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Criminal Appeals Bulletin

Welcome

Paul Taylor QC

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

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Katy Thorne QC asks: What is the Court of Appeal's attitude when experts turn out to be not as expert - or as honest - as they claim?

Joel Bennathan QC looks at the latest CACD decision affecting financial crime appeals – "A strange case that ignores an interesting issue in confiscation proceedings "

Peta-Louise Bagott analyses the CACD's decision on the admissibility of EncroChat messaging.

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Paul Taylor QC
Head of the DSC Criminal Appeals Unit

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Mental health disposals: A practical approach

By Daniella Waddoup

The Court of Appeal continues to grapple with the difficult and nuanced questions that arise in the sentencing of people with mental illness and/or disability who have committed serious criminal offences. In the two most recent of these cases, *R v Nelson* [2020] EWCA Crim 1615, and *R v Sowerby* [2020] EWCA Crim 898, [2021] 1 Cr. App. R. (S.) 14, the Court engaged in particular with the important "practical differences between, and advantages and disadvantages of, a 'hybrid order' under s.45A of the Mental Health Act 1983"[1] as compared with a hospital order with restrictions pursuant to ss. 37 and 41 of the 1983 Act.

The different outcomes reached – in *Nelson*, a hospital order was substituted, whilst in Sowerby a life sentence coupled with a hybrid order was upheld – illustrate that deeply individualised consideration of these issues is called for.

In approaching the question of disposal in such cases, the guidance set out in *R (Vowles) v Secretary of State for Justice and another* [2015] EWCA Crim 45 & 56, [2015] 1 W.L.R. 5131 (and subsequently clarified in *R v Edwards and others* [2018] EWCA Crim 595, [2018] 4 W.L.R. 64; see also *R v Cleland* [2020] EWCA Crim 906) remains relevant. Sentencers must address the following questions:

(1) The extent to which the offender requires treatment for their mental disorder. This was a decisive factor in Nelson, in which the Court concluded that the appellant (who had pleaded guilty to making threats to kill and offences of assault, and had anti-social personality disorder and a delusional disorder) would always suffer from some form of mental disorder. A linked consideration was that he had responded well to treatment and supervision in the nine years that he had spent in hospital since conviction, giving the Court a realistic hope that "with treatment and effective management and supervision he should progress to live as risk free as is reasonably achievable in society".[2] By contrast, while Mr Sowerby plainly required treatment for his schizophrenia, a perhaps unusual aspect of his case was that he had been subject to two previous hospital orders with restrictions, and in both instances had gone on to re-offend upon being absolutely discharged by the Mental Health Tribunal.

(2) The extent to which the offending is attributable to mental disorder. The Sentencing Council's Guideline on "Sentencing offenders with mental disorders, developmental disorders or neurological impairment" (which came into effect on 1 October 2020) sets out, at section two, factors that may provide a useful starting point. These include careful consideration of: (a) the precise way in which an offender's impairment or disorder may have affected their understanding, judgment, choices and behaviour relevant to the offence; (b) whether non-compliance with medication was wilful or attributable to a lack of insight; and (c) the extent to which any self-medication through alcohol or illicit drug use was accompanied by an awareness of the potentially risky effects.

The decision in *Sowerby* appears to have turned in large part on the "high culpability" of the offender. The medical evidence that he would not have committed the "brutal and frenzied" killing of his mother[3] but for his mental illness appears to have been accepted; so too the fact that his illness contributed to his failure to comply with his medication regime. The Court also acknowledged that there had been a lack of effective support and/or supervision in the community which meant that, in the days before the killing, a medication review that the appellant had asked for with a view to recommencing his medication did not happen. Yet the Court upheld the sentencing judge's overall conclusion that Mr Sowerby had "allowed the schizophrenia to deteriorate by refusing to take medication and also by using illicit drugs and alcohol",[4] and this over a period of years. His

1 *Nelson* at [1].
2 *Nelson* at [44].
3 *Sowerby* at [8], [42]
4 *Sowerby* at [43], citing the sentencing judge.

attempts to seek help in the days leading up to the killing had to be seen in this broader context.

