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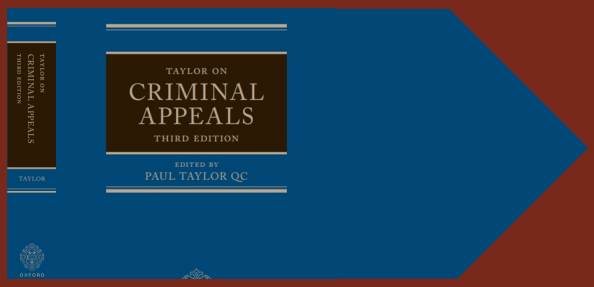
THE APPEAL BRIEF

The 5KBW Criminal Appeals Unit Newsletter



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

In this edition there are summaries and expert commentary on recent judgments from the Court of Appeal (Criminal Division), High Court (Administrative) and the Court of Appeal in Northern Ireland.

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.

There will also be a separate newsletter – *The Appellate Brief*- covering appeal cases from the Caribbean and the Judicial Committee of 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 (including future seminars and podcasts), articles on appellate matters and links to resources for those considering or involved in an appeal or application to the Criminal Cases Review Commission.

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

Follow us @5KBW_CrimAppeal

Contributors to this edition:
Paul Taylor KC
Mark Heywood KC
Charlotte Newell KC
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In this edition:

Seminar

5KBW Criminal Appeals Unit is delighted to present the first in a series of seminars on appellate matters:

The Criminal Appeal Office and Court of Appeal (Criminal Division) [CACD]

- *A practical approach to CACD procedure:* **Master Alix Beldam KC**, Registrar of Criminal Appeals
- *Fresh evidence as a ground of appeal (now and in the future)*: **Paul Taylor KC**, General Editor of *Taylor on Criminal Appeals*

Wednesday 22nd May 2024 at 6pm
Inner Temple Lecture Theatre

Master Beldam KC will discuss the work of the Criminal Appeal Office and the CACD, the procedural framework for launching and pursuing an appeal and the practical issues that often arise.

Paul Taylor KC will analyse the CACD's current approach to grounds of appeal based on fresh evidence. He will also consider potential changes in this area that may follow the recommendations of the Law Commission's Criminal Appeal Project (expected in 2025.)

Please click **here** to register your intertest in attending this seminar.

Latest News from 5KBW

Catherine Farrelly and Jonathan Polnay were appointed as King's Counsel (KC).

Jonathan Polnay and Louise Oakley were appointed as Senior Treasury Counsel.

Ben Holt was appointed Junior Treasury Counsel.

5KBW welcomed three new members: Paul Taylor KC , Kathryn Arnot Drummond and David Osborne

Charlotte Hole and Frederick Hookway were appointed to the Treasury Counsel Monitoree scheme.

Jack Triggs was appointed Deputy District Judge in the Magistrates Court.

To read more news click here.

POTENTIAL GROUNDS OF APPEAL (1): CRITICISM OF TRIAL LAWYERS

By Paul Taylor KC

In the last year, the CACD has handed down several judgments in appeals involving grounds criticising the trial lawyers. This article analyses the approach of the CACD generally to such complaints, lists some practical tips for preparing this ground, and seeks to identify some of the factors that may determine the outcome.

The starting point

All defendants are entitled to a fair trial, and this includes the fundamental right to *effective* legal representation. Consequently, whilst the threshold for an appellant to cross is high, failings by the lawyers instructed at trial can result in the CACD finding that a conviction is unsafe. However, unless the failings are so extreme that they have led to a failure of due process,[1] (see below) the mere fact of a failing without more will not inevitably lead to the conviction being quashed.[2] The failing must be shown to have had a detrimental effect on the safety of the conviction.

As Buxton LJ said in *Mark Darren Day* [2003] EWCA Crim 1060 [15]: [Emphasis added.]

> *"While incompetent representation is always to be deplored it is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that,… the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe."*

A recent example of this approach is *Brooker* [2024] EWCA Crim 103. The conviction was upheld despite the CACD finding that there was "a catalogue of elementary professional errors"[3], and an "erroneous strategic decision" not to challenge the main prosecution witness by cross-examination – "a stance he maintained at trial in the face of a ruling from the judge that he was professionally obliged to do so".

> *"In all the circumstances we are satisfied that his performance of his duties fell below the standard to be expected of a member of the Bar of England and Wales. We are not convinced that the accurate description is incompetence which implies a lack of skill. Here, having*

[1] Eg. *Boodram* [2002] 1 Cr App R 103

[2] Even where the CACD finds that there had been errors by trial counsel, it can still uphold conviction. See for example *Mahmood* [2023] EWCA Crim 1358

[3] [115]. These were said to include "communicated directly with his lay client, …; he took no notes of those discussions or of the advice that he gave; he apparently ignored the request for advice from his instructing solicitors; he failed to comply with directions made at a series of preparatory court hearings and there is no indication that he ever analysed the extensive medical records disclosed during the case."

> *made an erroneous strategic decision on the basis of his personal judgment [counsel], in his role for the defence, failed to comply with orders of the court before the trial and during the trial itself. He is a highly experienced advocate. It is hard to escape the conclusion that this was a deliberate course of conduct…"*[4]

However, notwithstanding counsel's conduct, "we are satisfied that the appellant's conviction is safe for a combination of reasons…"[5]

Practical issues

In order to succeed on this ground, the appellant must be able to demonstrate the "specific prejudice" that arose from the trial lawyers error(s).[6] In practical terms, this will involve:

a. Identifying the error(s); and
b. Analysing what impact these error(s) had on the safety of the conviction.

Identifying the errors

The type of errors that may give rise to a ground of appeal under this heading includes (i) pre-trial preparation and investigation (such as inadequate representation in the police station, failing to obtain witness statements[7], or expert evidence[8], failing to advise on defences that are available[9] that may have resulted in an erroneous guilty plea), and (ii) matters arising in the course of the trial (such as a failure to properly present the defence case,[10] or to properly advise the defendant on the need to give evidence[11].)

Almost invariably this ground will be raised by new appellate counsel who did not act at trial.[12] Accordingly, the first stage will be to establish the factual basis of the specific complaint(s) by obtaining a statement from the defendant, advising upon the need to waive legal professional privilege, obtaining the trial lawyers file, accessing the DCS, and obtaining transcripts of the relevant parts of the trial. The new solicitor / counsel must comply with the requirements set out in *McCook*[13] and send the grounds of appeal to the original trial lawyers. The response must be sent to the Criminal Appeal Office. Where there is a factual dispute between the applicant and the trial lawyers, the CACD may hear evidence from both in order to determine the issue. [14]

Analysing the impact of the errors on the safety of the conviction

When considering a ground of appeal that involves criticism of the trial lawyers, the central question for the CACD may be stated as being: whether, looked at in the

[4] [116]
[5] [117]
[6] *Sutherland & Khan* [2022] EWCA Crim 72 [34]
[7] Eg. *MT* [2023] EWCA Crim 558
[8] See *Ismael* [2024] EWCA Crim 301 (later in this newsletter) where the Court identified failings in relation to properly instructing a psychiatrist in relation to D's fitness to plead and allowed the appeal. [56] …It is sufficient to say that there was a failure by the appellant's lawyers to identify and act effectively in the light of their client's difficulties….." But cf. *Areguy* [2023] EWCA Crim 669 (failure to obtain a CCTV expert did not undermine the safety of the conviction); and *AUV* [2024] EWCA Crim 11.
[9] Eg. *Rashid Mahmood* [2023] EWCA Crim 1358, [46]; As to a failure to advise on the availability of a defence under s.45 Modern Slavery Act, see *AFU* [2023] EWCA Crim 233
[10] See *Brooker* [2024] EWCA Crim 103
[11] Eg. *Rashid Mahmood* [2023] EWCA Crim 1358 [52]
[12] It is possible that in a rare case the trial solicitors may remain involved in such an appeal if the criticism is restricted to trial counsel, and there is no conflict of interest.
[13] *McCook* [2014] EWCA Crim. 734.
[14] For recent examples, see *Brooker* [2024] EWCA Crim 103; and *Mahmood* [2023] EWCA Crim 1358

context of the prosecution and defence cases and "the dynamics of the unfolding evidence and the trial", the complaints "demonstrate impermissible error or irregularity"[15] that undermine the safety of the conviction?

In determining this question, the CACD may consider the following:

1. Was the matter complained of a reasonable tactical decision?[16]
2. Is the complaint based on "the way the applicant's new legal team would have conducted the criminal trial, and is wise after the event of conviction…"? [17]
3. If the complaint is that the trial lawyers failed to take statements from particular witnesses, what could those witnesses have said and how would this have undermined the prosecution case and / or added to the defence case?[18]
4. If the complaint is that a guilty plea was entered on the basis of erroneous advice, did that incorrect legal advice that deprived the defendant of a defence which quite probably would have succeeded such that a clear injustice has been done? [19]

Failure of due process

There have been exceptional cases where counsel's failings were 'so extreme as to result in a denial of due process' to the appellant.[20] In such cases the impact of counsel's conduct on the safety of the conviction is no longer relevant because the conviction was obtained without there having been a fair trial or the appearance of one. In such cases, the strength of the prosecution case and weaknesses in the defence case become irrelevant to the analysis of the safety of the conviction. [21]

When is the ground likely to succeed?

The cases in which this ground may arise are by their very nature fact specific. However, the following matters can be discerned from the authorities as to when the CACD is most likely to quash a conviction based on a ground involving criticism of the trial lawyers:

1. Where the procedural requirements (in *McCook*) have been complied with;
2. Where the complaint raised by the defendant is supported by other evidence (eg. conference notes);
3. Where the complaint relates to a central issue at the trial and may well have affected the jury's consideration of the defence / prosecution cases;
4. Where other grounds are raised in addition to this ground that may cumulatively undermine the safety of the conviction.

[For a fuller analysis of this potential ground see *Taylor on Criminal Appeals* at paras 9.451-9.462.]

[15] *AUV* [21]. See also *MT* [2023] EWCA Crim 558 [69]; *Rashid Mahmood* [2023] EWCA Crim 1358

[16] See eg. *BKI* [2023] EWCA Crim 1420; *AUV* [2024] EWCA Crim 11, [55]: Is the CACD "satisfied that trial counsel's decision was well within the band of reasonable strategical decisions open to him"?

