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Criminal Appeals Bulletin

Welcome

Paul Taylor KC

Welcome to the January 2023 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 a selection of the latest appeal cases from the Court of Appeal (Criminal Division), the Northern Ireland Court of Appeal, the Supreme Court and the Guyana Court of Appeal. 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.

With best wishes for 2023
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:
- New Silks
- Taylor on Criminal Appeals
- DSC Appeal Seminars
- New Criminal Appeals section – Caribbean Law
- In the Courts

England & Wales:
- Conviction appeals (CACD)
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Sanctions in contempt cases:
Breen v Esso Petroleum [2022] EWCA Civ 1405

UK Supreme Court:
Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32

Northern Ireland:
- Historic Convictions
- Sentence appeals (NICA)

The Caribbean:
Challenge to mandatory death penalty in Guyana Court of Appeal

LATEST NEWS

NEW TEAM MEMBER

We are delighted to welcome Melanie Simpson KC who joins our Criminal Law team (and is a contributor to this bulletin).

NEW SILKS

We are delighted that leading juniors, Joe Middleton, Jonathan Lennon, Garry Green, Benjamin Newton and Fiona Murphy have been appointed King's Counsel as a result of the 2022 competition. See here for more details.

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.]
>
> *Baroness Helena Kennedy KC* said:
>
> "I just wish that Paul's accessible book had been available when I was a younger lawyer… This book is really one that has to be on your desk, on your shelf, in your hand as you go forward with the cases to do justice in our courts for people who have sometimes been wrongly convicted."

DSC APPEAL SEMINARS

- DSC Appeals Unit presents a series of five seminars to celebrate the publication of *Taylor on Criminal* Appeals. The first two, given by contributors to the book, took place in 2022. In September Paul Taylor KC and Daniella Waddoup discussed "Early days in the Court of Appeal (Criminal) Division", looking at the procedural and practical issues involved in preparing and presenting a criminal appeal. In November, Edward Fitzgerald KC examined the CACD's approach to sentencing appeals, recent changes in sentencing law, and practical tips and advice for identifying potential grounds. The recording of this seminar can be found here on our appeal page.
- The next seminar is ***Judicial Review of criminal proceedings*** (19th January 2023), presented by **Nichola Higgins** (Matrix), author of the chapter on Judicial Review, and **Edward Fitzgerald KC**. This seminar will examine the issues within criminal proceedings that are amenable to judicial review and the approach of the Administrative Court to such challenges. Register your place here.
- On 23rd March 2023, Paul Taylor KC will chair ***In discussion with the Criminal Cases Review Commission*** with Helen Pitcher (Chair of the CCRC), Rob Ward (Commissioner), John Curtis (Head of Legal at CCRC). This seminar will provide an overview of the CCRC's powers and procedures, a spotlight on recent referrals and a panel discussion. Register your interest here.
- In June **Professor David Ormerod** and **Emma Goodall KC** will present ***The Court of Appeal (Criminal Division)'s approach to good and bad character evidence*** (1st June 2023). This seminar will look at the CACD's approach to grounds based on good and bad character evidence. Register your interest here.

NEW CRIMINAL APPEALS SECTION ON DSC WEBSITE – CARIBBEAN LAW

- 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]. We have now added a section with links to Caribbean Law websites.

IN THE COURTS

Since the last edition, Richard Thomas KC and Benjamin Newton represented *Mr. Elmi* in his successful appeal against possession of false ID document with intent, Graeme Hall and Kate O'Raghallaigh represented five sub-post masters and mistresses whose convictions were quashed in the latest decision relating to the Post Office 'Horizon' scandal [*Hawkes & others*], Edward Fitzgerald KC and Pippa Woodrow successfully challenged the sentence of detention for public protection imposed on *Mr. Surrey* in 2007 which was replaced with a Hospital Order, James Wood KC and Daniella Waddoup successfully resisted an AG reference seeking to increase *Mr. Alexander's* minimum term of 15 years for murder, Jude Bunting KC (and Owen Greenhall)

provided written submissions on behalf of Liberty in the *AG reference on a point of law* arising from the Colston statue trial, Annabel Timan represented the environmental protestor known as "Digger Down" in the challenge to the contempt proceedings brought against him [*Breen v Esso Petroleum*], Edward Fitzgerald KC, Joe Middleton and Pippa Woodrow and The Death Penalty Project assisted the local lawyers in a landmark constitutional challenge to capital punishment in Guyana [*Gordon, Greenidge and Harte*].

Each of these cases features in the summaries below.

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.*

COURT OF APPEAL (CRIMINAL DIVISION)

CONVICTION APPEALS

False ID Documents – Refugee / Humanitarian protection- Availability of Statutory Defence – guilty plea

R v Elmi [2022] EWCA Crim 1428

By Benjamin Newton

In August 2010 the Appellant arrived at Heathrow Airport from Somalia and used a false Norwegian passport to attempt to enter the UK. Having been stopped by border officials he claimed asylum. He was subsequently charged with possession of a false identity document with intent, and in September 2010 was sentenced to twelve months immediate imprisonment following his guilty plea at the Crown Court.

In July 2013, following protracted immigration proceedings, he was successful in his appeal to the First-tier Tribunal to the extent that he was granted humanitarian protection with Rule 339C under Part 11 of the Immigration Rules. The Tribunal had been satisfied that he had previously been persecuted for a Convention reason and was still at risk of serious harm if he was to return to Somalia. But, by 2013 that risk was no longer for a Convention reason due to the change in the political and security situation in Mogadishu. He was therefore **not** a refugee but **was** entitled to humanitarian protection. It was also held that returning him to Somalia would breach his Article 3 ECHR rights and would be a disproportionate interference with his Article 8 rights.

The CACD held that it is not possible to construe s31 Immigration and Asylum Act 1999 as if it applied to those with humanitarian protection as well as those with refugee status. The defence only applies to refugees, but, consistent with its statutory purpose, may be advanced at trial by those who are at that time presumptive refugees. It is for the jury to determine whether the defence is made out, and the issue is whether the defendant is a refugee.

On the facts of the Appellant's case, the CACD concluded that a jury in 2010 would not have been sure that he was not a refugee and would therefore have found him not guilty. That the First-tier Tribunal did not find him to be a refugee in 2013, based on the facts as they were in 2013, did not affect his status as a presumptive refugee in 2010 and did not therefore assist in that respect.

Finally, the CACD concluded that the failure of the Appellant's representatives to raise the s31 defence in 2010 had led to a clear injustice. 'Nothing that has occurred subsequently casts doubt on the fairness of that outcome, for example, by showing that he was not, in fact and law, a refugee *at that time*'. The conviction was therefore unsafe.

*See **Taylor on Criminal Appeals** para 9.141*

The Appellant was represented by Richard Thomas KC and Benjamin Newton.

