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

Issue 45 | August 2020

Criminal Appeals Bulletin

Welcome

Paul Taylor QC

Welcome to the August 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 Pippa Woodrow looks at the CACD's latest decision setting out its approach to ASD, discretionary life sentences and hospital orders.
We also look at:

- CACD conviction appeals: Rape, vitiating consent, vasectomy; bad character and deleted cautions; juries and mistaken verdicts; diminished responsibility and proving bad character evidence; adverse inferences
- CACD sentence appeals: historic sexual offences; minimum terms and young offenders; AG reference and single punch manslaughter.
- Supreme Court: Activities of "paedophile hunter groups" and article 8;
- Financial crime appeals: The Supreme Court and Hilton.
- Health and safety appeals: Abuse of process; The challenges for a jury in determining factual issues on technical matters.
- Caribbean appeals: CCJ and grounds not raised below; ECSA and Goodyear indications and unrepresented defendants.

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, Richard Vile on 020 7400 9054.

Useful links

Discretionary life v Hospital orders: R v C [2020] EWCA Crim 906

Pippa Woodrow looks at the CACD's latest decision setting out its approach to ASD, discretionary life sentences and hospital orders.

Appeals against Sentence; England and Wales

Maryam Mir considers the sentencing for one punch manslaughter.

We also look at historic sex offences, and minimum terms for murder.

Health and Safety Appeals

Benjamin Newton continues our occasional series on health and safety appeals.

Caribbean Case Summaries

Paul Taylor QC reviews the latest cases from the CCJ and ECSA.

Appeals against Conviction; England and Wales

Farrhat Arshad looks at recent cases involving rape, deceit vitiating consent; and bad character and deleted cautions.

Paul Taylor QC reviews the appeal based on a jury's "mistaken verdict", and diminished responsibility.

Paul Harvey analyses the Supreme Court's decision on "paedophile hunter groups" and article 8.

Richard Thomas looks at the latest on adverse inferences.

Financial Crime Appeals

Joel Bennathan QC looks at the latest Supreme Court decision on confiscation orders and asks : Can it be right?

Discretionary life v Hospital orders: R v C [2020] EWCA Crim 906

By: Pippa Woodrow

This was a successful appeal against a discretionary life sentence imposed upon the appellant ("C") in 2013 when he was aged 16 for an offence of attempted murder. C's case was referred back to the Court of Appeal by the Criminal Cases Review Commission on the basis of fresh medical evidence showing that, contrary to assessments conducted at the time of sentencing, C had been conclusively diagnosed with autistic spectrum disorder (ASD). The single ground of appeal was that, in light of the evidence now available, the sentence passed was wrong in principle and that it should now be quashed and replaced with a hospital order under Section 37 of the Mental Health Act 1983 (with restrictions under Section 41).

The Court's Approach

It was accepted that the Judge at first instance had proceeded on a basis now conclusively shown by the fresh medical evidence to be erroneous. The court was initially troubled as to whether there had to be an error in the Judge's sentencing decision to justify substituting a different sentence. However this issue was settled by reference to the principle set out in R v Bennett [1968] 1 WLR 988 which makes clear that where fresh evidence shows an appellant's mental health was otherwise than the Judge believed it to be, the court has the power to quash the original sentence if it considers (s)he "should be sentenced differently" and to impose such sentence as it considers appropriate.

In deciding whether a hospital order is the "most suitable method" of disposal for the purpose of Section 37, the court adopted the framework set out in the leading case of R v Vowles [2015] EWCA Crim 45 (in particular at [51-54]) which indicates the four particular issues that must be considered:

Need for treatment and culpability

It was uncontroversial that C required treatment. In relation to culpability however, whilst the fresh evidence showed that culpability was not as high as the judge had held at first instance (expressed as "exceedingly culpable"), the court found that C retained a "significant level" of responsibility for his actions. The seriousness of the particular aggravating features of the offence (including planning) was not reduced by his disorder.

Extent to which punishment was required

The court considered that the offence was very serious and that punishment was called for, even in respect of a young man of previous good character. However, on reviewing previous authorities, the court found it was entitled to have regard to the extent to which punishment had already been imposed by the time of the appeal. In C's case he had effectively served his minimum term and in the circumstances, they considered that the need for punishment now carried little weight.

Public Protection

The factor on which court placed greatest weight was the question of public protection. Given the life-long nature of ASD this was not a case in which the appellant might be 'cured' and associated risk eliminated. As such the court concluded that the principal focus must be on which regime would provide best protection if and when the appellant is released. This case presented a stark choice between a discretionary life sentence and a Section 37/41 order, as a hybrid order under Section 45A was not available by virtue of C's age at the time he was sentenced.

Having heard detailed evidence about the practical realities of management under the "mental health pathway" (section 37/41) and the "criminal justice pathway", the court concluded that the former offered greater prospect of successfully preventing future harm. The nature of ASD meant that any future risk would inevitably be associated with a decline in his mental state. This was not a case in which there existed risk of some form of criminal behaviour unconnected with his disorder. The court also found it important that the nature of C's treatment would involve psychological therapy rather than medication and therefore would not depend on his ability and willingness to comply with a medication regime. In his case the public would be best protected by expert treatment and specialist monitoring which was more likely to be available under the mental health pathway.

Commentary

This judgment represents the first successful appeal for an appellant with ASD absent any additional psychotic illness, psychopathic disorder or personality disorder. It holds promise for those with developmental disabilities (including learning disabilities) to whom the courts have historically been slow to extend the mental health pathway.

The court's emphasis on public protection also illustrates the importance of presenting detailed evidence from clinicians as to the practical realities of the way an appellant will be managed under the different pathways, and how that relates to the nature of the particular appellant's risk. A great deal of the oral evidence and argument in this case was concerned with exploration of these issues including considerations such as: the extent to which criminal justice agencies will continue to be

involved in managing the appellant within the mental health pathway (for example via MAPPA panels); whether the mental health pathway would enable longer-term planning and guarantee greater consistency of treating clinicians; and why specialist knowledge would be necessary to detect any decline in C's mental state and consequent increase in risk.

Where a condition is life-long and inevitably associated with future risk it should be possible to argue that the mental health pathway provides the best opportunity to manage that risk and identify potential escalation in advance of any harmful behaviour. The court's approach here suggests that a hospital order may well be the 'most appropriate' method of disposal in such cases.

Pippa was junior counsel in C and was led by Edward Fitzgerald QC. They were instructed by Dr. Laura Janes of GT Stewart.

f you'd like to speak to Pippa Woodrow_about this article, please click here.

About Pippa Woodrow

Pippa is regularly instructed to advise and appear in criminal appeals at all levels both in England and Wales, and in overseas jurisdictions including constitutional appeals before the Privy Council and Caribbean Court of Justice. She has particular expertise in offences of serious violence and terrorism and specialises in cases involving young or otherwise vulnerable defendants.

To see Pippa's full profile, click here.

