a virtual certainty that their opponents would be armed and would return fire, intending to cause at least really serious injury or indeed death. It would be a complete defence to this type of liability, for example, to establish that the group intended only a surprise attack. The Court of Appeal has again very recently, in a reserved judgement not yet handed down, that the threshold for this type of liability is high. Unfortunately for the appellants, there was sufficient evidence that they did share "*Gnango*" liability with the Blues, and the appeals were dismissed.

Cross-admissibility - Impact of a misdirection on consent

R v DB
[2024] EWCA Crim 881

By Frederick Hookway

This case concerned an appeal against conviction in respect of various sexual offences against two different victims, and an offence of assault against one of those same victims. At trial, the appellant was acquitted of other counts related to two other complainants.

The first ground of appeal challenged the adequacy of the direction on cross admissibility. The standard direction was given that, '*You may then consider whether he has a propensity, or tendency to commit offences of that nature'*. The appellant complained this direction was too blunt for the circumstances of this case, primarily because this direction did not distinguish between the counts so risking the scenario where the jury used the allegation of assault for corroboration of the sexual allegations.

Whilst acknowledging there might be cases whether further direction was necessary, the CACD determined this was not one of them. The CACD was satisfied that the standard direction, when considered in

tandem with the other standard direction for separate consideration of each count, was sufficient. The jury could be trusted to understand what, *'offences of that nature'* meant, and that the categories of offence (assault & sexual offences) were obviously different.

The second ground of appeal complained that the jury had not been directed about consent on a count of rape pursuant to s.1 Sexual Offences Act 1956 (count 9). The jury were directed only to determine whether he had done the act, namely whether he had penetrated V's vagina with his penis. A subsidiary part of this ground highlighted the particulars for the relevant count were based on the elements pursuant to the Sexual Offences Act 2003 as opposed to the 1956 Act. Under the 1956 Act consent was framed as the person not consenting, and the defendant, *'knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it'*. Thus, an honestly held belief in consent is grounds for acquittal under the 1956 Act.

The CACD determined that the complaints were well founded insofar as the count was wrong in law, and the directions did not reflect the necessary elements of the offence in relation to consent. Notwithstanding those imperfections, the CACD rejected the ground of appeal. The CACD determined that complaints about misdirection needed to be relevant to an issue in the case: [37]

> *"As this court said in Yeld [2021] EWCA Crim 866, where a similar issue arose, it is important to focus on the real issues and "a misdirection as to the ingredient of an offence does not necessarily rend the conviction unsafe*".

Here, the appellant had denied the intercourse ever happened. The victim was his daughter, and the CACD found there was no evidential basis for leaving any issue about consent or belief in consent to the jury. In disposing of this ground, the CACD concluded: [42]

> *"In our judgement the legal direction were faithful to the way the issues in the case emerged and consistent with the way the appellant and his legal team quite properly wished to run his case*"

The final ground of appeal submitted it was an abuse of process to prosecute count 8 (indecent assault contrary to s.14(1) of the 1956 Act). The appellant argued this was, in reality, an offence contrary to s.6(1) of the 1956 Act (unlawful sexual intercourse with a girl under the age of 16). The offence contrary to s.6(1) must be commenced within 12 months of the offence being allegedly committed. There is authority to support the proposition that the prosecution cannot subvert this limitation period by preferring a different offence.

The CACD rejected this ground, determining that: [48] & [49]

> *"This ground of appeal therefore depends on the proposition that the conduct on which count 8 was based was "only" an act or attempted act of unlawful sexual intercourse*

> *contrary to section 6(1) of the 1956 Act"*
>
> ……
>
> *"Even if, arguably, the evident might have justified a charge of attempted vaginal rape, it cannot be said that the conduct relied on was "only" an act or attempted act of unlawful sexual intercourse with a girl under 16. The prosecution had a proper and rational basis for charging and prosecuting DB on the factual and legal basis alleged in count 8"*

Finally, there was an appeal against sentence after the Registrar noticed the statutory maximum for the offence contrary to s.14(1) of the 1956 Act had been exceeded, and a surcharge had been imposed despite not being available at the time of the offending. These were corrected by the appeal against sentence being allowed to the extent that sentence was reduced from a special custodial sentence of 11 years' to one of 10 years' (9 years' custody plus 1 year licence period). The surcharge order was quashed.

Comment

This case is a helpful restatement of the merits in the standard direction on cross admissibility. It prefers the degree to which this invites the jury to apply common sense, as opposed to an overly prescriptive direction about the potential relevant of bad character evidence.

Further, the Court's ruling in relation to the misdirection in respect of consent is consistent with a focus on outcome rather than process. The practical analysis adopted leading to the conclusion that this misdirection was not determinative given it was not relevant to the central issue in the case. The outcome of the trial was therefore just, even if the process was imperfect. This pragmatism is understandable. But it might offend the legal purist to whom the relationship between fundamental failures of form, and failures of justice, is axiomatic.

Errors in taking majority verdicts – nullity – venire de novo

R v Wayne Clements
[2024] EWCA Crim 849

By Paul Taylor KC

Summary

WC was unanimously convicted by a jury (who were 11 in number) of causing a child to watch a sexual act contrary to section 9(1) Sexual Offences Act 2003 and sexual communication with a child contrary to section 15A(1) Sexual Offences Act 2003.

A majority direction was then given in relation to outstanding counts, in terms:

> "…I'm going to ask you to retire again, and I want to see if you can reach unanimous verdicts. If you cannot, then I can accept a verdict upon which at least nine of you are agreed. So *nine/two*[23], or 10/one, all

[23] Emphasis added

> right. Thank you very much, please retire."

Subsequently the jury purported to return a guilty verdict on count 1, which was sexual assault of a child under section 13, contrary to section 7(1) Sexual Offences Act 2003, by a majority stated of *9:2*. No verdict was taken on an alternative count of sexual activity with a child, that being represented in count 2 on the indictment. The convictions concerned the same complainant. The jury returned a not guilty verdict in relation to an offence of sexual assault of another complainant under 13, and in accordance with the orthodox practice, they were not asked to indicate voting numbers.

The judge gave directions as to sentence. The court clerk then informed the judge that the common platform was rejecting the verdict. The judge then realised what had happened. He provided a written ruling on the verdicts and in relation to retrial, in which he stated that the verdict on count 1 was invalid and granting an application for retrial on count 2.

The CACD stated that the Registrar has rightly indicated in referring the resultant application for leave to appeal against conviction to the Full Court:

> "Where a conviction has been recorded the appeal is before the CACD pursuant to s.2 of the Criminal Appeal Act 1968 and the court could set aside the conviction: *O'Donnell (Paul Anthony)* [1996] 1 Cr App R 286. I am not aware of any authority that would support the suggestion… of the [judge's] ruling that there is any inherent jurisdiction for the Crown Court to set aside the verdict in these circumstances at least not where an unequivocal verdict has been delivered and the jury has dispersed. (see *RN* [2020] EWCA Crim 937).
>
> …The verdict recorded in this case does not comply with s.17 of the Juries Act 1974."

Section 17(1) Juries Act 1974 provides:

"(1) Subject to subsections (3) and (4) below, the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if—

(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and

(b) in a case where there are ten jurors, nine of them agree on the verdict."

The CACD stated:

> "R v Patten [2019] 1 WLR 5265 is authority for the proposition that a majority direction that is inconsistent with the requirements of section 17(1) of the Juries Act 1974, does not of itself invalidate the verdicts which follow unless the verdict is expressed to be by a majority which is insufficient to meet the requirements of that

> section, as is the case here.[24] That is any verdict expressed to be by a majority of 9:2 would fall foul of section 17(1)."

The CACD issued a writ of venire de novo annulling the conviction on Count 1. No verdict was taken on count 2. The acquittal in relation to the other complainant remains. Retrial ordered on Count 1 (and alternative count 2).

The CACD endorsed the per curium comments of the then President of the Queen's Bench Division (Sir Brian Leveson) at paragraph 29 of *Patten*:

> "The giving of a majority direction and the taking of verdicts can very often be regarded as a formulaic exercise to which limited attention needs to be paid by the parties. The present case demonstrates how unwise that proposition is. The need for all parties to concentrate at all times on the directions being given and the taking of verdicts is paramount."

Comment

The CACD in this case concluded that the specific verdicts were a nullity and issued a writ of venire de novo. In other similar cases the CACD has dealt with such errors by finding the convictions to be unsafe [eg. *Adams* [2007] 1 Cr App R 34 declared the conviction unsafe and quashed it. [As to the implications of each approach see *Taylor on Criminal Appeals*, paras 9.02; 9.420 and 11.57.]

For an earlier example of an appeal based on errors in taking a majority verdict see *Stringfellow* [2008] EWCA Crim 2825.

Admitting further evidence after prosecution closing speech

R v Stewart Filkins and Hamilton
[2024] EWCA Crim 885

By Natasha Wong KC

Summary

The CACD considered the circumstances in which the prosecution should be permitted to adduce further evidence after closing speeches.

S,F & H appealed their convictions for fraudulently evading the prohibition on the exportation of goods (class A Drugs). A parcel was sent to Australia via DHL Croydon where S was employed. When opened in Australia it contained 24 x 1 kg parcels of methylamphetamine at 80% purity. The sender's name and address were those of a genuine unconnected person though contact details provided were not his. His replacement passport had been "lost" in the post.

S, employed at the DHL depot, had certified that she had fully searched the parcel to ensure contents were lawful and labelled it accordingly. She tracked it 5 times through the DHL system. The card used to pay for

[24] Emphasis added

the DHL service was connected to an account opened by F.

The applicants had suggested at trial that the drugs had been inserted by others unknown after S had certified the contents as lawful.

Counsel for S submitted for the first time in his closing speech that a photograph of the consignment purportedly at the time of its arrival in Australia showed extra DHL tape on the parcel than was visible from CCTV footage of it at DHL Croydon. This was to support his submission that it had been tampered with on the journey and the drugs may have been inserted after leaving Croydon. Another photograph (with others and relevant witness statements) had been served and was visible to all on CCDS from early in the proceedings. This other photo showed the parcel on arrival did not have the extra tape seen in the photo referred to by Counsel for S (which was the only photograph put before the jury during the course of the evidence.)

The CACD stated that the judge was right to exercise his discretion to allow the prosecution to correct their error in describing the photo with the tape as taken on arrival and to introduce the other photograph after closing speeches in order to show the consignment's actual appearance on arrival. The photos could have been compared at any time to establish whether any credible point based on them could be made. The judge gave all counsel the opportunity to make further submissions to the jury if they so wished. To have refused the prosecution's application would have resulted in the jury being misled. There was no prejudice to the defence case. Any suggestion by S's counsel that his credibility with the jury had been undermined by the introduction of the photo after his speech was "one of the hazards of advocacy". An earlier comparison of the 2 photos would have revealed it was a bad point to take. The law is clear, the trial judge does have discretion to introduce fresh evidence, in the interests of justice, to avoid a jury being misled. [31]-[33]

Bad character – previous conviction - s101(1)(d) – matter in issue - propensity – rebut "innocent dupe" defence

R v Alexander Thomas Windsor
[2024] EWCA Crim 798

By Aska Fujita

Summary

W renewed his application for leave to appeal against conviction.

W was a director and shareholder of the Eastenders group of Cash and Carrys. Another director of the Eastenders Cash and Carrys was KH.

The prosecution case was that Eastenders Cash and Carrys were the principal recipients of illicit alcohol from a highly sophisticated alcohol diversion fraud (as it was then termed), with approximately 25 percent of the alcohol sold in the cash and carry shops being illicit. Consignments of alcohol were smuggled into the UK from 5th December 2009 to 6th December 2010

without the appropriate duty or VAT being paid.

