

Criminal Appeals Bulletin



Welcome

Welcome to the January 2022 edition of the DSC Criminal Appeals Bulletin.

The Bulletin is aimed at assisting those involved in appellate work in England & Wales, Northern Ireland and the Caribbean. This edition contains a review of the most significant conviction appeal judgements in 2021.



Paul Taylor QC

In the last year the DSC Appeals Unit has celebrated the appointments of a number of past contributors to the Bulletin: HHJ Trowler QC (to senior circuit judge at the Central Criminal Court), Joel Bennathan QC (to the High Court QBD), and Richard Thomas, Liam Walker, and Sarah Vine to silk. (Congratulations also to Henrietta Hill QC – appointed to the High Court QBD, and Jude Bunting to silk.)

As in previous years, 2021 was exceptionally busy for DSC barristers involved in appeal cases. Whilst I was appearing before the Eastern Caribbean Supreme Court (Court of Appeal BVI), and the Court of Appeal of Trinidad and Tobago (co-appealing with Edward Fitzgerald QC) – alas only via Zoom from home - my colleagues were before the Court of Appeal (Criminal Division) and the Privy Council in some of the most important appeals this year.

In this edition I have summarised and commented upon a selection of appeals in 2021, many involving DSC tenants. Each case name is hyperlinked to the judgement. Some of the cases were the subject of an in depth commentary in an earlier edition of the Bulletin and the hyperlinks to these articles appear in the text below.

Coming soon....*Appealcast*

Starting later this month we will be sending out a link to a regular podcast looking at criminal appeal issues including comments on recent cases, interviews and short analyses of potential grounds of appeal. There will be two editions. One focusing on appellate cases in E&W and NI, the other on cases from the appeal courts of the Caribbean jurisdictions. It will be sent out to the Bulletin mailing list. If you are not on that list but would like to subscribe to the Bulletin and podcast, [click here](#).

DSC Criminal Appeal Unit

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 Appeal Handbook*, *Blackstones Criminal Practice (appeals section)*, and *Halsbury's Laws (Appeals)*.

The third edition of *Taylor on Criminal Appeals* - written by a team including 14 members of DSC - is due for publication later this year. [The first and second editions have been cited variously in the House of Lords, Judicial Committee of the Privy Council, Court of Appeal (Criminal Division), Court of Appeal in Northern Ireland, Final Court of Appeal in Hong Kong, Court of Appeal of New Zealand, High Court of Fiji, Eastern Caribbean Supreme Court and Caribbean Court of Justice. [For reviews of the second edition click here](#)].

Please feel free to email [Matt Butchard](#) or [Marc Gilby](#) or call our crime team on 0207 400 9088 to discuss instructing us in appeal cases. 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 criminal appeal services can be [found on the Criminal Law and Appeals page of our website](#) including links to back copies of the Bulletin and other resources.

With best wishes for a successful, healthy and safe 2022

[Paul Taylor QC](#)

Head of the DSC Appeals Unit
(Editor of Taylor on Criminal Appeals)

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1. TRIAL PROCEDURE

Severance

[Binoku \[2021\] EWCA Crim 48](#)

B appealed against his convictions. One of the grounds complained that the judge wrongly failed to sever counts 1 and 2. Count 1 alleged violent disorder involving a group of males and weapons, and count 2 alleged possession of an offensive weapon, some 6 days after the events in count 1 and 2 miles away. The allegations in count 2 were that a group of 5 males were seen with a person said to be B who had a white plastic bag from which he was handing out items to the others. One such item was said to be a red handled axe.

At trial an application was made to sever the two counts. It was submitted that the two incidents were entirely separate from one another. They were on different dates, in different places and involved different groups of people. The Judge ruled that there could not be severance because count 2 was “part and parcel of the ongoing antagonism between these two parties. It is linked in time and geography, and with the same characters, as it were, or protagonists, rather, who were involved in the earlier violent disorder”.

The CACD recognised that the judge’s statement that the characters were the same was an error because it was not known which groups were involved in count 2. However, the CACD rejected this ground on the basis that:

(a) *R v Toner* [2019] EWCA Crim 447; [2019] 1 WLR 3826 recorded that the Criminal Procedure Rules

2015 had removed technical barriers to joinder. The current rule is now contained in CPR Rule 3.29(4).

(b) “In our judgment in this case the judge was right not to sever the counts on the indictment. This was because the two offences were broadly in the same geographical area, separated by six days, and formed part of [the] a series of offences of the same character, namely alleged day-time street violence in Barking and Dagenham.”

Commentary

The CACD’s approach to the severance issue is troubling. Once it was accepted that the Judge’s was incorrect to rely on there being a link between count 1 and 2 on the basis that they both involved “the same characters, as it were, or protagonists, rather, who were involved in the earlier violent disorder”, the only links that remained appear to be highly tenuous. Moreover, we do not know from the judgement how the judge summed up the links between the two events and whether he repeated the error.

The approach set out in *Toner* to eschew unnecessary technicality in procedural matters is a continuation of the approach set out by the House of Lords in and continued in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340. (See also *R v Johnson* [2018] EWCA Crim 2485; [2019] 1 Cr App R 10 defendants who were tried and convicted on additional counts in relation to which the indictment had not been amended and they had not been arraigned, were treated as having pleaded not guilty. The trial had neither been invalid nor a nullity.)

See also the discussion in [Umerji \[2021\] EWCA Crim 598](#) regarding the effect of a failure to follow the procedural requirements in s.51 Crime & Disorder Act 1998 (esp. [96]); and the [commentary](#) by [Farrhat Arshad](#) on *Gould and others* [2021] EWCA Crim 44 relating to section 66 of the Courts Act 2003.

2. APPEAL PROCEDURE

The New “Blue” Guide

The latest edition of [The Court of Appeal Criminal Division Guide to Commencing Proceedings](#) was launched in July 2021.

The revised edition is fully digital with hyperlinks to the various legalisation, Criminal Practice Directions and Procedure Rules. It also contains useful points of contacts for staff of the Criminal Appeal Office

Extension of time - absconding

[Umerji \[2021\] EWCA Crim 598](#)

In 2018 U was convicted, in his absence, of conspiracy to cheat the public revenue (count 1) and conspiracy to transfer criminal property (count 2). In essence, the Crown’s case was that U was a leading participant in a high value VAT fraud.

In 2021 he sought leave to appeal against his convictions, out of time. The Registrar referred the application to the full Court.

The first proceedings against U were in 2009 when he was summonsed to appear at the magistrates court. He did not attend but was represented by counsel. The case was sent for trial in the Crown Court. His trial commenced on 3 May 2011. He did not appear and he chose not to be represented. The Judge ruled that the trial should proceed in his absence. He was convicted in June 2011. U successfully appealed, his convictions were quashed and a retrial was ordered.

Between 2013 and July 2016, efforts were made to seek the extradition of U from the United Arab Emirates. The request was refused.

The retrial took place between September and October 2018. U did not appear and was not represented. The trial judge ruled that the trial should proceed in their absence. U was again convicted.

He applied for an extension of 554 days in which to apply for leave to appeal.

The CACD approached the question on the basis that U is an absconder. “it is for this court to decide whether it is prepared to hear the appeal on the merits following the guidance given at in *R v Okedare and others* [2014] EWCA Crim 228 [2015] 1 Cr App R (see paragraph 35).”

“We have followed the approach explained by this court in *Welsh & Ors* [2015] EWCA Crim 1516; [2016] 4 WLR 13, that extensions of time will be granted if it is in the interests of justice to do so. As a result, it has been necessary to consider the merits of the underlying grounds before making the decision whether or not to grant the extension requested. As Hughes LJ explained in *R v R (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr App R 150 it is necessary to demonstrate a substantial injustice in order to secure an extension of time, given this heightened test is not limited to cases involving a change in the law (see [35])...” Leave was refused.