Appeals against Conviction; England and Wales

Rape; consent; ss 74 and 76 Sexual Offences Act 2003; deception; vitiating consent; nature of the deception

By: Farrhat Arshad

R v Jason Lawrance
[2020] EWCA Crim 971

JL appealed against his conviction of two counts of rape (he had also been convicted of a number of other rapes of other women, which were not the subject of appeal). JL met the complainant through a dating site. During an exchange of messages he told her he had had a vasectomy. Her evidence was that just prior to having sexual intercourse with JL she sought an assurance that he had definitely had a vasectomy. He assured her that he had. She made it clear that she did not want to risk becoming pregnant. He reassured her again that he had undergone a vasectomy. Sexual intercourse then took place between them on two occasions without the use of contraception. The next day JL sent her a message telling her he was still fertile. The complainant became pregnant and had a termination. The prosecution case was that the complainant's consent was vitiated by the appellant's deception as to his vasectomy and that even if he genuinely believed that she had consented, such a belief was unreasonable. JL argued that in order to vitiate consent a deception had to go to the nature of the sexual act or be closely connected to the sexual act. In the present case the deception did not fit into either category. JL argued that **Assange v Sweden [2011] EWHC 2849 (Admin)** (deceit as to the wearing of a condom vitiated consent) and **R (on the application of F) v DPP [2014] QB 581** (deceit as to intended withdrawal vitiated consent) could be distinguished on the basis that in those cases consent was given on the basis that ejaculate would be prevented from entering the vagina, whereas in JL's case that was not sought to be avoided. He submitted that his deceit went to the consequences of intercourse, rather than the performance of the act itself, and therefore it could not negate consent.

The CACD (Lord Burnett CJ, Cutts J, Tipples J) allowed the appeal: A review of the case-law (as had recently been undertaken in **R (Monica) v DPP [2019] QB 1019** (Lord Burnett CJ and Jay J) showed that under the common-law, deceit could negative consent in two circumstances: impersonation of a husband and deceit as to the nature of the act (sexual rather than medical). Section 1(2) of the Sexual Offences Act 1956 gave statutory force to the common law position that a man who induces a married woman to have intercourse by impersonating her husband commits rape. Subsequent decisions of the CACD extended the concept to mistake of identity generally: R **v Elbekkay [1995] Crim LR 163** and **R v Linekar [1995] QB 250.** Linekar was an important decision because it limited the instances where deception could vitiate consent to the two well-established categories, namely deceit as to identity and the medical cases. Section 76(2) of the 2003 Act put on a statutory footing the two well-established common law bases upon which deceit or fraud will vitiate consent but Parliament did not take the opportunity to go further. The facts of the instant appeal did not fall within either of the categories identified in section 76(2). [Paras 23-27 of judgment.]

In **Assange** Sir John Thomas P (as he then was) concluded that section 76 of the 2003 Act had no application because there was no deception as to identity or the nature or purpose of the act. The question whether the deliberate failure to wear a condom in these circumstances meant there was no consent was to be judged by section 74. Section 74 of the 2003 Act provided the basic definition of consent: "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice." In para. 72 of **Monica** the effect of the decision in **Assange** was explained in these terms, "What may be derived from **Assange** is that deception which is closely connected with 'the nature or purpose of the act', because it relates to sexual intercourse itself rather than the broad circumstances surrounding it is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act." [Paras 28-29 of judgment.]

The "but for" test was insufficient of itself to vitiate consent. There may be many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse. **Monica** was an example, but there were many: lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth are such examples. A bigamist does not commit rape or sexual assault upon his or her spouse despite the fundamental deception involved. Neither is the consent of a sex worker vitiated if the client never intends to pay (**Linekar**). The question is whether a lie as to fertility is so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that it is capable of negating consent. Is it closely connected to the performance of the sexual act?

"In our opinion, a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender. Unlike the woman in Assange, or in R(F), the complainant agreed to sexual intercourse with the appellant without imposing any physical restrictions. She agreed both to penetration of her

vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it. In terms of section 74 of the 2003 Act, the complainant was not deprived by the appellant's lie of the freedom to choose whether to have the sexual intercourse which occurred." [Paras 34-38 of judgment.]

There was force in the appellant's submission of an analogy with **R v B [2007] 1 WLR 1567**, where the accused failed to disclose that he was HIV positive prior to having sexual intercourse with the complainant. The failure to disclose his HIV status was held not to vitiate consent. [Para 39 of judgment.]

The CACD was of the view that it made no difference to the issue of consent whether, as in this case, there was an express deception or, as in the case of **R v B**, a failure to disclose. The issue is whether the appellant's lie was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it. In the present case it was not. [Para 41 of judgment.]

[1]

1 Section 76 provides:
"(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
(a) that the complainant did not consent to the relevant act, and
(b) that the defendant did not believe that the complainant consented to the relevant act.
(2) The circumstances are that—
(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant."

Caution adduced as bad character; deletion of caution; fresh evidence; admission of evidence underlying caution

By: Farrhat Arshad

R v Trevor Pierce
[2020] EWCA Crim 855

P was convicted of sexual offences against C committed when C was a child aged between 9 and 13 years. Those offences were said to have taken place between 1996 and 2000. Towards the end of the offending period P began sending indecent text messages and images to C. In 2004 C complained to others about the text messages and alleged P had also stroked her leg. She mentioned no other offending against her at that point. P was interviewed by the police. He was not legally represented. The text messages were not in the possession of the police but their nature and broad content were put to P. P stated he could not really remember sending messages but made certain admissions, saying things had started to get out of hand and he had said "the wrong things." When asked what he meant by "wrong things" he said, "Sexually explicit things I suppose I don't know." When it was suggested that in the later texts he had indicated he wanted to have sex with C he replied, "It could be yes I could have said that – I mean how can you recollect texts you sent I mean if she's saying that then I must have done". He was asked about sending the indecent images and he said it was not impossible for him to have done. He denied having stroked C's leg. P then accepted a caution on 1 April 2005 in relation to the messages. In 2013 C made a complaint to the police about the sexual offending against her by P and he stood trial. At trial, the parties agreed that the fact of P's caution should be admitted in evidence. In evidence P said that he could not remember sending the text messages but had admitted the caution to get it out of the way and that he had been convinced that he had sent the messages by those who had spoken to him about it. He was convicted after trial. Subsequent to his conviction, application was made to the police to delete his caution. The application

was made on a number of grounds including that P had not made a clear and reliable confession, as required by Home Office Circular 30/2005 on the Cautioning of Adult Offenders (issued two months after the caution was given). The point was also made that the caution was recorded on the PNC as being for a different offence than that shown on the caution form. Sussex police agreed to delete the caution in June 2019, nearly three years after trial. The Full Court granted permission to appeal and admitted the deletion of the caution as fresh evidence.

