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

Issue 58 | September 2022

Criminal Appeals Bulletin

Welcome

Paul Taylor KC

Welcome to the September 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.

In this edition we look at the proposals for the Law Commission's review of the criminal appeal system, and the latest appeal cases from the Court of Appeal (Criminal Division), the Northern Ireland Court of Appeal, the Supreme Court (Financial Crime Appeals), the Privy Council, and from the Caribbean appellate courts. The citations of the cases are hyperlinked to the judgments.

DSC Criminal Appeal Unit

Doughty Street is renowned for housing many of the leading specialist criminal appeal barristers who have appeared in some of the most important miscarriage of justice cases over the last 30 years. Our cases frequently involve complex legal or evidential issues. We have built up a particular expertise in cases involving fresh evidence, often from forensic experts including DNA, firearms, and CCTV, and in cases involving appellants with mental health issues.

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 new Criminal Appeals page of our website including links to back copies of the Bulletin and other resources.

Best wishes
Paul Taylor KC
Head of the DSC Appeals Unit

(Editor of *Taylor on Criminal Appeals*)

In this issue

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

Latest News

Law Commission
Reforming the law

Law Commission to review framework for criminal appeals

England & Wales:
- Conviction appeals (CACD)
- Sentence appeals (CACD)

The SUPREME COURT

Financial Crime Appeals (Supreme Court)

Northern Ireland:
- Conviction appeals (NICA)
- Sentence appeals (NICA)
- Procedure (NICA)

JUDICIAL COMMITTEE of the PRIVY COUNCIL

Judicial Committee of the Privy Council

The Caribbean: Conviction and sentence appeals

International Tribunals - Court of Appeal of Tanzania: Case summary

LATEST NEWS

PUBLICATION OF TAYLOR ON CRMINAL APPEALS (Third Edition)

- *Taylor on Criminal Appeals* (Third edition) was published on 31st July 2022 by Oxford University Press. The book was written by a team, including 14 members of Doughty Street and other leading experts in criminal appeals. [See here for further details and to order a hard copy or e-book at 30% discount.]

FORTHCOMING APPEAL SEMINARS

- We will be celebrating the publication of the new edition with a series of seminars by contributors to the book. [See here]

APPEALCAST

- Baroness Helena Kennedy KC introduces the first episode of Appealcast, an occasional podcast from the Doughty Street Chambers Appeal Unit in which we discuss the law and procedure relating to criminal appeals.
- In this episode – *A Decade of Legal Gamechangers* – we look at a selection of appeal cases that have changed the legal landscape in the last decade since the last edition of *Taylor on Criminal Appeals*.
- Paul Taylor KC, Edward Fitzgerald KC, Emma Goodall KC, Pippa Woodrow, and Daniella Waddoup discuss procedural changes in the CACD, appealing against a conviction based on a guilty plea, abuse of process, Endrochat, fresh evidence, *Jogee*, good character, jury irregularities, and sentencing issues relating to mentally disordered offenders, young adults and children. Click here to listen.

NEW CRIMINAL APPEALS SECTION ON DSC WEBSITE

- The ***Criminal Appeals page of the website*** has been updated with a new section on appellate resources including a searchable archive of the Criminal Appeals Bulletin and a list of useful links for those involved in advising or preparing criminal appeal. [See here].

IN THE COURTS

- In June, the Privy Council quashed a magistrate's committal decision taken in 2008 having regard to the appearance of bias (*Smith & Gomes v Chief Magistrate McNicolls & Others* [2022] UKPC 28). Mr Smith and Mrs Gomes were represented by Edward Fitzgerald KC, Fyard Hosein SC, Joe Middleton and Annette Mamchan, instructed by Simons Muirhead Burton LLP.
- In July, the Court of Appeal of Trinidad and Tobago quashed the manslaughter convictions of Roger Mootoo, Phillip Boodram and three others. The Appellants were represented by Edward Fitzgerald KC and Paul Taylor KC, leading Rajiv Persad, Kelston Pope, John Heath, and Gabriel Hernadez from Allum Chambers in Trinidad. The Appellants had been convicted in 2017 and sentenced to 28 years imprisonment with hard labour. The Court made comprehensive findings in relation to adverse publicity, non-disclosure (describing the prosecution stance at trial as having generated "profound disquiet"), the need for an accomplice warning, misdirection on lies, and the unviability of the prosecution case on manslaughter. They further found for the appellants on the rare ground of lurking doubt. The prosecution did not seek a retrial. The written judgment is expected later in the year.
- In July the Court of Appeal (Criminal Division) quashed AGM's conviction (based on her guilty plea) for being concerned in the production of cannabis. The case pre-dated the coming into force of s45 Modern Slavery Act 2015. The Court concluded that it would have, or might well have, concluded that prosecution was not in the public interest, and therefore the conviction should be quashed. Ben Newton represented AGM. The case is considered in detail below.
- In a landmark judgment, handed down on the 28th July 2022, in the case of *Attorney General of Trinidad and Tobago (Appellant) v Akili Charles (Respondent) No 2 (Trinidad and Tobago)* [2022] UKPC 31, Lord Hamblen, writing for the Judicial Committee of the Privy Council ('the Board'), struck down as unconstitutional the provisions of the Bail Act which had provided that bail could not be granted to any person charged with the offence of murder. Mr Charles was represented by Peter Carter KC and Pippa Woodrow, led by Anand Ramlogan SC.

- In August, the CCRC referred Jamie Smith's convictions based on joint enterprise back to the Northern Ireland Court of Appeal. Mr. Smith was convicted in March 2013 of murder and attempted murder, and two counts of possession of a firearm with intent to endanger life. He was sentenced to life imprisonment with a minimum of 21 years. This was the first time in Northern Ireland that the CCRC has referred a joint enterprise case as a possible miscarriage of justice. Mr. Smith is represented by Paul Taylor KC. For more details see here.
- In September the Court of Appeal quashed the convictions of 5 further sub-post masters and mistresses on the basis that their prosecutions and convictions were an abuse of process as the evidence against them arose from software, Horizon, which was replete with bugs, errors or defects, and which produced unsubstantiated shortfalls.The judgment can be found here and the background to these appeals can be found here. Kate O'Raghallaigh represented Mr Grant Allen, Mr Jack Smith and Ms Duranda Clarke. Graeme Hall represented Mr Richard Hawkes and Mr Robert Boyle.

LAW COMMISSION TO REVIEW FRAMEWORK FOR CRIMINAL APPEALS

By Kate O'Raghallaigh

On 5 August 2022, the Law Commission announced a *"wide ranging review of the laws governing appeals for criminal cases"*. The Commission aims to publish its consultation paper by late 2023. The Commission's review is preceded by its Thirteenth Programme of Law Reform (2017), in which the Commission cited the growing workload of the Court of Appeal but considered that *"access to a fair remedy must take precedence"*. The Commission has noted that the Justice Select Committee and Westminster Commission on Miscarriages of Justice have argued that the law in relation to criminal appeals is in need of reform.

The review's terms of reference are indeed wide ranging: they embrace the appellate jurisdictions of the Crown Court, the Court of Appeal (Criminal Division), and the referral jurisdiction of the Criminal Cases Review Commission (CCRC). Not only are the Court of Appeal's key statutory tests the subject of consultation (the 'safety test', and the test of whether a sentence is 'wrong in principle' or 'manifestly excessive'), but other legal principles will also be considered, such as 'lurking doubt' and 'substantial injustice'. These are often key levers at play when a person tries to appeal their conviction, with 'substantial injustice' having been influential in how the Supreme Court's decision in *Jogee* [2015] UKSC, relating to joint enterprise, has played out in real terms. Practitioners may (or may not!) be happy that the Commission will also consider reform of the Court of Appeal's much-dreaded jurisdiction to impose a loss of time direction.

The Law Commission's review of the criminal appeals system occurs during a fertile period in the Court of Appeal's history. The Court has determined dozens of high profile and legally important cases since the Thirteenth Programme of Law Reform was published. Criminal practitioners will need no reminder of the 'Stockwell Six' and 'Oval Four' cases, a series referrals by the CCRC some fifty years after the convictions of several men who had been arrested by the disgraced police officer DS Ridgewell. Nor can the historic Post Office appeals be forgotten, in *Hamilton* [2021] EWCA Crim 5078 the Court of Appeal quashed 39 convictions following the egregious failures of Post Office Ltd to disclose material about the flawed Horizon computer system to sub-postmasters who were prosecuted between 2000 and 2013[1]. Key 'fresh evidence' cases include those of 'Marine A' ([2017] EWCA Crim 190) and Sally Challen ([2019] EWCA Crim 916). The Court of Appeal has not just been dealing with a proliferation of important appeals against conviction but, since 2010, it has seen an increase in the volume of referrals made by the Attorney General in sentencing cases (see House of Commons Briefing Paper from December 2019: 'Review of Unduly Lenient Sentences').

In relation to the system of criminal appeals in the Crown Court, it is likely that the words of Max Hill DPP in March 2022 will be ringing in the Commission's ears, when he said of the automatic right of appeal to the Crown Court: *"The right to appeal a court's decision is a vital safeguard. But should defendants who want to challenge their conviction automatically be given a whole new trial? With all the implications for the system and victims and witnesses?"*. It seems likely that the Commission will consider the introduction of a 'permission filter' in respect of conviction appeals from the Magistrates' Courts, which would represent a fundamental change in the remit of the Crown Court's appellate jurisdiction.

Overall, it seems that the Commission's review of the criminal appeals system is being welcomed by practitioners and academics. Perhaps the most important aspect of the review for defence practitioners will be the Commission's interest in whether the 'safety test', which operates in the Criminal Division, may be too narrow, and whether the safety test may – as the Commission has put it: "Hinder the correction of miscarriages of justice". Whatever answer to that question may be, it is certainly one worth asking.

1 A total of 76 convictions have now been quashed, including appeals which were allowed by Southwark Crown Court

CASE SUMMARIES AND COMMENTARY

Where applicable, reference to the section dealing with the issues in Taylor on Criminal Appeals has been added to the commentary.

