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# Criminal Appeals Bulletin


## Welcome

*Paul Taylor QC*

Welcome to the November 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 I look at the recent use of pardons issued under the Royal Prerogative of Mercy.

We also look at appeals involving the admissibility of Facebook and social media; CCTV identification evidence; Victim Trafficking and the statutory defence; submission of no case to answer and autrefois convict.

Recent guidance from the Criminal Appeal Office on electronic bundles is reproduced at the end of this issue.

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

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## Contact us

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

## Useful links



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**Digital Bundles in the Court of Appeal (Criminal Division)**

*The Criminal Appeal Office released the following guidance in October*

# Narwhal tusks, enigma, striking miners and royal pardons

By Paul Taylor QC

Every so often, the ancient powers of the Crown prove highly effective in addressing modern day challenges.

In 2005 Stephen Gallant was convicted of murder and sentenced to life imprisonment with a minimum term of 17 years. In November 2019, while out on day release at a prisoner rehabilitation event, he confronted Usman Khan after he began stabbing people. Mr. Gallant was armed only with a Narwhal tusk. His actions were described as "exceptionally brave", and helped "save people's lives despite the tremendous risk to his own,"[1].

Had this occurred prior to the changes made in 2003 by the Criminal Justice Act, it would have been open to the Home Secretary to reduce the tariff on the basis of "exceptional progress"[2]. But that discretionary power has gone. So, what can be done now to recognise such actions? Step up the Royal Prerogative of Mercy, or Pardon.

According to BBC news[3], a Ministry of Justice spokesperson said "The lord chancellor has granted Steven Gallant a Royal Prerogative of Mercy reducing his minimum tariff by 10 months in recognition of his" actions. This will have the effect of Mr. Gallant being considered for parole 10 months early.[4]

What is the royal prerogative of mercy [RPM]?
It is a discretionary power exercised by the Sovereign on Ministerial advice in one of three ways:

(a) the grant of a free, unconditional pardon;
(b) the grant of a conditional pardon, whereby the penalty is removed, on the condition that a lesser sentence is served;
(c) the remission, or partial remission, of the sentence.

It has been said to be a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case.[5]

Other examples of the use of the RPM include the posthumous pardons granted to Derek Bentley (limited to his sentence of death; the conviction was later quashed on appeal), and to Alan Turing, the Enigma hero.

In recent times there have been moves to place the power to pardon on a statutory basis; see for example the Protection of Freedoms Act 2012 and the Police and Crime Act 2017. In October this year the Scottish government announced its intention to pardon hundreds of men convicted of offences during the 1984 miners' strike. Humza Yousaf, the Scottish justice secretary, said legislation due next year would provide the miners with a collective and posthumous pardon in an effort to provide closure to mining communities and the police officers involved[6].

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

[1] Quote attributed to the Ministry of Justice spokesperson in https://www.bbc.co.uk/news/uk-54588407
[2] Gill, Eccles, Abu-Neigh [2012] 1 WLR 1441
[3] https://www.bbc.co.uk/news/uk-54588407
[4] Interestingly, the matter does not appear on the Ministry of Justice website and I have been unable to find any press release. However, as stated in "The Report of the Hallett Review: An Independent Review into the On the Runs Administrative Scheme (July 2014): "There is no legal obligation to publish the exercise of the RPM. By convention, the use of the RPM to grant a free pardon… is published in the London Gazette. It is not the usual practice to publish the use of the RPM to remit sentences;" Para 2.59
[5] *R v Secretary of State for the Home Department, ex p Bentley* [1994] 2 WLR 101 at 113
[6] *The Guardian*, 28th October 2020