False identity documents – NRM – guilty pleas

R v BXR [2022] EWCA Crim 1483

By Tayyiba Bajwa

BXR appealed against conviction. He was a Nigerian who had entered the UK in 2007 on a visitor visa. He overstayed and started working in a factory in 2012 having used a false passport with a false stamp indicating he had been granted indefinite leave to remain. BXR pleaded guilty to two counts of possession of a false identity document with an improper intention, one count of fraud, and one of illegal working. He was sentenced in May 2017 to nine months' imprisonment.

In 2019 he was referred through the National Referral Mechanism and, on 29 October 2021, he received a positive conclusive grounds decision. He had been the subject of attacks in Nigeria which caused him to flee to Lagos. In Lagos, he had worked for a man (CD) who forced him to have sex with men, forced him to agree to a "Covenant" which included ritualistic elements, and then arranged his travel to the UK. Upon arrival in the UK, he was taken to a house where his movements were restricted, he was forced to have sex and take drugs, and was told he owed CD a large sum of money and couldn't leave the house until the debt was repaid. He escaped and became homeless whereupon he was taken in by a preacher, who offered him accommodation and work

if he underwent gay conversion therapy. The preacher gave him the photocopy of the passport used to gain employment; BXR never had access to the actual passport. For the first few years of his employment, he received no wages directly but was given a weekly cash stipend of a very small amount. In 2020, the First-tier Tribunal accepted he had been trafficked and allowed his appeal against the refusal of asylum. There was evidence from a clinical psychologist that he had PTSD and presented credibly as a survivor of persecution and trafficking.

He appealed against conviction on the basis that his legal advisers should have been on notice that he had been trafficked and, had the CPS known the reality of his situation, he might not have been prosecuted. The offences were all complete before the defence pursuant to s.45 Modern Slavery Act 2015 came into force.

The CACD allowed the appeal.

There were not circumstances sufficient to put the legal advisers on notice of the trafficking issue. However, the absence of fault by the legal advisers did not bar the allowing of the appeal (see, e.g. *R v O* [2011] EWCA Crim 2226 at §10).

Referencing the relevant CPS guidance in force at the time, the CACD observed the importance of the nexus between the offending and the trafficking and noted that other factors which engage the public interest are the gravity of the offence and alternatives reasonably open to the Defendant.

In this case, the CACD heard evidence from BXR and accepted his account of events, noting that while there were discrepancies and inconsistencies in his account, they were "readily explicable by the effect which the unchallenged trafficking and PTSD would have had, in conjunction with his cognitive difficulties" and they accepted his account as truthful.

The CACD found there had been a direct link between the trafficking and the offending and that he had experienced a high degree of compulsion due to his cognitive difficulties, his trafficking background, and his well-founded fear of persecution should he have to return to Nigeria. Had the prosecution known the true position and applied the 2013 guidance, it would very likely not have prosecuted him. Convictions quashed.

Comment:

This decision confirms that there is no requirement that the original advisers (or prosecution or court) need have erred in failing to observe the indicators of trafficking for there to be a successful appeal against conviction.

That the Appellant gave oral evidence in his appeal appears consistent with the CACD's observation, in *R v AAD* [2022] EWCA Crim 106, that there may be appeals where oral evidence will not be required but where "*the suggested trafficking is based…on unsatisfactory and untested hearsay evidence from the appellant, the court may express the view that it would be preferable for the appellant to give evidence*" [§108].

It is significant that the CACD recognised that discrepancies and inconsistencies in evidence will not in and of themselves invalidate an account of trafficking particularly when taken against a backdrop of exploitation and demonstrated cognitive difficulties confirmed by the expert evidence of a psychologist and self-evident in the Appellant's own evidence.

False identity documents – guilty pleas

BYA [2022] EWCA Crim 1326

By Peta-Louise Bagott

BYA applied for leave to appeal against her conviction from 2009. She had pleaded guilty to an offence of possession of a false identity document with intent, contrary to section 25(1)(c) Identity Cards Act 2006, and she was sentenced to 12 months immediate imprisonment. Her application was approximately 10 years and 10 months out of time.

It was submitted that BYA entered a plea without her status as a potential credible victim of trafficking being explored; and in fact, this had been 'ignored or overlooked' by the police and CPS [44]. Had the CPS been aware of the BYA's history, either the dominant force of compulsion was sufficient to reduce her culpability to a point where it was not in the public interest for her to be prosecuted, or she would or might well have not been prosecuted in the public interest [44]. BYA sought to rely on fresh evidence consisting of evidence and decisions from the Competent Authority, First-tier Tribunal ('FTT') and Upper Tribunal ('UT') supporting that she was a victim of trafficking [45].

The CACD were satisfied that it was "necessary" to admit the new evidence [43]. Further, that the case fell within the categories of when it was possible to

appeal a guilty plea as set out in *R v T* [2022] EWCA Crim 108 and *R v AAD* [2022] EWCA Crim 106 [43].

Notwithstanding BYA's guilty plea, the CACD found that the conviction was unsafe, and quashed it, on the basis that:

(a) She was a victim of trafficking by virtue of the debt bondage into which she was placed, which resulted in sexual exploitation, forced prostitution, and being re-trafficked to other countries [48-50];

(b) The offence was committed in the course of her forced prostitution and was a consequence of it [51];

(c) There was a strong nexus between the crime and the trafficking which considerably diminished BYA's culpability, with the compulsion arising 'directly from her trafficked circumstances and not just the trafficking' [52-54];

(d) It was open to them to consider the public interest question without trespassing on territory already appropriately considered by the prosecuting authority [55];

(e) Had the CPS known about her status as a victim of trafficking in 2009, the CPS 'would or might well' have not prosecuted her because her criminality, or culpability, was significantly diminished, and the public interest did not require a prosecution of this particular offence on the facts of the case [56];

(f) Leave to appeal out of time should be granted as the conviction was secured in an inadvertent breach of international law protections that should have been afforded to BYA [57].

Comment:

While the approach taken by the CACD is consistent with the previous authorities, this decision highlights two important points. First, the need to take a proactive approach to identifying possible credible victims of trafficking. Indicators of trafficking should be explored, including by way of a referral to the National Referral Mechanism, at the earliest opportunity by all parties. Second, the CACD will intervene and determine the public interest question if it has not already *appropriately* been considered by the CPS. Where the CPS has given careful consideration to this, and there is no new evidence or evidence that would change their decision on appeal, it is unlikely that the CACD will intervene and redetermine this question.