(3) The extent to which punishment is required is closely linked to the second question: punishment is more likely to be required where, notwithstanding a relevant mental disorder, residual responsibility and thus culpability remains. Although Mr Nelson's offending had caused "real harm" to the victims, there was less need for punishment precisely because his culpability "was so much adversely affected by [his] mental disorder".[5] By contrast, a penal element was found to be necessary in Mr Sowerby's case. This flowed from the sentencing judge's finding that he had planned to kill his mother for some time. Although his illness "played its part" in his distorted thinking that he needed to exact revenge on her for her perceived ill treatment of him, he remained "aware of his actions and of the consequences for his mother", and bore responsibility for not taking steps to address the risks posed by an untreated and self-medicated mental disorder.[6]

(4) Which regime for deciding release will best protect the public. This is perhaps the most important of the practical differences between the two disposals. In *Nelson*, the Court had two real concerns about the practical effect of the hybrid order that had been imposed on the appellant by the sentencing judge. The first concern arose from the fact that once well enough to be considered for release from hospital, he would be returned to prison. The Court heard evidence that this was likely to lead to a relapse of his delusional disorder because he would not take his anti-psychotic medicine. The reality, readily accepted by the Court, is that there may be no obvious advantage to an offender in taking medication once back in prison; indeed, there may be disadvantages in that the side-effects of medication may make a prisoner more vulnerable in a custodial environment.[7] Failure to take medication would result in the prisoner's return to hospital and then, once better, transfer back to hospital – resulting in an undesirable "yo-yo" between hospital and prison.[8] The second concern was that release from prison pursuant to a hybrid order would result in Mr Nelson's supervision not by a team of mental health experts who would report to the hospital and Secretary of State for Justice, but instead by a probation officer who would not have the equivalent training to spot the subtle signs of mental health deterioration and ability to intervene accordingly. This was particularly relevant given the Court's earlier finding that the appellant would always suffer some form of mental disorder.

In *Sowerby*, by contrast, the Court, perhaps influenced by the history of two previous unsuccessful discharges back into the community overseen by the Mental Health Tribunal, stressed that the s.37/41 regime does not necessarily offer greater protection to the public than a life sentence and hybrid order. Each case will turn on its own facts. Not unsurprisingly in light of the conclusion that the appellant carried a high degree of responsibility notwithstanding his mental disorder, the Court in *Sowerby* plainly felt more comfortable with release being considered by the Parole Board and the life-long possibility of recall to prison for reasons not only linked to a relapse in his medical condition.

Conclusions for appellate practitioners

The following points may be of particular interest to appellate practitioners:

First, medical opinion, while highly significant in cases of this nature, (a) may change and (b) is never determinative. In *Nelson*, the unanimous judgment of the doctors who gave evidence at the time of sentence was that a hybrid s.45A order was required. At the appeal, fresh medical evidence made clear that the concerns raised at sentencing had not been borne out. The evidence also highlighted the practical difficulties that would arise upon release if the s.45A order were to continue. In *Sowerby*, the psychiatrists at first instance had been in agreement in recommending a hospital order. In upholding the sentencing judge's decision to instead impose a s.45A order, the Court stressed that it was "in no way circumscribed by the opinions of psychiatrists as to the best way of dealing with this case".[9]

Secondly, can the answers to the *Vowles* questions discussed above be deployed more widely than in the s.45A/hospital order context? A focus on the precise impact of mental disorder on culpability – and so also on questions of punishment – will be relevant in a large number of sentencing appeals.

5 *Nelson* at [43].
6 *Sowerby* at [59].
7 *Nelson* at [36].
8 *Nelson* at [44].
9 *Sowerby* at [53].

But can sentencers be encouraged to adopt a more practical approach in considering questions of public protection in other areas too?

Tim Moloney QC represented Mr Sowerby in his appeal.

If you would like to speak to Daniella Waddoup about this article, 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.

Appeals against Conviction; England and Wales

Failings of prosecution trial experts as a ground of appeal

By Katy Thorne QC

R v Byrne and others [2021] EWCA Crim 107

What is the Court of Appeal's attitude when experts turn out to be not as expert - or as honest - as they claim?

We all know the duties that experts giving evidence in criminal courts are supposed to comply with: to be unbiased and objective, not to stray outside of their expertise and to disclose material and information which may undermine their opinion or standing.[1] These duties are currently set out in Part 19 Criminal Procedure Rules but have been in previous iterations of the Criminal Procedure Rules and set out many times the Courts[2] and by Regulators[3]. But what happens if experts do not comply? What happens when experts are not so expert? What happens when experts are not honest? Unfortunately, it appears, the Court of Appeal has recently been unwilling to interfere.

In the case of *R v Byrne and others* [2021] EWCA Crim 107, the Court of Appeal gave judgment in seven conjoined appeals which followed the collapse of a major fraud trial (*R v Sulley and others*) due to the wholesale discrediting of the Prosecution's carbon credit expert witness, Andrew Ager. In that earlier trial, at Southwark Crown Court, Ager had not just been shown to have questionable qualifications, but not to have complied with, or even understood his duties as an expert, and he had even attempted to improperly persuade a defence expert not to give evidence, in the fear that he, Ager would be exposed. The very senior trial judge found him not to be an expert of "suitable calibre" and the CPS indicated he would never be used as an expert again.