[17] *AUV* [20] "the fact [new appellate counsel] …would have made different tactical decisions does not determine the legitimacy of the tactical decisions made by trial counsel; *MT* [2023] EWCA Crim 558; see *Day* [2003] EWCA Crim 1060 [15]

[18] *AUV* [23-28]; *Areguy* [2023] EWCA Crim 669; *MT* [2023] EWCA Crim 558

[19] *Boal* [1992] QB 591; *Tredget* [2022] EWCA Crim 108.

[20] See eg. *Boodram* [2002] 1 Cr App R 103 PC

[21] See *Taylor on Criminal Appeals* paras 5.42 onwards "Safety v Fairness".

CASE SUMMARIES AND COMMENT

CONVICTION APPEALS

Guilty pleas – appeal against conviction - Unfitness to plead – fresh evidence – extension of time – disposal on appeal

Kamaladin Ismael [2024] EWCA Crim 301

By Paul Taylor KC

Summary

In this judgment the CACD considered the approach to grounds alleging unfitness to plead [15], and carried out a review of the legal framework. [12] – [15].

The grounds of appeal

"There were two grounds of appeal against conviction: that the appellant was unfit to plead when he pleaded guilty to the offences and that the legal representatives had failed in their representation of him. They are two facets of the same issue."

The Court granted lengthy extensions of time to seek leave to appeal, and to rely on fresh evidence from two consultant psychiatrists both of whom opined that KI was unfit to plead at the time he pleaded guilty.

The background

KI had a history of contact with the criminal justice system and the mental health and social services. His first appearance before the courts was just after his 16th birthday. He had been known to social services from 2003. He was diagnosed with Autism Spectrum Disorder (ASD) in 2011 when he was 6. He became a looked after child in 2020.

In 2020 he had pleaded guilty to 12 offences on two indictments (including theft, robbery, offensive weapons, abh). It was these offences that were the subject of this appeal.

In 2021 and 2022 there then followed a series of proceedings relating to further alleged offences. KI was represented by a new solicitor who was concerned about his mental and cognitive abilities and immediately commissioned reports from forensic psychiatrists. In the light of the reports the youth court found that KI was unfit to plead, and ordered an absolute discharge.

Further proceedings were brought in early 2022 following KI's arrest for assault occasioning actual bodily harm and a number of assaults on emergency worker (police officer). Further psychiatric reports were obtained. In October 2022 the judge found the defendant unfit to plead. In July 2023, a jury found that KI had done the acts constituting two counts (while under a disability).

The CACD analysis

The Court analysed the chronology of events leading up to KI entering his guilty pleas in 2020, the failure of the trial lawyers to properly investigate his mental state and particularly KI's understanding of the legal process, and the failure to seek to vacate his pleas. The CACD stated that: [11]

> *"The history of this case is profoundly dispiriting…we are satisfied that the appellant was unfit to plead at the time he entered his pleas of guilty. A review of the papers reveals that before, at the time of, very shortly after the pleas of guilty were entered and for months afterwards there was reason, which became overwhelmingly good reason, to question the appellant's fitness to plead. Nonetheless, the case*

> *proceeded through several court hearings without the issue being raised by anyone. This is highly regrettable. The result was repeated adjournments for further information leading, eventually, to an unworkable sentence based on unsafe convictions. Whilst the effects of the Covid pandemic played a part (directly and indirectly) in the unhappy course the case took, there is no avoiding the failure by all those involved (in particular the defence legal team) to act on the information before them."*

Moreover, even when the trial lawyers did instruct a psychologist (after the pleas had been entered, but before sentence) the expert was instructed to assess the intellectual capacity, suggestibility and understanding of KI and to advise as to his appropriate management and assist in his appropriate disposal. As the Court noted, this was in the light of the guilty pleas and with a view to sentence. [39] The instructions did not include consideration of unfitness.

The psychiatrist instructed at the same time opined that the appellant had "a very low IQ…which indicates a diagnosis of learning disability. His mental functioning is equivalent to that of a child of seven or younger. This is in addition to his Autistic Spectrum Disorder diagnosis." He "does not appear to have a working understanding of his current situation and will not be able to participate meaningfully in court proceedings. He would need an intermediary if required to give evidence. His appearance in court should be avoided if possible…." [40] He opined that the appellant did not have "the cognitive capacity to make a decision for himself about whether to plead guilty or not guilty…" [41] He did not think the appellant could meaningfully exercise his right to challenge jurors or to form instructions to solicitors…. "he is unlikely to engage effectively with the process." The Court commented [43]

> *"It is not easy to understand why an application to vacate the pleas of guilty was not even considered at that stage. [This psychiatrist] could not have made the position any clearer. Given the nature of the appellant's limitations it was highly improbable that he had been fit to plead two months earlier at the PTPH." [64] The Court started that at this point "an application should have been made to vacate the pleas."*

Having considered the fresh psychiatric evidence, the CACD stated that:

> *"We are quite sure that psychiatric reports directed to the question of fitness to plead could and should have been obtained by the appellant's lawyers long before sentence. That they were not was not the responsibility of the appellant. [62]*

The CACD ended the judgment with this salutary warning:

> *[75] This case should never have reached the point of sentence, still less this court. Fitness to plead does not arise only in the context of homicide or other very serious offences. All involved in criminal cases must be alert to its possibility and know what to do when faced with a defendant who appears cognitively vulnerable. This is so notwithstanding the very significant pressures on all those in the criminal courts who are dealing with very*

> *heavy workloads, large backlogs, and real pressure to deal with cases expeditiously.*
> *[76] Judges and lawyers should be aware of the relevant legislation. It is not lengthy, and it is not hard to find. We have referred to much of it in this judgment."*

Disposal of the appeal

The CACD considered what the correct disposal should be in this case. It concluded that Section 37 MHA 1983 did not apply.

The parties submitted that it was open to this court to apply section 6 (1)(b) Criminal Appeal Act 1968[22] and form the opinion that the case is not one where there should have been an acquittal, but there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him. The Court rejected this [67] and stated:

> *"Pleas of guilty, entered by a person who was unfit, are not evidence against him. The appellant's guilty pleas are of no relevance to our task. We are not in a position to determine that the appellant should not be acquitted. It is not for this court to embark upon a consideration of the statements to determine whether the appellant did the acts charged, nor were we invited to do so. Section 6 is of no application in this case. [72]*
> *We are satisfied that the convictions are unsafe based as they are on pleas of guilty from a defendant who was not fit to plead. The Crown, rightly, does not seek a retrial. A retrial would require the matter to go back to the Crown Court. There would be a hearing on the question of the appellant's fitness to plead. …We agree with the Crown that a retrial is not in the public interest. [73]*
> *Accordingly, we allow the appeal. The convictions are quashed. The sentence imposed falls away….[74]*

Comment

Instructing experts: This case is an important reminder to (i) instruct an expert as early as possible if there are concerns about a defendant's fitness to plead (ie. Before pleas are entered, or before sentence if concerns manifest themselves after plea); (ii) obtain as much information about the defendant's mental health history, (the CACD noted that it had "the solicitor's criminal files, along with documents from the original lawyers, and papers from the Court of Protection and from the Family Division of the High Court…"); and (iii) ask the expert the relevant questions (ie. The *Pritchard* criteria[23]).

The approach of the CACD to grounds alleging unfitness to plead: The importance of obtaining documentation relating to a defendant's mental health history is crucial when seeking to raise unfitness on appeal, and this will include contacting the original legal team for their views on D's fitness at the time. The CACD at [15] stated that

> *"This court approaches after the event challenges to fitness to plead*

[22] (1) This section applies where, on an appeal against conviction, the Court of Appeal, on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved, are of opinion—… (b) that the case is not one where there should have been a verdict of acquittal, but there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him.

[23] (1836) 7 Car. &P. 303; reaffirmed in *Podola* (1959) 43 Cr.App R 220 at 238; *John (M)* [2003] EWCA Crim 3452

with caution. In R v Erskine; R v Williams [2009] EWCA Crim 1425, Lord Judge CJ underlined the importance of a contemporary assessment and the duty of the trial judge. At paragraph 89 of the judgment, he said,…

"…Unless there is contemporaneous evidence to suggest that notwithstanding his plea and the apparent satisfaction of his legal advisers and the judge that he was fit to tender it, and participate in the trial, it will be very rare indeed for a later reconstruction, even by distinguished psychiatrists who did not examine the appellant at the time of trial to persuade the court that, notwithstanding the earlier trial process and the safeguards built into it, the appellant was unfit to plead, or close to being unfit or that his decision to deny the offence and not advance diminished responsibility can properly be explained on this basis…"

Appeal against conviction (following a guilty plea): See the CACD's recent analysis of this issue in *Tredget* [2022] EWCA Crim 108 and *Hamilton* [2021] EWCA Crim 577. See *Taylor on Criminal Appeals* paras 9.05 onwards.

Fresh evidence: s.23 Criminal Appeal Act 1968 sets out the statutory criteria for the admission of fresh evidence on appeal.

Jury Tampering – ss.46 and 47 CJA 2003 – Decision of Judge to discharge jury and to continue with Judge alone – Permission to Appeal

Mohammed and ors [2024] EWCA Crim 34

By Jonathan Polnay KC

Summary

Following attempts to influence a juror, the Judge decided to discharge the jury and continue the trial with the Judge returning the verdict. In refusing the appeal against those orders, the Court of Appeal summarised the relevant principles to be considered when discharging a jury and continuing with a Judge-alone trial. The Court of Appeal reiterated that permission to appeal should only be granted on a principled basis, not merely because of the nature of the decision.

The background

The five Defendants stood trial in relation to a £700,000 VAT fraud committed against HMRC. There was no dispute that a fraud had taken place, the key issue was the identity of those involved in the fraud.

On day 39 of the trial the jury retired to consider their verdicts. Four days later the jury sent a note describing two incidents of jury tampering that had taken place two weeks earlier. The Judge investigated the alleged jury irregularity in accordance with the stepped process prescribed by the Criminal Practice Direction. He found that a juror had been approached on two occasions and attempts made to influence the verdict. The juror discussed what had taken place with the rest of the jury.

There was no challenge to the Judge's finding that jury tampering had taken place and his decision to discharge the jury. After

his decision to discharge the jury, the prosecution applied under s.46 CJA 2003 for the trial to continue with the Judge returning the verdict. This application was granted.

The Judge granted permission to appeal his decision on the basis that he understood that trial judges in similar cases had always granted leave.

