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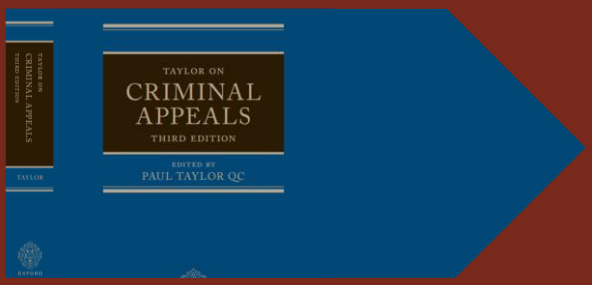
THE APPEAL BRIEF

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 2024 we were joined by Harry O'Sullivan, the author of ***Banks on Sentence***, and is the consultant editor of ***Halsbury's Laws of England*** latest ***sentencing and offender management*** volumes.

In this edition of the newsletter 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), and the Court of Appeal in Northern Ireland.

The featured article is "**Potential grounds of appeal (3): Jury irregularities**". 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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Case Summaries and Comment

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A-G's Ref 2024 Re Counihan [2024] EWCA Crim 747 - Conspiracy to steal – AG reference

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Ellen Pauline Teresa Gallagher (nee Mclaughlin) [2024] NICA 63 - Criticism of trial counsel as a ground of appeal – admissibility / reliability of interviews - The relevant legal principles applicable in Northern Ireland at the time of convictions, and the approach that an appellate court should take to the impact of these principles.

Latest News from 5KBW

5KBW are delighted to announce the following news:

New silk!

James Brown is to be appointed King's Counsel (KC). The Lord Chancellor will formally bestow the title of KC upon James at the Silks' appointment ceremony at Westminster Hall on 24th March 2025.

Sarah Forshaw KC and Mark Heywood KC, Joint Heads of Chambers at 5KBW, said:

"We could not be more delighted. James Brown is an advocate of exceptional calibre. Calm, highly effective, compelling, he stands out from the crowd. James brings the number of Silks in Chambers up to 10. At 5 King's Bench Walk (Crime Set of the Year), we pride ourselves on excellence; nothing less will do. That James has demonstrated that excellence, and been recognised for it, is such very good news."

***5KBW was awarded "Crime Set of the Year 2024"** at the Chambers UK Bar Awards, and **Louise Oakley won "Crime Junior of the Year 2024"** for her outstanding work over the last 12 months.*

5KBW have continued to be recognised as a Leading Set in the Chambers & Partners 2025 rankings, with 25 individual rankings across 2 practice categories: Crime and Financial Crime. The full list of 2025 rankings can be viewed here.

Welcome to Harry O'Sullivan and Jennifer Dannhauser

Jennifer Dannhauser was called to the Bar in 2010, she is an outstanding advocate who regularly prosecutes and defends in the most serious criminal cases including murder, rape, fraud and other serious violent, sexual and drugs offences.

Harry O'Sullivan was called to the Bar in 2016 and has a particular interest in sentencing law. Harry is the author of Banks on Sentence, the leading practitioner text on the subject and is the consultant editor of Halsbury's Laws of England latest sentencing and offender management volumes. Before coming to the Bar, Harry worked at the Law Commission of England and Wales on the project which produced the Sentencing Act 2020.

***Charlotte Hole has been appointed a Recorder**. Charlotte has spent her career to date specialising in Serious and Organised Crime and will continue in her practice in chambers.*

***Edmund Fowler has been appointed to be a Circuit Judge,** deployed him to the South East Circuit, based at Canterbury Combined Court Centre. We wish Edmund every success with his new judicial career.*

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.*

Articles

- **Horizon, the Post Office and free pardons:** Would the issuing of a free pardon under the Royal Prerogative of Mercy a potential remedy to the Horizon / post office scandal.
- **Renewed Applications for Leave to Appeal and Loss of Time Orders:** Analysis of the decision in Tamiz and Tamiz [2024] EWCA Crim 200, 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.** The first in a series of articles analysing the approach of the CACD to particular grounds of appeal, the legal framework, practical tips for preparing the ground, and identification of some of the potentially determinative factors in the outcome.
- **Potential Grounds of Appeal (2).** In this article Paul Taylor KC looks at grounds based on fresh evidence.
- **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 Andrew Malkinson's applications, and the need for a properly funded criminal justice system.
- **Attorney-General's references — are they always fatal?** Paul Taylor KC analyses the approach of the CACD to AG references and the factors that may affect the decision to intervene. [This article originally appeared in LCCSA The London Advocate, Autumn 2024.]

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.

Time for Change…The Law Commission Criminal Appeals Project

The Law Commission has been tasked with making recommendations for changes to the criminal appeal system. Paul Taylor KC discusses the project with **Professor Penney Lewis** (Law Commissioner for the Criminal Appeals Project), **Matt Foot** (co-director of APPEAL), and **Dr. Hannah Quirk** (Reader in Criminal Law at Kings College London, and editor of the Criminal Law Review.) Topics discussed include the safety test, the CCRC, substantial injustice, and compensation for miscarriages of justice.

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 (3):

JURY IRREGULARITIES

By Paul Taylor KC

This is the third in a series of articles analysing the approach of the CACD to particular grounds of appeal.

This article looks at grounds based on jury irregularities, 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 9.400 onwards.]

Areas giving rise to a potential ground of appeal

The safety of a conviction can be affected issues relating to:

(1) The initial selection of the jury
It is important to note that s.18 Juries Act 1974 prevents lack of qualification or unfitness on the part of an individual juror being a ground of appeal (other than on ground of personation) unless the irregularity is complained of but not remedied at trial.[1] However, a different approach is taken when the ground of appeal relates to the process by which the entire jury is selected. For example, the principle of random jury selection was found to have been breached and the trial declared a nullity when a judge ordered jurors to be "bused in" from another postal district. [2]

(2) Improper communications with the jury
Prohibited communications between the jury bailiff[3], clerk[4] or usher[5] *and the jury*, or between the jury and the Court[6] may provide a ground of appeal.

(3) Inappropriate knowledge of the defendant
The jury's knowledge of prejudicial material that they should not have been aware of may undermine the safety of a conviction. This can include inadmissible evidence.[7]
The CACD will consider how the matter was dealt with at trial, when it was raised, whether the judge's directions were sufficient, or whether the jury should have been discharged.

(4) Issues in retirement
This may include the time of retirement[8], unauthorised separation[9], dealing with jury

[1] *Chapman* (1976) 63 Cr App R 75. However, see the comment in *Taylor on Criminal Appeals* at para 9.400 that s.18 may violate article 6 ECHR. Cf. *Grant* [2017] EWCA Crim 414 where s.18 Juries Act was held not to apply when a juror at a retrial had also sat on the first trial.
[2] *Tarrant* [18.12.97]
[3] Eg. *Lamb* (1974) 59 Cr App R 196. Cf. *Ball* [2018] EWCA Crim 2896
[4] Eg. *Townsend* (1982) 72 Cr App R 218.
[5] Eg. *McCluskey* (1994) 98 Cr App R 216
[6] Eg. *Woods* (1988) 87 Cr App R 60
[7] Eg. *Kaul* [1998] Crim LR 135.
[8] See *Brown and Stratton v R* [2018] 4 WLR 84; *Smith (Joseph Henry) v R* [2018] NICA 10 (Northern Ireland Court of Appeal); see also the recent Privy Council case Shawn Campbell and others v The King (No 2) [2024] UKPC 6 (On appeal from the Court of Appeal of Jamaica).
[9] Eg. *Oliver* [1996] 2 Cr App R 514. See *Parker* [2023] EWCA Crim 753. (Although a trial judge had not followed the procedure set out in para.26M7 of the Criminal Practice Directions 2015 (Consolidated Version) [2022] when notified that a juror had used a mobile phone during a break in the jury's deliberations, there had been no impact on the trial

notes[10], giving of a *Watson*[11] direction and Majority directions.[12]

(5) Jury bias

Allegations of jury bias can result in a conviction being quashed.[13]

The test was re-affirmed by Lord Clarke in the Privy Council case of A-G of the Cayman Islands v Tibbetts[14]

> "[T]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the jury were biased: … The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious."

Investigation of the alleged irregularity

(1) By the trial judge[15]: Practice Direction 2015 PD 26M sets out the steps to be followed by a judge investigating an alleged irregularity. A challenge to a conviction may arise if the Judge refuses to investigate, does not provide appropriate directions or refuses to discharge the jury.

(2) By the CCRC and the Registrar: The Criminal Cases Review Commission is empowered to carry out inquiries into jury irregularities,[16] and the Registrar of Criminal Appeals can request the police to investigate matters.[17]

Evidence of the irregularity is limited to extraneous matters outside deliberations.[18]

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and no further investigation into the irregularity was necessary.)

[10] *Goodwin* [2024] EWCA Crim 1383: Conviction quashed where the judge had failed to deal correctly with jury notes. The lack of a response to the notes could have led at least one juror to have felt pressure to vote with the majority for an improper reason, namely to bring the jury's task to an end on that day; *Qasem* [2019 EWCA Crim 2245

[11] *Watson* (1988) 87 Cr App R 1; eg. *Morgan* (1997) Crim LR 593.

[12] See *Adams* [2007] 1 Cr App R 34

[13] See eg. *Hanif and Khan* [2014] EWCA Crim 1678 (police officer on jury who knew one of police officers giving evidence.); *Edgar and others* [2018] EWCA Crim 1857 (juror had relationship with family liaison officer.) cf. *Baybasin* [2013] EWCA Crim 2357; *Bermingham* [2020] EWCA Crim 1662.

[14] [2010] UKPC 8 [3]

[15] For a recent consideration of this issue by the Privy Council see Shawn Campbell and others v The King (No 2) [2024] UKPC 6 (On appeal from the Court of Appeal of Jamaica).

[16] S.21 CAA 1995 . See Cashman [2024] EWCA Crim 1543: the power to order investigations by the CCRC "has been used in a restricted number of cases, examples being McCluskey (1994) 98 Cr. App. R. 216, Baybasin [2013] EWCA Crim 2357 and Farah [2023] EWCA Crim 731. However, each turns upon its own facts…."[See also Winter [2024] EWCA Crim 1369]

[17] As happened in *Bermingham [2020] EWCA Crim 1662*

[18] See *Mirza* [2004] 1 AC 118.

CASE SUMMARIES AND COMMENT

CONVICTION APPEALS

Murder – leaving the partial defence of loss of control to the jury

Cheng [2024] EWCA Crim. 1400

By Mark Heywood KC

C, a woman aged 25, was convicted of the murder of a 39 year old man whom she knew well. She admitted having inflicted two deep stab wounds with a kitchen knife, whilst he was in her flat. One penetrated the right lung and had fatal effect. There were six other, more superficial, incised wounds. He collapsed and died in the street outside. CCTV showed that she and the deceased had entered her residential block together at 7pm. He left the flat at 8.51pm and shortly afterwards a previously fitted domestic violence alarm was activated at C's flat. When police arrived they forced entry. They found extensive bloodstaining and C, dressed only in a bra and with a small puncture wound to her right thigh, in distress. The large, bloodstained kitchen knife was in the hallway. At first, she said various things including that she had been stabbed by the deceased or by others she did not know. In interview she said that the deceased had become aggressive and stabbed her. There had been no sexual contact. She had pressed the panic button. He must have left and stabbed himself. [It was accepted at trial that these were lies.]

The trial: In evidence, C said that she had no memory of the stabbing and so no positive defence was advanced. She gave evidence that she had been drinking with the deceased and others and had left with her grandfather. She had no recollection of events from then (before 5.30pm) to the time she was arrested by the police at her flat.

There was a joint expert report by two psychiatrists who agreed that C met the diagnostic criteria for a personality disorder with emotionally unstable traits and that the diagnosis could also be conceptualised in the similar diagnosis of complex post-traumatic stress disorder.

The defence of self-defence and the partial defence of diminished responsibility were left to the jury. The judge concluded that there was insufficient evidence that C had inflicted the lethal wound as a result of her loss of self-control for the defence to be left to the jury.

The appeal: The single ground was that the judge was wrong to rule that the partial defence of loss of control should not be left to the jury in circumstances where arguably there was sufficient evidence of all three components of the test in section 54(1) Coroners and Justice Act 2009.

It was common ground that there had to be evidence of each of the three limbs of the statutory test in order for the defence to be left, namely that:

(1) C's acts in doing the killing resulted from her loss of self-control;
(2) The loss of self-control had a qualifying trigger; and
(3) A person of C's sex and age, with a normal degree of tolerance and self-restraint and in her circumstances, might have reacted in the same or in a similar way.

C relied on various features of the evidence as a circumstantial basis for a jury's potential conclusion that she in fact lost her self-control. These were:

(1) The recovery of a damaged black bra from the living room, the deceased's DNA (possibly from transfer) on the inside of the cup of the bra C was wearing and the presence of her DNA on penile swabs from the deceased, together with her complaint of vaginal

bleeding (she was not examined as to this);
(2) The number of wounds which, it was said, were indicative of a 'frenzied' attack;
(3) The presence of the incised injury to her leg;
(4) Damage and disturbance to the living room;
(5) C's previous good character and lack of violent behaviour;
(6) C's demeanour and highly aroused state on the arrival of the police;
(7) C's loss of memory; and
(8) C's evidence that if she had found the deceased having sex with her or he had attempted to do so, she would have 'flipped'.

C also contended that the judge effectively made findings of fact rather than reached a determination on whether the evidence reached a threshold.

The CACD referred to *Clinton* [2012] EWCA Crim. 2, [2012] 3 W.L.R. 515, *Gurpinar* [2015] EWCA Crim. 178, [2019] 1 Cr. App. R. 9, *Jewell* [2014] EWCA Crim 414 and *Goodwin* [2018] EWCA Crim. 2287, among other decisions, to indicate the following:

(1) It is for the trial judge to consider and weigh the evidence so as to determine whether there is a sufficient evidential basis on which to leave loss of control to the jury;
(2) What was required was a more rigorous assessment of the evidence;
(3) The process should be to consider the evidence on each of the three components sequentially and to exercise a judgement looking at all of the evidence; and
(4) The judge is not required necessarily to consider all three elements: if there is no evidence of a loss of control it will not be necessary to consider each of the other two elements.

The CACD considered in detail the evidence relied on and concluded that the trial judge was correct to determine that there was no sufficient evidence that C had lost her self-control, finding his ruling to be 'focussed, direct and responsive', describing C's as advancing 'an entirely speculative scenario'. The CACD also made reference to the difficulty, in some circumstances, for a defendant who seeks to rely on both self-defence and loss of control, additionally referring to *Martin (Jovan)* [2017] EWCA Crim. 1359 and *Islam* [2019] EWCA Crim. 2419.

Comment:

This case typifies the much hardened stance of the CACD to the test for leaving loss of control to the jury since the legislative change to partial defences to murder by Chapter 1, Part 2 of the Coroners and Justice Act 2009, demonstrated in *Clinton*, *Gurpinar* and particularly *Goodwin*. That said, the legal test on the first component under section 54 remains essentially as it was under the Homicide Act 1957. The task of the judge is to determine whether the 'evidential burden' has been discharged; in other words, all that the judge has to consider at first is whether there is evidence on which a reasonable jury properly directed could conclude that a loss of self-control had occurred. One difference is that it is no longer necessary for the loss of control to be 'sudden': see section 54(2). The CACD has recognised that the judge should proceed on the basis that the jury might take a different view of the evidence (see *Gurpinar* at [11]) but specifically drew attention in that case [6] to the distinction between the use of the words 'evidence' and 'sufficient evidence' in the two statutes. The judge must do so whether or not the issue has been raised.

What is required is a common sense judgment based on an analysis of all of the evidence, not rejecting disputed evidence which the jury might choose to believe (see *Clinton* at [46]). In the present case, as previously (see *Jewell* at [24] and *Gurpinar* at [18]-[21]), the CACD referred to a loss of control [26] as being whether the defendant has lost his/her ability to maintain his/her actions in accordance with considered judgement or whether he/she had lost his/her normal powers of reasoning. Practitioners seeking to rely on the defence would be well advised to identify and adduce all available evidence on each of the three components, preparing for the inevitable 'more rigorous' determination before a split summing up.

Doli incapax – failure to direct jury – historic sex offences

PRP [2024] EWCA Crim 1150

By Catherine Farrelly KC

The allegations were of historic sexual abuse involving four counts of indecent assault and three counts of rape.

The appellant was born in November 1976. The complainant was born in May 1980. The earliest counts on the indictment commenced on 30 April 1991, when the complainant was aged a day before her 11th birthday, and the appellant was aged 14 years and 5 months. The offences were alleged to have continued until around 1996, when she was 16 and she had started a relationship with a boyfriend.

The complainant's account about when the offending had started had differed at certain points. On one occasion, she stated that it had begun when she was around 13 years old and the defendant was 16. On another occasion, she said that it had started when she was at primary school. This evidence was relied on by the defence at trial to show that the complainant was not giving reliable evidence. The judge gave directions to the jury about the inconsistencies in the complainant's evidence, and their approach to the inconsistencies. The judge was not asked, and did not give, a direction on the use of the evidence about any incidents that had taken place before the timeframe of the indictment, or any direction about the appellant's capacity to commit crimes.