All the cases in the *Byrne and Others* appeal were previous trials where Mr Ager had given evidence about the carbon credit industry. The Court of Appeal accepted Mr Ager's wholesale failure in *Sulley* to comply with the requirements of an expert witness and the trial judge's conclusion that he was not suitable, but declined to quash any of the convictions. In their judgment, the Court sought to remind all parties of the need to ensure that inappropriate expert witnesses are not called in criminal trials, stating that the guidance issued by the CPS, and compliance with the Criminal Procedure Rules will ensure that rogue experts are weeded out. The Court said:

The Crown must take all necessary steps to ensure that inappropriate expert witnesses are not called in criminal trials in the future. Proper adherence to the two sets of Crown Prosecution Guidance set out in [87] above, together with the Criminal Procedure Rules and the Criminal Practice Directions, ***should ensure*** *that this regrettable lapse will not be repeated. The failure to detect the underlying problems with Ager as an expert witness was a notable error on the part of those with conduct of these cases.* [emphasis added]

Unfortunately, history tells us that such confidence may be misplaced, because time after time prosecution experts have overstepped their expertise or even turned out to be dishonest, but the same system has not exposed the failings until much later. There are many examples of such experts, from the infamous Sally Clarke case with Professor Roy Meadows and Dr Alan Williams, to the recent example, Saul Rowe in the LIBOR trial *R v Pabon* [2018], where again the Court of Appeal refused to quash convictions despite finding Mr Rowe had, *"signally failed to comply with his basic duties as an expert"* indicating,
" there is no room for complacency and this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre.'

Mr Ager continued to be instructed by and give evidence for the Crown despite the fact that the Criminal Procedure Rules and CPS guidance had long been in existence, and after the judgment in Pabon, and that Court's *"stark reminder"*, without any apparent interrogation of Ager by the Crown, or any change in the Crown's approach to his evidence.

1 Part 19 Criminal Procedure Rules , Criminal Practice Directions, Crown Prosecution Service Guidance for Experts on Disclosure, Unused Material and Case Management (updated 30 September 2019) and the Crown Prosecution Expert Evidence Legal Guidance (updated 9 October 2019).

2 Eg R v Harris [2005] EWCA Crim 1980, [2006] 1 Cr App R 5.

3 **Code of Practice and Conduct For Forensic Science Providers and Practitioners in the Criminal Justice System.**

Practitioners should note that this ruling is yet more reason to try get it right first time: not to accept a prosecution witness's credentials at face value, to instruct alternative experts and to ensure that they challenge the evidence, even when it appears difficult to do so, and at appeal, similarly, to ask for disclosure and instruct experts to truly examine the accuracy and honesty of the Crown's case at trial.

However, the concern must be that if there is no effective sanction for the prosecution in cases where they have called an unqualified or unscrupulous expert, and have failed to properly supervise and interrogate them, there is simply no incentive for any prosecutor (public or private) to ensure their experts comply with the CPS guidance or the Criminal Procedure Rules or the Forensic Science Regulator's latest Code of Conduct. Without convictions being quashed, the guidance, rules and codes are effectively toothless and, whatever is said by the Court, history will, inevitably, repeat itself.

If you would like to speak to Katy Thorne QC about this article, please click here.

About Katy Thorne QC

Katy Thorne QC has a long and varied appellate practice which she combines with her trial practice in homicide, fraud and sexual crime. She is an expert on challenging expert evidence and is also an Assistant Coroner and an editor of Mason's Forensic Medicine for Lawyers. The combination of trial and appellate practice and her expertise in expert evidence provide unrivalled perspective and experience to successfully assist both privately funded and legally aided clients alike. She appeared in *Byrne and Others*.

To see Katy's full profile, click here.

Think twice before sliding into EncroChat DMs

By Peta-Louise Bagott

A, B, D, & C v R [2021] EWCA Crim 128

EncroChat was a private messaging service that promised its users secure and encrypted communications. The use of the past tense is perhaps now more appropriate following the Court of Appeal's judgment in *A, B, D & C v R*.

The Court was asked to consider whether material obtained from the EncroChat application was admissible at trial. The appeal turned on whether communications had been intercepted while 'being transmitted' by the device or while 'stored' on it. As the material had been extracted from the device itself and was unencrypted, the Court found that the evidence was admissible.