ENGLAND AND WALES

CONVICTION APPEALS (CACD)

s.28 YJCEA 1999 – impact on safety when wrongly invoked – restrictions on questions

R v A
[2022] EWCA Crim 988

By Sarah Vine KC

A was convicted of 2 counts of sexual assault, contrary to s.3 SOA 2003, and acquitted of 3 similar counts. A appealed against the Resident Judge's decision to allow pre-recorded cross-examination of the complainant pursuant to s.28 YJCEA 1999. He argued that:

(a) The complainant had not been entitled to this special measure because the relevant legislation had not, at the time of the order, been extended to the trial court. (This was correct).

(b) There were restrictions placed on the questions counsel was permitted to ask the complainant in cross-examination due to the pre-recorded format.

Application of s.28? The complainant was 16 when she gave her ABE interview but was 18 by the time the special measures application was made. The s.28 'roll-out' legislation (as it applied to the trial court) was confined to cases in which the witness met the eligibility criteria under s.16 YJCEA 1999 (age or incapacity). The Crown Court had had no power to grant the application for pre-recorded cross-examination, because the witness fell outside the compass of s.16(1)(a).

At first instance the Crown had argued – and the Judge accepted – that the complainant could be brought back into the scope of s.16 by the provisions of s.22, thereby enabling the Court to grant the application. Section 22 expands the application of the 'primary rule' (as expressed in s.21(3)) to witnesses who have given an ABE whilst under 18 but passed that age before the application for special measures is heard. The primary rule is expressed in mandatory terms, but it is limited to the admission of extant video recorded evidence[2] and the grant of live link measures[3]. In seeking to circumvent the unavailability of s.28 in this case, the Judge placed an extraordinary weight on the word *"otherwise"* when interpreting the wording of s.21(3)(b)[4], construing it to mean that the primary rule, as it relates to live links, also permitted a direction for video recorded evidence "otherwise" than evidence in chief.

Little wonder then that the CACD found this a rather strained reading of the statute and unacceptable, noting that nothing in ss 21 or 22 makes a witness eligible under s.16 for s.28 purposes. Equally unsurprisingly, the CACD concluded that the resident Judge's error amounted to no more than a procedural irregularity, one with no impact on the safety of A's conviction nor on the validity of the proceedings.

Restrictions on questions by counsel: The second ground of appeal was dismissed but it is of interest that, in circumstances where there is no intermediary for a witness, practitioners continue to comply with orders to disclose in advance cross-examination to both the Judge and CPS. The lack of resistance to this practice has been astonishing. Where the form of questions does not need special tailoring, there is no more reason for advance disclosure than in any other case, and the advantage of pre-recording is that any improperly advanced question or topic can, on the ruling of a judge, be edited out. Questions put to a witness will frequently disclose the defendant's instructions in far more detail than the content of a Defence Statement. Requiring such disclosure prior

2 s.21(3)(a)
3 s.21(3)(b)
4 *"It must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24"*

to cross examination is a procedural asymmetry and is never reflected in any questioning of a defendant, however young or vulnerable s/he may be. It can, I suggest, only be justified in the most limited of circumstances, such as those set out in s.43 YJCEA 1999. Otherwise, there is no reason that advocates cannot, and should not, be trusted to cross examine in accordance with the relevant law and appropriate guidance.

[Editor: See *Taylor on Criminal Appeals 9.135*]

If you would like to discuss this case with Sarah Vine KC, please click here.

Sexual offences - Fair trial - Judicial restrictions upon cross-examination - assumption directions

R v Bhatt
[2022] EWCA Crim 926

By Emma Goodall KC

The Appellant was convicted of twelve counts of serious sexual offences. It was the prosecution case that between 2001 and 2005 the complainant, then aged between 10 and 15 years old, was groomed, abused, and raped by the Appellant. In 2018, the complainant made a disclosure to Social Services and there was a family meeting during which the Appellant was alleged to have made admissions.

At trial the complainant became distressed during cross-examination and required a break. The Judge imposed a time limit for the protection of both the Appellant and the witness due to the increased episodes of distress. He did so in the mistaken belief that the previous day the defence questioning had been ongoing for an hour and a half, as opposed to 48 minutes. The Judge directed the jury to blame him if they considered the questioning to be too short. Just as defence counsel broached the topic of the family meeting the Judge intervened to enforce the guillotine. The defence counsel stated he was reaching an important point and would rather not be harangued, and in response the Judge directed him to ask his last question or sit down. Defence counsel concluded by putting a rolled-up question to the witness. In total cross-examination lasted for 1 hour and 28 minutes.

Time limit: The CACD rejected the argument that the Judge was wrong to impose a restriction on cross-examination. Judges have a broad discretion. Although the time limit was 'quite tight' it could not reasonably be described as arbitrary. Where only a few additional minutes were required to put the defence case, the guiding principle for a strict guillotine should have been fairness. Although the enforcement was a significant step for the Judge to take it was within the range of appropriate decisions. However, the manner in which the Judge handled the termination of the cross-examination was considered unsatisfactory. It was pre-emptory and demonstrated an unnecessary adherence to form. The exchange was confrontational rather than judicially firm, although the Court noted they had not heard the recording so could not gauge the tone of the voices. If viewed in isolation it raised a question about the fairness of the trial process. However, it was out of line with, and substantially dissipated by, the conduct of the rest of the 10-day trial. Therefore, the CACD concluded that the failings did not give rise to any actual risk of unfairness.

Assumption Directions: When the judge summed up, he gave written and oral directions headed "Avoiding myths and stereotypes" and "Children and young people". These were in relatively standard form. The CACD accepted that the directions might have had the effect of bolstering D's evidence, but only to the extent necessary to prevent unfairness to D caused by the stereotypical thinking against which it warns. It was not unfair to the Appellant.

Commentary

Time limits: This case serves to highlight the broad measure of discretion afforded to Judges when deploying their trial management powers. The imposition of time limits, encouraged by the Criminal Procedure Rules (see Crim PR para 3.2(2)(e) and 3.8(7)), have become increasingly common place in Crown Court trials. Provided the CACD ultimately concludes that the overall fairness of the trial has not been compromised, it will not interfere (R v Butt [2005] EWCA Crim 805; G (S) [2017] EWCA Crim 617). This has been extended to circumstances where a witness became too distressed to complete cross-examination. As the examination was considered sufficient to allow the jury properly to assess the issues in dispute, the trial could continue (Pipe [2014] EWCA Crim 2570). The Crown Court Compendium provides specific sample directions for circumstances where cross-examination is either moderated or curtailed.

Although the judicial conduct of the trial in Bhatt

wasn't endorsed by the CACD as a paradigm of good practice, the specific criticisms were limited to the judicial inflexibility and the exchange in the enforcement of the guillotine.

If you would like to discuss this case with Emma Goodall KC, please click here.

Convictions - ss 17-29 Public Order Act – failure to obtain Attorney General's consent to prosecution.

R v Lalchan
[2022] EWCA 736

By Amanda Clift-Matthews

L argued that his conviction for an offence under s 18(1) Public Order Act, which requires the Attorney General give consent to prosecution, should be set aside because the Attorney General's consent in this case had not been given until after L had been convicted.

The prosecution argued that the failure was a procedural omission and a technicality. The 'more modern approach', it said, was for the consequence to depend on the fairness of the trial.

Section 27 of the POA states:

"No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General".

The relevant part, Part III, concerns offences of racial hatred under ss 17-29 of the POA.

The Court of Appeal found that there was no general assumption that procedural provisions were mere 'technicalities'. The outcome of a failure to comply with a procedural condition depended on the statutory provision and its context. The consequence of the prosecution's failure to comply with s 27 POA required the Court to ascertain the underlying parliamentary intention for the section.

The Court concluded that several factors supported a conclusion that Parliament intended for the proceedings to be invalidated in the event of non-compliance:-

(a) The clear and imperative language of s 27 POA, where the natural implication is that proceedings are invalidated if the consent of the Attorney General has not been timeously obtained.

(b) Section 25(2) of the Prosecution of Offences Act 1985, which expressly permits arrest or remand regardless as to whether the Attorney General's consent has been given. This implies that the other aspects of the criminal proceedings are not permitted without such consent.

(c) Previous cases such *Angel* (1968) 52 Cr App R 280 and *Pearce* (1981) 72 Cr App R 295 supported the conclusion that invalidity was the result of a failure to comply. Pearce concerned s 27's predecessor provisions under the former 1936 Public Order Act and were drafted in very similar terms. Parliament could be presumed to have intended the same effect as in *Pearce* when it enacted s 27 POA.

(d) There are cogent reasons as to why Parliament might wish to protect a defendant from an undesirable prosecution. These had been summarised by the Law Commission in its 1998 report *Consents to Prosecution*. A purposive interpretation supported a conclusion that the consent of the Attorney General was a condition precedent to proceedings.

(e) The interpretation advocated by the prosecution would render s 27 POA devoid of all meaningful content.

The Court of Appeal held that the prosecution's failure to obtain the Attorney General's consent to prosecution before proceeding against L rendered L's conviction invalid.

However, since the Attorney-General had now given its consent to L's prosecution for the offence under s 18(1) POA, the prosecution's request for a writ of venire de novo was granted to enable a fresh trial to take place.

Commentary

Lalchan follows on from *Stromberg* [2018] EWCA Crim 561, which concerned the proper procedure for seeking a writ of *venire de novo* in cases where consent to prosecution had not been obtained. But the issue of the potential consequences of a failure to obtain that consent was left unresolved, since S's application was years out of time.

Lalchan also confirmed that reference to the proceedings being a 'nullity' should be avoided, since

proceedings are valid until invalidated on appeal. The preferred analysis is that the statute conveys certain rights on a defendant where the Attorney General's consent to prosecution is not obtained prior to proceedings being instituted.

[Editor: See *Taylor on Criminal Appeals* 11.49]

If you would like to discuss this case with Amanda Clift-Matthews, please click here.

Abuse of process - Victims of Trafficking

R v AGM
[2022] EWCA Crim 920

By Ben Newton

The Appellant pleaded guilty in October 2014 to being concerned in the production of cannabis and was eventually sentenced to eighteen months imprisonment following a Newton hearing. In September 2018, she received a positive Conclusive Grounds decision determining her to be a victim of modern slavery. It was consequently argued that her conviction was unsafe because, if that had been known at the time, either she would not have been prosecuted or the proceedings would have been stayed as an abuse of process.