The appeal: The appellant submitted that a direction on doli incapax should have been given, or that directions should have been given, in accordance with the approach in *R v M* [2016] EWCA Crim 674. The prosecution submitted that no such direction should have been given, as doli incapax did not apply as none of the charges faced by the appellant related to anything that pre-dated his 14th birthday.

The Law: "Doli incapax" (incapable of evil) was the rebuttable presumption under common law that a child of not less than 10 years but under 14 years of age was incapable of committing a criminal offence. The presumption was rebutted only if the prosecution proved to the criminal standard, not only that the child caused the actus reus with the appropriate mens rea, but also that the child knew that the particular act was "seriously wrong" and not merely naughty or mischievous. The common law presumption for children of not less than 10 years was abolished on 30 September 1998 by the Crime and Disorder Act 1998.

In R v M [2016] EWCA Crim 674; [2016] 4 WLR 146 the Court, when addressing bad character evidence adduced of the defendant's sexual offending against his half-sister when aged between 10 and 14 years, confirmed that there was no need to address the issue of doli incapax. That approach was followed in R v AYS [2023] EWCA Crim 730; [2024] 1 Cr App R 3 at

paragraph 25 where the court held that doli incapax had no direct application. What was required was a direction to the jury that they must be sure that the earlier incidents occurred and, if they were, how the incidents might help them decide whether the defendant had committed the indicted offences.

The CACD Judgment: The Court concluded that the failure to follow the approach in R v AYS did not make the appellant's conviction unsafe.

The most important feature about the dates when the appellant had started to put his hand under the complainant's bed covers and touched her vagina were that they were inconsistent with the dates given in other accounts given by the complainant. It was therefore important that the judge give a full and fair direction about those inconsistencies and the judge did so. The real question for the jury was whether, notwithstanding these inconsistencies and the appellant's evidence denying any wrongdoing, they were sure that the complainant's evidence about the sexual assaults and rapes was reliable.

Comment:

This case underlines the importance of analysing the issues in the case when considering whether the doli incapax principle applies. Here, the prosecution case was that the allegations had taken place when the appellant was over 14 and so doli incapax would not apply. As the CACD identified, the evidence in relation to some of the criminality taking place earlier related to the issue of the complainant's credibility and reliability and, in respect of that issue, the judge had properly directed the jury.

Addressing outbursts by a defendant during the trial

Badelita [2024] EWCA Crim 1427

By Frederick Hookway

The trial: B was convicted after trial of six offences: common assault (count 1), threats to kill (counts 3,4,5 & 6), and criminal damage (count 7). Over the course of two days B had committed these offences against his wife, daughter, step-daughter and another female. During the evidence in chief of his wife, B interjected with a violent outburst. He threatened to kill the witness, slammed his head into the dock, and screamed. He had to be physically restrained and then removed from the courtroom. The judge rejected an application to discharge the jury and ruled the trial should proceed in the absence of B.

The appeal: Leave to appeal was granted for grounds related to the judge's treatment of this outburst.

(1) It was argued the judge should have explored other options to ensure B's participation.

(2) It was argued unfairness was generated by the conflicting directions given to the jury about how to treat this incident. Initially, the judge directed them it was irrelevant. Then, during his summing up, the judge directed them this was admissible bad character evidence capable of supporting the prosecution case.

The CACD rejected both grounds.

In addressing (1), the CACD decided it was appropriate B be excluded from the courtroom. There was no evidence he was unfit to plead, or otherwise unable to control his behaviour. It followed there was nothing to undermine the assumed agency of his behaviour, and the witnesses were

entitled to perform their role unhindered by his aggression. The main source of prejudice which gave the CACD pause for thought was the subsequent inability of B to give instructions to his counsel during cross-examination. But counsel could not specify how which this concern had manifested in compromised cross-examination.

In respect of whether further consideration should have been given of ways to ensure participation, Edis LJ offered the following pragmatism [at 48]:

> *"A balance had to be struck between ensuring that the appellant's trial was fair and that it proceeded without further incidents of this kind*."

The CACD considered the only potential was a video-link from elsewhere in the building, or another location. But even this was considered a remote prospect, and not one that could have been easily achieved.

The CACD approved of the Judge's direction to the jury regarding the absence of B to the effect it should not be held against him.

In addressing (2), the CACD considered the Judge was correct to have continued with the trial after this outburst. B's mental health had been explored earlier in the proceedings. Further, the CACD considered that medical evidence linking the outburst to a medical condition would not assist when that same condition provided no defence in law, or could otherwise raise the issue of fitness to plead (which had already been explored).

The CACD determined the judge's initial direction that the outburst was immaterial was, "*unrealistic*" [at 54]. It was not an outburst or reaction remote from the allegation; it was effectively repetition of exactly what the witnesses had described.

The judge's *volte face* was justified on the basis of B providing an explanation for the outburst during his testimony, and thereby bringing the issue into evidence. The CACD noted the defence had not been given warning of this risk prior to calling their client. Further, the CACD observed the jury should have been directed not to be swayed by any emotional reaction to the outburst they observed, and that culpability for this behaviour might be reduced by connection with a medical condition. But otherwise, the CACD determined the bad character direction was correct, and that treatment of this issue was, "*satisfactory in the result*" [at p61].

Of the other grounds dismissed, the CACD dwelt briefly on complaint about discharge of a juror after they reported being unwell. They were not afforded any time for recovery but instead summarily discharged. The CACD approved of this decision in principle. But the judge couched his ruling on this point by reference to competing judicial commitments the following week. As a restatement of principle, Edis LJ said; [at 40]

> "*It is inconceivable that a decision which was not in the interests of justice could become appropriate because of other commitments of the judge*."

<u>Comment:</u>

The case provides a salutary reminder that a defendant's behaviour in court can be deemed relevant. The CACD will not be sympathetic to appeals that claim a defendant should be rescued from problems of their own making.

Failing to surrender to bail – allegation of judicial bias

Serdoud [2024] EWCA Crim 1398

By Sam Willis

Having been convicted of failing to surrender to bail, S was sentenced to 2

months' imprisonment. He appealed against conviction and sentence.

The Bail Act offence arose from S's failure to appear at a sentencing hearing in January 2024. He had been convicted by a jury of offences under the Bribery Act 2010, having given evidence in his own defence. He was sentenced in his absence and a warrant was issued. S surrendered to the warrant in April 2024 and pleaded not guilty to the Bail Act offence.

S gave evidence during the summary procedure before the same judge that had presided over the trial of the substantive offences. The judge disbelieved his account and found that he had deliberately left the jurisdiction to avoid the sentencing hearing. S was convicted of the Bail Act offence and was sentenced for it.

The appeal: This was brought primarily on the basis of judicial bias. It was argued that the judge had already formed a view that S was dishonest based on his evidence during the substantive trial, and had also made comments and interventions during the Bail Act offence trial such that there was the appearance of bias. The judge should have recused himself.

The CACD refused the appeal. It found that the judge had made numerous interventions during S's evidence and had asked him challenging questions - but that had been acceptable given that the judge was the tribunal of fact. The judge's finding that S had been "thoroughly dishonest" when he gave evidence at the trial of the substantive offences was sufficiently tempered by the judge's direction to himself during the summary procedure that he should not assume S was still being dishonest. Given the Court's acceptance of the judge's factual findings, there were no grounds to change the sentence imposed.

Comment:

The CACD's decision in this case emphasises the difficulties facing practitioners appealing on the grounds of judicial bias. The Court found that the judge's comments, questions and interventions had not "overstepped the mark", but gave little guidance on where that mark was in this case or why it had not been crossed.

Practitioners may wish to consider two factors that *did* form part of the CACD's reasoning.

(1) An application for the judge to recuse himself had not been made at the start of or during the Bail Act trial. The Court found that this was "significant", presumably finding that an application would have been made at the time if the judge's interventions and comments had been sufficient. Practitioners dealing with Bail Act trials should be alive to this point and the need to act swiftly if bias is to form part of any subsequent appeal.

(2) The CACD essentially distinguished between judges intervening and questioning during the summary procedure from those that might be said to descend into the arena during a trial with a jury. In a Bail Act offence trial the judge is required to make findings of fact and so appears to have more leeway to intervene and question a defendant in order to understand their position. In addition, the judge is able to direct themselves and to put matters out of his or her mind that might otherwise be prejudicial. Practitioners considering appeals against convictions following the summary procedure will need to consider these distinctions.

Child grooming – Application to exclude evidence related to guilty pleas entered before/during trial – discharge of jury – McCook inquiries of trial counsel

Bancroft [2024] EWCA Crim 1393

By Charlotte Newell KC

B sought leave to appeal his convictions for 2 multiple incident counts of oral and 2 multiple incident counts of vaginal rape in respect of an 18 year old girl [C1] and 1 count of meeting a child following sexual grooming in respect of a second victim aged 15 [C2].

Before and during the trial he had pleaded guilty to multiple counts on the same indictment of sexual offending against several victims aged between 15-17 years. Material in respect of exchanges and meetings reflecting all of the offending was before the Jury throughout in the form of a "timeline".

Background: Over a period of many months JB, a man in his 60's had sought sexual contact with young, vulnerable and sexually inexperienced females via a website used by children whilst posing as significantly younger and offering "sugar daddy" arrangements. The communications included lewd content and dogged pursuit of meetings for sexual contact. On receipt of a positive response, he would move the contact offline seeking to further probe the girl's vulnerability to exploitation. Through this method he met a number of girls under the age of 18 for sexual activity and gave them a relatively small sum of money in return. It was apparent from his activities and messaging recovered from his phone that JB had a predilection for BDSM and saw himself in a dominator role looking for submissive sexual partners. The sexual interaction with these inexperienced girls frequently featured elements of sexual domination including a physical assault on one young victim, the procuring and taking of indecent images and involvement of third parties in the sexual activity including his own brother.

Pre-trial: Before trial JB pleaded guilty to assault occasioning ABH on one of the children he had met for sex and 14 counts relating to the indecent images of children who he had sought sex-for payment arrangements with. These pleas were the subject of an uncontested bad character application. Application was also made pre trial for all of the counts to be cross admissible on one another.

The trial: The remaining 23 counts against JB and 2 counts of sexual exploitation of the 2 of the same victims against his brother GM were prepared for trial. Much of the prosecution case was reduced to a bundle of material comprising a timeline of JB and GMs exchanges with each other and with girls and of their meetings.

On 2nd / 3rd November the case was opened to the Jury with detailed reference to the timeline. That document was then adduced into evidence through the officer in the case. On 5th November JB pleaded guilty to 5 counts of paying for the sexual services of a child, 9 counts of inciting or attempting to incite the sexual exploitation of a child and 1 count of attempted sexual contact with a child.

The trial continued in respect of C1 and C2. C1 was 18 at the time of her contact with JB. That communication had also taken place initially online and under a pseudonym and had involved the offering of a "sugar daddy" arrangement to this naïve, vulnerable and sexually inexperienced girl. It was the Crown's case that she had been groomed and exploited and coerced into oral and vaginal sex without free and informed consent. The defence case was that this was a genuine and consensual relationship in which he cared for C1 and which was of a wholly

different nature than his concurrent activities with others.

C2 had been groomed online into meeting JB when she was just 15 years old. JB claimed ignorance as to her age and asserted that it was he who had ceased contact having met and realized that she was so young.

On 10th November defence for JB informed the Crown that they objected to those parts of the timeline not directly related to the live counts remaining before the Jury.

On 12th November the co-defendant pleaded guilty to the indictment as it related to him and JB applied to exclude large swathes of the timeline arguing that it had become irrelevant and inadmissible. The application was resisted and refused on the basis that the material was admissible propensity evidence relevant to the issues of consent and knowledge or belief of the age of C2.

In due course the judge directed the jury that the material was capable of assisting them on the issue of grooming.

The appeal: The following grounds of appeal were settled by trial counsel;

(1) The Judge should have excluded material in the timeline relating to those in respect of whom he had pleaded guilty and

(2) The Judge failed in summing up to adequately identify facts relevant to issues in the case.

The application was refused by the Single Judge. Further grounds were lodged by new counsel repeating the original grounds and adding further;

(3) Trial counsel should have applied to discharge the Jury following guilty pleas; and

(4) Trial Judge failed to give adequate directions on the relevance of the messaging and meeting with others as illustrated in the timeline.

He further sought to appeal his extended determinate sentence which was a total of 25 years comprising 22 years and an extended determinate sentence of 3 years.

The appeal was refused;

Leave to amend to add ground (3) out of time was refused. The note provided by former counsel pursuant to the *McCook* procedure was clear that no application was made to discharge the Jury on fully informed instructions

The convictions and underlying material were relevant to the issue of JB's sexual interest in young women, desire to act upon that interest and capable of demonstrating the exploitative nature of his conduct as relevant to the issue of consent.

Legal directions were clear and sufficient, identifying the potential relevance of the material and providing all the necessary safeguards as to the limited use that could be made of it and guarding against over-reliance

Appeal against sentence failed: overall totality of sentence reflected relentless and prolific offending against multiple victims.

Comment:

The facts of the case in respect of C1 are a useful illustration of the development of an understanding and deployment of grooming as vitiating consent. This was a fundamental feature of the evidence and to view JB's activities in respect of C1 without proof of the "template" he deployed would have presented a mis-leading impression.

A reminder that where new counsel settle fresh grounds they must approach previously instructed counsel to ensure that grounds are accurate. This is not limited to circumstances in which the conduct of former representatives is being criticized. The requirements known as the *McCook* procedure are set out in *Taylor on Criminal Appeals* at para 6.94 – 6.100

Charlotte Newell KC represented the Crown.

Unfair trial - Judicial interventions – review of authorities and principles - impact on fairness of the trial

Leon Shortt [2024] EWCA Crim 1041

By Paul Taylor KC

S was convicted of various drugs offences. On appeal he argued that the trial was unfair as a result of interventions, comments and inappropriate behaviour by the Judge.

The initial submissions were based on the transcript of the trial, with certain passages identified and amplified by reference to counsels' recollections of what occurred. Following argument, the CACD listened to the audio recordings of the trial. The Court stated that "the audio recordings have proved to be extremely valuable, enabling the Court to assess the tone of the various exchanges complained of, alongside the content which was already evident from the transcripts."

There were three grounds of appeal:

(1) The Judge undermined the appellant's account and credibility in his summing up;

(2) The Judge undermined the defence in front of the jury; and

(3) The Judge was highly antagonistic and unprofessional towards defence counsel, which unfairly undermined defence counsel's ability and focus to represent the appellant in a fair and unobstructive way.

The Crown resisted the appeal.

The CACD set out the key principles in the authorities on unfairness in the context of trial management and allegations of judicial misbehaviour:

(1) There is a wider principle at play in cases where unfairness is alleged than the safety, in terms of the correctness, of the conviction. There comes a point when, however obviously guilty an accused person may appear to be, the appeal court reviewing the conviction cannot escape the conclusion that he has not been fairly tried. If the departure from good practice has been so gross, persistent, prejudicial or irremediable that an appellate court condemns a trial as unfair, the conviction will be quashed as unsafe, however strong the grounds for believing the defendant to be guilty;

(2) By no means all departures from good practice render a trial unfair. Ultimately, the question is one of degree; rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process;

(3) Allegations of unfairness are to be assessed objectively by the appeal court; that requires punctilious analysis of the evidence, given that the trial judge's view has not been heard in answer to those allegations.

(4) A judge's role is to hold the ring fairly between prosecution and defence and this cannot be done properly if a judge enters into the arena by appearing to take one side or the other during questioning of witnesses;

(5) That said, it is not only permissible for a judge, it is their duty to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if that is unclear.

In *Re AZ* [2022] EWCA Civ 911, [2022] 4 WLR 78 at [122]-[127], a family case, it was stated that:

(1) Judicial bullying is wholly unacceptable. It brings the litigation process into disrepute and affects

public confidence in the administration of justice.

(2) Trials are a very intense environment. Judges and counsel may in the pressure of the moment express themselves in ways which they did not really intend or say things which they would not have said if they had time for reflection.

(3) Where a judge concludes that counsel's conduct requires explicit correction or admonishment, that rebuke should be proportionate and delivered in measured terms, without showing personal resentment or anger.

Allegations of apparent bias are assessed objectively, applying the test of whether the fair-minded and informed observer would find there was a real possibility of bias (see *Porter v Magill* [2002] AC 357 at [102]).

The Statement of Expected Behaviour recognises the responsibility on judges to treat others fairly and respectfully, not to abuse their authority, to remain patient and tolerant, avoid shouting or snapping…

The appellant raised about 16 complaints. The CACD found the majority of those to lack substance. However:

a. The Court accepted that the Judge was unwise to interrupt defence counsel's cross examination of the drug expert in the way that he did; and on one occasion we think he improperly descended into the ring in doing so, even if those interventions did not in our judgment cross the line into unfairness or apparent bias.

b. The Court identified two occasions where the Judge lost his temper with defence counsel for reasons and in a way which cannot be justified.