# 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.

# Appeals against Conviction; England and Wales

**Facebook identifications; failure to hold ID procedure; effect of breach of Code D; Admissibility of evidence;**

By Farrhat Arshad

**R v Mark Crampton**
[2020] EWCA Crim 1334

C appealed against his conviction for indecent assault. The offence had been committed on a day between 1996 and 1997 when the complainant had been left alone with a man named Mark, known to her parents and grandparents. The man indecently assaulted her. When her parents returned to the house the complainant made immediate complaint to her mother and Mark was thrown out of the house. The complainant's parents did not report the matter to the police. The complainant continued to remember the assault. In May 2014 at her grandmother's funeral, the complainant told her aunt's boyfriend that she was trying to find out who the man called Mark was. He told her that the only person he knew of that name and description was Mark Crampton who was involved with a woman called K. The complainant then recalled his name having been mentioned previously. She subsequently conducted a search of their names on Facebook where she found the Appellant, saw a photograph of him, and immediately recognised him as the offender. The complainant recollected in her ABE evidence that the man who had abused her had blonde curly hair and this was not something that was evident from the Facebook image of the Appellant taken some 25 year later. In cross examination the appellant accepted that at the time he did have blonde curly hair.

The complainant's mother was present during the conversation at the funeral. Her evidence was that she had always known that the man's name was Mark Crampton. Her daughter subsequently showed her a screenshot of the image of the Appellant that she had found on Facebook and the mother immediately recognised him as Mark Crampton. The complainant's father made a witness statement. He knew the man as Mark and said that he would not recognise him again. He did however recall that the man was living at the time in a street which he identified and named. The complainant's grandfather, M, said in his statement that he knew the man was called Mark Crampton. However, it became apparent that this name had been communicated to him by a friend in a hospital 6 days before he made his statement in October 2018, when the investigation was already under way. He subsequently attended a VIPER procedure where he identified the Appellant as the man who had been thrown out of the house. A third person, who was a close friend of the family, D, was present when the man was ejected from the house. As far as he could recall, he was not told why the man was being thrown out. He only knew him as Mark.

Whilst a VIPER had been arranged for the grandfather to view, neither the complainant nor her mother were asked to view a VIPER. The officer in the case was asked about the VIPER procedure and his evidence was that it had not been considered necessary for the complainant or her mother because they had already produced a photograph of the Appellant.

The Appellant's case at trial was that he had never met the family or been to their house. He denied that he lived in the street mentioned by the father, but he did accept that although it was not his home address, he did stay there from time to time. His case was that this was a case of mistaken identity. He requested an ID procedure.

At trial, the Defence applied to exclude the evidence of the Facebook identifications submitting that there had been a breach of Code D of PACE because of the failure to hold an ID procedure for the mother and the complainant. It was argued that, as a result, the Facebook identification should be deemed inadmissible or be excluded under section 78 PACE. The judge concluded that a VIPER procedure should have been carried out with both the complainant and her mother; the failure to do so was a breach of Code D. He found that the breach was compounded by the fact that the identification of Mark Crampton was hearsay. However, the judge was also satisfied that the Facebook identification was admissible notwithstanding the failure to conduct an ID procedure. The issue was one of the weight of the evidence, in the context of the other identification evidence. The judge held that, properly and carefully directed, the jury was in a position to form a fair and considered view about this evidence. C was convicted.

C appealed. He argued that the judge erred in concluding that the Facebook identification evidence was admissible and was not to be excluded under Section 78 PACE. The starting point of the argument was the judge's finding of a breach of Code D. Allowing evidence premised upon that breach to go to the jury served only to bolster a

weak case. It was further argued that there were so many troubling aspects about the evidence taken as a whole that there was lurking doubt as to the safety of the conviction and it should be set aside.

The CACD (Green LJ, Spencer J, HHJ Menary QC) dismissed the appeal. It was not in dispute in the appeal that there was a breach of the Code but this did not, without more, suffice to exclude the Facebook identifications. Whether to exclude the Facebook identification evidence and its consequences for the trial was a matter of judgement for the Judge under Section 78 PACE. The question on the appeal was therefore whether the judge erred in the exercise of that judgement. The appeal court would be slow to disturb such an exercise: see e.g. **LT [2019] EWCA Crim 58**, which concerned a Facebook identification that the Court held had been wrongly excluded. At para 36, the Court in **LT** stated:

