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

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Criminal Appeals Bulletin

Welcome


Farrhat Arshad

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

Doughty Street practitioners continue to be involved in some of the most high-profile and important criminal appeal cases. Piers Marquis, Ben Newton and Annabel Timan appeared for the 14 appellants in the "Shrewsbury 24" case, who won their appeal against their convictions from almost 50 years ago. In this edition Annabel Timan analyses the CACD decision in **R v Warren and others**. Tim Moloney QC and Kate O'Raghallaigh appeared for 30 of the appellants in Hamilton v Post Office, righting an egregious miscarriage of justice. Joel Bennathan QC and Annabel Timan appeared for two of the Freshwater Five, which we will cover in next month's Bulletin.

Also in this month's edition, Paddy O'Connor QC looks at **R v Sakin**, a salutary lesson in paying attention in Court and not relying on a transcript alone, and I analyse the case of **R v Gould** on the exercise by Crown Court judges of the powers in section 66 Courts Act 2003 and seeking to rectify procedural errors.

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.

Farrhat Arshad
Deputy 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

Appeals against Conviction; England and Wales

Annabel Timan analyses the CACD decision in R v Warren and others [2021] EWCA Crim 413.

Appeals against Conviction; England and Wales

Patrick O'Connor QC looks at Ihan Sakin [2021] EWCA Crim 291 and 411, a salutary lesson in paying attention in Court.

Appeals against Conviction; England and Wales

Farrhat Arshad analyses the case of R v Gould [2021] EWCA Crim 447 on the exercise by Crown Court judges of the powers in section 66 Courts Act 2003 and seeking to rectify procedural errors.

Appeals against Conviction; England and Wales

By Annabel Timan

R v Warren and others
[2021] EWCA Crim 413

On 23 March this year, the Court of Appeal quashed the convictions of 14 of the "flying pickets" known as the Shrewsbury 24. It was an appeal against multiple convictions across three trials which took place nearly 50 years ago, in 1973 and 1974.

The allegations involved public order offences arising out of the National Building Strike of 1972. The defence cases at first instance, as far as can be gleaned from the available records, were broadly the same; the appellants accepted picketing various building sites in Salisbury and Telford but denied involvement in any criminality.

Eyewitness accounts identifying individuals and attributing specific acts to those individuals were crucial to the crown's case at trial. These accounts were vehemently disputed by the defence who cross examined witnesses extensively based on their (available) witness statements, highlighting any inconsistencies or omissions.

The Appeal

The appeal proceedings were protracted and involved judicial review of the CCRC's initial refusal to refer the case. In the course of the JR hearing, the CCRC conceded the application and the final reference to the Court of Appeal took two points:

i. **Destruction of evidence** – A note of a conference between lead counsel and officers in the case, that took place shortly before the first trial, was discovered in the National Archives in October 2013. Its content suggested that original handwritten statements, made by a number of civilian witnesses, had been destroyed. Neither the note nor the fact of the destruction of statements were disclosed to the defence who, throughout the course of the first trial, were repeatedly assured that they had seen all the evidence [15].

ii. ***"The Red Under the Bed"* Documentary** – At the close of the prosecution case in the first trial, a political documentary entitled, *"The Red Under the Bed"*, was broadcast nationwide. Government agencies had a *"discreet but considerable hand"* in the making of the programme, which featured a discredited journalist and contended that the building strikes were an example of *"blatant communist influence"* [88-90].

It was argued that the documentary, which included footage of four of the appellants marching through Shrewsbury, was prejudicial to the defence and, in the absence of proper judicial direction to the jury or indeed any steps to mitigate the broadcast, rendered the trial unfair [93].

The Destruction of Evidence

The court re-iterated the principle that *"there is no rule that if material has become unavailable, that of itself means the trial is unfair"*. Ordinarily the trial process, including judicial direction, will be adequate to deal with any prejudice caused to the defence[1].

However, in the present case, the issue of destroyed statements was never disclosed and the opportunity for the trial process to ensure fairness to the accused lost. The court noted that the common law relating to prosecution duties of retention and disclosure of evidence has evolved considerably over the decades since the trials. Applying the *Bentley* principle, the appellants did not receive a fair trial by modern standards and their convictions were unsafe [87].

The Documentary

The sole question for the court was one of prejudice. Namely, *"whether the risk that the programme may have been seen by one or more jurors renders the verdicts in the three trials unsafe"* [95]. The court concluded that it did not. In assessing safety, the court applied modern standards of fairness but considered prejudice by reference to what a jury in

1[84-85], citing with approval PR [2019] EWCA Crim 1225, [2019] 2 Cr App R 22 (227) at [65-71].

the 1970s would have made of the programme [95-98].