The Court focused on whether the Judge's conduct, considered overall, led to the trial being unfair.

> [67] "We have no real concern that the jury might have been unduly influenced in its deliberations, or that the Judge might have demonstrated (or might have been perceived to demonstrate) bias against the appellant."
>
> [68] We have also considered the appeal from the appellant's perspective. The appellant was in Court when the Judge descended into the ring that one time. He was also present when the Judge lost his temper with … counsel on the morning of the second day of trial. The latter has potential potency because it was shortly before the appellant was due to give evidence. …The appellant then gave evidence in a coherent manner; he set out his case in much the way that it had been foreshadowed in his defence case statement. These two incidents are regrettable, but set in the wider context of the trial as a whole, they are insufficient to demonstrate unfairness or bias, judged objectively from the perspective of the appellant.
>
> The question for us is whether the cumulative effect of the Judge's behaviour, to the extent we have found that behaviour to be inappropriate, rendered this trial unfair. Fairness is not an absolute concept; there are many things in life and in the law which could be done better but which do not make the process intrinsically unfair. Standing back, we have concluded that our concerns about the way this trial was managed do not come close to the point where the trial as

> a whole might be considered unfair. The incidents which have troubled us are few; they came and went quickly, in the context of a short trial where there was no time or space for resentments to build up; they were dealt with effectively by counsel who did not appear to be knocked off course; the most concerning incident occurred at a late point in the trial which made no difference to the way the defence was conducted; and there were much longer and larger parts of the trial which do not give rise to any legitimate grounds for complaint.

Abuse of process – prejudicial publicity – potential impact on retrial

Letby [2024] EWCA Crim 1278

By Danny Robinson KC

L worked as a nurse at the neonatal unit of the Countess of Chester Hospital. She was tried for the murder of seven babies and the attempted murder of fifteen more, and in August 2023 the jury convicted her of seven murders and seven attempted murders. They acquitted her of two counts of attempted murder, and they could not agree verdicts in relation to six other attempted murders. L received life imprisonment with a whole life order on each count.

The convictions were the subject of extensive press reports, including interviews the media conducted with police officers and witnesses associated with the case.

The retrial: In September 2023[19], the prosecution informed the court that they intended to have one attempted murder charge retried. The trial judge, Goss J, imposed a reporting restriction under s.4(2) Contempt of Court Act 1981 preventing reporting of any matter which would create a substantial risk of prejudice in relation to the retrial, which started on 10 June 2024.

Goss J presided over the retrial. At the start of the trial the defence applied for the indictment to be stayed on the grounds that to try the case would be an abuse of the process of the court. The application was put forward on both limbs one and two of the abuse of process doctrine: that it would be unfair to try the defendant (limb 1), and that she could not have a fair trial (limb 2). The basis of the application was that media reporting of the convictions had been so extensive as to engage both limbs.

The application was refused, and the trial proceeded. The convictions from the first trial were admitted into evidence at the retrial, and L was convicted. She received a sentence of life imprisonment with a whole life order.

The appeal: The sole ground of appeal was that the trial judge was wrong to refuse the application to stay the indictment.

(1) *Limb 1 Abuse:* L argued that the media coverage of her convictions was so great and so sustained that no jury would be able to give the issues in the retrial fair consideration. The extent of the coverage and the notoriety of the case were such that there could be no prospect of any juror's memory of the coverage having faded, and no direction given by the trial judge could remedy the position.

[19] Please note there is an error in paragraph 2 of the report, which should read "25 September 2023", not "25 September 2024"

(2) *Limb 2:* The second type of abuse arises when it would offend the integrity of the criminal justice system for a trial to proceed. Police or prosecutorial misconduct is required. Where Limb 2 abuse is alleged, any prejudice to a defendant must be balanced against the public interest in trying serious criminal offences. L submitted that following the convictions in August 2023 and before the making of the reporting restriction on 25 September 2023, police officers and representatives of the Crown Prosecution Service engaged in sustained hostile commentary about L's offending, such that it amounted to misconduct.

The CACD was at pains to make clear it was not concerned in any way with L's convictions from the first trial, which have been the subject of much discussion. It was concerned solely with the application before it, which arose from her conviction for attempted murder at the retrial.

As the application concerned the exercise of Goss J's judgment (as opposed to an exercise of his discretion), the Court proceeded on the basis that the application would succeed if the judge was wrong to conclude that there was no abuse. It afforded considerable weight to the fact that Goss J was the judge at the first trial, and that his experience as a criminal judge was "unrivalled".

The case was extraordinary, and the offending was horrific. The facts of the case would have attracted extensive media comment without police officers, CPS representatives, and an expert witness who gave evidence at both trials, giving interviews. In any event, those interviews did not misstate the facts of the case.

The CACD took the view that the memories of any jurors who read or saw the various media reports would have faded by the time the retrial took place, bearing in mind the imposition of reporting restrictions in September 2023, some nine months before the trial. Furthermore, the fact that the convictions from the first trial were admitted as evidence in the retrial militated against the application to stay the indictment: if the jury had known nothing of the previous trial, then the ensuing publicity might have been significant. But where, as here, the jury knew that L had been convicted of the murders of seven babies and the attempted murders of seven more, any publicity was of lesser effect than it might otherwise have been.

As to Limb 2, it was unrealistic to expect police officers not to comment on offences such as this. Given the nature of the offending, such comments from them were bound to be hostile. That did not amount to misconduct.

Comment:

It is no surprise that the court refused the application. Cases where publicity about the case is such as to give rise to successful application to stay the indictment are vanishingly rare.

[For a recent analysis of the CACD's approach to abuse of process see the appeals arising from the Post Office Horizon appeals (Horizon and others v POL [2021] EWCA 21]; and *Taylor on Criminal Appeals*, paras 9.79 onwards.

For examples of successful appeals based on prejudicial publicity see *McCann* (1991) 92 Cr App R 239; *Taylor and Taylor (1994) 98 Cr App R 361.* For a detailed analysis of the CACD's approach to this ground see *Taylor on Criminal Appeals,* para 9.441 onwards*].*

CCRC reference – post trial events undermining complainant's credibility – non-disclosure – arguing additional grounds not part of the CCRC reference

ABY [2024] EWCA Crim 944

By Paul Taylor KC

Whilst this judgment is largely fact specific, it provides a detailed example of the CACD's approach to (i) fresh evidence said to undermine a complaint's credibility; (ii) additional disclosure of matters at the appellate stage; (iii) seeking to argue additional grounds not referred by the CCRC.

ABY was convicted in May 2013 of nine specimen counts relating to sexual offences against a child under 13 and three specimen counts of cruelty to a person under 16. He was sentenced to a total of 18 years imprisonment.

His first appeal against conviction was dismissed in 2014. The CACD identified, as had the trial judge, that "… the fundamental thrust of the entire trial and, in particular, in the context of all the evidence, [was] the view the jury took of X…."

The CCRC referred the convictions back to the CACD on the basis of two matters which came to light after the trial and appeal:

(1) Allegations made in 2015 by the complainant ("X") against P, who had been a prosecution witness, although not called to give evidence in the case against the appellant. P had been tried and acquitted of the allegations made by X.

(2) An allegation made in 2016 by X in 2016 against an unidentified person said to have committed a series of violent sexual acts upon her.

The CCRC noted that the jury returned their guilty verdicts following an extended opportunity to assess X's evidence and that of the appellant, "in the carefully controlled framework of a Crown Court trial. It would take something new of clear significance to displace the verdicts produced by the process." In the CCRC's view, however, X's credibility is substantially undermined by the new material. "Given the centrality of her evidence to the prosecution case, the CCRC has concluded that there is a real possibility that the Court of Appeal will find that this is a difficult case, in which the jury's decision to convict might reasonably have been affected by the new material.

The CCRC reasons for referral included the following:

[48.] "…the fact that P was acquitted of all counts does not necessarily signify that the jury disbelieved X' allegations against him. The jury may simply have concluded that they could not be sure of P's guilt.

[49.] Nevertheless, it appears to the CCRC that the defence at P's trial were able to establish that certain elements of X's account were contradicted by the records and / or were explicitly rejected by P's colleagues.

[50.] It appears to the CCRC that it is arguable that these matters afford a "proper evidential basis" for asserting that X's complaint against P was untrue.

Further disclosure: Subsequent to the referral decision, and recently, the prosecution made further disclosure in accordance with the Attorney General's Guideline on Disclosure (2024) @ [140]. In brief, Police Force logs record that in May 2018 X using another name had entered a medical centre clearly distressed and asking for help. She said she had been trafficked into England at the age of 7 by a sex trafficking ring and had been sexually exploited and physically abused….[she] had reported that they had been subject to repeat abuse by a complex network of individuals, over many years and was fearful

of returning to the situation from which they had just escaped. Allegations were made of "very graphic sexual experiences and having been taken to various national and international locations for that purpose….
The disclosure note records: "The Respondent accepts that aspects of the allegation made … in May 2018 are factually incorrect. The victim was, at that time… suffering serious mental ill-health."
The appeal: Ground 1: It was submitted that the complainant's credibility, on which the prosecution depended, is substantially undermined by material that has emerged since the appellant's trial. Ground 1B: This related to the impact of the later disclosure. It was submitted that if the existence of X's allegations had been known before and during trial there would have been (a) a different approach taken by treating clinicians to X's allegations against the appellant; (b) the psychiatric evidence given at trial would have been different; (c) her approach to cross examination of X would have been different; (d) she would have required P to give evidence, and (e) the jury may have taken a different view of X's credibility, since it was implausible that she would disclose physical abuse by the appellant to a man who was himself abusing her.
The CACD considered the approach it should take when leave is sought to argue additional grounds to those referred by the CCRC. It stated that "in principle and in exceptional circumstances, this Court may give leave in respect of additional grounds to those referred by the CCRC even if the same argument has already been presented on appeal. See *R v Knights (Secretary of State for Justice Intervening)* [2017] EWCA Crim 1052 @ [33]. However, this Court will require to be satisfied that there is cogent evidence, or else cogent argument not previously properly developed…"
The CACD dismissed the appeal.

Inconsistent evidence - certain counts withdrawn from the jury and trial continuing - jury directions regarding the evidence of withdrawn counts - late disclosure

BHB [2024] EWCA Crim 834

By Fiona Ryan
The investigation: In 2021, aged 12, C alleged that BHB had orally raped and otherwise sexually abused her when she was 7 or 8 and he was about 15.
In a 'pre-assessment' interview in March 2021, C referred to sexual abuse taking place both in London (where BHB was from) and Hertfordshire (where C lived). There followed a formal video-recorded interview (VRI) in which C said that all of the abuse had taken place in Hertfordshire. A key event was that, after C's brother was discharged from a period in hospital, BHB had moved from a previous home in London to a flat in Hertfordshire. On a few occasions C visited the Hertfordshire flat, and she alleged that the sexual abuse had occurred during those visits. BHB denied any sexual abuse.
C was cross-examined under the s.28 procedure.
The trial: C's VRI and then s.28 recording were played to the jury. After that point the notes of the pre-assessment interview were disclosed for the first time. The fact that C had initially alleged that the abuse underlying counts 1 and 2 took place in London was thereby revealed, and was put into an agreed fact.
By the end of the prosecution case it was clear that the way C had referenced the dates of some counts (by her brother's stay

in hospital) and location (the flat in Hertfordshire) were inconsistent.

The defence application to discharge the jury was refused. However the judge acceded to a submission of no case to answer on Counts 1 and 2, which could not have taken place in Hertfordshire, and Count 7, of which no evidence had been adduced. The application regarding counts 5 and 6 was refused.

The jury were directed that they could consider what had been said on counts 1 and 2 in assessing C's credibility. The defence asked the jury to consider that, because C gave an account which cannot be true in relation to what was described as the first incident, they cannot rely on her evidence of other allegations. The jury were warned against considering the evidence of counts 1 and 2 as supporting evidence.

BHB was convicted of the four remaining counts.

The appeal: BHB appealed on the bases that:

(1) The judge had erred in refusing to discharge the jury.
(2) The judge should have allowed submissions of no case to answer on counts 3-6
(3) The judge was wrong to exclude evidence from S, that there was no occasion on which C stayed in the London flat during her brother's time in hospital
(4) The judge was wrong not to direct the jury that there was no evidence that counts 1 and 2 occurred at the London flat and any consideration of that possibility would be improper. These grounds, cumulatively, give rise to a very substantial risk that the jury speculated upon counts 1 and 2 having occurred in London
(5) The late disclosure of the pre-assessment notes of C render the conviction unsafe; the defence not being able to put all points to C in cross-examination nor challenge the admissibility of the VRI.

The CACD dismissed the appeal:

(1) Failure to discharge the jury: The discretion to discharge the whole jury must be used sparingly. The importance of continuing with criminal trials is even more acute when resources are under pressure. The judge achieved fairness by disposing of counts that could not be supported on the way the prosecution had opened the case. The factual inconsistency did not affect the remaining counts.

(2) Rejection of submission of no case: An inability to match dates and places accurately does not mean that, in this case, C's evidence became of such a character that the case could not proceed on the other counts. There was some supporting evidence which had been called, re early complaint and demeanour. The trial judge had seen the witnesses, and it cannot be said that he was wrong to have concluded there was sufficient evidence to permit the case to continue.

(3) Exclusion of S's evidence: S's evidence on this point had no potential relevance to the issues.

(4) Errors in directions regarding approach to counts 1 and 2: Defence counsel had made suggestions on the directions which should be given. Parties agreed that the jury should not be told to ignore *all* evidence in relation to counts 1 and 2, given defence wished to rely on the inconsistencies. This led to the specifically crafted direction which mirrored what defence had requested.

(5) *Failure to disclose:* The notes of the pre-assessment were clearly disclosable and there was no sensible explanation of why this did not occur earlier. However, whether non-disclosure is something that goes to the safety of a conviction must be assessed on a case-by-case basis. Crown counsel relied on the fact that, when the non-disclosure was remedied, C could have been re-called. The inconsistency was instead put in Agreed Facts. The Court did not consider that the VRI would have been excluded. The remedy for the inconsistency not being put in the s.28 was the opportunity to cross-examine her a second time, which was offered and declined. It was possibly more favourable to the appellant for the inconsistency to have been put before the jury the way that it was, and these points did not prevent him from presenting his case in its best light.

Comment:
See R v Gohil [2018] EWCA Crim 140, and *R v Akle and another* [2021] EWCA Crim 1879, regarding how to approach late disclosure. In *Akle* the appeal was allowed because the appellant 'was prevented from presenting his case in its best light'.

Ill-treatment of a person in care – s.20 CJ&CA 2015- *Jury Directions – Submission of No Case to Answer*

Banner & Bennett [2024] EWCA Crim 1201

By Ria Banerjee

PB and MB were both in senior healthcare roles at a hospital which provides specialist care to adult patients with learning disabilities and significant additional psychological and behavioural needs. Both were convicted of various counts of ill-treatment of a person in care, contrary to section 20 Criminal Justice and Courts Act 2015.

The trial: The Prosecution case was that the care the appellants provided to two female residents (AD and LH) "at times" amounted to ill treatment.

At the outset of the trial and with the agreement of the parties, the Judge gave written directions of law to the jury. In relation to the offence of ill-treatment, the Judge said that the prosecution needed to make the jury sure of two things. First, that the defendant engaged in deliberate conduct which can properly be described as ill- treatment. Secondly, either the defendant knew that they were inexcusably ill-treating the resident or were reckless as to whether they were inexcusably acting in that way. The Judge also made it clear that the prosecution did not have to prove that any suffering or injury to health was caused.

The conduct of each appellant included:

PB:

(1) "twanging" a balloon in AD's room while AD was distressed;
(2) talking about balloons to AD after she had expressed that she did not like them;
(3) Speaking French to LH when LH was using sign language;
(4) bouncing suddenly towards LH when she came out of her room.

MB:

(5) repeatedly asking AD if she liked balloons;
(6) while AD was distressed, threatening to have male carers supervise her (she had expressed a preference for female carers);
(7) entering AD's room despite her saying "No", asking her about

balloons and dancing to the words AD was repeating.

At the close of the prosecution case, submissions of no case to answer were made on behalf of both appellants on the basis that ill-treatment was not made out and there were innocent explanations for the appellants' conduct in relation to each count.

The Judge ruled that the counts would be left to the jury. He outlined the ingredients of the offence and said that it was common ground that the term "ill-treatment" should be given its ordinary meaning. The behaviour alleged should not be viewed in isolation but in the wider context of the case.

During summing up, the Judge reminded the jury of the written directions of law and gave the jury a written route to verdict which reflected those directions.

