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

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Criminal Appeals Bulletin

Welcome


Farrhat Arshad

Welcome to the October edition of our 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 Rebecca Trowler QC looks at the CACD's latest decision on abuse of process and disclosure.

Paul Taylor looks at the exceptional leave requirement in change of law cases and I look at an appeal against a guilty plea.

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)*.

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

Farrhat Arshad
Deputy Head of the DSC Criminal Appeals Unit

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Useful links

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Paul Taylor QC looks at the exceptional leave requirement in change of law cases.

Disclosure and Abuse of Process: R v Hewitt [2020] EWCA Crim 1247

(Historic sexual offences, delay, absence of documentation, abuse of process, adequacy of the summing up)

By: Rebecca Trowler QC

Mr Hewitt appealed against his conviction on one count of historic rape. The grounds advanced on his behalf were, firstly, that the trial judge had been wrong to reject his application to stay the indictment, concluding as he did that a fair trial remained possible notwithstanding failings in the disclosure process and the absence of relevant records and, secondly, that the trial judge's directions to the jury in the summing up in relation to the delay and missing documentation were inadequate.

The Allegations

Some 37 years prior to the appeal the now 80-year old appellant had been in charge of a children's home. In 2014 the complainant JE alleged that the appellant had raped her on a number of occasions during her time at the home where she stayed for a period of months in 1982/3. In 2019 the appellant stood trial on one count of rape, expressed to be a "specific incident reflecting the first time the defendant raped JE". The indictment also charged the appellant with a multi-incident count of rape against JE and offences against four other complainants.

Application to stay

Prior to trial the appellant argued for a stay of the indictment in light of a number of failings in disclosure process and, of central importance, the absence of the local authority files relating to the children's home and social services records. Substantial criticism was also made both of the disclosure officer, who it was said did not understand and/or neglected her duties, and of the civilian disclosure officer who was later recruited to assist her and who was untrained and allegedly incompetent. It was argued in particular that without the relevant records it was impossible to establish with any certainly when JE had stayed at the home and that the prejudice to the appellant was all the greater as the jury would hear of his convictions in 1995 for offences committed at the home in the years leading up to JE's arrival there.

The trial judge considered written and oral submissions prior to trial but did not determine the application until the close of the prosecution case, having reached the view that he would be in a better position to assess the impact of the absent evidence once the complainants had been cross examined. Counsel for the appellant concurred with his approach at the outset of the trial.

Notwithstanding that the Crown accepted there were serious shortcomings in the disclosure process, the trial judge concluded that that trial process, including his directions to the jury, could compensate for any prejudice arising from those failings.

Verdicts

In due course the jury convicted the appellant of the specific count of rape against JE but returned a not guilty verdict in relation to the multi-incident count and were unable to agree in relation to offences against the other complainants (for which he is to be retried).

Judgment of the Court of Appeal

In a lengthy and detailed judgment the Court of Appeal (Davis LJ, Spencer J, HHJ Potter) dismissed the appeal. The Court accepted that there were 'regrettable shortcomings' in the disclosure process and that this compounded the inevitable difficulties faced by the appellant in challenging the evidence so long after the alleged offences. However, having given the facts careful scrutiny the Court concluded that the judge was entitled to find that the appellant had failed to establish on the balance of probabilities that, as a result of the failings and the absence of documents, he would suffer serious prejudice such that a fair trial was not possible. The Court observed that the determination of the application to stay at the close of the prosecution case enabled the trial judge to assess the extent of any prejudice and the judge had been wise to take this course. Further, the Court was satisfied that the appellant had not been deprived of a fair trial. There had been robust cross examination of the complainants and effective deployment of material disclosed during trial. The appellant had not highlighted any particular document which late disclosure had deprived him of using in cross-examination. The Court considered at length the suggestion that there was missing contemporaneous documentation from the children's home which might fairly fall within the category identified by Treacy LJ in *R v RD* [2013] EWCA Crim 1592 namely: "…missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case…". Unlike the factual situation in *R v Burke* [2005] EWCA Crim 29, which was held on appeal to justify a stay, this was not an allegation of a single occasion of sexual abuse which occurred on a specific occasion capable of being identified by date

if contemporaneous documentation had survived. The situation in the present case was far more akin to that described by Treacy LJ in R v RD itself, where the complaints: "…were not date specific but were couched in general terms of sexual abuse occurring on very many occasions during visits during school holidays within wide periods identified in the indictment. Accordingly, an alibi in its true sense was not the issue before the jury. The issue was in reality whether or not the jury could be sure that the abuse had taken place…".