The case pre-dated the coming into force of s45 Modern Slavery Act 2015 on 31st July 2015, and therefore fell to be determined on the line of authorities that developed before there was a statutory defence. The applicable principles in such cases were summarised by Gross LJ in *R v GS* ([2018] EWCA Crim 1824). They include the need for "the careful and fact sensitive exercise by prosecutors of their discretion as to whether it is in the public interest to prosecute a VOT" and the relevance of "a reasonable nexus" between the crime and the trafficking. Gross LJ went on in GS to formulate the question for the Court of Appeal, which emerges from the authorities 'indistinguishably in one of two ways"…". The question as formulated goes:- "Was this a case where either: (1) the dominant force of compulsion, in the context of a very serious offence, was sufficient to reduce the applicant's criminality or culpability to or below a point where it was not in the public interest for her to be prosecution? Or (2) the applicant would or might well not have been prosecuted in the public interest? If yes, then the proper course would be to quash the conviction."

The Court in *AGM* noted that where the prosecution authorities have applied their minds to the relevant questions in accordance with the applicable CPS guidance, the courts will be reluctant to intervene. If the question has not been considered by the prosecution, however, then the courts will be readier to do so. 'Again, the existence and extent of any nexus between the offence and the trafficking and exploitation in question will be an important consideration, albeit not necessarily decisive in every case. Depending on the facts, it may be necessary to consider broader questions such as whether it was in the public interest to prosecute this particular defendant for this particular crime. Much may depend upon the circumstances and history of the defendant and the seriousness of the defendant's participation in the crime in question.'

The Court consequently observed that there may be circumstances where an abuse of process argument in a pre-MSA case may succeed even though a hypothetical defence under s45 would have failed for insufficient evidence of compulsion directly caused by slavery or exploitation. As the Court of Appeal recently made clear in *R v AAD* [2022] EWCA Crim 106, the abuse of process jurisdiction continues to exist in post-MSA cases, albeit exceptionally.

Applying these principles to the facts of AGM's case, the Court found that there was no evidence that she was acting under compulsion at the time she was arrested at the cannabis factory, and that she was no longer under the control of her traffickers. A s45 defence would not therefore, hypothetically, have succeeded if this were a post-MSA case. 'Accordingly the question whether it would have been in the public interest to prosecute the applicant if what is now known had been known at the time must be approached on the basis that, if the applicant were to be prosecuted, she would in all probability be convicted as her offending was not directly attributable to her previous abuse, albeit that (as the Judge found) she was subject to "some degree of pressure" when looking after the cannabis plants'.

In her case there had been no consideration at the time of her prosecution as to whether she was a victim of trafficking, and the Court found that the sexual slavery and physical violence to which she had been subjected over a period of years remained a highly relevant consideration in terms of the public interest in prosecution. 'This was a woman who had been subjected to horrific abuse over a period of years, who was severely traumatised by her experiences, and who was suffering from PTSD

and Major Depressive Disorder. Inevitably she was extremely vulnerable to further exploitation and that vulnerability had been exploited. She spoke no English and was therefore isolated, with limited, if any, realistic options for seeking help. Her family was still vulnerable to the threats of their creditors in Vietnam and her debts had not gone away.' The Court concluded that it would have, or might well have, concluded that prosecution was not in the public interest, and therefore the conviction should be quashed.

This case does not change the law but does vividly illustrate the restrictive element of s45(3)(b) MSA 2015, which requires an adult defendant to have been acting under compulsion that was a direct consequence of having been a victim of modern slavery. It also shows the consequent importance of the prosecution fully applying the CPS guidance, such that they look beyond whether or not a s45 defence is likely to succeed and consider the public interest in prosecuting a victim of trafficking where there is a broader nexus. As with any category of offender, the fact that a defendant would likely be convicted if prosecuted does not necessarily mean that it is in the public interest to prosecute them, and this issue is likely to arise far more frequently in relation to victims of trafficking.

Ben Newton represented AGM in her appeal.

[Editor: See *Taylor on Criminal Appeals* 9.74]

If you would like to discuss this case with Ben Newton, please click here.

SENTENCE APPEALS (CACD)

Substitution of hospital order

R v Crerand
[2022] EWCA Crim 962

By Daniella Waddoup

The applicant sought leave to appeal against his life sentence imposed in respect of an offence of s.18 (wounding with intent) on the basis that, in the light of fresh psychiatric evidence, the appropriate disposal was a hospital order with restriction pursuant to ss. 37 and 41 Mental Health Act 1983 ("MHA 1983"). There was no psychiatric report before the sentencing judge at the time of sentence, some 14 years ago, as the applicant did not wish to have one. It was conceded that the judge could not have imposed a hospital order at that time.

The applicant had served almost ten years in prison before being transferred to hospital under s.47 MHA 1983, although he started receiving anti-psychotic medication three years into his sentence. A conclusive diagnosis of paranoid schizophrenia was not made until after his admission to hospital.

His responsible clinician ("RC") was of the view that the applicant was suffering from schizophrenia at the time of the offence. This condition, in the RC's view, had been the main instigator of repeated aggression throughout his life, including at the time of the offence. The applicant's refusal to be assessed at the time of sentence was understandable given that he did not know then he was suffering from mental illness and feared the stigma in custody of being thought to have such an illness. The RC and the wider care team also considered that the applicant was and would be, if released, better managed in the mental health system rather than the prison system.

The RC's written evidence was supported by written and oral evidence from an independent consultant forensic psychiatrist. The focus of this evidence was largely on the consequences of a hospital order in terms of ensuring that (a) release and the terms of release are determined by the First-tier Tribunal under the MHA 1983 and (b) care, support and risk management are provided through health services. The expert evidence, commended by the court as thorough and distinctly impressive, highlighted the following aspects in particular:

(a) The mainstay of future risk management would be in the lifelong treatment of the applicant's psychotic illness, careful monitoring of his mental state and of his medication compliance.

(b) The expertise required to effectively achieve that would be via mental health services.

(c) A hospital order would ensure that pathways back to hospital were clear and immediate if the applicant relapsed or breached his mental health conditions in the community.

(d) In determining the recall of conditionally discharged restricted patients, public safety will always be the most important factor.

(e) It was highly unlikely the applicant would ever be returned to prison. As a result, he was highly unlikely to be considered for release by the Parole Board.

The psychiatric evidence, relied on by the respondent, questioned whether a psychiatric assessment at the time of sentence would necessarily have led to a diagnosis of mental illness. The respondent also

argued that there was a possible tension between what was best for the applicant and what best protects the public.

The Court of Appeal found no such tension. It granted leave for an extension of time, leave to appeal and leave to adduce fresh evidence. It quashed the life sentence and substituted the hospital order sought. In doing so, it relied on the medical evidence that addressed the nature of the applicant's mental illness, its causal connection with the offence, its treatability and the clear evidence that his condition would be better managed on release under the MHA regime. This course would also better protect the public.

The decision does not depart from the guidance in *R v Vowles and others* [2015] 2 Cr App R (S) 6, in particular the requirements to ensure that (a) careful consideration is given to culpability and the extent to which the offence is attributable to mental disorder and (b) the protection of the public by considering the regime on release. In relation to the latter consideration, however, the court makes an interesting point: namely that the Code of Practice to the MHA 1983 has "significantly" diminished the distinction between the recall regime when a person is released from prison and the recall regime applicable to a patient subject to an order under the MHA 1983.

Paragraph 22.79 of the Code requires quarterly reports from the patient's clinical and social supervisors. These reports should detail his progress, current presentation, and any concerns about risks to themselves and others. If, at any time, the clinical teams become concerned about a patient's behaviour or presentation they must investigate and contact the Ministry of Justice straight away. Paragraph 22.82 makes clear that a patient will be recalled where it is necessary to protect the public. Public safety will always be the most important factor. In fact, because recall decisions must give precedence to public safety considerations, this may mean that the Secretary of State will decide to recall on public safety grounds even if the patient's supervisors are of the view that recall would be counter therapeutic for the patient.

Expert reports that take care to highlight these features of the conditional discharge and recall regime are likely to provide the court with reassurance that an applicant with mental disorder is not only being released and supported by those with specific expertise in dealing with the risks the applicant poses, but that this better protects the public.

[Editor: See *Taylor on Criminal Appeals* 10.280]

If you'd like to doscuss this case with Daniella Waddoup, please click here.

Proper approach to "whole life orders"

R v Stewart and Others
[2022] EWCA Crim 1063

By Pippa Woodrow

In May of this year, a five-judge panel of the Court of Appeal (including the Lord Chief Justice and the President of the Queen's Bench) convened in *R v Stewart and Others* to consider the proper approach to "whole life orders". Following the abolition of the death penalty in 1965, such orders represent the most severe penalty available under our criminal justice system. They envisage that the offender will never have the opportunity to seek release and will die in custody unless released by the Home Secretary on "compassionate grounds".

Four cases of linked appeals were before the Court, including that of Wayne Couzens (the then Metropolitan Police Officer who pleaded guilty to the "notorious" kidnap, rape and murder of Sarah Everard in March 2021) and Ian Stewart who murdered his wife Diane Stewart 2010. Mr Stewart had then gone on to murder his subsequent fiance Helen Bailey in 2017 – a crime for which he had already been convicted and sentenced to life imprisonment with a minimum term of 30 years. Both men sought to appeal the whole life orders imposed by the sentencing judge.

Of the four cases, only Couzens' offending was deemed to meet the exceptionally high seriousness threshold for the imposition of a whole-life order. Stewart was the only successful defendant - his whole life order being quashed and a minimum term of 35 years substituted. It is, perhaps, these two cases that also gave rise to the most interesting questions of principle and approach.

As a matter of general principle, the Court took the opportunity to summarise and re-state various established principles, including: (i) the exceptional nature of whole-life orders even in the context of the most serious offence of murder (a borderline case therefore being inappropriate) and; (ii) the need for flexibility in the application of the statutory framework. The list of features in paragraph 2(2) of Schedule 21 (which provides illustrations for cases which are likely to be considered "exceptionally serious" and thus to attract a whole life starting point) is neither exhaustive, nor prescriptive. There may be cases whose seriousness is properly regarded as "exceptionally high" which fall outside that list – albeit that such cases will be "rare". Similarly, there may be cases within the ambit of paragraph 2 that

will not reach the necessary level of seriousness on the particular facts of the case.

