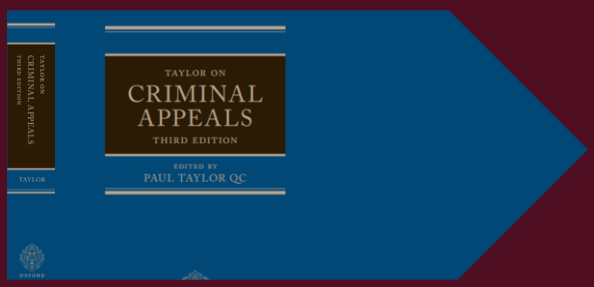
Issue 4

JULY 2025

THE APPEAL BRIEF

The 5KBW Criminal Appeals Unit Newsletter



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

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

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

The featured article is "**Potential grounds of appeal (4): Prosecution Impropriety**". This is the latest in a series of articles analysing the approach of the CACD to particular grounds of appeal. Visit the ***Criminal Appeals resources*** section on our website for links to these and other articles, external websites, procedural rules, guidance and research relating to criminal appeals.

To sign up to receive future editions of this newsletter (and / or *The Appellate Brief* – our newsletter covering appeal cases from the Caribbean and the Privy Council) click here or scan the QR Code.

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

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

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Latest News from 5KBW

5KBW and the Law Commission Criminal Appeals Project

The Law Commission has been tasked with making recommendations for changes to the criminal appeal system. 5KBW has been involved in responding to the proposals.

In 2024 Paul Taylor KC hosted a podcast ***Time for Change…The Law Commission Criminal Appeals Project*** in which he discussed the project with **Professor Penney Lewis** (Law Commissioner for the Criminal Appeals Project), **Matt Foot** (co-director of APPEAL), and **Dr. Hannah Quirk** (Reader in Criminal Law at Kings College London, and editor of the Criminal Law Review.) Topics discussed included the safety test, the CCRC, substantial injustice, and compensation for miscarriages of justice. To listen Click here.

In May 2025 we hosted a seminar ***The Future of Criminal Appeals – Time for significant change?*** Attended by senior judiciary, academics, and solicitors, papers were presented by Professor Lewis, Paul Taylor KC, Dr. Hannah Quirk and Mark Heywood KC.

5KBW's response to the Law Commission's Consultation Paper (by Paul Taylor KC, Mark Heywood KC, Phoebe Bragg, Ria Banerjee and Aamina Khalid) can be found here.

Paul Taylor KC assisted the Bar Council with the Law Reform Group's response to the Issues Paper and most recently the response to the Consultation Paper. Click here.

5KBW Welcomes New Tenants

We are delighted to announce that **Aamina Khalid**, **Claire Mainwaring** and **Harriet Palfreman** have all accepted an invitation to join chambers, following the successful completion of their pupillages.

Johan Eriksson Elected New Chairman of the Swedish Bar Association

Many congratulations to Johan Eriksson, an associate member of 5KBW, who has been elected the new Chairman of the Swedish Bar Association.

5KBW are delighted that they have been shortlisted in 2 categories in the Legal 500 Bar Awards for 2025:
- Crime & Extradition set of the year
- Corporate Crime Junior of the year – **Kathryn Arnot Drummond**, who is being nominated for the 3rd time in 4 years.
We would like to express our thanks to our clients and referees for their support and to **Legal 500** for recognising it. The winners will be announced at the Legal 500 awards ceremony on 24 September 2025.

5KBW Criminal Appeals Resources

Visit the resources section on our website for links to articles and external websites relating to criminal appeals. Click here.

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

POTENTIAL GROUNDS OF APPEAL (4):

PROSECUTION IMPROPRIETY

(PRESENTATION OF THE TRIAL)

By **Paul Taylor KC**

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

This article looks at grounds based on prosecution impropriety relating to the presentation of the trial, 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 9.208 – 9.214.*]*

The context for the ground of appeal

The prosecution advocate's improper behaviour during a trial can form the basis of a ground of appeal against conviction. The context within which such behaviour is considered is the role of the prosecutor within the criminal justice system. Rand J in the Supreme Court of Canada stated:[1]

> "…the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty…It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

The approach of the appellate courts

Once prosecution counsel's behaviour has been determined by the court as having been improper, the next question for the appellate court is whether 'the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty'.[2]

In determining this question, consideration will be given to the extent to which the trial judge intervened and directed the jury in relation to the impropriety.

In **The King v Jordan Glasgow** [2024] NICA 54 the Northern Ireland Court of Appeal rejected JG's renewed application for leave to appeal against his conviction for sexual assault. One of the grounds of appeal was that the Crown closing contained an unfair and prejudicial comment to the jury:

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

Senior defence counsel raised a complaint with the Judge, commented upon it in his closing speech to the jury, and the Judge directed the jury on this in the charge.

[1] *Boucher v The Queen* (1954) 110 Can CC 263, 270. See also *Randall* [2002] 1WLR 2237 PC.

[2] Randall [28]

The NICA analysed the duties of prosecuting counsel, and concluded [20]:

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

<u>Examples of successful appeals:</u>

The Privy Council has quashed convictions from the Commonwealth courts where the grounds (alone or in combination with others) raised the following complaints:

(a) Crown counsel had 'made "improper and unfounded allegations" against defence counsel on numerous occasions during the trial;[3]

(b) The trial judge had wrongly allowed prosecuting counsel to make a speech (the defence having called no evidence), and where the prosecutor informed the jury of his view that the defendant was plainly guilty, made emotional appeals for sympathy for the deceased and his family, demanded that the jury should not let the defendant 'get away with it', and repeatedly 'urged' the jury to convict. His speech contained many inflammatory passages;[4]

(c) Prosecuting counsel repeatedly interpolated prejudicial comments whilst examining prosecution witnesses, and his cross- examination of the defendant, repeatedly interrupted the cross-examination of prosecution witnesses and the examination in- chief and re-examination of the appellant, and interrupted the judge during his summing-up;[5]

(d) Prosecution counsel's closing speech was described as 'xenophobic, inflammatory and seeks to make use of inadmissible and irrelevant material'.[6]

[3] *Johnson v The Queen* (1996) 53 WIR 206, 215 (Court of Appeal of Jamaica).
[4] *Mohammed v The State* [1999] 2 AC 111, 125–126
[5] *Randall v R* [2002] 1 WLR 2237 PC.
[6] *Benedetto v The Queen* [2003] 1 WLR 1545, [55]. But cf. *Solloway* [2019] EWCA Crim 454.

CASE SUMMARIES AND COMMENT

CONVICTION APPEALS

Allowing serious physical harm to vulnerable adult - Statutory interpretation s.5 Domestic Violence Crime and Victims Act 2004 - Foreseeability - No case to answer

Sheikh (Shagufa) [2025] EWCA Crim 38

By **Mark Dacey**

Summary: The appeal focused on the construction of section 5(1)(c) and (d) Domestic Violence Crime and Victims Act 2004 ("DVCVA"). The Act has the effect of imposing a positive duty on members of the same household to protect children or vulnerable adults from serious physical harm or death.
The decision addressed the scope of liability of secondary parties and what is required to be foreseen by a non-perpetrator in order to necessitate them to take steps to protect the vulnerable person ('V'). It was concluded that the unlawful act must have occurred in "circumstances of the kind" that the defendant foresaw or ought to have foreseen a significant risk of serious physical harm. It was not restricted by foresight of the particular type or category of violence but was not so wide as to encapsulate all or any serious harm caused by any unlawful means in a domestic setting.