Commentary

When considering whether to grant an extension of time, the ultimate question for the CACD is whether it is in the interests of justice to do so. In effect, this requires an analysis of three central questions: What are the reasons for the delay? Will the applicant suffer a substantial injustice if the application is refused? What are the merits of the grounds of appeal? It is submitted that the last factor is the one that is determinative, and if there are strong merits this should inexorably lead to the conclusion that a defendant will suffer a substantial injustice if leave is refused. [However, see *Ordu* [2017] EWCA Crim 4, and the approach to substantial injustice in change of law cases see *Jogee* [2016] UKSC 8, and my article in *Counsel magazine* [“The Jogee Effect”](#)]

Other cases in 2021 involving an application for an extension of time include:

- (a) [Abdulahi \[2021\] EWCA Crim 1629](#) : an extension of 11 years and 8 months was granted where there were cogent and detailed reasons for the delay, including 4 years that were “clearly attributable to the applicant’s lack of knowledge or understanding of the statutory defence that had been available to him”, and a further 3 years “during which time his application to the CCRC was being dealt with” – before being refused. (A

had pleaded guilty to possession of false identity documents with intent, but was found to have a defence pursuant to section 31 of the Immigration and Asylum Act 1999.)

(b) [Hardy \[2021\] EWCA Crim 635](#) where an extension of 2022 days was granted.

(c) *M* [2021] EWCA Crim: [Edward Fitzgerald QC](#) and [Pippa Woodrow](#) secured leave to appeal 33 years out of time.

Appeal decision re-opened based on corrected information

[Sakin \[2021\] EWCA Crim 291](#)

[Sakin \[2021\] EWCA Crim 411](#)

At the first hearing the CACD had allowed the appeal on the basis of a transcript of the summing up that was, unknown to the CACD, incomplete. The second hearing reversed that decision after the remainder of the transcript was provided to the Court.

This case is analysed by [Patrick O'Connor QC](#) in "[A Comedy of Errors](#)".

3. CRITICISM OF TRIAL LAWYERS

Unjustified withdrawal of trial counsel mid trial – D represented himself – whether unfair / unsafe

[Daniels \[2021\] EWCA 44](#)

D had been convicted of murder.

The main grounds of appeal centred on the fact that D's legal team had withdrawn during the course of the trial. Leading counsel told the judge that they were in receipt of instructions from the applicant that "*put an entirely new gloss on the defence case*", with the result that they were professionally embarrassed and forced to withdraw.

The Judge allowed 7 days for D to find alternative representation. There were difficulties in securing leading counsel. Two junior counsel were available, but D stated that he would rather represent himself.

He then sought an adjournment. The judge refused because it would not be in the interests of justice as it would lead to the jury being discharged.

On appeal D complained that his trial legal team had acted with flagrant incompetence because the withdrawal was unjustified.

The CACD analysed in detail the material relating to D's instructions to trial counsel. The Court expressed "grave doubts" that trial counsel's withdrawal had been justified, but found that D's conviction was not unsafe because, inter alia, he had the opportunity to be represented by experienced junior counsel, but refused, leading counsel had already cross-examined 11 prosecution witnesses, and that the judge was correct not to adjourn the matter further.

Commentary

It is interesting to note the use of the term "flagrantly incompetent". The authorities have moved away from the need to meet this threshold in recent years, and the test is now focused more on the impact of the error rather than seeking to quantify the level of incompetence.

In many ways this is a concerning case. Having effectively found that the withdrawal of counsel was unjustified, it seems unfair to then look to D to accept replacement counsel who he did not wish to represent him. Moreover, the judgement leaves unanswered how the judge explained counsel's withdrawal to the jury and the potential detrimental impact that this may have had on D.

This case is an important example of how far the CACD will go in investigating complaints against trial counsel (and to what extent appellants should be prepared for this). D waived legal professional privilege and disclosed the written material relating to his instructions at various stages. Leading counsel produced the note of his telephone conversation with the Bar Council regarding his position at trial, and D, junior counsel, solicitor and police station representative all gave evidence before the Court.

[In contrast, in [Atkinson \[2021\] EWCA Crim 153](#) the issue was whether trial counsel has erred in failing to properly advise A, who has mental health issues, about pleas. The CACD noted that "There is no

witness statement from the appellant. Further, those acting on behalf of the appellant have not sought clarification from trial counsel as to the advice he gave in the course of about an hour or so spent with the appellant; and have not applied to cross examine trial counsel." Appeal dismissed. See also [Fanta \[2021\] EWCA Crim 564](#) and the comments of the CACD about the need to carefully substantiate complaints against trial counsel].

4. FRESH EVIDENCE

CCRC reference – exceptional circumstances (no previous appeal) – DNA – Bad character evidence of alternative suspect - Retrial

[Mohammed \[2021\] EWCA Crim 201](#)

The CCRC referred M's two convictions for indecent assault to the CACD. The basis for the reference was that 'fresh' DNA evidence undermines the reliability of the identification evidence upon which the prosecution case rested entirely.

M had not previously appealed against conviction. The CCRC has a discretion in exceptional circumstances to refer a case to the CACD even where there has been no appeal. In this matter the CCRC determined that it is highly unlikely that it would have been possible for the appellant or his representatives to readily obtain all the information on which the reference is founded, namely the information obtained from the Police National Computer and Database relating to another man, whose DNA profile is a good match for that found on a potentially incriminating article found at the scene.

M had been convicted in 2004. The CCRC conducted an investigation in 2019. Some of the original forensic material was still available. This included a sample swabbed from the mobile phone that was found at the scene of one of the assaults in July 2001. The sample had been DNA-tested as part of the police's initial investigation, which showed only that the DNA sample did not come from the appellant, but it did not show whose DNA it was, or could have been. The CCRC arranged for further DNA testing of the sample and a comparison with the NDNA database. In the opinion of the reporting scientist, one profile "appeared to be a good match" for the partial profile obtained from the mobile phone swab and related to

a male, S.

The CCRC investigation revealed that S was more likely to match the descriptions of the assailant than M, that S had a caution for a sexual offence in the same area, at around the same time as these assaults. The CACD held that the caution would have been admissible at M's trial. (s.100 (1)(1)(b) Criminal Justice Act 2003.)

Significantly, in terms of fresh evidence, it would have been impossible to match S to the phone in 2001, for his DNA would not appear on the NDNAD data base until 2003.

"The evidence was not available to be produced before the intervention of the CCRC and affords a ground for allowing the appeal. It would have been admissible in the proceedings. It does completely transform the landscape. The evidence that was available is given an entirely different and 'fresh' perspective." Appeal allowed.

The CACD refused the prosecution request for a retrial.

Commentary

CCRC and exceptional circumstances/no previous appeal: By its very nature there is no definition of "exceptional circumstances". The CCRC Casework Policy on this term - *CW-POL-06: Exceptional Circumstances* - is available on the [CCRC website](#).

S.23 Criminal Appeal Act 1968: Fresh evidence: The CACD considered the criteria in s.23 including the fact that the evidence could not have been available at trial (and so there was a reasonable explanation for not having adduced it – although the absence of such an explanation is not automatically determinative of an application to adduce fresh evidence).

The overarching test for admissibility of fresh evidence is whether it is in the interests of justice for the CACD to admit it. It clearly was in this case. As the Court noted, it *impacted* on and undermined the central features of the prosecution case (identification). The evidential landscape that was placed before the jury was transformed by the fresh evidence.

[Contrast this case with [Bolton \[2021\] EWCA Crim 689](#) where it was argued that the fresh evidence undermined the complainant's evidence in that "the

new evidence sharpens the focus on the nebulous picture left to the jury in so far as dates [of the offences] are concerned.” However, the CACD concluded that “the new evidence does not create a significantly different emphasis or background that renders the convictions unsafe.” See also [Hardy \[2021\] EWCA Crim 635](#) where the CACD held that new evidence, consisting of reports detailing text messages between H and the complainant, were capable of undermining the complainant’s evidence in relation to two counts, but that did not impact on the other 3 counts that resulted in convictions.]

Retrial: The CACD refused the Crown’s application on the basis of the age of the convictions, the fresh evidence and the vulnerability of M arising from his mental state. See also [Akle and Bond \[2021\] EWCA Crim 1879](#) [114]; and generally [Maxwell \[2011\] 1 WLR 1837](#) SC.

Fresh evidence from Appellant – not capable of belief – approach to fresh evidence appeals

[Barker \[2021\] EWCA Crim 603](#)

B appealed against his conviction for robbery. (His application for leave was referred to the full Court by the Registrar.)

The robbery had been recorded on a mobile phone. On appeal it was accepted that if B had been the person who had recorded it provided him with an alibi and he could not have been the robber. However, at trial a different defence of alibi had been put forward, which B later stated was “wrong” and resulted from a muddle about timings.

