Tel: 020 7404 1313
54 Doughty Street
London, WC1N 2LS
E: crime@doughtystreet.co.uk

Issue 46 | September 2020

Criminal Appeals Bulletin

Welcome

Paul Taylor QC

Welcome to the September edition of our monthly Criminal Appeals Bulletin.

The Bulletin aims to highlight recent changes in case law and procedure in England and Wales, Northern Ireland, the Caribbean and Hong Kong (with an occasional series on appeal cases from Scotland) and to provide practical guidance to those advising on appellate matters. Our monthly case summaries illustrate when an appellate court is likely to interfere with conviction or sentence, as well as looking at the courts' approach to procedural matters.

The featured article focuses on a current appeal topic. In this edition David Bentley QC looks at the CACD's latest decision on DNA evidence.

We also look at:

- *CACD conviction appeals:* Gross negligence manslaughter and causation (Broughton); joint enterprise, bad character
- *CACD sentence appeals:* Murder, minimum terms and young offenders;
- *Financial crime appeals:* What Waya did next: R v Andrewes
- *Hong Kong appeals:* Safeguarding National Security, bail and habeas corpus

Doughty Street has some of the most experienced appellate practitioners at the Bar, including the contributors to the leading works on appellate procedure - *The Criminal Appeals Handbook, Taylor on Criminal Appeals, Blackstones Criminal Practice (appeals section), Halsbury's Laws (Appeals)*.

Please feel free to e-mail us or to call our crime team on 020 7400 9088. We also offer our instructing solicitors a free Advice Line, where they can discuss initial ideas about possible appeals, at no cost to them or their client. More information on our services can be found on our website.

I hope you and your families are keeping safe and well.

Paul Taylor QC
Head of the DSC Criminal Appeals Unit

In this issue

Contact us

If you would like to know more, or discuss how our barristers may be able to help you and your clients, please contact Criminal Practice Manager, Matthew Butchard on 020 7400 9074.

Useful links

DNA and methods of transfer: R v (William Francis) Jones [2020] EWCA Crim 1021

David Bentley QC looks at the science and the latest judgement on the methods of DNA transfer.

Financial Crime Appeals

Joel Bennathan QC looks at "What Waya did Next": if an offender fraudulently got a job then did it adequately; should he pay back his salary?

Hong Kong Appeals

James Wood QC reviews two recent Hong Kong judgments involving the Law of the Peoples Republic of China on Safeguarding National Security in Hong Special Administrative Region.

Appeals against Conviction and Sentence; England and Wales

Farrhat Arshad looks at a joint enterprise murder appeal concerning post-Jogee accessory liability directions, bad character, use of covert recordings implicating co-defendants and the appropriate minimum terms for youths.

David Bentley QC looks at R v Kyries Davies, a decision on the applicability of the Sentencing children and young people Guideline in cases of murder and the appropriate minimum terms for young people convicted of murder.

Richard Thomas looks at the latest decision on gross negligence manslaughter and causation (R v Ceon Broughton [2020] EWCA Crim 1093).

DNA and methods of transfer: R v (William Francis) Jones [2020] EWCA Crim 1021

By: David Bentley QC

D was convicted after trial of a single count alleging conspiracy to possess explosives for an unlawful purpose contrary to s1(1) Criminal Law Act 1977, and thereafter sentenced to life imprisonment with a minimum term to serve of six years.

The brief facts were that following an anonymous 999 call reporting that a hand grenade had been left under a vehicle outside a house in Warrington, police attended and found what transpired to be a viable home-made hand grenade. The grenade was photographed and swabbed for DNA, which subsequently was found to match the DNA profile of D.

The prosecution case was that the grenade was placed in the driveway of a house as part of a tit for tat incident related to a drugs conspiracy involving D and three co-defendants (who were acquitted at trial).

Although there had been some telephone evidence that was also said to provide a link between D and the offence, that evidence had by the end of the trial fallen away.