> *"Whether the court hearing an application under s.78 is exercising a discretion or a judgement, is a matter of debate. However, it is not a matter that needs to be resolved in this case. If it is a discretion it is a broad discretion, and if it is a judgement it is the judgement which the Court of Appeal recognises is primarily a matter for the judge in the Crown Court. In either case, this Court is reluctant to interfere with such decisions in relation to these matters."*

In the present case, the judge set out at considerable length the evidence of the relevant Prosecution witnesses and the circumstances surrounding the identification evidence of each. He identified the risks with a Facebook identification (the absence of controlled conditions) but noted that Facebook identifications would become increasingly common and the courts would have to wrestle with such identifications for some time to come. The judge firmly rejected the proposition that Facebook identifications of this sort should always be excluded. He said:

> *"What is important, it seems to me, these Facebook identifications took place before the police were even involved. Is it the case, I question rhetorically, wherever that has taken place that essentially the previous identifications on social media by the witnesses should always be excluded. In my judgment, that could not possibly be right and the mere fact there has not been a correcting identification procedure afterwards does not in any way undermine those original Facebook identifications."*

In the CACD's judgment the judge did not err, and the conviction was safe. This was not a case where it was said that the judge misdirected himself by, for instance, ignoring relevant evidence or taking into account irrelevant evidence. It was clear from the ruling that the judge engaged in a detailed and careful review of the relevant evidence and assessed both its pros and its cons. It was not said that the judge's account of the evidence was inaccurate or unfair in any way. Having ruled as he did to admit the Facebook identification, he gave the jury a full account of the relevance of the evidence and its probative value.

The CACD emphasised that it was not in a position to substitute its view of the evidence for the judge's considered conclusion as to the probative weight of the Facebook identifications standing alone and/or in the context of the evidence as a whole. The judge had a balancing exercise to conduct, which he performed with some care. The Facebook identifications aside there were a variety of additional pieces of inculpatory identification evidence which the judge considered to be of material weight. It was not the view of the judge that the Facebook evidence therefore bolstered a weak case unfairly. The judge was in this regard the arbiter of the strengths of the overall evidence and the Court could see no reason to disturb his considered conclusions on this.

The Court referred to the observations of the CACD in **R v Pope [2012] EWCA Crim 2241** at paragraph [14]:

> *"As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this Court, but with the jury. If therefore there is a case to answer and, after proper directions, the jury has convicted, it is not open to the Court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the Court is confined to a re-examination of the material before the jury."*

**Commentary**

For other cases concerning the admissibility of Facebook/social media identifications see: **R v Phillips (Conner) [2020] EWCA Crim 126; Crim LR 940; R v Alexander and McGill [2013] 1 Cr App R 26 and R v McCullough (Owen) [2011] EWCA Crim 1413**. For an earlier case considering the principles that apply both during trial and on appeal when an informal identification precedes a formal procedure, see **R v I [2007]EWCA Crim 923**. Whilst the CACD in Crampton emphasises once again its reluctance to interfere with the judge's exercise of discretion (or judgement) in section 78 applications, it is of interest that the only recent case where the CACD

has interfered with the judge's discretion is one where the trial judge excluded the informal ID – **R v LT** , referred to above.

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.

## Evidence – identification – CCTV – failure to exclude – PACE Code D

By Amos Waldman

**Yarare, Hassan and Osman**
[2020] EWCA Crim 1314

The appellants were convicted of their roles in 3 violent disorders, which took place in Leicester on 30 April 2015. The third involved an attempted murder.

The appeals centred around the trial judge's refusal to exclude the CCTV identification/recognition evidence of DC Bee, pursuant to S78 PACE 1984.

Yarare and Osman additionally argued that he failed to properly direct the jury as to breaches of PACE Code D and failed to correct DC Bee's assertions regarding procedural obligations.

The appellants relied on **R v Smith [2008] EWCA Crim 1342** (importance of being able to test the purported recognition of police officers by reference to an initial observation and contemporaneous note). Code D was subsequently amended. Code D:3.34, 3.35, 3.36 and 3.37 stipulated what must be recorded and by whom.