Further, the trial judge's directions in relation to delay and the absence of documentation were adequate. He had conveyed the general prejudice likely to have been suffered. The Court accepted that it would have been 'useful' if he had identified the timings of alleged rapes against JE as an illustration of prejudice arising from the absence of records, but the failure to do so did not render summing up defective. The jury were fully aware of the missing documentation and had all the available dates in agreed facts. The central question was whether she was raped and questions of timing were only one factor going to her credibility.

If you would like to speak to Rebecca Trowler QC about this article, please click here.

About Rebecca Trowler QC

Rebecca Trowler QC is joint head of the Crime Team at Doughty Street Chambers. In the latest edition of the Legal 500 she is described in the following terms: *"Deep strategic thinker, exceptionally bright, sure footed, team player, commands the courtroom and has the ear of judges and juries alike. Sees the big picture but also the individual at the centre of the case. Masters complex facts, issues and law with ease - a true pleasure to work with."*

Legally significant and high profile appeals in which she has appeared include: *Al-Khawaja and Tahery v United Kingdom* 54 E.H.R.R. 807(23), Grand Chamber of the European Court of Human Rights, compatibility of sole or decisive hearsay evidence with Article 6 of the ECHR. Conviction quashed in Court of Appeal; ***R v Chaytor and Ors*** [2011] 1 A.C. 684, Supreme Court; ambit of parliamentary privilege; R v G [2009] AC 92, House of Lords, an appeal concerned with whether the prosecution / conviction of a child for consensual but underage sexual activity is in breach Article 8; *R v Grant* [2006] QB 60, Court of Appeal: appeal against conviction for murder; abuse of process, police using covert listening devices to record solicitor/client conversations in breach of Article 6 and legal professional privilege; *R v Childs* [2014] EWCA Crim 1884, appeal against convictions for 6 murders in the 1970s, described by the Crown in open court as "one of the gravest cases in British forensic history"; false confession and alleged police malpractice; and R v Lambert [2002] 2 AC 545, House of Lords, compatibility of s.28 Misuse of Drugs Act with Article 6 (2) ECHR, retrospective effect of Human Rights Act in criminal proceedings.

To see Rebecca's full profile, click here.

Appeals against Conviction; England and Wales

Application for permission to appeal out of time; Guilty pleas; GBH with intent; Murder;

By: Farrhat Arshad

R v Tierney-Campbell
[2020] EWCA Crim 1194

T sought to appeal against his conviction in 2015, upon his own plea, of GBH with intent. He had pleaded guilty to attacking DB, a stranger, by repeatedly punching and kicking him. The attack caused DB catastrophic brain injuries, leaving DB in a vegetative state. T was sentenced to an extended sentence of 14 years' imprisonment. In February 2019, DB died as a result of his injuries. T was subsequently charged with his murder. The Court noted the application to appeal against the Guilty plea post-dated the death of DB and T's being charged with murder. The murder trial was due to be heard the week after the permission hearing.

T argued that his Guilty plea was equivocal and/ or unsafe, in that he had not admitted he had the intent to cause really serious harm and had never given instructions to that effect. He argued that as the Pre-Sentence Report set out matters at odds with a Guilty plea his representative should have withdrawn at that point. Thirdly, he argued that he had not been properly advised: He had no knowledge as to the implications of any plea if the victim were later to die. The applicant having waived privilege, his original legal advisers responded, denying T's assertions as to the advice he was given and the instructions he gave. The Court heard from T and his original solicitor-advocate at the permission hearing.