The appeal: The grounds in substance, amounted to the following:

(1) The Judge failed to give an adequate definition of the term "ill-treatment". For example, the Judge made no reference to adjectives such as "cruel" or "abusive", although those had featured in the Crown's opening to the jury. The various dictionary meanings of the term "ill-treatment" were so broad that, without further assistance, the jury may have applied a meaning which was so broad that it would unacceptably cover conduct which ought not to be regarded as criminal.

(2) However wide the definition of ill-treatment may be, there was insufficient evidence before the jury upon which they could reasonably convict and therefore the case should have been stopped at half time on the relevant counts.

The CACD dismissed the appeals.

(1) Ground 1 was rejected on the basis that there was no requirement for the Judge to have defined the term "ill-treatment" beyond what he had said in his directions of law. The term was an ordinary one of the English language and should not be given any judicial gloss. It was clear that the Judge had carefully drafted his direction of law by reference to the decision of this Court in *R v Newington* (1990) 91 Cr App R 247. What counsel say in speeches do not constitute either evidence or directions of law to the jury. Directions of law come from the judge and by agreement, were given to the jury at the outset of the trial. The defence did not suggest at that stage that any further definition of "ill-treatment" needed to be given to the jury. There was no reason why the Judge should have done so.

(2) In relation to Ground 2, the CACD held that the issues raised were classically ones for the tribunal of fact (the jury) to decide after hearing all the evidence. The trial Judge could not be criticised for leaving these issues to the jury in accordance with *R v Galbraith* [1981] 1 WLR 1039.

Comment:

This case reiterates the general principle that terms which carry ordinary meaning in the English language should not be expanded upon through dictionary definitions or judicial gloss. In other words, Judges should not attempt to go beyond the wording used by Parliament.

Parliament had used the term "ill-treatment" in a number of offences of this

type. It can be assumed that when Parliament came to enact the Criminal Justice and Courts Act 2015, it was content to legislate on the basis of the interpretation that had been given in *Newington* to the materially identical provision in section 127 of the Mental Health Act 1983. The trial Judge based his directions on the decision in *Newington* and the CACD regarded the Judge's handling of this case as exemplary.

Evidence — Admissibility — Murder — Assisting offender as Prosecution witness — Immunity — Incorrect procedure — Whether conviction unsafe

Hutchinson [2024] EWCA Crim 997 ; [2025] 1 Cr. App. R. 2

By William Davis

H was convicted of murder.

H, and another man, P, had arranged to meet the victim, who was a drug dealer. When the victim started to drive away, H shot him with a shotgun through the rear driver's side window. The victim later died from his injuries. P's phone had been used to arrange the meeting.

Pre-trial: H and P were charged with murder and conspiracy to rob. In September 2022 P's solicitors contacted the CPS. They asked whether the Prosecution would consider not proceeding against P on the murder charge if he were to plead guilty to conspiracy to rob and give evidence against H. An initial statement from P was provided by his solicitors.

The police conducted a scoping interview with P, and then the Crown entered into an agreement with P under s.74 Sentencing Act 2020. Contrary to the relevant CPS guidance in force at the time, the s.74 agreement was finalised before the cleansing and debriefing process had been completed.

Further scoping interviews were conducted. P signed a witness statement. P said that he and H had run out of drugs and agreed to rob a drug dealer. H provided the shotgun. Although not expressly stated, from P's statement he appeared to know the gun was loaded. The plan was that P would ask for the drugs and H would then threaten the driver with the gun. However, the drug dealer became suspicious and tried to drive away at which point H fired the gun. [*The CACD observed that, on P's version of events, there was a strong case of manslaughter against him, and a case to answer that he was guilty of murder.*]

P was rearraigned and pleaded guilty to conspiracy to rob. The Prosecution indicated that they would not try him for murder at the conclusion of H's trial. H's solicitors were not informed about the hearing. The judge noted that the Prosecution intended to call P at the trial and directed that the s.74 agreement be disclosed. That order was not complied with but the relevant material was eventually disclosed during the trial.

H's Defence Statement was served shortly before the trial. He denied P's version of events but admitted manslaughter. He said there was no conspiracy to rob. His case was that the shotgun was taken to the scene by P and given to H to hold. It went off accidentally. H said he had not intended to kill or seriously injure anyone. It was P who removed the shotgun from the scene.

The trial: The Defence objected to P being called while he still faced the joint murder charge. Prosecution Counsel told the court that there was sufficient evidence to prosecute P for murder, but the public interest in doing so would be reviewed following H's trial. The judge said that if matters remained as they stood then he would consider excluding P's evidence under s.78 PACE. The trial was adjourned for the Prosecution to consider its position.

The Prosecution subsequently offered no evidence against P, and an undertaking was given not to prosecute him for manslaughter. P then gave evidence in accordance with his statement. In summing up, the judge directed the jury regarding the potential unreliability of P's evidence. He said that P had an incentive to tailor his evidence and that it should be approached with caution. They should ignore it if they thought P might have tailored his evidence to improve his own position or to falsely implicate the appellant.

H was unanimously convicted of murder and was convicted by a 10-2 majority of conspiracy to rob.

The appeal: H appealed on the ground that the Prosecution had departed from "proper and established procedure" in calling P, an accomplice and erstwhile co-defendant, as a prosecution witness.

The appeal was dismissed. Andrews LJ said that, whether they give evidence for the prosecution or in their own defence, an accomplice would always have an incentive to lie, to minimise their own involvement, and to blame a co-accused, and the jury had to be warned about that. A proper warning given to the jury of the dangers inherent in the accomplice giving evidence in such circumstances and the need to take them into account in their assessment of that evidence would usually be sufficient to meet those dangers.

However, a proposed prosecution witness who potentially stood to gain by the prospect of the prosecution abandoning serious criminal charges against him, provided that he helped them to secure a conviction, had a much more powerful incentive to say whatever was necessary to bring about the desired result. That incentive would only cease to exist if that situation were resolved by the time the witness was called to give evidence.

In *R v Pipe* (1967) 51 Cr.App.R. 17 Lord Parker CJ said that an accomplice against whom proceedings have not been concluded was a competent witness, but added:

> "… it was the practice (a) to omit him from the indictment or (b) to take his plea of guilty on arraignment, or before calling him either (c) to offer no evidence and to permit his acquittal or (d) to enter a nolle prosequi." [Emphasis added].

Andrews LJ said this practice provided an important additional safeguard for the defendant against the heightened danger of false or tailored evidence which would otherwise arise. Without it, the trial judge might well be justified in taking the view that the prejudice to the defendant would be too strong to allow such a witness to be called.

This heightened danger did not arise, and therefore the "established practice" referred to in authority did not apply, if the witness was not an accomplice and the charges left hanging over them concerned an unrelated offence. In that situation, the incentive was of a different nature, namely, a possible reduction in sentence for the unrelated offence in return for the assistance given to the prosecution in the case against the defendant. Nowadays s.74 of the *Sentencing Act 2020* provided the means by which any such deal with the prosecution could be formalised. There would generally be no unfairness in calling such a person as a witness, so long as the jury were told of that incentive and given appropriate directions as to the caution with which they should approach the witness's evidence because of it.

The same applied in principle to an erstwhile co-defendant who had entered into a s.74 agreement, and whose position in relation to all related offences had been

resolved in the manner envisaged in the authorities.

It would be impractical and unrealistic to expect the Prosecution to make a decision whether to accept a plea to a lesser offence without knowing what the accomplice would say in evidence. That decision would have to be taken as part of the formal process during which the accomplice would be interviewed.

The essential feature of the statutory regime in respect of "assisting offenders" originally introduced by the *Serious Organised Crime and Police Act 2005* (and now also partly contained in the *Sentencing Act 2020*) was that the offender must publicly admit the full extent of his own criminality and agree to participate in a formalised process (*R v Blackburn* [2008] 2 Cr.App.R.(S.) 5). By the time that a s.74 agreement was concluded, there should be no loose ends in the form of an unresolved criminal charge arising from the same facts and matters as the offender would be testifying about.

An offer to give evidence for the prosecution was unlikely to be made by an offender without seeking something in return. Generally, that would be a reduction in sentence. However, if the assisting offender was only willing to plead guilty to a lesser offence, the prosecution had to decide whether to offer no evidence on the more serious charge(s) or not to call them. That decision had to be made on a principled basis, in accordance with the Code for Crown Prosecutors.

The primary consideration for a prosecutor in that situation was whether the plea offered was commensurate with the seriousness of the alleged offending, but it was not the only consideration. The public interest in the prosecution of and conviction of offenders for the commission of serious criminal offences was an important factor when deciding whether to prosecute an accomplice who was a prospective witness. However, Andrews LJ said that where both the assisting offender and the other defendant were facing a murder charge, and there was sufficient evidence against each of them, the public interest would generally require that both be prosecuted. If the evidential test were met, the circumstances in which it would be in the public interest not to prosecute someone for murder were extremely rare.

In the present case the Prosecution wrongly believed that it could defer taking a decision on the acceptability of P's plea to conspiracy to rob until after they knew whether his evidence had helped to secure H's conviction. That was wholly impermissible. But the decision to offer no evidence against P, coupled with an undertaking in respect of manslaughter, meant that the situation was addressed before it was too late.

Had the matter been thought through more carefully once the scoping interview had been carried out, the Prosecution might well have indicated that they would only accept a plea of guilty to manslaughter as well as the proffered plea to the conspiracy to rob. Alternatively, they might have decided to continue to prosecute P for murder and not to call him, given that H had a case to answer without P's evidence.

Having not made a decision whether to proceed with the murder charge at the appropriate stage, the Prosecution then had to take that decision under extreme pressure of time. P could consider himself extremely fortunate that he ended up in the position that he did. However, the jury were made well aware of the incentives he had to lie. The Defence eventually had full disclosure and were in a position to cross-examine P fully on the relevant material.

In general, provided that all the circumstances in which the accomplice came to be called as a prosecution witness,

and what he stood to gain by doing so, were fairly and frankly put before the jury and they were appropriately directed by the judge, any mischief would be adequately addressed. There might be cases where no directions to the jury could suffice to cure the prejudice, but this was not one of them.

Comment:

Although the Prosecution's decision making process in relation to P was strongly criticised by the CACD, the outcome of H's appeal is not surprising. Matters had been put right by the time P gave evidence. The outstanding charges had been resolved against him and all relevant material had been disclosed. The Defence were able to challenge P's credibility and argue that he still had a strong incentive to lie. The jury were properly directed to treat his evidence with caution.

P can indeed consider himself fortunate. He avoided conviction for either murder or manslaughter, despite having agreed to participate in a robbery knowing that H was carrying a shotgun. In addition, he received the benefit of a reduced sentence for conspiracy to rob, pursuant to the s.74 agreement.

Following the judgment in this case, the relevant CPS legal guidance has been revised and renamed: "Assistance Provided by Offenders". The revised guidance refers expressly to *H* and states:

> The "cleansing" process means the offender must admit their criminality in full under caution before a final agreement is entered into to be relied upon in court as a witness.
>
> …
>
> A decision to sign an agreement with someone who has refused fully to admit their criminality is a high-risk strategy and very careful consideration will have to be given, particularly to their credibility if giving evidence. Cases where it is appropriate to proceed with an uncleansed assisting offender should be thought of as exceptional.
>
> …
>
> When an assisting offender has confessed to the crimes they are charged with or are being investigated for, prosecutors must review all the charges according to the Code before concluding a final written agreement. They need to make a definitive decision on how to proceed against the assisting offender. This decision should be clearly recorded, and disclosure obligations considered.

Adherence to the revised guidance should mean the problems that occurred in this case will be avoided in future.

CCRC reference – historic murder conviction – fresh evidence – contemporary standards of fairness – need to show "substantial injustice" – principles applicable to order for retrial

Oliver Campbell [2024] EWCA Crim 1036

By Paul Taylor KC

In 1991 C was convicted of offences of conspiracy to rob and murder.

The trial: The prosecution case alleged that two men – C, then aged 19 and of previous good character, and an older man ES – attempted to rob an off licence shop and C fatally shot the proprietor.

The prosecution case against C relied primarily on admissions that C had made in police interviews. An application to exclude the police interviews was made pursuant to ss76 and 78 Police and Criminal Evidence Act 1984 ("PACE"). The judge, having heard evidence on a voir dire, refused that application. Agreed facts relating to C's mental condition were before the jury: "Past psychological testing has shown a low full scale IQ of between 69 and 89….These scores are borderline defective….There can be no doubt that he suffered severe brain damage … The most significant consequence is his intellectual function and in this respect he should be regarded as showing significant mental handicap. This is reflected in impaired capacity to process or remember more than the simplest verbal information, severely restricted reasoning skills and poor concentration."

Those agreed facts were based upon reports which the defence had obtained from four expert witnesses, one of whom was Professor (then Doctor) Gudjonsson, a forensic psychologist. None of those witnesses was called to give evidence, and Professor Gudjonsson's written opinions were not before the jury.

ES pleaded guilty to conspiracy to rob and was found not guilty of murder.

The first appeal: In 1994 the CACD rejected C's appeal. [It had refused initial applications to adduce fresh evidence from two witnesses:

(a) Lloyd Sanderson, who had met ES in prison in August 1991 and stated that he had been told by ES that the man with him in the robbery was not the appellant. The court held that such evidence was inadmissible, his appeal against those convictions was dismissed.

(b) Dr Olive Tunstall, a consultant psychologist who had conducted further tests of the appellant's social functioning. She opined that the appellant was more vulnerable in the context of police interviews than had been thought by the other experts. The Court held that:

(i) The other experts consulted by the defence had plainly been unable to say that there was anything in the appellant's mental condition which made him especially vulnerable to suggestibility or to pressure in police interview.

(ii) Dr Tunstall's evidence did not fall within s23(2) Criminal Appeal Act 1968 because it could, with reasonable diligence, have been available at trial;

(iii) Dr Tunstall accepted that the appellant was not particularly suggestible or compliant.

The CCRC referral: The CCRC referred the conviction back to the CACD on the bases that:

"(i) There is fresh expert evidence, unknown at the time of trial or appeal, which establishes that there is a real possibility that the [CACD] may now find that [C's] admissions were unreliable. This is given by:

(a) … Professor Gisli Gudjonsson who has accepted that at the time he assessed [C] he did not properly understand the full nature of his vulnerabilities, and accordingly he focused too narrowly on his suggestibility rather than thoroughly examining his compliance, background and communication difficulties.

(b) … Dr Alison Beck supports this conclusion by explaining that modern psychological practice would now require [C's] background to be more rigorously assessed, also taking into account his compliance and memory issues, to examine how this would impact on his behaviour and ultimately his reliability.

(ii) Modern standards of fairness would now apply to C's case. Thus, there is a real possibility that the Court of Appeal would find that the modern psychological approach and the fresh evidence that flows from this as to [C's] previously misunderstood vulnerabilities, undermines the reliability of his admissions. Taken together with the status he would now have as a vulnerable adult, there is a real possibility the Court of Appeal would conclude [C's] admissions should now be excluded.

(iii) Given the developments in the law, there is now a real possibility that the admissions of LS may now be admitted in the interests of justice:

C applied for leave to adduce fresh expert evidence from Professor Gudjonsson, Dr Beck, and Professor Brian Thomas-Peter; and from persons to whom LS was said to have made statements exonerating the appellant.

The respondent opposed the admission of any fresh evidence, and in the alternative applied to adduce fresh evidence of its own because:

(1) The proposed evidence of Professor Gudjonsson and Dr Beck was inadmissible because they were both guilty of "expert overreach", and because their evidence in any event did not show any of the appellant's confessions to have been unreliable and so did not afford any ground of appeal. The court at trial was aware that the appellant was a vulnerable person, at risk of making unreliable admissions.

(2) In the alternative the Crown applied to adduce fresh evidence, including some which had become available to the respondent following a waiver of legal professional privilege by the appellant in connection with his applications to the CCRC.

(3) As to the evidence of persons to whom LS had spoken whilst that evidence would probably be admitted at a trial held now, what LS had said to those persons was clearly not capable of belief.

The CACD considered the following matters:

(1) The principles to be applied by the CACD, when considering an appeal against a conviction long ago [R v Bentley (Derek William) (deceased) [2001] 1 Cr. App. R. 21; R v King (Ashley) [2000] 2 Cr. App. R. 391; R v Hanratty (deceased) [2002] EWCA Crim 1141, [2002] 2 Cr. App. R. 30; R v Hussain (Abid) [2005] EWCA Crim 31; R v Nolan (Patrick Michael) [2006] EWCA Crim 2983.

(2) The approach of the CACD to assessing fresh evidence [*Pendleton* [2001] UKHL 66, [2002] 1 Cr. App. R. 34]; Dial v Trinidad and Tobago [2005] UKPC 4, [2005] 1 WLR 1660; R v Hunnisett [2021] EWCA Crim 265.