Comment

It is of note that the court held the appeal to have been based on a solid foundation that defence at trial were forensically interested in the existence of any additional accounts of witnesses [67-69].

That foundation, along with the court's ability to assess the meaning of "the note" and properly draw conclusions as to what must have happened *vis a vis* the destruction of the statements, was only made possible by the survival of significant case records. These included transcripts from the first trial, police reports held at the National Archives and hundreds of witness statements, all of which had been retained close to 50 years after trial.

The Court, in a postscript to the judgment, acknowledged that:

This case provides the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal etc.), particularly if they resulted in a conviction. At the point when the record is extinguished by way of destruction of the paper file (as hitherto) or digital deletion (as now), there is no way of predicting whether something may later emerge that casts material doubt over the result of the case [101].

In consideration of the above, the Court invited a review of the present regimen for retaining and deleting digital files including a reconsideration of the HMCTS Record Retention and Disposition Schedule dated 19 August 2020 [102-103]. It remains to be seen whether this review will be undertaken, which will necessarily involve considerations of privacy and GDPR.

Annabel, led by Piers Marquis, represented Ricky Tomlinson and Arthur Murray. Ben Newton, led by Danny Friedman QC of Matrix Chambers, appeared for the first 12 Appellants.

If you would like to speak to Annabel Timan about this article, please click here.

About Annabel Timan

Annabel is a leading junior with significant experience in criminal appeals against both conviction and sentence. She has particular expertise in handling fresh evidence cases and has advised and appeared in numerous cases in the High Court and Court of Appeal.

To see Annabel's full profile, click here.

A Comedy of Errors

By Patrick O'Connor QC

The two hearings of the appeal of Ilhan Sakin [2021] EWCA Crim 291 and 411, revealed a 'comedy of errors': but a sobering one, with a lesson for us all.

I.S. had been convicted upon six counts of serious sexual offences, for which he was sentenced to 14 years' imprisonment. He gave evidence in his own defence at trial. Though the Trial Judge indicated her intention in her summing- up to summarise his evidence, she apparently failed to do so. He appealed on this ground: see paras. 51- 58.

No counsel pointed out this omission at trial. As the Court comments at para. 57: "It is difficult to understand how (all four) counsel failed to identify what was a clear and obvious failure to cover IS's evidence. They cannot have been listening (or, if listening, concentrating) at all. "

At paras. 59- 60, the Court very helpfully condenses the principles to be applied to such an appeal. Even in a short and simple case, [para. 60 (iii)]: "*Where a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing-up, it is in general impossible to say that the conviction is secure in those circumstances. However, it may depend on the particular circumstances of the individual case but it must be a very rare case where a defence case is not included in the summing-up and yet a court can reach the conclusion that a verdict of guilty was safe…*"

The lack of any correction or objection from counsel may be of some relevance to the seriousness of the error [see Reynolds [2019] EWCA Crim 2145]. Counsel must raise the issue at trial in accordance with the 'Overriding Objective'. However, this failure could not rescue these convictions in these circumstances: see paras 60 (vii) and 61.

On this single ground, on 3.3.21., I.S's convictions were all quashed and a re-trial ordered: [2021] EWCA Crim 291. The consequences for the vulnerable young victims and the public purse were very serious.

But all was not as it seemed. The factual basis for this appeal proved to be 'wholly misconceived'. In a chance development at the Crown Court six days later, the Trial Judge and counsel for I.S. discussed the outcome of the appeal. Both listened to the audio tape of the summing- up, and the Judge had indeed summed up his Defence evidence fully. The transcript used in the appeal had been defective. Both contacted the Registrar. The Court was re-convened, and, on 22.3.21., the judgment in Sakin [2021] EWCA Crim 411 was given.

The power to re-consider arose because the first order of the Court of Appeal had not yet been issued and sealed by the Registrar, and formally recorded at the Crown Court: see para. 70. The conviction appeal of I.S. was dismissed.

Even in the context of the defective transcript, the alleged omission in the summing- up had seemed very surprising. In answer to a question from the Court, on the first appeal, all counsel had confirmed the accuracy of the transcript. At paras. 77- 79, the Court set out the general duties of counsel with regard to the summing- up in a criminal trial.

Allowing for all the pressures upon the criminal Bar, *"we regret to say that there simply can be no acceptable excuse for what has happened here."* "*We underscore that it is a core duty of trial advocates, both for the prosecution and defence, to focus on the judicial summing-up at the time that it is given. This is necessary for the proper discharge of the advocate's overriding duty to the court in the due administration of justice (to which the advocate's duty to act in the best interests of his or her client is subject). It is the advocate's duty to raise promptly with the Judge what appears to be a material error in the summing-up, whether it be of law or fact, at the time of the summing-up.*"

In the absence of any clear recollection or meaningful notes, when faced with any omission apparent from the transcript, and especially in the context of a 'well prepared and methodical summing-up', Counsel should, at least by the time of the appeal hearing, arrange to check the audio file for themselves: see para. 78. Here, counsel were obliged to apologise to the Court for their 'bind reliance' on the accuracy of the transcript.