In a May 2017 statement, DC Bee indicated that she would provide a statement regarding how she had identified the defendants in due course. She had met the defendants in person. She had viewed the footage on numerous occasions.

In an August 2017 statement, she confirmed she had viewed the footage hundreds of times and was able to recognise people by their actions, movements and features. She had also considered social media. In February 2018, a statement was served exhibiting extracts from 21 workbooks and 3 interviewing books.

3 days into the trial, a statement was served setting out further bases for her identifications. At trial, DC Bee suggested that she had viewed the footage thousands of times.

The trial judge refused the S78 applications. He rejected claims regarding the absence of a contemporaneous note. The defence had sought "counsel of perfection". There was ample material so that reliability could be dealt with in the trial. It would have been impracticable for the officer to have made notes of every thought.

The Court of Appeal dismissed the appeals holding that: The germane provisions of Code D should have been followed, particularly in relation to the making of a contemporaneous record; Whether a failure to follow Code D renders the verdict unsafe depends on any consequential unfairness; In reviewing a number of authorities it distinguished cases where no contemporaneous record was kept and the recognition was poor; from those in which a detailed explanation was given of the basis for the recognition, particularly when the jury is able to view the material; This case fell into the latter category.

DC Bee had viewed the footage over hundreds or thousands of hours. The footage had all been served. The defence were able to call visual imagery evidence. It would not have been practical to make notes of all her thoughts. She should however have recorded 'red-letter' moments.

As far as the summing-up was concerned, whilst expressing some concern that the trial judge failed to direct the jury of the legal requirement for DC Bee to maintain records, he reminded them of the main criticisms of her evidence. There was other evidence against each appellant.

Other grounds were also dismissed.

**Commentary:**

It is arguable that this case does somewhat dilute the principles which arose from Smith. The importance of a contemporaneous/initial record was such that it led, in part, to a revision of PACE Code D (and ACPO guidance).

It would not have been impracticable for the officer to have made a record of the 'red-letter' moments, at the very least. Had the jury been advised (ground 2) that the officer had breached her legal obligations, it may well have impacted upon their view of her reliability.

It is of concern that DC Bee, in evidence, denied that she had any procedural obligations when it is clear she ought to have had regard to PACE Code D.

That being said, there was other evidence, including digital imagery evidence and call data. The footage was clear, the jury were able to evaluate it at length. Had DC Bee's evidence been the only evidence, the court may have reached a different conclusion.

There is also a difference between a situation in which an officer is asked to view CCTV specifically to make an identification and this case, where the officer gave recognition evidence having acquired knowledge during the course of a substantial number of viewings.

If you would like to speak to Amos Waldman about this case, please click here.

# About Amos Waldman

Amos Waldman is a criminal specialist. He is regularly instructed in complex trial matters and appeals against both conviction and sentence.

To see Amos's full profile, click here.

## Victim of trafficking – fresh evidence

By Jonathan Lennon

**R v A**
[2020] EWCA Crim 1408

A was a young immigrant. He had spent time in foster care but had been involved in gangs and convicted of criminal offences. In August 2016, he entered an unequivocal plea of guilty to a single count of aggravated burglary. He was sentenced at the Woolwich Crown Court to 4 years detention in a Young Offenders Institution. No consideration had been given to the possibility that A had committed the offences as a result of exploitation as a victim of trafficking. He appealed against his sentence on that basis, and his sentence was reduced to 2 years.

A now appealed for leave to appeal against his conviction under s23 of the Criminal Appeals Act 1968; i.e. fresh evidence. The fresh evidence included that on 13/8/18 the Competent Authority made a decision that there existed, on the balance of probabilities, "conclusive grounds" that A was the victim of trafficking.