Jurors – bias – notes – investigation by judge

R v Skeete [2022] EWCA Crim 1511

By Daniella Waddoup

The Appellant was convicted of rape. The central issue at trial was whether he had been correctly identified by the complainant as the perpetrator. The Appellant appealed on four grounds, all of which raised alleged jury irregularities, and all of which were rejected. The two principal grounds (and those considered in this commentary) related to the issue of bias. They arose in the context of a note sent by the jury, once in retirement, in the following terms:

> *"There is a concern from a member of the jury that two other members of the jury have close personal experience of sexual assault and rape – and whether this has influenced their verdict. Is this a concern? If not, we have come to a majority verdict."*

The first ground sought to frame the note as disclosing evidence of apparent bias amongst the jury. Because the jury were in retirement, it was impossible to conduct any kind of investigation of the relevant jurors, such as asking what impact their experience had had on their deliberations. In those circumstances, it was argued, the only reasonable course open to the Judge was to accede to defence Counsel's application to discharge the entire jury.

The second ground concerned the adequacy of the steps taken by the Judge once he had decided not to discharge the jury. He had asked each juror to answer four questions, in open court, all concerned with whether they had thus far tried the case only on the evidence and felt able to continue to do so. All jurors answered in the affirmative. After a further brief retirement, the jury returned a majority verdict.

Rejecting the first ground of appeal, the CACD repeated the test for apparent bias set out in *Porter v Magill* [2002] 2 AC 357 i.e., whether a fair-minded and informed observer would conclude that there was a real possibility or danger that the jury would be biased. The Court concluded that the test was not met on the facts of this case. The note did not make any direct assertion of bias but was rather an expression

of generalised concern in the light of a disclosure that two jurors had particular personal experiences (cf. contra *Sander v UK* (2001) 31 EHRR 44, where a jury note made explicit reference to racial bias playing a part in the deliberations). The note in the appellant's case did not provide evidence that jurors were not staying true to their oaths. In these circumstances, the complaint that the only reasonable response open to the Judge was to discharge the whole jury could not be sustained.

This conclusion is consistent with the CACD's consistent position that *"jurors are not expected to be without any knowledge or experience of the criminal justice system or of the issues that arise in cases"* (*R v Bermingham* [2021] 1 Cr App R 24 at [55]). The key question is whether there is a link between those experiences and a real possibility of apparent bias arising.

The second ground was also dismissed. Just as it was a matter of judgment for the trial Judge whether to discharge the jury when confronted with the note, so it was a matter of judgment as to what should be done once he had decided not to discharge them. How a jury is to be directed in a particular case is, the Court emphasised, *"susceptible to more than one approach"*. It was not necessary in every case to make explicit reference to the issue; in the appellant's case the *"vague and imprecise"* character of the note was a relevant consideration, as was the fact that it was highly likely from the context that the jury would have been aware of the reason for the questions asked. The Court also noted that the approach taken, requiring each juror to state in terms that they could and would abide by their oath, was arguably more robust than the one commonly taken, namely a firm direction to reach a verdict based solely on the evidence.

The CACD's disposal of the second ground further reinforces the high threshold for interference with the trial Judge's exercise of discretion when confronted with issues of this kind (see further the recent decision of *R v Gynane* [2020] EWCA Crim 1348 at [41]).

*See **Taylor on Criminal Appeals** para 9.400 (jury irregularities)*

Admissibility - Criminal evidence - Hearsay evidence - Live link evidence - Mobile applications - Multiple hearsay - Witnesses abroad

R v Abdul Kadir [2002] EWCA Crim 1244

By Yvonne Kramo

The Appellant was convicted of rape, attempted rape and indecent assault. At trial, he applied to adduce evidence from his half-brother in Bangladesh, Abdus Samad (Samad), but the Judge refused his application. One of his grounds of appeal against conviction was that that the trial Judge had erred in refusing the application for Samad's evidence to be given via WhatsApp.

Initially, the defence wished Samad to give evidence from Bangladesh via the Cloud Video Platform ("CVP"), however, it proved impossible to establish a satisfactory link. The Judge was then asked to permit Samad to give evidence via a WhatsApp video call. After making enquiries, the Judge informed Counsel that she had been told that WhatsApp was "not deemed as secure" and she refused the application. Neither the Judge nor Counsel had had direct experience of WhatsApp ever having been used in this way.

Evidence via WhatsApp from a witness outside the UK: the legal framework

The CACD held that. under the temporary provisions of s51 CJA 2003 which were in force at the material time, the Judge did have the power to direct that Samad could give evidence from Bangladesh via WhatsApp, if satisfied that it was in the interests of justice for her to do so. The Court observed the following principles:

(a) It is for the party making the application for a live link direction to provide the Judge with all the requisite information.

(b) Section 6C CPIA Act 1996 must be complied with. The requirements apply to a witness who will give evidence in person as well as to a witness who will give evidence via a live link.

(c) When making an application for a live link for a witness who is in another country, it is necessary also to bear in mind the principle that one state should not seek to exercise the powers of its courts within the territory of another state without the permission (on an individual or a general basis) of that other state.

(d) The adequacy of the arrangements needs to be checked in good time. In addition, there needs to be sufficient information to enable the Judge to assess the risks which might be involved in a witness giving evidence from abroad, including any risk that s/he would be under any form of pressure from any other person.

Applying the above principles to the Appellant's case, the CACD rejected the submission that the Judge had wrongly refused the application to adduce Samad's evidence via WhatsApp. Although the Judge's belief that she lacked the power to direct that the evidence could be given in this way was misinformed, she could not have properly concluded that the preconditions of a grant of leave under s51(4) CJA 2003 had been satisfied for the following reasons:

(a) There had been no compliance with s6C CPIA Act 1996. No written notice of Samad's identity was given at any stage and there was, accordingly, no sufficient opportunity for the prosecution to make appropriate investigations.

(b) No steps were taken to establish whether Bangladesh was willing to permit a live link of the kind sought.

(c) No sufficient care had been taken to check the adequacy of the proposed arrangements in good time, or to consider suitable alternative arrangements should any technical or other problem arise.

(d) There was a dearth of information to enable the Judge to assess the risks which might be involved in Samad giving evidence from Bangladesh, including any risk that he would be under any form of pressure from any other person.

Comment

This case serves to highlight that WhatsApp is capable of being an "other arrangement" by which a witness may give evidence by live video link under s.51 Criminal Justice Act 2003. It would, however, be for the Judge concerned to make a fact-specific decision in the circumstances of the particular case. It is important for practitioners to note that, with effect from 28 June 2022, the Police, Crime, Sentencing and Courts Act 2022 further amended s51 of CJA 2003 and that the recent amendments to the Criminal Procedure Rules include new rules 3.35-3.39 relating to live link directions. Therefore, in similar circumstances today, a Judge would have the power to direct a live link via WhatsApp under the statutory provisions which are now in force.

*See **Taylor on Criminal Appeals** para 9.343 (hearsay)*

Admissibility – bad character evidence

R v P [2022] EWCA Crim 1582

By Laura Stockdale

P was convicted of child sexual offences that had occurred on three occasions between 2008 and 2009. At that time, he was between 16 and 17 years old and had been working on a farm where the victim, aged between 5 and 6, lived. P later stopped working on the farm, but in 2018 sent the victim messages on social media and left a sexual drawing in her bedroom. The victim reported the offences shortly afterwards. At his trial, P denied the sexual assaults and the Crown relied upon evidence obtained from his mobile phone of internet searches conducted in 2018 suggesting a sexual interest in underage girls as bad character evidence. P's appeal against his conviction centred on the admissibility of that bad character evidence.