The CACD (Dingemans LJ, Cutts J, HHJ Karu) refused the appeal. Whilst the caution may have been deleted nevertheless the evidence underlying the caution would have been admissible before the jury. It was common ground that the sending of obscene texts and photos to C would amount to misconduct being reprehensible conduct for the purposes of sections 98 and 112 of the Criminal Justice Act 2003 ("CJA 2003"). The evidence about sending the texts would have been admissible pursuant to two gateways in section 101 of the CJA 2003: "important explanatory evidence" pursuant to sections 101(1)(c) and 102 of the CJA 2003, and as "relevant to an important matter in issue between the defendant and the prosecution" pursuant to sections 101(1)(d) and 103 of the CJA 2003. As to "important explanatory evidence", without the admission of the evidence of the complaint in 2004, the jury would have found it very difficult or impossible to assess fairly C's delay in reporting the sexual assaults in this case. The making of the complaint in 2004 was part of the process by which the complaints were made against P, and it would not have been fair to the prosecution or to C to pretend that the first report made by C was in 2013 and not 2004. The report in 2004 was also very relevant to the defence case, namely that the disclosure in 2004 was, even if true, comprehensive of all the wrongdoing committed by P against C, and that there was no good reason for the continuing delay in reporting the sexual assaults.

The "important matter in issue" was whether P had a sexual interest in C. The sending of texts to C suggesting that sexual activity should take place between P and C showed a sexual interest in C by P.

If you'd like to speak to Farrhat Arshad about these cases, 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.

Jury procedure – note indicated verdict given was a "mistake" – judge's discretion to clarify verdicts and allow jury to continue deliberating

By: Paul Taylor QC

Newby
[2020] EWCA Crim 937

N was convicted of two counts of causing or allowing serious physical harm to a child contrary to section 5 of the Domestic Violence Crime and Victims Act 2004 (counts 1 and 2). CM, her then partner and co-accused, was also convicted on both counts.

After retirement jury indicated they had not reached a conclusion on count 1 for either defendant as it was still the subject of discussion, but they had reached verdicts on count two. The verdict on that count was taken and the jury convicted CM and acquitted the appellant. There was no equivocation in the way the verdicts were delivered.
Shortly afterwards, the judge returned to court and told counsel that he had been given a message that the jury might be able to reach verdicts on count 1 if they were given more time that afternoon. They retired again to continue their deliberations on count 1.

The court again reassembled in the absence of the jury and the judge stated:

"…I am given to understand from the usher that the foreman of the jury was dissatisfied with the way that he gave the verdicts… I don't think he was quite asked the right questions in respect of the female defendant."
The jury were brought back into court and, through a new foreman, without apparent hesitation, convicted CM and acquitted the appellant on count 1. The Judge asked the foreman to confirm your verdicts in respect of count two, and the foreman confirmed that they had agreed verdicts of guilty for CM and not guilty for RN. RN was discharged.
The jury then left court, but shortly afterwards the judge was told via the court associate that there was a problem with the verdict, and he informed counsel that there may still be some element of confusion. The usher wrote a note that indicated that within a minute or two after leaving court, the foreman and several other members of the jury indicated that there had been a mistake and they had not returned "a complete verdict". The foreman was separated from the rest of the jury and asked to write a short note describing what he thought had gone wrong. It stated: "Count one, question two was not asked. Count two question two was not asked".

The judge decided that it was in the interests of justice to clarify the position with the verdicts. The jury were brought back in and were directed again on the issues and sent back out into retirement to consider their verdicts in relation to RN. The jury retired at 10.44 am and at 11.11 am they returned to court and returned unanimous guilty verdicts against the appellant on both counts.

The appeal was advanced on the basis that the judge was wrong to exercise his discretion to permit the jury to amend their verdicts on both counts 1 and 2. It was submitted that there was no proper foundation for him to conclude that the jury had made a genuine mistake in returning not guilty verdicts on both counts and he failed safely to exclude the possibility that the jury had simply changed their minds. Additionally, on count 2 it is contended that the verdict of not guilty had been returned, and then confirmed, several hours before the jury indicated the nature of their concern. It was submitted that the lapse of time in respect of the amended verdict on count 2 is fatal to the safety of the conviction.

The CACD considered the principles to be applied in this situation [Paras 29-31].

"[32]…we consider that it should be emphasised that although the judge has a discretion in these circumstances, if there has been a material opportunity for further discussion after the verdict in question was delivered, thereby potentially leading to a change of mind, no amendment to the conviction or acquittal should be permitted. In this context – although it is not necessarily determinative – of clear importance will be whether the jury promptly indicated that the verdict needed correcting, and whether the court thereafter dealt with the issue straightaway and before any significant further deliberations occurred, or might have occurred, thereby excluding the risk of a change of view on the part of one or more jurors."

[37] "The determining factor…is that this was not a clear-cut instance of a jury indicating that there had been a mistake in the way the verdicts had been delivered, with that indication being provided promptly and the matter being resolved in circumstances which excluded the possibility of any further deliberations and a change of mind. The foreman had been isolated from the rest of the jury, rendering it unclear whether his short note of explanation reflected the views of the entire jury or only some of them. Furthermore, the jury were expressly asked by the judge to reconsider their verdicts as regards the appellant. Following that direction, they deliberated for over 25 minutes before convicting the appellant on both counts, having previously returned verdicts of not guilty. In these circumstances, the court cannot exclude the real possibility that the jury's verdicts, as finally delivered, may have been influenced by things they heard or discussed after the original acquittals. Although the verdict on count 2 stood unaltered for a longer period of time than that on count 1, the underlying considerations are identical for both counts.

38. It follows that the judge should not have re-opened the unanimous verdicts and he should not have directed the jury to reconsider their verdicts on both counts.

39. We allow the appeal. The convictions against the appellant on counts 1 and 2 are quashed. Given the acquittals on counts 1 and 2 should not have been reversed, there is no question of a retrial."

Manslaughter – diminished responsibility – non-defendant bad character evidence - self-defence

By: Paul Taylor QC

R v Olivia Labinjo-Halcrow
[2020] EWCA Crim 951

The victim, GC, died as a result of a stab wound above and behind his left knee which severed an artery. L-H was acquitted of his murder but convicted of manslaughter by reason of diminished responsibility.

L-H had revealed detailed allegations of past physical and sexual assaults at the hands of the deceased, and others, including when she was a child. She said she had not knowingly taken cocaine and her drink must therefore have been spiked by GC.

The prosecution case was that L-H had murdered GC, she was not acting in lawful self-defence. At the very least she would have appreciated that some harm would be caused by infliction of the wound and so lead to a conviction for an unlawful act manslaughter. The prosecution successfully applied to adduce evidence of the appellant's bad character, namely her aggressive behaviour in drink towards an ex-partner and GC.

L-H's case at trial was that she had no memory of stabbing GC, but accepting it was likely she had done so, she would have been acting in self-defence or acting with diminished responsibility or in loss of control.

LH and GC's relationship had been volatile and tempestuous. Both had accused the other of aggression and physical violence. L-H had made complaints to the police in the past about GC's assaults upon her but had then retracted the same.

L-H gave evidence regarding alleged previous incidents of physical and sexual abuse. She also recounted two incidents that she said had occurred in November 2018 involving G-C. In the first she alleged anal rape, in the second a physical assault that led to her stabbing GC in the ar m. She gave evidence of other incidents of violence by GC.