The fresh evidence comprised the video clip, and evidence from B and another witness.

The CACD found that the false alibi at trial was advanced dishonestly and that the dishonesty continued on appeal, and that the fresh evidence was neither capable of belief, or was there a reasonable explanation for failing to adduce it at trial.

Commentary

Towards the end of the judgement the CACD

considered the approach that should be taken in appeals based on fresh evidence where applying the “jury impact test” set out by Lord Bingham in [Pendleton \[2000\] EWCA Crim 45](#) (see para 19) would be artificial.

Edis LJ stated that:

“The “jury impact” test is a mechanism in a difficult case for the Court of Appeal to “test its view” as to the safety of a conviction. In this case it is necessary to be clear about what this hypothetical jury would see and hear. It is probably best to check this impact by imagining a re-trial in which the jury heard the evidence which was placed before us, and then observed cross-examination about the evidence given at trial. In other words, the only useful test imagines a jury at a retrial should there be one.” [Emphasis added.]

In the present case there was not only the fresh evidence relied upon by the appellant to support his new alibi. There was also the evidence given before the CACD relating to the false alibi given at the earlier trial. What would the jury have made of both?

Appellate courts are generally wary of accepting an appellant’s change in the account given at trial. As to the difficulties in relying on new psychiatric evidence based on the Appellant’s new (post trial) account see [Adrian Jones \(Decd\) \[2021\] EWCA Crim 929](#) [The Appellant was represented by Paul Taylor QC]; and [Cobley \[2021\] EWCA Crim 954](#).

Similar but different difficulties arise where the fresh evidence is a retraction by a witness of allegations they made at trial. See [Maharaj v Trinidad and Tobago \[2021\] UKPC 27](#) [Mr. Maharaj was represented by [Edward Fitzgerald QC](#).]

Fresh evidence - Non-disclosure – CCRC reference – Prejudicial publicity

[Warren and others \[2021\] EWCA Crim 413](#)

The CACD 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 appeals involved grounds relating to the destruction of original witness statements, non-disclosure and prejudicial publicity during the trial. See the [commentary](#) on this case by [Annabel Timan](#).

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.

Challenging trial prosecution experts on appeal

[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? See the commentary by [Katy Thorne QC: Failings of prosecution trial experts as a ground of appeal](#).

Katy appeared in Byrne & others.

Fresh evidence and victims of modern slavery

Issues relating to fresh evidence arose in a number of appeals relating to victims of modern slavery.

In [Brecani \[2021\] EWCA Crim 731](#) the CACD considered whether "a conclusive decision made for administrative purposes by the Single Competent Authority (part of the Home Office), on written materials applying the balance of probabilities, that a person is a victim of modern slavery admissible in evidence in a criminal trial?"

In [Abdulahi \[2021\] EWCA Crim 1629](#) the CACD admitted the CCRC's statement of reasons (in relation to a decision not to refer) and appendices, which include the documents obtained by the CCRC in relation to the original criminal proceedings, and the First-tier Tribunal judgment; extracts from a Home Office subject access request; evidence of employment and qualifications; leave to remain determinations. [[Ben Newton](#) represented the appellant.]

[AAJ \[2021\] EWCA Crim 1278](#) the appeals concerned the forced criminal exploitation of the appellant whilst under the age of 18. The CACD admitted new

evidence in the form of social services records, the positive reasonable grounds and positive conclusive grounds decisions of the SCA; a clinical psychology report.

5. EVIDENTIAL ISSUES

[A, B, D, & C \[2021\] EWCA Crim 128 \(Encro\)](#)

The issue in this appeal was whether evidence obtained from a mobile phone system known as EncroChat, which was marketed to its users as totally secure, can be admitted in evidence in criminal proceedings or is excluded by the Investigatory Powers Act 2016. The main question was whether the communications were intercepted at the time they were being transmitted or, as the judge found, were recovered (intercepted) from storage. If the judge was right, subject to a number of subsidiary arguments, the evidence would be admissible.

See the commentary on this case by [Peta-Louise Bagott](#) – [Think twice before sliding into EndoChat DM's](#).

Bad character – non-defendant

[A \[2020\] EWCA Crim 1687](#)

The key question addressed in this appeal was the admissibility of non-defendant bad character evidence under the second limb of s.100 Criminal Justice Act 2003 – that of "substantive probative value".

See the [commentary](#) on this case by [Tayyiba Bajwa](#).

Summing up – misdirections - cross-admissibility, hearsay, good character, bad character

[BQC \[2021\] EWCA Crim 1944](#)

The CACD quashed 26 counts relating to offences of sexual abuse of four different complainants over a period of some 13 years.

The four grounds of appeal related to:

1. The judge's failure to provide her directions of law

to the jury in writing, or in draft form to counsel for discussion in advance.

2. There were misdirections in relation to cross admissibility, previous complaint, good character, bad character;
3. The topic of recent and first complaint;
4. The hearsay evidence was wrongly admitted.
5. The evidence of the allegations of abuse by BP was wrongly admitted as bad character evidence.

The CACD concluded that the oral directions were seriously flawed [73] and that [75].

"The absence of an opportunity to consider the directions of law in writing, either in advance or when being given orally to the jury, was a very real hindrance to the defence in the fair conduct of the trial, quite apart from its adverse impact on the judge's function to give clear and correct directions of law and the jury's ability to perform their function of correctly applying the law."

The appellant was represented by [Sarah Elliott QC](#) and [Farrhat Arshad](#).

6. ELEMENTS OF OFFENCES

Open and closed conspiracies

[Gates \[2021\] EWCA Crim 66](#)

"There is one issue before the Court. It is argued that all persons with whom it was said by the Prosecution that the appellant actually conspired, were found not guilty so that the verdict of the jury, to the effect that the appellant was guilty of conspiracy, was illogical and inconsistent, and should be set aside. The Crown say that the indictment was that the appellant conspired with the other defendants, or some of them, or with other persons unknown. This was an "open" conspiracy. The Crown argue that the jury must have concluded that the appellant conspired with persons unknown, which was a verdict open to them."

See the commentary by [Daniella Waddoup](#): [Conviction in respect of an "open" conspiracy does not require the conviction of named alleged co-conspirators](#).

Assisting unlawful immigration to member EU State – Interpretation of "Entry" in Immigration Act, ss.11 and 25

[Bani, Mohamoud, Rakei, Zadeh \[2021\] EWCA Crim 1958](#)

These cases were grouped together because they all involved the same issue. Each of the four appellants was alleged to have steered a Rigid Hulled Inflatable Boat ('RHIB') from France towards the United Kingdom, which was carrying migrants. All on board each of the four RHIBs were seeking to arrive in the UK without having been given prior leave to do so. None of those in the vessels was a citizen of a member state of the EU. Each appellant was convicted of an offence contrary to section 25 of the Immigration Act 1971 ("the 1971 Act"). (Assisting unlawful immigration to member State).

Following [Kakaei \[2021\] EWCA Crim 503](#) it is necessary for the prosecution to prove that a person charged under section 25 in cases like this did acts which facilitated the "entry" without leave into the United Kingdom of a non-EU citizen. "Entry" is a defined term in s.1(1).

"The question common to these applications is how this aspect of the law should be dealt with in prosecutions under section 25 of the 1971 Act. "

The CACD quashed the convictions. It concluded that [119]:

"A matter which the prosecution must prove, that at the time of the facilitation the appellant knew or had reasonable cause to believe that his act was assisting entry or attempted entry into the United Kingdom without leave, was not properly investigated and was then not left for the jury to decide. We cannot accept the submissions of the prosecution that convictions are safe notwithstanding these failures. The errors were too fundamental for that."

[Kate O'Raghallaigh](#) (led by [Tim Owen QC](#) of [Matrix Chambers](#)) represented one of the four appellants, [Ghodratallah Zadeh](#).