The CACD held that the bad character evidence was admissible under section 101(1)(d) CJA 2003. The Court held that the internet searches were relevant to a matter in issue, namely, P's sexual interest in young girls or in the victim specifically (the victim matched descriptions in the search terms). It rejected the submission that there was a distinction between a sexual interest in prepubescent girls and in teenage girls. Moreover, the Court held that P's sexual interest in girls of both age groups was relevant since the offences had occurred when the victim was prepubescent and P had contacted the victim again in 2018 when she was aged 14. The CACD also found no error in the trial Judge's directions to the jury on the bad character evidence; the trial Judge had adequately directed the jury that P's sexual interest in girls did not itself prove that he was guilty of the offences.

Comment

As the internet searches post-dated the child sexual offences by a significant period, this case presents an unusual application of the principle established by *R v D, P and U* [2012] 1 Cr App R 8 that the viewing and/

or collecting of child pornography may be admissible bad character evidence against defendants charged with child sexual offences. In *R v D, P and U,* the CACD held that evidence of a sexual interest in children, a 'relatively unusual character trait', makes an allegation of child sexual offences more likely to be true and therefore falls within the category of propensity evidence. This case suggests that such propensity evidence may be admissible where evidence of a character trait is obtained long after the alleged offences.

See ***Taylor on Criminal Appeals,*** *para 9.288*

Bad character – non-disclosure – fresh evidence

R v Richards [2022] EWCA Crim 1470

By Katrina Walcott

Mr Richards ("A") was convicted of three counts of rape (Counts 1,2, and 3); GBH s.20 OAPA 1861 (Count 5); ABH s.47 OAPA 1861 (Count 6) and controlling or coercive behaviour, s.76(1) and (11) SCA 2015 (Count 8). The complainant ("C") was A's partner at the time of the offences. A was 43 at the time of conviction and C was 20 years his junior.

A was sentenced to a total of 15 years and extension period of 3 years – this being the longest sentence as applying to Court 3.

A appealed against conviction and sentence.

In terms of conviction, A argued that:

(a) It was wrong to admit bad character evidence in the form of R's previous convictions for sexual offences which dated back 34 years;

(b) Non-disclosure by the police/prosecution;

(c) Fresh evidence should be admitted under s.23 CAA 1968.

In terms of sentence, A argued that the sentencing Judge failed to have sufficient regard to totality and the sentence was manifestly excessive.

The facts: A and C begun a relationship in 2018. In June 2019, C was admitted to hospital with a broken jaw. At the time, she told the police that the injury was caused by a handstand gone wrong. A was arrested and provided a 'no comment' interview. Initially, C did not support the prosecution however, her position changed following disclosures of A's previous sexual offences convictions under "Clare's Law". In December 2019, C made further disclosures against A.

A's evidence was that the allegations were untrue. The defence heavily relied on the fact that C's disclosures were made *after* the "Clare's Law" disclosures.

The prosecution sought to admit the bad character as evidence of A's propensity toward sexual violence in a relationship. A disputed the admission of the previous sexual offences as had been committed when he was 14 and 16.

The Judge allowed the evidence to be admitted, providing full reasons, concluding that despite the "gap in time", the behaviour evidenced a pattern. The Judge highlighted this gap in time to the jury and cited A's potential to change as a factor to consider.

Ground 2 concerned A's claim that C had been bribed by the ex-boyfriend ("B") of his new girlfriend to make a false allegation. A alleged that material known to the police which evidenced the bribery in the form of comments made by a third-party acquaintance ("P"), was not disclosed. The evidence concerned was revealed during a police interview of P for a separate matter. P referenced B being a grass and "a girl" being given money to lie about "Tank" – A's nickname. There was also a text message on P's phone referring to the payment.

Ground 3 pertains to a statement made by ("D") provided in December 2019. The statement revealed that D delivered a payment to C on behalf of B for the purpose of a bribe to falsify evidence. A's solicitors claimed they first learnt of this evidence over a week after A's conviction.

The CACD dismissed all three grounds of appeal against conviction and the appeal against sentence.

Bad Character evidence: This case demonstrates a broad discretion afforded to Judges to admit considerably old convictions as bad character evidence, including those committed when the defendant was a youth. Indeed, The CACD ruled against A despite acknowledging the directions in *R v Hanson [2005] EWCA Crim 824; [2005] 2 Cr App R 21* regarding the limited relevance of old convictions. It appears considerable weight will be attached the trial Judge's direction of themselves and the jury, demonstration of their consideration of the antiquity of the convictions, and overall strength of the prosecution case. It is important to also note that the CACD considered that the bad character was central to A's defence that C made false allegations following the antecedence disclosed to her.

Non-disclosure: The CACD made clear that it would be "*unreasonable*" for the police to consider in *every* investigation whether evidence obtained relates to a known associate and relevant to unrelated proceedings. Notwithstanding, the CACD was satisfied that the prosecution had discharged their disclosure obligations as had provided the defence with text messages from C's phone, evidencing her connection with D and offer of money. The search terms used for the download of C's phone included B and D, as requested in the defence statement. Importantly, the defence statement did not specify the allegation of a bribery. Accordingly, it was held that C was sufficiently cross-examined on this basis.

Fresh evidence: The CACD applied the four considerations in s.23(2) CAA 1968 when finding against A. The "*very powerful factor*" was that there was no *reasonable* explanation for the failure to adduce D's evidence by the defence. The CACD highlighted that D had been mentioned to the defence at an early stage in proceedings, as he was mentioned in the defence statement. A's solicitors excuse that D was not contactable and therefore they could not obtain his supporting evidence was not accepted.

Sexual offences – bad character – unproven allegations

R v Khan [2022] EWCA Crim 1592

By Melanie Simpson KC

On 11 April 2022, the appellant was convicted of sexual assault, the offence occurred on 3 January 2008. The complainant "C" was a 15-year-old boy (described as young for his age) and the appellant who is now 49 was aged 34. The appellant was sentenced to 18 months' imprisonment.

The prosecution, following a successful bad character application, called witness "A" who alleged that the appellant sexually assaulted him in Pakistan in November 2010, when he was aged 25.

The admission of "A"s evidence is the substance of the appeal.