The Grounds of Appeal

A number of issues were raised on appeal, including:

1. That there were not exceptional circumstances such as to justify the removal of the right to a trial by jury.
2. It was unfair that the prospect of a trial by Judge alone was not raised when the submission on jury discharge were made.
3. There was an unfairness as between co-defendants. Some of the appellants were not implicated in the tampering. The only appellant directly implicated made a submission that the trial should continue. It was submitted 'the court should guard against rewarding jury tampering. Here [a Defendant] was getting what he wanted as a result of the jury tampering in which he was implicated'.

The CACD's decision

A very strong Court of Appeal (Carr LCJ, Edis LJ and Griffiths J) refused the appeal.

The relevant statutory provisions to continue a trial without a jury are set out in s46 CJA 2003. They require a Judge to be satisfied that jury tampering has taken place; to continue a trial without a jury would be fair; and that it is not necessary in the interests of justice for the trial to be terminated. The Judge then had a discretion to order the trial to continue.

The Court considered the following principles as to the interpretation and exercise of the power under section 46 could be found in case-law:

1. The relevant statutory conditions must be satisfied to the criminal standard of proof.
2. The power is additional (and not in place of) the power to discharge individual jurors or order jury protection.
3. Once jury tampering has been found to have taken place, 'the normal approach is that, assuming that the necessary conditions are established, the case should continue. This is because of the need to discourage jury tampering, the huge inconvenience and expense for everyone involved in a re-trial, and to ensure that trials should proceed to verdict rather than end abruptly upon the discharge of the jury'
4. General assertions as to unfairness are unlikely to be persuasive.
5. When jury tampering has taken place, it is irrelevant which (of many or any) defendants was responsible for it.
6. It is never too late for a judge to continue a trial without a jury, including when a jury is already in retirement.
7. The judge who decides whether or not there is jury tampering is not precluded from deciding the case. It is expected they will continue.
8. The question of jury discharge and continuation of a trial without a jury may be considered on separate occasions. However, the latter decision should be made as soon as is reasonably practicable.
9. A Judge may prepare draft reasons (ie a draft verdict) while matters are fresh in their mind.

10. A Judge's assessment that they are able to reach a true verdict based only on admissible evidence will normally be accepted.

The Court went on to consider and reject the specific complaints of procedural unfairness and that the Judge was wrong to conclude that the trial could continue fairly without a jury.

Finally, the Court noted that there was no automatic right of appeal from orders made for a trial without a jury. The Court held that trial Judges should only grant leave to appeal where there is a real prospect of success. 'The judge need be no more willing to grant leave to appeal in these than in any other cases. If leave is refused by the judge, it can be sought from the Court of Appeal in the usual way.'

Comment

In this decision the Court of Appeal helpfully draws together the principles relevant to the decision to continue as a juryless trial. Of particular importance is the Court's clear statement that once the pre-conditions for a juryless trial are established (jury tampering; that a trial would be fair; not necessary to terminate the trial) that the legislative intent is that the 'normal' position is that the case should continue.

It is now fifteen years since the first order for juryless trial on indictment in modern times was made in Twomey and ors [2009] EWCA Crim 1035. Contrary to concerns widely expressed at the time, juryless trial has remained a rarity with under a dozen reported cases of it ever taking place – less than one a year.

[*Editor: For another recent jury tampering case see the Privy Council judgment in Campbell and others v The King [2024] UKPC 6 and Taylor on Criminal Appeals paras 9.406 onwards.*]

Unrepresented defendant – bad character applications – fair trial

Reid [2024] EWCA Crim 308

By Charlotte Newell KC

By leave of the Single Judge AR appealed against his conviction for assault occasioning actual bodily harm contrary to s47 OAPA 1861.

AR was a prisoner at HMP Wayland serving an indeterminate sentence for public protection (IPP). He was accused of throwing boiling water in the face of a fellow prisoner causing blisters and burns. He accepted that there had been an assault but averred that it was provoked and had not resulted in injuries amounting to ABH.

After the Complainant's evidence AR expressed dissatisfaction with trial counsel's conduct of the case and refused to engage further with him. The judge informed AR that he had a "stark choice" of retaining the services of trial counsel or representing himself. Trial counsel withdrew, although solicitors remained on the record and emailed the Court to state that the Applicant wished to be represented and fresh counsel could attend the next day. That option was not entertained by the judge. The trial proceeded with AR representing himself and the Jury were told that he had chosen to do so.

AR gave evidence, the content of cross-examination by the Crown included;

1. Details of previous convictions beyond the scope of that for which leave had been granted in an application which had taken place after trial counsel had withdrawn.

2. A number of entries in the adjudication log including those which had not resulted in any disciplinary findings that for which leave had been granted in an application which had taken place after trial counsel had withdrawn.
3. Determinations of "dangerousness" said to have been made by Judges on two previous occasions.
4. Accusations of manipulating the proceedings by deliberately dispensing with trial counsel in order to introduce inadmissible material.
5. A note in the solicitors file of advice given to AR's mother following a waiving of legal professional privilege.

AR was refused permission to give an account of messages with the complainant on the basis that they were inadmissible hearsay a ruling that the Appeal Court described as "hard to understand". He was convicted and sentenced to three years imprisonment.

The CACD allowed the appeal under a number of headings, the cumulative effect of which was that the Defendant had not received a fair trial.

Ground 1 – The manner in which representation was dealt with

AR had not been given an opportunity to be represented by another advocate despite the request emailed to the Court by defence solicitors. He was not told that he was entitled to be advised by his solicitors whilst they remained on the record and solicitors were not called upon to provide a representative to attend and advise at Court.

The Jury should have been told that they should not speculate as to why he had dispensed with counsel and to bear in mind the difficulty he may have in representing himself.

Ground 2 - Admission of bad character evidence

Given the issues the Judge should have required counsel to spell out the precise relevance of the convictions to the issues given the highly prejudicial nature of the convictions. Crown Counsel then proceeded to adduce bad character evidence outside that for which leave had been granted. AR had not been given an opportunity to consult with legal representatives on the point or be represented by counsel.

Ground 3 - Second bad character application

During cross examination Crown Counsel made an application to adduce contents of a prison adjudication record to rebut AR's account that he had changed since his convictions as a young man. Permission was granted without AR being given an opportunity to be represented by counsel or consult with his solicitors. Consequent cross examination included material such as unproven allegations that were of no assistance to the Jury in determining whether AR had given a false impression.

Ground 4 - Waiver of LPP

During cross examination AR had given evidence of a number of exchanges with his solicitors. He was asked by the trial judge if he waived legal professional privilege and replied that he did. However, there was a lack of rigour in assessing the extent of the waiver and consequently AR was cross examined on material which had little relevance to the matters AR had referred to which was alleged to have created a false impression.

Ground Five – Use made of IPP sentences
The Jury were told repeatedly by the Crown and the Judge that AP had twice been found "dangerous" with no explanation what that meant which was highly prejudicial when combined with the use made of prison adjudications and accusation of manipulating the proceedings.

Comment

Unrepresented Defendants
It is hard to conceive that grounds 2 – 5 would have arisen had the Applicant been represented and this could have been avoided by granting the request for fresh counsel to attend or requiring solicitors to attend and advise pursuant to the representation order in force [Nguyen [2022] EWCA Crim 1444].

The *Crown Court Compendium* at Chapter 3 – 5 sets out the great care required of Judges dealing with an unrepresented defendant including the requirement to take every reasonable step to facilitate the participation of a Defendant [CPR 3.8(3)(b] and the desirability of telling the Jury to bear in mind the difficulties a Defendant may face presenting their defence [*De Oliveira* [1997] Crim L.R. 600]

FINANCIAL CRIME APPEALS

Fraud by abuse of position – s4 Fraud Act 2006 - necessary ingredients – whether a "Brown direction" was required
Sentence - Totality

Ames v Rex (Serious Fraud Office) [2023] EWCA Crim 1463

By Aska Fujita

Summary

This appeal concerned what the necessary ingredient/s of an offence were under s 4 Fraud Act 2006.

The Offence
The appellant controlled a company called Harlequin Management Services (South East) Ltd [HMSSE] as a shadow director and the primary authority / decision-maker. Between 2005 and May 2013, HMSSE sold over 9,000 off-plan "properties" in the Caribbean to investors for a total of £1.4b. The resorts were owned by offshore companies known as Resort Development Companies [RDCs], which were controlled and beneficially owned by the appellant, who was the sole director and shareholder. Despite HMSSE receiving c£398m from investors, less than 2% of the total properties contracted to be built were constructed.

Count 1 alleged the appellant's conduct concerning HMSSE was fraudulent from 2010 onwards, with an alleged loss of c£196m. Count 2 was an alternative to Count 1, alleging fraud involving HMSSE from February 2011 onwards, with an alleged loss of c£112m.

Count 3 alleged dishonesty relating to a successor company to HMSSE called

Harlequin Hotels and Resorts (Cayman) Ltd [HHR], from mid-2012 onwards, with an alleged additional loss to investors of c£30m.

The appellant was convicted unanimously of fraud by abuse of position in respect of counts 1 and 3.

The Law

Section 4 Fraud Act 2006 is headed "Fraud by abuse of position".

Section 5 Fraud Act 2006 defines "gain" and "loss"

Legal directions

The trial judge directed the jury that in order to find the appellant guilty of a particular count on the indictment, they must be sure of all five matters below:

1. That the appellant occupied a position within HMSSE [counts 1 & 2] or HHR [count 3] where he was expected to safeguard, or not to act against, the interests of Harlequin investors; and
2. That at any point during the time period covered by the particular count considered, the appellant abused his position within the relevant company by continuing to accept monies from Harlequin investors in respect of overseas properties when he knew or believed that the true state of affairs in relation to those properties was such as to expose those investors to loss of a risk of loss; and
3. That continuing to accept monies from Harlequin investors in those circumstances did expose those investors to loss or a risk of loss; and
4. That by continuing to accept monies from Harlequin investors in those circumstances, the appellant acted dishonestly by the standards of ordinary decent people; and
5. That by continuing to accept monies from Harlequin investors, the appellant intended **to make a gain for himself and / or members of his family, and / or to cause loss to those investors or expose them to a risk that they would lose some or all of the monies they were paying**. [Emphasis added by CACD]

The appeal against conviction

The appellant argued that subsections 4(1)(c)(i) and 4(1)(c)(ii) each constitute a separate identifiable legal ingredient of the offence. Therefore, where more than one intent is alleged, the jury must be given a *Brown*[24] direction: that they need to be unanimous on at least one intention before finding a defendant guilty. In failing to give such a direction, it was submitted the Judge materially misdirected the jury.