The case therefore turned on the DNA evidence connecting D to the grenade. Both prosecution and defence instructed experts to report on the DNA findings. Those experts met pre-trial, and agreed on a number of conclusions. There were no areas of disagreement.

They agreed that the DNA results showed the presence of DNA from at least three people on the firing pin, and that all the components of D's DNA profile were observed within the mixed result. This meant that it was 1 billion times more likely than otherwise that the DNA came from D. They also agreed that this statistical evaluation only addressed the issue of whether D could be a possible contributor to the DNA mixture and did not address the mechanism by which the DNA was deposited, nor the time of deposition, nor the order in which the different contributions of DNA were deposited.

They agreed that if it was accepted that this was D's DNA present on the firing pin, the DNA result alone did not assist in determining whether D was the last person to have touched the pin before its recovery, how long ago the DNA was deposited nor the mechanism of deposition, including whether that was by directly (primary transfer) or indirectly via an intermediary (secondary transfer). It was agreed that the findings could support direct transfer by D – ie direct contact with the firing pin, but that if sufficient DNA from D was present on another item or person then it may have been transferred indirectly.

Importantly, having agreed that there existed little experimental data to support any expert evidence on the weight to be given to the method of transfer in a particular case, they further agreed that "since the tiny traces of DNA or skin involved in such transfer are invisible to the naked eye, it is not realistic to expect anyone to be able to account for the ways in which their DNA may have been transferred by indirect methods."

D was interviewed by police but gave no explanation as to why his DNA might be on the firing pin. He asserted it was impossible for it to be there as he had never handled a grenade.

At the close of the prosecution case, the defence made a submission of no case based on the proposition that the DNA evidence was insufficient to distinguish between direct and indirect transfer. Rejecting that submission, the judge reminded himself (in particular from the case of R v Tsekiri [2017] EWCA Crim 40) that there was no evidential or legal principle that a case can never be left to a jury on the basis of a defendant's DNA profile being left at the scene of a crime. Whether it was appropriate to do depends on the facts of the case, and the six (non-exhaustive) potentially relevant considerations set out in Tsekiri.

The defence submission was essentially repeated as the basis for the appeal. It was argued that there was no confirmatory evidence supporting direct rather than indirect transfer. The prosecution argued that primary transfer was inherently more likely than secondary/indirect transfer.

On appeal, the CACD reviewed the case law, including Tsekiri. One of the questions asked in that case was whether it was more or less likely that the DNA profile attributed to the defendant was deposited by primary or secondary transfer. The CACD noted in Tsekiri that the expert evidence was that secondary transfer was an unlikely explanation (for DNA found on a car door handle). The expert evidence had been that the likely reason for the DNA being on the door handle was that the appellant there had touched it.

Allowing the appeal in the present case, the CACD found "a significant distinction from the position in Tsekiri." In the current case, there was no expert evidence to say secondary transfer was improbable. Instead, the evidence was that as a point of general principle direct transfer is more likely than indirect transfer, qualified by the observation that no conclusion along those lines could be reached in relation to the individual case. There was also the agreed fact that "it was unrealistic to expect anyone to be able to account for the ways in which their DNA may have been transferred by indirect methods." (The CACD declared itself sceptical as to the wisdom of the prosecution agreeing to this "very broadly based formulation").

As the height of the prosecution case was that direct transfer was more probable than indirect, the CACD ruled that "probability was insufficient for conviction of guilt". In the absence of any further evidence, there was no basis for a safe conviction.

The CACD was however at pains to point out that (barring their criticism of the unwise agreed fact) this case did not represent guidance for other cases and that every case depends on its own facts.

So what should practitioners take from this case? As DNA analysis of complex mixtures becomes ever more powerful – driven by both increased sensitivity in the methods used to sample crime stains, and also sophisticated computer algorithms to analyse those results – challenges to the fact of a match to a defendant's profile becomes increasingly hard to sustain.