Section 5 DVCVA 2004 provides:

> "(1) A person ("D") is guilty of an offence if—"
>
> (a) a child or vulnerable adult ("V") dies or suffers serious physical harm as a result of the unlawful act of a person who—
>
> (i) was **a member of the same household** as V, and
>
> (ii) had frequent contact with him,
>
> (b) D was such a person at the time of that act,
>
> (c) **at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and**
>
> (d) either D was the person whose act caused the death or serious physical harm or—
>
> (i) **D was, or ought to have been, aware of the risk mentioned in paragraph (c),**
>
> (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
>
> (iii) **the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.**

The Facts: V was a vulnerable adult who suffered serious physical harm which left her in a persistent vegetive state. One unidentified household member had previously deliberately inflicted a caustic burn to the lower back of the victim. The subsequent serious physical harm was caused by poisoning with anti-diabetic medication. The issue was whether members of the household were or should have been aware that the previous injury to the back had been caused *and that the previous unlawful act indicated that V was at significant risk of serious harm by the further unlawful act of another member of the household* and therefore culpable. At first instance a submission of no case on the basis that the lower back injury was wholly different from the unlawful act which had subsequently caused the serious physical injury was rejected.

The CACD decision: The proper focus of the legislation was the circumstances in which the unlawful act occurred rather than the unlawful act itself or the precise nature of the injury caused.

s.5(d)(i) places emphasis on the reasonable foreseeability of risk of further serious physical harm based on the fact of the previous unlawful conduct by a member of the same household whereas S.5(d)(iii) imports the need to focus on the "circumstances of the kind" not on the category of offence. This, it was said, limits the scope of the offence and safeguards a non-perpetrator against *any* unlawful act by the principle.

But the Court in giving examples disagreed with the construction of s.5(d)(iii) in the 16th Edition of Smith Hogan and Ormerod's Criminal Law where it was opined that a defendant with foresight of a GBH caused on V by punching cannot be convicted if the subsequent injury or death is caused by poisoning. The CACD felt this went "too far in adopting a generic characterisation of unlawful acts as illustrative of "circumstances of a kind"".

The CACD's view did however accord with the 17th edition of the above text and which they specifically endorsed:

> "Care must be taken to avoid the circumstances being interpreted too loosely. It is not, it is submitted, enough that the prosecution can say that the circumstances are of a 'kind' which involves general violence towards V in the domestic context such that any unlawful act that causes serious injury to V in that setting is capable of being one that D2 ought to have foreseen (even if the act itself was of a wholly unforeseeable kind)."

It was accepted that the act may be different in nature but committed with the same desired outcome in mind. Their Lordships sought not undermine the safeguards in s.5(d)(iii) and stated that it would be a matter for a jury, or the judge on a submission of no case to answer, to have regard to all the evidence and all the circumstances.

The appeal was allowed on the basis that administration of the substance was "so utterly different" from the previous injury that it was doubted that a reasonably jury properly directed could conclude that it occurred "in circumstances of the kind that D foresaw or ought to have foreseen". It was emphasised they were not suggesting a D will necessarily escape liability if the act is of a "different category" and each case will be fact specific.

Comment

The case seeks to give assistance in identifying the limits of the offence and the duties of those living in a household against an unlawful act (or omission) against a vulnerable adult. It both guards against a narrow interpretation which may afford a defence where the injury is caused by a different mechanism but states that the section must not be interpreted too loosely so as to cast a net encapsulating all and any serious harm caused or inflicted by ANY unlawful means if it occurs within a domestic setting.

In this case there were evidential difficulties in establishing precise causation of the serious injury and the tailored directions called for to find that a non-perpetrator had failed to take steps that it was reasonable for them to take were lacking. Here it was not a cumulative course of conduct but one act or another and the circumstances were not addressed sufficiently and called for an

intricate and evidentially tailored direction into all components of subsection.

This is a complex piece of legislation that has not often come before the Court of Appeal. I would suggest reading the judgment in full which addresses other areas and the case of R. v Khan (Uzma) [2009] EWCA Crim 2; [2009] 1 W.L.R. 2036; [2009] 1 WLUK 200 (CA (Crim Div)) which deals with other aspects of S.(5) and their interpretation.

Admissibility of identification evidence by a police employee arising out of repeated viewing of CCTV footage - Submission of No Case

Scott Garrington [2025] EWCA Crim 52

By James Brown KC

G was convicted of the murder of JJ, possession of a prohibited firearm, two counts of having an article with a blade and perverting the course of public justice. G's co-accused T and W were convicted of the murder and P, B and S of manslaughter. JJ was a heroin addict and owed T, a drug dealer, £175. On the evening of 25th February 2022 G's co-defendants drove to JJ's house in a Renault car, driven by W, and gained entry. T was armed with a sawn-off shotgun and P, B and S with two large knives and an imitation Glock pistol. T ran upstairs and shot JJ in the chest, killing him instantly. W drove them away from the scene and the Renault was subsequently burnt out. The Crown's case against G was that he played a supporting role. He was involved in preparation for the murder, provided a base for others to change their clothing, assisted them at other locations before they arrived at JJ's house and helped to set fire to the Renault.

The case relied on a Sequence of Events, prepared by a police employee SJ. SJ had spent a lot of time studying available CCTV footage and had identified profiles of people on it and compared them to stills of the defendants. The prosecution said profile 3 ("P3") was G. SJ identified common features between the still of G and footage of P3 on the afternoon before the murder. In cross-examination, SJ said, *"I am satisfied that there is sufficient there for me to be able to say there is (sic) consistent features that I can't exclude him from being one and the same."*

At trial, a submission of no case was made. It was said that SJ's evidence did not amount to a positive identification and was insufficient to satisfy the criminal standard of proof. It was conceded that SJ's evidence was a form of identification evidence and admissible. The trial judge rejected the submissions, concluding that the evidence amounted to an identification and, in any event, the prosecution case was also based on the movement of the appellant and other defendants, the use of mobile telephones and cell-site evidence.

The CACD decision: Trial defence counsel appeared in the CACD. He changed tack, arguing that SJ's evidence did not amount to identification evidence at all. Perhaps unsurprisingly, this got a rather stony reception. Holgate LJ, giving the judgment of the court, emphasised the discussion in *R v Turnbull [1977] QB 224* concerning poor identification and the possibility of other evidence to support its correctness. SJ, *"on a fair reading"* had made a positive identification. The prosecution was not required to show that SJ's evidence identified the appellant to the criminal standard of proof. The issue was whether the prosecution's evidence, taken as a

whole, entitled a reasonable jury to convict him.

Comment

The CACD heavily underscored the *"a reasonable, not all reasonable juries"* aspect of the judgment in *G and F v R [2012] EWCA Crim 1756*, adding that the focus should be on what a reasonable jury could do, rather than on what it could not do. On appeal, the issue for the court was whether in fact there was a case to answer, rather than on the sufficiency of reasons given by the judge (cf: *R v Chauhan and Croft [2019] EWCA Crim 1111*).

The case is notable for two other reasons. Firstly, on one view, the CACD placed a great deal of reliance on the concession made at trial that SJ's evidence amounted to identification. Some might say it was barely that. Interestingly, Males LJ, in a differently constituted court which granted leave by the Full Court, said that it was arguable that SJ's evidence amounted to nothing more than that the images of the appellant in arrest were consistent with P3.

Secondly, the case demonstrates the almost inevitable folly of shifting ground on important points between trial and appeal.

s.75A Serious Crime Act 2015 – intentional strangulation or suffocation – one offence or two? Held – one offence. R. Hughes [2024] EWCA Crim 593 approved.

Jones [2025] EWCA Crim 195

By **Danny Robinson KC**

J was convicted of a number of offences against two complainants, including two counts of intentional strangulation or suffocation, contrary to s.75A Serious Crime Act 2015. The evidence was that on both occasions J intentionally strangled the complainants by the application of force to their necks. There was no evidence of any other act carried out by J which affected the complainants' ability to breath. The allegations were pleaded in the statement of offences as *"intentional strangulation contrary to section 75A(1)(a) of the Serious Crime Act 2015."* The particulars of offence alleged that the appellant had *"intentionally strangled"* the complainants.