7. ABUSE OF PROCESS

Abuse of process – non-disclosure – CCRC referral

Hamilton & others v Post Office Limited

<https://www.bailii.org/ew/cases/EWCA/Crim/2021/21.html>

<https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html>

<https://www.bailii.org/ew/cases/EWCA/Crim/2021/1874.html>

The CCRC referred to the CACD forty-one cases in which sub-postmasters and mistresses [SPM] and other Post Office employees were convicted of offences of false accounting, theft and fraud. The prosecutions were brought by Post Office Limited, [POL] and in most cases relied on records kept by the Post Office's Horizon accounting system. The reliability of Horizon was subsequently called into question, and adverse findings were made in civil litigation, comprising a group action in which hundreds of former Post Office employees were the claimants.

The basis of the CCRC's reference was that

- i) POL could not show that the Horizon figures were correct, nor could they show when or how the alleged shortfalls occurred.
- ii) There was no direct evidence that the applicants had stolen any money.
- iii) The applicants had no choice but to falsify accounts: they would not have been able to continue trading if the books did not balance, and they were in fear of having their branches taken away from them.
- iv) The terms of their contracts were unfair, and there was no motivation for them to raise Horizon problems: if they did so, POL failed to investigate properly and would inevitably hold the SPM responsible for any monies which Horizon showed to be missing.
- v) POL failed to make adequate disclosure to the defence in the criminal proceedings of data on the Horizon system.

The reasons given by the CCRC gave rise in each case to two grounds of appeal:

- i) Ground 1: the reliability of Horizon data was essential to the prosecution and, in the light of all the evidence including the findings in the High Court [the Civil action], it was not possible for the trial process to be fair;
- ii) Ground 2: the evidence, together with the findings in the civil action, shows that it was an affront to the public conscience for the appellants to face prosecution.

Those grounds reflect two possible circumstances in which criminal proceedings may be found to have abused the process of the court.

The CACD quashed the majority of the convictions.

Commentary

This judgement is essential reading for anyone considering running an abuse of process application, especially in relation to non-disclosure of evidence by the prosecution.

Tim Moloney QC and Kate O'Raghallaigh represented Josephine Hamilton and 31 of the other appellants.

In relation to non-disclosure and abuse of process see also [Akle and Bond \[2021\] EWCA Crim 1879](#). The CACD quashed convictions for conspiracy to give corrupt payments, brought by the SFO, after finding that there had been non-disclosure of material that would have assisted A in presenting an abuse of process argument / argument that evidence should be excluded under s.78 PACE. A "was prevented from presenting his case in its best light." The CACD refused to order a retrial. [114]

8. JUROR ISSUES

Juror with autism – failure to discharge juror

[Lally \[2021\] EWCA Crim 1372](#)

M appealed against his conviction for attempted murder. One of the two grounds contended that the conviction was unsafe by virtue of the fact that the judge failed to discharge a juror with autism who remained on the jury.

At the close of the prosecution's opening, one of the jurors sent a note to the judge indicating that she had autism and expressing a concern that she would have difficulty dealing with concepts such as intention and emotion relating to other people. The judge invited her into court with both counsel and the appellant present, but in the absence of the other members of the jury. He asked her a series of questions directed at whether she felt she could be true to her oath. She responded equivocally that she did not know. She was asked about her abilities to deal with matters in day-to-day life and she made clear that she could deal with drawing inferences on a day-to-day basis but that the experience of being in court was new to her and that in the context of the courtroom she was unsure. Again, asked if she could be true to her oath, she told the judge frankly that she was concerned she could be a hindrance and that when "other people will interpret something they'd have to explain to me why they've done that and that will then backfire". The judge said that his preliminary view was that jurors frequently relied on others, for example, to explain evidence and he gave an example of a situation where a juror might have to ask questions of other jurors; or a juror with particular qualifications might be in a position to explain to other jurors with less understanding of those matters, the position on a particular topic.

The judge ruled that having listened to the responses that the juror gave and to her thoughtfulness, she was a juror who could be true to her oath and she should not be discharged.

L argued on appeal that "the appellant was entitled to be tried by 12 independent jurors and that in light of the responses given by the particular juror and the emotional nature of this trial, the judge was wrong not to discharge her and to proceed with only 11, as he

described it, independent jurors in the circumstances." [31] The CACD disagreed and concluded that neither the procedure adopted by the judge in this case nor the ruling he made, can be criticised. This conclusion was based on the following matters: [32-35]

(a) The Judge had the benefit of hearing and seeing the juror give answers to the questions asked;

(b) The judge made an assessment of the juror as a high functioning individual who in everyday life accepted that she made assessments of the facts and drew the sorts of inferences from facts that she might have to draw in this particular case;

(c) The advantage of a jury of 12 people made up of citizens randomly selected in this country is that they are inevitably people who come to a trial with different lived experiences and different abilities. This particular juror's autism is but one aspect of that variety. People with different mental and physical abilities and disabilities make up the society from which jurors are selected and those differences are not a basis for excluding anyone, provided that a juror can be faithful to his or her oath in trying a defendant on the evidence.

(d) "We are fortified in reaching that conclusion by the fact that neither the juror in question nor any other member of this jury, raised any concern whatever about her ability to understand the evidence during the course of the trial, or to participate in the verdicts that were reached on a unanimous basis."

Commentary

It's 12 years since I represented Mr. Jeff McWhinney, the chief executive of the British Deaf Association. Jeff had been summonsed for jury service. He replied accepting but asking for a sign language interpreter. Jeff was profoundly deaf. The Crown Court responded by automatically discharging him from being a juror. I represented him in a little used procedure to appeal against a refusal to be allowed sit as a juror. The two main obstacles were, firstly that he would receive all the evidence through a third party – the interpreter. This was not considered to be insurmountable. Secondly, he would need a thirteenth person in the jury retirement room – the interpreter. That was seen as an incurable irregularity and the refusal to let him sit was upheld.

See <https://www.theguardian.com/uk/1999/nov/10/claredyer>.

This bar is about to be removed and the [Police, Crime, Sentencing and Courts Bill](#) will amend the existing prohibition on third parties being in the jury room and allow sign language interpreters to assist when it is in the interests of justice to do so.

The point of telling you about this is that a disability is not an automatic bar to sitting on a jury. However, in order to ensure that the juror can participate effectively it may be necessary to make “reasonable adjustments.” In some cases, this may not be possible or not in the interests of justice to do so. [The Crown Court Compendium states that: [2-2, para 3]

“The judge has the discretion to stand down jurors who are not competent to serve by reason of a personal disability: CrimPD 26C.3..... “

One of the issues raised by the Lally case is how to ensure that a Court faced with similar issues has sufficient information to determine what reasonable adjustments are necessary. The Equal Treatment Bench Book [ETBB] has a section on jury service and disability (p.104) and does identify a series of potential difficulties with the legal process that “Autistic parties and witnesses, depending on the nature of their autism, may have” in court. [p.390]. The footnote to this section states: “Difficulties with the court process have been identified with the assistance of the National Autistic Society’s training team.” These potential difficulties may apply in the same way to jurors.

The reason that the ETBB sets out these issues is in order to assist judges in understanding what reasonable adjustments should be made to try and ensure that the party, witness or juror can participate effectively in the proceedings. These include communication, breaks, and explanations, but the ETBB cautions “...every autistic person is different. Always ask the individual.” The ETBB states:

“The judge must consider a disabled person’s right to expect reasonable adjustments which might allow him or her to be an effective jury participant. The decision must be compatible with the defendant’s right to a fair trial.” [p.105]

However, the fundamental difference between a

party or witness and a juror is that the Court is likely to have detailed medical information about the party or witness, but will not necessarily do so in relation to the juror – although the jury summons requests information on impairment or disability from potential jurors. Consequently, it may be difficult for the Judge to make “reasonable adjustments” without knowing the full background.

In light of the above, the judgement in Lally raises a number of concerns:

- a) Firstly, the Judge does not appear to have had any information about the juror’s challenges other than those recounted by the juror herself. Understandably, there was no expert diagnosis or opinion as to what the difficulties may be or how they can be ameliorated. The question is whether the judge should have sought such information. This in itself would engage the juror’s article 8 rights, as well as the defendant’s article 6 rights.
- b) Secondly, whilst the discussion with the juror is not set out in detail, there is no reference to the Judge asking what assistance/adjustments she may need to participate effectively as a juror, or of any such assistance being provided.
- c) Thirdly, the CACD’s reliance on “the fact that neither the juror in question nor any other member of this jury, raised any concern whatever about her ability to understand the evidence during the course of the trial, or to participate in the verdicts that were reached on a unanimous basis” is open to challenge. It may be seen as unlikely that the juror would raise the matter again having already done so and having her concerns dismissed. Moreover, it may not have been obvious to other jury members what difficulties the juror may have been experiencing.