So the real question (as in the Jones case here) is no longer likely to be is it a match to the defendant's DNA , but rather "how did it get here?". Direct transfer will in most cases be highly incriminating, but indirect transfer can well occur innocently given the ease with which tiny amounts of DNA can be transferred between people and/or objects.

The science on how DNA gets transferred is far from settled. Although expert reports relied on by prosecutors now routinely make reference to the possibility of (innocent) indirect transfer, such observations are frequently followed with the assertion that direct transfer is the favoured explanation, and that indirect transfer is possible but unlikely.

Countering such assertions requires the input by the defence of an expert fully conversant with the latest experimental data on methods of transfer. Whilst following Jones it is unlikely that any prosecutor will end up agreeing facts as generously as happened in that case, it may none the less be possible with the right expert evidence to demonstrate before a jury the limitations of adverse opinions as to methods of transfer.

If you would like to speak to David Bentley QC about this article, please click here.

About David Bentley QC

David has a wide-ranging appeal practice – informed by over thirty years of defending in serious crime. He regularly advises on the prospects for successful appeal both by direct application to the CACD and also through submissions to the CCRC. Recent cases have included murder/manslaughter, terrorism and sexual offences. He is known for having a special interest in cases involving DNA and other complex forensic science issues. He also has an interest in cases relating to young offenders. In R v KD, a 21 year minimum term for murder was reduced by 5 years on appeal. He has recently obtained permission to appeal against a 10 year old murder conviction– with a 2 day hearing in the CACD set for this autumn.

To see David's full profile, click here.

Appeals against Conviction; England and Wales

Murder; Joint enterprise; directions; bad character; youth sentencing – minimum terms

By: Farrhat Arshad

R -v- CN, FN and DW
[2020] EWCA Crim 1028

CN, FN and DW were convicted of the murder of EG. CN and FN appealed against their convictions. CN, FN, DW and another had arrived together at the scene of the stabbing; another youth joined them shortly afterwards. EG and others were already present. DW deliberately provoked a fight with EG. They fell to the ground together. CN and FN kicked and punched the deceased while he was fighting DW. The other two youths in their group were shouting encouragement (these two were later acquitted of murder). When EG rose to his feet at the end of the fight it became obvious that he had been stabbed, although witnesses had not seen a knife or knives used during the fight, and no knives were subsequently identified in the police investigation that followed as having caused the wounds. EG collapsed and died at the scene. He had been stabbed 17 times to 12 different areas of his body. The cause of death was a stab wound to the heart. The prosecution opened their case as follows: "Save that [DW] clearly used a knife to stab Esrom Ghide, it is not as clear how many of the others may have done as well, although it is clear that all five were involved in the fatal attack, either as stabbers or doing other violence to him or giving encouragement to the others. What is clear is that the prosecution case is that all these defendants shared the intention to attack and cause Esrom Ghide really serious harm, or to kill him."

Appeal against Conviction: CN and FN appealed against conviction on the following grounds (i) The judge erred in his approach to accessory liability; (ii) Their previous convictions for possession of bladed articles ought not to have been admitted; (iii) The judge erred in admitting covert recordings of DW at trial, which as well as implicating himself, also implicated CN and FN.

Appeals dismissed:

(i) The judge had not erred in his approach to accessory liability. He had directed the jury that in respect of each defendant they had to be sure that they used force or participated in the attack upon the deceased knowing that knives would be used. What mattered and was rightly emphasised in the circumstances of the case was that the jury should be sure that CN and FN used or knew that a knife or knives would be used with the intent, at least, to inflict grievous bodily harm, and which was/were used and led to the death of EG;

(ii) This was not a weak case that was bolstered by bad character evidence. The judge's decision to admit the previous convictions was well-reasoned: There was a real issue as to whether CN and FN had taken knives to the scene which were used by them or passed to a co-accused for use in stabbing the deceased. The bad character evidence was relevant for the jury to consider whether CN and FN had a knife at the scene which they used in the attack;

(iii) The covert recordings were admissible as against DW but not against CN and FN. As was the case with interviews of co-accused, the jury heard what was said by DW about CN and FN but were directed that was hearsay, as such not evidence against CN and FN and should be ignored in respect of them. As for cross-examination, Prosecution counsel should not have been permitted to refer to the covert recording in cross-examining CN, as to do so would be to suggest it had probative value against CN. However, as CN had not made any concessions, the Court did not consider that this error undermined the fairness of the court process nor the safety of the convictions.