Ultimately, all decisions must be fact specific – "*justice cannot be done by rote*", and as such, comparison with other cases is unlikely to be helpful. Whilst the court must have regard to the general principles set out in Schedule 21, *"it is the application of the principles to a careful assessment of the relevant facts of the case that is important".* [19(v)(i)].

Wayne Couzens

The Court of appeal agreed that the unique features of Mr Couzens' crime merited a whole life order, notwithstanding that it did not fit into any of the categories or circumstances set out in paragraph 2(2) of Schedule 21.

The Court of Appeal did, however, differ from the sentencing judge in respect of some of his reasoning. Although the Court agreed with the sentencing judge's remarks about the unique position of the police and the critical importance of their role and the trust the public repose, it was not appropriate to approach offending on the basis of "creating a new category" of offences worthy of a whole life order to cater for police officers abusing their power. The creation of "categories" is a matter for Parliament. By contrast the correct approach for a sentencing judge is simply to focus on the facts which, in a rare case, might lead to the conclusion that a whole life order is appropriate.

Applying the statutory framework according to the principles they set out, the starting point was a 30-year minimum term, reflecting "particular" seriousness. Thereafter regard to the extreme aggravating features increased the sentence from that starting point, such that only a whole-life order should be made. The unique and defining feature of the case - Couzen's use of his police powers – was thus to be taken into account as an aggravating feature elevating the starting point, rather than as the basis for judicial addition or amendment to paragraph 2(2). It is (perhaps) possible to view this emphasis as consistent with recent judicial trends seeking to distance the courts from any suggestion of judicial legislating or political interference. In any event, it is now clear that there is sufficient flexibility within the consideration of aggravating and mitigating factors for cases that do not fall within paragraph 2(2) of Schedule 21 to attract a whole-life order if (but only if) they are sufficiently egregious.

Ian Stewart

Notwithstanding the Court's rejection of innovation in approach in Couzens' case, rather a different stance appears to have been taken in Mr Stewart's. The latter case raised a novel question, which clearly troubled the Court: how should a judge approach a sentencing exercise for murder where the offender was already the subject of a life sentence for a later homicide?

Contrary to the assumptions of the advocates and the Judge in the Court below, the Court of Appeal held that the case fell outside the circumstances under paragraph 2(2) of Schedule 21 that would have provided for a starting point of a whole life order.

Paragraph 2(2)(e) applied to a person who, having been convicted of murder, nevertheless goes on to murder again. At the time he murdered his wife, Mr Stewart was not "an offender previously convicted of murder". Nor was Mr Stewart being sentenced for "two or more murders" given that the murder of Ms Bailey had already been the subject of a separate sentencing exercise.

Viewed in isolation, the Court of Appeal considered the murder of Ms Stewart was not "exceptional". Rather, it was "particularly high" in seriousness (because it had been for gain). From the appropriate starting point of a 30-year minimum term, significant upward adjustment would then be required to reflect the various aggravating features present.

The Court clearly found it difficult to identify how best to approach the fact of Ms Bailey's murder, and the sentence already imposed for her murder, given that life sentences could not be ordered to run concurrently, nor is it possible for a minimum term order to run consecutively to another imposed on a previous occasion.

The Court therefore crafted a bespoke solution drawing, by analogy, from the case of *Davies* [2012] 1 WLR 212 in which the Court had sought to achieve the effect of consecutive minimum terms (that case concerned a life sentence imposed on a prisoner serving an IPP sentence). The Judge in *Davies* adjusted the minimum term of the later sentence having regard to the time already served on the former. Although not entitled to treat Ms Stewart's murder as exceptionally serious, the Court therefore adjusted what would otherwise have been the appropriate minimum term in order to achieve "just punishment" for the first murder and to ensure the overall sentence was in fact proportionate to Stewart's offending as a whole. Adjustment was also

made to reflect the fact that the minimum term for Ms Stewart's murder would start after he had already served approximately four years of his minimum term in respect of the murder of Ms Bailey.

Whilst this flexible approach is to be welcomed, it does not sit easily with previous case-law (see *Burinskas* [2014] 1 WLR 4209) which instructed judges to disregard the practical effect of the more punitive release regimes for extended sentences when determining what type of sentence to pass and for how long – however unjust and/or discriminatory the ultimate result. If meeting "the justice of the case" in practice is a permissible factor which allows for a tailored approach taking into account subsequent execution of sentences, one might think that should apply equally to both sides.

If you would like to discuss this case with Pippa Woodrow, please click here.

FINANCIAL CRIME APPEALS (SUPREME COURT)

By Peter Caldwell

R v Luckhurst
[2022] UKSC 22

In *R v Luckhurst* [2020] EWCA Crim 1579 the Court of Appeal took a deep dive into the nature and purposes of restraint orders, made under the Proceeds of Crime Act 2002 (PoCA), with particular focus on the criteria to be applied in determining what were "reasonable living expenses" under s.41(3)(a). In doing so it ruled that section 41(4) of POCA did not preclude an exception to a restraint order to make provision for reasonable legal expenses incurred in respect of civil proceedings, founded on the same or similar allegations. The prosecution appealed on a certified question limited to this issue.

The background to the question posed is that, while an exception to a restraint order may be made to allow the (alleged) criminal to incur reasonable legal expenses, that exception is precluded under section 41(4) of POCA where the legal expenses "relate to an offence" giving rise to the restraint order. The legal expenses of defending criminal proceedings for the offence itself, or of resisting a confiscation or restraint order in respect of that offence, are precluded.

The question examined whether the preclusion extended to legal expenses in respect of a civil cause of action founded on the same or similar alleged facts and/or evidence as the offence.

In answering this question. the Court restated the principle of statutory construction given in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3 [28-29], namely that the Court should consider the importance of context and purpose to the meaning of the provision.

From that premise (and in the absence of very much antecedent authority), the Court held that, on a natural meaning of the words in their context, legal expenses in civil proceedings for a cause of action do not relate to a criminal offence [26]. Likewise, the natural meaning of the words in their context, legal expenses that "relate to an offence" in section 41(4) include legal expenses that are incurred in defending criminal proceedings for, or a criminal investigation into, an offence or in resisting a confiscation order for an offence [25].

The CPS's attempt to carve out a meaning for legal expenses in civil proceedings for a cause of action that "relate to an offence" was considered to be artificial and problematic [26]. The Court rejected the CPS argument that legal expenses in civil proceedings were precluded where the civil proceedings are founded on the same or similar allegations, alleged facts, and/or evidence as those of the offence(s) which give rise to the making of the restraint order The Court held that such a test was insufficiently precise.

Those conclusions were fortified by the observations that, in the context of the significant cutbacks in legal aid made by the Legal Aid Sentencing and Punishment of Offenders Act 2012, it would be that unlikely defendants would receive legal aid for most relevant civil claims so that the provision of state funding would not be a quid pro quo for a preclusion of that type of legal expense. The Court also adopted the reasoning of Popplewell LJ in the Court of Appeal that the Court could properly supervise in its discretion whether the exclusion of restrained property was proportionate – particularly where the litigation in prospect might serve the legislative steer under s.69 to preserve the value of assets with a view to any future confiscation order.

R v Jon Andrewes
[2022] UKSC 24

The defendant had applied for, and obtained, employment based on statements about his qualifications and experience that were false and misleading. But the defendant had performed the employment competently and lawfully, giving full value for the remuneration received, and had thereby made full restoration.

The Court of Appeal allowed Mr Andrewes' appeal on the reasoning that the confiscation order was disproportionate under the proviso in section 6(5) of POCA because Mr Andrewes, by performing the services which it was lawful for him to carry out, had given full value for the remuneration he had received. The situation was therefore analogous to restoring

the benefit received. Therefore to confiscate the value of a benefit where the benefit had been restored amounted to "double recovery" and this went beyond confiscation and amounted to a penalty, per Waya [28-29].

The Supreme Court held that disproportionality was to be assessed by reference to the making of a confiscation order, not to the amount of benefit as such. The assessment of disproportionality did not involve a balancing of factors and competing interests in the way that might be appropriate in public and family law contexts

In its review of caselaw, the Court noted a difference between a business which itself is a criminal enterprise, and a business which is not a criminal enterprise, but involves transactions tainted by criminality where there has also been a partial restoration of value by a defendant of the employment which was not itself a criminal enterprise.

In the Court of Appeal, the parties had argued for a "take all" (prosecution) or "take nothing" (defence) approach. The Supreme Court instead endorsed a "middle way", which considered the element of profit made from the offending. Restricting that analysis to Curriculum Vitae (CV) fraud cases, the Court held that where, focusing solely on the performance of services, the fraudster has given full value for the earnings received — and excluding situations where the performance of the services constitutes a criminal offence — it will normally be disproportionate under the proviso in section 6(5) to confiscate all the net earnings made.

It will, however, be proportionate to confiscate the difference between the higher earnings made as a result of the CV fraud and the lower earnings that the defendant would have made had he or she not committed the CV fraud. In many situations of CV fraud it will be appropriate, as a pragmatic approximation of that profit, simply to base it on the percentage difference between the fraudster's initial salary in the new job obtained by fraud and the fraudster's salary in his or her prior job. Accordingly, the Supreme Court allowed the prosecution's appeal, restoring the order made in the available amount – which did not exceed the calculation of profit which formed the assessment of the benefit figure.

This focus on the issue of profit, as opposed to the value of the criminal enterprise as a whole, sits outside the usual rationale for the determination of benefit and may be reserved specifically to CV frauds. Though the Court emphasised that the question of proportionality under section 6(5) PoCA is to be addressed in the making of the order rather than the assessment of benefit, it is curious that it was the calculation of benefit that provided the route by which the Court accommodated the typical concerns over double recovery that in Waya was assessed in terms of proportionality alone. In that sense, the decision represents a triumph of pragmatism over principle.

If you would like to discuss these cases with Peter Caldwell, please click here.

NORTHERN IRELAND COURT OF APPEAL

By Paul Taylor KC

CONVICTION APPEALS (NICA)

Abuse of process – delay – fair trial

Paul Campbell (Conviction)
[2022] NICA 42

Following a non-jury trial, the appellant was convicted of unlawfully and maliciously causing an explosion of a nature likely to endanger life or cause serious injury to property, contrary to section 2 of the Explosive Substances Act 1883. He appealed against his conviction.