The respondent's position was that a defendant's intention for the purpose of s4(1)(c) is a single overarching ingredient of a section 4 offence. It was submitted that the essential ingredients of the offence are sections 4(1)(a), 4(1)(b) and 4(1)(c). Subsection 4(1)(c)(i) and (ii) constitute different mechanisms through which the jury may be satisfied of the ingredient of section 4(1)(c), and there was no misdirection by the Judge.

The CACD considered the issues raised by the *Brown* decision and concluded that:

1. A jury must agree on every ingredient of the offence for it to be proved. There is no requirement for such agreement for evidential / ancillary issues.

[24] [1984] 79 Cr App R 115

2. In Pennock [2014] EWCA Crim 598, the court found that in a section 4 fraud case, the prosecution had to prove four matters:
   a. The defendant at the relevant time occupied a position in which he is expected (by a reasonable member of the public) to safeguard (or not act against the financial interests of another);
   b. The defendant "abuses" that position by using it incorrectly or putting it to improper use contrary to the expectation resulting from the position held
      (i) The defendant's abuse of that position is dishonest
      (ii) The defendant intends, by means of his dishonest abuse of that position, either to make a gain for himself or another person; or intends to cause loss to another or expose another person to a risk of loss.
3. Considering the prior authorities, the structure and language of the statute, the court concluded that section 4(1)(c) Fraud Act 2006 contained a **single overarching ingredient** of intent for the purpose of a section 4 offence, which was intention by means of the abuse of that position to make a gain (for himself or another) or to cause loss to another (or to expose another to a risk of loss), in other words to have a financial impact, whether by way of gain or loss (actual or potential) [53, 56].
4. Accordingly, the court found a *Brown* direction was unnecessary in this case where neither subsection (i) or (ii) gave rise to a different defence, nor where distinct events or incident were alleged for the purpose of either subsection [57]. The jury had been properly directed and the appeal against conviction dismissed.

Comment

The door has been left open for (rare) cases where the facts are such that the precise mechanism for intent under section 4(1)(c) is relevant, in which case a *Brown* direction may be appropriate.

The circumstances in which a *Brown* direction is required has long been a fertile area of dispute. The principles in *Brown* are:

1. Each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction);
2. However, where a number of matters are specified in the charge as together constituting one ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved; but (because of the first principle above) any such matter must be proved to the satisfaction of the whole jury.

In Chilvers [2021] EWCA Crim 1311, it was confirmed that a *Brown* direction is appropriate in the following three circumstances [63]:

1. Where the factual basis of the crime charged are individually coterminous with an essential element or ingredient of the offence, for instance:
   a. Affray – where the conduct alleged to constitute the affray is not continuous but falls into separate sequences, the character of the conduct in each sequence may be quite different, as may be its effect upon persons (hypothetically) at the scene. A *Brown* direction should be given to avoid a result where there was no unanimous

jury verdict in support of conviction based on a particular sequence: *Smith* [1997] 1 Cr 14

b. Indecent assault – it was necessary for the jury to conclude unanimously that at least one of the types of conduct relied upon had occurred on a particular occasion: *D* [2001] 1 Cr App R 13 [22];

2. Where two distinct events or incidents are alleged, either or which constitutes the ingredient of the offence charged, such as Murder – where the two possible means by which a killing is effected comprise completely different acts, which happen at different times, the jury ought to be unanimous on which act led them to the decision to convict: *Boreman* [2000] 2 Cr App R 17
3. Where two different means of committing the offence may give rise to different defences, for example: Murder – where the difference between the two forms of alleged assault (a fatal kick or a punch) depended on a stark difference in the evidence and gave rise to two very different defences (identification and self-defence, respectively), the jury should have been directed that they must reach a unanimous decision on the deliberate which they found proved and on the unlawfulness of that act: *Carr* [2000] 2 Cr App R 149

A *Brown* direction is not necessary in cases where individual particulars are not said to be coterminous with an essential element or ingredient of the offence and when the individual particulars do not involve different defences: *Chilvers*, at [64]. Examples include:

a. Intent to supply controlled drugs – where the jury could convict on the basis of either social supply to a friend, or commercial supply in a nightclub, as the neither the identity of the intended recipient nor whether the supply was on a commercial basis was an ingredient of the offence: *Ibrahima* [2005] EWCA Crim 1436
b. Intent to pervert the course of justice – where more than one type of proceedings may follow an incident, and the defendant's action could mislead the court in any or all of those proceedings, it was sufficient that the defendant intended to mislead the court in any of the proceedings which may ensue: *Sinha* [1995] Crim LR 68;
c. Conspiracy to defraud – where conspirators agreed to make dishonest representations to induce victims to invest, which constituted a certain agreement, there was no requirement that the precise nature of the specific misrepresentations to be made were agreed by the conspirators: *K* [2004] EWCA Crim 2685;
d. Controlling or coercive behaviour – where the jury's task was to evaluate the entirety of the behaviour in question and decide whether it was controlling or coercive in light of all of the evidence it was not necessary for them to be agreed as to the parts of the evidence which led them to the conclusion that the *actus reus* of the offence had been made out: *Chilvers* [2021] EWCA Crim 1311.

The appeal against sentence

The appellant was sentenced to 9 years' imprisonment on count 1 and a consecutive

sentence of 3 years' imprisonment on count 3. The appellant's primary submission was that the Judge was wrong to impose consecutive sentence.

The Sentencing Council Definitive Guideline on Totality at the time[25] stated consecutive sentences are appropriate where offences arise out of unrelated facts or incidents; or offences are of the same or similar kind but the overall criminality will not sufficiently be reflected by concurrent sentences. The Guideline also stated that "it is not permissible to impose consecutive sentences for offences committed at the same time in order to evade the statutory maximum penalty".

The court concluded that in the appellant's case, the following features militated in favour of consecutive sentences:

1. Different time periods (even if overlapping);
2. The use of different entities in the fraud (Count 1 featured HMSSE, count 3 involved HHR);
3. Different victims of fraud;
4. The seriousness of the offending (losses totalling £196m for count 1, £30m for count 3);
5. The appellant's overall criminality.

In respect of the Fraud Guidelines, given the starting point for category 1A offending in the Fraud Guideline was based on losses of £1m, the court found that "the amounts involved of themselves justified, indeed necessitated, a starting point outside the identified range".

On the facts of the case, the court considered the trial judge was fully entitled to conclude consecutive sentences were justified on the facts and that the imposition of concurrent sentences, giving a maximum custodial term of 10 years would not sufficiently reflect the appellant's overall criminality.

The appeal against sentences was dismissed as the overall sentence of 12 years' imprisonment could not be said to be manifestly excessive.

CCRC reference – conspiracy to defraud – construction of contracts – stare decisis – s.14(4A) CAA 1995 (arguing additional grounds not part of CCRC reference)

Hayes & Palombo [2024] EWCA Crim 304

By Danny Robinson KC

Summary

Background

LIBOR (London Interbank Offer Rate) and EURIBOR (LIBOR's Euro equivalent) are benchmark figures at which a bank could borrow money in London each day. LIBOR was administered by the British Banking Association. Traders from a number of banks responded to the question *"could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11.00 London time."* The European Banking Federation asked a similar question in respect of EURIBOR. The BBA and the EBF averaged out the responses and produced a figure which represented the interest rate that a bank can expect to borrow money at for the next day's trading. The LIBOR and EURIBOR figures were used to set interest rates for many different types of financial transactions. The Appellants were traders

[25] The current Sentencing Council Guideline on Totality has been in force from 1st July 2023

for banks who took part in those processes by submitting figures that represented their views about the rate they could borrow money at. Hayes was a LIBOR trader, and Palombo was a EURIBOR trader.

At a preparatory hearing for Hayes' trial, Cooke J ruled that there was a legal duty on a bank to submit a rate in accordance with the definition of LIBOR, and that the definition implicitly excluded taking into account the bank's commercial interests. In effect, he ruled that the question should be answered by the bank submitting its genuine assessment of the proper rate, i.e. an honest answer to the question.

That ruling was upheld on appeal, and again by the CACD following Hayes' conviction. The ruling was followed by the trial judge in Palombo's case, and by a trial judges in other LIBOR cases. In a preparatory hearing in Palombo's trial, and on appeal against conviction in his cases, the CACD approved the ruling.

In 2022 the United States Court of Appeals for the Second Circuit allowed appeals against convictions for two other traders, Connolly and Black, were tried and acquitted in the United States of like offences arising from the same LIBOR question.

The CCRC Referral

The CCRC referred the appellants' cases back to the CACD on the grounds that "there is a real possibility that the Court of Appeal will prefer the findings of the US appeal court in *Connolly and Black* regarding the definition and proper operation of LIBOR to those which were reached in Mr Hayes's own case, and will conclude that this renders his conviction unsafe." The referred Palombo's case on the basis that the same logic applied to his case.

Hayes appealed on two grounds:

1. The judge's direction to the jury that there was an absolute legal prohibition on commercial considerations in the LIBOR setting process was wrong in law; and
2. The judge was wrong to direct the jury that, as a consequence of the legal prohibition on commercial considerations, if the Appellant agreed to procure submissions which were intended to advantage his trading then the sole remaining issue was dishonesty.

Palombo appealed on three grounds:

1. The definition and proper operation of EURIBOR was, by analogy with LIBOR, correctly characterised by the Second Circuit in *Connolly and Black*, and
2. The judge's direction to the jury that there was an absolute legal prohibition on commercial considerations in the EURIBOR submission process withdrew important matters of fact from the jury; and
3. The conviction was unsafe because the indicted conspiracy to defraud was advanced on a basis that is incompatible with the requirements of legal certainty at common law and/or under Article 7 of ECHR.

Those grounds of appeal departed from the basis upon which the CCRC had referred the cases. The court ruled that only Palombo's first ground arose from the basis of the CCRC referral.

The appellants sought to argue that a trader could submit a figure in answer to

either the LIBOR or EURIBOR question that was a figure selected from a range of possible answers. The court rejected those submissions.

The CACD rejected the appeals. The court rejected the CCRC's interpretation of the Second Circuit's ruling. It held that the American court, in allowing the appeals against conviction of Connolly and Black, was ruling upon the sufficiency of evidence called before the trial jury to prove that the LIBOR contract had been infringed. Moreover, the court restated the principle that in English law judge's, not juries, rule on the proper construction of contracts.