Before summing-up, counsel contributed to the judge's directions of law, which included a direction that a defendant is guilty of intentional strangulation if he (1) intentionally strangles a person; or (2) he intentionally applies any force to that person which affects that other person's ability to breathe. The judge then distilled the direction into one question for the jury to answer: *"Are [you] sure that the defendant intentionally applied any force to the complainant which affected their ability to breathe?"*

In retirement, the jury sent a note asking if J would be guilty if he had applied the chest of either complainant, thereby affecting their ability to breathe. There was no evidence that J had applied force to the chest of either complainant. The jury note prompted defence counsel to reconsider the direction on the intentional strangulation counts that had already been given. She submitted that as a matter of law s.75A created two separate offences, namely (i) intentional strangulation and (ii) suffocation. The judge rejected defence counsel's submissions and answered the jury's question by repeating the question the jury should answer, while emphasising that there was no evidence that J had applied force to the chest of either complainant. J was convicted on both counts, and on the other counts he faced.

Grounds of Appeal: The grounds of appeal mirrored trial counsel's submissions after the jury note, namely that on a true construction of the statute s.75A created two separate criminal offences. Counsel drew the CACD's attention to the different states of mind which the distinct acts required: whereas strangulation required an intentional application of pressure to the neck, suffocation could be committed by a battery, liability for which only required recklessness. There was a danger that the appellant was convicted on the basis of suffocation, an offence he was not charged with. The single judge granted permission to appeal.

The CACD decision: The CACD held that s.75A created one offence, which could be committed by either intentional strangulation or by suffocation. The fact that the offence could be committed by different mental states did not mean there were two offences: if Parliament had intended to create two offences it could easily have done so.

After the conclusion of the appellant's trial, the CACD heard the appeal against conviction in R. v. Hughes [2024] EWCA Crim 593. That constitution of the court decided that although the prosecution case at trial was that the appellant intentionally strangled the complainant, it was open to the jury to convict him on the basis that he had committed an act of battery which affected the complainant's ability to breath. The CACD in *Jones* was not persuaded that *Hughes* had been wrongly decided.

Further, the court noted that s.75A was inserted into the Serious Crime Act by the Domestic Abuse Act 2021. The court referred to the explanatory notes which accompanied the 2021 Act in support of its conclusion that s.75A created a single offence.

During the course of his judgment the Vice President noted that the 2015 Act did not contain any definition of strangulation or suffocation. In the court's view, *"strangulation"* refers to compression of the neck, whether by pressure of a hand or ligature around the neck, or by a body part or object across the neck. *"Suffocation"* refers to interference with the victim's ability to breath, otherwise than by compression of the neck.

The Vice President suggested that in future case where an offence contrary to s.75A is alleged, the particulars of offence on the indictment could be drafted simply as "intentional strangulation", or "intentional strangulation or suffocation". Either form of words would allow the jury to convict if the defendant had committed either of the acts specified by the section.

The CACD stated that in order for a jury to convict, it was not necessary for them all to agree on which of the acts the defendant had committed; as long as the jury were sure the defendant had committed one of the acts specified by s.75A, that would suffice. It would only be in rare circumstances that a *Brown* direction should be given.

Comment

The CACD gave the appeal fairly short shrift. In fairness to defence counsel, the appellant's convictions pre-dated the Court of Appeal's decision in *Hughes*, which settled the point. The judgment in *Hughes* meant that counsel in the present case had to argue that *Hughes* was wrongly decided. Unsurprisingly, the CACD declined to do so.

Guidance on the jury direction where it was alleged that a defendant had told a deliberate lie in relation to a material issue

Bhatti [2025] EWCA Crim 8

By Kathryn Arnot Drummond

Summary: B appealed with leave of the full court against his conviction for five offences of making and possessing explosive substances and possession for handbooks and material for terrorist purposes. The issue for the jury in relation to the former was whether he could show that he had them in his possession or under his control for a lawful object. The issue in relation to the latter offences was whether the prosecution could prove that his possession of those items was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

Grounds of Appeal: The two grounds of appeal related to the directions given to the jury about (1) the significance of lies told by the appellant to the police in interviews; and (2) the relevance of evidence that the appellant had never applied for a certificate from the police that he was a fit person to acquire, or acquire and keep, explosives.

Facts

B was arrested after police were notified that material had been found on his laptop by a computer shop. Police attended the shop and took a forensic image of the hard drive before returning it for collection by B. When examined, material was identified relating to explosives, jihad and handguns. B was arrested at his home, and an urgent initial interview was carried out in a police car to ensure the safety of officers entering the premises. B said that there were no firearms or explosive substances at his address. This turned out to be a lie as, when officers searched both his home and a separate storage facility, they found a number of those items. Thereafter, B was interviewed on several occasions in which he told police that he had not created explosives and did not have any nitro-glycerine. It was later accepted that one of the glass flasks found in a search contained that substance, the appellant having made it himself. The interviews contained multiple lies of this kind which were subject of the direction given by the judge which is criticised in Ground 1.

The CACD decision: The appeal was dismissed. The CACD found that the lies direction subject to Ground 1 was adequate, but it could have been clearer and structured in a way that would have avoided the appeal. That would have been achieved had it been reduced to writing and provided to counsel in advance. The court therefore gave guidance on Lucas directions from para 60 as a Practice Note.

Practice Note

This part of this judgment concerns only the manner in which, and the time at which, any lies direction should be given. Its content is the subject of extensive guidance in, principally, the Crown Court Compendium which was not repeated.

A lies direction should be reduced to writing and shared with counsel before it is delivered. Lies directions and section 34 adverse inference directions are among those directions which must respond to the way in which the parties put their cases to the jury. This can be done by asking counsel how they propose to address the jury and giving the directions before speeches or waiting for speeches and designing the directions in light of what is said. In a complex case, the latter course may be more appropriate, but it is a matter for the trial judge. Whenever the discussion takes

place, it should be clear that it is the role of the prosecution to decide what lies to rely on or adverse inferences to seek and not that of the judge. If the judge needs to give further legal directions after speeches, the judge should not be inhibited to do so when the need arrives, but they should also be in writing and dealt with in the same way as other directions.
[Discussion on lies from para 39-45 of the judgment.]

Fresh evidence – CACD approach – potential impact of acquittal of co-defendant in conspiracy count

Leon Smith [2025] EWCA Crim 25

By Paul Taylor KC

LS appealed against convictions for conspiracy (with DB and others, including Khalifa Benjamin) to possess a firearm with intent to endanger life and to possess ammunition.

The ground of appeal was based on the evidence that Khalifa Benjamin gave at his trial, Mr. Benajmin's acquittal, and fresh evidence in the form of a new statement from Mr. Benjamin.

The judgment addressed the following issues:

(a) The CACD's approach to fresh evidence;
(b) The potential impact of a co-defendant's acquittal on the safety of the appellant's conviction;
(c) The analytical exercise that the CACD is likely to carry out in fresh evidence appeals when considering whether the new material could reasonably have affected the jury's decision to convict.

Comment

See *Sensi [2020] EWCA Crim 1383 where the* CACD considered the impact on S of a successful appeal by his co-defendant.

As to the CACD's approach to inconsistent verdicts generally, see *Taylor on Criminal Appeals*, paras 9.424ff

Jury Irregularity – Bias – Discharge of Jury

Cepe [2025] EWCA Crim 196

By Ria Banerjee

C sought leave to appeal his conviction for a number of offences including rape, assault occasioning actual bodily harm and controlling or coercive behaviour against a woman ("V"). The issues for the jury were essentially factual and turned on their assessment of the truthfulness and reliability of V's evidence.

During the jury's retirement, the judge received a number of notes from members of the jury, which ultimately led to the discharge of one juror (J10). She refused to discharge another juror (J5) and the jury as a whole.

In relation to J10, the background to the judge's decision was that during the evidence of V, J10 had been making noises, stretching his arms and acting in a bizarre fashion. He had also been seen smiling and smirking at inappropriate points during the prosecution opening and parts of the evidence. There had been delays to the trial on a number of occasions, which she understood to be because of J10's behaviour. Later in the trial, J10 had been on his mobile phone, which the judge repeatedly had to ask him to put away.