The central ground of appeal contended that the decision of the court to refuse to stay the proceedings as an abuse of process was wrong in law. It was submitted that the appellant could not have a fair trial and that it was unfair to try the appellant because:

(a) The circumstances showed that the Prosecution was at fault for a delay of over 18 years between the identification of the appellant as being responsible and him being charged. It was submitted that this case was truly exceptional, and the delay caused real and identifiable prejudice such that the appellant could not have a fair trial.

(b) There was a compelling basis for the conclusion that a trial should offend the court's sense of justice, undermine public confidence in the criminal justice system and bring it into disrepute.

The NICA concluded that the Judge was right to reject the application to stay as an abuse of process:

(a) The starting point with reference to the delay in the present case is that the appellant made himself a fugitive from justice and gave a palpably mendacious account for his reasons for absconding to the Republic of Ireland, leaving a false trail. [30]

(b) The appellant caused or substantially contributed to the delay. Whilst there has been some unexplained delay there is absolutely no evidence of any misconduct on the part of the police or the prosecuting authorities nor any evidence of serious prejudice to the appellant.

(c) The appellant had failed to show that he has been prejudiced in undermining the prosecution case and/or in the presentation of his case. The trial process and the warnings the Judge gave himself concerning the impact of delay on the defendant were, in the Judge's assessment, well able to deal with any alleged prejudice.

The NICA rejected the other grounds related to the admission of hearsay evidence, the identification evidence, and other matters going to the safety of the conviction as well as Section 2 of the Explosives Substances Act.

Commentary

For a recent detailed analysis of the CACD's approach to grounds based on an abuse of process see *Hamilton v POL* [2021] EWCA Crim 577 which involved a number of appeals arising from significant flaws in the Post Office's *Horizon* accounting system. The judgment is essential reading for those considering a ground based on abuse of process.

[See *Taylor on Criminal Appeals* 9.74.]

Rape – bad character – emotive nature of prosecution opening and closing speeches – bad character – unbalanced summing up/charge - inconsistent verdicts

Shaun Hegarty
[2022] NICA 31

SH was convicted in November 2020 of two counts of rape; attempting to choke with intent to commit rape; causing grievous bodily harm with intent; and developing a relationship without disclosing his previous criminal convictions. He was acquitted of one count of administering a stupefying substance to enable sexual activity. The court imposed an extended custodial sentence of 20 years' imprisonment and five years on licence.

The complainant "M" agreed to meet PH at his flat. Her evidence was that on returning from the bathroom, she took a sip of her drink and passed out. She woke to find herself on a mattress with a rope around her neck. She left the flat and was discovered lying on a bank at the side of the road. When the police arrived, M told them she had been assaulted and raped. The medical evidence was that she had suffered a subarachnoid haemorrhage on the left side of her brain, and that she had been subject to a "very

aggressive sexual and physical assault".

M gave various accounts of how she came to be at the applicant's flat and how she came to sustain her injuries. She claimed she had been injected with something however, toxicology samples taken some time after the events showed low alcohol readings and no evidence of drugs in her system. The applicant's case was that all sexual activity had been consensual and that the injuries to M's face were caused when she walked into a door during a visit to the toilet.

The applicant has a previous conviction for a rape and sexual assault which occurred in February 2010 for which he received a seven-year prison sentence and was required to disclose his criminal conviction when entering into a relationship. The circumstances of that rape were that the complainant was not aware of it until she woke and was in essence raped whilst in an unconscious state.

Grounds of appeal

1. The prosecution opening: PH argued that the prosecution opening was "emotive" and that the photographs depicting M's injuries were presented to the jury in a manner which was "prejudicial, rendering the trial unfair and the convictions unsafe". PH also contended the Judge erred by refusing to discharge the jury when asked immediately after the prosecution opening.

The court agreed with the Judge's assessment that the prosecution was not overly emotive and said that this was a case involving serious allegations and unpleasant details, which had to be explained to the jury, and that counsel had not overstepped the mark in doing so. The court also agreed with the Trial Judge's assessment that there was no reason not to give the photographs to the jury. The court said it was "perfectly proper" to have the photographs presented to explain a case of this nature and noted there was no defence objection at the time. The court further found no error in the Trial Judge's approach of advising the jury in advance of the prosecution opening that what was being said was not evidence but a guide and that they should make up their own minds on the evidence. Also, the court was satisfied that the Trial Judge, in his charge to the jury, made it clear that the decisions about the facts of the case where for the jury alone to decide.

2. The admission of bad character evidence: The prosecution had relied on Article 6(1)(d) of the Criminal Justice (Evidence) (NI) Order 2004 ("the Order") to admit evidence of the applicant's previous convictions for rape and sexual assault in 2010. Article 6(1)(d) provides that bad character evidence is admissible if it is relevant to an important matter in issue between the defendant and the prosecution. Article 8(1)(a) of the Order provides that such matters include the question of whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence.

The calculation over whether to exclude a conviction involves a range of issues including the similarity between the conviction and the offence currently charged, the gravity and age of the offence and the weight of the other evidence to ensure that evidence is not used to bolster an otherwise weak case. The Trial Judge decided to admit the bad character evidence based on the similarities between the two cases, in that both complainants were unconscious in the sense that they did not know at the time what was happening to them and in both cases their clothing was removed without their knowledge. The Trial Judge did not think the previous conviction was too old to be admitted and considered that the probative value of the evidence was substantial and outweighed any prejudicial effect. The court considered the Trial Judge's approach to be "impeccable" and said it accords with the guidance given in case-law. It added that there is no absolute bar as regards old offences and that each case will turn upon its own facts. The court accepted there were inconsistencies in the complainant's account but said these were highlighted by the prosecution and Judge throughout the trial and properly left to the jury to determine.

3. Inconsistent verdict: The applicant contended that the jury's verdict was logically inconsistent as it had acquitted him of the count of administering a stupefying substance ("count two") which he said was inextricably linked to the rapes and the attempted choking charges. He claimed that M's account that she was "drugged" and thereby rendered unconscious was fundamental to her narrative. The court, however, said that on the facts of the case, it seemed entirely logical that the jury had reached guilty verdicts in relation to the rape and attempted choking counts. It said that count two was not a necessary pre-requisite to proving the charges of rape and attempted choking and that the injuries sustained by M could have led the jury to conclude that there was a lack of consent, whether she had been rendered unconscious or not. Further, it was open to the jury to conclude that M was rendered

unconscious by the applicant, as a result of a physical assault such as a blow to the head, for which there was ample evidence. The court concluded that count two was not so inextricably linked to the other counts that the guilty verdicts were logically inconsistent and unsafe, and so dismissed this ground of appeal

4. The prosecution closing: The applicant submitted that the emotive tone of the prosecution closing speech and reference to matters for which evidence had not been established rendered the convictions unsafe. In particular, objection was taken to prosecution counsel referring to the "merciless beating" the applicant had subjected the complainant to. The court said the closing speech must be viewed in its totality. It said that, given the injuries to M, it did not seem unreasonable for the prosecution to put the case to the jury that the applicant had caused the injuries and to reject the claim that M had walked into a door when visiting the bathroom. Furthermore, the court said the Trial Judge had made it clear on several occasions that the decisions about the facts of the case were for the jury alone to decide and cautioned them to clear their minds of any sympathy or prejudice. The court concluded that the Trial Judge had made it patently clear that the cause of the injuries was a matter of evidence on which the jury was free to reach their own conclusion.

5. The Trial Judge's charge: The applicant contended that the Trial Judge failed to present a sufficiently balanced summing-up and did not deal with the complainant's dishonest and inconsistent evidence adequately. His counsel, when asked however, was unable to point to any non-direction or misdirection by the Trial Judge. The court said it was not essential that a judge should make every point that can be made for the defence: "The fundamental requirements are correct directions on points of law, an accurate review of the main facts and alleged facts, and a general impression of fairness." The court said the Trial Judge referred to the complainant's inconsistencies on several occasions throughout the summing up and issued cautions on two separate occasions. It noted that over the course of his detailed charge to the jury, the Judge provided directions on points of law and a comprehensive review of the main facts and evidence adduced.

Commentary

The prosecution opening and closing speeches: The improper behaviour of a prosecution advocate during a trial may form the basis of a ground of appeal. The impropriety may relate to opening / closing speeches or cross-examination. Much will depend on the nature of what is said by the advocate, the unfair impact this may have had on the jury's consideration of the issues, and whether the Trial Judge intervened and directed the jury to ignore the impropriety. [See *Randall* [2002] 1 WLR 2237 PC; *Taylor on Criminal Appeals* 9.208].

The Judge's charge: Every defendant is entitled to a fair, balanced and legally accurate summing-up, but in considering a complaint that this has not occurred the appellate court will consider the summing up as a whole, and in the context of the live issues at trial. [See *AG* [2018] 1 WLR 5876; *Taylor on Criminal Appeals*, 9.215.]

Conclusion: The court found no merit in any of the grounds of appeal and concluded that the conviction was safe. It refused leave to appeal and dismissed the application.

SENTENCE APPEALS (NICA)

Approach to sentencing appeals – function of appellate court – sentencing range for causing an explosion – mitigating factors (family, age, eligibility for early release) -meaning of "manifestly excessive"

Paul Campbell (Sentence)
[2022] NICA 41

The appellant has been unsuccessful in his appeal against conviction for causing an explosion likely to endanger life or cause serious injury to property, contrary to section 2 of the Explosive Substances Act 1883. [See above.] He appealed against his sentence: a determinate custodial sentence of 7½ years, divided 50/50 with three years eight months custody and three years eight months licence.

The NICA stated that to succeed in this appeal against sentence, the appellant must satisfy this court that a sentence of 7½ years after trial for taking part in the terrorist bombing of a police station in a busy town centre is manifestly excessive or wrong in principle. The thrust of the appeal appeared to be that the sentence ought to have been suspended.

The Function of the Appellate Court: The court stated that its function on appeals when concerned with sentencing is one of review. In this jurisdiction the appellate court does not conduct a re-sentencing exercise, i.e. it does not impose whatever sentence

the Court of Appeal would have imposed if it was the court sentencing at first instance.