Stare decisis

The rule of stare decisis binds the CACD to follow previous rulings made by a different constitution of the CACD, the Supreme Court, or the House of Lords, unless:

1. The previous decision conflicts with another previous decision of the CACD; or
2. The previous decision cannot stand with a decision of the House of Lords or Supreme Court although not expressly overruled; or
3. The previous decision was reached *per incuriam; or*
4. Where, in a criminal case where the liberty of the subject is in issue, the court can depart from a previous decision where it is necessary to do so in the interests of justice because the law had been misapplied or misunderstood.

None of these exceptions having been made out, the court held that it was bound to follow the previous rulings of the CACD.

Comment

Despite the publicity the judgment generated – see, for example, the comments of Lord Mackay of Clashfern, the former Lord Chancellor[26] – this was an unsurprising decision. The Court of Appeal reiterated that it was bound by its previous decisions on the proper construction of the LIBOR and EURIBOR contracts and questions which it had ruled on during the preliminary hearing appeals, and then in its rulings on the appeals for convictions.

Grounds not related to the CCRC reason for referral: By section 9(2) Criminal Appeal Act [CAA] 1995, a reference *to the CACD by the CCRC is to be treated, for all purposes, as an appeal under section 1 Criminal Appeal Act 1968 and so no leave is required. However, the effect of subsections 14(4A) and 14(4B) 1995 Act is that any additional grounds not related to any reason given by the CCRC cannot be argued unless the CACD gives leave. As to the approach of the CACD to additional non-referral grounds in this case see [123]:*

> *"We agree that the proposed unrelated grounds must as a minimum be arguable grounds which may undermine the safety of the conviction. But in addition it must not undermine the purpose of the prohibition in s.14(4A) designed to ensure that a reference is not used an opportunity to argue points which were available at a previous appeal but were not taken. This ground was available at Mr Hayes' and Mr Palombo's appeals, and the dismissal of those appeals should have been the end of the matter. It would be contrary to the purpose of*

[26] https://www.thetimes.co.uk/article/case-of-jailed-bankers-should-go-to-supreme-court-wgqtgrmdm

s. 14(4A) to allow them to piggyback these unrelated appeals upon the reference concerned with Connolly and Black."

Winzar [2020] EWCA Crim 1628 [3], Smith [2023] NICA 86, and Malkinson v R [2023] EWCA Crim 954.

*[Editor: The CACD appears to be stating here that even if the additional ground is arguable and may undermine the safety of the conviction, leave will not be given if it was available – but not argued – at the original appeal. With respect, this cannot be correct. The statutory role of the CACD in a conviction appeal in s.2 CAA 1968 is that they "shall allow an appeal against conviction if they think that the conviction is unsafe", and s.14(4A) CAA 1995 gives the CACD power to grant leave to a ground unrelated to the CCRC referral reason. No restrictions on this discretion are set out. There does not appear to be any basis for stating that "*the purpose of the prohibition in s.14(4A) designed to ensure that a reference is not used an opportunity to argue points which were available at a previous appeal but were not taken." *If this was correct, the statute could state this specifically. It does not.]*

Confiscation orders - Prosecution appeals – refusal by judge to make confiscation orders – failure to complete proceedings within permitted time – s.14 Proceeds of Crime Act 2002

Haden, Smith and ors [2024] EWCA Crim 344

The CACD considered four unrelated cases in which the prosecution sought leave to appeal against refusals by judges of the Crown Court to make confiscation orders against the respondents because of a failure to complete the proceedings within the permitted time provided by section 14 Proceeds of Crime Act 2002 ("the 2002 Act").

Section 31(2) 2002 Act, enables the prosecution to appeal, with leave, against a decision of a Crown Court judge not to make a confiscation order. Section 32 provides that on such an appeal the Court of Appeal may confirm the decision, or if it believes the decision was wrong it may either itself proceed under section 6 or direct the Crown Court to proceed afresh under section 6. All these applications were referred directly to the Full Court by the Registrar.

At the start of the detailed judgment, [3-11], the CACD set out a summary of its conclusions "as to the current state of the law… these conclusions are the result of the application of the principles derived from a decision of the House of Lords and a decision of the Supreme Court to the construction of section 6 and section 14 of the 2002 Act.

1. If confiscation proceedings have not concluded before sentence, they may be started and postponed so that they conclude after sentence. Such commencement and postponement must take place before the court is *functus officio*... A court becomes *functus officio* in a criminal case when sentence has been imposed and time for variation or rescission of the sentence under section 385 of the Sentencing Act 2020 has elapsed (56 days from the imposition of the sentence). The postponement provision is a procedural device to prevent a court from being unable to conduct confiscation proceedings after sentence for this reason. It is,

therefore, an enabling rather than a limiting provision.

2. The two-year permitted period provided by section 14 of the 2002 Act limits the time between the point when the court comes under a statutory duty to proceed as required by section 6 of the 2002 Act and the time when the confiscation proceedings are to be concluded. It is irrelevant to the point at which that duty to proceed arises.
3. The permitted period may be extended if there are exceptional circumstances so that it is longer than two years. This may happen whether the two year period has expired or not, and whether an application was made before expiry or not. It can happen even if no application has ever been made.
4. Compliance with the procedural requirements of section 14 of the 2002 Act is not a condition precedent to the court retaining jurisdiction to make a confiscation order. Jurisdiction is retained until the proceedings are determined in accordance with section 6 of the 2002 Act.
5. Non-compliance with procedural requirements of section 14 may be relevant to what order the court considers it fair to make. In some cases it may render the proceedings an abuse of process, but such cases are likely to be very rare indeed.
6. The court should always case-manage confiscation proceedings with a view to their timely determination and should strive to ensure they are completed no later than two years after conviction.
7. When considering whether there are exceptional circumstances justifying an extension of the permitted period beyond the two years from conviction, the court should take a broad view of what constitutes exceptional circumstances.
8. If this court allows a prosecutor's appeal and directs the Crown Court to "proceed afresh" this does not mean that the confiscation proceedings have to start again from scratch. The Crown Court is required to carry on the proceedings from the point at which it had declined to make a confiscation order, on the basis that it has jurisdiction to do so…

[See also Luxton [2024] EWCA Crim 340]

SENTENCING APPEALS

Murder – correct approach to joint offenders just above and below 18 years

Kamarra-Jarra [2024] EWCA Crim. 198

By Mark Heywood KC

The appellant, aged 18 years and 4 months at the time, with two others, JC, aged 17 years and 10 months and CD, aged 17 years and 9 months, together forced their way in to the deceased's home at night, where he was living with his partner and young child. JC was in dispute with the deceased, a man aged 31, over escalating demands for money due in relation to a drugs line JC was operating for the deceased. Each had a large knife, one a three foot long Rambo knife with a serrated edge. JC struck the deceased with a knife to the head in chopping actions. He entered further into the property to steal money, drugs and car keys. The appellant and CD then together stabbed the deceased 18 times in all, collapsing a lung and severing the pulmonary artery. The three fled on foot

laughing. They later made rap videos glorifying what they had done before separating and leaving the area. All three were arrested within days and were later convicted of murder after a 12 week trial. Each had several previous convictions, the appellant's being for assault occasioning actual bodily harm, attempted robbery, affray, firearms and witness intimidation. All admitted being actively engaged in drugs supply, including Class A.

The sentence

There were pre-sentence reports for all three and expert psychological reports for JC and CD, as well as references. This material included evidence of the appellant's extremely troubled background and immaturity. This included separation from his mother at 7 months and then serious physical abuse and chronic ill-treatment in the care of his father and stepmother between the ages of 6 and 11. Later he lived with his mother, fleeing domestic abuse and moving, including from refuges, six times in four years, was removed from education, at one time subject to a child protection plan and was receiving medication for ADHD. The pre-sentence report identified low maturity levels, poor attitudes and an inability to use pro-social methods (i.e. behaviour that benefits others). The appellant struggled to trust adults, felt rejected and perceived a lack of support, all of which were directly relevant to his record of offending, which began when he was 13.

The judge concluded that all three were jointly responsible for an intentional killing acting as a team, although JC was the instigator.

The offence was a murder for gain (and so its seriousness was 'particularly high'; paragraph 3(1) of Schedule 21 of the Sentencing Act 2020, having been committed in the course of robbery. Knives were carried but that was encompassed in the increased starting point for the minimum term.

Aggravating features included that the offence occurred in the home of the deceased, was premeditated (although without significant planning), occurred against a background of unlawful activity and had involved the appellant attempting to stop a young female witness giving evidence.
Mitigating features included the age of the appellant, the fact that there had been some exploitation of JC by the deceased and that the appellant had had an extremely difficult life as a child, including chronic abuse.

The appellant was sentenced to custody for life (section 275 Sentencing Act 2020) and CD and JC to be detained during His Majesty's pleasure (section 259).

As the appellant was over 18 at the time of the commission of the offence, the starting point for the minimum term in his case was one of 30 years. In the case of the other two, who were 17 at the time, it was 27 years, under paragraph 5A of Schedule 21 (introduced by section 127 of the Police, Crime, Sentencing and Courts Act 2022 and which applies to any person convicted on or after 28 June 2022). The judge made adjustment for the aggravating and mitigating features and specified minimum terms to be served of 32 years in the case of the appellant and 29 years in the cases of JC and CD, less time served on remand.

The appeal

The ground of appeal was that the minimum term specified was manifestly excessive in that:

1. The Judge made insufficient allowance for the appellant's youth and immaturity, which should have led to a downward adjustment from the statutory starting point and
2. The resulting disparity with the co-defendants did not reflect the finding of equal culpability or that there was only a six month age difference (they were in the same school year). A literal application of the new paragraph 5A may lead to unintended consequences in the sentencing of young adults between the ages of 18 and 21.

The Court of Appeal referred to the terms of paragraph 5A, comparing its provisions with the previous position where paragraph 6 of Schedule 21 set the starting point for the minimum term at 12 years and paragraph 7 provided for adjustment for aggravating and mitigating features, and then drew attention to existing authority that it was neither just nor rational for significantly divergent terms to be imposed on grounds of age alone and that the proper approach is to move from each starting point to a position where any disparity is no more than a fair reflection of the age difference: see *R v Taylor (Joel)* [2017] EWCA Crim 803; [2008] 1 Cr App R(S) 4, at [8] and *Attorney General's References Nos 143 and 144 (R v Brown and Carty)* [2007] EWCA Crim 1245; [2008] 1 Cr App R(S) 28 at [27].