Against that background, during the jury's deliberations, two jurors had indicated

serious concerns that J10 was refusing to engage in discussions, had said he would not accept any evidence except the video evidence and that of 'credible' eye witnesses (i.e. evidence other than V's account), had said that he had been falsely accused of sexual misconduct, had made comments like "all women lie" and had "trashed" the "Me Too" movement. When questioned about this, J10 stated that he did not hate women and that other members of the jury were biased on the grounds of gender, religion and race. He alleged that J5 had said "Turks get angry a lot", implying they often lose control and had claimed that "[the applicant] is lying because he blinked a lot."

When questioned about the above comments, J5 stated: "I mean by some of my friends and workmates – when they talk loudly, when they get upset and move their hands around. It wasn't just about Turkish people."

The defence submitted that J5's reply showed unconscious bias, which was of concern, because the applicant is Turkish.

The judge referred to the procedure set out in Criminal Practice Direction 8.7.5. She directed herself that she must discharge a juror where there is an evident need to do so, where it is necessary. The judge further directed herself that where there is a question of bias, the test was whether she could conclude that a fair minded and informed observer would not consider that there was a real possibility of bias. On applying both tests, she concluded that it was necessary to discharge J10.

The remaining 11 jurors were then asked to individually confirm that they could remain true to their oaths and try the case on the evidence. They were reminded of the directions and given additional directions to respect each other's opinions, not allow themselves to be pressured into changing their opinions and not to exert pressure on others. The jurors continued to deliberate.

Later that day the defence applied to discharge the whole jury on the basis of two issues: first, the comment about the applicant lying because he was blinking too much; and secondly, concern as to whether what had taken place in relation to J10 may have inhibited other jurors in conducting their deliberations. The judge concluded that there was no necessity to discharge the jury.

In relation to J5, the judge found that there was no evident need to discharge him. If there was any apparent unconscious bias, it had been dealt with by her directions and J5's confirmation of his ability to try the case in accordance with his oath.

Grounds of Appeal: The judge erred in rejecting the applications to discharge the jury as a whole and J5 individually.

The Decision of the CACD: Appeal dismissed. The CACD held that the judge rightly focused on the impact on the trial and carefully followed the stepped procedure set out in Criminal Practice Direction 8.7.5 She applied the principles stated in a number of cases including *Porter v Magill* [2001] UKHL 67; *R v Gynane* [2020] EWCA Crim 1348 at [40]; and *R v Skeete* [2022] EWCA Crim 1511 at [25].

The judge was entitled to conclude that there was a high degree of need to discharge J10. The CACD did not accept that the discharging of J10 would or might have had a chilling effect on other jurors or would have caused them to feel unable to challenge the prosecution case.

In relation to J5, the judge had taken a careful approach. The process undertaken by the judge would in itself have caused J5 to reflect carefully upon his position and his responsibilities as a juror. Applying the correct test in relation to potential juror bias, the judge was entitled not to discharge J5.

The CACD concluded that the judge dealt appropriately with the jury matters which arose and reached decisions which were properly open to her and could not be impugned.

Comment

This case highlights the importance of following the stepped procedure set out within Criminal Practice Directions 8.7.5 - 8.7.22 which includes considering isolating the juror(s), consulting with the advocates and seeking to establish the basic facts of the jury irregularity, before making a decision.

Jury irregularities – investigation by trial judge – Crim PD 26M- investigation by CCRC under s.23A CAA 1968

Stokes, Miller, Palmer [2025] EWCA Crim 51

By Paul Taylor KC

The applicants had been convicted of conspiracy to murder. This judgment deals with their renewed applications for leave to appeal against the convictions, and for M, sentence. The grounds related to the admissibility of evidence and jury irregularity.

In relation to the jury irregularity ground the CACD considered the trial judge's handling and investigation of concerns raised by specific jurors (Crim PD 23M, paras 8.7ff Crim PD 2023), the discharge of a particular juror and their continuing "influence" on jury deliberations, the extent to which trial counsel (and appellate counsel) should be told of the full contents of juror notes sent to the judge, and whether the CCRC should be directed to investigate the conduct of the jury under s.23A CAA 1968.

> "The applicants rely on the recent decision of the Privy Council in Campbell v R [2024] UKPC 6. Their Lordships there confirmed that judges faced with allegations of juror misconduct have a wide discretion as to how to proceed and, in many circumstances, it would not be necessary to discharge the entire jury. Once a jury irregularity has been identified, the key question is whether a fair trial remains achievable. It is therefore necessary for the judge to investigate the facts as best as possible, and to establish the extent to which contamination has spread." [86]

The CACD analysed the steps taken by the trial judge to investigate and address each of the issues relating to the jury.

(a) The Court refused to disclose the jury's notes. [103]

> "The judge had to, and did, steer a careful path to inform counsel of as much as possible of the content of the notes, without breaching the prohibition on revealing the jury's discussions or individual decisions."

(b) The CACD stated that [114] "the stance taken by all counsel [at trial] is important: it was of course for the judge, not counsel, to make the

decisions; but he was entitled to take into account the collective view of all the legal representatives who had been involved in the trial."

(c) The CACD analysed the trial judge's approach, whether the investigation conducted was sufficient, and what matters the judge could be confident of from the material before him. [108-116]

(d) However, the CACD concluded that [116] the Judge "carefully followed the process set out in Crim PD 26M, and we are not persuaded that he fell into error in the manner in which he did so…the judge was entitled… to conclude that a fair trial remained achievable."

Comment

This case demonstrates some of the difficulties in relying on jury irregularities as a ground of appeal. [See generally the article on our website: Potential Grounds of Appeal: Jury Irregularities][7]

Had the CACD granted the applicants' requests for disclosure of the jury notes in full, and directed an investigation by the CCRC, there may have been greater clarity as to what had occurred and the extent to which it prejudiced the applicants. Against taking such a course, the CACD was faced with the trial judge who faithfully followed the Crim PD, and the need to protect jury confidentiality.

Ultimately, once the CACD concluded that the trial judge followed the correct procedure investigating the concerns – even though they may have done some things differently[8] - the deciding factor appears to have been the Court's conclusion that the trial judge had sufficient material to exercise his discretion as he did.

There is one particular matter that the CACD relied upon that is open to question: [114]

> "The judge was also entitled to take into account his experience of conducting the trial over a period of weeks, and his assessment of what may be described as the jury dynamics. He was well placed to assess, for example, the extent to which the notes reflected an apparent clash of personalities between A and one or more of the other jurors. …"

It does not appear that the Crown relied upon this point, nor that any evidence on this issue was before the CACD, nor indeed what form such evidence could take. Reliance on this matter by the CACD does seem to have been speculative - and unnecessary in light of the other matters relied upon.

CCRC reference – cell confession - Fresh evidence – retraction by prosecution witness – CCRC investigations – s.19 CAA 1995

Calvert [2025] EWCA Crim 345

By Paul Taylor KC

In 2014 LC was convicted of murder and possessing a firearm with intent to endanger life. He unsuccessfully sought leave to appeal against conviction in 2016.

[7] One of the changes currently being considered by the Law Commission Criminal Appeals Project is the investigation of jury irregularities. See the Consultation paper , p.242.

[8] The Court accepted "that careful further questioning could have been undertaken without trespassing on forbidden territory…." [108]

A central plank of the prosecution case against LC at trial was what was said to be in effect a cell confession made by LC, while on remand, to another prisoner, RC.

The CCRC referred the case back to the CACD on the basis of fresh evidence that RC, a critical prosecution witness, ostensibly admitted that he gave perjured evidence at LC's trial.

The judgment provides an example of the issues that are likely to arise in an appeal based on fresh evidence of retraction by a prosecution witness. These include the need for a detailed analysis of:

(a) The prosecution and defence cases at trial, and in particular the evidence and cross-examination of the impugned witness;
(b) Matters raised in previous applications for leave to appeal;
(c) The circumstances in which the fresh evidence arose, and the veracity/credibility of the explanations given by the witness for lying at trial, and then for giving the new account;
(d) The witness's evidence before the CACD.