The prosecution alleged that AH, KH's brother, was the principal organiser of the fraud. Although tried separately due to case management, other defendants in this case included AH and G.

W's defence was that he had been concerned only with administration for the Eastender Cash and Carrys, not buying and selling, which he claimed was the responsibility of KH. W had been duped by AH and KH; he knew nothing about the frauds.

During the trial, W's previous conviction was admitted into evidence. The facts of that offence were as follows:

In 1997, W, AH, KH and G were convicted on a joint indictment of being knowingly concerned in 1995 in the evasion of excise duty for an outward alcohol duty diversion for the ultimate benefit of Hare Wines, operating Cash and Carry outlets in East London, controlled by the H brothers and their family members with the assistance of G and others. G was convicted after trial; the remaining three pleaded guilty.

W operated a transport company which enabled movements of alcohol that was shown on accompanying administrative documents to be intended for export from UK bonded warehouses to Europe, but which were diverted to Hare Wines.

The prosecution case for adducing the conviction was that it showed W had a propensity to commit offences of cheating the HMRC, and a propensity to commit offences of cheating the HMRC with some of the defendants, and that he was not an innocent dupe.

On 8th March 2023, W was convicted of two counts of conspiracy to cheat HMRC for the evasion of duty and VAT.

The appeal against conviction

The proposed ground of appeal was the admission of W's bad character evidence. It was submitted on behalf W that his role in the previous offending (transporting the alcohol) was very different from his role in the current trial (operating the cash and carries receiving the alcohol).

The CACD found the trial judge was entitled to admit W's previous conviction, as the issue in the trial was whether the applicant was an innocent dupe of other defendants who had exploited him and his business. The judge was entitled to conclude the previous conviction showed a propensity to commit offences of cheating the HMRC and a propensity to act when doing so with the other named defendants.

Comment

As to the admissibility of a defendant's bad character to "an important matter in issue between the defendant and the prosecution" see section 101 Criminal Justice Act 2003(esp. ss.101(3)(d) and (4), (5)(b), (6)(d)).

In *Hanson* [2005] EWCA Crim 824, the Court of Appeal found:

> "Where propensity to commit he offence is relied upon there are thus essentially three questions to be considered:

> Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
>
> Does that propensity make it more likely that the defendant committed the offence charged?
>
> Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted? [para 7]
>
> …
>
> If a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of noncompliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense [para 15]"

This case is a helpful reminder that s101(1)(d) may be used to properly admit a previous conviction which can rebut an innocent explanation provided by the defendant (see also *Jordan* [2009] EWCA Crim 953, and *Hay* [2017] EWCA Crim 1851)

In this case, notwithstanding the previous conviction was 14 years prior to the current offence, and the different role W played, the CACD found it capable of rebutting the W's defence.

Unfitness to plead - the mental element in 'trials of fact' - section 4A Criminal Procedure (Insanity) Act 1964

R v Goldsmith
[2024] EWCA 780

By Dickon Reid

Overview

The question in this appeal is whether, in a trial of fact conducted under section 4A of the Criminal Procedure (Insanity) Act 1964, as amended ('the 1964 Act'), relating to an offence of possession with intent to supply a controlled drug contrary to section 5(3) of the Misuse of Drugs Act 1971 ('the 1971 Act'), a jury is obliged to consider only whether the defendant was in possession of the drugs in question, or whether it must also consider whether the defendant intended to supply them. The answer to that question will turn on whether the latter element forms part of the act charged against the defendant as the offence.

Summary

On 8th October 2022, the appellant was stopped outside a public house in Shepherd's Bush, searched and found to be in possession of a large quantity of Class A drugs consistent with supply. She was subsequently charged with two counts of possession of Class A with intent to supply and three counts of simple possession.

At the PTPH she pleaded not guilty. By the time of trial, she was assessed as being unfit to plead and stand trial. Following submissions it was agreed it would be appropriate to proceed in her absence as she was also unfit physically to attend trial.

The defence and prosecution were at odds as to the scope of the mental element engaged by PWITs charges and as to what precisely the jury would have to determine. They agreed that, in respect of the first element [possession], the jury would need to determine whether she had the knowledge of the presence of the drugs in order to determine whether the appellant had done the act charged. They disagreed however as to whether the mental element for intention to supply formed part of the act charged.

The defence contended that intention formed part of that act and could be assessed objectively. In contrast, the Crown's position was a trial under section 4A Criminal Procedure (Insanity) Act 1964 is not concerned with mens rea such that consideration of intent was not appropriate.

The Recorder accepted the Crown's submission and ultimately directed the jury that its only consideration was whether the appellant had been in possession of crack cocaine in that she had had knowledge of its presence and some control over it. By majority, the jury found that the appellant had done the act charged

Grounds of appeal

The single ground of appeal was that the Recorder had been wrong to find that the second element, intent to supply, was irrelevant to a consideration of whether the appellant had done the act charged, and, thus, to have removed consideration of that issue from the jury.

The sole issue for determination was therefore whether, in a trial of fact relating to PWITs, a jury is obliged to consider whether the defendant intended to supply the drugs in their possession. The appellant submitted that to allow the facts of a simple possession to ground a decision that a charge of possession with intent to supply had been committed ran contrary to the intention of Parliament.

In dismissing the appeal, the Court ruled that the answer to that question turns on whether the latter element forms part of the act charged against the defendant as the offence.

Comment

In the judgement, the CACD reviewed a number of relevant authorities that they relied upon in reaching their decision. In reviewing the authorities, it also drew together a list of general principles which will be of practical benefit. As the CACD said in its ruling, there is not necessarily a 'bright light' between the actus reus and mens rea. Accordingly, what will require determining by the jury will need to be assessed on a case by case basis.

A summary of some of the principles are as follows:

In hearing pursuant to section 4A, a hearing, the jury will be concerned only with the injurious act (or omission) which would constitute a crime if accompanied with the requisite mens rea.

There is no 'bright line' between the actus reus and the mens rea. Depending upon the nature of the offence charged, the former

may involve mental elements. A proper consideration of the 'acts' required to prove an offence requires an offence specific consideration of its ingredients.

In some cases, there are practical difficulties in distinguishing between the actus reus and the mens rea, it being the case that, in some instances, the act of the crime might include a mental element.

In each case, it will be necessary to analyse the essence of the allegation which constitutes the act or omission. Where the offence charged is statutory, that will require interpretation of the language used and of the pleaded particulars. That exercise may result in a conclusion that the 'act' of which the jury must be sure, goes beyond physical acts and encompasses some aspect of the defendant's intention at the relevant time. In such circumstances, it is that intention or purpose which results in the act in question being, in the language of Lord Hutton, 'an injurious act', in which the two components are indissoluble and only a consideration of all matters provides real meaning to the jury's verdicts.

A state of mind not directly linked to the outward component of the act i.e. which is not the reason for it, does not form part of the act charged as the offence and, accordingly, will not be a matter for the jury to determine.

In a case in which there is objective evidence which raises a prospective defence to the actus reus of the offence charged, albeit one entailing some consideration of the mental state of the defendant, the jury should not find that the defendant did the 'act' unless it is satisfied beyond reasonable doubt, on all the evidence, that the prosecution has negatived that defence.

Where a prospective defence does not relate to the actus reus of the offence charged, it is not open to the jury to consider issues of mens rea. Therefore, on a charge of murder, it is not open to the jury to consider lack of specific intent, diminished responsibility and provocation, the last of which is relevant only when the jury was satisfied that the defendant had the requisite mens rea for murder.

The Court took the view that an intent to supply was not an 'indissoluble component' of the injurious act of possession. Rather, it is the mens rea of the offence. Per *R v Antoine* [2001] 1AC 340 HL, no enquiry into the defendant's intent is permitted and the direction to the jury was therefore correct.

FINANCIAL CRIME APPEALS

Acquiring Criminal Property - s.340 POCA 2002 - Modern Slavery

R v Jing Du
[2024] EWCA Crim 713

By Kathryn Arnot Drummond

Summary

Jing Du was convicted after trial of one count of acquiring criminal property contrary to section 329(1)(a) Proceeds of Crime Act 2002 ["POCA"]. The particulars were that between 1 January 2018 and 31 December 2020, she had acquired criminal

property namely, £725,954.59, knowing or suspecting it to represent the proceeds of criminal conduct. This sum constituted faster payments and cash deposits into seven accounts in her name.

The prosecution case was that the huge scale of funds passing through her accounts together with the connection of her phone to accounts for purchasing escort services and on web chats advertising sex services was sufficient to infer the money was criminal property and that she was involved in running prostitution. She had not declared any income to HMRC during the relevant period.

The defence raised at trial was that Jing Du was a victim of modern slavery and did not have control over the bank accounts. She gave evidence at her trial that she had entered the UK as a student but, within a few weeks of arriving, had been drugged at a bar and woken up in a strange flat naked with men she did not know. After they threatened to show explicit photos of her to her family, she had been coerced into working for them as a sex worker.

Leave was granted on the second ground of appeal that the Judge erred in her directions to the jury in respect of the elements of the offence upon which Jing Du had been convicted. It was submitted that the directions failed to direct the jury to consider separately the questions: (a) whether Jing du had "acquired" the money which was paid into the bank accounts, given the claim that the accounts were being controlled by others without her consent; and (b) whether she knew or suspected that it was "criminal property" as defined in s.340 POCA. That latter point should have included the question whether she knew or suspected that it constituted or represented a person's benefit from criminal conduct. What the jury were told in the route to verdict was as follows:

"the first question that you have to ask, deals with whether the fact Ms Du knew or suspected that the funds had been transferred into her accounts. And you have heard evidence about what her state of knowledge was, in relation to the transactions. If you think that she did not, or may not, have known that the funds had been transferred, then you find her not guilty, and that is the end of count one."

The CACD accepted the criticisms of the written directions and route to verdict. The separate element in (b) is integral to the offence. Even though Jing Du's defence was that she had no knowledge or control over the bank accounts at all, Jing Du was entitled to have each element of the offence considered by the jury and the jury were required to satisfy themselves so that they were sure that she had acquired the property in question (namely the funds); and also that she knew or suspected the property to have been, either directly or indirectly, the proceeds of criminal conduct. That knowledge or suspicion on her part could not be assessed as at the date of trial, by which time Jing Du would have known and did know, far more about the nature of the funds by reason of the police investigation than she did, on her case, know before she was arrested. This

deficiency in the directions to the jury rendered the conviction unsafe. The conviction was quashed with no consequential orders. The Crown did not seek a retrial.

Whilst the CACD held that the Judge had erred in her directions, it had no doubt that she did not obtain the assistance she was entitled to expect from either the Crown or defence representative as the directions were agreed by the lawyers. The question is why were these directions agreed and how was a key element of the offence overlooked. S.329(1)(a) POCA is worded simply that the offence is committed if A acquires, uses or has criminal property. However, the definition of "criminal property" which includes the mens rea is to be found in s.340 POCA, namely, that property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and A knows or suspects that it constitutes or represents such a benefit. Practitioners should be familiar with s.340 and with the Supreme Court case of *R v Anwoir* [2008] EWCA Crim 1354 which contains guidance for prosecutors and defence practitioners on the scope and interpretation of the money laundering offences.