Cross examination was short lived. L-H refused to continue to give evidence. The prosecution was unable to challenge the reliability of her evidence in respect of the past incidents or immediate circumstances surrounding the stabbing.
[15] Psychiatric evidence was called as to L-H's likely state of mind at the relevant time. Both psychiatrists were clear that it was for the jury to determine whether her account was to be believed, but with that proviso, if the 'factual matrix' was established it supported their respective opinion that the defence of diminished responsibility was made out.

The judge's direction to the jury on self-defence in the first section of his summing up was unimpeachable and we need not repeat it here. His direction to the jury on the question of non-defendant bad character followed his rehearsal of the appellant's account of her relationship with Gary Cunningham, in the following terms:
"The next topic is Gary Cunningham's history of violence. Obviously, you have heard about that really as part of the defendant's case because she says, "He has used violence in the past towards me" and that is part of the important background to this case in explaining why she used violence on this occasion.
…
You must decide whether you are sure that the evidence demonstrates the defendant has been physically and sexually assaulted in the past by Gary Cunningham. …

If you are not satisfied so you are sure that Gary Cunningham behaved in any or all of the ways alleged, then you should ignore those parts of that evidence that you are not satisfied of. If you are sure that he did behave in that way, then you are entitled to consider that evidence… when you consider the defendant's claim in evidence that it was Gary Cunningham who started the incident on 23 February, in particular, whether it supports the fact that she was acting in self-defence. The fact that Gary Cunningham has acted in this way in the past does not mean that he must have used unlawful force on this occasion but it is something you may take into account when you are deciding whether or not the prosecution have made you sure it was the defendant and not Gary Cunningham who started the violence, and that the defendant's use of force was unlawful."

[21] "We have no hesitation in saying that this direction was fundamentally wrong in law. This direction transfers the evidential burden to the defence and to the criminal standard. This is unwarranted and offends against the basic principles of criminal law.

[29] The jury were correctly directed upon the defence of diminished responsibility, and the 'value' of the information she provided to the psychiatrists. They were specifically told that it was not to be treated as 'additional evidence' of what took place to that which she had related in evidence to them. However, in following the legal direction regarding the appellant's need to prove the factual matrix upon which the psychiatrists relied on the balance of probabilities to find diminished responsibility , as we assume they did, they were obliged to consider whether her account of past events was or may be correct. They obviously did so to return the verdict of guilty they did. This raises an obvious question as to whether, if correctly directed in relation to the appellant's evidence relating to past misconduct, the jury would have been made sure by the prosecution that she was not acting in self-defence.

30. We have no hesitation in quashing the conviction as unsafe. We allow the appeal.

Commentary:
As to proving the factual matrix in relation to bad character issues see Patrick O'Connor QC's article in last month's bulletin [Click here]

If you would like to speak to Paul Taylor QC about these cases, please click here.

Adverse Inference – Sufficiency of Evidence

By: Richard Thomas

R v Ludovic Black
[2020] EWCA Crim 915

The defendant was convicted of conspiracy to commit fraud by false representation. The prosecution case was that Mr Black conspired with his co-defendants to make false and dishonest representations to customers to induce them to purchase solar panels with returns promised under the UK Government's "feed in" tariff scheme ("FIT"). The prosecution relied on evidence from customers, sales and office staff, as well as documentary exhibits including the sales brochures and e-mails sent between the co-defendants.

At interview, Mr Black answered no comment to all the questions. A Defence Statement was served, albeit it was accepted that given delays in the service of the prosecution case against him, he had not been in a position at that time to have read all the evidence. The appeal raised an issue about whether sufficient evidence had been adduced about the strength of the prosecution case at the time of interview, to permit an adverse inference to be drawn from the failure to mention specific facts pursuant to section 34 of the Criminal Justice and Public Order Act 1994 ("CJPOA 1994"). Leave was not granted (and refused when renewed) on a ground relating to directions given about inadequacies in the Defence Statement.

At trial, Mr Black gave evidence about three matters that were not mentioned in interview or raised in the Defence Statement [see para. 23]. The judgment records that he was cross-examined not on specific failings to mention, but in short and general terms which he accepted, namely that he had been provided with a bundle of disclosure before interview, that he had a 'story to tell' at the time consistent with his innocence, and that he chose not to give that explanation. Mr Black's position was that he had acted on the advice of his solicitor. It was argued on his behalf that no section 34 direction should be given: the brief questioning on the issue did not address the questions asked at interview and did not amount to a sufficient basis to determine how the prosecution case appeared at interview. The judge ruled that he would give a direction, noting that it was alleged Mr Black (a man with a similar previous conviction) was a leading figure in the alleged fraud and a jury could conclude that he should have made a comment [para. 27].

The Court reviewed the statutory provision and the relevant authorities [paras. 33 – 41]. The purpose of the provision was to deter late fabrication of defences and to encourage early disclosure of genuine defences. In Argent [1997] 2 Cr App R 27, the Court held that '*the circumstances existing at the time*' (i.e. of the interview) were not to be interpreted restrictively and could include defendant's state of health, sobriety, tiredness, knowledge and legal advice. In that case, one of the issues was the extent to which full disclosure had been made by the police at the time of interview (i.e. going to 'knowledge'). In Condron [1997] 1 WLR 827 and *Pektar* [2004] 1 Cr App 22 it was established, as reflected in the standard directions in the current version of the Crown Court Compendium, that no adverse inference should be drawn unless "*the prosecution case as it appeared at the time of the interview was such that it clearly called for an answer*". The trial judge gave this standard direction. The Court of Appeal confirmed that whilst this requirement was not set out in the wording of section 34 CJPOA 1994, Condron and Pektar were correct '*because if nothing has been shown to the defendant at the police interview to call for an answer from the defendant, it would be wrong to draw an inference against the defendant for a failure to provide such an answer*'.

As to whether there was such sufficient evidence, it was argued on behalf of Mr Black that since the prosecution had failed to adduce evidence of what was asked in interview, or what disclosure had been given to Mr Black, there was no basis on which the jury could consider the prosecution case called for an answer and the direction should not have been given. The prosecution case was that the cross examination had been sufficient: it had been established that disclosure had been given to Mr Black, that he was an intelligent and articulate person, that he had understood the caution, had lived through the relevant events and had an account to give at the time.

The Court's conclusion is a clear indication that whilst the 'circumstances' at the time will not be interpreted restrictively (and will include knowledge and the strength of the prosecution case), a restrictive approach to the factual basis for establishing those matters will not be entertained: The Court held that 'living through the events' meant an acceptance of being involved in the scheme. The matters not mentioned in interview amounted to key aspects of that scheme and these were matters readily understood by an intelligent and articulate man. The Court also noted that there was no evidence adduced by the defendant to show that the prosecution case at the time of interview was insufficient to call for an answer and Mr Black did not make the assertion in his evidence. Whilst there was no burden on Mr Black to give such evidence, its absence meant there was nothing to rebut the proper inferences to be drawn about the strength of the prosecution case at the time of interview.

The Court of Appeal's judgment leaves open an attack on a section 34 direction on the basis attempted by Mr Black, but it is clear that it could only succeed if there was a fuller exploration of the disclosure given at interview and of a defendant's state of mind at the time.

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.