The Lady Chief Justice, giving judgment, said [33]:

> *"33. The advent of section 127 does not dictate a different approach when sentencing either a defendant who has just turned 18 or who is just under 18. It is never just a question of mathematical age. Age governs the normal starting point for a minimum term, but not the assessment of culpability by reference to maturity. The court is always obliged to look beyond mere chronological age."*

The sentencing judge had been right to identify the 30 year starting point and aggravating features that served to increase it, although the starting point encapsulated many of the aggravating features. But he had not mentioned or given sufficient weight to the effect on culpability of the appellant's immaturity and extreme childhood experiences and neither had he referred to the Sentencing Children and Young People Guideline or the Youth Bench Book, an "essential guide". Those features should have outweighed the effect of the aggravating features. Disparity was also a consideration. The shortest possible minimum term should have been no more than 28 years. The appeal was allowed, the minimum term imposed was quashed and substituted accordingly.

<u>Comment</u>

The lessons are clear: the Court of Appeal will intervene where paragraph 5A of Schedule 21, with its very long minimum terms for children and young people, is applied in a way that is mechanistic or has insufficient regard to the level of maturity, rather than chronological age, or results in disparity. Especially where the appellant's age is close to a boundary, practitioners should focus on evidence of background that truly affects culpability by, for example, indicating significant immaturity. Sentencers will also need to take care to avoid a disparate result from the over-rigid application of the starting points in paragraph 5A.

As a postscript, the Court of Appeal repeated that in imposing a life sentence the reduction for time served is a judicial

function that may not be adjusted administratively if incorrect. That can only be done under the slip rule: section 385 of the Code and *Cookson* [2023] Crim 10.

Murder – minimum terms -assessment of seriousness

Norris [2024] EWCA Crim 68

By Sam Willis

Summary

Having been convicted of murder, the appellant was sentenced to imprisonment for life with a minimum term of 27 years (less 194 days spent on remand). He appealed against that sentence.

Applying Schedule 21 of the Sentencing Act 2020), the judge took a starting point of 25 years. Five aggravating factors were identified: relevant previous convictions, that the murder took place in the victim's home, that the victim was vulnerable due to being asleep when attacked, the disposal of the murder weapon, and that the appellant lied about another's involvement in the murder. Those were balanced against four mitigating factors: the lack of recent convictions for violence, the lack of sophistication, that the offence was committed because the appellant believed that the victim had treated another poorly, and that the offence involved a single blow. Finding that the aggravating factors outweighed the mitigating factors, the judge increased the minimum term to 27 years.

The sole ground of appeal was that the aggravating factors identified by the judge should not have outweighed the mitigating factors. It was submitted that the aggravating factors identified were either not aggravating, or were of limited relevance.

The Court refused the appeal, finding that the sentence was severe but not manifestly excessive. It held that the judge had been wrong to consider that lying about another's involvement in the offence was an aggravating factor (following *Lowndes* [2014] 1 Cr App R (s) 75), but that they had been right in their assessment of the other factors. The Court noted that the appellant's state of intoxication was an additional aggravating factor not identified by the judge, and that the judge had been wrong to consider that the lack of sophistication, that the offence was committed because the appellant believed that the victim had treated another poorly, and that the offence involved a single blow, provided mitigation. In any event, the balancing of the aggravating and mitigating factors was a matter of judgement and not an arithmetical exercise.

Comment

This judgment is noteworthy for two reasons.

1. The Court emphasised that the balance between the aggravating and mitigating factors is a matter of judgement that will depend on the particular facts of each case. Appeals focused on simply reducing the number of aggravating factors present are unlikely to succeed, without considering the wider factual picture. Here, the Court was prepared to accept that one of the factors identified as aggravating should not have been, but was unpersuaded that this had led to an unjustified increase from the starting point. Practitioners may therefore wish to grapple with the relative weight of each factor, and how errors made by the sentencing

tribunal altered the overall result of the balancing exercise.

2. When coming to its ultimate conclusion on whether or not the sentence was manifestly excessive, the Court was prepared to find that the sentencing tribunal had failed to take into account additional aggravating factors and had wrongly taken into account factors identified as mitigating. Practitioners may wish to head this possibility off in their written submissions - e.g. appellants may wish to outline why the judge was right to consider certain factors as mitigating. It is not a given that the Court will restrict itself to considering the 'contested' factors identified, but will look at all of the elements that led to the sentence under appeal.

Issues relating to the reduction in sentence afforded to offenders who have provided information and assistance to the law enforcement authorities - anonymity

Royle, AJC, BCQ [2023] EWCA Crim 1311

The CACD considered the following issues:

1. The principles applicable to the sentencing of those who provided information and assistance;
2. The statutory procedure;
3. The text procedure
4. At what stage of sentencing should the reduction be made?
5. How great a reduction should be made?
6. What factors are relevant in determining the appropriate reduction?
7. Must the sentencer state in open court the level of reduction made?

[See also BHR and BMV [2023] EWCA Crim 1622 where Holroyde VPQBD considered the applicable principles to appeals based on assistance given *after* sentence:

> *"Each of these applicants seeks a reduction in his sentence on the grounds that, after having been sentenced, he has provided important information and assistance to the law enforcement authorities. Neither entered into any formal statutory agreement with a specified prosecutor. The judges who imposed their sentences were unaware that such information and assistance would be provided, and accordingly did not take it into account by way of mitigation. The applicants' cases therefore raise the issue of whether in such circumstances this court has power to hear an appeal against sentence and to reduce a sentence…"*

The Court concluded that:

> *[29] "…we conclude that the general rule is as so recently summarised in Royle: an offender who wishes to rely on the text procedure must provide, or at least offer, assistance before he is sentenced. If he fails to do so, he cannot rely on a text as a basis for asking this court to alter a sentence which is unimpeachable on the basis of what was known to the sentencing judge.*
>
> *[30] It follows that an offender who offers or provides assistance for the first time after he has been sentenced, or who is invited to do so, must not be told, or given to understand, that he will be able to engage in the text procedure and to rely on that assistance as the ground for an appeal to this court relying on the text procedure. In*

such circumstances, the offender may be able to engage in the statutory procedure under section 388 of the Sentencing Code. As to whether any alternative route may be available to him, we have received no submissions about the availability or scope of any application which might be made by the offender to the Secretary of State for the Home Department. It is not for this court to comment on whether the strong public interest reasons urged upon us by counsel militate in favour of such a route being available. Nor is it for this court to comment on the decision of Parliament to exclude from the statutory scheme those who have pleaded not guilty to a charge of murder but have been convicted of that crime."

Restraining order imposed on acquittal – necessity – procedural errors

McCarren [2023] EWCA Crim 1233

No evidence was offered against the appellant on an indictment containing three counts of breaching a non-molestation order, contrary to section 42A Family Law Act 1996. A not guilty verdict was entered, pursuant to section 17 Criminal Justice Act 1967.

On the same day, with the consent of the appellant, a restraining order on acquittal was imposed.

The appellant appealed against the imposition of that restraining order.
The grounds of appeal raised the following issues:

1. Was it necessary to impose a restraining order?
2. Were there procedural errors in relation to the application for and granting of the restraining order that require it to be set aside?

The CACD considered the principles to be applied and concluded: "….the restraining order must be quashed and the appeal allowed."

[See also Mari [2023] EWCA Crim 1631 where part of a restraining order was removed on appeal as a result of lack of evidence, absence of adherence to the procedural safeguards in the Criminal Procedure Rules, and the draconian nature of the prohibition; and Bate [2024] EWCA Crim 137.]

Sexual Harm Prevention Orders – unnecessary and disproportionate prohibition

David [2023] EWCA Crim 1561

An example of CACD quashing a particular prohibition in a SHPO on the basis that it was disproportionate.

Mental Health Act disposals

Hawkridge [2023] EWCA Crim 1288

In this case the CACD addressed:

1. The sentencing issues that can arise where a defendant with severe mental health issues *may* fulfil the criteria for a hospital order under s.37 Mental Health Act 1983, but at the date of sentencing is detained under be the civil powers of s.3 Mental Health Act 1973.
2. The requirements under S. 232 Sentencing Act 2020 to obtain and consider a medical report where "the

offender is or appears to be suffering from a mental disorder" "unless, in the circumstances of the case, it considers that it is unnecessary…"

3. The Guideline on sentencing offenders with mental disorders;
4. The need for a sentencing judge to give appropriate consideration to the effects of a custodial sentence upon a defendant.

PROCEDURAL SHORTS

Wrong count in the indictment – Firearms Act 1968 – error only spotted post conviction, but before sentence – substitution of verdicts under s.3 Criminal Appeal Act 1968

Vincent and Vincent [2024] EWCA Crim 258

Appeal against convictions for possession of prohibited ammunition under s.5(1)(c) of the Firearms Act 1968. All agreed that the appellant's should have been charged in the trial indictment with an offence under s.1(1)(b) of the Act. It was agreed that their convictions under s.5(1)(c) were unsafe.
Court concluded that on the evidence it had no power to substitute verdicts under s.1(1)(b) Firearms Act because (1) that the power under s.3A CAA 1968 only applied where an offender could "on the indictment" have pleaded guilty to, or been found guilty of, the lesser offence, and (2) that his plea of guilty indicated an admission of facts which proved him guilty of the lesser offence.

Trial in absence of defendant – judge's discretion

Arshad [2024] EWCA Crim 67

Appeal against the appellant's convictions for rape and sexual assault.After his arrest for these matters, police interview and the grant of bail, the appellant did not attend court hearings and, following failed attempts to locate the appellant in the United Kingdom by the police, the trial judge had directed that the trial could proceed in the absence of the appellant.

Post sentence a warrant for the appellant's arrest was executed because he had returned from living abroad in Pakistan.

Appeal on the basis that the trial judge misdirected herself and was therefore wrong to permit the trial to continue in the appellant's absence.

The ground of appeal was whether the judge had expressly taken into account the seriousness of the offence which Lord Bingham in *R v Jones* [2002] UKHL 50; [2003] 1 AC 1 had ruled should not be taken into account when deciding to order a trial in the absence of the appellant.

