

# Take two

The court may allow fresh evidence on appeal, but where it was admissible at trial it will only be permitted in exceptional circumstances, says **Benjamin Newton**

**THE RULING IN** *R v Erskine; R v Williams* [2009] EWCA Crim 1425 is the latest in a series of judgments that can be taken to stamp the authority of the latest Lord Chief Justice (see *R v T* [2009] EWCA Crim 1035, *Solicitors Journal* 153/24, 23 June 2009 – quashing the decision of Calvert-Smith J and allowing the first ever judge-only trial due to jury tampering). Here the Court of Appeal turned its attention not only to the question of diminished responsibility in murder appeals, but also the far-from-diminishing use of authorities by advocates.

Kenneth Erskine was convicted, on 29 January 1988, of seven counts of murder and one of attempted murder. “Elderly vulnerable people were killed in their homes by an intruder who subjected them all to gratuitous violence and then manually strangled them. In five of the cases there was clear evidence that the victims were also subjected to serious sexual assault... Taking all these offences together, this was a truly appalling series of crimes.”

Erskine had denied the killings and so there was never any possibility of advancing a diminished responsibility defence, but, by the time of the appeal, psychiatrists had concluded that at the time of the killing his mental responsibility was diminished.

Having also instructed their own expert, the Crown accepted on appeal that, if offered at trial, a plea to manslaughter on the grounds of diminished responsibility may well have been acceptable. The Court of Appeal concluded that this was a very straightforward case and a conviction of manslaughter was therefore substituted.

Ryan Williams pleaded guilty to a single count of murder on 7 December 1999. On 17 December 1998 he had participated in the gratuitously violent torture and consequent death of his girlfriend’s father following revelations by her that she had been sexually assaulted by him on numerous occasions.

His girlfriend and a mutual friend were both convicted after trial and received longer minimum terms as a consequence. Williams’ guilty plea was entered only after every other possible avenue had been explored, including obtaining psychiatric reports to make sure he had no medical defence. The medical evidence had excluded that possibility.

The Court of Appeal considered the new material which had since emerged to be



unconvincing. They also found that “the plea was a deliberate and properly informed decision” and the issue of a possible defence of diminished responsibility had been closely examined at the time. They therefore upheld the conviction for murder.

Each of these cases turned on fresh evidence that the court had admitted. The jurisdiction to do so is governed by section 23 of the Criminal Appeal Act 1968. The Court of Appeal may admit fresh evidence “if they think it necessary or expedient in the interests of justice”. In considering this, the court must have particular regard to (section 23(2)(a)-(d)) whether the evidence appears capable of belief, whether it may afford any ground for allowing the appeal, whether it would have been admissible in the earlier proceedings on an issue which is the subject of the appeal, and whether there is a reasonable explanation for the failure to adduce it in those proceedings.

## Exceptional circumstances

The Court of Appeal chose to take this opportunity to emphasise that this decision is case and fact specific, and that where evidence which could and should have been deployed at trial was not it will be exceptional for it to be admitted on appeal. Having made these brief observations, 23 detailed paragraphs are then given over to illustrating “the way in which a series of decisions of the court addressing this stark question in individual cases appear to have developed a jurisprudential momentum of their own”.

The conclusion was that the practice of the court in making reference to its previous decisions when explaining the reasons for the

exercise of its section 23 powers has given rise to a line of authorities which “is neither necessary nor desirable... Examples rarely assist, and some 40 years after its enactment, the essential framework and the over-arching test contained in section 23(1)... should be well understood without recourse to previous decisions of the court which do no more than evidence the application of those provisions to factual situations”.

The court’s direction was therefore that this judgment should suffice for any future analysis of earlier decisions (a favoured passage from Lord Bingham’s judgment in *R v Criminal Cases Review Commission Ex Parte Pearson* [2000] 1 Cr App R 141 having been reproduced as the correct approach to section 23). The parties to any such appeal should, however, provide a detailed analysis of the facts to assist the court in applying the statutory test. At paragraph 92 a detailed checklist of the seven areas specifically requiring analysis is set out, which will no doubt make its way into the relevant sections of the 2010 practitioner texts.

Having rather warmed to its theme, the court chose not to limit the restrictions on authorities to section 23 fresh evidence cases, but to apply its edict to all criminal appeals. This was set out in terms, but can perhaps be most succinctly summarised in the Lord Chief Justice’s own words: “Adapting the well known aphorism of Viscount Falkand in 164: if it is not necessary to refer to a previous decision of the court, it is necessary not to refer to it.”

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Benjamin Newton is a barrister at Doughty Street Chambers