Section 45 of the *Modern Slavery Act 2015* (the Act) provides a statutory defence for some victims of trafficking to some offences. However, aggravated burglary is one of a number of offences in Schedule 4 of the Act for which the s45 defence is not available. It was argued that had the relevant CPS guidance been applied properly, then it would have been the case that it was not in the public interest to prosecute A. Further, that as Schedule 4 was not applicable and the s45 defence did not apply, then the court should retain the power both to prevent a prosecution from proceedings as an abuse of process and to quash a decision where the prosecution has failed to apply it to the test within the CPS guidance.

The Act was implemented in order for the UK to comply with its obligations under international law, namely the *Council of Europe Convention on Action against Trafficking in Human Beings 2005* and the *EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims 2011/36/EU*. Prior to the enactment, there was a *lacuna* in domestic law in relation to these international obligations. Consequently, a special abuse of process jurisdiction developed to protect victims of trafficking who commit criminal offences: in *R v LM* [2011] 1 Cr App R 12, a stay of proceedings on the grounds of abuse was available in certain limited circumstances. It was submitted that this should be retained in cases such as A's where s45 and Schedule 4 had no application.

Application refused. It was held that the Act had changed the legal landscape in this area (paragraphs 61-62). An absolute defence was not required under the UK's international obligations and was not adopted. The court considered at [64] that it would be 'rare' that a case would arise for which, neither duress nor the s45 defence would be available and yet, where it would not be in the public interest to prosecute on the basis of a victim of trafficking's status. In A's case, considering the Defendant's high degree of culpability on the facts, a very high level of compulsion would have been necessary, and the factual circumstances of the case were not such that this threshold had been reached.

If you would like to speak to Jonathan Lennon about this case, please click here.

# About Jonathan Lennon

Jonathan Lennon (1997 call) is an experienced criminal barrister specialising principally in white-collar crime, asset recovery and Pt 5 civil POCA claims. He was junior counsel in the seminal case on PII, R v H & C [2004], and the first High Court civil recovery case to reach the Supreme Court; SOCA v Gale [2011] and appeared for the successful applicant in the leading cash-forfeiture case of; Angus v UKBA [2011]. Jonathan's white collar crime practice includes defending in significant and substantial tax, investment and pension fraud allegations as well as advising individuals and corporations in Account Freezing Order, cash forfeiture and Part 5 POCA High Court civil recovery claims.

To see Jonathan's full profile, click here.

## Submission of no case to answer – circumstantial evidence – reasonable inference of guilt – exclusion of possibilities consistent with innocence – safety of conviction

By Rabah Kherbane

**Bassett (Jordan)**
[2020] EWCA Crim 1376

*In this judgment, the CACD confirmed and applied the test to be considered on a submission of no case to answer based on circumstantial evidence. A case should not be left to a jury on the basis of circumstantial evidence, unless there is evidence which could eliminate every realistic co-existing inference consistent with the defendant's innocence.*

JB was acquitted of murder after shooting and killing his close friend, AP (Count 2). JB was however convicted of possession of a firearm with intent to endanger life (Count 1). JB had already entered Guilty pleas to manslaughter by gross negligence (Count 3), and possession of a prohibited firearm (Count 4).

JB was sentenced on Count 1 to an extended term of imprisonment of 23 years, made up of a custodial term of 18 years and an extended licence of five years.

JB appealed against his conviction on Count 1, and his sentence.

Facts
JB and AP were involved in the supply of drugs, and had visited the flat of WA, later a prosecution witness. JB's account was that AP produced a firearm for the first time whilst in WA's flat, and whilst JB examined it, this accidentally misfired and wounded AP. JB panicked, collected the firearm and shot, and fled.

WA noted that he found JB panicking and holding AP. AP was wounded to the neck. WA noticed for the first time a slim black handgun on the seat between the two men. JB was desperately trying to treat AP's wound, and demanded an ambulance was called. JB threatened that he would kill WA if the police were called. JB ran around, panicked, looking for the key to his motorbike, and searched the floor for the discharged 'shot'. WA rang the police as soon as JB left. JB surrendered himself to the police three days later, and informed them of the location of the firearm. He provided a full comment interview.