PROSECUTION APPEALS

Appeal against terminatory ruling - stay of proceedings - abuse of process - lack of prosecution counsel

R v Ng and O'Reilly
[2024] EWCA Crim 493

By Charlotte Newell KC

Summary

An impressively constituted court (Carr LCJ, Edis LJ and Pepperall J) heard this appeal against a terminatory ruling pursuant to s58 CJA 2003 following a stay of proceedings as an abuse of process due to lack of prosecution counsel.

The Defendants had been charged with offences arising out of a dispute with Ng's ex partner; Ng with 2 counts of assault occasioning ABH and possession of an offensive weapon, O'Reilly with malicious communications and assault by beating. They pleaded not guilty and the case was sent to the Crown Court at Canterbury for trial.

At PTPH on 19th April 2022 the trial was placed in a 2 week warned list for the week commencing 7th November 2022. However, on 18th October 2022 it was moved to the later warned list of 3rd July 2023 to allow for outstanding proceedings against one defendant to be concluded.

The matter was not listed in the July warned list due to lack of available prosecutor and administratively adjourned to the warned list of 29th January 2024.

On Friday 26th January 2024 prosecution counsel's clerk requested the trial not be listed on Monday 29th due to counsel's unavailability. That was granted and trial listed as a "backer" for another trial on 30th January. In fact it could not go ahead on 30th for a number of reasons;

No prosecution trial counsel was available. Instructed trial counsel had another professional commitment later in the week and CPS had been unable to find cover despite extensive efforts.

O'Reilly had been remanded into custody and had not been produced.

The backer trial was effective.

The trial was adjourned to be re-fixed, the Judge noted that the next available fixture was likely to be in 2025 and ordered skeleton arguments on abuse of process to be heard on 8th March 2024. Crown Counsel was required to explain why they had prioritized another case over the trial. Crown Counsel responded that he had done so as he felt professionally obliged to attend a sentence following trial in which there was a substantial factual dispute.

On 8th March 2024 the Judge made a finding that the Court had been unable list the case for trial on three occasions "all because of difficulties caused by the prosecution" and acceded to the application for a stay concluding;

> *"condoning further delay in this particular case, caused by a failure by the Crown to ensure it is in a position to present the allegations amounts to an abuse of the process because it would be a decision which has a clear and obvious capacity to undermine the integrity of the criminal justice system. To allow the prosecution to continue in the circumstances I have outlined, offends my sense of justice and propriety and to condone the circumstances behind the delay and simply to do nothing would be something which would have a clear capacity to undermine public confidence in the criminal justice system and consequently risk bringing it into disrepute."*

In allowing the Crown's appeal against this terminatory ruling the CACD rehearsed the relevant legal principals most recently set out in R v BKR [2023] EWCA Crim 903

The CACD underlined that where a fair trial is possible and the consideration is whether it would be unfair to try an accused, a stay could only arise from *misconduct* and would not be imposed for the purposes of punishing or disciplining prosecutorial incompetence or negligence. The exceptional step of a stay would only be imposed where misconduct was such that it was appropriate in order to safeguard the integrity of the criminal justice system

The trial judge had failed to observe those principles;

The fact that a prosecutor could not be found did not come close to the sort of executive misconduct sufficient to justify a stay.

The exercise of balancing the competing public interests in trying those accused of crime against faith in the criminal justice system had not been performed.

The CACD provided guidance to minimize the risks of trials being ineffective due to a lack of counsel;

A pre trial review 2-3 weeks in advance of the warned list slot to identify difficulties

Listings should take account of counsel's availability where possible

Counsel should promptly inform the Court of anything that may affect their availability for trial (in accordance with CPR 3.12)

Maximizing productivity of advocates by use of remote hearings save in trials, PTPH and sentencing hearings.

However where no prosecution counsel is in attendance (for reasons other than, for example, serious illness) the Court will have to consider whether to adjourn and a refusal to do so has the effect of requiring the prosecution to offer no evidence and the court can enter a verdict of not guilty pursuant to the power contained in s17 CJA 1967. Any such decision must be communicated to the prosecution so that they can consider an appeal against terminatory ruling.

Comment

The power to appeal a terminatory ruling has been in force since 4th April 2005, the initial fear that the floodgates would open has never come to pass doubtless as a result of the CPS guidance that the right should be used sparingly and judiciously[25].

In 2005 it was practically unheard of for a trial to stall for lack of prosecution indeed it barely warranted analysis. That position has changed. CBA analysis of official data shows that the number of trials ineffective due to lack of prosecution advocate on the day a trial was due to start was 756 in 2023, a 42 fold rise on 18 in 2019

Whilst this case rather closes the door to lack of prosecution counsel being grounds for a stay it is perhaps only a matter of time before we see an appeal against a terminatory ruling where an application to adjourn for lack of counsel has been refused.

One can understand the frustration of the RJ in this busy court centre dealing with the consequences of the lack of counsel. That frustration is shared by counsel and their clerks who have to balance the servicing of work against the vagaries of the warned list system where counsel cannot reasonably be kept free in the hope that a case may enter the list. The judgment referenced the concerns of the SPJ in the listing advice published in 2023[26]. The encouragement to take counsel's dates to avoid into account will be welcome although challenging for those tasked with listings.

[25] See Taylor on Appeals chapter 8 "Prosecution Interlocutory Appeals under CJA 2003"

[26] Listing-Advice-from-the-SPJ-to-PJJ-and-RJJ.pdf (judiciary.uk)

Section 58 Criminal Justice Act 2003 - Prosecution's right to appeal - written notice of the intention to appeal - delay

R v AWQ
[2024] EWCA Crim 898
R v AMF & AZJ
[2024] EWCA Crim 899

By Ben Holt

Overview

The same Court, on the same day, dealt with two separate applications by the prosecution for leave to appeal terminating rulings pursuant to section 58 Criminal Justice Act 2003.

Prior to the enactment of this section, the prosecution were not able to appeal decisions or rulings by a Trial Judge during the course of trial on indictment. By this section, once a count on the indictment is 'terminated', for example by a ruling following a successful submission of no case to answer, the prosecution are able to apply for leave to appeal that ruling. As part of the appeal, they can nominate other rulings, made during the course of the trial, also to be part of the appeal. The prosecution can apply for the appeal to be expedited. The obvious benefit of this course being that the trial can resume once the expedited appeal has been heard.

There are strict processes that need to be followed at the time of and subsequent to the ruling. They are all set out in the section itself and associated Criminal Procedure Rules [Part 38]. A number of appeals have failed because prosecution counsel has failed to give the acquittal guarantee following the ruling [see s58(4)]. The best example of this was the case emanating from Woolwich Crown Court when the Judge, dealing with a PCMH, called for a jury to be sworn immediately having been told by prosecution counsel that the CCTV of a stabbing was still unavailable. During a testy exchange, counsel was effectively forced to offer no evidence; an application for time having been refused. No doubt surprised by how matters had proceeded, counsel omitted to give the acquittal guarantee. The Court of Appeal concluded that they had no jurisdiction to hear the appeal [CPS v C, M and H [2009] EWCA Crim 2614]. Although well known, this case is far from unique *[for example, see R v NT* [2010] EWCA Crim 711, *R v M* [2012] EWCA Crim 792 and *R v B* [2014] EWCA Crim 2078. See *Taylor on Criminal Appeals, Chapter 8*].

AWQ and AMF & AZJ concerned the same requirement; namely that written notice of the intention to appeal must be lodged with the Crown Court, defendant and Registrar of the CACD within five working days of the indication of intention to appeal having been given to the Trial Judge. In both of these cases, to a greater of lesser extent, this had not been done. The cases had different outcomes; bearing in mind the reasons behind the delay.

Hearsay ruling – submission of no case – reason for delay – whether prejudice caused

R v AWQ [2024] EWCA Crim 898

Summary

The case involved a large-scale conspiracy to supply drugs. The principal conspirator was the brother of AWQ. He had pleaded

guilty prior to the trial commencing. The prosecution's case relied upon two main events that implicated AWQ in the conspiracy. They also relied upon various text messages and telephone contacts. The prosecution sought to adduce messages between another conspirator, JB, and his sister. In those messages, she had spoken of taking '*drug money*' to '*them brothers*'; the implication being she was referring to AWQ and his brother. The Crown applied to adduce the messages pursuant to s114(1)(d) – interests of justice. The Judge refused the application.

At the close of the prosecution case, the Trial Judge acceded to a submission of no case to answer made on behalf of AWQ. The Crown thereafter applied for leave to appeal. They nominated the ruling on hearsay to be treated as part of the appeal.

Procedural Issue

Before dealing with the substantive appeal, the Court set out the procedural issue that had arisen in this appeal.

The ruling was given on 9 May. The prosecution requested, and were granted, an adjournment to consider their position. On 10 May they indicated orally that they intended to appeal. The acquittal guarantee was given. The jury were discharged in respect of AWQ; the trial continued to a conclusion in relation to other co-defendants.

CPR 38.7(3)(b) mandates that a written notice must be served on the Crown Court, Registrar and defendant within five working days. The notice was served on the Court and AWQ. However, the email address used for service on the Registrar was defunct; in spite of it still being listed on the relevant gov.uk website. This came to light when the respondent was in the process of serving a Respondent's Notice.

The prosecution applied for an extension of time for service; pursuant to the Court's general discretion under CPR36.3(a). The Court concluded that the interest of justice meant that such extension should be granted. The reason for the late service was an error on a gov.uk website. No prejudice had been caused; the documents having been served on him.

Substantive Appeal

They went on to consider the substantive appeal.

The CACD disagreed with the Trial Judge in respect of both the hearsay ruling and the half-time submission. Criticism was made of the brevity of the judgment given in the Crown Court. Without hesitation, however, the CACD concluded that they reached the '*opposite conclusion to that reached by the Judge*'. They said that any other outcome would not be reasonable. The hearsay statement made by JB's sister had independent support for its accuracy. The messages were part of unguarded conversation between herself and her brother; with no apparent motive to lie. They should have been admitted.

Both rulings were, therefore, reversed.

The case was sent back to the Crown Court for a re-trial. The Court agreed that expedition would not have been necessary

in this case; the trial continuing, as it did, in respect of co-defendants.

R v AMF & AZJ

[2024] EWCA Crim 899

Summary

The procedural error by the prosecution in this case was fatal to the appeal. To compound matters, the CACD would have allowed the appeal; but for late service of the appeal documents.

The two respondents were tried at the Crown Court in respect of allegations of historical sexual offences that dated back to the late '80s and '90s. There were three complainants and a total of twenty-three counts on the indictment. AMF faced counts 1-21; AZJ was indicted on counts 22-23.

During the trial, the brother of one of the complainants, referred to as VV, had attended the Crown Court where the trial was taking place for a wholly unrelated matter. He saw the respondents and spoke with them. He told the respondents that he knew that the allegations that VV had made against them were untrue. These were the only counts faced by AZJ.

A Police Officer then took a statement from him. He said the opposite in that statement. He said that VV had indeed been sexually abused by the respondents. Remarkably, perhaps, he was called as a prosecution witness. Although maintaining his account that the abuse had happened; his evidence was at odds with that given by VV.

It was this contradictory and apparently confusing evidence that spurred the Trial Judge on to make an enquiry of counsel in relation to the sufficiency of evidence in counts 20-23; those relating to VV. He invited submissions.

Procedural Issue

At shortly before midday on Friday 3 May, having heard argument, the Judge gave a detailed ruling in which he concluded that there was not sufficient evidence to sustain those counts. The prosecution applied for time to consider their response to the ruling. The application was granted.

The Court reconvened on Tuesday 7 May; after the Bank Holiday. The prosecution, by email, informed the Court that they intended to appeal. The acquittal guarantee was given. So far, there were no procedural issues.