Appeal against Sentence: All three defendants appealed against sentence - detention at HM Pleasure with minimum terms of 15 years for CN and FN (who were aged 14 at the time of the offence) and 18 years for DW (who was aged 16). Because of their ages, the starting point for the minimum term was 12 years. The most serious aggravating factor was that knives had been taken to the scene. Additionally, their antecedent history and the background of territorial drug and gang-related violence were aggravating factors. The judge found that there was a significant degree of planning but that this was largely subsumed in the finding that more than one knife was taken to the scene to challenge and fight the deceased. In terms of mitigation, the judge took into account their youth and background, particularly the difficult childhoods of CN and FN and that both had expressed remorse. There was no intention to kill, only to cause grievous bodily harm. In allowing the appeal against Sentence the CACD found that although younger by two years, both CN and FN were more heavily convicted than DW. CN had three previous convictions for possessing a bladed article and two convictions of possessing Class A drugs with intent to supply. FN had a previous conviction for robbery and two convictions of possessing a bladed article. DW had one previous conviction for possessing an offensive weapon for which he received a referral order.

The CACD reminded itself of the principles to be derived

from the Overarching Sentencing Guideline for Sentencing Children and Young People, specifically that the seriousness of the offence will be the starting point but that the sentence must be focused on the young person rather than offence focused. Rather than make deduction of what would have been the appropriate sentence for an adult committing the offence (in excess of 25 years) the Court must take the appropriate starting point in determining the minimum term to be 12 years. As monstrous as the crime was and deserving of condign punishment, the sentences were manifestly excessive bearing in mind the age and circumstances of the three appellants. The Court also considered that the sentence of DW as compared with CN and FN was disproportionately gauged. That is, on the judge's findings that either CN and/or FN had taken a knife to the scene and used it and he could not determine who had inflicted the fatal wound but was satisfied that it was not with the intent to kill, there is nothing to differentiate between the appellants. The CACD took into account that DW started the violence but he had not been present when CN and FN had threatened EG with a knife two weeks previously and CN and FN were considerably more heavily convicted than he was. The least possible minimum term congruent with their welfare and necessary rehabilitation was 14 years in relation to CN and FN, and 16 years in respect of DW.

If you'd like to speak to Farrhat Arshad about this case, please click here.

About Farrhat Arshad

Farrhat is an experienced appellate barrister, acting in both conviction and sentence matters in the Court of Appeal. Her appellate practice also includes applications to the Privy Council and to the Criminal Cases Review Commission. Farrhat authored two of the chapters in the 2nd edition of Taylor on Criminal Appeals, (OUP, March 2012): Appeals to the Divisional Court by way of Case Stated and Appeal to the Supreme Court and is Co Vice-Chair of the Criminal Appeal Lawyers Association.

To see Farrhat's full profile, click here.

Gross negligence manslaughter – Causation – submission of no case

By: Richard Thomas

R v Ceon Broughton
[2020] EWCA Crim 1093

The Appellant attended Bestival Music Festival with his girlfriend, Louella Fletcher -Michie ('Louella'). They took drugs together. Louella took 2C-P (containing MDMA and acid) as well as ketamine and ecstasy. The jury concluded that the Appellant had supplied her with the 2C-P and 'bumped it up' either by increasing the dose or combining it with other drugs. They left the grounds of the festival for nearby woodland. Louella experienced a 'trip' and then what was plainly a bad reaction to the drugs. The prosecution case was (i) that having supplied the drugs and remained with her, at the point at which her life was obviously in danger, the Appellant owed her a duty of care to secure medical assistance (ii) he was in breach of that duty by failing to obtain help, (iii) the breach (i.e. the negligence) was gross and (iv) was a substantial cause of her death. The defendant was convicted and sentenced to a total of eight and half years' imprisonment.

