



## POTENTIAL GROUNDS OF APPEAL (3): JURY IRREGULARITIES

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This article first appeared in the January 2025 edition of *The Appeal Brief*- The 5KBW Criminal Appeals Unit newsletter.

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

*This article looks at grounds based on jury irregularities, lists some practical tips for preparing this ground, and identifies some of the factors that may determine the outcome.*

*[For a detailed analysis of this ground see Taylor on Criminal Appeals paras 9.400 onwards.]*

### **Areas giving rise to a potential ground of appeal**

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

#### (1) The initial selection of the jury

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

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<sup>1</sup> *Chapman* (1976) 63 Cr App R 75. However, see the comment in *Taylor on Criminal Appeals* at para 9.400 that s.18 may violate article 6 ECHR. Cf. *Grant* [2017] EWCA Crim 414 where s.18 Juries Act was held not to apply when a juror at a retrial had also sat on the first trial.

<sup>2</sup> *Tarrant* [18.12.97]

(2) Improper communications with the jury

Prohibited communications between the jury bailiff<sup>3</sup>, clerk<sup>4</sup> or usher<sup>5</sup> and the jury, or between the jury and the Court<sup>6</sup> may provide a ground of appeal.

(3) Inappropriate knowledge of the defendant

The jury's knowledge of prejudicial material that they should not have been aware of may undermine the safety of a conviction. This can include inadmissible evidence.<sup>7</sup>

The CACD will consider how the matter was dealt with at trial, when it was raised, whether the judge's directions were sufficient, or whether the jury should have been discharged.

(4) Issues in retirement

This may include the time of retirement<sup>8</sup>, unauthorised separation<sup>9</sup>, dealing with jury notes<sup>10</sup>, giving of a *Watson*<sup>11</sup> direction and Majority directions.<sup>12</sup>

(5) Jury bias

Allegations of jury bias can result in a conviction being quashed.<sup>13</sup>

The test was re-affirmed by Lord Clarke in the Privy Council case of [A-G of the Cayman Islands v Tibbetts](#)<sup>14</sup>

“[T]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the jury were biased: ... The fair-minded and informed observer must adopt a balanced approach and is to be taken as a

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<sup>3</sup> Eg. *Lamb* (1974) 59 Cr App R 196. Cf. *Ball* [2018] EWCA Crim 2896

<sup>4</sup> Eg. *Townsend* (1982) 72 Cr App R 218.

<sup>5</sup> Eg. *McCluskey* (1994) 98 Cr App R 216

<sup>6</sup> Eg. *Woods* (1988) 87 Cr App R 60

<sup>7</sup> Eg. *Kaul* [1998] Crim LR 135.

<sup>8</sup> See *Brown and Stratton v R* [2018] 4 WLR 84; *Smith (Joseph Henry) v R* [2018] NICA 10 (Northern Ireland Court of Appeal); see also the recent Privy Council case [Shawn Campbell and others v The King \(No 2\)](#) [2024] UKPC 6 (On appeal from the Court of Appeal of Jamaica).

<sup>9</sup> Eg. *Oliver* [1996] 2 Cr App R 514. See *Parker* [2023] EWCA Crim 753. (Although a trial judge had not followed the procedure set out in para.26M7 of the Criminal Practice Directions 2015 (Consolidated Version) [2022] when notified that a juror had used a mobile phone during a break in the jury's deliberations, there had been no impact on the trial and no further investigation into the irregularity was necessary.)

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

<sup>11</sup> *Watson* (1988) 87 Cr App R 1; eg. *Morgan* (1997) Crim LR 593.

<sup>12</sup> See *Adams* [2007] 1 Cr App R 34

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

<sup>14</sup> [2010] UKPC 8 [3]

reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious.”

### **Investigation of the alleged irregularity**

- (1) By the trial judge<sup>15</sup>: Practice Direction 2015 PD 26M sets out the steps to be followed by a judge investigating an alleged irregularity. A challenge to a conviction may arise if the Judge refuses to investigate, does not provide appropriate directions or refuses to discharge the jury.
- (2) By the CCRC and the Registrar: The Criminal Cases Review Commission is empowered to carry out inquiries into jury irregularities,<sup>16</sup> and the Registrar of Criminal Appeals can request the police to investigate matters.<sup>17</sup>

Evidence of the irregularity is limited to extraneous matters outside deliberations.<sup>18</sup>

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

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

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

<sup>17</sup> As happened in [Birmingham \[2020\] EWCA Crim 1662](#)

<sup>18</sup> See [Mirza](#) [2004] 1 AC 118.