Having identified the various concerns, challenging such a similar decision on appeal is fraught with difficulties. As the CACD said, the judge heard the juror, and exercised his discretion. Much will depend on the disability in question, the issues in the case, what information is available regarding the disability, and what reasonable adjustments should have been, but were not, implemented.

9. CHALLENGING DECISIONS OF THE CRIMINAL CASES REVIEW COMMISSION

New Rights of Appeal for Judicial Review of CCRC decisions

Paul Cleeland v Criminal Cases Review Commission [2021] EWCA (Civ)

A preliminary ruling in this case given by the Court of Appeal (Civil Division) on 8 December has established an important point of jurisdiction in cases of judicial review of decisions of the CCRC. Whilst the final judgement is awaited, both Counsel for the CCRC and the Court agreed with the Applicant's submission that the Judicial Review of a decision of the CCRC should no longer be considered a 'criminal cause or matter' in the light of the earlier decision of the Supreme Court in the case of *re McGuinness* [2020] UKSC 6 (relating to the Judicial Review of parole board decisions). By its ruling the Court of Appeal has established, for the first time, that a convicted person who is turned down by the CCRC can pursue a Judicial Review in civil proceedings. If refused leave, he can renew his application to the Court of Appeal (Civil Division) and he can also appeal an adverse decision at a substantive hearing to the Court of Appeal (Civil Division). Previously it had been held in a series of cases, including *ex parte Saxon* (2001) EWCA Civ 1384 and *ex parte Garner* (1990) WL 753269, that the Judicial Review of a CCRC decision was a 'criminal cause or matter'. That meant that, for decades, the only remedy for an adverse decision from the High Court was to seek a certificate that the case involved a 'point of law of general public importance' and then to seek to obtain leave from the Supreme Court. The Court of Appeal's ruling establishes additional important procedural rights for those seeking the redress of adverse decisions by the CCRC. It gives them new rights where they are refused leave to apply for Judicial Review by the High Court and can now renew their application to the Court of Appeal (Civil Division). And it gives them a right of appeal against adverse substantive decisions by the High Court to the Court of Appeal (Civil Division) rather than forcing them to seek to obtain a certificate of a 'point of law of general public importance' and then seeking the exceptional leave from the Supreme Court to appeal.

Final judgement on Mr Cleeland's application to appeal is awaited.

This ruling has considerable implications for Judicial Review of equivalent powers in other jurisdictions, typically vested in the executive, to refer cases back to the Court of Appeal (Criminal Division) in the light of new evidence. Such powers are vested in the executive in many Commonwealth Caribbean jurisdictions and other former British colonies where there is legislative provision for the executive to refer convictions back to the Court of Appeal (Criminal Division) in the light of new evidence. If the decision is followed in those other jurisdictions then the appellate rights of those refused a reference back will be considerably extended in those jurisdictions too.

[Edward Fitzgerald QC](#), [Richard Thomas QC](#) and [Abigail Bright](#) represented Mr Cleeland in his continuing fight to have his 1973 murder conviction overturned. [Paul Taylor QC](#) also assisted with his advice.

If you would like to discuss any of these cases with [Paul Taylor QC](#), please [click here](#).

NORTHERN IRELAND – APPEALS AGAINST CONVICTION

Sexual offences – demeanour of complainant – separate consideration of complainants – danger of contamination

Appellate procedure – application to appeal out of time – impact of misdirection on safety of conviction

[RD \[2021\] NICA 60](#)

RD was convicted of five sexual offences after a trial in 2017. This was his renewed application for leave to extend time and appeal against conviction. The full Court refused to grant an extension of time and dismissed the appeal.

The applicant was convicted of four offences of rape in relation to X (his son) and one offence of sexual assault in relation to Y (his daughter). He was sentenced to a 14 year custodial sentence made up of 7 years' imprisonment and 7 years on licence. He was also placed on the Sex Offenders Register indefinitely and he was made the subject of a Sexual Offences Prevention Order.

There were six grounds of appeal:

- (1) That evidence given by the mother in respect of X's behaviour and demeanour over a period of time should not have been admitted.
- (2) That the judge's direction in relation to separate consideration of the complainants was inadequate.
- (3) That there was no evidence to support the alternative count 9 in relation to child Y and the judge's direction was inadequate in relation to that.
- (4) That the judge's direction was inadequate in relation to the mother's evidence in that he did not state that that evidence is not independent.
- (5) That there was an improper direction given to by the judge to the jury regarding the standard of proof in relation to the defence medical expert.
- (6) That the judge failed to give an adequate direction in relation to the dangers of contamination.

The judgement of the Court was given by Keegan LCJ. It contains important analyses of the authorities

relating to appeals out of time, and the approach to complaints about misdirections in the charge.

Commentary

(a) Application to appeal out of time: [10]. The application was 2 years and 4 months after conviction. The Court referred to the approach to such applications based on "the principles set out in [R v Raymond Brownlee \[2015\] NICA 39](#).

..."(ii) Where there has been considerable delay substantial grounds must be provided to explain the entire period. Where such an explanation is provided an extension will usually be granted if there appears to be merit in the grounds of appeal.

...

(vi) Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed."

Comments: In terms of explaining the delay a chronology, supporting statement and documents are essential. However, in support of para (vi) of *Brownlee*, where there is substantial merit in the appeal but limited or no explanation for the delay, it is also worth bearing in mind the observation of Lord Bingham in *Ashley King [2000] 2 Cr App R 391* that where there was merit in the ground, it would not be in the interests of justice to refuse to extend time where the likely result would be a reference back by the CCRC at a much later date.

(b) The relevance of the fact that there were no requisitions from either the prosecution or the defence in relation to the Judge's charge. [14-17]: "The failure to raise requisitions is of course not determinative of the criticisms now raised by the applicant... However, the fact that those involved in the trial did not feel it necessary to raise any issues with the judge's charge suggest that there was no contemporaneous concern that he erred in any way."

Comments: The failure to take a point at first instance or an agreement to the point at trial is not a procedural bar to raising it on appeal. However,

it is a relevant matter for the appellate court to take into account when it assesses the validity of the later complaint and its impact on the safety of the conviction. In *AG* [2018] 1 WLR 5876 the Court stated that “Such an omission is not dispositive of an appeal based on errors in a summing up, but is nevertheless a matter to be borne in mind.”

(c) Ground 1 - the judge erred in admitting evidence given by the mother regarding X's behaviour and demeanour [45], [46-50]. The Court analysed the authorities relating to the admissibility of evidence of the demeanour of complainants when making allegations in sexual abuse cases.

(d) Ground 2 - the judge's charge was inadequate in how it dealt with separate consideration of the complainants [54]. The Court accepted that, whilst the judge had warned the jury to consider each charge separately, he had not warned that one complainant's evidence could not be used to establish guilt in relation to another complainant's evidence. However, “This is not a case where the judge misdirected the jury in relation to this issue. Rather this case comes down to a question of omission in that a separate specific direction was not given to the jury to warn them not to use one complainant's evidence to support the allegations of the other.” [58] The Court examined the effect of this non-direction in this case [71] and applied the test set out in *R v B* [2019] 1 WLR 2550: “The issue is whether the judge's directions risked distorting the direction of the jury's deliberations to such an extent as to render the verdicts unsafe.” Keegan LCJ added that “what the court should do is look at the case in the round and notwithstanding that there may be some omission, the entirety of the judge's charge must be considered in the context of the facts of this case.” [72] “Having examined the evidence and the arguments, we accept that there was a valid legal argument to make in relation to the adequacy of the charge. However, the outworking of this does not lead to any unease on our part in terms of the safety of this conviction for the reasons we have given. We have reached this conclusion on the particular facts of the case.” [74]

[The Court applied the same approach to Grounds 4 and 5]

(e) *Ground 6 – The Judge failed to give a contamination warning* [79]

The Court rejected this ground. [80] “. The reality in this case is that a contamination argument was never part and parcel of the defence case. Therefore, this ground of appeal is totally divorced from the reality of the case that was put before the court....”