As to the approach that appellate courts should take to such grounds, the CACD stated: [56]

> "The caution that is inevitably urged upon a jury determining the credibility and reliability of a so called "cell confession" is entirely apposite for this Court to bear in mind when considering the apparent retraction of the same. It is well established that a rigorous examination of the circumstances of the ostensible retraction, both in terms of its provenance and the cogency of its contents are necessary; See Maharaj v Trinidad and Tobago [2021] UKPC 27 [55] – [69]

Fresh medical evidence – cause of death - CCRC reference

Colin Campbell (aka Norris) [2025] EWCA Crim 795

By **Paul Taylor KC**

CC was a nurse. In 2008 he was convicted of four counts of murder and one of attempted murder. In 2009 the CACD dismissed his appeal against conviction. The matter came back before the CACD following a referral by the CCRC.

The medical issue raised at trial, on appeal in 2009 and in 2025 was "when and in what circumstances is it proper to infer poisoning by an overdose of injected insulin, as opposed to severe hypoglycaemia arising from natural causes?"

The decision to refer by the CCRC can be summarised as:

(a) The case against CC was wholly circumstantial and was heavily reliant on expert opinion evidence….
(b) The CCRC has decided to refer based on fresh expert evidence from Professor Vincent Marks and Dr Simon Croxson. They "do not agree on every point, but they agree that insofar as each of the four patients exhibited hypoglycaemia, that condition may be accounted for by natural causes."

The grounds of appeal relied on fresh expert evidence, inter alia, "which posits a plausible natural cause for the occurrence of the hypoglycaemia, if indeed present at all, in the case of each of the index

patients." In the alternative, the new evidence in relation to the onset of hypoglycaemia, if caused by exogenous insulin, undermines the prosecution case as to when the insulin was administered and exculpates the appellant…"

The CACD noted that the

> "appeal is pursued in terms that the new evidence is at the "frontier" of scientific knowledge and is "groundbreaking". Acknowledging the summing-up to have been "meticulous", nevertheless Mr Mansfield KC stated that the jury had been "left empty handed" and deprived of the benefit of the "evolution of understanding and knowledge about hypoglycaemia" as now advanced … which calls for "a holistic approach" to the symptomology and explains the possibility of natural causes to account for the hypoglycaemia."

Having analysed the fresh evidence presented on before of the appellant and in rebuttal by the Respondent, the CACD rejected the Appellant's submission that "The fresh expert evidence of Dr Hopkins and Dr Croxson completely changes the landscape of the evidence on the crucial issue of whether the jury could be sure that, in each of the four prosecution cases the patient had developed hypoglycaemia as a consequence of being injected with insulin or the administration of sulphonylureas."

"We have no doubt about the safety of any of the five convictions. The appeals are dismissed."

Comment

The CACD has allowed appeals based on fresh evidence relating to advances in medical science where it impacts on the main issues at trial. See generally *Taylor on Criminal* Appeals para 6.319 (e). eg. *Hobson* [1998] 1 Cr App R 31; *Cannings* [2004] 2 Cr App R 7; *Malkinson* [2023] EWCA Crim 954.

Prior consensual activity between complainant and appellant – application of section 41 YJCEA 1999

Wilson and Smith [2024] EWCA Crim 1514

By Jennifer Dannhauser

Summary: *Both appellants had been convicted of rape on the same occasion. Wilson appealed on the basis he should have been able to adduce evidence of previous sexual encounters with the complainant (C). He argued the evidence a) was not an issue of consent (s.41(3)(a)), b) the circumstances were strikingly similar (s.41(3)(c)) and/or c) he was seeking to rebut or explain evidence adduced by the prosecution (s.41(5)). Smith's conviction was so inextricably connected to Wilson's, that his appeal was 'piggy-backed'.*

The CACD decision: The CACD commented that s.41 had been the subject of a great deal of academic and political debate, with all agreed it is "a highly problematic provision". They stated that gateway (c) is particularly difficult to construe, and had also been given a rather wider construction since *R v. A (No 2)* [2001] UKHL – sometimes called the "ECHR Gloss" where the House of Lords had said that s.41 had to be "read down" so that it was compatible with Article 6, particularly where sexual behaviour evidence concerned the complainant and the defendant. The CACD stated that this may mean that the exclusionary rule under s.41(2)(b) [whether a refusal of leave might render unsafe a conclusion of the jury] lacked clarity.

The CACD suggested that an answer to some of the problems in applying s.41 may

lie in giving s.41(2)(b) greater prominence. The CACD stated that in certain cases, the appropriate question in considering s.41(2)(b) may be a similar one to that asked in s.100(1)(b) CJA 2003: whether the evidence had substantial probative value in relation to a matter that was in issue in the proceedings, and was of substantial importance in the context of the case as a whole. If the evidence satisfied that test, then it was likely that its exclusion would fall foul of s.41(2)(b) and it would be admitted. Otherwise, there would need to be some other identifiable reason why its exclusion might render a conclusion on that issue unsafe.

In the present case the CACD seemed unconvinced that the evidence would squeeze through gateways s.41(3)(a) or (c) but said that if it did it would founder on the twin rocks of s.41(2)(b) and s.41(4) [impugning the credibility of the complainant]. In relation to s.41(5) the CACD reaffirmed previous principles from *Hamadi Zeeyad* [2007] EWCA Crim 3048 and *Hill* [2024] EWCA Crim 1423 as to circumstances in which s.41(5) would be engaged, but said that in this case the evidence emerged during questioning by defence counsel about C's previous encounters with the appellant in circumstances where counsel knew that C accepted previous sexual intercourse. Whether that engaged s.41(5) was not answered because in any event, the CACD considered that the appellant did not wish to rebut something damaging, but instead to exploit something which was helpful to his case. Accordingly, s.41(5) did not apply.

The evidence was therefore inadmissible and both convictions were safe.

Previous allegedly false allegations by complainant – s.41 YJCEA 1999 – s.100 CJA 2003 - interaction between those sections – CCRC reference – fresh evidence

Hurley [2025] EWCA Crim 642

By **Jennifer Dannhauser**

Summary: *H had been convicted of rape and assault by penetration. Following a reference by the CCRC on the basis of partly fresh evidence, the CACD considered the proper approach to evidence of allegedly false complaints of a sexual nature and concerning domestic violence, by the complainant (C) which had the potential to materially affect her credibility and reliability. This involved a consideration of both s.41 YJCEA 1999 (evidence about sexual behaviour of the complainant) and s.100 CJA 2003 (non-defendant bad character), and the interaction between those sections.*

The CACD decision: The CACD undertook a review of previous authorities, which is worth reading for any practitioners dealing with similar themes. However, the key principles are as follows:

(a) False complaints where the complainant claims to be the victim of other sexual offending will engage s.41 if the evidence is about the complainant's sexual behaviour. Where the questioning is not about the sexual activity, but about what the complainant said, then s.41 will not be engaged. A clear case is where there was a false assertion that sexual activity had taken place, when in fact it had not. The situation is more difficult where there had been sexual activity but the 'falsehood' alleged is about whether it had been consensual- as this would necessarily involve an

introduction of evidence about sexual behaviour, case of *Cox* (1987) 84 Cr App R 132 considered and distinguished;

(b) However, before s.41 could be avoided on the above basis, there must be "a proper evidential basis" for concluding that the complaint was false. This could however, "be less than a strong factual foundation" indicative of falsity;

(c) Whether evidence relating to allegedly false sexual allegations was subject to s. 41 or not, such evidence is always still subject to s.100, because making false allegations is always reprehensible behaviour;

(d) Whether applying s.41 or s.100, the admissibility decision will be highly fact-specific, and it is neither possible nor desirable to delimit or prescribe the circumstances in which the test will be met in any individual case;

(e) The CACD approved the decision in *Wilson* [2024] EWCA Crim 1514 and the suggestion of using the same test in s.100(1)(b) when considering s.41(2)(b).

