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Issue 49 | December 2020

Criminal Appeals Bulletin

Welcome


Paul Taylor QC

Welcome to the December 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, and the Caribbean (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 Hayley Douglas looks at the impact of Covid on sentencing appeals and seeking leave out of time.

Also in this issue – Daniella Waddoup analyses a recent Privy Council decision which considered the fairness of criminal trials conducted remotely, and Joel Bennathan QC delights in a Court of Appeal judgment on financial crime that "addresses and resolves numerous legal principles in clear and direct terms"!

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.

Best wishes for 2021.

Paul Taylor QC
Head of the DSC Criminal Appeals Unit

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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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Covid-19 and sentencing: the limits of *Manning*

By Hayley Douglas

This article considers the post-Manning authorities of R v Smith [2020] EWCA Crim 1014, R v Randhawa [2020] EWCA Crim 1071 and R v Whittington [2020] EWCA Crim 1560. R v Whittington provides guidance both in relation to the application of Manning to those serving long sentences, and to those sentenced prior to the onset of the pandemic.

R v Manning established that the Covid-19 pandemic could be taken into account by sentencing judges in deciding on the length of sentence, or whether to suspend a sentence, because of the general sentencing principle that the particular impact of a prison sentence on a prisoner must always be taken into account when a sentence is being determined. The judgment has no doubt featured regularly in mitigation up and down the country, and some Crown Courts are reported to have applied a so-called "Covid-discount" to even lengthy custodial sentences.

But what is the position for those seeking leave to appeal against sentences passed before the first national lockdown in March 2020 and the consequent impact upon conditions in prisons? Three recent authorities have considered the extent to which *Manning* has application in such appeals.

On 14 July 2020, the Court of Appeal considered the appeal of Peter Smith (*R v Smith* [2020] EWCA Crim 1014). Mr Smith was convicted of attempting to communicate with a child and sentenced to 9 months' immediate custody on 23 March 2020. The Court quashed the sentence and substituted it for a 9-month suspended sentence. In doing so, the Court applied the so-called 'Covid-discount' notwithstanding the fact that Mr Smith had been sentenced prior to the onset of the Covid-19 pandemic and the judgment in *Manning*. The Court stated at [16]: "*We are entirely confident that had Manning been available to the experienced Deputy Judge Advocate, his decision would have been as ours now is. Having considered all the facts and the available sentencing options, a term of imprisonment, otherwise inevitable, would have been suspended*".

However, just over a week later on 23 July 2020, a differently constituted Court held in *R v Randhawa* [2020] EWCA Crim 1071 at [15] that the decision in *Manning* had no application to appellants who had been sentenced "*prior to the Covid-19 lockdown*". Mrs Randhawa was sentenced on 28 February 2020 to concurrent sentences of 28 months' imprisonment in respect of 16 counts of fraud by false representation. The Court did reduce the sentence to 24 months and ordered that it be suspended, but on grounds that the value of the fraud and other mitigating factors had not been properly taken into account.

The differing approaches were reconciled to some extent in *R v Whittington* [2020] EWCA Crim 1560 (23 November 2020) in which the Court considered a series of authorities post-*Manning*.

On 12 September 2018, Tyler Whittington received a total sentence of eight years' imprisonment following his convictions on three counts of possession of a controlled drug with intent to supply. The judge assessed the offences as being very serious because of the quantity of the drugs involved and the applicant's significant role. Mr Whittington originally sought leave to appeal, 180 days out of time, on the grounds that he should not have been placed in a significant role and therefore the sentence was manifestly excessive. Leave was refused by the single judge, and it was only when a renewed application for leave to appeal was made in September 2020, some 14 months out of time, that it was argued Mr Whittington's sentence should be reduced as a result of the impact of the Covid-19 pandemic.

The Court appeared to disagree with the "*absolute approach*" taken in Randhawa that the *Manning* principle does not apply at all to a sentence passed before the pandemic but held (at [30]) that it will be rarely – if ever – appropriate to reduce a long sentence passed "*many months before the pandemic started*".

It was notable in Whittington that the appellant required a significant extension of time to make his application: it was only because he was so far out of time that he was able to raise Covid-19 at all. Had he made his original application in time, and applied to renew against the refusal of leave in time, then his case would have been determined in 2019, long before the pandemic began.

As for the availability of the *Manning* principle to long-term prisoners, the Court concluded at [30]:

> "*The more serious the offence, and the longer the sentence, the less the pandemic can weigh in the balance in favour of a reduction unless there is clear, cogent and persuasive evidence of a disproportionately*

harsh impact on the prisoner. Over the course of a long sentence the period of time during which the prisoner is subject to lock down because of the pandemic might be quite short in relative terms. It is for prison governors to do what they can to alleviate the worst adverse effects."