Comments: A misdirection alone will not automatically render the conviction unsafe. As here, the appeal court will analyse the extent of the error, the issues in the trial and the potential impact on the jury's approach to the consideration of the evidence. The irregularity must relate to a live issue in the trial.

*Appeal against conviction based on guilty plea -
Non-disclosure – fresh evidence – abuse of process -
entrapment*

John Hamilton Grace [2021] NICA 21

In 1993, the appellant was the driver of a minibus stopped by an RUC patrol on Ballygomartin Road, Belfast. In the rear of the minibus, police found a holdall containing firearms and ammunition. On 1 December 1993, the appellant pleaded guilty to possession of firearms and ammunition with intent by means thereof to endanger life or cause serious injury to property or to enable some other person by means thereof to endanger life or cause serious injury to property.

In 2017, the appellant lodged an appeal against conviction on the basis that his conviction was unsafe as a result of the undisclosed involvement of a state agent, Colin Craig, who was alleged to have been employed at the material time as a covert human intelligence source. It was contended that the appellant had been deprived of the opportunity to pursue an application to stay the proceedings as an abuse of process on the basis of entrapment and that no trial should have taken place.

The judgement of the Court was given by Morgan LCJ. It set out the NICA's approach to issues of fresh evidence, non-disclosure and the impact on the safety of a conviction based on a guilty plea.

Commentary

(a) The central issues that the appellant had to

address were his explanation for pleading guilty (and why that plea should be set aside) and the mitigation put forward¹, his account of what he asserted actually happened regarding the offence, and his account of how he obtained the information regarding Craig and his alleged role in the offence. The only effective way of adducing this evidence on appeal would be to prepare a statement addressing the issues and then (if required) to give evidence before the NICA. (Under s.25 CAA(NI) 1980 the Court is required to consider, inter alia, whether new evidence is “credible”.) G’s account was initially contained in the skeleton argument, but an application was later made to admit a statement from the appellant under [section 25 of the Criminal Appeal \(Northern Ireland\) Act 1980 \(“the 1980 Act”\)](#) [5].

(b) The Court analysed G’s statement in the context of the evidence of the case, and the previously non-disclosed material and concluded that “There are numerous difficulties with the account contained in the appellant’s proposed statement.” [13], and [20]

“We do not consider, therefore, that this account which he proposed to give approximately 24 years later was capable of belief. We also consider that he had every opportunity to explore this account with his counsel and solicitors prior to his decision to enter a plea of guilty. This was a voluntary plea which should not lightly be set aside.”

(c) The Court reviewed the law relating to disclosure [22] and entrapment [25], but concluded that “we are satisfied that there was no failure of disclosure in this case and no basis for an argument of abuse of process based upon entrapment. The conviction is safe and the appeal is dismissed.”

[See also [Workman \[2021\] NICA 20](#) where similar issues were considered]

Circumstantial evidence - Imitation firearms – Possession

[Murphy \(John\) \[2021\] NICA 16](#)

A conviction for possession of an imitation firearm with intent was unsafe in circumstances where the trial judge had said that the intention required to found the offence was a more generalised and lesser

intent than that needed to convict for possession of a quantity of ammunition with intent.

Alternative verdicts

[Maybin \[2021\] NICA 12](#)

M was convicted by majority verdict of a single offence of wounding with intent contrary to [section 18 of the Offences Against the Person Act 1861](#). The appeal related to the failure of the trial judge to leave an alternative verdict of [section 20](#) assault.

Prior to trial the prosecution had offered a plea to s.20, but that M had rejected this on the basis that he had done nothing wrong. M also instructed his defence team that he did not want an alternative s.20 count left to the jury. Defence counsel told the prosecution that it was an “all or nothing” defence that he had to run.

At the conclusion of the evidence, the trial judge raised the issue of whether she should leave the alternative [section 20](#) offence. The trial judge was informed that the “agreed position” was that she should not.

At the appeal hearing prosecution counsel acknowledged that intent would have been a core issue in this case and that “... a jury could have come to the view that the appellant did not intend to inflict really serious harm in the heat of the moment but nonetheless had committed the unlawful assault.” He also acknowledged that it was open to the jury to conclude on the evidence that the blows with the hurley stick were deliberate (and not in self-defence) but that the appellant did not have the necessary intent for [section 18](#) (i.e. intent to inflict grievous bodily harm). This reflects the fact that a jury is entitled to conclude that self-defence has been disproved by the Crown but equally find that the defendant didn’t intend to cause the injury that was sustained or find that it was a deliberate blow from the outset but not necessarily with the specific intention to cause a wound.

Treacy LJ stated that “The decision as to whether to leave an alternative verdict to the jury is not a matter for counsel to decide, as stated by Lord Bingham at para 23 in [R v Coutts \[2006\] 1 WLR 2154](#).”

“The public interest in the administration of justice is, in my opinion, best served if in any trial

on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support..."

In quashing the conviction, Treacy LJ stated [14] that:

"Even if both counsel are agreed on the issue of whether an alternative count should be left to the jury, they are still required to remind the judge of her/his "greater and more onerous" independent function and responsibility in relation to alternative verdicts."

Commentary

Coutts emphasised the consequences of failing to leave a viable alternative [61]: An appellate Court should 'save in exceptional circumstances find a miscarriage of justice, where the judge had erred in failing to leave a lesser alternative verdict obviously raised by the evidence'.

In *Hodson* [2009] EWCA Crim 1590 the CACD stated that it is particularly important that the alternative verdict is left to the jury where the offence charged requires proof of a specific intent and the alternative offence did not.

CCRC reference – Confidential annex to Statement of Reasons - Confessions – Interviews – Reliability - Disclosure – Identification - Terrorist offences

[Devine \(Michael\) \[2021\] NICA 7](#)

D had been convicted in 1981 when he was 19 for offences including attempted murder and possession of firearms with intent. The convictions were quashed following a referral by the Criminal Cases Review Commission which raised evidential issues questioning the reliability of purported admissions made in police interviews and the conduct of the interviewing officers.

The NICA provided guidance in respect of the CCRC's disclosure policy and the procedural framework to be applied in every case where a CCRC referral featured the disclosure of confidential material.

The prosecution case at trial alleged that D had made full admissions during three police interviews. He

and his co-defendant, independently and without any opportunity to confer, had both complained to the police doctor that false admissions had been recorded by the interviewing officers. During a fourth interview the appellant denied having made the admissions and, in a later interview with different officers, alleged that the original interviewing officers had recorded in writing things he had not said.

The judge found that the appellant's claims were fabricated and that the officers' interview notes were genuine and accurate.

The appellant was convicted solely on the basis of his admissions.

In this appeal based on the referral by the CCRC McCloskey LJ gave the judgement of the Court.

1. Safety of the convictions

(a) Cumulatively there were a number of issues which generated unease about the safety of the convictions.

(b) These included the failings in the Judge's analysis of the evidence, specifically:

i) His finding that the interviewing officers had been "truthful and convincing witnesses". This was unsustainable.

ii) His withering condemnation of the appellant's veracity omitted the essential exercise of considering the consistency of the appellant's evidence.

iii) He did not engage with the evidence regarding the complaints made to the police doctor, evidence which bore on his assessment of the respective veracity of the testimony of the interviewing officers and the appellant.

(c) Furthermore, the prosecution adduced eye-witness evidence that the person who hijacked the motorbike had a moustache. It was not disputed that that could not be a description of the appellant, meaning that there was a direct conflict between that evidence and the appellant's alleged admissions. The judge did not address that in his judgment, when it was incumbent on him to do so.

(d) It was impossible to overlook the similarities between the conduct attributed by the appellant

to one of the interviewing officers and alleged conduct by that officer in a separate case. That concern was aggravated by other post-conviction evidence relating to the officer's professional conduct

(e) Cumulatively, those sources of evidence questioned the reliability of the admissions attributed to the appellant and fortified reservations about the safety of the convictions (see paras 62-73 of judgment).

2. CCRC referrals: disclosure

(a) The CCRC material included a "Confidential Annex". The CCRC's powers and duties relating to the acquisition and disclosure of documents and other materials were governed by a tailor-made statutory regime under the [Criminal Appeal Act 1995 s.17](#) to [s.25](#). Practitioners should be aware of the CCRC's policy on disclosure, which should inform their interaction with the CCRC in appropriate circumstances. The policy was not law and, in the event of any conflict, had to yield to relevant statutory provisions and common law principles, *R. v Secretary of State for the Home Department Ex p. Hickey* [1995] 1 W.L.R. 734, [1994] 11 WLUK 366 applied.