At trial, JB's plea to Count 4 represented his conduct in taking and disposing of the firearm after the shooting. Count 1 represented JB's possession of the loaded firearm prior to the shooting, alone or jointly with AP, during their drugs supply operation.

JB submitted there was no case to answer on Count 1 as (i) there was no evidence he had possession or knowledge of the firearm before the shooting; and (ii) his conduct after the shooting was equally consistent with panic, having shot his friend. The Crown argued that JB's conduct after the shooting (search and disposal of the shot, threatening WA) was evidence from which prior possession could be inferred. The trial judge refused JB's application, on the basis that the jury could infer he had been in possession of the firearm before the shooting on the basis of his actions afterwards.

Appeal
On appeal, JB argued that it was unsafe for this count to have been left to the jury because 'the evidence was equally consistent with other possible explanations, none of which a reasonable jury properly directed could convict upon.'

Drawing on previous authorities, the CACD confirmed that:

> (i) A criminal case often depends on a jury, safely, being able to draw logical inferences from a series of established facts;
> (ii) The ultimate question for a judge is 'could a reasonable jury, properly directed, conclude that it is sure the defendant is guilty';
> (iii) In order to draw such an inference, the jury must be able to 'exclude all realistic possibilities consistent with the defendant's innocence';
> (iv) On a submission of no case to answer where circumstantial evidence is in issue, a judge therefore needs to decide whether the jury could exclude all realistic possibilities consistent with the defendant's innocence.

On the facts of the case, the CACD decided that the possibility of panic, rather than prior possession, as an explanation for JB's actions after the shooting could not be eliminated. The CACD held that as long as this possibility could not properly be excluded on the available evidence, a jury could not have safely concluded that the only inference to be drawn from JB's conduct was his guilt on Count 1. The Count should not have been left to the jury, and the appeal against conviction would be allowed.

Finally, in reformulating sentence as a result, the CACD found (i) the finding of dangerousness no longer applied; (ii) a sentence of 15 years' imprisonment before credit for guilty plea was appropriate for this Category A offence of gross negligence manslaughter; and (iii) a previous suspended sentence of 13 months' imprisonment would be activated, as 'no action' was not available for a breach as such. Count 4 remained unaffected and would run concurrently, making a total of 11

years and one months' imprisonment.

**Commentary:**
The CACD neatly drew together a number of previous authorities (*R v Masih* [2015] EWCA Crim 477; *Teper v R* [1952] AC 480; and *DPP v Kilbourne* [1973] AC 729) on the proper approach to a submission of no case to answer where the prosecution relies on circumstantial evidence to invite an inference of guilt. The CACD set out the relevant principles, before unhesitatingly applying them in a transparent, comprehensible manner to a serious case.

One comment is apt: from the language reinforced in this judgment, the capacity to 'exclude' a realistic co-existing possibility is a high hurdle, which a trial judge must be satisfied of before permitting a case to proceed. This would necessitate that a trial judge proactively identifies (i) any co-existing inference(s); and then (ii) whether there is available evidence adduced by the Crown which could eliminate this inference.

When one is considering the sanction and potential loss of liberty associated with a finding of guilt, it is unsurprising that the CACD has insisted on this robust standard for the many cases reliant on circumstantial evidence. A 'safe' conviction is not possible where some important aspect of the evidence is missing. A conviction can only be safe where a jury is able – on the evidence – to eliminate all realistic possibilities consistent with innocence. This is an essential feature of the burden and standard of proof.

If you would like to speak to Rabah Kherbane about this case, please click here.

# About Rabah Kherbane

Rabah specialises in crime and appeals. He has appeared in serious trials, involving complex issues under the Investigatory Powers Act, Modern Slavery Act, and arguments under the Human Rights Act. He recently appeared before the Court of Appeal in *Omar* [2020] EWCA 684, a successful appeal against a sentence of seven years' imprisonment, confirming the approach to 'offer to supply' offences. He is shortly due to appear before the CACD on an appeal against conviction on the basis of improper judicial comment during trial. Rabah advises on fresh appeals against conviction and sentence.