The Court discouraged long-term prisoners from applying for leave to appeal where they had no viable ground of appeal other than the pandemic, warning that they are likely to be given *"short-shrift"*. The clear message from *Whittington* is that for appellants sentenced pre-lockdown or sentenced to a lengthy term of imprisonment, particularly cogent, individual evidence will be required to demonstrate that the custodial sentence will have a disproportionately harsh impact on them. In Mr Whittington's case, no such evidence had been advanced and the Court declined to interfere with what was an appropriate sentence.

If you would like to speak to Hayley Douglas about this article, please click here.

About Hayley Douglas

Hayley is frequently instructed to advise on prospects of appeal against conviction and sentence. She is experienced in drafting grounds of appeal to the Court of Appeal Criminal Division. She also has experience of drafting submissions to the Criminal Cases Review Crime Commission and working with the families of convicted individuals.

To see Hayley's full profile, click here.

Financial Crime Appeals

Forte and Vale [2020] EWCA Crim 1455: Where crime and civil law meet

By Joel Bennathan QC

For readers familiar with this area of law this is an early Christmas cracker. It has it all: a defendant said to have gained £2 million who quantifies his available assets at £37, several clear and new rulings of law, and Edis J casually using *"exiguous"* to describe the trial judge's ruling [which had this reviewer, at least, scrambling for a dictionary].

The defendant was convicted of fraud with a benefit to him of at least £680 000. The main available assets, as far as the police and prosecution could tell, were worth £612 000 and were the marital home held in the name of his ex-wife and a bank account held in the name of his ex-mother-in-law, with his ex-wife as signatory. The trial Judge held a hearing under section 10A of the Proceeds of Crime Act 2002 ["POCA"], the provision that allows a determination of the share held in property that will bind at the enforcement stage, provided that those who may have an interest ["the interested party"] have the chance to participate in the Crown Court hearing. Neither the defendant nor his ex-wife testified at the confiscation hearing though both were represented. The Judge, in an exiguous [short] ruling, found the defendant had a half share of the house and owned all the bank account. Both the defendant and his ex-wife appealed, with the latter seeking to adduce fresh evidence and allege incompetence on the part of her Counsel at the Crown Court.

The Court of Appeal made numerous significant rulings and observations:

1. Given the reverse burden on the defendant and his failure to give evidence, the confiscation order need not have been confined to the contested assets but could have been [at least] for the larger £680 000 amount. The implication here was that judges and prosecutors should not confuse the section 10A procedure with the basics of the POCA confiscation scheme [5].

2. The Supreme Court's decision in *R v Hilton* [2020] 1 W.L.R. 2945 should not be read as limiting section 10A Crown Court hearings to simple cases [11].

3. The Court noted the different routes to appeal for a defendant [section 9 of the Criminal Appeal Act 1968, as defined by section 50 of the same Act] and the interested party [section 37 of POCA], and the different tests; *"manifestly excessive or wrong in principle"* for the defendant and *"serious risk of injustice"* for the interested party [9 and 10].

4. There is no section 35 Criminal Justice and Public Order Act 1984 adverse inference from silence in confiscation proceedings, but the outcome will often be determined by the POCA reverse burden of proof for the defendant [The judgment refers to this as the "Criminal Procedure and Public Order Act 1994", even Homer nods] [16].

5. The interested party is not a criminal litigant and therefore a trial Judge should apply some aspects of the civil law; the prosecution carry the burden of proof to the civil standard, a failure by the interested party to testify has the significance in common law described in *Prest v Petrodel* [2013] A.C. 415, and while the statutory provisions regarding adducing fresh evidence in the Court of Appeal are in identical terms, they will not necessarily lead to the same result given the civil law has a different approach [*Ladd v Marshall* [1954] 1 W.L.R. 1489] and because under civil law an incompetent defence lawyer can be sued [13 to 16].

For a jaded reviewer of appellate judgments, this case is a breath of fresh air. In an age when the Court of Appeal tends to retreat into factual complexities, this judgment addresses and resolves numerous legal principles in clear and direct terms. Overall, this judgment, while far from exiguous, is well worth a read.

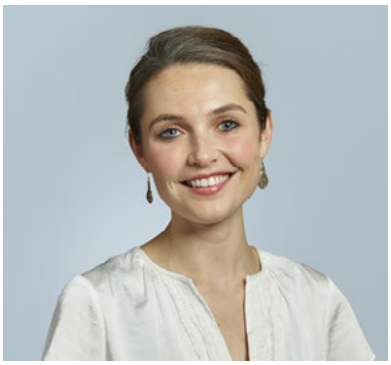
If you would like to speak to Joel Bennathan QC about this case, please click here.

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.