The CACD (Carr LJ, McGowan J and Martin Spencer J) rejected the application for an extension of time and for permission to appeal: The principles on which a defendant may be permitted to go behind a plea of guilty were well-established: as summarised by Lord Hughes in **R v Asiedu [2015] EWCA Crim 714** at paras 19 to 25. The trial process is not a "tactical game" (see para 32 of **Asiedu**). A defendant who has admitted facts which constitute an offence by an unambiguous and deliberately intended plea of guilty cannot ordinarily appeal against conviction, since there is nothing unsafe about a conviction based on his own voluntary confession in open court. A defendant will not normally be permitted on appeal to say that he has changed his mind and now wishes to deny what he has previously admitted in the Crown Court. The exceptions to this principle were:

(i) Pleas which are equivocal or unintended;

(ii) The plea was compelled as a matter of law by an adverse ruling by the trial judge which left no arguable defence to be put to the jury; and

(iii) Those cases where, even if on the admitted or assumed facts the defendant was guilty, there was a legal obstacle to his being tried for the offence.

Beyond those exceptions, there was the general jurisdiction under s. 2(1) of the Criminal Appeal Act 1968, that the conviction was unsafe. If a defendant who has pleaded guilty could bring himself within that section, the court would be bound to quash the conviction - **R v Boal [1992] 1 QB 591; [1992] 95 Cr App R 272**. However, the fact that the defendant had been fit to plead, known what he was doing, intended to plead guilty and had done so without equivocation and after receiving expert advice will be highly relevant to the question of whether or not the conviction is unsafe - see **R v Lee (Bruce) [1984] 1 WLR 578; [1984] 79 Cr App R 108**. (Paras 45-47 of judgment.)

Where a defendant enters a guilty plea and subsequently appeals on the basis that the plea was entered following erroneous legal advice, the facts must be so strong as to show that the plea of guilty was not a true acknowledgement of guilt; the advice must have gone to the heart of the plea - see **R v Saik [2005] 1 Archbold News 1**.

However, a conviction based on a plea of guilty may be held to be unsafe on account of erroneous legal advice, or a failure to advise as to a possible defence, notwithstanding that the advice may not have been so fundamental as to have rendered the plea a nullity. But the court will only intervene if it believes that, with the benefit of correct advice, there would probably have been an acquittal and that therefore an injustice has been done. As per **R v K [2017] EWCA Crim 486; [2017] Crim LR 716** emphasising the observations in **Boal**, that the CACD will only intervene where it believes that the defendant has been deprived of what was in all likelihood a good defence which would quite probably have succeeded and thus a clear injustice has been done. Such a scenario would not often arise. (At para of judgment 48.)

A plea would only be equivocal if its terms include

an assertion or qualification which amounted to a denial of an essential ingredient of the offence. There was nothing on the facts in the present case that came close to such an assertion or qualification. (At paras 49-50 of judgment.)

As to safety, there was a compelling, if not overwhelming, case on the question of intention, given, amongst other things, i) the nature of what was a vicious and sustained attack involving blows to DB's head as well as his upper body, ii) the fact that the applicant did not cease the assault of his own accord, and iii) the evidence as to what the applicant said in the immediate aftermath, namely that he believed that he had killed DB. The Court was sure that the applicant was in no doubt as to the scope of his plea of guilty, and that he knew that he was thereby admitting an intention to cause really serious harm to DB at the time of his attack, and that he pleaded guilty of his own free will. (At paras 55-56 of judgment.)

Whilst the Court found on the facts that the applicant was advised that his plea to the section 18 would leave him open to conviction of murder if the victim died, the Court stated that, in any event, had he not been so advised that would not have made the conviction on the section 18 offence unsafe. It would not undermine his admission of the ingredients of that offence. That issue did not go to the heart of the plea; it ran parallel to it. (At para 61.)

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

About Farrhat Arshad

Farrhat defends in serious criminal cases and is an experienced appellate barrister. Farrhat is recommended in Legal 500, 2020 as: *"the consummate appeals barrister, with an instinctive feel for the shape of an appeal. She is a leader in this field."* Her appellate practice includes both conviction and sentence appeals to the Court of Appeal, the Privy Council and applications 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.