To see Rabah's full profile, click here.

## Autrefois convict

By David Rhodes

**Joseph Wangige**
[2020] EWCA Crim 1319

*In Wangige the Court of Appeal strengthened the principles and the protection of a plea of autrefois convict, rejecting a narrow interpretation. The case provides a salutary lesson for prosecutors to ensure they 'get it right first time', since Courts are unlikely to allow more serious charges to be brought at a later stage, based on fresh expert opinion.*

*The Facts*
The case arose out of a fatal road traffic collision. Late at night, as he tried to cross a junction, V was struck by D's car. D failed to stop at the scene. The vehicle had been in a dangerous condition. An eyewitness estimated that D was travelling at least 50mph in a 30mph zone. However, an expert police collision investigator examined CCTV footage and concluded the speed was around 30mph. He did not attribute the collision to the dangerous condition of the vehicle.

After a full and thorough investigation and careful consideration of the appropriate charges, D was charged with four summary only offences, including using a vehicle in a dangerous condition and failing to stop after an accident. D pleaded guilty and was sentenced.

The coroner prompted the police to undertake a further review of the CCTV and a subsequent report by an independent expert concluded D's vehicle was travelling around 46mph. As a result, and also relying on the pre-existing defects of the car, the CPS charged D with causing death by dangerous driving.

In the Crown Court, the judge rejected an application to stay, based on a plea of *autrefois convict*. She took a narrow view of the evidence, holding that the new prosecution case was not based on 'the same or substantially same facts', since the indictable offence was based on the collision itself, whereas the summary conviction was based on D's subsequent driving. Alternatively, she held that the errors in the initial investigation, the fresh expert report and the greater gravity of the new charge, all amounted to 'special circumstances' such as to justify a continued prosecution. D then pleaded guilty.

*The Principles*
In *Connelly v DPP* [1964] AC 1254, the House of Lords held (1) that no person should be punished twice for an offence arising of the same, or substantially the same facts; and (2) there should be no sequential trials on an ascending scale of gravity. There was a public interest in finality in litigation, 'so the general rule must be that a prosecutor should combine in one indictment all the charges he intends to prefer.'

In *Beedie* [1998] QB 356 a landlord pleaded guilty to regulatory offences after his tenant died from a defective gas fire and blocked flue. A subsequent prosecution for manslaughter offended against both the *Connelly* principles.

In *Phipps* [2005] EWCA Crim 33, an initial prosecution for drink driving precluded a subsequent prosecution for dangerous driving: "The Prosecution must decide at the outset what charges it wished to bring arising out of the same incident".

The CACD came to the 'clear conclusion' that it was unfair and oppressive for Wangige to face a second prosecution. They rejected the judge's narrow focus upon the different ingredients of the subsequent offence, preferring a "more holistic approach" by reference to all the circumstances. The Crown's case now relied upon the dangerous condition of the vehicle (which was the subject of summary convictions) as a causative factor in the fatal collision. The reality was that both prosecutions arose from "the same incident." The CACD also rejected the notion that a wide disparity in the gravity between the two sets of proceedings could amount to 'special circumstances.' That was the whole point of the protection of *autrefois convict*: see *Connelly* and *Beedie*.

The key point was that the new expert report did not amount to 'fresh evidence'. The facts had not changed. What had changed was the expert evaluation of those facts. Without wishing to say that a fresh expert report designed to correct errors or oversight in the initial investigation could never constitute 'special circumstances, the CACD said that such a scenario would call for very close scrutiny indeed.

**Commentary**
This case provides a clear lesson for police and prosecutors to ensure that they get the investigation and charges 'right first time.' Just as the CACD is wary of "expert shopping" in 'fresh evidence' appeals against conviction, so too must Courts closely scrutinise second prosecutions, claiming a change of circumstances based on fresh expert reports. "Were it otherwise, the prosecution might actually be advantaged, in making a further charging decision, following a previous conviction, by its own wholesale failures and neglect in investigation at the first stage."