Caribbean Case Summary



Trial by screen is not inherently unfair

By Daniella Waddoup

Attorney General of the Turks and Caicos Islands v Misick and others
[2020] UKPC 30

Amongst the myriad challenges presented by the Covid-19 pandemic has been the need to ensure that the criminal justice system continues to function in a safe but fair way. Modern technology has played an invaluable role in preventing the wheels of justice from grinding to a halt. But where to draw the line? Does a criminal trial conducted remotely – where a judge in a judge-only trial hears and determines the evidence through the medium of a screen – offend basic principles of fairness? Does an accused have a fundamental right to see the evidence unfold whilst he or she is in the physical presence of the tribunal of fact? Does it matter if the judge "beams" or "zooms" in from a different jurisdiction? And what if the trial in question was part-heard when it was adjourned as a result of strict lockdown measures, such that there is now only a question of the defence case being heard remotely? These were the key questions the Privy Council had to grapple with (in a remote hearing!) in the case of *Attorney General of the Turks and Caicos Islands v Misick and others* [2020] UKPC 30. The criminal trial in question was a high-profile one and concerned complex allegations of misconduct against the former premier of the Turks and Caicos Islands ("TCI") and a number of his former associates. At the time the trial was adjourned, the trial had occupied some 490 sitting days.

Anxious to ensure the trial would not be jeopardised, the Crown made an application for the remainder of the trial to take place remotely. The Crown relied on regulations made under emergency powers exercised specifically in relation to the Covid-19 pandemic as providing a legal basis for this course. The defendants objected and filed a constitutional challenge, which ultimately came before the Privy Council for resolution.

The first issue was whether the relevant regulations which purported to allow the judge to sit outside the Islands was ultra vires the TCI Constitution. Regulation 4(6) provides that in the context of remote sittings, the courtroom "shall include any place, whether in or outside of the Islands, the Judge … elects to sit to conduct the business of the court". The defendants relied on the fact that whilst the TCI Constitution makes explicit provision for its Court of Appeal to sit abroad, no such provision exists in relation to its Supreme Court. It was not in dispute that within the constitutional framework of the TCI, sittings of the Supreme Court are required to take place within the Islands. The defendants contended that the Court of Appeal had been wrong to find that a remote hearing in which the Judge was physically located in Jamaica but was virtually connected to a courtroom in the TCI would not offend this rule because the judge in this case was in fact "sitting" in the TCI. The defendants' argument, in essence, was that "where the judge is, there the court is": if the judge was in Jamaica, so was his court.

The Privy Council found against the defendants. An intention to create a courtroom of the Supreme Court in a foreign state, in breach of constitutional and international law, would not be inferred lightly. Any ambiguity in what was a hastily drafted piece of legislation could be resolved on a purposive reading of the Regulations. This purpose could be summarised as ensuring that the administration of justice, including trials, continues during the Covid-19 pandemic in a way that does not endanger public health by reducing the need for people physically to attend the courtroom through the use of video and audio links. The purpose was not to permit the Supreme Court to sit outside the TCI. As such, the purpose of Regulation 4(6), properly construed, supported the conclusion that it merely deemed the judge to be sitting wherever the court was assembled, notwithstanding his or her actual location.

In light of its conclusion on the *ultra vires* issue, it was unnecessary for the Board to determine the alternative argument that a judge could connect remotely to a courtroom in the TCI from another state by exercising the Supreme Court's inherent jurisdiction to govern its own processes. The Board did, however, find considerable force in the argument that, in light of evolving technology and the need to ensure that trials can continue, such a power exists at common law.

The second key issue before the Board was whether the application of Regulation 4(6) half-way through the defendants' trial, and only in relation to the defence cases, would create an inequality of arms in breach of the Constitution. Here too the defendants were unsuccessful, with the Board declining to intervene in the trial process in circumstances where the trial judge had not yet determined the Crown's application for the trial to be resumed on a remote basis. Significantly, while the Board was prepared to accept that jury trials raise distinct issues (without getting into the finer details or commenting on

specific examples, such as Scottish measures to host jury trials on cinema screens), there was no intrinsic reason why video links could not be used in criminal proceedings. The defendants had not been able to establish that remote evidence was 'second best', and that the judge's ability to assess evidence so given would be impaired. Whilst there may be some cases, or some parts of cases, where there are particular reasons why it may not be appropriate to use video links, these were matters for the trial judge to determine in the exercise of his or her discretion and on the basis of all the relevant facts and circumstances. The Privy Council's ultimate conclusion that there may be circumstances in which a remote hearing is justified was, however, tempered by a recognition that "it will be preferable that the judge is physically present".

Daniella was junior counsel in this appeal, led by Edward Fitzgerald QC.

If you would like to speak to Daniella Waddoup about this case, please click here.

About Daniella Waddoup

Daniella has a keen interest and fast developing practice in criminal appeals, particularly those involving appellants with mental disorder and children and young people. As well as being involved in appeals against conviction and sentence to the Court of Appeal, she has appeared before the Supreme Court, Privy Council and European Court of Human Rights. She was junior counsel for the intervener Just for Kids Law in R v Jogee; R v Ruddock. Daniella acted as judicial assistant to Lord Mance JSC and was led by Edward Fitzgerald QC in Pitman & Hernandez v The State, an appeal concerning the constitutionality of sentences of death imposed on those suffering from intellectual disability. Daniella also has experience of making applications to the Criminal Cases Review Commission.

To see Daniella's full profile, click here.