(b) The policy also had the potential to feature in judicial review proceedings.

(c) Unlike the usual procedure at trial and appeal, the court had a separate responsibility to consider the disclosure of confidential material received from the CCRC, *R. (on the application of Nunn) v Chief Constable of Suffolk* [2014] UKSC 37, [2015] A.C. 225, [2014] 6 WLUK 540 followed, *R. v Morrison (Daniel)* [2009] NICA 1 considered.

The NICA also highlighted the desirability of a procedural framework to be applied where a CCRC referral featured a confidential annex.

Commentary

Fresh evidence undermining the interviewing officer's credibility: The NICA considered material from a variety of sources that undermined one of the interviewing officer's [DS Harper] credibility. [36] These were matters unrelated to the appellant's case including a CACD judgement quashing a murder

conviction that had been based, to a significant degree, on a confession written down by DS Harper; and the findings of a major police inquiry in which DS Harper appeared to have misled senior colleagues and politicians with significant consequences. Section 25 (1)(a) CA(NI)Act 1980 provides a power for the court to order "the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;". This would include the material ordered here [See also eg, *Callaghan* [1998] 66 Cr App R 681], as well as in related or unrelated civil proceedings [for a discussion of this area see *Dorling* [2016] EWCA Crim 1750 (civil judgments undermined the credibility of prosecution witnesses) But cf. *L* [2007] 1 Cr App R 1 (issue estoppel, care proceedings in family court on same issue not admissible in criminal proceedings).]

If you would like to discuss any of these cases with [Paul Taylor QC](#), please [click here](#).

THE CARIBBEAN – APPEALS AGAINST CONVICTION

The Eastern Caribbean Court of Appeal

Sexual offences – summing up – failure to direct on recent complaints – Proviso - Retrial

[Leon Riley ANUHCRA2019/0004](#)

R appealed against his convictions for serious indecency and rape.

The summing up

The appeal was allowed on the basis that the learned judge did not give any direction to the jury on the law of recent complaints or previous self-serving statements or any directions as to how to use such evidence [29-50]. Accordingly, the judge's failure to direct the jury in this regard was a fatal flaw. [50]

The Proviso

The Court declined to apply the proviso. It stated that:

The test to determine whether the proviso within section 40 of the Supreme Court Act should be applied, is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence. Upon considering the judge's summing-up, it cannot be concluded that a reasonable jury, properly directed and confronted with this evidence would, inexorably have convicted the appellant of the charges against him. That being the position, the proviso cannot be applied. [51-57]

Retrial

The Court considered whether to order a retrial and stated that:

To determine whether or not the proper course is to order a re-trial, this Court considered several non-exhaustive factors which include:

- (a) the seriousness and prevalence of the offence;
- (b) the expense and length of time involved in a fresh hearing;
- (c) the ordeal suffered by an accused person on trial;
- (d) the length of time that will have elapsed

- between the offence and the new trial;
- (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; and
- (f) the strength of the case presented by the prosecution.

The Court also took into account that a new trial should not be ordered if the effect would be to give the prosecution time to strengthen its case. [66]

The Court was also of the view that, the decision requires the exercise of the collective sense of justice and common sense of the judges, who are familiar with local conditions. Applying the factors above, it is in the interest of justice that the question of the appellant's guilt be determined by the verdict of a jury. It is therefore appropriate in the circumstances for this Court to order a retrial.

Commentary

Retrials: In addition to the above list, recent authorities have also referred to the following potentially relevant factors:

- (a) Public confidence in the due application of the law [*DPP v Largesse* [2020] UKPC 16];
- (b) Whether it is an appeal from a first or second trial [*Stubbs v the Queen* [2020] UKPC 27 [167];
- (c) The admission or proposed admission and effect of fresh evidence [*DPP v Largesse*, [53]]

Sexual offence – summing up – s.136 (2) of the St. Lucia Evidence Act – Recent complaint - Proviso

[Gael Dariah SLUHCRAP2017/0012](#)

GD was convicted of rape. He appealed against his conviction on the basis that the learned judge had misdirected the jury in accordance with section 136 (2)(b) of the Evidence Act, specifically he failed to identify the matters that may cause the V.C.'s evidence and VC's husband's evidence (recent complaint) to be unreliable. [18]; or failed to state any reason for not giving the section 136(2) warning.

Section 136 is based on the common law requirement that the trial judge is required to give a warning to the jury in respect of potentially unreliable evidence.

The relevant part of section 136 of the Evidence Act1 reads as follows:

“(1) This section applies in relation to the following kinds of evidence -

...

(e) in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence;

(2) Where there is a jury the Judge shall, unless there are good reasons for not doing so -

(a) warn the jury that the evidence may be unreliable;

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform the jury.”

The Court dismissed the appeal on the basis that:

1. VC’s evidence - There was no need for a warning

(a) The fact that evidence comes within one of the sub-paragraphs in section 136(1) does not automatically give rise to the requirement for the judge to give the warning in accordance with section 136(2). The section is not mandatory but discretionary. [26]

(b) The judge is required to consider the evidence and use his discretion as to whether the warning is necessary. In doing so, the judge should hear submissions from both sides. [26]

(c) If the judge determines that a warning is necessary, then the judge must give the jury all three limbs of the warning in section 136 (2). If the judge determines that a warning is not required, then the judge should give reasons for this decision.[26]

(d) In the present case, the Court rejected the appellant’s arguments that there was evidence that required a warning. The matters relied upon were based on:

i) A conflict of evidence, (a mere conflict in evidence would not be a matter which would cause the V.C.’s evidence to be unreliable and therefore engage section 136[31]), and

ii) a “mere suggestion by counsel” to the VC that “it was difficult to have non-consensual sex in the type of car” (section 136 is only engaged when there is an evidential basis. The mere suggestion by counsel is not a sufficient basis to engage the section 136 warning.) [31]

(e) The learned judge therefore did not err by not giving a section 136(2) warning.

2. VC’s husband’s evidence

(a) VC’s husband had given evidence of what the VC had told him “Zack raped me”. It was submitted by the Appellant that this was hearsay evidence, was admitted as evidence of recent complaint not to show consistency as was the situation at common law, but under the Evidence Act as evidence of the truth. The learned judge was therefore required to direct the jury that the evidence was admitted as evidence of the truth and to give them the warning in accordance with section 136. [32]

(b) Section 136 (1) (a) applies to evidence which falls within the ambit of Division 1 or 3 of Part 4 of the Evidence Act. Evidence of recent complaint is included in section 53 (2) of Division 1 in Part 4. Section 53 of the Evidence Act allows a person to give what would otherwise have been excluded as hearsay evidence. It thus allows evidence of recent complaint to be admissible.

(c) Therefore, the evidence of the V.C.’s husband that, upon arriving at the V.C.’s mother’s home, he saw the V.C. and was told by her that the appellant raped her (recent complaint), was admissible evidence in accordance with section 53. [42] This meant that the evidence would be of a kind that fell within the ambit of section 136 and therefore section 136(2) would apply. [42]

(d) The learned judge gave a direction in relation to the recent complaint evidence, however, this was not in compliance with section 136(2). [42-44]

(e) As indicated above, section 136 is not a mandatory but discretionary provision.

(f) However, the learned judge should have given his reasons as to why no warning was necessary. [42, 44]

(g) In view of the strong case put forward by the prosecution and having found that in the circumstances of this case that there were good reasons for the learned judge to exercise his discretion and not give the section 136(2) warning [44]:

- i) There were no matters that might cause the evidence of the V.C.'s husband to be unreliable.
- ii) There was no contradiction between the evidence of the V.C. and the V.C.'s husband.
- iii) Further, the complaint was made the same evening.
- iv) The evidence of the V.C.'s husband was not challenged. There was simply no cross-examination.

In the circumstances, there was no need for the warning to be given. However, the learned judge should have given his reason why no warning was necessary. [45]

(h) The question which arises is whether the failure to state any reason for not giving the warning in accordance with section 136(2) was fatal.