Grounds based on clarification of the common law / change in law – application for extension of time to appeal – exceptional leave

By: Paul Taylor QC

Flint and Holmes
[2020] EWCA Crim 1266

These two cases involved the possession of explosive substances for the suggested object of experimentation `and self-education/curiosity. The applicants were convicted before the decision of the Supreme Court in *R v Copeland* [2020] UKSC 8; [2020] 2 Cr App R 4. The common issue was whether the CACD should grant the applications for exceptional leave to appeal out of time, bearing in mind the majority decision in *Copeland*.

H was convicted of five counts of having an explosive substance, contrary to section 4 Explosive Substances Act 1883 ("ESA").

H submitted that he would suffer substantial injustice if exceptional leave was not granted. The jury were directed that as a matter of law, failure to hold an appropriate licence meant that H could not have had a lawful object in his possession of the substances. It was submitted that the effect of the legal direction was to remove a crucial element of H's defence.

The Crown submitted that:

(a) H was applying for exceptional leave to appeal out of time, relying on a suggested change in the law. In R v Johnson and others [2016] EWCA Crim 1613; [2017] 1 Cr App R 12 (at [18]) it was highlighted that a change in the law does not of itself result in previously decided cases being reopened. Exceptional leave will only be granted if the applicant can establish that a substantial injustice would otherwise result.

(b) The application was, in any event, not dependent on the decision in *Copeland*. Any error by the judge in Hs's case in her direction was clear at the time the summing up was delivered. Therefore, it was entirely open to H to appeal in 2018 based on the law at the time of his conviction.

(c) On the undisputed facts H's defence was, at best, tenuous and it could not sustainably be argued that substantial injustice will be caused to H if exceptional leave is refused or that H's conviction was unsafe.

F changed his plea to guilty on two offences of having an explosive substance, contrary to section 4 ESA. In addition, F changed his plea to guilty to affray, and, at an earlier hearing, he had pleaded guilty 2 x possessing a prohibited weapon, having an offensive weapon and having an article with a blade or point.

It was submitted that:

(a) The ambit of the defence of 'lawful object' was clarified in *Copeland* in a way that was highly relevant in this case, given it is submitted experimentation and self-education can potentially constitute a lawful object.

(b) The guilty plea was entered on the basis of the decision of the Court of Appeal in *Riding* [2010] 1 Cr App R (S) 7. However, following *Copeland*, he should have been able to rely, by way of a defence to both charges, on the interest and curiosity which he expressed in his defence statement.

The Crown submitted that:

(a) Even allowing for the clarification provided by the decision in *Copeland*, it had always been open to F to rely on curiosity and self-experimentation as a defence.

(b) The real complaint by F was that he pleaded guilty on the basis of incorrect legal advice, and not because the law founding his conviction subsequently changed because it was in error.

(c) F failed to demonstrate that a substantial injustice would be done if leave is not granted.

The CACD refused the applications for exceptional leave. In so doing it stated that:

(a) The court is reminded this is a high threshold and in determining whether it has been met, the court will "primarily and ordinarily" have regard to the strength of the case advanced and whether the suggested change in the law would, in fact, have made a difference. It is argued by the Crown that on these facts it is highly unlikely that the applicant would have been acquitted.

(b) H was correct to submit that the judge should not have directed the jury that the breach of the Explosives Regulations was determinative of the issue as to whether, on a balance of probabilities, he had a lawful object. However, the Crown is equally correct when he observes that the erroneous nature of this direction was clear on the jurisprudence at the time of the trial.

(c) In consequence, the incorrect direction the judge gave before and after the jury's question was apparent at the time of the trial… As a result,

the ordinary test of whether the conviction is safe applies, and the court, if relevant, will need additionally to consider whether substantial grounds have been provided for the period of the delay. In this regard, it is important to note that the test to be applied in cases relating to a change in the law is different from that otherwise applied in the Court of Appeal (Criminal Division). As was set out by this court in Johnson: "18. In our view [...] the fact that there has been a change in the law brought about by correcting [a] wrong turning [...] is plainly, in itself, insufficient. [...] a long line of authority clearly establishes that if a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done. The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law.