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

# About David Rhodes

David Rhodes is an experienced appellate advocate and a contributor to the leading textbook, Taylor on Criminal Appeals (OUP 2012). David has a reputation for meticulous preparation and polished courtroom advocacy. As a trial advocate, he is praised equally for his skill in cross-examination and closing speeches as he is for his persuasive written advocacy. Recent instructions range from heavyweight allegations of homicide, serious violence and organised crime, to cases of rape and 'historical' sexual offences requiring a sensitive approach, to esoteric and intellectually challenging fraud work.

To see David's full profile, click here.

# Digital Bundles in the Court of Appeal (Criminal Division)

Since March 2020 the Criminal Appeal Office has been providing the judiciary with digital bundles by making use of the Crown Court Digital Case System (DCS).

Many regular CACD advocates will have some experience of these digital bundles. The CAO continues to provide an index to the judges' bundles in Word format. In a digital bundle, each item on the index is in fact then a hyperlink to the relevant document on DCS. Opening the hyperlink will take the user directly to the DCS platform and the document will appear.

To achieve this the CAO creates two additional sections on the existing DCS record. CACD1 and CACD2. CACD1 is for sharing documents with the parties and the judiciary and CACD2 is for sharing material with judges only. The CAO will upload material into these two sections and create hyperlinks to the material. Additionally the CAO will upload transcripts into the existing Section Y.

Further hyperlinks will be created to material already on DCS – such as opening notes, PSRs, antecedents.

The combination of material from the new sections and the existing sections, provides for all material to be referred to in digital format.

In multi-handed cases CACD1 is configured so that defence advocates only have access to documents relevant to their client. There are also some "old style" multi handed cases in which each defendant has their own record and a consolidated record exists for shared material. The CAO will create a CACD1 for each defendant, who appeals, again to ensure that there is no inadvertent wrong access.

Advocates will be able to access all of this material via their existing DCS access. Fresh representatives will be invited into cases as necessary by the CAO.

Not only does this reduce reliance on hard copy bundles, it also provides for more convenient access to appeal documents. To facilitate the use of digital bundles during a hearing, there is WiFi in all of the CACD courtrooms at the Royal Courts of Justice. This is the Professional Court User (PCU) WiFi.

**Advocates are not permitted to upload any further material to DCS after the conclusion of the trial.** **At the appeal stage only the CAO is permitted to upload**. The existing DCS folders make up the formal Crown Court record and should not be varied in any way. Additionally, **DCS is not a method of service that is recognised by the CAO**. Advocates should continue to serve documents directly to the CAO. Amendments are being proposed to the Criminal Procedure Rules and Criminal Practice Direction which will require that parties should lodge material electronically wherever possible by hyperlinking, within the grounds of appeal, to any relevant material that is on DCS. It is hoped that this will reduce the need to provide appendices such as Opening Notes, Defence Statements etc, which already exist online.

Hyperlinks can be generated when reviewing the evidence. DCS guidance explains how to create the link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729013/QRG16_Additional_review_tools.pdf

**New appeals must not however be uploaded to DCS by the parties** – there is separate guidance available on the Criminal Procedure Rules as to how to lodge an appeal (http://www.justice.gov.uk/courts/procedure-rules/criminal).

Not all Crown Court cases are on DCS. In these cases the CAO will make use of internal IT systems to share documents electronically with the judiciary, or provide paper bundles in exceptional circumstances. In those circumstances advocates will still be provided with an index and can request copies of any material from the Criminal Appeal Office.

There is also a forthcoming change to the way that authorities are lodged and amended rules will state that in all cases authorities must be lodged electronically. Where a party proposes to rely on more than 2 authorities then these must be lodged as a composite pdf bundle with bookmarks created for each case cited.

The Registrar and the Vice-President of the Court of Appeal (Criminal Division) wish to continue developing the use of digital bundles and would appreciate any comments or feedback on the provision of material in this way. Please direct any feedback/comments to Chris Williams (Senior Legal Manager) Christopher.williams@hmcts.x.gsi.gov.uk.