The jury was discharged. There was no application to expedite the appeal.

The prosecution did not serve written notice within five days of their intention to appeal. Indeed, no such application was received until nearly midnight on 24 May, a Friday. The effective date of service, therefore, was Tuesday 28 May (Monday 27 May being a Bank Holiday).

In those circumstances, the prosecution applied for an extension of time; again, pursuant to CPR 36.3(a). Explanations were put forward as to the delay. The Court found these '*difficult to follow*'. Counsel and CPS had explained that there was a misunderstanding; each thinking the other had complied with the Order.

As a result, the Court found that there was no satisfactory explanation for the delay.

They were unable to exercise their discretion to extend the period of time for service. *R v H [2008]* EWCA Crim 483 cited:

> '*There has to be a real justification for an extension of time at all and that expedition is always requisite*'.

The Court noted the '*incursion*' into the finality of a Crown Court verdict by virtue of s.58 CJA 2003. The interests of justice did not require for the time period to be extended.

Substantive Appeal

The CACD did, however, go on to consider the merits of the appeal. It was common ground that two of the offences [indecency with a child] were not made out on account of the complainant not being under 14 at the relevant time. However, in respect of the other counts, the Court concluded that the Judge was wrong to conclude as he did; the matters he was concerned about were matters of credibility and, therefore, matters for the jury.

Expedition

It should also be noted that the Court was critical about the lack of expedition in this case. They noted that two complainants would have to give evidence again; the jury having been discharged in respect of all counts. This situation could have been avoided had the prosecution applied to expedite the appeal. The trial could have continued following a break.

Comment

These cases serve as reminders to prosecutors of the importance of the provisions of s58 CJA 2003; both in appealing the terminating ruling itself and other rulings made during the course of the trial. In *AWQ*, the Crown followed the correct procedural course [albeit with a minor, non-deliberate, hiccup]. The appeal was allowed and the respondent's case sent back to the Crown Court for a re-trial. Not only that, a ruling excluding important prosecution evidence was reversed.

However, both cases [*AMF & AZJ* in particular], remind counsel about the necessity to comply with the statute and associated rules in relation to prosecution appeals. Similar strict timetables apply in respect of applications to refer a sentence to the CACD as being unduly lenient. Indeed, for those applications, there is not even a discretion to extend the time-period.

The error made in *AMF & AZJ* was fatal to, what would otherwise have been, a successful appeal. These cases perfectly illustrate that if there is no good reason advanced by the prosecution for failure to comply with a stipulated time period, the CACD will not extend that period simply to correct an error made by a Trial Judge. The time periods are set for good reason and must be obeyed.

This is certainly not the first time that the CACD has been forced to dismiss an otherwise valid appeal on account of a procedural error [*R v M* and *R v B*, above, were also such cases].

AMF & AZJ also provided the CACD with an opportunity to encourage prosecutors to use the expedited appeal route. This was a classic case where expedition was required; such a course could have kept the trial on

the rails and prevented the two complainants from having to evidence again. This is especially pertinent at the moment with the backlog and listing issues.

[For the approach taken by the NICA to delay in prosecution appeals see *JM* [2013] NICA 64.]

S.5 Domestic Violence, Crime and Victims Act 2004

ATT and BWY
[2024] EWCA Crim 460

By Catherine Farrelly KC

Summary

Section 5(1)(c) Domestic Violence, Crime and Victims Act 2004 Act requires the prosecution to prove that there is a pre-existing risk of serious physical harm. Such a risk must exist prior to and independently of the event which caused the serious physical harm that was suffered.

The defendants (ATT, mother and BMY, father) were the parents of a 3 month old child, who had suffered catastrophic, non-accidental brain injuries. There was no evidence of skull fractures or impact injuries to the head and the brain injuries were therefore considered to be the result of severe shaking, with a single incident of shaking considered to be most likely. In addition to the brain injuries, a number of marks were noted to the child's body which were consistent with gripping and abrasion/scratch injuries. The gripping injuries were thought to possibly relate to the single episode of shaking.

There was evidence that the family home was chaotic, although there had been no previous concerns regarding the physical health or of physical harm to the child. Two days before the injuries were discovered, a health visitor had visited the family home and had seen no injuries to the child, and he had been alert and responsive.

Both defendants denied causing the injuries and stated that they did not know how they had occurred.

They were jointly prosecuted pursuant to section 5 Domestic Violence, Crime and Victims Act 2004 (as amended). At the close of the prosecution case, both defendants made submissions of no case to answer on the basis that the prosecution could not prove that there had been a significant risk of serious physical harm being caused to the child, as required by section 5. They submitted that such a risk must exist *prior to and independently* of the event which caused the serious physical harm that was suffered; they further submitted that the evidence had failed to establish a risk of serious physical harm being caused by either defendant. The submissions were upheld, and the prosecution appealed the terminatory rulings pursuant to section 58 Criminal Justice Act 2003.

The Grounds of Appeal

The prosecution submitted:
That section 5 did not require a pre-existing risk of serious physical harm to the child or vulnerable person if the defendant was the person who caused the serious physical harm which constituted the offence

Even if the judge was correct that a pre-existing risk of serious physical harm was required, the evidence was sufficient to permit a jury to conclude that such a risk had been demonstrated

The CACD Analysis & Decision

The CACD initially considered what is the correct test when considering whether to grant leave to the prosecution: is it that the prosecution must show a seriously arguable case (as per *B* [2008] EWCA Crim 1144) or is it sufficient to show that it is in the interests of justice for the appeal to be heard (as per *A* [2008] EWCA Crim 2186)? The Court considered section 67 of the 2003 Act which sets out the three bases upon with the Court may reverse a ruling on appeal (that the ruling was wrong in law, involved an error of law or principle or it was a ruling that was not reasonable for the judge to make). In this case, the prosecution advanced two submissions: first, that the ruling involved an error of law, in respect of which the Court held that the interests of justice test applied- and, secondly, that ruling was no reasonable for the judge to make, in respect of which the Court held that the seriously arguable case test applied. Leave was granted on both grounds.

Is a Pre-existing Risk of Serious Physical Harm Required?

The CACD began by considering section 5 as originally enacted, and before its amendment in 2012. The section had previously only related to causing or *allowing the death* of a child or vulnerable adult and in 2012 was amended to apply to circumstances where serious physical harm was also caused. The Court noted that the purpose of the amendment in 2012 was to allow the section to also apply where serious physical harm was inflicted to the victim and no other changes of substance were made to the section.

The section is set out below, with the words in bold being those added following the amendment of the Act in 2012:

A person ("D") is guilty of an offence if—

(a) a child or vulnerable adult ("V") dies [**or suffers serious physical harm]** as a result of the unlawful act of a person who—

(i) was a member of the same household as V, and

(ii) had frequent contact with him,

(b) D was such a person at the time of that act,

(c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and (

d) either D was the person whose act caused V's death [**or serious physical harm]** or—

(i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),

(ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and

(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (subparagraphs (i) to (iii)) that applies.

Serious physical harm was defined as harm amounting to grievous bodily harm.

The Court considered the explanatory notes in relation to section 5(1)(c) as originally enacted, which stated:

> "*The victim must also have been at significant risk of serious physical harm. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. The offence will not apply if the victim died of a single blow when there was no previous history of abuse, nor any reason to suspect a risk*."

The Court further considered that the words of the section made it clear that the serious physical harm of which there was a risk could not be coterminous with the serious physical harm which had led to the death (see paragraph 37), stating

"*such a person could not be in a position to take steps to protect the victim from the risk of harm if that risk only arose at the point at which the act was committed*".

The Court highlighted that the purpose of section 5, as originally enacted, was to capture those who had caused the death and those who had allowed the death without having to prove into which of those two categories a defendant fell.

The Court also considered the explanatory notes in relation to the 2012 amending legislation:

> "*The extended offence will….apply only where the victim was at significant risk of serious physical harm (section 5(1)(c) of the 2004 Act). The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. The extended offence will not apply if there was no previous history of abuse, nor any reason to suspect a risk.*"

The Court noted that the final sentence of the explanatory note was not identical to the 2004 note as it did not specifically exclude a single blow causing serious physical harm but it did maintain the position that the offence would not apply where there was an absence of a previous history of abuse or a reason to suspect that there was a risk of serious physical harm and that the risk would be likely to be demonstrated by a history of violence. This interpretation was supported by the Ministry of Justice Circular 2012/3 (see paragraph 41).

The Court then considered the commentary and a draft indictment for the offence, as set out in Blackstones Criminal Practice 2024, which was relied upon by the prosecution and stated

> "*With respect to the editors of Blackstone, if they intended to say that the significant risk of serious physical harm could arise from the*

> *unlawful act constituting the offence, we disagree with that proposition*" (at paragraph 45).

The CACD made it clear that the purpose of section 5 was to cover situations where someone (usually a very young child) had been unlawfully killed or seriously injured and the two adults in the house were silent or blamed each other. The prosecution is not required to prove who killed or seriously injured the victim. It can present the case on the basis that someone must have unlawfully killed the victim, that it had to have been one of the two adults and that the adult not directly responsible for the killing allowed it. Whether the jury will be in a position to identify the person who caused the death or the serious injury will depend on the evidence. It will not matter if the evidence does not permit them to do so (at paragraph 47).

The Court inquired of the prosecution whether it could prove which of the defendants had caused the serious brain injury to the child and it was conceded that it could not. The Court then concluded that the jury would have been required to find that the prosecution had, in respect of each defendant at least satisfied the requirements in the second part of section 5(1)(d) which inevitably involved a significant risk of serious physical harm in existence prior to the infliction of the injury reflected in the offence:

> "*Even if the prosecution submission in relation to the elements of the offence applicable to a person who caused the injury were correct (which we are satisfied it was not), on the facts of this case it would not avail them"* (at paragraph 48).

Whether the Judge was Correct that the Evidence was Insufficient to Permit a Jury to Conclude that a Pre-Existing Significant Risk of Serious Physical Harm had been Demonstrated

The CACD then considered whether the judge erred in concluding that no reasonable jury could be satisfied that the was a pre-existing significant risk of serious physical harm to the child caused by the unlawful act of someone within the household.

The Court considered the marks found on the child's legs and the evidence which showed general poor parenting on the part of the defendants. The Court considered that, on the evidence, the trial judge was entitled to conclude that none of the evidence relied upon gave rise to a significant risk of serious physical harm and that the trial judge was entitled to conclude that the marks to the child's legs could not amount to serious bodily harm. The Court observed that whilst any unexplained injury to a small baby must raise concern, it is not the same as amounting to a significant risk of serious physical harm.

Comment

The ruling demonstrates the importance, when prosecuting a case pursuant to section 5, of establishing a clear chronology in relation to evidence of events which took place *prior to* the event which caused the serious physical harm or death. Furthermore, prior events and injuries must

be subjected to careful analysis and assessment of whether they are capable of proving that those in the household should have appreciated that those events or injuries gave rise to a significant risk of serious harm. As demonstrated by this case, general poor care or parenting, absent evidence of serious bodily harm, is unlikely to be sufficient.

SENTENCE APPEALS

Drugs – County lines – inordinate delay

R v Charlie Birtchnell
[2024] EWCA Crim 830

By Irshad Sheikh

Summary

Following convictions for offences of conspiracy to supply cocaine and heroin, the appellant was sentenced to a total of 5 years' imprisonment.

The case concerned County Lines drug dealing and two drugs' lines, running from London into Chard, Somerset. It also featured a further drug line operating in and around the London area, for which the leading defendant in the conspiracy was alone charged.