Summary of the facts: The appellant attended a birthday celebration, which was held at "C"s family home. At the end of the night "C's mother allocated a spare bed in the house to the appellant. It was a single bed in the attic room used by "C" and his 11-year-old brother, they shared bunk beds with "C" on top. The appellant tried to persuade "C" to drink alcohol and suggested that "C" should watch pornography on the computer, "C" refused these requests. The appellant asked "C" to show him where the toilet downstairs was and upon returning to the room he threw "C" onto the spare bed. "C" got into the top bunk, he was dressed in pyjamas and was inside a sleeping bag. The appellant stood over the bunk bed and tried to touch "C"s foot and leg through the wooden rails and told "C" not to tell anyone about what was happening. The appellant then put his hand over the top of the rail and touched "C"s leg and moved his hand close to C's groin. "C" jumped out of bed and ran to his parents' bedroom telling them that the appellant had tried to feel him/ molest him, "C" was crying and shaking. The parents took the younger brother out of the bedroom and required the appellant to leave in the morning. The police were called and took an initial account from "C" but he did not want the matter pursued. The appellant was contacted by the police and understood that "C" had claimed he was interfered with.

Proceedings: Matters rested there until 2019 when the appellant stood for Parliament in the General Election, and that came to the attention of "C". The appellant was elected and, two days later he left "C's" brother in law a voicemail expressing concerns about the 2008 incident. Following a family meeting, "C" contacted the police on 17 December 2019 and he was ABE interviewed.

The prosecution of the appellant commenced in 2021. The resultant publicity came to the attention of "A" who complained to the police that he too had been sexually assaulted by the appellant.

"A"s complaint was serious, he alleged that he was required to share a bedroom with the appellant during a work trip. The appellant gave him a sleeping pill and he woke up to find the appellant sucking his penis.

Because of "A"s age at the time there was no jurisdiction to prosecute his complaint, but that did not preclude his evidence being used as bad character in the prosecution of "C"s complaint.

Bad Character Ruling: The judge allowed "A"s evidence to go before the jury. He stated that the case against the appellant was not weak and the central issue was "C's" credibility. The judge considered that there were sufficient similarities in the two accounts to safely enable the jury to conclude that, if they were sure that "A" was telling the truth, then the appellant had a propensity to commit offences of sexual

assault. Given the centrality of "C"s credibility the Jury would be entitled to consider the likelihood or otherwise of mere coincidence that two young males came forward, independently of each other, to allege sexual assault in similar circumstances. The admission of the evidence would not lead to prejudicial satellite litigation or render the trial unfair.

Appeal against conviction: The CACD held that the judge was entitled to find that the prosecution case was not weak. "A" fled the bedroom and immediately complained and police were called. His account of was consistent and supportive evidence was given by his family. Furthermore, the appellant left a voicemail after his General Election victory in which he expressed concern about what happened in 2008.

The evidence was admitted on two bases – propensity and unlikelihood of co-incidence, however the judge was right to confine the legal direction to the latter as this was likely to be of more assistance to the jury given the centrality of C's credibility.

There were similarities and differences between the complaints. The principal similarities were the relative youth of both, the incidents occurred within a short time of the complainant being required to share a bedroom. There was encouragement to take a form of intoxicant prior to the alleged assault. The he appellant sought to explain both complainants conduct in the aftermath as caused by anxiety or confusion around their sexuality.

The judge's conclusion that similarities were sufficient for "A's" evidence to be admitted had been within the scope of his discretion. There was no doubt that the trial was fair and the conviction was safe. [Paras 57-65]

Appeal against sentence: The judge's findings that the offence fell into Category 2A of the relevant Guideline was plainly within the range of findings that were open to him. In particular, he was right to regard "C" as particularly vulnerable. The judge considered whether the sentence should be suspended but concluded that, given the serious nature of the offence in terms of culpability and harm, appropriate punishment could only be achieved by immediate imprisonment, he was entitled to reach that conclusion.

Comment

There has been a creeping use of unproven allegations being used to make and support character applications under the 2003 Act. A defendant of good character can be found to have a propensity to commit offences of the kind charged, on the basis of a single unproven allegation used as bad character evidence. In this case, a serious sexual allegation made by a 25-year-old man was used to support an allegation of sexual touching on the leg made by a 15-year-old boy. Once a judge has correctly applied the legal principles and admitted bad character evidence, any appellant must show that the decision was *Wednesbury* unreasonable, an almost impossible hurdle to reach.

Sexual offences - admissibility of previous allegations – summing up bias

R v Pike [2022] EWCA Crim 1501

By Hayley Douglas

P appealed with leave against his conviction for one count of causing or inciting a child under 13 to engage in sexual activity, one count of rape of a child under 13, and 7 further counts of rape of a child. He was acquitted on one count of causing or inciting a child under 13 to engage in sexual activity. He had pleaded guilty to causing or inciting child prostitution or pornography and taking indecent photographs of children. All the counts related to a single complainant (C). The Prosecution case was that P had abused C when she was aged between 12 and 16 years old, including oral and vaginal intercourse. Whilst the Prosecution relied principally on C's evidence, messages and images found on P''s electronic devices provided corroborative evidence. P had admitted to taking indecent photographs of C but denied any sexual activity had taken place until she was 16.

The CACD dismissed the appeal. [Leave to appeal was refused on a number of additional grounds advanced subsequent to the original grant of permission.]

Admissibility of previous allegations: C made allegations against P shortly after she found out that allegations of sexual touching she made against a different person (JH) would not be pursued, because she was 16 and the contact had been consensual. The trial judge refused an application by P to cross-examine C on those circumstances, finding that the evidence was not relevant and inadmissible. The CACD concluded that the judge was right to reject any suggestion that the JH material provided evidence in support of making false allegations against P: the JH allegations were *true* and therefore there was no logical or evidential connection between them and

P's defence of false accusation. Although the CACD found that other judges may have admitted the evidence as relevant to the issue of delay (permitting P to argue that the allegations against him were late invention on C's part), it concluded that it was open to the judge to exclude the material.

Summing up bias: The central complaint was that the judge's summing up – particularly his alleged "explaining away" of inconsistencies in C's account – went beyond reasonable comment on the evidence. The CACD rejected the argument that the complaints amounted to bias. The judge had twice reminded the jury that it should ignore any views he appeared to express which it did not agree with. The fact that the jury had acquitted P on one count indicated that it had properly understood its role.

Pressuring the defence: Interventions during the cross-examination of C, defence closing speech or at any other time were not improper or unfair and did not lead to a perception of bias against P.

The CACD considered the overall safety of the conviction, concluding that it was a strong Prosecution case and admission of the JH material would not have significantly assisted the defence since the issue of delay was already before the jury. The case turned on C's credibility and there were messages and images supporting her account.

Comment:

This case serves to highlight that the threshold for a finding of bias, whether in a judge's management of a trial or during summing up, is a high one. In particular, the CACD is looking out for serious errors in the summing up and warned of the danger in taking individual elements of the summing up out of context and over-analysing them. Particularly in cases involving multiple allegations over a number of years where the judge has a lot of evidence to summarise, complaints need to be considered in the context of the entire summing up.