(3) Applications for an extension of time to bring an appeal against conviction based on a change in the substantive law, ["it is well established that the court will not grant leave unless the applicant shows that a substantial injustice would

otherwise be done. That requirement is imposed because of the public interest in legal certainty and in the finality of decisions made in accordance with the then law: see eg R v Jogee; Ruddick v R [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387 at para 100 and R v Johnson (Lewis) [2016] EWCA Crim 1613, [2017] 4 WLR 104 at para 18.] The Court considered whether this was "a change in the law" case. It concluded that:

[127.] …"we are inclined to accept Mr Price's submission that an appellant who seeks a long extension of time to advance a ground of appeal based on a change of practice, or on changes in standards of fairness, must satisfy the "substantial injustice" test, as he would have to do if relying on a change in the applicable substantive law. We need not, however, decide that point, because in our view the most important considerations relate not to changes in practice or in standards, but rather to the fresh expert evidence."

(4) Reliance on grounds of appeal not related to the CCRC's reasons for referral, and which therefore require the leave of the Court under CAA (C had sought leave to argue an additional 17 grounds).

The CACD allowed the appeal on the basis that:

(1) We accept the evidence of Dr Beck and Professor Gudjonsson that, over the years since the trial and the 1994 appeal, understanding of the factors which may contribute to a false confession has increased, and the research which has contributed to that understanding has also led to the development of psychometric tests for measuring relevant factors.

(2) The principal reason for our disquiet arises from the fact that the fresh evidence would provide a court with the benefit of much more information than was available at the trial about the appellant's mental state when he made his confessions.

(3) As a result of the fresh expert evidence, the whole approach to the case would now be informed by a different and better understanding of relevant factors.

(4) We agree with Mr Price that there is no basis for impugning the findings made by the judge, or the fairness of the trial, on the basis of the evidence then available; but we accept that the fresh expert evidence, in particular that of Dr Beck, adds material information about the risk of a false confession which was not and could not be known at the time. It follows that the conduct of the trial would have been materially different if that information had been known at the time: …The judge would necessarily have been considering submissions in a materially different context. To that must be added the change in practice as to the treatment of vulnerable suspects and defendants and the potential

availability of an intermediary to assist the appellant at trial….

(5) [135]True it is, as this court held in the 1994 appeal, that the prosecution case did not rest solely on the appellant's confessions. Nonetheless, the real possibility that different rulings as to admissibility would be made if the fresh evidence were available brings with it the real possibility that a jury would be considering a significantly different evidential picture. Even if all the evidence of confessions were admitted, a jury knowing of the fresh evidence would be considering the reliability of those confessions in a materially different context. In those circumstances, we cannot say that the fresh evidence could not reasonably have affected the decision of the jury to convict.

(5) Retrial

(6) The CACD refused to order a retrial on the basis that "The fresh evidence which we have received in the appeal shows that, at the time of his trial and in the years thereafter, the appellant's ability to process information and to hold information in his working memory was well below what would be expected, even for someone of his low IQ. We have heard nothing to suggest that those deficiencies will be any less serious now. On the contrary, they will be compounded by inevitable effects of the passage of a very long period of time. The appellant's problems in those respects could, of course, be the subject of expert evidence in a retrial. But at the heart of any retrial would be the confessions made by the appellant to the police and others, and there would inevitably be a focus on why the appellant said what he did if he had no part in the crimes. Any defendant would struggle, so long after the relevant events, to explain his thought processes, and the factors which did or did not affect what he said and why he said it. We are persuaded that this appellant would face much greater difficulties than almost anyone else, and much greater difficulties than he faced when he gave evidence during the trial."

"We have found this a finely-balanced decision. We attach considerable weight to the public interest in a fair trial resolving the issues in this case; but we conclude that that general interest is outweighed by the consideration that the appellant – who has served over a decade in prison and has been subject to licence conditions for more than two decades – cannot have a fair trial in circumstances where he will be so severely handicapped in addressing the matters which he would want and need to address."

Inconsistent verdicts – review of authorities and CACD approach

Hussain & Ghani [2024] EWCA Crim 1344

This decision sets out a useful summary of the authorities relating to inconsistent verdicts at [26]- [27], and an example of the approach taken by the CACD when analysing (and rejecting) this ground at [28]-[30].

[For a detailed analysis of this ground see *Taylor on Criminal Appeals*, para 9.424]

Stalking – aggravated offence – substitution of alternative verdict on appeal – s.3 CAA 1968

Tanner [2024] EWCA Crim 1576

T appealed against his conviction for the aggravated offence of stalking, contrary to section 4A of the Protection from Harassment Act 1997. The victim was C.

The first ground of appeal was that the judge should have acceded to the submission of no case to answer. The CACD concluded "that the judge should have allowed the submission of no case to answer and directed the jury to return a not guilty verdict to the charge of aggravated stalking.

The CACD refused the prosecutions' application to retry the appellant.

The Court did, however, consider "the question of whether we should substitute the lesser offence of stalking in breach of section 2A of the Act" under Section 3 of the Criminal Appeal Act 1968.

The Court concluded "We are in no doubt that the jury would have been entitled, on the evidence that was led before them prior to the submission of no case to answer, to convict the appellant of an offence of harassment." In substituting this offence, the Court took into account

"The maximum sentence is one of 51 weeks. Ms Flint realistically recognises that the previous convictions of the appellant are of significant aggravating factor. Despite the personal mitigation that is afforded to him by state of his health, it is not a matter that has dissuaded him from pursuing a course or campaign of conduct against C amounting to harassment and stalking. We consider it is necessary, not only to mark his antecedent record with the fact that he has committed a further such offence, but also to impose a prison sentence, albeit that the time served will mean his immediate release.

In the circumstances, we regard that the appropriate sentence after trial would have been one of 5 months. That is the sentence that we intend to impose on the substituted conviction for a section 2A offence.

MSA defence – anonymity order – fresh evidence – change of law – extension of time – guilty plea

AAB [2024] EWCA Crim 880

In this appeal against conviction the CACD addressed the following issues:

(1) The Modern Slavery Act 2015 created a defence under s.45:

(2) The Applicant's request for an anonymity order to protect the interests of the proper administration of justice under s.11 of the Contempt of Court Act 1981. [The Court noted that the normal rule is open justice, but an anonymity order in the present case is strictly necessary, pursuant to the principles identified in R v AAD and others [2022] EWCA Crim 106 at [3] and [4] and summarised in Human Trafficking and Modern Slavery

Law and Practice (2nd ed) (at 8.103-8.108).]

(3) Appealing against a conviction based on a guilty plea;

(4) An application for an extension of time to seek leave to appeal (of 4659 days);

(5) Leave to adduce fresh evidence under s.23 Criminal Appeal Act 1968 (this included:
   a. The Reasonable Grounds decision and Conclusive Grounds decision
   b. Results of SAR from Derbyshire Police;

(6) Grounds of appeal based on a change of law (In R v S(G) [2018] EWCA Crim 1824 at [1] the court reviewed the position generally in light of a change of law between the date of conviction and an appeal in cases of victims of trafficking. The court also established principles to be applied in the approach to fresh evidence supporting the status as a victim of trafficking at [66] to [69]).

PROSECUTION APPEALS

Joint enterprise – restricting Gnango liability

ARU, AOC, BHL [2024] EWCA Crim 1101

By Jonathan Higgs KC

In an important restriction on potential liability under the Gnango principles, the CACD upheld a trial judge's decision of no case to answer in three linked murder appeals.

Although the recent appeal of Seed and others [2024] EWCA Crim 650 was not overruled, the CACD emphasised important restrictions upon its application. Davis LJ stated:

> "*Cases in which opposing sides engaged in violence have a common purpose of the kind required to fix all participants with liability for the death of anyone resulting from the violence will be rare.*" He further stated: " *The state of mind required of the gang member participating in the riding out was an appreciation that it was virtually certain that the opposing gang was similarly armed and that they would return fire with the relevant intent.*"

This second statement comes very close to establishing a threshold for joint intention that returns to the pre-*Jogee* foreseeability tests. What is seemingly now required to be established is not just a shared intention between each group to inflict grievous bodily harm on opponents, but also an actual appreciation of the "virtual certainty" that the opponents would be armed in the same way. A standard ride out, where it is expected and certainly hoped for that the opponents will be caught unawares, and will therefore not be similarly armed, would appear to be immune from *Gnango* liability.

ARU and others involved two groups threatening each other via messages, including references being armed with knives, but falling short of direct evidence either of gang motivation or expressed expectations that the opponents would similarly be armed with knives (even though in the event both sides were indeed armed with similar knives). The CACD was emphatic that the trial Judge's decision that this was not enough was not only entirely reasonable, but also that any contrary ruling would have been unreasonable.

Any future consideration of these principles will undoubtedly now focus not just on the background of gang involvement, but also

the requirement for intention of some degree of equality of arms. The Court further signalled that such cases would be very rare indeed, and far beyond a mere agreement to fight. The appellants in *Seed and others* can consider themselves unfortunate to have been just the wrong side of that very fine distinction. Anyone convicted under those principles will want to consider whether this judgement may assist them.
[Jonathan Higgs KC represented the Crown]

Significant case regarding Hearsay - Reformulation of 6 step test and practical guidance on Riat

BOB [2024] EWCA Crim 1494

By Kathryn Arnot Drummond

This was an appeal by the prosecution against a ruling, which was effectively terminatory, that a series of witness statements from each of two witnesses who had died before the trial were inadmissible hearsay. S.71 CJA 2003 apply to these proceedings with the exception of the limited judgment summarised below.

Background: The CACD in Riat and others [2012] EWCA Crim 1509 explained that a decision to admit hearsay evidence involved two "paired expressions" used in Horncastle [2009] UKSC 14. Hearsay may be admitted it if it either demonstrably reliable *or* its reliability was capable of proper testing and assessment. Hearsay which is demonstrably reliable is unlikely to be problematic. The difficult cases will concern evidence which is *not* demonstrably reliable but whose reliability is said to be capable of proper testing and assessment. If the judge rules that it is, then that testing and assessment will be a function of the jury. Citing §6 of *Riat*, the availability of independent dovetailing evidence and good testing material admissible under s.124 CJA 2003 concerning the reliability of the witness may show that the evidence can properly be tested and assessed.
This case: Witness 2 had made a final statement after the death of witness 1 and prior to his own death, in which he said they had agreed to supress the truth that they had encountered the defendants because they allowed them to use their flat to deal in drugs. Previously they had said that the defendants burst into their flat and attacked them for no reason. The change of account was a significant reason for the judge's decision to exclude the evidence but it was agreed that the witnesses were attacked in their own home. Further, both witnesses had made identifications at procedures whereby they identified the defendants as their assailants. None of the defendants disputed having been in the flat for a few days and video footage confirmed this. The new account was significantly more plausible that the first and there was an obvious reason why the witnesses may have chosen to suppress it at first – there having been strong evidence that both were users.
The CACD decision: The CACD was satisfied that the judge's ruling to exclude the hearsay statements of witnesses 1 and 2 was wrong and not a reasonable ruling for him to make, the appeal was allowed and the hearsay statements were ruled admissible.
In reaching this decision, the CACD found that the decision of the trial judge was critically flawed as a result of his failure to take properly into account the fact that the contents of the statements of the two witnesses were largely agreed by the defence and were supported in most respects by very strong independent supporting or dovetailing evidence. A

further important flaw in his reasoning was his concentration on flaws in the statements. He was able to address those flaws because they were apparent and therefore matters which the jury would be able to take into account in deciding whether the statements were reliable or note. They were not necessarily fatal to the reliability of the disputed parts of the statements but were matters which enabled that reliability to be tested and assessed.

Further practical guidance: In light of the experience in this case, the Court offered further practical guidance on *Riat* and slightly re-crafted the 6 step test of Hughes LJ, which is repeated here:

"The statutory framework provided for hearsay evidence by the CJA 2003 can usefully be considered in these successive steps:

i) is there a specific statutory justification (or "gateway") permitting the admission of hearsay evidence (ss.116–118)?

ii) what material is there which can help to test or assess the hearsay (s.124)?

iii) is there a specific "interests of justice" test at the admissibility stage?

iv) if there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (s.114(1)(d))?

v) even if prima facie admissible, ought the evidence to be ruled inadmissible (s.78 of the Police and Criminal Evidence Act 1984 (PACE) and/or s.126 of the CJA 2003)?

vi) if the evidence is admitted, then should the case subsequently be stopped under s.125?"

In considering the "paired expressions of (ii) and (v), the court considered the further valuable guidance from §17 and 18 of *Riat*. If it is the Crown which is seeking to adduce the evidence and if the evidence is important to the case, the judge is entitled to expect that very full enquiries have been made as to the witness' credibility and all relevant material is disclosed.

In the present case, the judge had not been assisted as he might have been by consideration of the first accounts by both witnesses to police officers. This included an early account captured on BWF which was in the unused material. There was also inadequate disclosure by the prosecution of the documents concerning the circumstances in which witness 2 came to give his last statement.

It also follows from §18 of *Riat* that in taking the admissibility decision the court is required to consider the importance of the evidence in the case as a whole. It may be sole and decisive evidence, and yet admissible.

Step (v) is not simply a rehash of step (ii). By this stage, the court will have decided at step (ii) that the reliability of the evidence can by properly tested and assessed by the jury, and the exclusionary powers may be exercised for good reason notwithstanding this fact.

Finally, the CACD made observations on step (vi) which relates to s.125 CJA. The duty on the court to stop a case in those circumstances is an important safeguard which should be considered by the court of it's own initiative if not party raises it, in all cases where it applies. Whilst it may be

considered at the stage when a submission of no case to answer may be made, the Court suggested that most commonly it would arise at the close of all the evidence when the issues will have become very clear, and the importance of the hearsay statement and any difficulty a defendant has in challenging it can be assessed.

The CACD considered that the explanation of step (ii) in the "six steps" should be expanded to include reference to the content of §6 and 18.

Having made those observations, the Court suggested that the *Riat* 6 steps may be reformulated as follows, resulting in 7 steps. There is a new step 1 dealing with disclosure and an expanded steps 3 and 7, formerly (ii) and (vi). In most cases the review of disclosure should not be a burden on the court. The obligation is on the prosecution to inform the court that it has done its job properly and to produce the results of the investigation. It is to be hoped that that will be enough in most cases. In including the disclosure obligation as one of the steps the court was adding it to a checklist, but not in any way changing what *Riat* already requires:-

"The statutory framework provided for hearsay evidence by the CJA 2003 can usefully be considered in these successive steps:

1. is the court satisfied that the prosecution has adduced all relevant evidence, and disclosed all relevant unused material to enable the court to assess the extent to which the hearsay evidence is demonstrably reliable and, if not, the extent to which it can be safely assessed and tested? If not, should the court simply refuse the application or do the interests of justice require directions for a proper disclosure process?
2. is there a specific statutory justification (or "gateway") permitting the admission of hearsay evidence (ss.116–118)?
3. what material is there which can help to test or assess the hearsay? This may be undermining evidence admitted under s.124, or other inconsistent evidence and it may also be independent dovetailing or supporting evidence. The court is required to make a judgment on the basis of all the evidence, having regard to the issues in the case and the importance of the hearsay to those issues.
4. is there a specific "interests of justice" test at the admissibility stage?
5. if there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (s.114(1)(d))?
6. even if admissible, ought the evidence to be ruled inadmissible (s.78 of the Police and Criminal Evidence Act 1984 (PACE) and/or s.126 of the CJA 2003)?
7. if the evidence is admitted, then should the case subsequently be stopped under s.125? This safeguard should be considered in all cases where it applies, at the initiative of the court if the parties do not raise it. It will generally be best determined at the conclusion of all the evidence. This is reinforced by the fact that this is the stage when the judge is likely to have drafted legal directions and to be consulting counsel about them. In a case of this kind, where the prosecution seeks to prove an

important and disputed fact by relying on hearsay, the judge is required to give a careful and tailored direction to assist the jury in deciding whether they can safely rely on the hearsay or not. Its sufficiency will be relevant to the safety of any resulting conviction and it will be helpful for the judge to have regard to it when carrying out the assessment required by section 125.

Comment:

The expansion of the 6 step test in *Riat* is not a radical shift to the correct approach in cases where the admissibility of hearsay is in issue. The duty of disclosure and requirement that reliability of the maker of the hearsay statement and the statement itself are fully investigated are well established. Furthermore, the expansion arises from the body of the judgment of *Riat* itself. However, it is an important re-crafting of the test which practitioners will find useful and should familiarise themselves with. It is also a stark reminder to prosecutors and investigators in such cases that the judge ought be assisted properly.

Section 58 CJA 2003 – Hearsay – Real Evidence - spreadsheet

AEB & ors [2024] EWCA Crim 1320

By Ben Holt

These defendants were charged with converting criminal property. They were allegedly behind a scam that involved the use of gift cards issued by Apple to acquire Apple products. The products were then either sold or returned to a shop and exchanged for another gift card.

The prosecution had sought to rely on a spreadsheet; the contents of which had been drawn from a wider data set. The question was whether the process of searching and selecting data had altered the category of the material; effectively turning it from real evidence to inadmissible hearsay. The Judge excluded the spreadsheet on the grounds that its contents were hearsay. The prosecution appealed the decision as a 'terminatory ruling'. The CACD concluded that the Judge had made an error or law. The ruling was reversed and the appeal allowed.