The CACD held: [32]

> *"We have had a close regard to the fairness of the proceedings. We consider that, with his defence before the jury, and the inevitable further delay which was caused by the appellant's decision to abscond and disappear abroad, the balance weighed in favour of continuing this trial, even in the absence of the appellant." Appeal dismissed.*

[See also Baldwin [2023] EWCA Crim 1475: The applicant was tried in his absence and

convicted of an offence of causing grievous bodily harm with intent, (section 18 Offences Against the Person Act 1861.) He was subsequently sentenced to 6 years' imprisonment. He sought an extension of time to apply for leave to appeal against his conviction. Refused. "

Loss of time direction

Simon Coombes (aka Tharme) [2024] EWCA Crim 188

The Applicant applied to renew his application for leave to appeal against two convictions for rape. He had been sentenced to an extended sentence of 17 years 6 months. He was not represented at the renewal hearing. The Court concluded that:

> *"…we agree with the single judge that there is no merit whatsoever in any of the grounds of appeal against conviction."*
>
> *"There remains the question of whether we should make a loss of time order. In R v Gray & Others [2014] EWCA Crim 2372 the then Vice-President of the Court of Appeal (Criminal Division) observed that:*
>
> > *"the only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offences Act 1985".*
>
> *In this case the single judge not only indicated that the Full Court should consider making a loss of time order in this case, but specifically drew Mr Coombes' attention to the fact that he was doing so. Far from this acting as a deterrent, it appears to have encouraged Mr Coombes to bombard the Criminal Appeal Office with further correspondence.*
>
> *In a case in which the applicant is already serving a lengthy sentence this Court would usually draw back from making a loss of time order, but some cases are exceptional, and this falls into that category. There is absolutely no merit in any of Mr Coombes' complaints, as he was told by the single judge. He was forewarned of the risk he took by renewing these applications. The sheer volume of the paperwork he has generated in respect of the appeal against conviction, in particular, has wasted a huge amount of court time. In all the circumstances, we consider that it is appropriate to make an order that 56 days should not count towards his sentence.*

[See also *Olujosun [2023] EWCA Crim 223* for an egregious example of a meritless application, and the article by **Paul Taylor KC** *Renewed Applications for Leave to Appeal and Loss of Time Orders*]

Anonymity orders in CACD judgments

In Royle, AJC, BCQ [2023] EWCA Crim 1311 (reduction in sentence for assistance to the authorities – see above).

> *"…the court was satisfied that the risk of harm to the applicants if they were identified as informers necessitated a derogation from the important principle of open justice. We therefore ordered that those*

> *applicants should remain anonymous; and orders have been made, pursuant to section 11 of the Contempt of Court Act 1981…"*

AFU [2023] EWCA Crim 23 (Victim of trafficking)

> *"We make an anonymity order in this case in order to protect the interests of the proper administration of justice. We bear in mind that the normal rule is open justice, but an anonymity order on the facts of the present case is strictly necessary, pursuant to the principles identified in R v AAD and others [2022] EWCA Crim 106; [2022] 1 WLR 4042 ("AAD") at [3] and [4] and summarised in Human Trafficking and Modern Slavery Law and Practice (2nd ed) (at 8.103-8.108). The risk to the applicant of being re-trafficked for criminal exploitation in the United Kingdom ("UK") is real. Such an order is also consistent with (and so does not risk undermining) anonymity orders made in respect of the applicant in the First-Tier Tribunal (Immigration and Asylum Chamber)."*

Horizon conviction appeals – CACD fastrack approach

Falcon [2024] EWCA Crim 311

The CACD quashed the 2014 fraud conviction of Jacqueline Falcon. The Lady Chief Justice added the following to the Court's judgment delivered by Holroyde LJ (VPQBD).

> *"26. … This is the 71st Horizon conviction that has been quashed by this court. Mrs Falcon's appeal was commenced in mid-September 2023. The Registrar granted legal aid for legal representatives to advise and assist her. Her final grounds of appeal were lodged by the beginning of December. The appeal itself has been disposed of just over three weeks after the respondent then indicated that the appeal based on category 1 abuse of process would not be opposed.*
> *27. Today's hearing has lasted some 30 minutes in total, including delivery of our oral judgment.*
> *28. The court has been, and remains, committed to the efficient and swift dispatch of Horizon appeals. This year to date six applications have been received, the most recent of which has arrived this week. Four that were unopposed have already been quashed – two within 14 days of Notice of Appeal being received by the Court of Appeal Office, and two within seven days.*
> *29. These matters have proceeded under the fast track approach which has been implemented. The Registrar seeks confirmation within 14 days of receipt of an Appeal Notice in a Horizon case, whether or not an appeal will be opposed and, if so, whether on either or both category 1 and category 2 abuse cases. At the same time, legal aid is granted for experienced solicitors and counsel to act for the applicant. Where an appeal is unopposed, the appeal can be listed on an expedited basis.*
> *30. With the co-operation of all parties, for which we are grateful, the court has been able to quash these Horizon convictions speedily."*

Retrial following successful appeal – Sections 7 and 8 Criminal Appeal Act 1968 – fresh indictment – time limit for arraignment missed – consequences – "acted with all due expedition"

Gill [2023] EWCA Crim 976

G's conviction for s.18 gbh was quashed and a retrial ordered. The CACD directed "that a fresh indictment should be served within 28 days and that an arraignment on that indictment should take place within two months." This did not happen.

The CACD subsequently heard the application by the prosecution for leave to arraign the defendant out of time in accordance with section 8(1) and 8 (1B) of the Criminal Appeal Act 1968 and in accordance with rule 39.14 of the Criminal Procedure Rules.

The application was opposed and the defendant makes a counter application under the same provisions for an order setting aside the order for retrial and for the entry of a judgment and verdict of acquittal. *"The sole issue is whether the prosecution has behaved with all due expedition or not."*

The CACD reviewed the law and factual matrix and concluded that:

> *"We, therefore, allow the prosecution application for leave to arraign this defendant, notwithstanding the expiry of the statutory time limit."*

[cf. Layden [2023] EWCA Crim 1207 in which the CACD (judgment by LCJ Carr) considered an appeal against L's murder conviction arising from a retrial "following the earlier quashing by the Court of Appeal of the appellant's conviction for the same offence."

> *"The central issue is whether, in respect of a retrial ordered pursuant to s. 7 of the Criminal Appeal Act 1968…, the Crown Court's jurisdiction is contingent on fulfilment of the requirements in s. 8 of the CAA …, such that a defendant cannot lawfully be tried on a fresh indictment after the expiry of two months of the date of order for retrial, save where the Court of Appeal has given leave. In R v Llewellyn [2022] EWCA Crim 154; [2023] 2 WLR 121 … the Court of Appeal concluded that the jurisdiction was so contingent…"*

It was common ground that: [32]

i) The appellant was not arraigned on a fresh indictment within two months of the order for a retrial following the quashing of the appellant's conviction;

ii) At no time did the prosecution obtain an extension of time for such arraignment under s. 8 (and arraign within any extended period).

The CACD concluded that:

> *[38] "…the Crown Court did not have jurisdiction to retry the appellant. His conviction for murder is unsafe and must be quashed. The appeal will be allowed.*
>
> *[39.] We recognise that this is to permit the appellant's conviction for a most serious offence to be set aside for procedural error in circumstances where the conviction was otherwise sound, and in circumstances where no prejudice arose out of the failure in question. However, the legislation is unambiguous. The situation was entirely avoidable. There was ample*

> *opportunity for the appellant to be rearraigned at or before the PCMH and in any event within the relevant two-month period. Judges and practitioners involved in retrials following orders of the Court of Appeal under ss. 7 and 8 should be in no doubt as to the importance of strict compliance with what are clear procedural requirements.*

AG references – unduly lenient sentences – applying to certify a point of general public importance - strict time limit – CACD has no power to extend time

Ahmed [2024] EWCA Crim 306

Following a successful AG reference in which the CACD increased A's original sentence after having found that it was "unduly lenient", A lodged an application under section 36(5) CJA 1988 Act inviting the CACD to refer a point of law to the Supreme Court for their opinion. The Registrar refused to accept the application on the basis that "She considered that the application was ineffective because it was out of time. She concluded that the court had no power to extend time. A applied to the CACD for an extension of time. The Court concluded that:

> *"We consider that the time limits in relation to applications pursuant to section 36 of the 1988 Act are to be applied strictly…There is no provision for any extension of time unlike the provisions of the 1968 Act relating to applications for leave to appeal…In relation to an application for leave to appeal to the Supreme Court by an offender, this will have an impact on the victim(s) of the relevant offences. Their interests dictate a need for speed and certainty…*
> *We do not consider that there is injustice in requiring a person in that position to make any further application within 14 days.*
> *…It follows that we conclude that the application made in this case is out of time. The Registrar was correct to determine that it was invalid. However, for the sake of completeness, we shall consider the substantive merits of the application…"*

The Court went on to consider the merits of the application and concluded that no point of general public importance arose in any event.

HIGH COURT (ADMINISTRATIVE)

Erroneous verdicts announced by jury forewoman – jury discharged – discharge revoked -
Whether resulting detention and order for a retrial was unlawful – writ of habeas corpus - judicial review- "relating to trial on indictment"

Yusuff, Yusuff, Traore v Governor of HMP Belmarsh, Central Criminal Court, CPS and Government Legal Department [2024] EWHC 692 (Admin)

By Paul Taylor KC

Summary

Background

The applicants had stood trial at the Central Criminal Court on an indictment which was amended during the trial to contain three counts. On counts 1 and 2 each of the applicants was charged with murder, or in the alternative with manslaughter. On

count 3, the first applicant was charged with having a bladed article in a public place.

[At the close of the prosecution's case, the judge upheld a submission of no case to answer made by the third applicant on the charge of murder. On the judge's direction, the jury therefore returned a not guilty verdict in relation to him on count 1. Charges of manslaughter against all three applicants were then added to the indictment.]

The issue before the High Court concerned what happened after the jury had retired to consider their verdicts and were brought back into court to be given a majority direction.

The applicants each issued applications under the Civil Procedure Rules (CPR), rule 87 for a writ of habeas corpus directed to the respondent, the Governor of HMP Belmarsh, for their immediate release. In the alternative, they applied under CPR 87.5(d) for permission to apply for judicial review. The Court refused the applications in each case.