It is also a helpful illustration of the CACD's strict approach to multiple additional grounds lodged after the initial grant of permission. Grounds that could and should have been raised before are given short shrift.

Post office – Horizon – abuse of process

Hawkes and others v Post Office Ltd [2022] EWCA Crim 1197

By Graeme Hall

This case represents the latest decision from the courts relating to the Post Office scandal.

In the original decision of *Hamilton and others* [2021] EWCA Crim 577, in which Doughty Street members Tim Moloney KC[1] and Kate O'Raghallaigh appeared, the same constitution of the Court of Appeal ruled that there were significant problems with the software used by Post Office Limited ('POL') called "Horizon". In particular, Horizon was replete with bugs, errors, and defects, that produced unsubstantiated shortfalls. These shortfalls formed the basis of a significant number of prosecutions of sub-postmasters and sub-postmistresses ('SPMs'). *Hamilton* concluded *inter alia* that POL was aware of the serious issues surrounding the reliability of Horizon but had failed to make all reasonable lines of enquiry, and had failed to make relevant disclosure. Further, as the CACD put it in *Hawkes*, POL had "*failed to be open and honest about the issues affecting Horizon and had effectively steamrolled over any SPM who sought to challenge its accuracy*".

The five appellants in ***Hawkes*** were all former SPMs who had been convicted at various times for offences of false accounting, theft and/or fraud arising from purported shortfalls recorded by Horizon. They applied for leave to appeal their convictions (including long extensions of time). POL did not, in the end, resist the applications, and conceded that the appellants' convictions were wholly dependent on the reliability of Horizon. The concessions were based primarily on the fact that each of the appellants had, to varying degrees, put in issue Horizon's reliability when they were interviewed, including that they did not understand the source of the shortfalls. Further, there was no independent corroborative evidence of any shortfalls over and above the Horizon generated print-outs.

The CACD found the appellants' prosecutions and convictions to be unfair and an affront to justice. The convictions were ruled an abuse of the Court's process. Each conviction was accordingly quashed.

*See **Taylor on Criminal Appeals**, para 9.74 (abuse of process)*

Graeme Hall represented Mr Hawkes and Mr Boyle,

1 See also M*cLaughlin* [2022] NICA 64

Kate O'Raghallaigh represented Mr Allen, Mr Smith and Ms Clarke. Both were instructed by Hudgell solicitors.

Drug importation – defences - mistake of fact – mistake of law

R v Datsun [2022] EWCA Crim 1248

By Jonathan Lennon

Luke Datson imported cannabis products from a company based in Switzerland called Green Brothers. Over two periods he was sent packages from Green Brothers to his home address via UPS. UPS intercepted the first parcel at a distribution centre in Swansea. There were a number of bags which were labelled as purporting their contents to contain a THC level of less than 0.2%. However, on examination the consignment was actually 11.678kgs of mature cannabis in the form of female flowering head material – it was 'skunk'. Mr Datson was duly arrested and shortly afterwards another package was intercepted in similar circumstances. On arrest a further 221.2 grams of cannabis had been found.

In interview Mr. Datson explained that his business was involved in the importation and supply of cannabidol (CBD), that he purchased hemp flowers from Green Brothers and he believed that he could lawfully import hemp that had a THC level of less than 0.2%. He was wrong. As one of the officers stated in in a statement; "*It is a common misconception that products containing less than 0.2% THC are legal*". That is not the position, though there was evidence at least to suggest that Mr. Datson genuinely, but erroneously, believed that to be the true position.

Mr Datson stood trial on 2 counts of being knowingly concerned in the fraudulent evasion of the prohibition, in force by virtue of s3(1)(a) *Misuse of Drugs Act 1971* (MODA), on the importation of cannabis contrary to s170(2) *Customs and Excise Management Act 1979* (CEMA). He was charged on count 3 with possession with intent supply in relation to the cannabis found at his home and to simple possession on count 4, as an alternative to count 3.

The Law:

Section 170(2) CEMA provides that:

"*…. if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion –*

……

He shall be guilty of an offence under this section and may be detained."

Cannabis is a controlled Class B drug under MODA and s3(1) provides the importation/ exportation offences. Section 3(2) provides that s3(1) does not apply to the importation or exportation of a controlled drug excepted by order, or licensed by the Secretary of State.

S.28(3)(b)(i) MODA provides a defence which, Mr Datson argued, enabled him to seek to prove that, as a result of his mistaken belief, he had; "*neither believed nor suspected, nor had reason to suspect, that the substance in question was a controlled drug*".

Arguments in Crown Court

At the conclusion of the prosecution case, it was argued by the defence that '**knowingly'** in s170(2) CEMA meant that the Defendant fell to be judged on the facts as he believed them to be (i.e. his mistaken belief that the drugs were hemp and were not prohibited from importation). The defence also argued that the inclusion of the word '**fraudulen**t' in s170(2) meant that the prosecution had to prove that Mr. Datson had acted dishonestly, in the sense of dishonest conduct deliberately intended to evade the prohibition.

Both submissions were rejected by the Judge, who concluded that the mistake that the Defendant made did not afford him a defence to the importation offences. There was no defence in law and consequently Mr Datson changed his pleas to guilty. He was sentenced to a suspended sentence of 9 months imprisonment.

The Judge had proceeded on the basis that the Defendant was genuinely mistaken about the lawfulness of importing cannabis products containing less than 0.2% THC. But the judge noted that the Defendant was not mistaken as to the facts; he had believed that what he was importing was the female flowering head of a variety of the cannabis sativa species - that was precisely what was being imported. His mistake was not a mistake of fact but a mistake of law. It was a general proposition that mistakes of law do not provide a defence to criminal charges.

The Judge next concluded that it was not necessary for the prosecution to prove that the *Defendant* had acted fraudulently. Rather, it was necessary for the prosecution to prove that the *evasion* was fraudulent – i.e. was deliberate and calculated to defeat the

prohibition contained in s3(1)(a) MODA.

As to s28(3)(b)(i) MODA, i.e. the Judge found against the defence stating that if a person was proved to be in possession of a drug which was controlled, but asserted credibly, and on reasonable grounds, that he did not believe it to be a controlled drug, that would be a mistake of *law* and would provide no defence.

CACD

Mr. Datson's appeal to the Court of Appeal advanced the following grounds:

(a) The Appellant should have been judged on his genuine, although mistaken, belief that the goods were not prohibited.

(b) The correct interpretation of s.170(2) of CEMA required the prosecution to prove fraudulent conduct - in the sense of dishonest conduct deliberately intended to evade the prohibition.

(c) In relation to Count 3 it was argued that the Judge erred in law in not allowing the Appellant to avail himself of the defence provided by section 28(3)(b)(i) MDA.

The Court considered the caselaw on *mens rea* ranging from R v Hussain [1969] 2 QB 567 to Henvey v HM Advocate [2005] HCJAC 10.