Supreme Court

Activities of "paedophile hunter groups" - whether compatible with accused's Article 8 rights

By: Paul Harvey

Mark Sutherland v Her Majesty's Advocate
[2020] UKSC 32

Facts

In *Sutherland*, The Supreme Court has finally considered the human rights implications of paedophile hunter groups, an issue Sarah Elliot QC first discussed in this Bulletin in her commentary on *R v TL*, availabe here.

Sutherland was a Scottish case but for all material purposes, the evidential and human rights issues that the case presented are the same as for the rest of the UK, a matter which presumably influenced the decision of the DPP to intervene in the case and make written and oral submissions. Indeed, for those acquainted with the activities of paedophile hunter groups in England and Wales, the facts of the case follow a familiar pattern.

A decoy from "Groom Resisters, Scotland" (GRS) created a Grindr profile using a photograph of a boy aged 13 years old. Grindr's terms and conditions require its user to be aged 18 or over. The appellant, Mark Sutherland, initiated contact with the decoy over Grindr. This included Sutherland making sexual explicit statements and sending sexually explicit photographs, to which the decoy responded stating he was 13. Sutherland continued to send sexual communications to the decoy on Grindr and, subsequently, over WhatsApp. They eventually arranged to meet; at the meeting, Sutherland was instead confronted by members of GRS who contacted the police. Sutherland was charged with, and later convicted of, attempting various sexual offences against a child. At trial and on appeal he challenged the admissibility of the decoy's evidence on the grounds that it was not compatible with his rights under Article 8. Those challenges failed and, on further appeal to the Supreme Court, the issues were:

(i) whether Article 8 was engaged (and if so, whether obtaining and using of the decoy's evidence at trial was "in accordance with law" for the purposes of Article 8 § 2); and

(ii) the extent to which the State's obligation to protect the Article 8 rights of others was compatible with the use of material supplied by paedophile hunter groups to investigate and prosecute crime.

The Supreme Court unanimously dismissed Sutherland's appeal. The Supreme Court (Lord Sales giving the only judgment) proceeded on the basis that charges on which the appellant was convicted covered the entire period of his communications with the decoy. Accordingly, it was not necessary for it to consider whether Sutherland thought (either as a result of Grindr's terms and conditions or otherwise) that the decoy was a child when he sent his first message.

On that basis, the Supreme Court found that Article 8 was not engaged because: (i) the nature of the communications between the appellant and the decoy were not capable of making them worthy of respect for the purposes of Article 8; and (ii) the appellant had no reasonable expectation of privacy in relation to the communications (paragraph 31 and following).

On the second issue (the nature and extent of the State's positive obligations under Article 8), the State had no supervening positive obligation to protect the appellant's interests that would prevent the Crown making use of the evidence to investigate or prosecute the crime. On the contrary, the relevant positive obligation on the Crown was to ensure that the criminal law could be applied effectively to deter sexual offences against children. Article 8 has the effect that the Crown should be entitled to, and might indeed be obliged to, make use of the evidence in bringing a prosecution (paragraphs 64 and following).

The Supreme Court added that, even if the appellant had been able to show an interference with his Article 8 rights, he would have faced fundamental difficulties in challenging his conviction. It could find no reason to think that the High Court of Justiciary was incorrect in its treatment of justification for the interference under Article 8 § 2. And if there had been a breach of Article 8, it would not follow that Sutherland's conviction should be quashed because evidence obtained in breach of Article 8 could still be used in criminal proceedings provided there was no breach of Article 6.

Commentary:

The Supreme Court's conclusion that there was no interference with Article 8 on the facts of this case meant that it was unnecessary for it to consider the question of justification under Article 8 § 2.

That is significant because a great deal of the submissions in this case focussed on the question of whether any interference was "in accordance with law" for the purposes of Article 8 § 2. The police and Crown in all three UK jurisdictions have, quite properly, made clear that they do not condone the activities of paedophile hunter groups. Nonetheless, the question remains as to whether, as the appellant submitted, the repeated use of the evidence of such groups amounts, in effect, to tacit or constructive encouragement of them.

If that is so, then the question also remains as to whether there requires to be a lawful basis for using the evidence of these groups. This would be necessary to ensure that the "in accordance with law" test under Article 8 § 2 is satisfied and to ensure that such tacit/constructive encouragement is not, in effect, a circumvention of RIPA. Thus, in any subsequent case where the facts that suggest Article 8 is engaged, the issue of "in accordance with law" will still have to be determined, and it may be that the Supreme Court will have to decide it in an appropriate case.

That may also require the Court to revisit the question of whether evidence obtained in breach of Article 8 can be used in criminal proceedings. The Supreme Court judgment applied the settled principle that evidence obtained by a one-off breach of Article 8 will not prevent that evidence being used at trial. But it does not address the question of whether that principle applies when the breach is not one-off but rather systematic. Thus, if Article 8 is engaged and the Crown's used of paedophile hunter evidence is found to be constructive encouragement of paedophile hunter groups, then Court may have to reconsider whether the principle still applies.

If you would like to speak to Paul Harvey about this case, please click here.

To see Paul's full profile, click here.

Appeals against Sentence; England and Wales

Historic sexual offences; Meaning of "measured reference"; multiple complainants; lengthy period of offending

By: Farrhat Arshad

R v Dylan John Lamb
[2020] EWCA Crim 881

L had committed a number of sexual offences against five boys over a number of years in the mid-70s to the late 90s when he worked as a sports coach in a number of different locations. The acts included buggery, masturbation of the boys and by the boys and oral penetration. Following conviction after trial of 21 offences, he was sentenced to a total of 30 years' imprisonment. L appealed against sentence on the basis that it was manifestly excessive, the judge had failed to make "measured reference" to the sentencing guidelines and insufficient regard was had to totality.
The CACD (Bean LJ, McGowan J, Murray J) allowed the appeal, reducing the sentence to 25 years. The term "measured reference" (R v H (J) [2011] EWCA Crim 2753) was not intended to prescribe a mathematical exercise, but rather to cause the court to reflect the previous maximum sentence as part of the composition of the sentence based on current guidelines. It must achieve a proper calibration and thereby some reduction to reflect the statutory maximum available at the date of offending. Applying the approach set out in Forbes [2016] EWCA Crim 1388, to the current case the CACD found that there was a failure to apply measured reference between the current guidelines and the statutory maximum terms in force at the time. Applying the principle in Forbes and making measured reference to relevant contemporary sentencing guidelines in light of the statutory maxima at the relevant time, the CACD concluded that the total term of 30 years was excessive and that a total of 25 years would have been appropriate.

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

Murder – minimum terms – young offenders

By: Paul Taylor QC

Smith, Drage, Higgs and Crowley
[2020] EWCA Crim 973

All four appellants were sentenced for conspiracy to rob, to which they pleaded guilty, and murder of which they were convicted by the jury after a trial.

The judge passed sentence on 1 November 2019. At that date Smith, Drage and Higgs were aged 20, having been 19 at the time of the murder. Crowley was aged 21, having been 20 at the time of the murder.

Two of the appellants were sentenced for other offences, concurrently with the life sentences for murder. There were two offences of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861.