The Appellant's submission on appeal (a repeat of what was advanced in a submission of no case to answer and in arguments on legal directions to be given to the jury) was simple: in circumstances where, at its highest, the prosecution evidence could not exclude the real possibility that Louella would have died even with timely medical assistance, the element of causation was not made out.

Gross Negligence Manslaughter

Having reviewed the authorities, the Court identified the six elements that the prosecution must prove before a defendant can be convicted of gross negligence manslaughter:

(i) The defendant owed a duty of care to the victim.

(ii) The defendant negligently breached that duty of care.

(iii) At the time of the breach there was a serious and obvious risk of death. Serious, in this context, qualifies the nature of the risk of death as something much more than minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation.

(iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.

(v) The breach of the duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim.

(vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

The element that was the subject of the appeal was (v), namely what was meant by the breach causing, or making a significant contribution to, the death of the victim.

The Opposing Positions

The Appellant's position was that in a case concerning negligent lack of medical attention, to establish that the breach of duty (i.e. failure to obtain treatment) was a substantial cause of death the prosecution must prove to the criminal standard that the person concerned would have lived had help been obtained. The approach to causation was settled in *R v Morby* (1882) 8 QBD 571: "to convict of manslaughter you must shew that he caused death or accelerated it". The principle was not abrogated in the intervening 140 years and was reflected in the summing up of Langley J in *Misra* [2004] EWCA Crim 2375 which was approved by Judge LJ in that case and by Leveson P in *Sellu*. It was argued that 'substantial cause' does not dilute the need for causation to be proved to the criminal standard, but is simply a recognition there can be more than one cause of death. The only evidence on causation came from Prof. Morley and, even at its highest, was that Louella stood a 90% chance of survival, which left open a realistic possibility she would have died even with help. Causation was not therefore established and the judge should have allowed the submission of no case to answer. Alternatively, it was argued the judge's directions diluted the required for causation to be established to the criminal standard.

The prosecution argued that the correct test is "whether [the jury was] sure that the defendant's negligence deprived the victim of a significant or substantial change of survival that was otherwise available to the victim at the time of the defendant's negligence". This submission was founded on an extract of the summing up of Nicol J quoted by Sir Brian Leveson P in *Sellu* [2016] EWCA Crim 1716. It was argued that requiring proof of certainty of survival would render many cases where death had ensued after gross negligence, medical or otherwise, impossible to prosecute because of the difficult of proving that there was no possibility of the victim dying if treated.

The Court's conclusion

The Court concluded that the Appellant had made good his first argument and that the case should have been stopped at half time. *Sellu* is not authority for the proposition advanced by the Crown that in cases of gross negligence manslaughter the limit of the obligation on the prosecution is to prove that the failing in question deprived the victim of a significant or substantial chance of survival that was otherwise available at the time of the defendant's negligence. The prosecution must prove causation to the criminal standard. That means the prosecution must prove that the deceased would have lived in the sense that life would have been significantly prolonged. The jury must make judgments on 'realistic not fanciful possibilities': To be sure that the gross negligence caused the death the prosecution must exclude realistic or plausible possibilities that the deceased would anyway have died. The conviction was quashed.

Richard Thomas was junior counsel for Mr. Broughton at trial and on appeal

If you would like to speak to Richard Thomas about this case, please click here.