The Issue: The prosecution obtained and a spreadsheet that had been produced by a fraud specialist employed by Apple. He had not compiled the spreadsheet himself. However, he could explain how the document had been put together. The process had relied on an '*internal tool*'. This had been able to '*input a gift card number, which enabled the specialist to view a receipt, from which a credit card number was obtained*'. It was used to retrieve from Apple records the history of all gift cards purchased using a specific credit card; along with the history of purchases made with the gift cards and purchases which were subsequently returned to a store for a refund in the form of a fresh gift card.

The prosecution sought to rely upon this document in support of their case. The defence objected; arguing that the contents of the spreadsheet was inadmissible hearsay.

The Crown placed reliance on the case of *Spiby* [(1990) 91 Cr App R 186. This case considered whether information held on a computer, that had not passed through a human mind, amounted to real evidence. The Court adopted the explanation provided by Professor Smith that '*hearsay information invariably relates to information which has passed through a human mind*'.

Following this logic, the prosecution submitted that the information contained within the spreadsheet was not hearsay; it was real evidence. If that argument was incorrect, their fallback position was that the document was admissible pursuant to section 117 CJA 2003 [a business document].

The defence, on the other hand, argued that the information contained within the spreadsheet was indeed hearsay. They further argued that the conditions contained within section 117 were not met. They went on to argue that, even if the evidence was not hearsay, it should be excluded pursuant to either s117(6) CJA 2003 and/or s78 PACE.

The Ruling: The Judge identified three relevant questions:

(1) Was the information contained within the spreadsheets hearsay?
(2) If so, did s117 CJA 2003 apply?
(3) If the material was admissible, how would it be produced?

In relation to the first issue, the Judge concluded that the spreadsheet was based on raw data. However, it was not the raw data itself. As such, it was not automatically generated without the intervention of the human mind. The information had been selected by the prosecution. The spreadsheets contents were, therefore, hearsay.

Turning to the proposed route to admissibility and section 117 CJA 2003, the Judge did conclude that s117(2)(a) was satisfied; that is to say that the document was created by a person in the '*course of a trade, business, profession or other occupation*'. However, he could not say whether s117(2)(b) was met; the person '*had or may reasonably supposed to have had personal knowledge of the matters dealt with*'. Further, s117(5) was engaged but insufficient evidence had been produced to satisfy its requirements.

As a result, the spreadsheet was '*inadmissible hearsay*'.

The Judge, therefore, did not need to decide the third issue.

The appeal: The Crown made application to appeal the ruling pursuant to section 58 CJA 2003; deeming it to be a '*terminating ruling*'.

It was argued that the information did not cease to be raw data because a human mind had been involved in selecting a sub-set of the overall data. The process involved simply selected and extracted information which then appeared in the spreadsheet. The process, such that it was, simply limited the amount of data; without altering its status as real evidence. It was, therefore, not hearsay.

In the alterative, it was argued, all requirements of s117 CJA 2003 were satisfied.

The defence maintained the position as set out in the Court below. They argued that the spreadsheet was not simply an extraction of raw data but a report which had been produced after searching, sifting, selecting and collating extracts of the raw data. This had ultimately been carried out at the discretion of an Apple employee. As a result, a human mind had been involved. In the alternative, they supported the Judge's conclusion that s117 was not satisfied.

The CACD stated that the starting point was that the raw data held by Apple was recorded automatically when the transactions were carried out. The raw data would be stored in vast quantities that could not be understood by a jury. The prosecution had, therefore, selected records involving relevant gift cards and subsequent transactions. This was common ground.

The question in this appeal boiled down to whether the process of searching, selecting and extracting a sub-set of the overall data transformed the material from being real evidence to a hearsay statement.

The Court, unhesitatingly, concluded that it did not. They said this, '*Raw data which is merely selected and extracted from a larger body of raw data is still the raw data'.* The human decisions taken [defining parameters etc] could be the subject of challenge on different grounds. However, the process did not alter the characteristics of the evidence. There had not been any human intervention that could have altered or added to the overall body of raw data. The data within the spreadsheet remained real evidence; not hearsay. The spreadsheet was admissible.

Accordingly, the appeal was allowed and the Judge's ruling reversed.

Comment:

There was no dispute in this case that the raw data was real evidence. The question was whether the human mind had interfered with the raw data such that its category changed; from being real evidence to being inadmissible hearsay.

The entire data set had been searched and sifted to provide material that was relevant to the case. Such refinement is vital in the preparation of any prosecution. Failure to do so would have caused its own issues. For example, the entirety of the raw data would have been voluminous and impossible for a jury to understand. The search results were then put into a spreadsheet. During this process, no amendments had been made to the raw data. The data, therefore, was unaltered and, for the purposes of admissibility, remained the real evidence. There had been no '*human mind'* applied to the data.

In allowing the prosecution's appeal, the Court emphasised the stark distinction between arguments that relate to the admissibility *per se* of evidence and arguments about material that is admissible but might be excluded on the grounds of relevance or fairness. The arguments in this case fell within the latter category. For example, the defence *could* have argued that the material was inadmissible pursuant the Court's general discretion to exclude unfair evidence on the grounds that they did not have access to the entirety of the data set.

Plainly, such argument does not affect the admissibility of the evidence. Rather, it enables the Court to exclude otherwise admissible evidence.

FINANCIAL CRIME APPEALS

Proceeds of Crime Act - Restraint orders - External requests - Trade and Cooperation Agreement

Wieromiejzyk v DPP [2024] EWCA Crim 1486

By James Martin

This was the first case to come before the CACD concerning an external request from a member state relating to a provisional measure pursuant to Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 ("the Order 2005") following the advent of the Trade and Cooperation Agreement (Treaty Series No.8) (2021) ("TCA").

The initial external request by the Republic of Poland, pursuant to the 2005 Order, asserted that the Applicants were said to be members of an organised crime group in Poland, focusing on producing and supplying psychoactive substances through a network of shops and, latterly, through websites. It was alleged that such activities constituted criminal activities under Polish law, although the Applicants disputed that

fact. The matter had been subject to criminal investigation in Poland.

An administrative freezing order had been issued in Poland which extended to certain cryptocurrency accounts held by the Applicants in London with a company called Payward Limited. It is said that at the time of the initial application the amounts in such accounts exceeded US $24 million. Challenge was made in Poland by the first Applicant to the freezing order. That challenge, however, was dismissed by the Circuit Court of Katowice on 16 March 2022.

The Applicants sought to have the Restraint Orders discharged at the Crown Court citing various arguments: First, that the Payward accounts were not "relevant property" for the purposes of Article 7 of the 2005 Order. Second, there had been unreasonable delay since the Restraint Orders were first made by the Crown Court on 11 November 2021. Third, the Restraint Orders had been wrongly extended by variation on an incorrect interpretation of the law. Fourth, the Crown Court had been given incomplete or misleading information as to the status of relevant investigations being conducted in the Netherlands and Germany with regard to the Applicants. All of these arguments were dismissed by HHJ Baumgartner.

The appeal: By the time the matter was referred to the CACD there had been a significant revision to the arguments advanced. In essence, the object of the applicants' primary grounds was to attack the legitimacy of the Polish authorities' criminal investigation and the legitimacy of the freezing order made in Poland. It is asserted that there was a "rule of law crisis" in Poland and unwarranted interferences on the part of the Minister of Justice and Prosecutor General. As such the argument advanced was that the United Kingdom, as a state of law, could not support an undemocratic justice system in Poland nor enforce orders which were illegal.

Having carefully considered the detailed submissions the CACD described the grounds as "Unsustainable". In their view the grounds in involved raising a collateral challenge to the substantive reasons for the requested measure on the part of the requesting state. But that was contrary to the policy and objectives of the TCA and contrary to the express provisions of Article 689(2) of the TCA which explicitly confirms that in this context the requirement for respecting necessity and proportionality rests on the requesting (not requested) state.

The Court scrutinised carefully and thoroughly the evolution of the legislation following Brexit in this area and concluded that the Crown Court can perfectly properly proceed on the footing that a requesting member state has satisfied itself that the requested measure is justified and that requirements of necessity and proportionality have been duly assessed.

In conclusion the Court set out its observations of the required approach with regard to external requests for provisional measures from member states of the European Union:

(1) An external request, and the information contained in it, should always be carefully scrutinised by the Crown Court;

(2) In deciding whether to make a Restraint Order pursuant to such an external request the current required approach continues to be in substance the same as that required immediately before 2021;

(3) In deciding whether to make a Restraint Order the Crown Court must initially assess whether the first condition or second condition set out in Article 7 of the 2005 Order is satisfied;

(4) In deciding whether the relevant condition is satisfied and whether to make a Restraint Order the Crown Court should

focus solely on the information provided with the external request;
(5) In deciding whether to exercise the power under Article 8 of the 2005 Order to make a Restraint Order the Crown Court should aim to give effect to the policy and objectives of the TCA, as well as to the "steer" given in Article 46(2) of the 2005 Order itself.
(6) In deciding whether to make a Restraint Order the Crown Court is not (subject, for the avoidance of doubt, to the prior requirement to be satisfied by the external request as to the first condition or second condition in Article 7) concerned with the substantive reasons for the making of the measure which is the subject of the request;
(7) On any subsequent application to discharge or vary a Restraint Order under Article 9 the Crown Court again is not concerned with the substantive reasons for the making of such measure; and any substantive challenge to the measure (including any challenge as to its necessity and proportionality) should be raised by the affected party in the requesting state.

Confiscation - Determination of Benefit - Judge's factual findings at sentence - Proportionality

Bond [2024] EWCA Crim 1570

By Olivia Haggar

AB was convicted of Conspiracy to Cheat the Revenue. He was the director of a group of companies which had dishonestly claimed VAT input tax. AB had arranged for a series of VAT registered companies "the defaulting traders" to provide false invoices purporting to charge VAT inclusive sums on sales. The defaulting traders either did not account for the VAT to HMRC or failed to pay the sums.

The Prosecution position at sentence was that AB had benefitted financially from the conspiracy. Applying the Revenue Fraud guideline, they placed harm within category 2 based on a £17m gain, or a £17m loss to HMRC.
The defence submitted that as per the legal directions, the jury could have convicted AB either because there were no sales, or no sales as described, however the jury's verdict did not establish that the sales were in toto fictitious or that no VAT was paid to the suppliers. In short, whilst the jury's verdict meant that some sales claimed did not take place, there was insufficient evidence upon which the value of the false claims could be quantified.
In sentencing, the Judge embarked upon an exercise as per *King* [2017] EWCA Crim, that where there was more than one possible interpretation of the jury's verdict the Judge must make up his own mind, to the criminal standard, as the factual basis on which to sentence. The Judge was satisfied to the criminal standard that no VAT had been paid to the supplier traders, and that either the trading did not take place, or if it did, that no VAT was paid. The basis upon which he sentenced AB was therefore that the gain was c. £17m, but he afforded a 15% reduction to £15m, or that the loss to HMRC was c.£17m, again reduced to £15m. AB was sentenced to 7 ½ years.
During confiscation proceedings, the Prosecution submitted that the Judge, having determined the value to be £15m at sentence, and that the companies were synonymous with AB, should find that AB's benefit was £15m.
The defence submitted that the Judge was now engaged in a wholly different exercise and should reach a different view as to AB's benefit. The defence submitted i) the evidence was insufficient to determine AB's benefit and ii) because of the way the VAT recovery system operates, there was a risk

of double recovery which would render the order disproportionate.

The Judge rejected the defence submissions. Having made a primary finding that no VAT had been paid on the evidence available at sentence, he would not come to a different conclusion at the confiscation stage where no additional evidence had been adduced. The Judge determined that AB had benefitted from his criminal conduct, the value of that benefit was £15m, and the available amount was set at £1.8m.

The appeal: AB appealed on four grounds, the primary ground being that there was insufficient evidence upon which the Judge could properly determine that AB had benefitted, or the extent of his benefit.

The CACD dismissed the appeal.

It was common ground that the jury's verdict was not determinative of the extent to which AB had benefitted from the conspiracy. The trial Judge was therefore required to determine the factual basis upon which to sentence.

The CACD determined that the real issue for them to consider was whether for the purposes of confiscation, there was sufficient evidence to enable the Judge to determine the extent to which AB had benefitted, and whether he was entitled to determine that benefit was £15m. In this case, because the Judge primarily determined the basis for sentence on the extent to which AB benefitted from the conspiracy, they reviewed the evidence upon which that determination was made.

The CACD rejected the suggestion that there was insufficient evidence to enable the Judge to determine the extent of AB's benefit. The Judge had been entitled to conclude on the evidence that no VAT was paid to the supplier traders.

It was unsurprising that the Judge would reach the same conclusion, on the same available evidence, for the purposes of confiscation as he had at sentence. Although the Judge's determination for sentence was distinct from confiscation proceedings, in reality the question was the same, namely the extent of AB's "gain" or "benefit".

The CACD was satisfied there was no question of disproportionality. HMRC had pursued the defaulting traders, but none had or would be paying VAT to HMRC, there was therefore no risk of double recovery.

Comment:

Although sentencing and confiscation are distinct exercises, in cases where a Judge has determined the value of a conspiracy at sentence, it is perhaps unsurprising that absent any evidential change, the same determination may well be reached in respect of benefit at the confiscation stage. Of course, each case will be fact specific, but the CACD confirmed there was nothing wrong in the Judge's approach in this case.

Concealing criminal property s327(1) POCA – can legitimate but undeclared profits amount to "criminal property" for the purposes of Part 7 of POCA

Richardson [2024] EWCA Crim 1286

By Aska Fujita

R, his wife and sister were charged with offences related to the fraudulent evasion of taxes totalling £2,177,246.18 by companies they operated and controlled, including SBR (UK).

SBR (UK) was incorporated in February 2007. It was not registered for VAT until December 2011 and could not charge VAT on its supplies. However, from incorporation to December 2011, SBR (UK) used the VAT registration of another company controlled by R and purported to charge VAT on sales invoices to customers. From December 2011 when it registered for

VAT and used its own VAT registration number, to its liquidation in July 2015, SBR (UK) did not account to HMRC on any of the VAT purportedly or actually charged to its customers.

On 13th September 2012, SBR (UK) received into its business account a credit of £529,569.64 from Network Rail, which mixed with other funds in the account. The same day, three payments totalling £220,000 were transferred from bank accounts in the name of SBR (UK) to the applicant's personal accounts. On 14th September 2012, £219,123 was transferred from the applicant's personal account to the account of Vickie Amas. Ms Amas then transferred £219,000 to solicitors for the purchase of Ilex Cottage, which was in her own name.

Count 4 was charged under section 327(a) POCA 2002, the particulars being:

> "Ben Stewart Richardson and Vickie Marie Amas, between the 1st Day of September 2012 and the 30th day of September 2012, concealed, disguised, converted or transferred criminal property, namely monies in the sum of £219,123, knowing or suspecting that they represented in whole or in part and whether directly or indirectly, benefit from criminal conduct."

On 8th November 2022, the appellant pleaded guilty to fraudulent evasion of VAT (Counts 1, 2, 3 and 7 on the indictment; Count 2 was the failure to account for VAT in respect of SBT (UK) set out above), concealing criminal property (Count 4), fraud by failing to disclose information relating to the Construction Industry Scheme returns (Count 8), fraudulent evasion of PAYE income tax (Count 9) and fraudulent evasion of PAYE National Insurance Contributions (Count 10).

On 3rd March 2023, The applicant was sentenced to a total term of six years' imprisonment. For Count 4, the applicant was sentenced to three years and ten months, to be served concurrently with the other sentences. A timetable for confiscation proceedings under Part 2 POCA 2002 was set. Count 4 is the only offence the appellant was sentenced for which is listed in Schedule 2 to POCA 2002. Due to Count 4, the confiscation proceedings were based on the applicant being deemed to have a criminal lifestyle.

The appeal

R sought an extension of time to appeal on the basis that the £219,123 referred to in the particulars of Count 4 was drawn from legitimate trading receipts of SBR (UK) and not criminal property; the guilty plea was entered under a mistake in law. It was submitted on behalf of the appellant that should the conviction for Count 4 be quashed, the criminal lifestyle provision of POCA 2022 would not apply.

The issue was whether the £219,123 amounted to "criminal property" within s340(3) POCA 2002.

The definitions of Part 7 POCA 2002 are set out in section 340 POCA 2002.

The CACD noted the issue of whether funds from legitimate trading activity could be "criminal property" for the purposes of s340(3) had previously been examined in the following cases:

(1) *Gabriel* [2006] EWCA Crim 229: the Court recognised that whilst the failure to declare profits for the purposes of income tax may give rise to an offence, that does not make the legitimate trading in goods an offence of itself.

(2) *I K* [2007] EWCA Crim 491: the Court found that a person who cheats HMRC obtains a pecuniary advantage as a result of criminal conduct within the meaning of s340(6) POCA, in which case the undeclared takings from legitimate

trading constitute a "benefit" within the meaning of s340(3)(a) POCA.