The prosecution case against the appellant was, that on 31st August 2021, the appellant had driven a 16-year-old male to Chard knowing that the minor was going there to sell class A drugs.

On the basis of the appellant's 'limited' involvement, under direction, the prosecution and defence agreed that the appellant had performed a lesser role for the purposes of the sentencing guideline. The offences involved selling directly to users, meaning that they were category 3 offences, with a starting point of 3 years. The fact that the defendant's involvement was to drive a minor was accepted to be a serious aggravating factor, as recognised in any event as a statutory aggravating factor in the definitive guideline.

Because of that aggravating factor, the judge had increased the starting point from 3 years to 5 ½ years. It was unclear whether the judge had elevated the appellant's role to one of significant or simply increased the starting point for lesser role to that of 5 ½ years. Either way, it was argued that in the circumstances the starting point was too high.

The appellant had 19 previous convictions for 24 offences, but none for drug trafficking. In mitigation, the absence of relevant recent convictions, the impact that imprisonment would have on the appellant's partner and their six-year-old child, and the delay between arrest and the service of postal requisition at the end of January 2023 were advanced. In the period between arrest and sentence, the appellant had taken steps to address his offending behaviour; he had obtained a PSV licence and at the time of sentence was in full-time employment as bus driver.

There were three grounds of appeal. Firstly, that the increase in sentence to reflect the involvement of a child was excessive, if starting from the lesser role category. Secondly, that insufficient account was

taken of the delay in the investigation and prosecution of the case which was "inordinate and unjustifiable". Thirdly, that insufficient account was taken of the appellant's personal mitigation.

The Appeal

In giving judgement, Lord Justice Warby referred to *R v Ajayi* [2017] EWCA 2011, where it was noted that this type of offending carries with it the hallmark of professional crime above and beyond that involved in ordinary street dealing. Primarily on that basis, the court took the view that the appellant's case could properly be viewed as one of significant role or, even if it fell within the lesser role category, then it was at the top end of the range which is equivalent to the four-and-a-half year starting point for significant role. The court's conclusion was that in all the circumstances a sentence of five-and-a-half years before allowance for mitigation was severe but not manifestly excessive.

The court, however, saw force in the submissions revolving around the judge's approach to delay and personal mitigation and the fact that he had not taken sufficient account of either. The court noted that the judge had mentioned both those matters in the course of his remarks but the only reduction he made was the six-month deduction for the appellant's lack of relevant previous convictions. In the court's judgment that reduction fell a long way short of what was merited on the facts viewed overall. The court emphasised that where there had been an unreasonable delay that had impacted detrimentally upon a defendant, then a significant reduction was merited. In that regards, Lord Justice Warby referred to R v Noor [2024] EWCA Crim 714

The CACD concluded that the sentences in the case were manifestly excessive and quashed the sentences of 5 years and substituted concurrent sentences of four years' imprisonment.

Irshad Sheikh represented Mr. Birtchnell

Sexual Harm Prevention Orders – whether terms were necessary and proportionate - Guidance given in Parsons – impact of advancements and sophistication in technology

Rex v Dewey
[2024] EWCA Crim 409

By Sam Bonner

Summary

D pleaded guilty to four offences of making or possessing indecent images of children and one offence of possessing extreme pornographic images. The NCA had received reports that D had uploaded indecent images to his online storage. A search warrant was executed at his address and ten devices were seized and analysed. On five of those devices police found indecent images of children of various categories. The offending had occurred over a number of years. D was sentenced to 12 months imprisonment suspended for 2 years.

The SHPO contained seven clauses. The first was a non-contact provision included by the Recorder due to the 'medium risk of harm' to 'teenage boys' detailed in the PSR. The second detailed the use of Risk Management software on internet enabled devices. The remaining clauses detailed notification to police of digital devices, programs and storage used by the appellant and allowed the police to access premises where he was present to check compliance with the order.

On appeal, D challenged the terms of the Sexual Harm Prevention Order.

The appellant was a 37 year old man of previous good character. He had been employed in a senior professional role and elected a local councillor before his arrest. A pre-sentence report detailed difficulties forming relationships and increasing isolation which triggered the use of the internet for sexual stimulation.

Since his arrest, the appellant had voluntarily signed up for counselling to address his addiction to illegal images. The pre-sentence report described that the appellant was 'a medium risk of re-conviction for an internet sexual offence.....and a low risk for a contact offence....' Confusingly the appellant was also said to be a 'medium risk of harm to children, most likely teenage boys.'

Whilst the SHPO was uploaded prior to the hearing, this was not done two business days before as required by Crim PR rule 31.3(1)(b) and (5). This lack of time to consider the order prevented sensible discussions by counsel prior to the hearing.

Two important points were highlighted for consideration when imposing a restrictive order. Firstly, the court stated that 'touchstone when considering the precise terms of a restrictive order such as a SHPO is always necessity and proportionality' and secondly, that the 'terms which are necessary in an individual case must be carefully considered and weighed against the facts of the case.' [15] The fact that an offender will also be on the Sexual Offences Register and subject to the Disclosure and Barring Service should be kept in mind as both afford protection to the public and can result in duplication of restrictions.

The CACD found in this case where there was no evidence that the appellant had ever sought contact with children either online or in person, that the non-contact provision imposed was not necessary or proportionate, given that the appellant had been assessed as a 'low risk' of committing contact offences.

Regarding the scope and wording of restrictions on internet-enabled devices, the CACD endorsed the work undertaken in Parsons and Morgan [2017] EWCA Crim 2163 by experts in internet and business software. Two experts had set out restrictions which were 'effective, clear and realistic' whilst also being 'readily capable of simple compliance and enforcement.'[19] For example, the court had concluded that routine installation of risk management software was 'administratively unworkable' given realistic demands on police resources.[19] Instead, the Court in *Parsons* found that conditions

to notify police in relation to any device capable of accessing the internet, preventing the deleting of internet history and a requirement to produce the device to police upon request was preferred.

In regards to cloud storage, the court agreed that a condition to notify police of any remote storage facilities was preferred rather than a general restriction.

In the circumstances of this case, the CACD did not see the need for a term restricting the use of a mobile phone or image capturing device given there was no evidence the appellant had used a device to communicate with a child or had ever sought to make or capture any images himself. The main focus of the SHPO was control over devices used for downloading or viewing indecent images as was the offending in this case. The Court also found that giving the police power of entry to any premises was unnecessary and disproportionate given the other requirements of notification, production and inspection of devices.

Lastly the court recognised that technology had advanced and become more sophisticated since the expert evidence given in 2016 in the *Parsons* appeals. It was stated that the time may now have come when further contemporary expert evidence was needed to address proportionate and realistic restrictions.

Preparation of terrorist acts – Guilty plea – Life imprisonment– Sentencing guidelines – Dangerousness

R v Shabaz Suleman
[2024] EWCA (Crim) 804

By William Davis

Summary

The appellant pleaded guilty to one offence of preparation of terrorist acts, contrary to section 5 Terrorism Act 2006. He was sentenced to life imprisonment with a minimum term of 9 years 6 months, less time served on remand. He appealed against sentence on the grounds that: (i) the judge placed the offence into the wrong category in the sentencing guideline; and (ii) the judge's finding of dangerousness was erroneous and that, consequently, a determinate sentence should have been imposed.

Background

The offence was committed in August 2014 when the appellant was 18 years old. By the time of conviction and sentence he was 27.

In August 2014 the appellant went on a family holiday to Turkey. He attempted to cross over into Syria to join Islamic State ("IS") with the ambition of becoming a sniper. He was detained by the Turkish authorities but, rather than being deported to the UK, he chose to be part of a prisoner swap with IS in October 2014. Analysis of the appellant's computers showed that he had immersed himself in IS propaganda and was fully aware of the extreme violence in which that organisation was engaged.

The appellant performed a number of roles with IS, including becoming part of their Military Police and undertaking armed guard duty. He was active on social media and made clear in his postings that he had joined IS, that he wished to fight with them, and that he was being trained by them.

After some 5 to 6 months the appellant became disenchanted with IS and sought to leave, but he was not permitted to do so. He was captured by the Free Syrian Army and transferred to Turkey. He then went to Pakistan. He was arrested on his arrival at Heathrow Airport in 2021.

The judge placed the offence in Category B2. The starting point for Category B2 is life imprisonment with a minimum term of 15 years (range 10 – 20 years). The judge found that appellant was dangerous and concluded that the seriousness of the offence was such as to justify the imposition of a life sentence under s.285 Sentencing Act 2020.

Ground 1: Sentencing Guideline (Preparation of terrorist acts)

The appellant submitted the harm should have been assessed at Level 3. The significance of this was that the starting point for Category B3 is a determinate sentence of 12 years, whereas the starting point for Category B2 is life imprisonment. An offender within Category B2 is likely to meet the criteria for dangerousness if the risk of harm and culpability factors are met. Category 2 includes cases where multiple deaths are risked but not very likely to be caused. Category 3 includes cases where any deaths are risked but not very likely to be caused. The court held that harm was to be assessed based on the type of harm *risked* and the likelihood of that harm being caused. The issue of risk was to be judged by what the appellant intended (per Holroyde LJ in *R v Boular and Boular* [2019] EWCA Crim 798).

The role of a sniper, if carried out, would have resulted in multiple deaths. The judge took into account the fact that the appellant's behaviour involved a degree of immaturity and bravado, that he did not carry out any combat duties, and that no harm was actually caused. Nevertheless, he concluded that the case fell into Category 2. The court held that the judge's approach was "unimpeachable".

Ground 2: Dangerousness

The judge applied the correct test when assessing dangerousness. It was clear from the pre-sentence report that the appellant was extremely immature when he travelled to Syria. He presented as articulate and forthcoming in interview with the Probation Officer, and said that he no longer believed in violence or the politics of IS. However, there was no real explanation as to why the appellant had returned to the UK, what his intentions were, what skills he had learned, and what his true attitude was towards violence. The Probation Officer said that until the appellant had been sentenced and fully assessed the risk to others remained high.

The court will not normally interfere with a finding of dangerousness unless the sentencer has applied the wrong test or reached a conclusion to which he was not

entitled to come on the material before him (*R v Choudhury* [2016] EWCA Crim 1341). Here the court said the judge was entitled to conclude that the appellant was dangerous on the material before him. They added that they endorsed the judge's conclusion.

Comment

The appellant was unable to identify any error in the judge's approach either to the sentencing guideline or the question of dangerousness, and so it is perhaps unsurprising this appeal was unsuccessful. When a sentencing judge is required to make an evaluative judgment on an issue such as dangerousness, an appeal based on a submission that the judge simply reached the wrong conclusion will rarely succeed.

It is significant that the offence in this case predated the Counter-Terrorism and Sentencing Act 2021. Had the offence been committed on or after 29th June 2021 then this would have been a "serious terrorism case". Where a life sentence is passed in a serious terrorism case, the minimum term must be at least 14 years (s.323(3) SA 2020). If there is a guilty plea the minimum term cannot be reduced below 80 per cent of 14 years (i.e. 11 years 73 days). However, the minimum term may be less than 14 years if the court is of the opinion that there are exceptional circumstances. It may also be less than 14 years if the court considers it appropriate taking into account (a) time on remand or on a qualifying curfew, and (b) reductions for a guilty plea or assistance to the prosecution.