About Richard Thomas

Richard Thomas has extensive experience of complex criminal proceedings. His recent appellate cases include appearances in the Supreme Court in R v Lane & Letts and SXH v CPS (UNCHR intervening) and in the Judicial Committee of the Privy Council in Stubbs, Davis & Evans (Bahamas) Lovelace (St Vincent) and Saunders (Bahamas).

To see Richard's full profile, click here.

Appeals against Sentence; England and Wales

Gang related murder – minimum term – young adults

By: David Bentley QC

R v Kyries Davies
[2020] EWCA Crim 921

Those who deal with gang-related murder cases involving young defendants may have detected a gradual rise in the length of the minimum terms for life sentences being handed out following conviction. Despite the statutory starting point of 12 years for under 18s, minimum terms in the low to middle 20s have now started to become the norm for teenagers. And notwithstanding these rises, the government still appears to respond to pressure to consider even longer terms for young people to have to serve.

So it is refreshing to see in this recent case the LCJ emphasising that age and personal circumstances must be reflected properly in the minimum term set following conviction.

KD (aged 16 years and three months at the time of the offence) was convicted along with three adult co-defendants of a murder where the underlying facts were described by the CACD as *"truly appalling…illustrating the pernicious, destructive and evil influence of gang culture on young people."*

Following an incident of "disrespect" between members of rival gangs, a group including KD set out to find and attack a member of the rival gang. The victim, aged 17, was set upon and stabbed 15 times. He died shortly afterwards of his injuries.

KD was sentenced to be detained at HM Pleasure with a minimum term of 21 years. (A 19 year old co-defendant received the same minimum term. A 20 year old, 23 years, and a 22 year old, 25).

The sentencing judge took the view that despite his age, KD had a prominent leading role in the attack and was responsible for "corralling" the group in a premeditated revenge attack. He also found an intention to kill.

A pre-sentence report revealed that KD had had a disturbed background, and had been habituated at a very young age to violence and drug dealing. He had become a drug dealer and gang member by around the age of 13. He also had previous convictions for offensive weapon and threatening behavior.

In his sentencing remarks, the judge purported to take account of KD's disturbed background but expressly disapplied the Sentencing Council Definitive Guideline for sentencing children and young people. He also concluded that the age difference between the defendants was of much less importance than would at first sight appear.

The appeal was based on several grounds, the principal of which was that the increase to 21 years from the statutory starting point of 12 years was far too great, and that the judge had paid insufficient regard to KD's age and personal circumstances when considering his level of culpability.

Allowing the appeal, the CACD made a significant reduction of 5 years from the term of 21 years originally imposed – resetting it at 16 years. The CACD pointed out that the SGC guideline did in fact apply. The CACD referred to the recent case of **R v DM [2019] EWCA 1354** (post-dating sentencing of KD) which confirmed the applicability of paragraph 4.10 of the guideline, where it was held that notwithstanding the fact that in cases of murder, the welfare of the offender is not a material consideration, *"… it nevertheless remains important when considering the appropriate minimum term to consider the developmental and emotional age of the offender and to consider, in accordance with paragraph 4.10 of the guideline, whether the young offender has: the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences."*

The CACD found itself *"in respectful disagreement"* with the judge's conclusion that despite KD's youth and background that the sentence should be as high as 21 years. It accepted the defence submissions that the minimum term of 21 years was *"significantly longer than is appropriate."* KD's personal circumstances were described as "striking" and his youth compared to his co-defendant as carrying "significant weight."

David Bentley QC acted for KD at trial and on appeal.

If you would like to speak to David Bentley QC about this case, please click here.