Criminal property

The Court in *Richardson* considered it '*established that where a person has been proved to have cheated HMRC, legitimate but undeclared profits may amount to "criminal property" for the purposes of Part 7 of POCA, as they represent, at least "in part" the tax of which HMRC has been cheated*' [para 22].

SBR (UK) had collected VAT from its client invoices but had never paid it to HMRC, resulting in SBR (UK)'s funds including the VAT owed to HMRC. Thus, the £219,123 which was the subject of Count 4 was criminal property for the purposes of s340(3) POCA.

The Court was satisfied that once the Network Rail credit of £529,569.64 had mixed with the funds in SBR (UK)'s account (which constituted criminal property), they were indivisible. Accordingly, the fact that SBR (UK) had yet to account to HMRC on VAT for the Network Rail credit was immaterial.

The application for an extension of time was refused, as was the application for leave to appeal against the conviction on Count 4.

Comment:

Post-*Richardson*, there is very limited scope (if any) for arguing that the legitimate but undeclared profits do not amount to criminal property under s340(3) POCA where fraudulent evasion of VAT has been established. The fact that the business was legitimate is immaterial, as is whether part of the profits are yet to be declared.

APPEALS AGAINST SENTENCE

Use of vehicle as a weapon

Deeprose [2024] EWCA Crim 1431

By Anthony Orchard KC

In what circumstances is an offender to be taken as having taken a weapon to the scene of an offence, where the weapon is a vehicle that has been driven to the scene? The resolution of this issue will affect, for the purposes of sentencing, the starting point for setting the minimum term for an offence of murder, or the correct categorisation of an offence of attempted murder. The CACD, in dealing with this question, heard these two appeals together.

To fall within paragraph 4 of schedule 21 (twenty-five year starting point for minimum term for murder), the offender must have taken the car to the scene. The car must have been taken to the scene with the intention of committing an offence or having it available to use as a weapon. The car must have been used as a weapon to commit murder (or attempted murder – see below). If these matters are proved, the offender will fall within the paragraph.

These features in combination, also involve a "high" level of culpability as described in the guideline for attempted murder. That high level of culpability arises from the premeditation, planning and danger that arises where a person takes a weapon to the scene where they then use the weapon, or have it available, to commit the offence. Such elements are just as present where the weapon is a car, as where the weapon is a knife.

A number of helpful examples of when a vehicle may or may not be 'a weapon' for the purpose of sentencing were outlined by the Court. It also reminded the reader that paragraph 4 (2) is not restricted to knives, but also relates to any "other weapon",

including a stick and a bottle (*R v Howson* [2016] EWCA Crim 655); a hammer (*R v Thompson* [2012] EWCA Crim 135); and even a rolling pin (*R v Singer* [2014] EWCA Crim 1322).

The CACD, following *R v Beckford* [2014] EWCA Crim 1299, [2014] 2 Cr (S) 34, was of the opinion a car can undoubtedly be a weapon and could see no reason it should be incapable of being taken to the scene.

The Court decided the critical feature to be that car is taken to the scene not just as a mode of transport, but with the intention of using it, or at least having it available, as a weapon.

The Court acknowledged that just as there may be fine distinctions between different situations in which a knife is taken from one place to another, so the same may apply to the use of a car as a weapon. As with cases where a knife is the weapon involved, the court will have to make a judgment. Where an offender goes and gets his car from a car park 100 yards away from the point at which he drives at and kills his victim with the car, this may be a case where the offender has taken the car to the scene as a weapon. The same may not apply where the car is parked across the road from where the car subsequently is used as a weapon. The Court stressed every case will be fact specific, adding that the fact that some cases may be on the borderline is no reason to exclude cars as weapons which may be taken to the scene.

Appeal against sentence - Approach to and departure from minimum sentence starting points specified by schedule 21 and s.5A Sentencing Act 2020 for defendants under 18.

Ratcliffe [2024] EWCA Crim 1498

By Dickon Reid

On 11th February 2023, 15 year old SJ met up with Brianna Ghey, who was 16 years old. The two knew each other from school. Also with SJ was her friend, the applicant, ER, also 15 years old. ER had brought with him a hunting knife. The three of them walked to a local park where SJ and ER used the knife to stab Brianna 28 times to the head, neck, chest and back, killing her. It was a brutal and shocking murder, resulting from a sustained and very violent assault. The case was unusual, not least because of the youth of the assailants and their victim and the viciousness of the assault, but also because of graphic and sinister exchanges between SJ and ER in the build-up to the attack. The attack was also based on hostility to Brianna as she was transgender.

The trial: SJ and ER denied stabbing Brianna and blamed each other. They were both convicted of her murder. SJ later admitted her guilt; ER maintained to a Probation officer that he had not stabbed Brianna. Subsequently, both were sentenced to detention at His Majesty's pleasure with respective minimum terms of 22 years and 20 years. Prior to the murder, both had been of good character.

Approach to sentence- establishing the Starting Point: The trial judge, Mrs Justice Yip, was obliged to identify the appropriate starting point for the minimum term in accordance with Schedule 21 to the Sentencing Act 2020. The applicant conceded the appropriate starting point was 17 years as per paragraph 5A [15-16 year old defendant; taking a knife to the

scene intending to commit an offence]. The Crown submitted that the seriousness of the offence was "particularly high", as per paragraph 3(1)(a) of Schedule 21. The effect of that was to invite a 20 year starting point provided for in paragraph 5A. Paragraph 3(2) of Schedule 21 provides that cases that would normally fall within 3(1)(a) include, *inter alia*, murders involving sexual or sadistic conduct [subsection e] or those aggravated by racial or religious hostility or by hostility related to sexual orientation [subsection g].

In respect of SJ, the judge concluded that the murder involved sadistic conduct. With regards the applicant, the judge then said that, although his motives may not have been the same, he knew what Jenkinson wanted to do and why and he understood her desire to see Brianna suffer. Given his participation in the murder knowing the sadistic motives behind it, he was unable to avoid the consequences by saying he did not have the same desires.

As to whether the murder was aggravated by hostility related to sexual orientation, the judge noted that Brianna was transgender, in that she was born male, but by the time of her death she was receiving hormone therapy and was living, dressing and referring to herself as female. With reference to dehumanising and transphobic messages exchanged between SJ and the applicant, the judge concluded the applicant was motivated in part by transphobia towards Brianna.

Accordingly, the judge took an appropriate starting point for both as 20 years. SJ's sentence was elevated reflecting aggravating features in her case.

The appeal: The applicant appealed against the minimum term imposed on him. Seven grounds of appeal were advanced on his behalf, as follows:

(1) The imposition of a minimum term of 20 years was "manifestly excessive".
(2) The judge erred in determining a 20 year "starting point" for ER as well as JS.
(3) The judge failed to reflect the age and level of maturity of the applicant when determining the appropriate "starting point."
(4) The judge erred in increasing the starting point to a notional level reflecting aggravating features disproportionately against the applicant.
(5) The sentence imposed does not sufficiently reflect the personal mitigation advanced on behalf of the applicant based upon his ASD diagnosis and significant impairments in functioning.
(6) The judge failed to sufficiently distinguish between the role and culpability of JS and the applicant.
(7) The judge failed to structure and fully give reasons in her sentencing remarks which makes it impossible to gauge the different levels of uplift and downward adjustment for the respective aggravating and mitigating features. Figures are arrived at but it is not possible to understand the path or reasoning leading to the figure for either JS or the applicant.

Dismissing the appeal, the CACD addressed each of the proposed grounds of appeal in turn, save for ground 1, which it viewed as, in substance, a summary of the alleged effect of the other grounds.

With reference to s.322 Sentencing Act 2020, the Court stated that the first step for a judge sentencing in a case such as this is

to identify one of the starting points in Schedule 21. As emphasised by paragraph 8 of schedule 21, a starting point is, as its name suggests, merely a starting point. Detailed consideration of aggravating or mitigating factors thereafter may result in adjustment of a minimum term whatever the starting point, or in the making of a whole life order.

In their judgement, the Court stressed that it is unhelpful, and can be confusing, to refer to anything other than the starting point chosen from Schedule 21 as the "starting point" in any particular case. In other words, the first step in a sentencing exercise such as this is to identify where withing Schedule 21 the offence sits. Thereafter, in a separate exercise, to consider aggravating and mitigating factors. Applying this, the Court dismissed grounds 2 and 3 as premised falsely. Dismissing ground 2, the Court ruled that if, with reference to paragraphs 3 to 5A of Schedule 21, 20 years was the appropriate starting point in the applicant's case, it does not cease to be so merely because SJ's culpability was greater. In those circumstances, the role played by each of SJ and the applicant in the murder would be a matter to be taken into account when considering aggravating and mitigating factors.

Dismissing ground 3, the Court said that, in choosing 20 years as the appropriate starting point, the judge took account of the applicant's age to the extent provided for by paragraphs 3 to 5A of Schedule 21, since those paragraphs provide for different starting points in the case of offences of particularly high seriousness committed by defendants who are 18 or older (30 years), 17 (27 years), 15 or 16 (20 years) or 14 or younger (15 years). Once the appropriate starting point has been chosen, the offender's age and maturity may be a matter to be taken into account when considering the aggravating and mitigating factors, but they do not affect the choice of the appropriate starting point

As an aside, at appeal, the respondent submitted that the seriousness of Brianna's murder was in fact "exceptionally high" in the sense in which that expression is used in paragraph 2(1)(a) of Schedule 21. That submission had not made at the sentencing exercise. In the case of an adult, that would have resulted in a whole life order. Such orders cannot be imposed on defendants who were under 18 when they committed the offence and paragraph 5A of Schedule 21 does not provide a starting point for offences whose seriousness is "exceptionally high".

Of significance, the Court observed that the judge found as a fact that the murder was partly motivated by hostility related to sexual orientation on the applicant's part. In its ruling it said that the Court of Appeal will not interfere with a finding of fact made by the sentencing judge unless it is satisfied that no reasonable finder of fact could have reached that conclusion: see, for example, *R v Cairns* [2013] 2 Cr App R (S) 73 at [10].

The Court concluded that the sentencing judge was entitled to choose 20 years as the appropriate starting point in the applicant's case given the sadistic and transphobic nature of the murder. It then assessed the numerous aggravating and mitigating factors present and endorsed the approach taken and findings made by the judge. Accordingly, the appeal was dismissed.

AG reference - Conspiracy to supply drugs – challenge to trial judge's finding of facts and sentencing category – factors considered when not interfering with a sentence

Roberts and others [2024] EWCA Crim 1397

By David Osborne

This was a sentencing case by way of AG reference. The three appellants were convicted of a conspiracy to supply drugs. The CACD expressed reluctance to interfere with the sentencing judge's finding of facts after trial and with the sentencing category into which each offender was placed.

The CACD upheld the sentences of 9 years' imprisonment for both DR and MR, rejecting the Attorney General's arguments for categorizing them as having leading roles throughout the entire conspiracy. Regarding GB, the CACD granted leave to refer his sentence but ultimately did not alter the suspended sentence of 2 years.

The CACD emphasised its reluctance to interfere with the trial judge's findings of fact and application of sentencing guidelines. They stressed that an appellate court should not readily overturn a judge's assessment, particularly when it involves evaluative judgments based on a comprehensive understanding of the evidence presented during the trial.

The Court said that a challenge to a judge's categorisation of an offender's role in a sentencing appeal "should not be upheld unless this court is satisfied that the judge's categorisation of the Offender's role was plainly wrong."

The Court recognised the trial judge's advantage in having heard all the evidence, observed the defendants' demeanour, and assessed their credibility during the trial. The Court highlighted the importance of allowing trial judges to exercise their discretion in applying sentencing guidelines, acknowledging that these guidelines often require a balancing act to reach a fair and just outcome.

The CACD highlighted that overturning the judge's decision to suspend the sentence would be a drastic measure, particularly considering Barnes's youth, immaturity, previous good character, and the time elapsed since the events.

SENTENCING APPEAL ROUND UP

By Harry O'Sullivan

Indecent pseudo-photographs - "taking or making of an image at source" – production or possession

Jaycock [2024] EWCA Crim 954.

D pleaded to making indecent pseudo-photographs. Police seized D's computer and found indecent images of three children, two of them known to D, depicting activity falling into all three categories. The images had been digitally edited by D in order to superimpose the faces of the children onto downloaded pornographic images of adults. The judge approached sentence as production, rather than mere possession, of the images, and located the offending within Category A, given the activities shown, but at the lower end of the range given D had not himself produced the images of sexual activity. There had been a breach of trust owing to D's friendship with the mother of one child and the offences were aggravated because the images depicted exploitation, bondage and distress. Also aggravating was D's previous conviction involving similar pseudo-images. D had made admissions to police which amounted to mitigation. The judge took a starting point of 5 years, towards the lower end of the 4 – 9-year range indicated for Category A production offences.

Held. There was no error in the judge's approach. There was an inconsistency in the previous decisions of the Court. *R v Norval* [2015] EWCA Crim 1694 had addressed the meaning of "taking or making of an image at source" in the Guideline, where offending had involved a child's head superimposed onto images of naked adults. In that case, the Court concluded that this activity ought to be treated as an offence of possession. This was to be contrasted with the approach taken more recently in the case of *R v Bateman* [2020] EWCA Crim 1333, concerning very similar facts. In the more recent decision, the Court concluded that the divide between possession and production was not to be rigidly construed. What may begin as possession of a downloaded copy of an image may then be produced into something different and more offensive. The Guideline category most closely resembling the offending in the present case was therefore rightly assessed as being that for production of the images. Manipulation of the photographs was substantially more serious than merely downloading them. Superimposing a picture of a child's face onto a picture of an adult body showing a sexual pose or activity amounts in fact to the creation of a new indecent image of a child and should be treated for sentencing purposes as a production offence. Appeal dismissed.

Comment:
This decision is the latest in which the Court has been forced to grapple with a type of offending unlikely to have even been possible when the Protection of Children Act 1978 was drafted. The ability for offenders to access sexual pseudo-images of children will likely only increase as photo-editing software and access to advanced tools such as artificial intelligence improves. The Court rightly recognises that offences such as these are not without harm simply because no contact offending takes place. The children in question are unable to consent to the use of their images for sexual gratification and the adult subjects of the underlying images would presumably object to their likeness being used in furtherance of child sexual exploitation. Further, as the technology improves, it will likely become harder for investigators to accurately distinguish between a real image of abuse and a digital manipulation. There are therefore good public policy reasons to treat the digital creation of such images as being comparably serious as taking originals. Against that, and as the Court recognised, proximity to the underlying child abuse will usually be a relevant consideration. Accordingly, in this case, the sentencing judge was right to take a starting point towards the lower end of the category range, in recognition of the fact that no direct harm was caused.

2005 conviction (D aged 18) - Gbh – dangerousness – detention for public protection lawfulness of that sentence – recall on licence

Ashmore [2024] EWCA Crim 1083
D was convicted of causing grievous bodily harm with intent in 2005, then aged 18. He had taken part in a group attack on a man outside a pub including kicks and stamps delivered to the head, causing a broken jaw among other injuries. D had a previous conviction for violent disorder dating to 2003. In accordance with the statutory provisions then in force, the judge proceeded on the basis that D was to be presumed to be dangerous and that there were no reasons to exercise the discretion not to make that finding and so imposed a sentence of detention for public protection. D had been released after serving over 6 years but later recalled on this

indeterminate sentence in 2020 owing to suspected involvement in drug offences.
Held. The sentence imposed in 2005 was unlawful. D was aged 18 at conviction and the sentence ought to have been imprisonment for public protection (IPP) under Criminal Justice Act 2003 s 225, rather than 'detention' under s 226. This court considering that sentence almost 20 years later is not a court of review and must not seek to substitute the original judge's exercise of discretion simply because a different decision might have been taken. Instead, the Court looks to whether an error of principle occurred in the determination that D was dangerous. The considerations in Lang [2005] EWCA Crim 2864 were not followed, in particular as to D's youth, immaturity and the lack of evidence of future risk. The presumption that D was dangerous ought to have been displaced and accordingly a sentence for public protection was not available. 3 years 6 months substituted (already served).

Comment:
This is a relatively rare example of the CACD deciding to come to the assistance of an appellant falling foul of IPP, now long-repealed and recognised to have produced injustice: partly due to the blunt presumption of dangerousness and partly due to the lifetime licence which followed. Those still serving IPP sentences may currently apply to the Parole Board for the termination of their licences but only 10 years after initial release. Reforms which come into force on 1/02/25 will introduce automatic licence termination for those released at least 5 years ago and permit the Parole Board to end licences sooner than that upon application. In this case, although the appellant now awaits sentence for the new drugs offending, it was fortunate that the Court were satisfied that the original judge had fallen into error when accepting the presumption that he posed a danger to the public.