Life imprisonment v Extended sentence - attempted rape and assault ABH

R v Hussain
[2024] EWCA Crim 824

By Danny Robinson KC

Summary

H, then aged 26, was convicted of the attempted rape of C1 and assault ABH on C2. The offences were committed minutes apart on two sex workers. His previous convictions showed repeated sexual offending of increasing seriousness. He received a sentence of life imprisonment, with a minimum term of eight years, pursuant to section 323 Sentencing Act 2020 for the attempted rape, and a concurrent term of four years' imprisonment for the ABH. The CACD upheld the judge's decision to impose a life sentence, rather than an extended sentence.

First offence – attempted rape: H agreed to pay C1 for oral sex, but he then became violent. He shoved her to the ground, and attempted to rape her vaginally for 7 minutes (the whole incident was captured on CCTV). He licked her breasts and vagina, and he removed the condom she had put on his penis in order for her to perform oral sex on him. He only stopped trying to rape her when he was disturbed by a passer-by. He filmed the incident on his mobile phone. He could be heard on the recording giving a running commentary, saying things like *"raping this fucking bitch, this fucking slag right now."*

Second offence: Within 7 minutes the offender found another sex worker on the street. Once again, he agreed to pay her for oral sex, but then committed a *"determined, vicious and brutal, physical attack. He punched and kicked her multiple times to the head and face. He put his hands around her throat and forced his fingers into her mouth. She struggled to breathe and she thought that she would die. During the course of the attack he told her "Shut up bitch"."* The attack lasted for between 10 to 15 minutes. C2 was hospitalised as a result of the assault dislodging her dialysis tube.

Judge's approach to sentence: The judge had seen H give evidence, and had the benefit of a pre-sentence report and a psychiatric report.

The judge concluded that the offender had gone out that night to on the lookout for sex workers to target in order to express his violent sexual feelings towards females. She took the attempted rape as the lead offence. The facts of that offence were as close as possible to the completed offence.

His previous convictions were shocking. As the court observed, these offences were committed only 14 weeks after he had been released on licence from an extended sentence arising for multiple offences of sexual activity with a child and making indecent photographs of children. The facts of his previous offending showed that he was violent towards women, and the extended sentence had not dispelled that.

Structure of sentence: This was a Category 2 case for harm, given the sustained nature of the attack on C1, who was particularly vulnerable as a sex worker who provided sexual services late at night on the street. She was subjected to humiliation and degradation. The judge held back from putting the offending into Category 1 for harm, which she could have done had she found that the extreme nature of those harm factors elevated the offending into that category. This was a culpability A case because the offender recorded the attack on his phone. That gave a starting point of 10 years' custody, with a range of 9 to 13 years.

The following aggravating features were present: previous relevant convictions, the offences were committed in breach of licence for sexual offences, and an attempt to dispose of the evidence on his phone.

The judge took her starting point as 13 years. She reduced the sentence to 10 years to reflect the fact that the lead offence was an attempt, before increasing the sentence to 12 years to reflect the aggravating factors.

The judge found the offender to be dangerous.

Having made that finding, she went onto consider whether the seriousness of the offences justified a life sentence, pursuant to s.285 Sentencing Act 2020. The requirements of s.285(1) were met (the appellant was over the age of 21; the offence was a Schedule 19 offence; the offence was committed after 4 April 2005; and the judge had made a finding of dangerousness.)

The judge acknowledged that a life sentence was a sentence of last resort, but in her judgment the offender was a very dangerous man who, by virtue of his young age, would remain so for many years to come. There were no alternative sentences which would provide a sufficient level of protection to women.

Grounds of appeal and CACD's approach to the sentence: A single ground of appeal was advanced: that the Judge had erred in principle and/or passed a manifestly excessive sentence when she imposed a life sentence rather than an extended sentence under sections 279 and 280 of the Sentencing Act 2020.

The Court referred to the well-known case of Attorney General's Reference No 27 of 2013 (R v Burinskas) [2014] EWCA Crim 334; [2014] 2 Cr App R(S) 45

The Court made no criticism of the judge's approach to the sentence, nor to the life sentence she passed. The Court held that the judge was entitled to conclude that the life licence regime would provide a further safeguard to protect the public from the offender in the future.

Comment

Given the circumstances of the offending and the offender's previous convictions, this was an unsurprising decision. The fact that the offences were committed such a short time after his release on licence from an extended sentence when he had been found to be dangerous demonstrated that the extended sentence had failed to protect women from him. As the CACD observed, the judge was right to conclude that if anything, the offender had become even more of a danger to women since the extended sentence was passed. In those circumstances the judge was obliged to pass a life sentence.

Reduction in sentence to reflect time served on licence recall - Delay and discretion

R v Seer

[2024] EWCA Crim 776

By Sam Willis

Summary

Having pleaded guilty to strangulation and assault occasioning actual bodily harm, the appellant was sentenced to 31 months' imprisonment. He appealed against that sentence.

The primary ground of appeal was that the judge should have reduced the sentence to reflect the time spent by the appellant in prison, having been recalled, whilst the new offences were investigated.

The Court considered the chronology. In September 2022, the appellant had been released on licence. He committed the strangulation and assault occasioning actual bodily harm offences later that month, and the investigation was completed soon after. He was then recalled to prison a month later, in October 2022, and was still there when he received a written charge and postal requisition in November 2023. He pleaded guilty at a PTPH in January 2024 and was sentenced later that month. A potential injustice

therefore arose from the unexplained delay of 13 months between investigation and charge- the defendant could have started the new 31-month custodial sentence much earlier had there been no delay. When sentencing the appellant, the judge had refused to make any reduction for this.

The Court refused the appeal. It found that generally a period of recall is not relevant to a later sentence- but in cases of excessive delay it could be a factor leading to a reduction, flowing from the sentencer's discretion to do justice on the particular facts of the case (following R v Castello [2010] EWCA Crim 371, and R v Kerrigan [2014] EWCA Crim 2348). In this case, the judge had refused to exercise his discretion and the Court could not say that had been wrong.

Comment

In this case the Court accepted that the sentencer could have reduced the appellant's sentence, but also found that the sentencer was not bound to do so. Practitioners considering appeals in similar circumstances may wish to focus their submissions on the latter point- to show that the sentencer was so wrong in the exercise of their discretion that the appellate court should intervene. Where delay is the reason for the injustice, the Court is likely to consider the length and the causes (in this case, the appellant's denial in interview was considered relevant).

This case also serves as a reminder that the exercise of discretion will be difficult to challenge on appeal, and so practitioners would be wise to focus on persuading the sentencer to exercise their discretion favourably at that stage.

Joint enterprise - life sentences – minimum terms - calculating time served

R v Seed and others
[2024] EWCA Crim 650

By Jonathan Higgs KC

See the summary and comment in the conviction section above.

The sentence appeal related to a matter frequently overlooked when sentencing either mandatory life sentences under section 322 Sentencing Act 2020 or discretionary life sentences under section 323. It is not enough that the judge indicates when passing sentence that days spent in custody are intended to be reduced from the stated minimum term. The sentencing judge must himself calculate the reduction, and pronounce the minimum term after reduction of those days served prior to sentence. The Home Office has no power to perform that calculation itself, as it would do where the sentence is a determinate one. The Court of Appeal will not be amused at having to make such a correction again in the future.

ATTORNEY GENERAL'S REFERENCES

Defendant fabricated mental disorder to force victim to engage in sexual activity – significant delay between offence and sentencing

Attorney General's Reference (Head)
[2024] EWCA Crim 836

By Charlotte Hole

Summary

The Offender was convicted after trial of three counts of rape and one of assault by penetration. He and the victim had met as students, with the victim offering friendship and support to the Offender, who told her he had an autism spectrum condition. He claimed to have Multiple Personality Disorder or Dissociative Identity Disorder, and threatened suicide, in order to manipulate her into a sexual relationship, beginning in November 2017.

Using an alternative personality he would introduce games which gave options, one being to perform a sexual act. Other options might be that the victim had to hurt him with a knife, or herself be hurt, or she had to watch him walk in front of a car; she felt the sexual act was the least painful option.

The Offender raped the victim vaginally and orally on several occasions, and penetrated her vagina with his fingers then his entire fist, causing her to cry in pain. On one occasion he claimed to have taken an overdose; toxicological evidence showed this was fabricated.

In January 2018, having spent the night in the victim's home, the Offender claimed to be unable to seen or hear properly. He then assumed the personality "Samaritan", telling her repeatedly "I need to break you now". He threw her around and pinned her down, causing bruising, before raping her. During the rape he assumed a different personality, "J", produced a pair of scissors, and made her mark him and then herself with them. He also placed an ignited lighter under her chin.

Psychiatric evidence established that he did not have a mental disorder. His neurodevelopmental disorder may have contributed to the offending, but did not satisfactorily explain it. There was evidence that he had a fascination with controlling and manipulating others.

Timeline & Delay

Numerous delays in the investigation were described as 'too long and not entirely justified: six years passed between complaint and charge. The initial complaint was made to police in January 2018, and after two changes of investigating officer, the pandemic hit in March 2020, and the investigation was "put on a 'back burner'" as resources were deemed to be needed elsewhere. The Offender was eventually charged in June 2022 and, being on bail, was tried in September 2023, and convicted the following month after an 18 day trial.

Sentence

Upon conviction by the jury, the Offender was sentenced to a total of 8 years' imprisonment, concurrent on each count.

The Judge determined that the case fell into Category 3A of the Sentencing Guidelines in respect of the rapes, and 2A in respect of the assault by penetration. Despite consideration of dangerousness, a determinate sentence was imposed, in light of the absence of other violence and no further offending in the intervening six years.

Application

The Attorney General applied for leave to refer the sentences to the Court of Appeal under s.36 Criminal Justice Act 1988 on the ground that they were unduly lenient, arguing:

That the rapes should have fallen into Category 2 harm, given that there was violence or a threat of violence (beyond that which is inherent in the offence), giving a starting point of 10 years, with a range from 9-13 years custody.

Whilst there was no issue taken with the decision to impose concurrent terms rather than consecutive sentences, when considering totality the increase from the starting point was inadequate to reflect the aggravating features (the use of a weapon to frighten, and to injure and frighten in Count 1, to conceal or dispose of evidence, and ejaculation on at least 2 occasions), the number of offences, and the respondent's overall behaviour.

The defence argued that the sentencing judge had presided over a lengthy trial and was best placed to make the relevant assessments; that all rape offences assume a baseline of harm, and in the absence of additional degradation or humiliation this case had been correctly categorised. The deletion of messages was not a sophisticated attempt to dispose of evidence and should not aggravate the offence. The lengthy delay warranted a reduction, contrasting Attorney General's Reference (Timson) [2023] EWCA Crim 453

Judgment

The CACD refused the Attorney General's application. They noted that the Judge had to perform a "difficult and sensitive sentencing exercise" and found that he did so after "carefully considering all the circumstances and explaining his reasoning in sensitive and balanced remarks". They noted that the Judge, having presided over the trial, was best placed to make an assessment as to categorisation. They found the categorisation in 3A to be correct, with an appropriately substantial increase to account for the aggravating features and totality, before coming down for mitigation. The Judge was entitled to take into account delay and lack of further offending in the intervening six years.

Comment

Despite the unusual factual background, this case raised issues of general application in such appeals.

The Court restated that their role on an application under s.36 of the 1988 Act was not "simply to retake the sentencing decision as if it were the sentencing court", and referred to the summary of principles set out in *Attorney-General's Reference (Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R (S) 10 at [72]; in particular, the judge at first instance is particularly well placed to

assess the weight to be given to competing factors in considering sentence.