These appeals are in substance against the length of the minimum terms which were imposed for the offence of murder. Higgs and Drage received minimum terms of 28 years each. Smith received a minimum term of 31 years and Crowley received one of 34 years. In each case the judge specified the number of days (268 days) which were to be deducted to reflect time spent on remand.

The CACD considered the authorities and principles that applied in such cases.

[74] The crux of the arguments on behalf of all four appellants is that the judge gave insufficient regard to three features of the case which were present in respect of each of them:
(1) Their relatively young ages.
(2) The lack of an intention to kill.
(3) The lack of premeditation.
[75] In our view, the third of those features adds nothing material on the facts of the present case to the second.
[77] In our view, the crucial point is the one which is common to all of these appellants: it is whether the judge at the end of the day gave sufficient weight to both the ages of the appellants and to the fact that she had found that they did not have an intention to kill. We have come to the conclusion that, with respect, she did not give sufficient weight to those two features of this case.

78] In our view, those factors, when taken together, should have led to a minimum term in the case of Higgs and Drage of 26 years rather than 28 years.

[79] It is clear from the reasoning of the judge that she carefully sentenced in respect of the other offences for which she had to sentence Smith and Crowley. No complaint was made before this Court about the correctness of those sentences. It follows that the minimum terms in their cases had to be higher than those for Higgs and Drage, particularly bearing in mind the principle of totality and that the other sentences would be concurrent. Applying the thinking of the judge therefore we have come to the conclusion that the appropriate minimum term in the case of Smith should have been one of 29 years rather than 31 years and the minimum term in the case of Crowley should have been one of 32 years rather than 34 years. In each case the number of days spent on remand (268 days) must be deducted from those minimum terms.

If you would like to speak to Paul Taylor QC about this case, please click here.

AG Ref- Appeal against sentence - single punch manslaughter – categorisation (culpability) moved from C to B - sentence increased.

By: Maryam Mir

R v Michael Taiwo
[2020] EWCA Crim 902

The Attorney General applied, under section 36 of the Criminal Justice Act 1988, for leave to refer this sentence of four years ten months' imprisonment for a guilty plea to single-punch manslaughter on the ground that it was unduly lenient. Simultaneously D, of former good character, challenged the same sentence on the ground that it was manifestly excessive.

D was evicted from a pub garden following a fracas with the deceased and another. Returning to the scene he caught the deceased off guard, delivering a single running punch to the head. After a short delay, the deceased fell to the floor, banging his head on a table on the way down. He suffered a brain haemorrhage and died. D fled the scene, swapping his t-shirt with another to avoid detection.

Following an accepted guilty plea to a lesser offence of manslaughter, the sentencing judge determined it was a category C case in terms of culpability. Considering the aggravating and mitigating features and giving 20% credit for guilty plea, the sentence indicated was reached.

D's appeal against sentence was refused, with the court rejecting the argument that there were more mitigating than aggravating features and determining credit had been properly applied.

Considering the range of factors relevant to assessing culpability, the court went on to say at para 26:

> "there is no principle that a single punch manslaughter can never come within the first two factors identified in the sentencing guideline relating to high culpability (category B)… the guideline is framed on the footing that it is capable, in terms of culpability, of applying across the range of categorisations where no weapon is used. It is, thus, correspondingly to be noted that lack of use of a weapon is not identified in the guideline as a mitigating factor reducing seriousness. Thus, whilst no doubt many single punch manslaughter cases will properly be assessed as falling within category C, it is by no means the case that all must be so categorised; although certainly it will always be relevant to consider whether or not a weapon has been involved."

The court cited the recent decision of *R v Coyle* [2020] EWCA Crim 484, another single-punch to the back of the head case where the category was said to be "squarely 1B", together with *R v Bola* [2019] EWCA Crim 1507 on the point of not applying the guidelines in an "overly mechanistic way" whilst considering the relevant context (para 32).

Allowing the AG's appeal, the court found that the balance of aggravating/mitigating features, notwithstanding the appellants guilty plea and remorse, fell into category B where the starting point is 11 years. Reducing that for relevant mitigation, the court increased the sentence to one of seven years and two months' imprisonment.

If you would like to speak to Maryam Mir about this case, please click here.

About Maryam Mir

Maryam has frequently been involved in cases where there is a dispute about categorisation of culpability. She previously represented a defendant charged with a "smash and grab" burglary; who entered a guilty plea on a basis. The CA accepted evidence that D had been exploited by others in circumstances where he suffered a learning disability. Obtaining reports at an early stage, together with a carefully drafted basis, was crucial to ensuring D stood his best chance when appealing his sentence.

To see Maryam's full profile, click here.

Financial Crime appeals

R v Hilton [2020] UKSC 29: Can this be right?

By: Joel Bennathan QC

R v Hilton [2020] UKSC 29

The Supreme Court appears to have sacrificed logic and the meaning of words at the altar of practicality in this decision from Northern Ireland. With apologies to Northern Irish readers, I substitute the identical section-numbers of the English provisions of the Proceeds of Crime Act 2002.

We know the basics: a judge will make a confiscation order for the Recoverable amount, which is the benefit the offender has obtained, limited to what they have [the available amount]. The appellant here, Ms Hilton, pleaded to benefit fraud and the judge made an order for a recoverable amount, based on her assertion of her share of the value of her house, £10 000. Problem; under section 10A, "*Where it appears to a court making a confiscation order that there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and a person other than the defendant holds, or may hold, an interest in the property, the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property* [but] *The court must not exercise [that] power unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.*". Given the £10 000 was stated as being Ms Hilton's share of the house, it is really hard to see how the judge was not "*determining the extent*" of Ms Hilton's interest, and it must have been blindingly obvious that someone else at least "*may*" have an interest in the house. The Court of Appeal in Northern Ireland found that the judge's failure to give the absent interest-holder an opportunity to be heard was fatal to the order. The Supreme Court, spotting that the Court of Appeal decision would make life more complicated for judges making confiscation orders, has now held that a judge who does not refer to the relevant section, does not make a "*determination*" under it, drawing a distinction [paragraph 12] between "forming a view" and "*determining*". What, then, was the point of section 10A, one might ask? And are we really going to approach the law on the basis that a judge who "*forms a view*" on a subject and makes an order based on that view has not "determined" anything? In the end there is not much harm done, as a later section allows an interest-holder in the property to make representations before a receiver can sell it [section 51(8B) in England and section 199(8B) in Northern Ireland, as you ask], but this commentator would humbly wonder if this is really the Supreme Court's finest hour.

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.

Health and Safety Appeals

Abuse of process

By: Benjamin Newton

R v Connors Building & Restoration Ltd
[2020] EWCA Crim 868

Without creating any new principle, the case is illustrative of the way in which the Court will approach challenges to decisions to prosecute made through applications to stay as an abuse of process.

The Appellant was convicted of a single count of failing to comply with s2(1) Health and Safety at Work Act 1974. This related to an incident in which an employee was working on a rip saw in their new joinery room and was struck in the nerve and main artery in his leg by an offcut piece of timber, for which he required surgery and was left with a limp and ongoing shooting pains.