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Applying those principles in this case, the CACD concluded that there was not a proper evidential basis to suggest that the previous sexual allegations were false, therefore the evidence was subject to s.41. Alternatively, the CACD concluded that the evidence was nonetheless subject to s.41 because it was about C's sexual behaviour since it concerned acts of sexual intercourse which did take place, and which could not be separated from the statements about those acts. The CACD then considered that the evidence would fall foul of s.41(2)(b) (using the test as set out in *Wilson*) and 41(4). As a result of using the test from *Wilson* to determine s.41(4) (that set out in section 100(1)(b)), the evidence was also therefore not admissible under s.100.

The CACD did not consider that the number of rape allegations made (in consideration of s.100(3)(a)) changed the position; C's life circumstances were such that a clear or reliable inference that the number of complaints meant they were false, could not be drawn.

In relation to the domestic violence allegations, the CACD did not consider that the evidence the allegations were false was convincing. Further the evidence did not have substantial probative value in relation to the credibility of C's allegation of rape against the appellant. Therefore, they would not have been admissible under s.100.

The evidence was therefore inadmissible, and the convictions were safe.

Assault and consent - "consensual" assault carried out during consensual activity - Availability of consent as a defence

Hobday [2025] EWCA Crim 46

By Gregory Fishwick

Cases cited: *R v. Brown* [1994] AC 212; *J.J.C. (A Minor) v. Eisenhower* [1983] 3 All E.R.; *Wilson* [1997] Q.B. 47; *BM* [2019] QB 1; *R v. Boyea* [1992] Crim LR 574-576

H appealed against his conviction for Assault occasioning Actual Bodily Harm s47 Offences Against the Person Act 1861.

The facts were that the complainant approached the appellant outside a public house and asked about drugs. She willingly went to the Appellant's address, and they engaged in consensual sexual activity, during which the victim started to carve the appellant's initial "M" into her buttock with

a Stanley knife blade. She asked the appellant to continue the carving, which he did, but then she finished it herself. She asked the appellant to make the injury bleed more which he refused.

The issue for the Court was whether this, on the face of it, consensual behaviour between two adults, was a defence to the charge.

The CACD do provide a helpful recitation of the cases it has dealt with since the landmark House of Lord's decision in *Brown*, Wilson, BM above as well as S.71 Domestic Abuse Act 2021.

The trial judge had considered *Brown* and *Wilson*. In *Wilson*, the Defendant and complainant were a married couple. The complainant asked for her husband to use a hot knife to brand her buttocks with his initial. In the appeal of Wilson, the Court commented on why the prosecution authorities thought it appropriate to charge Wilson at all. The trial judge said that the heart of the case of Wilson was that consenting activities between consenting spouses should not be the subject of criminal charges. The trial Judge distinguished that from the present case as Wilson involved a happily married couple who had been in a loving relationship for many years.

The grounds of appeal: It was argued that (i) the Judge had wrongly distinguished *Wilson* from the present case by, amongst other things, including an element of value judgement in regard to a valid consent, and (ii) the Judge should have left any consideration on S71 to the jury and in particular s71(4) to the jury. Instead, he had told them that consent was not an available defence.

The CACD decision: The CACD gave a helpful and chronological summary of the cases pointing out that they were, at least in part, based on the social constructs of the day. In Brown the focus was on the AIDS pandemic, and that Wilson may now be considered differently in light of new offences relating to controlling and coercive behaviour.

The CACD decided that:

(a) Wilson was a case decided very much on it's own facts,
(b) The law in this area should develop on a case-by-case nature as was stated in BM;
(c) "…in any event, if we considered that we were free to decide whether cutting the skin of a young person with an unsterile Stanley knife should be a lawful activity if she consented to it, we would decide that it should not be."

The appeal was dismissed. The CACD also reiterated the Crown's duty to decide what is in the public interest in cases such as these and that the issue of consent is "very relevant to sentencing".

Comment

There is, in the author's opinion, very much a "value" judgement being made here by the CACD. The author would question whether they are in the position, without evidence, what is relevant "in our changing times."

Joint Enterprise - secondary parties - overwhelming supervening acts - Jogee

Ayre, Henneberry & Tomlinson [2025] EWCA Crim 255

By Catherine Farrelly KC

Summary: In a case of joint enterprise murder/manslaughter, the CACD considered overwhelming supervening acts in the context of encouragement or assistance being provided by a secondary

party, with specific consideration given to R v Jogee [2016] UKSC 8 and R v Grant [2021] EWCA Crim 1243.

The Facts:
The case involved two groups. The victim group consisted of the deceased; a second victim, who had sustained severe, life-changing injuries; and two other victims who both sustained relatively minor injuries. The appellants' group consisted of the three appellants: Henneberry, Ayre and Tomlinson, all of whom were convicted of manslaughter, causing grievous bodily harm and assault occasioning actual bodily harm in relation to each of the pedestrians. It also included two others: Rollason, who was acquitted of all counts; and Donald who was convicted of murder, causing grievous bodily harm with intent, and attempting to cause grievous bodily harm with intent. He did not seek to appeal his conviction.

A history of tension between the deceased and Henneberry culminated in the events on the night of the incident.

The victim group had gone to the street in which Henneberry lived. Henneberry was at home with his co-appellants and Donald and Rollason. Words were exchanged between the groups, during which Henneberry was armed with a wooden pole. Henneberry was heard to say, "You little pricks are getting it".

The victim group walked away. Less than a minute later, Donald went to a car parked outside Henneberry's address. Seconds later, Tomlinson followed and, seconds after that, Ayre briefly exited before returning to get a baseball bat. Henneberry then joined them, armed with the wooden pole. Rollason also got into the car.

Donald pointed the car in the direction of the victim group and drove off. Ayre was in the passenger seat and the other three in the back. Donald followed the victim group. A short distance later, the car turned in a way that suggested that the victim group had been spotted. The lights of the vehicle were turned off and it was driven at speed at the victim group, colliding with two of the victims. Henneberry opened one of the rear doors, which would have given him a view of the two victims who had been struck.

The appellant group then left the scene and Donald and Ayre made attempts to dispose of the car.

In evidence, Donald stated that Tomlinson had seized the steering wheel and directed the car towards the victim group.

The Issues and Ruling: The Appellants argued that the trial judge should have acceded to a submission of no case to answer on the basis that there had been an overwhelming supervening act or, in the alternative, the issue should have been left to the jury. The trial judge had rejected both submissions on the basis that the conduct of the Appellants could in no way be said to have "faded to the point of mere background" and was current and contemporaneous encouragement of the principal offender.

The CACD's decision: The CACD considered *Jogee* and *Grant* and made the following clear:

(a) The important questions are whether the secondary party intentionally assisted or encouraged the principal's crime and whether he intended to assist or encourage the principal to act with the intent required
(b) It is not necessary to prove that the secondary party gave their encouragement or assistance in a particular way

(c) Therefore, *Jogee* and *Grant* significantly limited the circumstances where it will be appropriate for a jury to consider whether a principal has departed from an agreed plan and cases in which there is sufficient evidence to leave such an issue will be rare.

In analysing the facts of this case, the CACD noted that there was sufficient evidence from which a jury could infer a joint plan: the threats uttered a short while before; two of the appellants were armed with weapons; the appellants had all got into the car which had pursued the group. The CACD concluded that, if the jury were sure of such a plan, they would then need to decide whether the parties to it also shared an intention to attack the other group with an intent, at least, to cause them really serious harm, or at least with a shared intention to commit an assault which all sober and reasonable people would realise carried the risk of some harm.

Comment

Following from *Grant*, the CACD has now reiterated that the instances in which it will be appropriate for the issue of an overwhelming supervening act will be rare and the parties should always focus upon the central issues of whether the evidence is capable of proving that the secondary party intentionally assisted or encouraged the principal's crime and did so intending to assist or encourage the principal to act with the intent required.