Practitioners responding to such applications will want to apply this principle to their own cases, particularly – as here – where the factual background is not straightforward, a contested trial has taken place, and psychiatric and other expert evidence called. Where an Offender has given evidence, the sentencing judge will also arguably be best placed to assess their maturity, empathy, and ultimately culpability.

The Court noted that "sentencing is an art and is not a scientific or arithmetical exercise", and (per Lord Lane CJ in Attorney-General's Reference No 4 of 1989 (1990) 90 Cr App R 366 "mercy is a virtue and does not necessarily mean that a sentence was unduly lenient".

The Court also considered the mitigating impact of delay. Cases with lengthy delays are increasingly common since 2020. *Attorney General's Reference (Timpson)* [2023] EWCA Crim 453 identified that unreasonable delays between investigation and charge would likely result in some reduction in the eventual sentence, especially for offenders who pleaded guilty, though unlikely to be as much as 25%, particularly where the offences were serious. However this should be considered alongside the Sentencing Council 'General Guideline: overarching principles', which identifies "Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence if this has had a detrimental effect on the offender."

Again practitioners will need to apply this to their own facts. In the instant case, the mitigation in the delay was balanced by the absence of detriment: in fact the Offender had been able to carry on working and engage in treatment in the community.

HIGH COURT (ADMINISTRATIVE)

Judicial review - challenging decisions of prosecuting authorities - judicial interference only in narrowest of circumstances

R (Jessica Rooks) v Crown Prosecution Service

[2024] EWHC 1941 (Admin)

By Rupert Kent

The claimant, JB, a complainant in a domestic abuse prosecution, brought a claim for judicial review challenging the decision of the defendant, the Crown Prosecution Service ('CPS'), to discontinue that prosecution.

That prosecution arose from an incident, as a result of which the claimant's partner had been arrested on suspicion of having assaulted her. In police interview, the claimant's partner did not dispute that the claimant had suffered injuries as a result of this incident, but asserted that they were inflicted lawfully. Though a prosecution was initiated against the claimant's partner, those proceedings were later discontinued.

The decision to discontinue was made in application of the evidential stage of the test under the CPS Code for Crown Prosecutors. That decision was then the subject of a request by the claimant for review, under the Victims' Right to Review Scheme ('VRRS'). The review resulted in the CPS upholding its original decision, albeit doing so in more detailed terms. It was the result of that review that was ultimately the subject of this claim.

An important factor behind the decision to discontinue was the claimant's credibility. Just under a year after the initial incident, the claimant had herself been arrested for offences relating to her partner. In police interview for that matter, the claimant had given a potentially incredible account. In large part, it was the inevitable disclosure of that account in the prosecution for the initial incident, and the anticipated use of it by the defence to damage the claimant's credibility, that led to the CPS deciding that the evidential stage was no longer met.

The issue in the proceedings before the court was whether the defendant's decision not to continue the prosecution was legally flawed, by virtue of an error of law in public law terms, in circumstances that would permit the court to interfere.

In oral submissions, the claimant conceded that the defendant's view of the claimant's credibility could not be said to be *Wednesbury* unreasonable. Instead, it was contended that the CPS's response to the claimant's VRRS request for review had failed to address all of the necessary considerations relevant to the question of whether the claimant's injuries had been inflicted lawfully. Therefore, it was said, the decision was based on an error of law.

In response, the defendant submitted that, given the duty to review a case was a continuing one, it was artificial to look only at the wording of the VRRS response, especially given earlier reviews had identified the referenced considerations. As such, it was said that there had been no error of law, and that the decision had rather been based on the exercise of evidential analysis.

In her judgment, McGowan J rehearsed the development of the law in this area, identifying that courts would only use the power to interfere with such decisions sparingly. This was because of the identified importance of maintaining the constitutional independence of the prosecuting authorities, as well as because of the recognised expertise that such authorities had in making such decisions. This meant, therefore, that a significant margin of discretion in this regard was to be given to prosecutors (especially when they were dealing with issues of primary fact), and that interference would only be appropriate in the narrowest of circumstances – where a policy was unlawful, where the prosecuting authority had failed to apply its own policy, or where there had been an error of law in its decision-making process, such that the decision was perverse.

In this case, however, the court was not prepared to interfere with the decision taken by the CPS. In identifying that the

decision made, rather than the quality of its expression, was the essential point of consideration, McGowan J accepted the defendant's submissions that there had been no error of law, and found, therefore, that the CPS's decision was not one that could be said to have fallen within the narrow list of circumstances identified by the authorities. Accordingly, the claim for judicial review was refused.

Comment

Two other similar recent cases are also of note on this topic.

First, in *R (Hillary Smith) v Director of Public Prosecutions* [2024] EWHC 2032 (Admin) the claimant sought judicial review of the defendant's decision not to prosecute a door supervisor for gross negligence manslaughter. Fordham J was required to consider various elements of the offence which the defendant found had not been made out on the evidence. Although the court found in favour of the claimant in relation to one of those elements, Fordham J found in favour of the defendant's decision-making process in relation to the remainder, and thus dismissed the claim. In doing so, the court underlined the importance of recognising and respecting the latitude that had to be afforded to prosecuting authorities.

Second, in DPP v Chris Durham & 2 Others (Trinidad and Tobago) [2024] UKPC 21 the Judicial Committee of the Privy Council ('JCPC') was concerned with an appeal from Trinidad and Tobago, resulting from the Director of Public Prosecution's decision to continue (rather than to discontinue) a murder prosecution. Identifying that the courts would use their power to intervene even more sparingly where the decision was to continue a prosecution, the JCPC was critical of what was styled as an unjustified collateral attack by a civil court using judicial review to interfere in ongoing criminal proceedings.

The authorities in this area make clear that a claim for judicial review in relation to the decision of a prosecuting authority will only be successful in the rarest of circumstances, especially where the decision was based on an assessment of fact rather than law, and especially where the decision is to continue rather than to discontinue a prosecution.

NORTHERN IRELAND COURT OF APPEAL

Unsolicited allegations made by witness - Failure to discharge jury – jury irregularity – confusion over verdicts returned

The King v BD
[2024] NICA 46

By Paul Taylor KC

This was a renewed application for leave to appeal against conviction. The conviction concerned three complainants and relates to serious sexual offences. The applicant was convicted after a trial of three counts of rape; one count of attempted rape; three counts of buggery; and 12 counts of indecent assault.

Ground 1 – Failure to discharge the jury upon defence applications: The jury should have been discharged given the prejudice

to BD by the witness NR making several unsolicited allegations about the applicant. It was submitted that the prejudice caused could not be corrected by way of a warning to the jury.

It was argued that the accumulation of all of the prejudicial evidence meant that the gravity and prejudicial nature of the claims necessitated a discharge to the jury, and they could not be corrected by the trial judge's warnings.

Counsel for BD "realistically accepted that how a trial judge should act in a case such as this will depend on the facts of a particular case, that the issue of discharge of the jury is a matter of discretion for a trial judge and that the Court of Appeal will not lightly interfere with what the trial judge does. … see R v Weaver [1968] 1 QB 358 R v Blackford [1989] 89 Cr App R 238, R v Boyes [1991] Crim LR 717, and Arthurton v The Queen [2005] 1 WLR 949.

[31]…The principles have also been applied in this jurisdiction in R v Ghadghidi [2016] NICA 43 paras [26]-[28].

[38] … the core question arises whether any prejudice has been remedied. In this regard, we have closely examined the trial judge's charge. In the charge the trial judge expresses himself in very clear and unequivocal terms raising concerns about the evidence of NR which he repeats on several occasions. To our mind, this charge is a model of how a charge should be framed to preserve fair trial rights for an applicant.

[39] Accordingly, we have no hesitation in finding that any prejudice that has been caused to the applicant by virtue of NR's unfortunate outbursts at times in this trial have been remedied by the charge to the jury, which clearly highlighted that NR may be viewed as a flawed and suspect witness…

[40] Overall, the approach adopted by the trial judge was within his discretion and is not one we will interfere with. The trial judge was best placed to assess any potential prejudice to the applicant and guard against it. We consider that he did so in his charge. Hence, we dismiss this ground of appeal.

Ground 2 – Material irregularity in relation to the verdicts.

[41] …after the verdicts were recorded and the jury was discharged a juror suggested to a member of court staff that none of the verdicts announced by the foreperson of the jury were unanimous.

There were 11 unanimous verdicts and eight majority verdicts recorded. It is therefore submitted that the verdicts are non-verdicts.

[42] We have read the trial judge's ruling in relation to this issue. In that ruling we note the following approach which bears upon our decision:

(i) Upon being informed of this issue by the court clerk, the trial judge enquired as to the whereabouts of the jurors and confirmed that they had all (including the unidentified juror who had raised this point) left the building.

(ii) The trial judge directed the clerk to contact the foreperson to enquire if he had any papers or documents relating to the verdicts and, if so, to ask that he keep them.

(iii) The trial judge also directed that any papers in the jury room be retained in case further enquiry was necessary.

(iv) The trial judge considered whether the information might require him to reconsider his decision to remand the applicant into custody (and has given reasons as to why this was not required).

(v) He further contacted senior counsel by way of email to inform them of what had occurred and asked for their submissions as to whether the court should take any action as a result (and, if so, what action).

(vi) The trial judge requested that senior counsel agree an early date for hearing on the issue and directed the applicant to appear via Sightlink. 9 October 2022 was agreed, and written submissions were also received prior to judgment.

[43] The jury foreperson could not be contacted despite all efforts. It is also clear that there was limited paperwork in relation to the jury analysis. The trial judge records all of this in his judgment and sighted counsel on this. In his ruling he ultimately decided that this was not a material irregularity on the basis of how the verdicts were returned.

[44] Crucially, in the ruling the trial judge explains that 11 of the verdicts were declared unanimous by the foreperson and on each occasion, he was asked in the presence of the other 11 jurors, including the juror who raised the issue, if this was the verdict of all and he said, "yes." As the trial judge records no issue was expressed by any juror on any of the 11 occasions on which this question was asked and answered in this way. The trial judge's core conclusion, therefore, reads as follows:

"Further, on my view, significantly, there were eight majority verdicts, where the foreperson stated in open court that it was not the verdict of all, but that 10 agreed and two disagreed. I find it incredible that if the juror who later demurred is correct, that not one of the 11, including himself or herself, raised this during the extended period the verdicts were being recorded. I do not accept as a reasonable possibility that all 11 failed to understand and draw to the court's unanimous attention that no verdicts are unanimous."

[45] … R v Charnley [2007] EWCA Crim 1354 is a well-established authority to the effect that there is a presumption in favour of assent of a jury to a verdict and that it is only in "extreme circumstances" that exceptions are permitted.

In Charnley no majority direction had been given; and the evidence was that the requisite number of 10 jurors had clearly not agreed to the guilty verdict in the jury room communicated though the bailiff. These are stark circumstances which do not translate into the circumstances of this case.

[46] Thus, having considered the law and applied it to the facts of this case we entirely agree with the trial judge that this was not an exceptional case where he was

required to go behind the verdicts described by the foreperson in open court in the presence of the other jurors and to which they presumptively assented. We consider that the trial judge took all reasonable steps to deal with this issue by engaging counsel, considering the law, and providing a reasoned ruling. There is no valid reason why we would interfere with this approach of the trial judge. As such, we dismiss this ground of appeal.

Inconsistent verdicts – Prosecution counsel's closing speech - whether unfair / prejudicial

The King v Jordan Glasgow
[2024] NICA 54

By Paul Taylor KC

This case provides a useful analysis of the approach to grounds based on prosecution impropriety and inconsistent verdicts.