Financial Crime Appeals

What Waya did next

By: Joel Bennathan QC

R v Andrewes [2020] EWCA Crim 1055

Let us start, in the manner of a TV series where the viewer may have forgotten the previous episodes, with a recap. The confiscation regime under the Proceeds of Crime Act 2002 seemed to be mechanistic and simple; how much has the offender acquired by his crime? Then make him pay that by way of confiscation, limiting it only to the maximum he has available to stump up. In *Waya* the Supreme Court found that applying that approach crudely to a case in which the offender had already given back his ill-gotten loot was a violation of the right to free enjoyment of one's property as promised in Article 1 of the First Protocol to the ECHR. This led to an amendment to section 6(5) of POCA to allow an escape route if the sentencing judge thinks the order she is about to make would be disproportionate. The judgment in *Waya* specifically left open the question of what would transpire if an offender fraudulently got a job then did it adequately; should he pay back his salary? *Andrewes* answers that question, or sort of does so.

Mr Andrewes lied profusely to get a senior managerial job, then did it rather well. When his lies came to light, he was sacked, prosecuted and imprisoned. Pity the Recorder then left to decide the confiscation order. The Court of Appeal wrestled with various questions such as "disproportionate to what", but in the end decided that the key test was "if the order were made, would it be disproportionate to the statutory aim of confiscating an offender's criminal gains"? The answer in this appeal was "yes", and the confiscation order was quashed. Yet nothing is ever too simple; the Court suggested that a confiscation order would be permissible if the offender was working illegally, either by way of his immigration status or some bar on his doing that job at all, but even in those cases, the Court of Appeal added, that might not be the case on the particular facts of future appeals. And so, we leave *Andrewes* a bit further forward but with plenty of appellate litigation yet to come.

If you would like to speak to Joel Bennathan QC about this case, please click here.

About Joel Bennathan QC

A large part of Joel Bennathan QC's practice is in advising and arguing appeals; he has conducted and won appeals in the House of Lords, the Court of Appeal, the European Court of Human Rights and the Privy Council.

To see Joel's full profile, click here.

Hong Kong Appeals

James Wood QC reviews two recent Hong Kong judgments in which the Hong Kong High Court interpreted the Law of the Peoples Republic of China on Safeguarding National Security in Hong Special Administrative Region (known as a the "NSL"). In a week during which Lord Sumption was sitting in the Hong Kong Court of Final Appeal (HKCFA) , the High Court did not mince its words in robustly rejecting applications for bail and Habeas Corpus, although the possibility of a challenge to the HKSC on grounds that the NSL was incompatible with the Hong Kong Basic Law was hinted at.

By: James Wood QC

It was on the 30th June 2020 that the much publicized **Law of the People's Republic of China on Safeguarding National Security in Hong Kong Special Administrative Region ("NSL')** came into force. The very next day Tong Ying-kit a 23 year old protester was arrested and charged under articles 20 and 21 after riding his motorcycle around a demonstration whilst displaying a flag with the motto "Liberate Hong Kong Revolution of our Times". Articles 20 and 21 carry life imprisonment and are made out if by so doing he "*incited other persons to organize, plan, commit or participate in acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification*". Having been surrounded by HK police, he sought to ride away, and so was also charged under article 24 (which also carries life imprisonment) with "*causing serious injury to three officers with a view to coercing the Central Peoples Government or the HK Government, or intimidating the public in order to pursue political agenda, committed terrorist activities causing or intended to cause grave harm to society, namely serious violence against persons, or other dangerous activities which seriously jeopardized public safety or security*".

Having been denied bail by the Chief Magistrate of West Kowloon, his lawyers sought to challenge the provisions of the NSL by way of application for *Habeas Corpus*, and on bail appeal to the High Court. In separate recent judgments on the 21st August [2020] HKCFI 2133 (Hon Chow and Alex Lee JJ) (*Habeas Corpus*) and the 25th August [2020] HKCFI 2196 (Hon Alex Lee J) (*Bail*) the High Court rejected all arguments, but in doing so exposed some of the appalling abuses and denial of rights to which Hong Kong citizens will now be subject should they seek to exercise rights of protest, or campaign for greater independence for Hong Kong.