Prior to trial the Appellant had applied to stay the proceedings as an abuse of process, essentially challenging the decision to prosecute following written representations made to the Health and Safety Executive. They had argued that the public interest for prosecution had not been met and that prosecution was not a proportionate response. In particular they focused on the fact that the company had a single customer, Scottish Power, and that they would inevitably fail in a forthcoming re-tendering process if convicted of a criminal offence.

The investigating inspector gave evidence at that hearing and said that she had reviewed the written representations made on behalf of the Appellant, and, with reference to the Enforcement Policy Statement, the Enforcement Management Model and the Code for Crown Prosecutors, had concluded that both the evidential and public interests tests were met, and that prosecution was a proportionate response.

In refusing the application to stay the judge had noted that the "risk gap", which involves comparing the actual risk arising with the benchmark risk, was assessed as "extreme". The Appellant had failed to meet well-known and established standards, resulting in a serious breach which had resulted in serious injury. Once a conclusion was reached that prosecution was in the public interest, the fact that there are alternative enforcement sanctions do not fetter the discretion to prosecute. The available alternative of an Improvement Notice had been considered and rejected, the rip saw having been removed after the incident. The decision to prosecute was not Wednesbury unreasonable and there was no abuse of process.

The judge also noted that no enquiries had been made of Scottish Power and that the consequence of conviction was therefore speculative. She also noted that where a company was prosecuted it was open to those with whom it did business to reconsider the relationship – this was an ordinary consequence of conviction and could not be oppression.

The grounds of appeal essentially came down to whether there was a breach of the HSE's prosecution policies and, if so, was the judge's decision not to stay the proceedings an unreasonable exercise of her discretion.

Dismissing the appeal, the Court agreed with the Respondent's contention that a less burdensome response than prosecution would not have met the competing public interest considerations the HSE is required to consider.

The Appellant's argument was also substantially diminished by the fact that the company had succeeded in the Scottish Power tendering process notwithstanding the conviction, vindicating the judge's decision that the contentions in this regard were merely speculative. The Court also agreed with the HSE that the need for consistency meant that considering the relative level of unemployment in the area in which a business operates would be wrong, and would also lead to workers in high unemployment areas having less health and safety protection. As such, had it been necessary to consider whether oppression arose on the facts, the Court again upheld the judge's decision.

Jury – determination of factual issues in technical areas

By: Benjamin Newton

R v Biffa Waste Services Ltd
[2020] EWCA Crim 827

The Court addressed a difficult scenario that would be challenging to any jury in seeking to reach a factual determination in a technical area.
The Appellant, a waste management company was convicted of two offences of illegally exporting household waste to China contrary to Regulation 23 of the Transfrontier Shipment of Waste Regulations 2007 - a strict liability offence.

Part of their business involved sorting Y46 household waste and exporting those parts of it that met the requirements to be recycled as paper. One such consignment was inspected at Felixstowe and found to be contaminated with more than the small allowed proportion of household waste.

Two grounds of appeal were advanced, the second being a relatively simple issue as to whether a false impression had been given during evidence-in-chief as regards the company's ethical standpoint on compliance with regulations, which led to the judge allowing the prosecution to introduce previous convictions for other offences. The Court upheld that decision and dismissed the ground of appeal.

The more significant ground of appeal related to the judge's decision to exclude factual and expert evidence as to whether the waste met Chinese standards of acceptability for recyclable paper waste, the Appellants having contended that the inspected consignment would have been recycled at its destination. This gave rise to an interesting and subtle issue.

The prohibition on the export of Y46 household waste to non-OECD Decision countries is a blanket one, and there no distinction can be drawn between individual non-OECD Decision countries. The correct categorisation of a consignment of waste is therefore to be determined at the location from which it is exported, and evidence of what would happen at its destination is irrelevant. The issue for the jury to determine was whether at the beginning of the journey the level of contaminants were so small as to be minimal (R v Ideal Waste Paper Co Ltd [2011] EWCA Crim 3237). As such the judge had been right to prohibit evidence as to what would have happened to the waste had it reached China.

This begged an important question. 'How then is a jury in a case such as this to decide whether the prosecution have proved that at the start of its journey the waste was Y46 household waste? No simple metric can be provided. As is clear from Ideal Waste, the jury will need to consider the quantity, nature and quality of the contaminants which remain after the sorting process' (para 47).

It would therefore be relevant for a jury to know whether the contaminants might, although small, prevent or impede the recycling of the waste in an environmentally sound manner. Otherwise a jury may wrongly conclude that the presence of any contaminants would prevent recycling.

To counter this risk the Court held that it is in principle open to a defendant to adduce evidence to show that the bales of paper waste produced by its sorting process could without further sorting be recycled in an environmentally-sound manner. They could adduce evidence, including expert evidence, of the general processes, although such evidence cannot be determinative of the evaluation which the jury has to make. It remains necessary for the jury to make an overall assessment of the quantity, nature and quality of the contaminants, and to make its own judgment as to whether the waste in question was still Y46 household waste when its export began.

The judge had been correct, however, to exclude evidence of how the waste would be processed at a particular destination as the jury hast to determine the correct categorisation of the waste when its journey begins rather than where it is going.

Benjamin Newton was awarded Crime Junior of the Year at the 2019 Chambers and Partners Bar Awards and is ranked in Band 1 in Crime. He represents those accused of the most serious and complex criminal offences at both first instance an on appeal, and is regularly instructed in high profile and legally significant cases.

If you would like to speak to Benjamin Newton about these cases, please click here.

About Benjamin Newton

Benjamin Newton was awarded Crime Junior of the Year at the 2019 Chambers and Partners Bar Awards and is ranked in Band 1 in Crime. He represents those accused of the most serious and complex criminal offences at both first instance an on appeal, and is regularly instructed in high profile and legally significant cases.

To see Benjamin's full profile, click here.

Caribbean Case Summaries

By: Paul Taylor QC

The Caribbean Court of Justice

When will CCJ consider grounds not raised in Court of Appeal – challenging court of appeal's implementation of proviso

Winston Alexander v The Queen
[2020] CCJ 13 (AJ) BB

On Appeal from The Court Of Appeal Of Barbados
CCJ Application No. BBCR2020/001 /BB Criminal Appeal No. 6 of 2012

The CCJ refused the application by Winston Alexander for special leave to appeal his murder conviction.

1. He was proposing to be permitted to argue grounds which did not arise out of the decision of the Court of Appeal.

An appeal to the CCJ lies from a decision of the Court of Appeal; it does not lie from the decision of the trial court. As this Court stated in Andrew Lovell v The Queen [2016] CCJ 6 (AJ) at [19], an appellant must bring to the Court of Appeal the whole case he has and will not be allowed to bring different aspects of his case before different appellate tribunals. The Court will treat the attempt to do so as an abuse of process unless there are exceptional reasons for doing otherwise and it would be a miscarriage of justice to refuse to permit the new ground to be argued. In the present case, this Court considered the new grounds and was satisfied there was no potential miscarriage of justice in refusing to permit the applicant to rely on them as proposed grounds of appeal.