JG renewed his application for leave to appeal to challenge a majority (11/1) jury verdict convicting him of a single count of sexual assault. The jury returned a separate verdict of not guilty in respect of the second count on the indictment, namely rape of the same person, a female teenager four years younger than the appellant.

There were two grounds of appeal:

(i) The conviction on Count 2 is an inconsistent verdict;

(ii) The Crown closing contained an unfair and prejudicial comment.

Ground 1: Inconsistent Verdicts: The NICA analysed the "test to be applied when considering whether a conviction should be quashed based on apparently inconsistent verdicts" [12].

In R v DH [2020] NICA 57 the NICA stated:

… The legal test to be applied in such cases was subject to extensive analysis in R v Fanning [2016] 1 WLR 4175. Having reviewed the authorities the court concluded that the approach that should be taken was that set out by Devlin J in the unreported case of R v Stone (13 December 1954):

'When an appellant seeks to persuade this court as his ground of appeal that the jury had returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is upon the defence to establish that.'

This approach had been expressly approved by the Court of Appeal in England and Wales in R v Durante [1972] 1 WLR 1612 and was subsequently adopted in this jurisdiction in R v H [2016] NICA 21.

[9] The burden of showing that the verdicts cannot stand is upon the appellant. It is for the appellant to persuade the court that the

nature of the inconsistencies are such that the safety of the guilty verdicts are put in doubt. That question will turn on the facts of the particular case and it is not safe to attempt to formulate a universal test.

[10] …there were suggestions in some of the cases that if the credibility of the complainant was rejected on one count it was difficult to see how it could not be rejected on another. That suggestion should be rejected. It was generally permissible for a jury to be sure of the credibility or reliability of a complainant or witness in relation to one count in the indictment and not to be sure of the credibility or reliability of the complainant on another count.

[11] … in Fanning the court also indicated that in the overwhelming generality of cases it will be appropriate for the judge to give the standard direction that the jury must consider the evidence separately and give separate verdicts on each count. That applies to cases where there may be multiple counts involving the same complainant and cases where there are specific counts and specimen counts….

[14] The effect of the governing principles is that the threshold to be overcome in sustaining a complaint of inconsistent jury verdicts is an elevated one. … The two verdicts, on their face, are perfectly rational. They disclose no aberration. They are harmonious with the governing principles. They generate no reservations on the part of this court about the appellant's conviction. We concur with the reasoning of the single judge. We identify no merit in this ground of appeal accordingly.

Ground 2: The closing address to the jury of leading prosecuting counsel included:

"…be careful of the clouds of confusion created by those who aim to confuse you and steer you away from the truth, always applying your critical common sense eye and compare that account given by the defendant to the clear, definite, unwavering and meticulous account provided by [AB]."

Senior defence counsel raised a complaint this with the Judge, and in his closing presentation to the jury, highlighted it in three separate places the Judge directed the jury on this in the charge.

The NICA analysed the duties of prosecuting counsel "as formulated by this court in R v West [2009] NICA 53". References were also made to Boucher v R [1954] 110 CCC 263; R v Gonez [1999] All ER (D) 674; Randal v R [2002] 1 WLR 2237; Ramdhanie v Trinidad and Tobago [2006] 1 WLR 796; the Code of Conduct for the Bar of Northern Ireland at paragraph 1701; the Public Prosecution Service Code paragraph 5.1.5.

[19] Refusing leave to appeal in respect of this ground, the single judge reasoned as follows:

"In my judgement, if the improper statement by Crown Counsel had the potential to unfairly prejudice the jury against the applicant, any such prejudice and unfairness was rectified by the LTJ in her further direction to the jury."

[20] We consider that the impugned statement of leading prosecuting counsel was inappropriate, though not egregiously so. It fell on the wrong side of the notional line. However, we are satisfied that the trial judge handled this matter carefully and skilfully and in a manner which successfully provided an appropriate counterbalance to any risk of unfair prejudice to the applicant. This assessment is reinforced by senior defence counsel's closing address…. There was no distortion of the equilibrium which is an essential element of every criminal. In summary, this ground of appeal generates no reservations on the part of this court about the safety of the applicant's conviction.

Comment

See *Taylor on Criminal Appeals* para 9.208 – 9.214 regarding Prosecution Impropriety, and para 9.424 regarding Inconsistent Verdicts.

Contributors

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*. Chambers and Partners described him as "One of the foremost appeals lawyers…"

Mark Heywood KC, joint head of 5KBW, has huge experience of criminal appeals, appearing regularly in the Court of Appeal for both appellants and respondents. Described in Legal 500 (2024) as 'a master advocate at the height of his powers', and former First Senior Treasury Counsel, Mark has also taken appeals to the House of Lords, the Supreme Court and the Court Martial Appeal Court. Recent cases establishing principle include *Stanciu* [2022] EWCA Crim 1117, [2023] 1 Cr. App. R. (S.) 10 (minimum term starting point for arson with accelerant in murder) and, acting for the appellants, *Royle and other appeals* [2023] EWCA Crim 1311, [2024] Crim. L.R. 191 (modern guidance on reduction in sentence for assistance to law enforcement).

Jonathan Higgs KC. Since taking Silk in 2011, Jonathan has had wide experience in all areas of Criminal Law, but with a real specialism in joint enterprise murder, cases both at trial and on appeal. He secured the first acquittal nationally following the judgment in R v Jogee [2016] UKSC 8 . He also has considerable expertise in the review and testing of DNA evidence, particularly in cases involving Probabilistic Genotyping software such as LiRa, TrueAllele and STRmix.

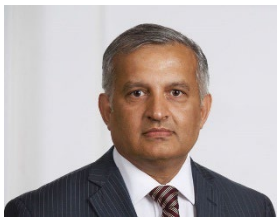
Natasha Wong KC is ranked as a Leading defence silk specialising in Financial Crime and Crime. Described as "charismatic, shrewd, hardworking and relatable" and "an exceptional leader in the most complex cases", she is "tactically extremely astute", and her client care is exceptional. Her advisory and appeal work is always meticulously considered.

Danny Robinson KC took silk in 2019. He prosecutes and defends in cases of homicide and fraud.

Charlotte Newell KC has established a substantial criminal practice prosecuting and defending at the very highest level. She has particular expertise in cases of homicide, and serious sexual allegations and cases involving young and vulnerable witnesses, appearing in cases of the utmost gravity in the Crown and Appellate Courts.

Catherine Farrelly KC specialises in cases of homicide, serious sexual offences and organised crime, acting for both the prosecution and the defence. She is particularly recognised for her robust and meticulous approach to her cases and her skill at dealing with cases of particular sensitivity. Recent cases include the prosecution of a businessman and several others for targeting barristers instructed by the NCA culminating in the planting of fake bombs in Gray's Inn, for which she was selected as the *Times* Lawyer of the Week, and the widely reported prosecution of a Metropolitan Police Officer for a series of serious sexual offences.

Jonathan Polnay KC is a Senior Treasury Counsel based at the Central Criminal Court. He has been instructed in some of the most high-profile cases in the criminal courts, which include the recent prosecutions of the murder of Sir David Amess MP, John Worboys ('the black cab rapist), the PC Harper trial and the trial concerning the manslaughter of 39 Vietnamese migrants. He brings to all cases his fierce intellect, unstinting hard work and dedication and an approachable and down-to-earth manner. He is much admired for his excellent and incisive judgment and legal knowledge as well as his ability to communicate complex evidence in a way that is clear and attractive to juries. As Treasury Counsel, Jonathan represents the Law Officers on references of sentences to the Court of Appeal as potentially unduly lenient. He also undertakes a wide variety of appellate work, often where a specialist second opinion is needed.



Irshad Sheikh. From his first appearance before the then Lord Chief Justice (Peter Taylor of Gosforth), over 30 years ago, Irshad has amassed considerable experience in appearing as an appeal advocate. An early, notable appearance was the appeal case of *R v Ghadami [1998] 1 Cr. App. R. (S.) 42*; an appeal against a confiscation order and guidance as to liabilities of a defendant which can and cannot be taken into account under the CJA 1988. In *R v Noor Ullah [2022] EWCA Crim 777,* an AG's Reference, the sentence of 2 years and 5 months for facilitating illegal immigration was found to be lenient but not unduly lenient. In *R v Birtchnell [2024] EWCA Crim 830,* the sentence was reduced as the delay had not

been taken sufficiently into account, (Summarised in this edition)

William Davis is a highly experienced criminal practitioner and a Recorder of the Crown Court. He specialises in cases of homicide, serious organised crime, and health and safety, and associated appellate work.

Dickon Reid is a specialist criminal barrister who has been practising with 5KBW since 2005.

Ben Holt is a Junior Treasury Counsel based at the Central Criminal Court. He is regularly instructed in high-profile cases involving homicide and organised crime. Recently, these having included the prosecution of three defendants for the murder of Shakira Spencer and the prevention of her lawful burial. Ben was also involved in the prosecution of defendants linked to the manslaughter of 39 Vietnamese migrants. He also has extensive experience prosecuting a wide range of fraud allegations; from 'insider' bank frauds to dishonest arising from the Grenfell Tower disaster. As JTC, Ben regularly appears in the Court of Appeal instructed by the Attorney General's Office on References of sentences considered to be unduly lenient. He has experience in a range of other appellate hearings; from jury irregularities to POCA Orders.

Rupert Kent specialises in the defence and prosecution of lengthy and complex cases involving financial crime, in particular in 'white collar' work, as well as in murder and other serious crime cases. He has extensive experience in appellate work, and is regularly instructed to advise on, and appear in, appeals before the Court of Appeal Criminal Division.

Kathryn Arnot Drummond specialises in financial crime cases including fraud, money laundering and bribery. She acts for the prosecution including CPS SEOCID, The Insolvency Service and HMRC as well as for the defence and has experience working on some of the largest SFO cases over the last decade. Nominated for Corporate Crime Junior of the year 2024 and 2022.

Charlotte Hole was appointed Treasury Counsel Monitoree in April 2024 and appears on behalf of the Attorney General in applications to refer potentially unduly lenient sentences to the Court of Appeal. She is regularly instructed as leading counsel in large and complex cases involving serious and organised crime, often with an international element,

for which she has received commendations from Europol and the Metropolitan Police.

Aska Fujita specialises in crime and fraud. She is sought out for her meticulous preparation, compelling advocacy, and sensitive client care. Aska's practice involves a wide range of substantial, complex and high-profile cases both for the defence and for the prosecution.

Frederick Hookway is a highly rated junior with a track of record of achieving exceptional results on both sides of the courtroom. Regularly instructed in complex and lengthy cases, both at first instance and on appeal, he is scrupulous in his preparations and regarded for his command of the law. Appointed Treasury Counsel monitoree in March 2024, Frederick is regularly instructed in sensitive and high-profile cases, including homicides, terrorism offences, and financial crime. Further, as part of his appointment Frederick routinely advises the Attorney General's Office in relation to Unduly Lenient Sentences.'

Sam Bonner practices across all areas of criminal law for both prosecution and defence. She is regularly instructed on serious and complex cases involving multiple defendants. Sam was also instructed as counsel to the Grenfell Tower Inquiry and is instructed by the MET in relation to their criminal investigation Operation Northleigh.

Sam Willis is instructed for both prosecution and defence. His practice is focused on serious and complex cases, usually involving organised crime, violence, firearms, drugs, and fraud. Formerly an IT developer, he draws on his experience to quickly analyse and present high-volumes of complex information. He is experienced with cases consisting of many moving parts, usually involving complex facts, multiple defendants, and lots of pieces of evidence to sift through.