The public policy arguments in favour of allowing EncroChat material before courts are obvious. For that reason, many will find the decision unsurprising. But, on a practical level, where does that leave future defendants facing proceedings on the basis of EncroChat material?

The Court of Appeal's ruling

'Being transmitted' vs 'stored'

In this case, the material was intercepted by the French and Dutch Joint Investigatory Team ('JIT') through the EncroChat communications system. The French Gendarmerie sent an undercover implant to all EncroChat devices disguised as an 'update' for the system.

The implant worked in two stages. Stage 1: it caused the device to transmit all of the data that had not been erased to the French police digital crime unit server (C3N) and then to Europol. Stage 2: it continued to collect data that was created after the device had been 'infected' by the update.

The central issue before the Court was the construction of s.4(4) Investigatory Powers Act 2016 ('IPA'). The distinction between material 'being transmitted' (s.4(4)(a)), and material being 'stored' (s.4(4)(b)) is significant. It was agreed by the parties that s.4(4) should not be construed as meaning that if a communication was 'being transmitted' it could not be 'stored by or in the system' at the same time [35].

Within the IPA itself there is a specific provision prohibiting the admission of material intercepted in the course of its transmission: s.56. As a result, if EncroChat material were found to have been intercepted while 'being transmitted' (s.4(4)(a)), s.56 would have operated to prevent the material from being admitted at trial.

The Appellants argued that the material had indeed been intercepted while 'being transmitted' so fell within s.4(4)(a) and not s.4(4)(b) [34 – 37]. There were a number of technical points raised by the Appellants, supported by expert evidence, in this regard.

The Crown responded, arguing that the material had been intercepted when it was 'stored' in accordance with s.4(4)(b): s.56 did not apply and the evidence was admissible, subject to any other challenge.

Despite numerous technical arguments being raised by the Appellants about storage, the Court found that the intercepted material had been 'stored' and was not intercepted while 'being transmitted' [50].

The Court's interpretation of s.4(4)(b) is set out in paragraph 62:

> As a matter of ordinary language, section 4(4)(b) is clear and unambiguous in its meaning. It extends to all communications which are stored on the system, whenever that might occur. That broad meaning coheres with the structure of the 2016 Act considered in overview, and importantly with the different types of warranty for which the Act provides. Part 5 warrants are required for the interception of stored material, and Part 2 warrants for material which is to be intercepted while being transmitted. It also advances the overall purpose of the legislation in preserving the legislative framework – and the distinction between the different types of intercept – to which we have referred. The statutory question for any court in determining section 4(4)(b) applies is this: was the communication stored in or by the system at the time when it was intercepted?

Particular attention was paid to the fact that the material was recovered in the form of unencrypted messages 'stored' on the device. Had a message been intercepted while 'being transmitted', it was found that it would had been encrypted [66, 14].

It concluded that:

- the communications were stored on the handset;
- the EncroChat material was not caught by the

s.56 exclusion;
- the material was lawfully intercepted while it was stored on the handsets; and
- the material was admissible [66-67, 69].

For proceedings in the future seeking to rely on extracted material from a device, providing the Prosecution can show that the material is 'stored' somewhere on it, any arguments made on the basis of s.4(4)(a) are unlikely to get off the ground.

Expert evidence

Supported by expert evidence, the Appellants argued that the communications were extracted while 'being transmitted' on the basis that transmission starts when the user presses 'send' and ends when the communication is accessible by a human recipient [35].

The arguments made about how a device stores data within Random Access Memory (RAM) and Read-only Memory (ROM, or Realm for EncroChat devices) were dismissed. The Court endorsed the Judge's finding that the communications were extracted directly from the handset of the user and not while they were in transit to, through, or from any part of the system. It explained that 'the material was recovered in the form of unencrypted messages stored in the RAM of the device in a form in which they existed before they were transmitted from the decided to the servers' [63]. For this reason, the intercepted material was 'stored' when it was intercepted and fell within s.4(4)(b).

Going forwards, raising these points again on the basis of expert evidence is likely to be met with the following rationale:

> The 2016 Act does not use technical terms in this area. The experts have an important role in explaining how a system works, but no role whatever in construing an Act of Parliament. They appear to have assumed that because a communication appears in the RAM as an essential part of the process which results in the transmission it did so while "being transmitted". That is an obvious error of language and analysis [68].

The judgment does not bode well for future technical arguments. If the communications can be 'transmitted' and 'stored' at the same time, then providing the unencrypted material is somewhere on the device a court is likely to fall back on s.4(4)(b).