2. The sole ground, then, on which the application was permitted to proceed was that the Court of Appeal erred in not allowing the appeal and setting aside the conviction for murder; that court having found that the trial judge did not properly direct the jury on the defence of accident. The Court of Appeal had accepted that the trial judge had not given a full direction on the defence of accident. Instead of allowing the appeal, however, the Court of Appeal applied the provision in section 4(2) of the Criminal Appeal Act Chapter 113A, commonly called 'the proviso' by lawyers for historical reasons, which reads: 'the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

This Court was satisfied that the applicant did not have an arguable case that the Court of Appeal erred in applying the proviso. The principle we applied in arriving at that decision is that where this Court is satisfied that the Court of Appeal gave proper consideration to whether to apply the proviso and committed no error of principle and did not misdirect itself, this Court will not interfere.[See Fazal Mohammed v The State (1990) 37 WIR 438 at 445 Quoting from Lee Chun-Chuen [1963] AC 220 at 231]. It will not review the exercise of judgment by the Court of Appeal with a view to substituting its own determination, even in a case where it may have decided differently; and in this case the applicant has pointed to nothing to make this Court think it may have been minded to decide differently.
it did not render the trial unfair so as to justify quashing the conviction for unlawful sexual intercourse.

Commentary:

By way of analogy, for examples of the situations in which the Judicial Committee of the Privy Council will allow argument in relation to points not raised in the appellate court below see *Taylor on Criminal Appeals* para 17.169. These include points raised for the first time where, if successful, they would show that the trial Court ought not to have convicted and that a sentence following would have been unlawful [*Ong Ah Chuan v Public Prosecutor*, [1981] AC 648], ad where the new point was visible on the face of record and the local Court of appeal failed to raise it of its own volition [Prasad v The Queen [1981] 1 WLR 469], or fresh evidence [See Lester Pitman [2008] UKPC 16].

Eastern Caribbean Supreme Court

Appeal against sentence - Goodyear Indication to unrepresented defendant - Voluntariness of guilty plea – Whether legal basis exists in Antigua and Barbuda for the imposition of suspended sentences – Whether suspended sentence was manifestly lenient

DPP v Shane Williams

In the Court of Appeal Antigua and Barbuda
ANUHCRAP2018/0011

Shane Williams ("SW"), was charged with the offence of sexual intercourse with a female under 14 years. He was unrepresented throughout the proceedings below. At his arraignment he pleaded not guilty. On his second appearance, the judge determined of his own motion, without a request from SW, that a Goodyear Indication ought to be given. The judge then asked SW what he wanted to do in light of the indication given, in response to which SW maintained that he was not guilty. The judge continued to engage SW on the possibility of entering a guilty plea in light of the Goodyear Indication, at which time SW queried whether he would be able to walk free if he entered a guilty plea. The judge answered affirmatively. SW then entered a guilty plea and the judge imposed a sentence of 2 years' imprisonment, suspended for 1 year.

The DPP appealed against SW' sentence, arguing that:

(i) the judge did not have jurisdiction to impose a suspended sentence; and alternatively,

(ii) the sentence imposed was manifestly lenient.

The DPP also raised issues as to the propriety of the judge's Goodyear Indication and SW' guilty plea.

Held: allowing the appeal to the extent that the sentence which was imposed is substituted to the 7 days SW spent on remand, that:

1. In order for a plea to be validly entered, it must be unequivocal, voluntary, informed and devoid of undue pressure or inducements. In this case, it was not open to the judge to engage in negotiation with the respondent on his plea, and in effect hold out an inducement of a non-custodial sentence, after being twice told by SW that he wished to plead not guilty. SW having stated that he was not guilty, his+ plea ought to have been entered and the matter should have proceeded to trial.
R v Nightingale [2013] EWCA Crim 405 applied; R v Turner [1970] 2 QB 321 applied; R v Goodyear [2005] EWCA Crim 888 applied; R v Sidhu 2019 BCSC 129.

2. A judge should only give a Goodyear Indication where it has been sought by the defendant, or where the sentence or type of sentence would be the same whether the case proceeds on a guilty plea or , following a trial, results in a conviction. The judge therefore erred in so far as he initiated and took an active part in the Goodyear Indication without a request from SW for such an indication. In the circumstances, the judge's conduct improperly pressured SW to plead guilty. It was not enough for the judge to merely say to SW that he did not have to plead guilty.
R v Rajaeefard [1996] OJ No. 108 applied; R v Goodyear [2005] EWCA Crim 888 applied; R v Nightingale [2013] EWCA Crim 405 applied.

3. A statement that on a plea of guilty a judge would impose one sentence, but that on a conviction following a plea of not guilty a severer sentence would be imposed, is one which should never be made as it may amount to undue pressure on the accused which deprives them of complete freedom of choice. In this case the judge erred in advising SW along those lines. Accordingly, the sentence flowing from the Goodyear Indication and guilty plea, even if permissible by statute, could not, in any event, stand.

4. The Legislature of Antigua and Barbuda has not enacted any legislation providing for the imposition of suspended sentences. Accordingly, in the absence of the requisite statutory underpinning, the judge lacked jurisdiction or authority to impose SW' sentence. In any event, even if the judge had jurisdiction to impose such a sentence, exceptional circumstances must be in play to facilitate the invocation of that jurisdiction. There were no exceptional circumstances at play in this case.
Winston Joseph, Benedict Charles and Glenroy Sean Victor v The Queen Saint Lucia Criminal Appeals Nos. 4, 7 and 8 of 2000 (delivered 17th September 2001 and re-issued 31st October 2001, unreported) considered.

5. In light of the findings on the impropriety of the judge's Goodyear Indication and SW's guilty plea, the case ought properly to have gone to trial before a judge and jury to determine SW' guilt or innocence. An order to that end would have been available to the Court if there were an appeal against SW's conviction. In the absence of an appeal against conviction however, there is no question of the conviction being set aside. In the circumstances, the justice of the case is best served by setting aside the sentence imposed and substituting a sentence of seven days' imprisonment, being the time spent by SW on remand.

Commentary:

As the Court pointed out: "[4] It is important to note that the respondent did not appeal his conviction or sentence. This Court therefore has no jurisdiction to upset his conviction. The appeal against sentence is at the instance of the Director of Public Prosecutions." Consequently, despite the findings in relation to the voluntariness of the guilty plea it could not be quashed as the Court was not seized of an appeal against conviction.
As to the vexed question of whether a guilty plea that is based on improper judicial pressure renders the conviction unsafe or a nullity see the commentary in McCarthy. Access here.

If you would like to speak to Paul Taylor QC about these cases, please click here.

About Paul Taylor QC

Paul specialises in criminal appeals. He is Head of the DSC Appeals Unit and editor of Taylor on Criminal Appeals. He is regularly instructed to advise in potential appeals before the CACD, Privy Council and Caribbean appellate courts. He has extensive experience in drafting submissions to the CCRC. Earlier this year he appeared before the Privy Council in a constitutional challenge to the Antiguan and Barbudan money laundering legislation.

Paul's list of appellate cases before the Court of Appeal (Criminal Division) and the Privy Council can be found here.