Under the pressures of a busy practice, some of us may exceptionally feel the need to switch focus from a tedious summing- up, to the next case. However, summary notes of the most relevant parts are now mandatory: in the interests of the client, the Court and Counsel's own reputation.

If you would like to speak to Patrick O'Connor QC about this case, please click here.

About Patrick O'Connor QC

Patrick O'Connor Q.C. has conducted many 'miscarriage of justice' and 'cutting edge' appeals,: including the **'Guildford Four'**, for Gerry Conlon and his father, Giuseppe: the **'Birmingham Six'**: the **'Carl Bridgewater'** case: the **'M 25' appeal**, Davis, Rowe and Johnson: and **R v Tymen**, the first ever successful appeal based on European Community Law. He has appeared in many leading House of Lords and Privy Council criminal appeals: including: **B. v DPP** (strict liability in crime), **R v Looseley**, 'entrapment' guidelines and limits: **R v Kennedy**, causation in manslaughter: and **R v Maxwell**, 'abuse of process'. Patrick recently conducted the voluminous fresh evidence CCRC reference of **'Dorling.'**

He continues to defend in the more challenging and complex criminal trials.

To see Patrick's full profile, click here.

Section 66 Courts Act 2003; powers of Crown Court judge; Magistrates' Court; procedural errors;

By Farrhat Arshad

R v Gould;
R v Moffat;
R v Brown;
R v Mugenzi
[2021] EWCA Crim 447

In this Guideline case, the CACD (Fulford LJ, VP, Holroyde LJ and Edis J.) considered the exercise by Crown Court judges of the powers pursuant to section 66 of the Courts Act 2003 ("s 66") and the procedures to be followed if exercising those powers. In the four otherwise unconnected cases Crown Court judges had sought to use s 66 to rectify perceived deficiencies either in the charges or the procedure at the Magistrates' Court. The CACD considered in detail the use of section 66 and the ambit of those powers. The Court concluded that the important parameters of section 66 had been ignored and it was necessary to restate them. These were:

i) When the Magistrates' Court made an order which gave jurisdiction in the case to the Crown Court, whether by committal for sentence or sending for trial, that was the end of their jurisdiction in the case. In technical language they were functus officio. The Crown Court judge could not use section 66 to make any order which the Magistrates' Court could no longer make;

ii) There was no power in the Crown Court to quash an irregular order. Where it was plainly bad on its face, the Crown Court may hold that nothing has occurred which is capable of conferring any jurisdiction to deal with it.

The CACD appreciated that this consequence of the decision in **R. v. Sheffield Crown Court ex p DPP (1994) 15 Cr App R (S) 768** limited the power under section 66 to correct errors in committals for sentence, but it was unavoidable. In the CACD's view if quashing was required this could only be done by a Divisional Court.
It was open to the judge in the Crown Court, sitting as a DJ(MC), to lay and commit a new charge in the correct form. The Court urged the relevant Rules Committee to consider whether an expedited and summary procedure could be adopted for the quashing by consent of unlawful committals and sendings which "have been overtaken by events". [At para 80 of the judgment.]
Whilst a judge of the Crown Court or of the Court of Appeal Criminal Division was vested with all the powers of a DJ(MC) in relation to criminal causes or matters by virtue of holding that office, it had to be remembered that the powers of the Magistrates' Court were circumscribed by a statutory scheme which was, "complex, prescriptive and restrictive." It was not the intention of Parliament in enacting the 2003 Act and the amendments in 2013 to allow the judicial office holders mentioned in section 66 to ignore the rules which the DJs(MC) would be obliged to follow. If they did not properly apply those rules, "then this court (or the Divisional Court) will consider what has happened, applying the analysis in **R v Ashton, Draz and O'Reilly [2006] EWCA Crim 794**, to determine whether the procedural flaws are so bad that they go to the root of the exercise of the section 66 power requiring the quashing of the orders, or whether they can either be overlooked or remedied if this causes no prejudice." [At paragraph 82 of judgment.]

To the broad statement of principle set out at para 9 of **Ashton** the CACD added the note of caution of Lord Bingham in **Clarke and McDaid [2008] 2 Cr App R 2** at para 17 where it was stated, "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place." Noting that Parliament had changed the law to reverse the effect of **Clarke and McDaid** in its particular context, the CACD stated that nevertheless the proper approach to the legal requirements for criminal proceedings explained by Lord Bingham remained sound. There should not be a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect. [At paras 84 and 85.]