Section 170(2); Mistake of Fact. The Court found [45] that the law in relation to mistake of fact is simply an application of the general principle that the prosecution must prove its case;

It is long established that […] a genuine belief in factual circumstances which, if true, would make a Defendant's conduct innocent may result in the prosecution not being able to prove a requisite element of the offence, which may include any necessary mens rea…

Section 170(2); Mistake of Law. The Court found [45] that, ignorance, or mistake, of the criminal law is generally no answer to a criminal charge;

However, that may not be the case where the offence expressly makes relevant the Defendant's knowledge or belief as to the legality of his, or another's, action. In such a case, absence of the requisite knowledge or belief via ignorance or mistake of law may result in a live issue as to whether the prosecution have proved (whether in whole or in part) the mens rea of the offence – see e.g. Secretary of State for Trade and Industry v Hart [1982] 1 AER 817

Section 28(3)(b) MODA Defence. The Court found [61] that the Judge below had fallen into error. The section involved a persuasive, rather than an evidential, burden on a Defendant;

The Appellant was entitled to seek to rely on section 28(3)(b)(i), albeit […] subject to review at the end of all the evidence, when it would have been open to the judge to decide whether or not the appellant had discharged the evidential burden upon him and thus whether the jury should be directed to consider the issue - in relation to which the appellant also faced some challenging factual obstacles.

The convictions were duly quashed. There was no order for re-trial as by the time the case came to be heard the operational part of the suspended sentence had been served.

This would seem to be a victory for common-sense- especially when set against the background of the vast majority of most drugs importation cases involving clear deception to hide the drugs from the authorities.

AG reference – point of law – criminal damage – Colston statue

Attorney General's Reference No. 1 of 2022 [2022] EWCA Crim 1259

By Amanda Clift-Matthews

This referral to the CACD arose out of the trial and acquittal of four protesters who were involved in the removal of Edward Colston's statue in June 2020.

The protesters had been tried under s.1(1) Criminal Damage Act 1971 for damaging property belonging to Bristol City Council without lawful excuse. One defence raised concerned Articles 9 and 10 European Convention on Human Rights. The protesters argued before the trial Judge that their freedom to thought and conscience and their freedom of expression had been engaged by the charges. An abuse of process argument was made on that basis but dismissed.

During the trial, the protesters argued that the prosecution was required to prove that their Convention rights did not provide them with a 'lawful excuse' for their actions. Thus, the jury were directed that if they had rejected the defence case on all other grounds, they had to be sure that convicting the Defendants of criminal damage would be a proportionate interference with their rights under Articles 9 and 10.

The Attorney-General raised three points of law for

determination: -

Question 1: Does the offence of criminal damage fall within that category of offences referred to in *DPP v Cuciurean* [2022] EWHC 736 (Admin) where conviction for the offence is, without the need to consider proportionality in individual cases, a justified and proportionate interference with any rights engaged under Articles 9, 10 and 11 of the Convention?

Question 2: If not, what principles should judges apply when determining whether the freedoms in Articles 9, 10 and 11 of the Convention are engaged by the potential conviction?

Question 3: If those rights are engaged, under what circumstances should the question of proportionality be withdrawn from a jury?

The CACD rejected the protesters' argument that the case of *DPP v Zeigler* [2021] UKSC 23 held that whenever peaceful protest gives rise to a criminal penalty, the prosecution must prove that a conviction is a justified and proportionate in that individual case. An assessment of proportionality was only required when (a) these Convention rights are engaged by the facts and (b) the ingredients of the offence do not themselves strike the appropriate balance so that a case-specific assessment is required.

The CACD's further reasoned that Article 11 only protects the right to peaceful protest and does not cover a protest where participants engage in violence. Rights under Articles 9, 10 and 11 may be restricted with criminal sanctions in order to prevent public disorder and protect the rights of others: *Kudrina v Russia* (App No 34313/06). Causing significant damage could not be thought of as peaceful and, even if it could be, a conviction would be a proportionate interference with a perpetrator's rights.

However, the CACD also rejected the AG's argument that the offence of criminal damage automatically fell within the category of offences described in *Cuciurean*, where proof of the ingredients of the offence was sufficient to show that the defendant's conduct was unreasonable so that the restriction on his or her rights was justified. The offence of criminal damage was very broad, and the CACD found there was no authority that suggested that any damage, no matter how trivial, would take the perpetrator's acts outside the protection afforded by the Convention or in all cases be proportionate. In such cases, the route by which proportionality may be assessed was via the offence ingredient of 'without lawful excuse'.

The CACD answered the questions in following terms (taking questions 2 and 3 together): -

Question 1: A conviction for causing significant damage to property during a non-peaceful protest falls outside the protection of the Convention. Even if the act could be described as peaceful, a conviction would be proportionate. In such cases, proof the ingredients of criminal damage on their own are sufficient to justify any conviction.

Where the damage to property is minor or temporary, a case-specific assessment of the proportionality of a conviction may be appropriate. However, such prosecutions should not be avoided and where such an assessment is needed should be rare.

Questions 2 and 3: The issue of proportionality should not be left to the jury where the conduct in question was not peaceful, or the damage was significant, or both. In cases involving minor or trivial damage to property, prosecutorial discretion on whether to proceed to trial should be exercised carefully, paying heed to principles governing Convention rights and to proportionality.

Comment

In delivering judgment, the CACD was aware that similar arguments to those of the protesters were due to be heard by the Supreme Court in *Reference by the Attorney General of Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* and indicated that their findings were subject to the SC's determination of the issues (see below).

To some extent the judgment has been superseded by the Police, Crime and Sentencing Courts Act 2022, which under s 50 creates a standalone offence of damage to a memorial. Ordinarily, only criminal damage that exceeds £5000 may be tried in the Crown Court. But in the case of a memorial, the cost of the damage is not a relevant consideration (like arson). That allows potentially any offence of criminal damage to a memorial to be tried in the Crown Court, where the perpetrators are liable to more severe penalties. In light of this apparent signal that damage to a memorial is an aggravated form of the criminal damage, prosecutions in cases of only minor or trivial damage to monuments may not be as rare as the CACD appeared to presume.

Jude Bunting KC and Owen Greenhall provided written submissions on behalf of Liberty

*See **Taylor on Criminal Appeals,** Chapter 17 (ECHR)*

SENTENCE APPEALS

AG reference – murder - minimum term

***R v Mark Richard Alexander* [2022] EWCA Crim 1517**

By James Wood KC and Daniella Waddoup

Court of Appeal refuses Attorney-General's application to increase sentence of mentally disordered offender convicted of murder

The CACD declined to interfere with the minimum term of 15 years set by trial Judge HHJ Munro KC following Mr Alexander's conviction for murder. A defence of diminished responsibility had been rejected by the jury.