(d) Accordingly, the questions for this court are whether Holmes' convictions are safe on the five counts, and (if relevant) whether there are substantial grounds to justify the notable delay (472 days).

(e) We are unhesitatingly of the view that the conviction is safe.

(f) F: we are unpersuaded ... that it would have been apparent to the applicant that curiosity and self-experimentation has always been available as a defence. We are, however, equally unpersuaded that a substantial injustice will result if exceptional leave is not granted. The circumstances in which these explosive substances were in the possession of the applicant involved a clear risk of harm, most particularly to the applicant but also to members of the public.

(g) It follows that the applicant, in the way he pursued these activities, posed an obvious risk to other people and their property and his object was, on any view, clearly mixed and therefore not wholly lawful. At the very least, he was reckless regarding the risk of damage or injury, and in consequence his activities were tainted by the unlawfulness inherent in what he did.

(h) On the undisputed facts, the applicant would have been unable properly to establish his defence. The court will not grant leave unless it is demonstrated a substantial injustice will otherwise be done. We are confident there will be no substantial injustice and that his conviction, founded on his guilty plea, is safe.

Commentary:

Grounds of appeal based on a clarification of the common law are subject to the "exceptional leave" requirement, meaning that the first hurdle for an applicant is to show that s/he would suffer a "substantial injustice" if leave were not granted. This is a judicial (as oppose to statutory) construct. It was considered in *Jogee* [2016] UKSC 8 [87] where the Supreme Court, sitting in a conjoined appeal also as the Privy Council, 'clarified' the previous understanding of the common law on secondary party liability. However, even where the previous understanding of the law was declared to have been wrong, 'The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down' previously (*Jogee* [100]).

There has been much criticism of the "exceptional leave" requirement. These include the certainty with which an applicant is required to show the detrimental impact of the change in law on his conviction is far more onerous than in other appeals. The need to show that he 'would not' have been convicted under the new law contrasts with the usual need to show that a misdirection 'might have' made a difference to the verdict (*Graham* [1997] 1 Cr App R 302, 308 per Lord Bingham CJ, a conviction is unsafe if the CACD '... is left in doubt whether the Appellant was rightly convicted of that offence or not'). As Professor Ormerod QC has pointed out: 'Indeed, if the evidence is such that D 'would not' have been convicted of murder then presumably it would be inappropriate for there to be a retrial for murder?' (CALA Conference paper, November 2017, para 2.20.)

Moreover, the higher test also brings with it a greater danger that the Court of Appeal will need to speculate improperly about the jury's reasoning and the potential impact that the 'old law' misdirection would have had (see *Pendleton* [2002] 1 Cr App R 34 [16-19]). In Holmes case the CACD stated:

> "We are unhesitatingly of the view that the conviction is safe. If the correct directions had been given to the jury on the issue of lawful object, we are confident the applicant would have been unable to make out the defence on a balance of probabilities. On the undisputed facts, the applicant would have been unable properly to establish his defence."

One can legitimately ask how confident a court can be in concluding that in the absence of an identified misdirection, and when given the appropriate guidance of a lawful direction, the jury would still not have acquitted. This is particularly so where the Court had not heard the evidence, experienced the dynamics of the trial, or been present in the jury room.

As to the relevance of "exceptional leave" to applications to the CCRC see s.16C Criminal Appeal Act 1968 and *R(Davies) v CCRC* [2018] EWHC 3080 (Admin)

This commentary was based in part on an article in Counsel magazine in September 2018: The Jogee Effect (Paul Taylor QC).

If you would like to speak to Paul Taylor QC about this case, 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 is recommended in the 2020 edition of Legal 500 as, *"a first-rate criminal appeal barrister. He is meticulous, thoughtful and provides well structured advice."*

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