D aged 17 – bladed article – committed further offence aged 18 whilst on bail – no "cliff edge" at 18 – ZA

A-G's Ref 2024 Re Watson-Berry [2024] EWCA Crim 1098

While aged 17, D pleaded to possession of a bladed article. He had used a knife to inflict five serious stab wounds to his father's back but asserted that he had acted in self-defence. The prosecution did not pursue more serious charges. Three months later, having turned 18 in the interim, and by then on court bail for the knife offence, D committed a street robbery. Along with two others, wearing face coverings, they punched a man and took £600 and an expensive coat. Two weeks later, D and the same group arranged to meet a man who was offering to sell electrical bicycles online. When he arrived with his step-father, D's group held them at knife point, produced an imitation firearm and removed two bicycles from their vehicle before leaving. The victim and his step-father suffered from anxiety, stress and flashbacks after the event. D denied these offences but was convicted after trial of the two robberies, two further bladed article offences and possession of an imitation firearm. Before the first blade offence, D had no previous convictions. The most recent and most serious robbery was treated as the lead offence; the judge placed it within category 1A given a finding of serious psychological harm caused to the victim and the use of weapons. This would have provided for a starting point of eight years' custody and a range from seven to 12 years. Aggravating features were the significant planning, the high value of items taken and D's leading role. Mitigation acknowledged by the judge was D' youth,

lack of previous convictions, his own experience of trauma, character references and his very recent fatherhood. The judge made express reference to D's youth and the fact that turning 18 was not a 'cliff edge'. With regard to totality, the sentences were then imposed concurrently amounting to 3 years 9 months' custody in total.

Held. This sentence was unduly lenient. The judge's starting point was not adequately adjusted to reflect the aggravating features nor the seriousness of the other offences before the court. The practical effect was that the earlier robbery and knife offences had had no impact on the sentence. The judge was correct to recognise, in accordance with ZA [2023] EWCA Crim 596 that the sentencing of young people is invariably difficult and that D was not to be treated as having become a fully mature adult on the night of his 18th birthday. However, each of the robberies required an upwards adjustment to reflect the aggravating features rightly identified by the judge and the fact that the offender was on bail at the time. Making every allowance for totality, the least sentence for a mature adult on these facts would have been 11 years and accordingly the total sentence for D ought to have been no less than 6 years detention. Given D had no prior experience of the criminal justice system and was correctly described as continuing to mature, the judge was correct in declining to find D dangerous on these facts.

Comment:

This case serves to emphasise the difficulty in sentencing young people and particularly those who commit offences on the cusp of legal adulthood. The judge, having sat through the trial adopted a lenient approach to sentence, having concluded that there was a real prospect of rehabilitation for this offender. This approach in itself was commended by the CACD, but had produced on these facts an excessive reduction below the adult starting point.

Murder – whether falsely seeking to cast blame on another is aggravating factor

Koroma [2024] EWCA Crim 1539

D was convicted of murder and arson reckless as to endangering life. He had killed his wife in their home by stabbing her four times in the face and neck causing massive blood loss and death. She had been attacked while asleep in her bed. D then poured petrol on her body and set the house alight in an attempt to destroy evidence, including placing her phone with her body. There was evidence that D had planned the attack in the preceding 48 hours. Motive for the killing remained unestablished, but the couple had had a 20-year marriage which had featured long periods of separation, infidelity, disagreements over money and past violence. V told friends that she planned to leave D, had purchased a ticket to go to Sierra Leone and spoke of fearing for her life and that D was threatening her. At trial, D blamed his 17-year-old son for the offences. D had one irrelevant previous conviction and was 48 years old at sentence. The judge identified 15 years as the applicable starting point within schedule 21 and the following aggravating features: this was a planned murder of a woman in her own home and constituted a violation of trust, their son was asleep in the house at the time, a knife had been used to inflict four stab wounds, there had been a background of threats and abuse, D wrongly sought to blame his son for the killing, D severely burnt V's body in an attempt to destroy evidence. These features led to a minimum term of 26 years. Turning to the arson offence, there was a clear risk that the fire would quickly spread into adjacent dwellings and endanger the

lives of the occupants, as well as to D's son, particularly given the use of petrol as an accelerant. For that offence alone the sentence was 7 years, but in light of totality this was reflected in the eventual minimum term of 27 years 6 months and 9 days (29 years less 537 days on remand, in the format for declaring the minimum term now clear following Sesay [2024] EWCA Crim 483).

Held. It was suggested that the judge had been wrong to treat D's attempt to cast blame on his son for the killing as an aggravating feature. *R v Lowndes* [2013] EWCA Crim 1747 was cited as authority for the principle that an attack on another in one's defence should never amount to an aggravating feature at sentence. The Court disagreed and distinguished the facts of *Lowndes* from the present case. Here the defendant did not simply try to lie or cast blame but went significantly further and through his defence compounded the grief his son would have felt in these horrific circumstances, causing further harm. However, turning to the impact of aggravating features overall, the increase from 15 to 26 years was too great. Further, the increase of 3 years to reflect the arson offence was arguably disproportionate. Therefore, the minimum term will be 23 years 6 months and 9 days (25 years less time on remand, not 29).

Comment:

The crucial distinction at the heart of the discussion in this judgment is between cases where a defendant simply tries and fails to suggest that someone else was responsible, and those cases where a defendant goes beyond this in their efforts and causes additional harm. The standardised aggravating feature in the guidelines "Blame wrongly placed on other(s)" indicates that an offence is more serious where blaming someone else either hinders the investigation or causes that person to suffer, but not where an offender has simply exercised their right to silence or denial. This case, *Lowndes*, and more recently Norris [2024] EWCA Crim 68, attempt to delineate a difficult distinction. One can readily imagine that any innocent party would 'suffer' to some extent if it were suggested that they were responsible for an offence. Does the fact that the innocent party here was the victim's 17-year-old son make a difference in deepening the grief already caused? Certainly there is a rather hollow line to be drawn between an aggravating feature and "the absence of a mitigating feature" which it has to be said, feels rather too close to punishing a defendant more severely for exercising his right to trial, however unattractive the defence he elected to pursue may have been. Ultimately, the CACD is careful to say that the presence of this feature will always depend upon a careful examination of the facts, but those involved in such cases should be careful to establish that there is actual evidence of the additional harm caused before submitting or acquiescing to the "blamed another" uplift.

Large-scale violent disorder - nationwide – following Southport stabbing in July 2024

Cush and others [2024] EWCA Crim 1382

The CACD considered four joined appeals which concerned defendants who had been sentenced for their role in large-scale violent disorder occurring nationwide in the aftermath of the tragic stabbing of three young girls at a dance class in Southport in July 2024. A wave of violence, in various towns and cities and inspired by online misinformation and far-right sentiment, was targeted at mosques and locations housing asylum seekers. Significant damage was caused and injuries sustained. The

appellants in this case had variously been convicted of assaulting emergency workers and violent disorder. Each had been swiftly identified, charged and convicted for their respective roles.

Held: The CACD reaffirmed guidance issued in similar previous cases involving sentences passed at times of national public disorder. Although the precise involvement of each individual is a relevant consideration, that is simply part of the whole picture to which they are contributing. Having all proper regard to the purposes of sentencing and the Guidelines for specific offences, a context of wider public disorder is undoubtedly to be regarded as a serious aggravating factor. In particular, the court highlighted and approved in each case the sentencers' respective intentions to give due weight to deterrence. (the Court went on to consider in each case whether the sentences imposed had been manifestly excessive).

Comment:

This judgment, swiftly delivered by the LCJ, confirms a position made clear in the wake of the 2011 summer riots, that deterrent sentences are to be expected in cases such as these. Each case also serves to underline the importance of these cases reaching sentence promptly if that deterrence is to have any impact on ongoing disorder. A person inclined to join a mob is unlikely to be deterred if those involved the night before are not identified, arrested, charged, tried and publicly sentenced for many months or years. Of course, some of those involved take a longer period to be identified, but one must question how the criminal justice system suddenly found the capacity to so swiftly deal with these offenders when we are told daily that serious Crown Court trials are being removed from the lists for lack of courtrooms or judges.

Special custodial sentence - Rape – assault by penetration – 15 year old victim – gross breach of trust – immediate and lasting harm

s.11(3) CAA 1968 - substitution sentence – "taking the case as a whole, more severe than before"

ES [2024] EWCA Crim 753

D was convicted of rape and assault by penetration. The victim was his 15-year-old step-granddaughter who had been living with him and his partner under a special guardianship order. The second offence had involved digital penetration of the same victim one day after the rape. The offences had involved a gross breach of trust and caused immediate and lasting harm to the victim. The judge imposed a special custodial sentence of 11 years' imprisonment (10 years' with 1 year extended licence) for the rape and 3 years (2 years' with 1 year extended licence) consecutive for the assault by penetration.

Held. The sentences were unlawful. The special custodial sentence under Sentencing Act 2020 s 278 was only required or available for offences listed in Sch 13 to that Act. That schedule does include rape and assault by penetration of a child aged under 13, but not the offences involved in this case, because V was aged 15 at the time. Those sentences were unlawful and therefore quashed.

The CACD then considered Criminal Appeals Act 1968 s 11(3) and the need to impose a replacement sentence which was not, "taking the case as a whole, more severe than before" (to summarise the provision). An issue arose owing to the change in release arrangements between D's sentence and the appeal. At the time of D's sentence, release from the special custodial sentence was after serving 1/2 of the custodial term and upon Parole Board direction. By contrast, the position by the

time of the appeal was that release from a determinate sentence of at least 7 years, would be automatic, but only after serving 2/3 of the term (applicable to the rape offence, ½ release would still apply to the shorter consecutive term for the assault by penetration). Previously, D would have been eligible for directed release after serving 6 years (1/2 of 10+2 years), whereas replacement with the same standard determinate custodial sentence would entitle him to automatic release after serving 7 years and 8 months, arguably more onerous 'taking the case as a whole'. Patel [2021] EWCA Crim 231 is the latest in a line of authorities confirming, however, that release arrangements are not relevant in deciding the length of custodial sentences. The position in rectifying an unlawful sentence on appeal in accordance with s 11(3) is however an exception to that principle. Thompson [2018] EWCA Crim 639 provides for a similar situation to the instant case: the quashing of an unlawful special custodial sentence. Here, the change from a special custodial sentence to a determinate sentence would not delay the date of D's unconditional release entitlement. The involvement of the Parole Board in the arrangements for the initial sentence means that D could not have been certain of release being directed after 6 years; they might have refused it at that stage. It is the date of automatic release which must be central to the assessment of "more severe" for s 11(3) purposes. The determinate sentence did not therefore to be reduced to secure the same earliest release point and the substituted sentence was 12 years in total.

Comment:

The ever-shifting sands of release strike again. Given the increasing complexity of the release arrangements, frequently the levers of a government tinkering with the deckchairs of the prison population, it is hardly surprising that issues such as this arise. Defendants are not especially concerned with the period they will spend on licence; it is the shortest possible length of time until they can hope to be released that is important to them in the experience of those who advise them on the day of sentence or appeal. To that end, decisions such as this are logically and legally valid, but perhaps s 11(3) does not realistically cater for human minds. The provision is intended to safeguard appellants against a worsened outcome, which might otherwise have deterred their appeal. Would the appellant in this case have been grateful to the Registrar of Criminal Appeals for spotting the sentencing judge's error given they will now serve an additional year and 8 months before any form of release is a possibility?

[Ed: [An analysis of the law relating to s.11(3) CAA 1968 is set out in Taylor on Criminal Appeals, para 11.82 onwards.]

Conspiracy to steal – AG reference

A-G's Ref 2024 Re Counihan [2024] EWCA Crim 747

Four defendants pleaded guilty to conspiracy to steal. Each had played a part in an enterprise which stole fibre optic installation equipment to the value of £113,192 from BT Openreach vans across 8 counties and involved dozens of individual thefts or attempts and caused £390,627 total losses to BT. Each defendant had specialist knowledge of the sector and of the equipment they stole. Typically, targeted vans were accessed via holes cut into roof panels. The defendants were linked via extensive telecommunications evidence. Three of the four advanced bases of plea, but none implicated any other person nor was clearly identifiable as the

controlling mind of the conspiracy. The judge concluded that each defendant's role fell between high and medium culpability, but that harm was firmly within category 1. The judge adopted a starting point before mitigation and credit said to be 'in the region of 2 ½- 3 years' imprisonment'. The judge then variously acknowledged the mitigating features in each defendant's case, particularly delay given 2 years had passed between plea and sentence for three of the four. The resulting sentences were 16 months, suspended for 12 months with 150 hours unpaid work, with full credit (save one defendant pleaded significantly later and after a trial date had been set and received the same sentence albeit with a differing percentage reduction).

Held. There was no doubt that the judge was correct to place this offending within category 1. This was a brutally effective conspiracy involving high value and sophisticated individual thefts on a nationwide scale. The losses were significantly higher than the £100,000 figure on which the category starting point is based. As to culpability, there were certainly elements of higher culpability present to justify a Category 1A starting point. There were unusual features of this case: the lack of evidence as to the hierarchy within the conspiracy and who the leader was, and the substantial delay during which the defendants had significantly 'turned their lives around'. In light of these unusual features, the judge was justified in adopting the very humane approach necessary to have produced suspended sentences. These were lenient sentences which at first sight appear to be far too low but in view of the exceptional features here, they were not unduly so and the Court declined to intervene.

Comment:

This is a particularly complex set of facts on the individual defendants' respective cases and perhaps is not of enormous assistance to anyone seeking to establish the correct sentence for any similar conspiracy. The defendants' roles are too unclear and the impact of delay is the overwhelmingly more significant feature. That delay might not have been so great had one of the four not initially elected to plead not guilty, and his co-conspirators were the beneficiaries of this decision to some extent, much later. In a struggling criminal justice system, it will become increasingly more common to find defendants who have completely turned their lives around between committing offences and the day of sentence and perhaps what was once significant mitigation will become routine.

NORTHERN IRELAND COURT OF APPEAL

Ellen Pauline Teresa Gallagher (nee Mclaughlin) [2024] NICA 63

The judgment in this historic appeal provides a detailed analysis of the following issues:

(1) Criticism of trial counsel as a ground of appeal;

(2) Evidence of the appellant's low IQ, illiteracy and ill-treatment by police relevant to: (i) The admissibility and/or reliability of purported statements of admission; and/or (ii) The formation of the specific intent.

(3) Limited material available to the NICA in an historic appeal;

(4) The relevant legal principles applicable in Northern Ireland at the time of convictions

Biographies of 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).

Anthony Orchard KC has prosecuted / defended in numerous homicide cases at the CCC and elsewhere. Notable appellate cases include: R v. Peters ; Palmer; Campbell [2005] 2 Cr. App. R.(S.) 101. There is no mathematical scale to fixing the minimum term in a murder sentence; R v Jones [2006] 2 Cr App R (S) 19. Guidance as to the fixing of the minimum term in cases of murder, particularly those of exceptional seriousness; R v Lindo [2016] EWCA Crim 1940. Mental health and drugs. Public policy proceeds on the basis that an offender who voluntarily takes alcohol or drugs and behaves a way in which he would not have behaved when sober is not normally excused responsibility. People who take drugs run the risk of suffering side effects such as psychosis; R v Edwards [2016] EWCA Crim 595. Hospital and Limitation Direction Orders under s.45A Mental Health Act 1983

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.

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.

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.

David Osborne has been instructed by the Criminal Appeals Office to act on behalf of unrepresented appellants. He maintains a significant defence practice involving homicide, attempted murder, large-scale drugs cases and grave sexual offending. He was a solicitor before joining the Bar and sits as a Recorder of the Crown Court.

James Martin is recommended as a leading advocate by both Chambers & Partners and The Legal 500. His practice focuses on Financial and Serious Organised Crime. He appears regularly in the Crown Court as a Leading Junior. He also regularly appears in the Court of Appeal (Criminal Division) instructed by Private Individuals, the Registrar and via referrals from the CCRC.

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.

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

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.

Fiona Ryan is instructed to prosecute and defend, including as leading or led junior. Recent cases include allegations of large-scale drugs importation and supply, possession of firearms, people trafficking and modern slavery. Fiona is particularly experienced in cases of serious sexual offending.

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.'

Ria Banerjee is a tenacious defence barrister and sought after jury advocate. She was recently selected to undertake a 10-month secondment at the Post Office, where she provided specialist advice and assistance in relation to complex cases and matters of appellate law relating to the Horizon scandal".

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.

Olivia Haggar's practice covers the full range of criminal proceedings, but with emphasis on cases involving sexual misconduct and violence. She has particular experience in cases involving young and vulnerable witnesses. Olivia has a developing fraud practice, accepting instructions in serious and complex cases on behalf of both the prosecution and defence.

Harry O'Sullivan is the author of *Banks on Sentence* and was consultant editor for the latest Sentencing and Offender Management volume of *Halsbury's Laws of England* (2021). He joined 5 King's Bench Walk in 2024 and has an exclusively criminal practice prosecuting and defending in London and the South-East. He is the circuit junior of the South-Eastern Circuit. Before coming to the Bar, Harry worked as a researcher at the Law Commission of England and Wales on the codification project which ultimately produced the Sentencing Act 2020.