The Supreme Court considered this issue in R v Docherty [2017] 1 WLR 181. At para 44€, Lord Hughes, who delivered the unanimous judgment of the Supreme Court, explained:

"Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-hearing ab initio, as is the rule in some other countries; on appeal a sentence is examined to see whether it erred in law or principle or was manifestly excessive …"

It is not enough that the appellate court might have sentenced differently.

The review exercise described above does not mean the appellate court examines the original sentence as the Judicial Review Court would. [See R v Chin-Charles [2019] EWCA Crim 1140, Lord Burnett CJ at [8]; R v Cleland [2020] EWCA Crim 906 [49], and R v A [1999] 1 Cr App (S) 52, [56].]

A sentence is manifestly excessive if it falls outside the range of appropriate sentences for a particular type of offending, adjusting for the particular circumstances of the case.

Appellant's Grounds

(a) The court rejected PC's argument that the fact that terrorism was treated as an aggravating feature in an explosives case is duplicitous. "That brand of motivation is not an ingredient of the offending and cannot therefore be suggested to be duplicitous. …We agree the authorities are clear that terrorism offending requires a significant element of deterrence in sentencing."

(b) The court also rejected the submission that a suspended sentence ought to have been imposed. "In DPP Ref Nos 13, 14 and 15 [2013] NICA 63, Morgan LCJ observed that, although there is no statutory requirement in this jurisdiction to find exceptional circumstances before suspending a sentence, a sentence should only be suspended in "deterrent sentence" cases in "highly exceptional circumstances as a matter of good sentencing policy." … This principle must apply a fortiori in a terrorist offence where deterrence is an important factor."

(c) So far as delay was concerned, the court noted that "the position on delay is now as set out in DPP's Reference (No5 of 2019) [2020] NICA 1 paras 40-52. This court made it clear that delay, even delay amounting to a breach of the Article 6 requirement for a trial within a reasonable period of time, ought not to automatically lead to a discount in sentence. The court said that in most cases, public acknowledgement of the delay will provide satisfactory relief."

(d) The court rejected PC's family circumstances and young age as providing as basis for reducing the sentence in this case. [In R v Wootton and McConville DPP Reference (No's 2 and 3 of 2012), Morgan LCJ said that, while a young man's age can be taken into account when sentencing in a terrorism case, as he had reached his majority and voluntarily participated in a serious act of terrorism, the mitigating effect of his age was lessened.]

(e) The fact that the appellant may be eligible for release under the Northern Ireland (Sentences) Act 1998 was not a matter for this court. He should be sentenced in the normal way.

The sentence imposed was not manifestly excessive or wrong in principle.

In an appendix, the court summarised the authorities providing an overview of the sentencing for bomb-related offending in and around the 1990s and into the 2000's and reviewed some of the more recent authorities dealing with explosives.

Commentary

Approach to sentencing appeals – function of appellate court: An appeal against a sentence can involve consideration of fresh evidence and the impact such material has on the original sentence. Section 15 Criminal Appeal (Northern Ireland) Act 1968 states:

> "On an appeal to them against conviction or sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence authorised by law (whether more or less severe) in substitution therefore as they think ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the trial." [Emphasis added].

This reflects the wording in section 11(3) CAA 1968 - 'if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the Court below'. This has been interpreted to mean that the CACD can have regard to material not available before the sentencing judge, and to factors occurring subsequent to the sentencing hearing. [See *Sawyer* [16th December

1993]; *Beatty* [2006] EWCA 2359; *Cleland* [2020] EWCA Crim 906; *Taylor on Criminal Appeals*: 10-190. 10-293, 11-90.]

If you would like to discuss these cases with Paul Taylor KC, please click here.

PROCEDURE (NICA)

Practice Direction – procedure – electronic bundles

PRACTICE DIRECTION NO 2 of 2022

SUBMISSION AND FORMAT OF E-BUNDLES

Court of Appeal (Civil and Criminal Divisions), Chancery Division, Queen's Bench Division, Family Division

This Practice Direction sets out the requirements, in the Court of Judicature, for the submission of electronic bundles ("e-bundles") where permitted by existing Practice Directions or by direction of the court. The guidance contained herein should give way to any specific directions by particular courts or the requirements of particular judges / masters in particular cases.

This Practice Direction is to be read and applied in conjunction with Practice Direction 1/2020 [REV2] (the Remote Hearings Practice Direction), the Court of Appeal (Civil and Criminal Divisions), Chancery, Queen's Bench and Family Divisions Practice Direction 6/2011 (revised March 2021), the Queen's Bench Division (Commercial) 'Commercial Hub' Practice Direction 1/2022 the Judicial Review Practice Direction 3/2018 and any Masters guidance pertaining to e-bundles.

This Practice Direction came into effect on 1 June 2022.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Judicial review – committal order - protection of constitutional rights – appearance of bias

John Henry Smith & Another v Attorney General of Trinidad and Tobago and Others
[2022] UKPC 28

by Joe Middleton

In this case, the Privy Council quashed a magistrate's committal decision taken in 2008 by reason of the appearance of bias. The background to the appeal involved politically charged criminal proceedings in Trinidad and Tobago, the Chief Magistrate's solicitation of an alleged bribe, the Attorney General's covert, and open, interventions in support of the Chief Magistrate, and an unsuccessful attempt to remove the Chief Justice of Trinidad and Tobago.

The issue in the appeal was whether the Court of Appeal was entitled to conclude that the Chief Magistrate's ruling was not vitiated by the appearance of bias, or by the deprivation of the Appellants' right to due process and a fair hearing. On the appearance of bias, the Board applied the test in Porter v Magill [2002] 2 AC 357 of "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

The legal principles were not in dispute. The appeal turned on the interpretation of undisputed facts.

The appeal had a long history. Between 2002 and 2008 the former Chief Magistrate of Trinidad and Tobago conducted the so-called "Piarco 1" committal proceedings against the Appellants and their co-accused in relation to fraud and corruption allegations. The charges arose from the construction of Piarco International Airport in the late 1990s, when the United National Congress (UNC) was in power. The defendants included the former UNC Minister of Finance and supposed financial supporters of the UNC. In a departure from normal practice, the charges were brought by a special anti-corruption unit established under the aegis of the Attorney General. By that point, the People's National Movement (PNM) was in power and the Attorney General was a PNM appointee. In 2008, the Chief Magistrate committed the defendants to stand trial.

In a related criminal trial of the former UNC Prime Minister, who was also accused of corruption in relation to the Airport project, it was revealed that the Chief Magistrate had accepted a substantial sum of money from a company connected with the main defence witness in the trial as soon as the witness had given evidence. The payment was supposedly for the purchase of a plot of land owned by the Chief Magistrate, although there was no contract or other evidence of a legitimate payment. When the transaction came to light, and by which time the Chief Magistrate had convicted the former Prime Minister and sentenced him to imprisonment, the PNM Attorney General publicly supported the Chief Magistrate and privately persuaded the PNM's Treasurer to buy the Chief Magistrate's land through one of his companies.

The Chief Magistrate also claimed that the Chief Justice had intervened in the former Prime Minister's trial to try and secure his acquittal, an allegation that led to a formal investigation of the Chief Justice in an inquiry led by Lord Mustill. The Chief Justice was vindicated, but the Mustill Inquiry made serious criticisms of the Chief Magistrate's conduct.

The Appellants applied for judicial review and constitutional relief. This was on the basis that the committal order was tainted by the appearance of bias, and that they had been denied due process and a fair hearing, to which they were entitled under sections 4(a) and 5(2)(f)(ii) of the Constitution. They also challenged the Chief Magistrate's refusal to recuse himself. The High Court and Court of Appeal rejected their claims, in 2009 and 2017 respectively. This was in part on the basis that there was no real connection between the trial of the former Prime Minister, which was accepted to have been tainted by the appearance of bias, and the Appellants' committal proceedings.

The Judicial Committee's reasons for allowing the appeal included the following:

(a) On the facts of the appeal the Chief Magistrate was beholden to the Attorney General and was "hopelessly compromised", having regard to his reprehensible conduct (para 86).

(b) The notional fair-minded observer would perceive a close connection between the trial of the former Prime Minister and the Piarco 1 proceedings. That connection, the Attorney General's oversight of the Piarco prosecutions, his undoubted interest in the

outcome of the proceedings, and the Chief Magistrate's beholdenness to the Attorney General gave rise to a legitimate doubt as to the Chief Magistrate's ability to act as a wholly impartial judge (paras 79-80).

(c) It was irrelevant that the Court of Appeal had identified the correct legal test on the appearance of bias (para 74). It was the application of the legal test that fell to be assessed.

(d) The Court of Appeal erred in rejecting the case of apparent bias by concluding that actual bias had not been established (paras 82-83).

(e) The Board rejected the Respondents' argument that it should show deference to the local courts' application of the Porter v Magill test. To do so would amount to "an abdication of responsibility" given "the constitutional importance of an independent and impartial tribunal to the fair administration of justice and preservation of the rule of law" (para 75). The Board was in no worse position to apply the test than the local courts (paras 73-76).

In allowing the appeals, the Board quashed the decisions of the Court of Appeal and granted judicial review and the claim for constitutional relief. It remitted the matter to High Court to deal with consequential issues, so it now falls to the High Court to determine what further steps, if any, should be taken with the criminal charges against the Appellants.

[Editor: See *Taylor on Criminal Appeals* 4.62]

If you would like to discuss this case with Joe Middleton, please click here.

CARIBBEAN APPEALS

Prepared by Rajiv Persad, Shalini Sankar, Ajesh Sumessar and Gabriel Hernandez of Allum Chambers, Trinidad and Tobago

Hostile Witness- when can Court treat a witness as hostile?

Norbert Aaron v The State
Crim Appeal 26/2017
Court of Appeal (Trinidad and Tobago)

The Court of Appeal considered:

(a) Whether the virtual complainant (VC) could be deemed a "hostile witness" if there was no previous inconsistent statement made by the witness and therefore there was no factual basis on which to deem the witness hostile.

(b) Whether the Trial Judge erred in law in his treatment of the evidence of the virtual complainant by:

i) admitting both the deposition and the police statements of the virtual complainant and

ii) failing to warn the jury not to rely on the consistencies in the deposition and the police statements as supportive of its truth.