FINANCIAL CRIME APPEALS

Defining essential agreements and particulars of an alleged conspiracy to defraud

Skeene and Bowers [2025] EWCA Crim 17

By Natasha Wong KC

The appeal centred around 3 counts of conspiracy to defraud contrary to common law. Investors in respect of each count understood their funds were to be ethically invested in Brazilian teak plantations, in return for a regular and safe income.

Each count was similarly drafted and contained a broad description of the dishonest scheme alleged, together with a numbered list of alleged representations or failures to correct false impressions, appearing after the words "by dishonestly".

The main issue was whether there was any ambiguity in the form of the indictment, specifically whether the prosecution had to set out and prove one or more of the means of carrying out the agreement (i.e. one or more of the representations or failures listed and particularised) as essential elements of the offence alleged or whether they simply had to prove the existence of the agreement and each individual's participation in it.

The CACD decision: The CACD acknowledged that each case is fact sensitive and that the form of an indictment and summing up ought to be tailored accordingly. It was "*conceptually possible*" to have an agreement to defraud without "*necessarily or probably*" an agreement about the means by which it will be carried out. There was no ambiguity in the form of this indictment: it was clear on its face, in

accordance with s3 Indictments Act 1915 and Rule 10.2.1 CPR 2020, consistent with the approach endorsed in *Landy* [1981] 1 WLR 355 and *Hancock* [1996] 2 Cr App R. 554 and its contents were well understood by all sides at trial. The numbered list of representations / failures were all particulars of the means adopted in furtherance of the conspiracies. They set out clearly and unambiguously the case brought by the prosecution and which the applicants had to meet. They were not essential elements of the conspiracies alleged. Accordingly, there was no need for the jury to be unanimous in finding any specific numbered particular proved.

Comment

Of note, the judgment refers to the trial judge previously acceding to a defence submission that 2 additional counts of forgery ought not to appear on the trial indictment as separate counts on the basis they could be included in the itemised particulars as overt acts evidencing the existence of the conspiracies. This was evidence that all parties clearly understood the meaning of the indictment at trial.

This issue is likely to return to the CACD until there is a successful appeal on this point to the Supreme Court, given the CACD's acknowledgment of "*tension*" between the authorities cited. This includes Thomas LJ's judgment in R v K [2005] 1 Cr App R 25@ [36]:

> "*there must be a clear distinction between the agreement alleged and the reasonable information given in respect of it …the indictment should identify the agreement alleged with the specifity necessary in the circumstances of each case; if the agreement alleged is complex, then details of that may be needed and those details will as in Bennett form part of what must be proved. If this course is followed it should then be clear what the prosecution must prove and the matters on which the jury must be unanimous*." ;
>
> and

Hickinbottom J's judgment in *Evans* [2014] 1 WLR 2817;

> "*the common law has imposed firm limits on the conceptually wide offence*".

This was a complex allegation of fraud. Although this appeal failed, the judgment arguably does not deal with sufficient specificity as to the nature of the complexity required for the prosecution to have to prove details (particulars) of an agreement to defraud, or of the nature of what should be particularised in those cases.

Whether unfair or unjust to hold the appellant to a confiscation order which he sought, albeit the available assets had been calculated on an incorrect basis and were not available to satisfy the confiscation order.

Jason Butler [2025] EWCA Crim 1

By **Aska Fujita**

Summary: The CACD found that it was not unfair or unjust to hold the appellant to a confiscation order which he instructed his lawyers actively to seek, albeit the available assets had been calculated on an incorrect basis and were not available to satisfy the confiscation order, leading to the default sentence being activated.

The Case law:

Hirani [2008] EWCA Crim 1463: The court described the consent order made in this

case as "*in effect a consent order which the appellant had bought off risk, both as to the amount of the confiscation order and the period he would be allowed to meet it. There was also in this case a real concern about perjury which gave rise to additional risks*". [34] Whilst is possible for confiscation orders to be set aside, "*where the essence of the complaint is that, in seeking to secure the best deal available, erroneous advice was given to one of those who was party to the agreement, save in the most exceptional circumstances*" and "*there would need to be a well-founded submission that the whole process was unfair*". [35]

Mackle [2014] UKSC 5: "*…it would be manifestly unfair to require the appellants in this case to be bound by their consent to the confiscation orders when … the only possible explanation for the consent was that it was given under a mistake of law*". [53]

Ghulam [2018] EWCA Crim 1691: "*…an appeal against a confiscation order based upon exceptional circumstances relating to negligent advice or representation … cannot have any realistic prospect of success unless it can be shown that competent representation would probably have resulted in a more favourable outcome for the appellant*". [72]

Miller [2022] EWCA Crim 1589: "*…there is a strong public interest in holding defendants to orders made by consent, particularly where it can be seen that the effect of the agreement and order is to buy off the risk of an adverse outcome if the issues were to be litigated to judgment*." [81] "*Where [the defendant's] perception and understanding are based on incorrect advice it seems to us that there may be wholly exceptional cases where it may be unfair to hold him to his consent and the consequential order.*" [82]

The Grounds of appeal: B argued that the two assets on the basis of which he made an offer to consent to an available amount figure of £1,112,670.24 were not available to him at the date of the order. He alleged that contrary to what was thought in April 2021, 1) there were no properties with any equity available to him, and 2) unbeknownst to him, Nudge Ltd which was to receive the money (and pass it to the appellant) was removed from the company register in Gibraltar in early April 2021, making the debt unrecoverable. B submitted he had no way of checking the correctness of the value of the properties prior to the confiscation order being agreed and realised the correct value months after the confiscation order was made.

It was argued on behalf of B that a grave injustice had been committed as the appellant was serving a default term of imprisonment for failing to pay an order when there were never any assets from which it could be satisfied.

The CACD decision: The CACD did not accept it was unfair or unjust to hold the appellant to the order which he instructed his lawyers actively to seek.

B was a resourceful businessman who had built up his property portfolio, who clearly knew in April 2021 that it was worth little or nothing. B had no explanation for an entry at Companies House showing him as the sole shareholder for Nudge Ltd, and the CoA noted the funds laundered through it had become irrecoverable due to its sudden disappearance, which gave "the appearance of highly successful money laundering".

The CACD concluded that as a convicted fraudster and apparently accomplished money launderer, he was likely to fail to prove in a contested hearing that the

available amount was less than the benefit figure. This would result in a confiscation order made in a significantly higher sum, with the default term of imprisonment significantly longer. To avoid this, the appellant adopted a strategy of offering to consent to a much lower order based on assets on which particular values were placed in the negotiations. The appellant would have known that those values were unsustainable on examination and if a hearing in the Crown Court had taken place in 2021, any attempt to show the available amount as £1,112,670.24 would have failed. The appellant had every reason to consent to the order made, as a contested hearing would have resulted in an order in the amount of the benefit.

As to B's argument that the court could be satisfied that the appellant did not have any assets to pay the order as if he had, he would do so and secure his release from prison, the CACD found it carried no weight. The CACD noted that at the time of the confiscation hearing on 18th December 2024, the appellant would have to serve approximately 12 months more, which would be a financially attractive prospect to retain a seven-figure sum.

The CACD noted that should B's contention that the only available assets were the £104,725.24 which had been paid prior to his sentence being activated was correct, and the benefit figure of £5,915,191.77 was right, B would have managed to dissipate £5,810,466.53 of the proceeds of his fraud without having anything at all to show for it. It was also noted that the profit obtained from the sale of the data leads was not included in the available assets.

Comment

Butler demonstrates that evidencing a factual error in the value of an available asset will not automatically give rise to a finding of unfairness or injustice and will not qualify as a "most exceptional circumstance" *per se*. Following *Hirani* and subsequent authorities, the CACD considered not only the actual value of the available assets but also "buying off risk" i.e. the risks of a contested hearing resulting in a higher available amount or perjury and balancing it with the overall fairness of the proceedings. Whilst this may appear harsh, given the conduct of the appellant after he became aware his appeal was dismissed, it was a shrewd decision by the CACD.

