

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

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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

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.”

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 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 statements⁷, or expert evidence⁸, failing to advise on defences that are available⁹ 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 evidence¹¹.)

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

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.

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 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

¹³ *McCook* [2014] EWCA Crim. 734.

¹⁴ For recent examples, see *Brooker* [2024] EWCA Crim 103; and *Mahmood* [2023] EWCA Crim 1358

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”.

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.]



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