(c) Whether section 15H of the Evidence (Amendment) Act was properly invoked to deem the virtual complainant as a hostile witness;

(d) Whether the trial judge erred in allowing her deposition and her two statements to the police to be read into evidence.

The Court distinguished the judgment in R v Muldoon [2021] EWCA Crim 381 indicating that in determining whether to deem a witness as hostile, consideration must necessarily be given to the legal requirements as well as to relevant factual issues, which may include the demeanour of the witness.

The Court found that there was no distinction between a witness who, on oath, states that he is reluctant to give evidence and a witness who departs from her earlier proof of evidence or deposition in favour of the other side. In light of the VC's reluctance to give evidence and refusal to have her memory refreshed, it was held she was being hostile to the interests of the prosecution. Therefore, in those circumstances, it was reasonably open to the judge, who exercises a wide discretion in such scenarios, to treat her as a hostile witness.

The Court then laid out the procedure to be followed after a witness has been deemed hostile

Directions on Circumstantial Evidence

Anderson Ryan Ince v The Queen
CRIMINAL APPEAL NO. 10 OF 2018 Court of Appeal (Barbados)

The Court of Appeal held that, in the classic formulation of the direction concerning reaching a verdict, the jury is reminded that the strength of a case based on circumstantial evidence derives from the coincidence of the various facts and circumstances. No direction is usually given with respect to the standard of proof to be applied to each individual item.

The jury is directed that they must consider whether all the facts and circumstances taken together lead them to the inference that the accused is guilty beyond reasonable doubt.

In other words, in the classic formulation, the direction on the standard of proof beyond reasonable doubt relates to the ultimate inference of guilt, not to each separate item of circumstantial evidence.

However, where the particular fact or circumstance is essential to a finding that an ingredient of the offence is proved, or to the ultimate finding or inference of guilt, such a fact or circumstance must be proved beyond reasonable doubt.

Each case in which circumstantial evidence is relied upon will be based on its own peculiar facts. It is for the trial judge to consider the facts carefully and to decide whether there are items of evidence which are indispensable to finding an inference of guilt. If the judge determines there are such facts or circumstances, the judge should draw them to the attention of the jury, being careful to direct them that it is for them to determine whether or not these facts or circumstances in fact possess such probative value that they are indispensable to finding an inference of guilt.

The judge should further direct the jury that unless they find these facts and circumstances proved beyond reasonable doubt, they must not rely on them to support an inference of guilt.

Judicial Review of DPP decisions to continue prosecutions- murder – Reviewing Court quashes indictments- Appeal by DPP – governing principles- exceptional application.

DPP -v- Durham, Salandy and Calliste
Civil Appeal Number P248 of 2019
Court of Appeal (Trinidad and Tobago)

This appeal arose from the decision of the trial judge to permit judicial review of decisions of the DPP to continue the prosecutions of the respondents who were accused of three murders. The Trial Judge quashed the indictments and the accused were released.

This action challenged whether the decision to continue the prosecutions of the respondents or the accused, solely on the basis of evidence from a witness who had clearly stated to prosecutors that:

> (i) he lied on oath before the magistrate's court at the preliminary inquiry; and
>
> (ii) intended to do so again when called to testify at the trial of the accused before the Assizes, was so exceptional as to fall within the rare category of decisions to prosecute that were amenable to the public law remedy of judicial review.

The Court of Appeal dismissed the Appeal of the Director of Public Prosecutions.

Criminal Appeal - Murder - Manslaughter - Appeal against conviction - 291(b) of the Penal Code Joint Enterprise - Judge's Direction to Jury

Dervinique Edwards and Zaria Burrows v DPP
SCCrApp. No. 144 of 2020; SCCrApp. No. 96 of 2021
Court of Appeal (Bahamas)

In the case of Burrows, the Judge's direction did not state that if the jury was not satisfied that Burrows knew Williams had the knife and intended to stab Breanna (meaning they could find that the agreement to which Burrows was a party to was only to injure Breanna and not to kill Breanna), then Burrows would not be guilty of murder. This was clearly the defence of Burrows, and she was entitled to have that specific defence put to the jury for consideration. It is accepted that the Trial Judge put to them a manslaughter verdict as an alternative to murder only if they were satisfied that Burrows intended to injure and not to kill Breanna.

However, the directions of the Judge did not put, in the clearest terms, to the jury that Burrows' knowledge that Williams had a knife at the time of the incident was itself a critical factor in determining whether Burrows had an intention to kill. It is for this reason that the verdict of murder with respect to Burrows was unsafe. As the evidence was clear that Burrows knew that they had an intention to injure or harm Breanna but not to kill, a conviction for manslaughter should be substituted in place of the conviction for murder.

In the case of Edwards, it was her defence that she did not leave the vehicle and did not know that Williams had a knife or intended to stab Breanna. However, the evidence of Brown was that Edwards did leave the car and had a bottle in her hand. The evidence of McKenzie was that the girls threw the bottles at Breanna after Williams had stabbed her. On this evidence, a jury was entitled to find that Edwards participated in the attack on Breanna, that she knew Williams had a knife and continued to attack Breanna after she was stabbed – thus sharing the common intention of Williams to kill Breanna. In the circumstances, it cannot be found that the verdict of murder is unsafe and the appeal against conviction is dismissed.

The appeal, by Burrows, against the conviction of murder is allowed and there is substituted a conviction of manslaughter. The sentence of 28 years is quashed and a sentence of 15 years from the date of conviction is imposed. The appeal by Edwards against conviction and sentence is dismissed.

Criminal appeal — Appeal filed against conviction and sentence — Abandonment of appeal against conviction — Reopening of appeal against conviction — Whether abandonment of appeal against conviction was a nullity — Whether abandonment was deliberate

and informed decision of appellant — Application to tender fresh evidence of alibi on appeal — Test for reception of fresh evidence on criminal appeal — Whether failure to call alibi witnesses at trial rendered conviction unsafe — Identification evidence — Turnbull guidelines — Whether judge failed to identify weaknesses in the identification and other evidence in summing up the case to jury— Good character direction — Whether judge erred in not giving good character direction to jury on behalf of the appellant — Application of the proviso.

Nardis Maynard -v- The Queen
SKBHCRAP2004/0012
Court of Appeal (St. Christopher and Nevis)

Maynard appealed against his conviction and sentence. In 2006, at the hearing of the appeal, his counsel informed the Court that the appeal against conviction was being abandoned and proceeded with the appeal against sentence only. The Court dismissed the appeal against sentence.

Fourteen years later, Maynard, having obtained new counsel, filed an application to render the abandonment of the appeal against conviction a nullity and to reopen his appeal against conviction. He stated that he had only become aware that his appeal against conviction was abandoned by his former counsel in 2014. He also sought permission to tender fresh evidence on the appeal in the form of an affidavit of Yvette Maynard in support of the alibi defence raised at trial.

Upon hearing submissions from Maynard's counsel and in light of the respondent's concession on the point, the Court declared the abandonment a nullity and promised to provide its reasons for so doing at a later date.

The Court accordingly proceeded to hear Maynard's appeal against conviction, admitting the fresh evidence of Yvette Maynard de benne esse and reserving its decision on the merits of the fresh evidence application. The issues which arose for the Court's determination on the substantive appeal were: (1) whether the failure to call alibi witnesses, Yvette and Terence Maynard, at the trial rendered Maynard's conviction unsafe; (2) whether the judge failed to identify for the jury, the weaknesses in the identification evidence during his summing up of the case; and (3) whether the judge erred in not giving a good character direction to the jury on Maynard's behalf.

Criminal Appeal - Manslaughter - Appeal against Sentencing - Whether sentence was excessive - Aggravating and mitigating factors - Reluctance of an appellate court to intervene in sentences imposed - Pierre Lorde Guidelines

Elliston McDonald Greaves -v- The State
BBCR2021/003 : Caribbean Court of Justice (Barbados)

Greaves pleaded not guilty to murder, when he appeared in the Barbados High Court on 3rd July 2017, but guilty to manslaughter on grounds of provocation. This plea was accepted by the State. On 12 July 2018, following a sentencing hearing, a victim impact statement, and a pre-sentence report, the learned Judge set the notional sentence of the appellant at 16 years imprisonment of which the 928 days spent on remand were deducted leaving a term of imprisonment of 13 years and 168 days.

The Sentencing Judge arrived at the 16 years sentence by (1) using a starting point of 20 years; (2) increasing it by 4 years because the aggravating factors of the offender outweighed the mitigating factors; and (3) deducting 8 years representing the one-third discount for Greaves's early guilty plea. He was therefore sentenced to 13 years and 168 days imprisonment.

Greaves's appeal of his sentence was dismissed by the Court of Appeal on 19 March 2021. The Court of Appeal found no fault with the Sentencing Judge's assessment of the seriousness of the offence, and the aggravating and mitigating circumstances of the offence in arriving at a starting point of 20 years.

Mr. Greaves appealed to the CCJ arguing, among other things, that his sentence was contrary to the Penal System Reform Act, that his previous convictions were not personal aggravating factors warranting the increase of the starting sentence by four [4] years, and that the sentence of sixteen [16] years was excessive, having regard to the Pierre Lorde Guidelines.

Constitutional law - Fundamental rights and freedoms - Murder - life imprisonment – entitlement to mitigate and not assume imposition of life imprisonment in all cases- substitute sentence - Section 14 of the Trinidad and Tobago Constitution - Order as to cost - Appeal dismissed.

Naresh Boodram -v- The Attorney General of Trinidad and Tobago
Judicial Committee of the Privy Council

Boodram appealed to the Court of Appeal of the Republic of Trinidad and Tobago. There he successfully argued that his case should be remitted to the High Court for re-sentencing, on the basis that the court should

not be restricted to commuting the sentence to life imprisonment and should instead have the power to impose any lawful penalty other than sentence of death. The Court of Appeal allowed his appeal and remitted his case to the High Court, making no order as to costs.

The Attorney General appealed, before the Judicial Committee of the Privy Council, in relation to the nature and limits of the High Court's discretion to re-sentence Boodram. Boodram cross-appealed in respect of the Court of Appeal's decision that there should be no costs award in his favour.

Held: The Board agreed with the Court of Appeal that the width of the wording of section 14(2) of the Constitution permits the High Court, in an appropriate case, to substitute the death penalty for a sentence of life imprisonment, with a recommended minimum period (or tariff) to be served before consideration of release. Notwithstanding, there will be many cases in which the High Court would in any event regard life imprisonment as the appropriate substitute sentence.