Quashing committals and "remitting cases from the Crown Court to the Magistrates' Court"

The Court reiterated that there was no power in the Crown Court to quash a committal by the Magistrates' Court. The position could be different where the order was "obviously bad on the face of it" (as per Kennedy LJ in **R v Sheffield Crown Court**) such that the Crown Court never had jurisdiction. In such cases there was no question of the Court remitting the matter – the Court simply did not have jurisdiction and the Crown would have to return to the Magistrates' Court so that it "could be sorted out". The Crown Court had no power to do anything by way of an order to remit a case. [At paras 94-96.]

The Prosecution in one of the matters sought to argue that the combined effect of the numerous defects in the original charges, of varying degrees of seriousness, was to render the committal either

bad on its face, or invalid applying the principles explained in **Ashton**. This provoked the Court to comment, "The sight of the prosecution relying on the depths of its incompetence to extricate a serious and distressing case from the procedural nonsense it has created is not attractive. It is also misconceived." [At paras 97-98 of the judgment.]

S 17A Magistrates' Court Act 1980, (Mode of trial for offences triable either way). The CACD reiterated the importance of following the procedure set out therein. The procedure was mandatory and contained important safeguards. Failure to follow this procedure rendered what followed a nullity and liable to be quashed as per **R (on the application of Rahmdezfouli) v. The Wood Green Crown Court and the London Borough of Barnet [2013] EWHC 2998 (Admin)**. [At paras 101-106.]

Vacating pleas: The Prosecution sought to argue that the Crown Court judge had the power to vacate pleas even where the defendant did not wish to vacate his pleas. Whilst the CACD was loathe to rule out such a power, in the Court's view, "Such a power, though, must obviously only be exercised sparingly and when the interests of justice so require. It is unlikely to be appropriately used in order to rescue the prosecution from a muddle of their own making. More usually in cases where it appears that an important element has been misdescribed in the charge, to the adventitious advantage of the defendant, powers of amendment are more likely to be deployed, when available. That may cause a defendant to seek to be allowed to vacate a plea, which would no doubt often be allowed." [At para 112.]

Commentary: This is an important judgment on the limits of the powers of the Crown Court to rectify perceived procedural errors or failings by the Magistrates Court. The importance of getting the procedure right is illustrated by the case of **Gould** itself. The purported quashing by the Crown Court judge of the original committal for sentence was found to be in want of jurisdiction – all that followed was therefore a nullity including all the proceedings relating to the attempted rape put for the first time in the Crown Court, to which G had pleaded and for which he had been sentenced to an extended sentence. The result was the quashing of that plea and sentence. The original committal remained to be dealt with by the Crown Court. What happened in these cases could perhaps be seen as various chickens coming home to roost following the CACD's refusal in recent years to have regard to procedural defects and failings. Perhaps the decision in Gould with its references to the depths of the Prosecution's incompetence will have the salutary effect of ensuring compliance with procedure.

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

About Farrhat Arshad

Farrhat defends in serious criminal cases and is an experienced appellate barrister. Farrhat is recommended in Legal 500, 2021 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.

Message from the Criminal Appeal Office:
Electronic documents for an application to the Court of Appeal

Most documents needed for a Crown Court trial are now delivered and stored electronically on the Crown Court Digital Case System ("DCS"). The court and the parties have easy access to all relevant documents.

On an appeal from the Crown Court to the Court of Appeal the staff of the Registrar of Criminal Appeals also have electronic access to those documents and the Criminal Appeal Office makes use of DCS to produce digital bundles for the CACD.

It is now a requirement of the Criminal Procedure Rules that the parties to an appeal to include with their appeal notices electronic links to any document on DCS that they wish to refer to, or rely upon in support of the application for leave to appeal. This will allow applications to be processed more efficiently.

It is important now to add hyperlinks to DCS within grounds of appeal. Guidance on how to create hyperlinks can be found on the DCS website: Guidance

In short, in viewing a relevant document in the review mode, parties can use 'Copy Link' which takes a URL of the page and allows it to be pasted in a document to create a link to that document.

It is also now a requirement that authorities are sent to the Criminal Appeal Office in pdf format. Where parties rely on more than 2 authorities, these should be served as a consolidated pdf document with bookmarks.

Rule 39.3(1) now states that Grounds of Appeal must:

(f) identify any other document or thing that the appellant thinks the court will need to decide the appeal and include or attach an electronic link to each such document that has been made available to the Registrar under rule 36.8(1)(a) (Duty of Crown Court officer); and

(g) include or attach—
(i) an electronic copy of any authority identified by the grounds of appeal (see paragraph (2)(f)), or
(ii) if two or more such authorities are identified, electronic copies of each together in a single electronic document.

Similar amendments are made in respect the Parts relevant to other types of appeals – ie prosecution appeals, confiscation and AG's References.