Exclusion and abuse

The scope of the appeal did not include the Judge's decision to reject the application to exclude the EncroChat material under s.78 Police and Criminal Evidence Act 1984 and stay the proceedings as an abuse of process [4-5]. The effect of the Court of Appeal's reasoning is that any challenges to the admissibility of EncroChat material under the IPA are unlikely to get very far. However, these avenues remain open for issues separate and distinct from this.

Conclusion

The decision will be celebrated by the National Crime Agency and the Prosecution as the precedent set will make it harder to challenge the admissibility of EncroChat material intercepted by intelligence agencies. Unaffected by this judgment are the common evidentiary challenges in relation to attribution, continuity, and other deficiencies in the Prosecution's case. Whether that is enough to overcome the impact of having EncroChat material before the jury will depend on the facts of the case.

One unencrypted message to screenshot from this judgment, is that communications arising from sliding into EncroChat DMs are likely to find their way before a jury one way or another.

If you would like to speak to Peta-Louise Bagott about this case, please click here.

About Peta-Louise Bagott

Peta-Louise is an experienced advocate in both domestic and international criminal law, and professional discipline. Within crime, Peta-Louise has particular experience dealing with complex, document-heavy cases involving telephone and cell-site evidence. She is equally adept at acting as a led junior or as a junior alone in cases ranging from complex frauds to organised crime and terrorism offences.

To see Peta-Louise's full profile, click here.

Financial Crime Appeals

A strange case that ignores an interesting issue in confiscation proceedings

By Joel Bennathan QC

R v Court [2021] EWCA Crim 242

In the recent decision of R v Court [2021] EWCA Crim 242 the Court of Appeal skates over some potentially interesting issues about the "benefit" in confiscation proceedings, throws open the chance of re-litigating lost appeals without needing to trouble either the Supreme Court or the Criminal Cases Review Commission, and possibly enjoyed some *schadenfreude* at the expense of another 3 very senior Judges.

Mr Court pleaded guilty to cultivating cannabis. At the time of the offence, he owned a piece of land worth £62 000. His offence triggered the "criminal lifestyle" provisions of the Proceeds of Crime Act 2002 [sections 10 and 75 and schedule 2], which meant the land was rebuttably presumed to be the benefit of crime. Mr Court called evidence that he had bought the land under a mortgage taken out against a house he owned some years before he was found to be growing cannabis. The sentencing judge found that the mortgage was fraudulently obtained, basing that finding on Mr Court failing to declare his spent convictions and failing to tell the mortgage company he did not own the house outright; the problem with that ruling was that one does not have to declare spent convictions [hence the phrase "spent"] and elsewhere in the same ruling the judge found Mr Court *did* own the house outright.

Mr Court appealed on numerous grounds. The Single Judge refused leave, so he renewed. At the renewed leave hearing the first Court gave judgment allowing the appeal on the single issue of the "benefit" of the piece of land. So far, so good [for Mr Court, at least]. Unhappily, the Registrar had not told the Prosecution about the renewed leave hearing, so they did not attend. More unhappily, the Judges in the first appeal did not follow the Court's published practice of giving leave then adjourning a final decision for the Prosecution to attend. Thus, the Prosecution found they had lost an appeal without even being aware it was happening: They were not impressed. There is a rarely used power [see *Yasain* [2015] 2 Cr App R 28] for the Court of Appeal to reopen an appeal where (i) there are exceptional circumstances, (ii) it is necessary to avoid real injustice, and (iii) there is no other remedy available [often the existence of the CCRC, another remedy, will block a convicted person from using this route]. On this occasion, the Court was prepared to allow a second appeal, and a new constitution re-heard the appeal and upheld the original confiscation order on the basis that there were other clear reasons for the sentencing judge to have found the mortgage was fraudulently obtained. In doing so, the second court, in effect, declared that the 3 Judges in the first had made pretty basic errors of both reasoning and procedural fairness: This commentator is far too low down the legal food-chain to have any idea whether this would have caused the second constitution pleasure or pain.

The striking thing about the facts of this case is that by the end Mr Court was found to have benefited by £62 000 by way of an offence completely unrelated to the index offence, that was then litigated with a reverse burden of proof, without [as far as the appeal judgment reveals] the sentencing judge directing himself as to the mens rea of a mortgage fraud. The questions the Court of Appeal could have considered might be: Is a confiscation based on a mortgage taken out and repaid, proportionate under the *Waya* test? Can a judge use the statutory assumptions of sections 10, 75 and 76 of POCA to semi-convict of an offence of dishonesty without addressing the mens rea? Can a quasi-conviction for an unconnected offence be upheld when the trial judge's expressed reasons are all agreed to be wrong? They could have, but they didn't. Maybe these are questions for another case on another day.

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.