Moreover, the Board agreed with the Court of Appeal that the case must be remitted to the High Court for the determination of the appropriate sentence in this case.

Bail – Murder – Constitutionality of Statutory Provision preventing Bail for Murder

Attorney General v Akili Charles
Judicial Committee of the Privy Council
2022 UKPC 31

This appeal concerns the constitutionality of a law passed by the Parliament of the Republic of Trinidad and Tobago which provides that bail may not be granted to any person charged with the offence of murder.

The appellant, the Attorney General, accepts that the Bail provision derogates from the fundamental rights and freedoms enshrined in sections 4 and 5 of the Constitution of Trinidad and Tobago, adopted in 1976 ("the Constitution"), but contends that it was nevertheless constitutional on two grounds.

First, it was an "existing law" immediately before the commencement of the Constitution and therefore, pursuant to section 6 of the Constitution, it was not invalidated by anything in sections 4 and 5 ("the existing law issue").

Secondly, it was passed with a special majority under section 13 of the Constitution ("the section 13 issue"). Section 13 allows for Acts of Parliament to be passed even though they are inconsistent with sections 4 and 5, provided that they are declared to have that effect and that they are passed with a three-fifths majority of both Houses of Parliament, as the Bail Act was. An Act will have the declared effect unless it is "shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual".

The Court of Appeal rejected the Attorney General's case, holding that the Bail provision was not an existing law and that it was not reasonably justifiable so as to be validated by section 13 of the Constitution. The Attorney General appeals with leave to the Privy Council.

Whether the sentence of twenty-five (25) years imprisonment was manifestly excessive — Whether the disparity of sentences was disproportionate.

Entitlement to deduct from sentence period of time for delay in accused awaiting trial- pre trial incarceration - material mitigating factor

George Thomas v The Queen
ANUHCRAP2018/0018 OECS Court of Appeal (Antigua)

Disparity by itself can never be a sufficient ground for overturning a sentence.

The question that must be answered is whether the sentence given by the court is wrong in principle or manifestly excessive. In the case of Mr. Thomas, there were significant differences in the level of participation, with respect to his co-defendants, as well as the guilty plea of Mr. Seraphin which were factored in so as to justify a disparity in sentence.

In the case of Mr. Thomas, the delay has been a considerable one, being eight plus (8+) years, and the learned judge ought to have considered the issue of delay as a material mitigating factor allowing for a reduction in sentence. This Court has the discretion to take this delay into account, as this is a serious offence, and clearly a custodial sentence was appropriate. Having considered all the circumstances, a reduction of two (2) years for the delay is in order.

In the absence of unusual circumstances, a judge should fully credit a prisoner for pre-sentence custody not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence. The learned judge failed to specify the period of pre-trial incarceration for Mr. Thomas. Mr. Thomas is entitled to credit for the six (6) years and eleven (11) months he spent on remand.

INTERNATIONAL TRIBUNALS

Tanzania Court of Appeal

Challenge to mandatory death penalty

Kambole v Attorney General
[2022] TZCA 377

By Amanda Clift-Matthews

K had challenged the lawfulness of the mandatory death penalty for murder in s 197 Penal Code on grounds that it was arbitrary, a cruel and inhuman punishment, and a breach of the fair trial rights of an offender to be heard before sentence. The High Court dismissed the claim on the basis that it was bound by the earlier judgment of the Court of Appeal in *Mbushuu Alias Dominic Mnyaroje and Another v Republic* [1995] TLR 97. K appealed.

In *Mbushuu* the Court of Appeal found the death penalty to be a lawful punishment. Although the Court considered the death penalty to be inhumane and cruel, they held it was permissible under article 30(2) of the Tanzanian Constitution. Article 30(2) allows for a breach of rights when 'reasonably necessary in the public interest'. The Court of Appeal in *Mbushuu* concluded that the objective of the death penalty was deterrence and that Parliament had decided that the death penalty was reasonably necessary to further that objective.

At the hearing in the Court of Appeal, K argued that his complaint had not been against the death penalty but the mandatory nature of the death penalty only, which was disproportionate to its objective. He argued that there was a distinction between the type of punishment (death penalty) considered in *Mbushuu* and the manner in which it was imposed (automatically). K pointed to case law from multiple jurisdictions that had found the mandatory imposition of a death sentence unlawful, yet affirmed the death penalty itself.

The Court of Appeal, however, dismissed the appeal on the basis that the issue was res judicata. The reasoning given was that the death penalty and its mandatory imposition were inseparable and, therefore, part of the ruling in *Mbushuu*. The Court also referred to the case of *Tete Mwantenga Kavunja v Attorney General*, Miscellaneous Civil Cause No 21of 2014, where a challenge to the mandatory death penalty had been raised in the petitioner's prayer but was not decided on the merits. The Court of Appeal said that the fact the petitioners were different in *Mbushuu* and *Tete* from the appellant in the present case was irrelevant since this was public interest litigation. For those reasons, it held, the doctrine of *res judicata* applied.

Commentary

The Court of Appeal would have been at liberty to distinguish *Mbushuu* or depart from that decision, which was made more than 25 years ago, but chose not to. The Court made no reference to the 2019 ruling of the African Court on Human and People's Rights, in *Ally Rajabu and Others v United Republic of Tanzania* (Application No 007-2015, Judgment on Merits and Reparations, 28 November 2019), which held that Tanzania's mandatory death penalty was an arbitrary deprivation of a life and a violation of the right to a fair trial under the African Charter on Human and Peoples' Rights. That ruling drew criticism from Tanzania's government, which promptly withdrew the right of individuals and NGOs to file cases directly in the African Court. *Kambole* was delivered in the wake of these political sensitivities.

The judgment in *Kambole* puts Tanzania in conflict with international jurisprudence, which has drawn a clear distinction between a death sentence for an offence and the mandatory imposition of that death sentence. The judgment also bucks the trend of other African jurisdictions, such as Kenya, Uganda, and Malawi, that have moved away from the mandatory death penalty. In some cases, such as Sierra Leone and Zambia, they have moved away from capital punishment altogether.

But despite the mandatory death penalty's continuation under Tanzanian law, Tanzania has not carried out an execution since 1994.

[Editor: See *Taylor on Criminal Appeals* 18.60.]

If you would like to discuss this case with Amanda Clift-Matthews, please click here.

CONTRIBUTORS TO THE SEPTEMBER EDITION

Kate O'Raghallaigh specialises in criminal defence, extradition and crime-related public law Kate has acted in many leading cases in recent years, including the 'Post Office' miscarriage of justice scan-dal: *Hamilton & Others* [2021] EWCA Crim 577, *Ambrose* [2021] EWCA Crim 1443; *Allen & Ors* [2021] EWCA Crim 1874; *Cameron* [2022] EWCA Crim 435. Kate also acted in the 'small boats' conjoined appeal relating to migrants crossing the English Channel (*Bani & Ors* [2021] EWCA Crim 1958), the leading case on the impact of Coronavirus on custody time-limits regula-tions (*R (on application of DPP) v Woolwich Crown Court* [2021] 1 W.L.R. 938) and the Privy Council's recent judgment in relation to the illegality of children's detention in adult prisons in Trinidad and Tobago: *Seepersad v. Commissioner of Prisons* [2021] 1 W.L.R. 4315.

Emma Goodall KC is a specialist criminal practitioner. She has earned a loyal following amongst solicitors due to her meticulous approach to law and case preparation and her reputation for outstanding client-care. She has a strong track record in dealing with vulnerable and mentally disordered clients.. She is regularly instructed in trials of a high profile, complex and sensitive nature including serious sexual offences, homicide, drug trafficking and fraud. Emma also advises upon criminal appeals where she did not act at first instance and in Judicial Review proceedings. n 2012, she was appointed as a criminal Recorder.

Benjamin Newton has practiced as a criminal defence barrister since 2004. He is instructed to represent those accused of the most serious and complex criminal offences, frequently in high profile and legally significant cases. He regularly appears before the Court of Appeal in fresh appeals, and has particular expertise in cases relating to sexual offences and human trafficking. He also sits as a Recorder in the Crown Court and as a judge of the First-tier Tribunal in mental health.

Pippa Woodrow is regularly instructed to advise and appear in criminal appeals at all levels both in England and Wales, and in overseas jurisdictions including constitutional appeals before the Privy Council and Caribbean Court of Justice. She has particular expertise in offences.

Paul Taylor KC specialises in criminal appeals and has developed a particular expertise in cases involving a particular expertise in cases involving fresh expert forensic evidence (including GSR, DNA, CCTV), homicide, and offenders with mental disorders. He is head of the DSC Criminal Appeal Unit and editor of Taylor on Criminal Appeals. Chambers and Partners 2022 describe him as "One of the foremost appeals lawyers…"

Sarah Vine KC is ranked in both Chambers and Partners and the Legal 500 (Tier 1). Her appellate work includes the leading authority on the admissibility of Encrochat evidence (R v A [2021] 1 Cr. App. R. 22) and the related Judicial Review of the international warranty used to secure that evidence (R (oao C) v DPP [2020] 4 W. L. R. 158).

Peter Caldwell is ranked by Legal 500 and Chambers UK as a leading barrister, (Band 1) in international crime and extradition and in criminal fraud. He has over 20 years' experience in defending people accused of serious criminal offences and preserving the reputations of those wrongly accused.

Daniella Waddoup has a keen interest and fast developing practice in criminal appeals, particularly those involving appellants with mental disorder and children and young people. She was junior counsel for the

intervener Just for Kids Law in R v Jogee; R v Ruddock. Daniella acted as judicial assistant to Lord Mance JSC and is regularly instructed in appeals to the Privy Council by the Death Penalty Project.

Joe Middleton is a barrister at Doughty Street Chambers. He has a mixed practice including immigration, nationality and asylum law, public and constitutional law (including death penalty strategic litigation in common law jurisdictions), and cross-border crime (extradition and INTERPOL red notices).

Amanda Clift-Matthews is a specialist appellate barrister in criminal law and human rights, with a particular focus on the Caribbean and hearings before the JCPC. She recently joined DSC from the Death Penalty Project where she was in-house counsel