In the Habeas Corpus proceedings the first challenge related to Article 42 of the NSL which reverses the presumption in favour of bail which normally applies. In criminal proceedings. Art 42 provides that when applying the act the "*.. judicial authorities….shall ensure that cases concerning ….national security are handled…so as to… prevent, suppress and impose punishment…No bail shall be granted to a… defendant unless the judge has sufficient grounds for believing that the …defendant will not* ***continue*** *to commit acts endangering national security*".

Other arguments advanced contended that the imposition of mandatory minimum terms for offences under articles 20, 21 and 24, and that the requirement in Article 44 concerning the appointment of specialist judges, rendered the law ultra vires the Basic Law of Hong Kong.
The court rejected the article 42 challenge on the basis it did not create a presumption of guilt by use of the word "Continue", and the reversal of the burden is a narrow one, presenting no absolute prohibition on bail (per paras 31-49). Arguments of interference with judicial independence contained in article 44 were similarly brushed away (paras 51-64).

The existence of minimum terms of 10 years for "principle offenders" (Article 20(2)), or those causing serious injury, or significant loss to public or private property ((article 24(2) and 3 years for "active participants" (Article 20(2)) where considered unobjectionable (per paras 65-68).

In the subsequent bail hearing whilst relying on much of the reasoning in the Habeas Corpus ruling Lee J distinguished himself by redacting from public consumption all of his reasons for refusing bail at paragraphs 20-31, save that (at para 18) he contended that the "*NSL…does not introduce any drastic or significant changes to the existing law and practice regarding bail applications*".

At para 26 of the Habeas Corpus judgment there was an important flagging of the key constitutional challenge which may yet arise on the validity of the NSL where it is in conflict with the Basic law of Hong Kong. The court stated:

"*The question of the relative status of the Basic Law and the National Security Law, and how any inconsistency between the two which cannot be resolved by applying ordinary techniques of statutory interpretation should be dealt with by the court, is a question of fundamental importance. In this respect, although Article 62* (of the NSL) *states that* ***"[t]his law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law"****, the answer to the question of whether the reference to "local laws" included the Basic Law was, understandably, left open by Mr Yu on the basis this question did not arise for determination in the present case. Since the disposition of the present application does not require a determination of this important question, we would leave it for future consideration should it become necessary to do so.*"

Whilst the court brushed the issue away, in a week that Lord Sumption sat in the HKCFA, a full throttle attack on the constitutional compatibility of the NSL with the Hong Kong "Basic Law" may yet see international judges sitting in the HKSC dealing with the basic compatibility of this apparently

repressive legislation. As Lord Reed (President of the UK Supreme Court) stated on the 17th July:

"The new security law contains a number of provisions which give rise to concerns. Its effect will depend upon how it is applied in practice. That remains to be seen. Undoubtedly, the judges of the Court of Final Appeal will do their utmost to uphold the guarantee in Article 85 of the Hong Kong Basic Law that 'the Courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference.' As the Chief Justice of Hong Kong, the Hon Geoffrey Ma, recently said: 'The independence of the Judiciary and the rule of law are cornerstones of the Hong Kong community, and they are guaranteed under the Basic Law. It remains the mission and the constitutional duty of the Hong Kong Judiciary to maintain and protect them.'

Only time will tell whether they are still permitted to do so, when the challenge is finally comes to be made.

To access **Tong Ying Kit and HKSAR [2020] HKCFI 2133** click here, and for **HKSAR and Tong Ying kit [2020] HKCFI 2196** click here.

If you would like to speak to James Wood QC about this case, please click here.

About James Wood QC

From historic and celebrated miscarriages of justice to complex forensic science cases and fresh evidence appeals, throughout his long career James has been involved in numerous appeal cases in the UK and abroad. Determination, persistence and hard work are, he believes, the ultimate keys to his success. This has recently been illustrated by the CCRC referral back to the Court of Appeal, after almost 15 years of work by all involved, of the murder case of his long standing and still, he believes, wrongly convicted client, Lee Firkins.

To see Jame's full profile, click here.