<u>The sequence of material events:</u>

1. The jury retired to consider their verdicts (there were potentially six verdicts in all, depending on the outcome of the charges of murder). One juror became seriously ill and was discharged. There were 11 jurors from then on. The trial was adjourned for the holiday period.
2. The jury resumed their deliberations on 10 January 2024. That afternoon, the jury sent the judge a note. The judge told counsel he had received the note; he could not reveal its contents, he proposed to bring the jury back and give them a majority direction.
3. The jury were brought into court, and in accordance with the usual practice, the clerk asked the forewoman to stand and answer the questions that were put to her. The forewoman was asked whether the jury had reached verdicts in relation to all defendants. To the evident surprise of those in court, the forewoman answered yes.
4. In view of that answer, the clerk, after checking briefly with the judge, proceeded to ask the jury in respect of each count on the indictment, whether they found the particular defendant to whom that count related, Guilty or Not Guilty. In respect of each count her reply was "Not Guilty"; and then to the subsequent question (whether that was the verdict of them all) she said it was.
5. The judge then discharged the applicants and the jury.
6. Within a few minutes of the court rising however, the judge received a communication from the jury and he asked for the court to be reassembled.
7. He told counsel in the absence of the jury, the substance of what was said. In short, their forewoman had made a mistake when answering the questions put to her; and the jury had not reached unanimous verdicts in respect of any of the counts they were required to consider.
8. The judge having heard brief submissions from counsel about what was to be done, did not accept, as he had been invited to by counsel for the applicants, that the verdicts should stand nonetheless, or that the court was functus.

9. He revoked his direction for the discharge of the applicants and of the jury.
10. The jury were brought back into court, given a majority direction in conventional terms, and invited to retire to continue their deliberations. The applicants remained in custody.
11. The court adjourned and on the following day, the jury returned a not guilty verdict on count 3 (the bladed article offence) against the first applicant. The jury were unable to agree verdicts on the remaining counts, (murder and manslaughter). They were discharged on the same day.
12. The applicants were remanded in custody (no applications for bail have been made).
13. The prosecution later confirmed they would proceed with a retrial.

<u>The proceedings before the High Court</u>

The claims sought to quash:

1. The decision of the judge on 10 January 2024 (he having found that the jury verdicts were given in error) to revoke the discharge of the applicants and of the jury and to remand the applicants in custody; and
2. The decision of the judge on 11 January 2024, to discharge the jury and to allow the prosecution to apply for a retrial.

The relief sought was a mandatory order requiring the Central Criminal Court to enter not guilty verdicts on all relevant counts in relation to each applicant and that the applicants be released from prison.

Habeas corpus application

The High Court analysed the material events and concluded that:

a. The jury were discharged on 11 January 2024, because they were unable to reach verdicts on five counts. This did not amount to an acquittal on any of those counts. Their remand in custody continued pending a retrial (Archbold (2024) at para 4-320). The orders previously made for the applicants to be remanded in custody continued in force and continue to be in force. They have not been set aside by any court.
b. The Governor had been and remained obliged to comply with the warrants of the Central Criminal Court remanding the applicants in custody. There was nothing on the face of the warrants to indicate that any of them was unlawful.
c. It is plain that in the interests of justice a judge in the Crown Court has a power to consider whether a mistake has been made in the giving of a verdict and to correct it (by revocation) even if that verdict is one of guilty and the jury has been discharged….When considering whether to exercise that power, the judge is not functus officio in relation to the trial on indictment. In particular, if the power is exercised in respect of a not guilty verdict, and the jury continue to deliberate neither he nor the jury are functus officio.
d. An error of law in the exercise of that power does not alter the obligation of a Governor to comply with any order remanding a defendant in custody or warrant reflecting the same; and that remains the case unless and until the remand order in question is set aside.

Judicial review

The Court stated that "The question that arises is whether this court has jurisdiction to review the decisions in issue before us, centrally, the decisions to revoke the discharge of the jury and the discharge of the applicants."

The Court reviewed the legal framework starting with Section 29(3) of the Senior Courts Act 1981, as amended, and the authorities that addressed the meaning of the term "relating to trial on indictment", and the power of the trial judge in the Crown Court to allow a verdict of the jury to be corrected even after they have been discharged.

The Court concluded that:

a. *"a judge in the Crown Court has the power to consider whether a mistake has been made in the giving of a verdict and to correct it (by revocation) even if that verdict is one of guilty and the jury has been discharged." [49]*
b. *[67.] "It is well-established on the authorities that a judge has a discretion to allow a verdict of the jury to be corrected even after they have been discharged… The trial judge is not therefore functus officio when deciding whether to exercise that discretion; such an issue, where it arises, clearly does so in relation to the issue between the prosecution and the defendant formulated by the indictment within the meaning of section 29(3) of the 1981 Act and cannot be challenged by judicial review.*
c. *Further, whilst this court may intervene by way of judicial review in relation to an order made by a judge during a trial on indictment which the judge had no jurisdiction to make, or to address a jurisdictional error of sufficient gravity as to take the order out of the jurisdiction of the Crown Court, the decisions made by the judge in this case involved no error of law and lay well within the ambit of the discretion which he was empowered to exercise. [68]*

"…we have concluded that the applicants' continuing detention pending their retrial is lawful; this court has no jurisdiction to judicially review the decisions under challenge; the applications for judicial reviews are accordingly not arguable and all applications before us including the applications for a writ of habeas corpus, must be refused."

Comment

The options open to the applicants were limited. There was no immediate right of appeal to the Court of Appeal, Criminal Division. The CACD noted that "The applicants have indicated that they may challenge their (continued) prosecutions as an abuse of the process. In the event that those challenges (if made) are unsuccessful and/or if any applicant is convicted at the retrial, then subject to the issue of leave being given, the correct route of challenge will be by way of appeal to the Court of Appeal, Criminal Division."

For an example of an appeal based on a confused verdict see Stringfellow [2008] EWCA Crim 2825

For a detailed analysis of the meaning of "criminal cause or matter" see *Taylor on Criminal Appeals,* para 15.42-15.60.

NORTHERN IRELAND COURT OF APPEAL

Fresh evidence – guilty plea – interests of justice

The King v Jamison [2023] NICA 51

By Paul Taylor KC

Summary

J appealed against his conviction and sentence in respect of two offences of withholding information, contrary to section 18(1)(a) of the Prevention of Terrorism (Temporary Provisions) Act 1989 ("the 1989 Act").

He sought leave to adduce fresh evidence from four witnesses. None of the evidence sought to be adduced was given at his trial. He entered a plea of guilty and did not challenge the prosecution evidence.

The Court considered the principles that applied to applications to call fresh evidence under section 25 Criminal Appeal (Northern Ireland) Act 1980. [41]. It found that the proposed evidence was not capable of belief and that there was no reasonable explanation for the failure to adduce in the earlier proceedings. [85-92] *"In applying the interests of justice test we refuse the application to admit fresh evidence." [93]*

Comment

This case sets out an analysis of the NICA's approach to grounds of appeal that challenge the safety of a conviction arising out of a guilty plea. [See 53-73, *Tredget* [2022] EWCA Crim 108. See also *Taylor on Criminal Appeals:*] Some of the obstacles identified in this case were that [66]:

> *"The appellant does not dispute the facts of what occurred, or his admissions at police interview, or that he voluntarily entered a guilty plea in which he had the benefit of solicitor and counsel…"*

The Court of Appeal will usually hesitate before finding fresh evidence not capable of belief – particularly without hearing the witnesses itself. In this case, counsel for J submitted that [5]

> *"The appellant contends that the gravamen of the application to adduce fresh evidence centres upon the court hearing oral testimony from Mr Jamison and therefore being able to assess his demeanour and the credibility of his account (which, they say, to all intents and purposes now hinges on his evidence and the evidence of Paul King, William Dalton Watty and Eleanor Jamison as corroborative witnesses). It is acknowledged that this is an unusual application, acknowledged that this is an unusual application, but it is said that the facts of this case, as put forward by the appellant, are also very unusual."*

However, the Court disagreed and determined the issue "on the papers", taking into account the proposed appellant's fresh affidavit evidence and the affidavits in response from the Crown.

The authorities make it clear that if the Court thinks that the evidence appears 'plainly incapable of belief' it will not usually be received. [*Clarke* [2004] UKPC 5; *Newman* [2016] EWCA Crim 380.]

The judgment also provides an example of the challenges that face an appellant when the fresh evidence is based wholly or in part on their uncorroborated accounts. [4]. [73]. The appellate courts will hesitate before

admitting fresh evidence that is based on a new account from the appellant, [see *Pendleton* [2002] 1 Cr App R 441 HL, per Lord Hobhouse [46] unless it is corroborated by independent evidence. [See *Taylor on Criminal Appeals*, para 6-319]

Alternative verdicts – hostile witnesses – bad character evidence

The King v Joseph Joyce [2023] NICA 67

This judgment provides a detailed analysis of the legal framework relating to the circumstances in which a trial judge is under an obligation to leave an alternative verdict to the jury (in this case whether manslaughter should have been left as an alternative to murder), hostile witnesses and bad character evidence.

Contributors

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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).

Danny Robinson KC is renowned for his expertise in cases of Serious Fraud, Homicide, Sexual Offending and all forms of Organised Crime. He is listed by both Chambers UK and the Legal 500 as a leading silk. He has particular expertise in cases involving RIPA, PII and disclosure issues. He has vast experience in prosecuting and defending cases of serious sexual misconduct. He has been described as "a first class advocate, with a real cutting edge. Bags of charm but utterly ruthless."

Charlotte Newell KC has developed a formidable practice appearing in cases of the utmost gravity in the Crown and Appellate Courts and has with particular expertise in the Prosecution and Defence of serious sexual allegations and cases involving young and vulnerable witnesses. She prosecuted one of Britain's youngest murderers for the fatal stabbing of a 12 year old girl stabbed to death in Liverpool City Centre.

Jonathan Polnay KC is a Senior Treasury Counsel based at the Central Criminal Court. He has been instructed in some of the most high-profile cases in the criminal courts, which include the recent prosecutions of the murder of Sir David Amess MP, John Worboys ('the black cab rapist), the PC Harper trial and the trial concerning the manslaughter of 39 Vietnamese migrants. He brings to all cases his fierce intellect, unstinting hard work and

dedication and an approachable and down-to-earth manner. He is much admired for his excellent and incisive judgment and legal knowledge as well as his ability to communicate complex evidence in a way that is clear and attractive to juries. As Treasury Counsel, Jonathan represents the Law Officers on references of sentences to the Court of Appeal as potentially unduly lenient. He also undertakes a wide variety of appellate work, often where a specialist second opinion is needed.

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.

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.