3. The Proviso

(a) In *Michael Freemantle v The Queen* [1994] 1 WLR 1437 the Privy Council found that having regard to the strength of the prosecution's case, the misdirection in that case did not result in a miscarriage of justice and applied the proviso and dismissed the appeal.

(b) In *Stubbs v The Queen* [2020] UKPC 272 the Privy Council declined to apply the proviso where the misdirection related to the central issue in the case was whether the appellant acted in self-defence. Their Lordships stated that they could not be sure that no miscarriage of justice had occurred since there could have been a different outcome even if improbable, had the learned judge give the proper direction.

"In considering whether the proviso should be applied, the court is required to look at the admissible evidence that was led and determine whether if the jury were properly directed the jury would inevitably have come to the same

conclusion. Applying this approach, I have no doubt that the proviso should be applied. The prosecution presented a formidable case against the appellant. None of the witnesses were contradicted under cross-examination..." [52]

Failing to put the defence case

Junior Meade MNIHCRA2019/0002

The Appellant was found guilty of indecently assaulting a ten year-old girl ("the child").

At the trial, the critical evidence against the appellant came from the child's testimony. The appellant did not give evidence but gave a lengthy caution statement to the police denying the allegations against him. The appellant also suggested that there was an ulterior motive for the charge against him in that the child's mother was using the child as bait against him for financial gain and further, that the child was oversensitised by her mother to the sexual threat men posed.

The appellant appealed against his conviction on the basis that:

- (a) The judge failed to adequately put the appellant's defence to the jury;
- (b) The fresh evidence adduced at trial constituted a material irregularity thus rendering the trial unfair;
- (c) The judge's summation to the jury rendered the verdict unsafe and constituted a material irregularity;
- (d) The judge erred in preventing the defence from seeing the psychologist's notes.

The Court dismissed the appeal.

1. Failure to put the defence case to the jury

(a) Having analysed the summing up in the context of the requirements as set out in the authorities [10-11]³, the Court concluded that [13]:

"It can be seen at once that the learned judge's approach is not what is countenanced by the learning. It is, therefore, not surprising, that Mr. Kelsick was severely critical of the judge's summation and represented that the learned judge did not put the appellant's case to the jury..."

(b) The Court noted in particular that:

"The learned judge then commenced a verbatim recitation of the evidence, reading out at length from his notes the evidence of each witness, entirely devoid of analysis of the issues or relating the evidence to those issues. Having done that, at the end of the summation, he purported to state the respective cases:

"On the one hand, the prosecution has pointed during a 45 minute speech to 10 features of the case which they say show the sure guilt of the defendant. On the other hand the defence points in a 1 hour 45 min speech to a myriad other features of the case which they say point to how the evidence of KH is unreliable so that reasonable doubt properly arises, meaning he is not guilty. I will not summarise each party's points as each has made so many, and I have no doubt the points from these able speeches will be collectively in your minds. It is now your task to say whether you are sure of guilt; if not, you will acquit." [12]

(c) The Court stated that:[18] "The judge is obliged to put the defence case fairly to the jury and to summarise the respective cases of both the prosecution and the defence.... Instead of pointing out what these [myriad other] features were, and summarising each party's case, the learned judge stated that he has no doubt that the points from the able speeches of counsel will be collectively in their minds."

(d) The Court also found that the Judge had failed to "go far enough" when dealing with the caution statement. The Judge said that appellant did not give evidence and was 'entitled to say through his counsel that he relies on his statement under caution'. The Court found that "The learned judge should have gone on to bring to the jury's attention to material in the caution statement which may have assisted the appellant." [14] "in my judgment, merely reading the appellant's caution statement in full as part of the summing up, cannot without more, constitute putting of the defence to the jury. The fact that the appellant did not give evidence at the trial or advance a positive case does not relieve the judge of the obligation to point out to the jury aspects of a defence which can be gleaned from the caution

statement or arise in cross-examination." [15]

2. Failure to direct the jury as to how to approach the inconsistencies in the evidence: The Court found that "the judge needs to do more than just remind the jury of the inconsistencies in the evidence if they, the jury, find that inconsistencies exist.... Even though the matters raised were fully explored by [defence counsel] in cross-examination, it was incumbent upon the learned judge to instruct the jury as to how to treat with the inconsistencies." [20-27]

3. Non-disclosure of psychologist notes

(a) It emerged in cross-examination of the child's mother that the child had seen a psychologist after the incident. The defence subsequently informed the prosecution of its wish to see the report to ascertain if the child had made a previous inconsistent report to the psychologist. [28]

(b) The judge allowed the prosecution, but not the defence to review the notes and accepted prosecuting counsel's opinion that the notes contained nothing he considered disclosable. At the instance of the defence, the trial judge reviewed the notes himself and agreed with the prosecution and denied the defence's request to see the notes.[29]

(c) The Court found that "Ordinary fairness would therefore require that the defence be allowed to see the notes before the judge made a decision disallowing the defence request. Nothing however turns on that with respect to the disposition of the appeal." [30]

4. Proviso

(a) "The shortcomings in the summation have been pointed out. The question which follows therefore is what is the effect on the safety of the conviction?" [31] The Court found that:[32-35]

- i) The case against the appellant was not complex;
- ii) "The critical issue really boiled down to whether the jury believed the child's evidence and were sure that the appellant indecently assaulted her, as charged."
- iii) The jury would have been aware of the defence case;

- iv) The verdict showed that the jury believed the child's evidence and rejected the defence case.
- v) The jury were clearly entitled to convict the appellant on the child's evidence.
- vi) "Not only am I persuaded of the guilt of the appellant, I am also persuaded that notwithstanding the inadequacies in the summation, any jury acting properly would inevitably have convicted the appellant. Any jury acting properly would have rejected the appellant's case that he did not indecently assault the child or that the child's mother put her up to make the allegation for financial gain or that the child was over-sensitised by her mother to the sexual danger posed by men. In the circumstances, I am satisfied that no miscarriage of justice occurred." [35]

departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate Court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

d) The Court's reliance and interpretation of the jury's verdict fails to consider that the jury may have convicted because of the judge's failure to set out the defence case, rather than *because* the jury considered it and rejected it.

Commentary

Three main issues arise in this judgement:

1. *The Court's approach to the irregularities at trial*

(a) Having found that the judge failed to set out the defence case, or analyse the inconsistencies in the prosecution evidence – both fundamental parts of the trial judge's role - the Court applied the proviso on the basis, inter alia, that the jury would have been aware of the defence case, any jury acting properly would have rejected the defence, and the verdict showed that the jury believed the child's evidence and rejected the defence case.

(b) The question in every case will be whether the identified unfairness is sufficient to render the entire trial unfair and the resulting conviction unsafe. It is arguable that the Judge's failings in this case amounted to a failure of due process.

(c) Whilst the Court's view of the weaknesses of a defence can be a relevant factor in an appeal, it should not be a determinative factor when the trial is fundamentally unfair because of serious judicial failings. Every defendant is entitled to a legally compliant summing up, and that right is not dependent on the strength of the defence case [See Miah [2018] EWCA Crim 563. As Lord Bingham stated in [Randall \[2002\] UKPC 19](#): "...the right of a criminal defendant to a fair trial is absolute. There will come a point when the

2. The non-disclosure issue

(a) It is not clear whether the appeal court itself considered the psychologist's notes. It is submitted that this would have been the appropriate approach to the issue – particularly when the Court found that the notes should have been disclosed at trial.

(b) Whilst the authorities recognise that non-disclosure may be appropriate in certain circumstances, the appellate courts have stressed that the fair trial provisions require judicial oversight of the procedure and material where necessary, and that this extends to the appellate court. It should not be left to prosecution counsel to decide whether to disclose when the defence have sought disclosure and the request may be justified. [See [Hand C \[2004\] \[2004\] UKHL 3](#); and the European Court of Human Rights *Rowe and Davis v UK* (2000) 30 EHRR 1.]

Interrupting defence counsel's cross-examination

[Lee Cramp ANUHCRA2019/0011](#)

The appellant's appeal against his conviction for rape was dismissed. Amongst the grounds that he relied upon was that the judge improperly interrupted the defence during cross-examination in such a way that he effectively undermined the defence's case. The Court analysed the authorities relating to this ground of appeal at [36]-[40].

If you would like to discuss any of these cases with [Paul Taylor QC](#), please [click here](#).