Equally perceptive was the CACD noting that suddenly paying the order at this stage would cause the appellant significant further problems as it would indicate he had hidden assets at the time the confiscation order was made, undermining the evidence in the confiscation proceedings and potentially leading to further criminal proceedings.

Parties to future confiscation proceedings and those advising them should be alive to the benefits of agreeing a confiscation order, particularly when the sums will not stand up to examination in a contested hearing. Pleading an error in the value of the available assets at a later date may not be considered with indulgence by the court.

Contrary to the advice given to the appellant prior to the confiscation order being agreed, the CACD confirmed that s23 POCA 2002 does not allow the appellant to advance his case. In *Butler v Leeds Magistrates' Court* [2023] EWHC 3420 (Admin), it was accepted on behalf of the defendant that s23 POCA "*provides a mechanism for an offender to seek a variation of the order where there is a deficiency in the amount available to satisfy it*" which could not assist the appellant as it "*cannot be made in order for an offender to seek to correct deficiencies in the case he*

presented at the time the order was made." [24]

NORTHERN IRELAND

By Paul Taylor KC

Supreme Court

Construction of defence case statement – whether question of law or fact

R (Respondent) v Perry (Appellant) [2025] UKSC 17

Summary: The question of law certified for appeal was whether the construction of a defence statement is a question of law for the trial judge.

The Supreme Court stated:

> [22] It was common ground on the appeal that the certified question of law cannot be answered in abstract terms. The answer will depend on the nature of the statement made in the defence statement and the purpose for which that statement is being relied upon.
>
> [23] It was also common ground that the interpretation of para 4(n) of the defence statement in this case involves a question of fact not law.
>
> [33] No good reason has therefore been shown for going behind the judge's conclusion on the question of fact in issue. Moreover, that finding of fact has been upheld by the Court of Appeal and so this is an appeal against concurrent findings of fact. It is only in very rare cases that it will be appropriate for this court to take the exceptional step of disturbing concurrent findings of fact…

Northern Ireland Court of Appeal

Article 3 adverse inferences - misdirection

CH [2025] NICA 9

Summary: CH submitted that the judge misdirected the jury regarding the defendant's failure to mention facts when questioned in interview.

In the first interview, during portions he responded "no comment" to a number of questions on the advice of his solicitor. Once the background to each of the allegations was explained to him, he answered each question fully. Despite this, the applicant was cross-examined by the prosecution in relation to his decision to initially answer no comment, and the prosecution referred to this in the closing speech. In her charge the judge directed the jury that:

> "If you're satisfied beyond reasonable doubt that the true explanation for his failure to deal with matters straight off and his failure to mention facts straight away is that he was waiting to have the detail of the allegations put to him and he was doing so on the advice of his solicitor, if you consider that he was prevaricating because he had no answer and no satisfactory answer and the advice of his solicitor was doing nothing more than giving him a shield, *then you could hold that failure to mention the facts against him and draw such conclusion as you would think proper from that failure.* But this is a case in which every time, once he got the detail, he gave his account of the incident under consideration."

The NICA decision: Having considered the applicable legal principles regarding inferences from silence, the NICA concluded that:

> [76] The applicant's brief 'no comment' answers assumed an extraordinary, disproportionate and prejudicial prominence at various key moments of the trial process. The prosecution justifies their cross-examination and closing on the basis that they were addressing the credibility of the applicant. This is hard to fathom when there were no inconsistencies between his interview under caution and what he said during his evidence at trial. We have a concern that the prosecution attempted by the back door of credibility to get in what they could not get in through the front door of Article 3 and that in their closing they were in fact inviting the jury to draw an adverse inference from the applicant's brief 'no comment' responses. Such an approach is impermissible.
>
> [77] Furthermore, we simply do not understand why, if the jury were not being asked to draw an adverse inference from 'no comment' answers, the prosecution still saw fit to remind the jury of this and place such reliance upon it in their closing in the passage we set out at [45] above. Finally, it should have been clear to the prosecution that the judge in her closing was doing that which they say she was not being asked to do and which the prosecution say she was not justified in doing. That being so we remain surprised that the prosecution (or the defence) did not requisition the judge so that the matter could be corrected and the jury brought back and directed that they should draw no adverse inference.
>
> [78]… given the serious flaws that we have identified above in relation to ground 3 on the Article 3 adverse inference issue we are left with no alternative but grant leave, allow the appeal on that ground only and to quash the convictions. That is because by reason of the flaws we have identified, we cannot be satisfied that the resulting convictions are safe. We will hear the parties as to whether a retrial should be directed."

Right to silence – misdirection – whether renders convictions unsafe

CD [2025] NICA 34

[16] The single judge granted the appellant leave to appeal on one ground only, namely that the judge failed to properly direct the jury concerning the appellant's right to silence. The essence of this alleged failure was that the judge failed to direct the jury that they '*should not find the defendant guilty only, **or mainly** because he did not give evidence*' as per the Northern Ireland Crown Court Bench Book and Specimen Directions (3rd edition, 2010). [Emphasis added].

The NICA decision: The NICA concluded that even though the judge's charge did not take the recommended form

> [43] We consider that the terms of the charge to the jury issued by the judge in the present case were sufficient to comply in principle with the requirements for an adequate

> charge. We reach this conclusion mindful of the value and the importance of Bench Books and Specimen Directions, and conscious that compliance with their helpful recommendations remains the easiest away to ensure that cogent and consistent judicial charges are issued in all jury trials. Best practice will always be for judges to use the terms recommended in specimen directions, especially where those terms are terms-of-art derived from applicable case law."

DPP reference – unduly lenient sentence – applicable principles

Robert George David Anderson [2025] NICA 33

The NICA set out a helpful reminder of the approach to DPP references:

> "The nature of a reference is explained in recent cases of this court including the case of *R v Ali* [2023] NICA 20. To summarise, a reference is not a generalised right of appeal. A sentence must be wrong in principle or outside the reasonable range open to a sentencing judge for a reference to succeed. A sentence must not just be lenient, but unduly lenient, and even if a court reaches that point, a court has a discretion not to interfere with a sentence imposed. We also reflect that considerable weight is given to the position of a trial judge who conducted the trial."

Re-opening a concluded appeal

Hazel Stewart [2025] NICA 36

The NICA considered the circumstances in which an appeal that had been determined by the NICA could be re-opened without a CCRC reference.

Guidance as to sentencing for manslaughter in cases of diminished responsibility.

Donnelly [2025] NICA 7

In this judgment the NICA provided guidance as to sentencing for manslaughter in cases of diminished responsibility.

Biographies of contributors

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

Paul is head of the 5KBW Criminal Appeals Unit and editor of *Taylor on Criminal Appeals*. Chambers and Partners described him as "One of the foremost appeals lawyers…"

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

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

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

James Brown KC is an experienced and highly respected advocate, with an established and busy leading practice, centred almost exclusively on serious and financial crime. After many years prosecuting and defending cases involving organised crime, drugs, homicide, kidnap, armed robbery, police corruption, sexual offences and fraud as leading junior, James took silk in early 2025

Mark Dacey is a sought-after senior defence counsel. He has established a reputation among those instructing him for outstanding case preparation and client care. He is a determined advocate who is renowned for his meticulous attention to detail and hard work. Mark's professionalism and approachability, combined with excellent judgment and

strategic skill are appreciated by courts, juries and clients alike with an ability to make complex arguments and points of law accessible and relevant. He has appeared in the full spectrum of criminal cases of the utmost gravity in respect of homicide, sexual offences and fraud. Mark undertakes appellate work which has included those referred by the CCRC, appeals against conviction and sentence, he has a number of cases reported in Archbold Criminal Pleading Evidence and Practice.

Gregory Fishwick has practiced for almost 30 years and has defending in heavy-weight crime for most of that time. He has been instructed by the Registrar of Criminal Appeals in both conviction and sentence appeals.

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

Jennifer Dannhauser is a highly sought after advocate, specialising in serious violent and sexual offences. She has been described in Legal 500 as "a silk in waiting". She is regularly instructed to consider appeals against conviction and sentence.

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.

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