The Court of Appeal agreed with the Judge's assessment that this was a "complex and very difficult sentencing exercise". The highly experienced trial Judge had had the advantage of a host of more detailed evidence than the written reports which were before the Court of Appeal. This included several thousand pages of medical notes; evidence from lay witnesses addressing the background to Mr Alexander's relationship with the deceased and the impact of his mental health on that relationship; evidence from professional witnesses involved in Mr Alexander's care both before and after the killing; and expert psychiatric evidence which spanned a number of days.

As a result, the Judge was "especially well placed" to assess the degree to which Mr Alexander's "undoubted" mental health problems reduced his culpability for the offending. Although the case was complicated by elements of "malingering, fabrication and exaggeration", as well as some "culpable refusal" to take medication, this had to be balanced against the evidence of "genuine psychosis and delusions". The Judge also accepted that Mr Alexander had been willing to go to hospital to receive treatment in the run-up to the killing, but that this did not happen because no bed was available.

The Court of Appeal rejected the Attorney General's submission that the Judge had given too much weight (i.e., a six year reduction) to the "important mitigating factor" of Mr Alexander's mental disorder and disability. This did not involve going behind the jury's verdict: Schedule 21 specifically identifies as a mitigating factor (at para. 10(c)) the fact that the offender suffers from a mental disorder or disability which (although not amounting to a defence of diminished responsibility) lowers the offender's degree of culpability. The Judge had been entitled to conclude, on the evidence she had heard, that the offence would probably not have happened were it not for Mr Alexander's complex presentation of mental disorder and disability.

In so holding, the Court expressed its hope that the Attorney General would "keep in mind" the well-established principles that apply in the context of applications to refer sentences on grounds of undue leniency. These include that "sentencing is an art rather than a science; that the trial Judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice" (*AG's Ref. (No. 4 of 1989)* [1991] 1 WLR 41 at p.45H). It remains to be seen whether this hope will be realised: whilst at the time of the passage of the Criminal Justice Bill it was envisaged that applications would be made sparingly, with an estimate of around a dozen applications a year, the figures in practice are significantly higher. If references are made too easily, it is difficult to see how the interests of justice – encompassing the rights of victims and their families, offenders and society as a whole – are being well served.

*See **Taylor on Criminal Appeals,** Chapter 13 (AG references)*

James Wood KC and Daniella Waddoup, represented Mr Alexander at trial and in the Court of Appeal, instructed by Grace Loncraine of Commons Solicitors

Indefinite terms of imprisonment – Hospital orders

R v Paul Richard Surrey [2022] EWCA Crim 1379

By Pippa Woodrow

This is the latest judgement in a rapidly growing line of authorities concerning appeals brought by prisoners seeking to replace indefinite sentences of imprisonment with hospital orders under Section 37 Mental Health Act 2006 ("MHA"), usually together with a restriction order under Section 41 sometimes referred to as the "mental health pathway".

PS had been sentenced to detention for public protection (the youth equivalent of the infamous indefinite "IPP" sentence for adults) following his guilty plea to stabbing another young person at a party in 2006 when he was 17. At the time of his sentencing he had not been identified as having a specific mental disorder for the purposes of the MHA, and no consideration had been given to the possibility of a hospital order - notwithstanding that he had been previously referred to forensic mental

health services, and that a psychologist had provided an expert report detailing his very low IQ consistent with a learning disability, along with a host of other symptoms consistent with both mental ill health and possible mental disorders.

Following his sentence PS had struggled to cope, finding himself bounced between different prisons and to hospital and back again many times in the context of ongoing paranoia, self-harm and a number of violent incidents. He remained detained long past his minimum tariff of two years - at the time of his appeal he had served almost 15 years. He has eventually been diagnosed with a learning disability which presented as associated with aggression, and subsequently also diagnosed with paranoid schizophrenia and a personality disorder. By the time of his appeal, he had been receiving treatment in hospital on a permanent basis for some years.

Applying the, now well established, principles set down in the leading cases of *Vowles* [2015] EWCA Crim 45, *Edwards* [2018] EWCA Crim 595 and *Cleland* [2020] EWCA Crim 906, the Court found that, in light of the information subsequently discovered as a result of post-sentence clinical assessments and treatment, all four of the considerations laid down in *Vowles* pointed towards a hospital order with restrictions as the most appropriate sentence in the Appellant's case.

(a) Firstly: it was clear that PS required treatment for his multiple mental disorders. Indeed, he had been successfully treated for a number of years by means of medication and learning-disability specialist psychological intervention, which had led to a transformation in his presentation and behaviour. All three disorders were more likely than not to have been present at the time of the offence (albeit that schizophrenia could only have been present in a prodromal state) and all (both separately and in combination) were more likely than not to have significantly contributed to PS's offending behaviour.

(b) Secondly: in accordance with the principles set out in *Cleland* the Court placed little weight on the question of "punishment" given that PS had served his minimum term almost 8 times over by the time of the appeal. The Court also made particular noted of PS's age at the time of the offence and emphasised the application of the welfare principle to his sentencing, as a young person under 18.

(c) Thirdly: the medical evidence on appeal was clear that PS's offending was inextricably linked to his mental disorders and that one (or likely all) of them would have had a causal effect on the commission of the index offence. Whilst the clinicians were unable to be certain as to the presence of schizophrenia at the time of the offence the Court appears to have accepted that it was more likely that not to have been present in a prodromal state. Further, the learning disability, which would certainly have been present, was of itself a significant contributing factor.

(d) Fourthly, and most importantly: the Court found that public protection would be better served if PS's post-release supervision was under the mental health pathway than if it were conducted probation pursuant to release via the Parole Board. In particular it was critical that PS could be mandated to take his medication and such conditions cannot be imposed by the Parole Board as a condition of release on license (this is made clear in the License Conditions Police Framework issued 26 July 2021). Further, it was imperative for prevention of harm to the public that powers of recall should attach to any actual or potential deterioration in his mental state.

Comment:

It is increasingly clear that the CACD's primary focus in these cases will be on the question of public protection. Where this is best served by means of a hospital order, an appeal will have good prospects of success. In this case the CACD made explicit that the public protection factors were sufficiently important of themselves, to allow the appeal. Solicitors and Counsel preparing such appeals should therefore be careful to ensure that the evidence presented to the Court, and in particular, the experts instructed, deal thoroughly with the question of public protection. There are many different benefits of the mental health pathway which may lead to more robust public protection for those whose offending is linked to mental disorders. Practical factors to consider may include:

(a) The importance of medication and other treatment in managing the offenders' mental state. The Mental Health Tribunal, unlike the Parole Board, has the power to make mandate compulsory medication as a condition of

release.

(b) The extent to which deterioration in mental state is linked to risk. If there is an inextricable or otherwise close link, it follows that it will be important for public protection that the mental health pathway offers:

(i) supervision by those likely to be able understand and identify early signs of deterioration that are linked to elevation in risk (i.e., by specialist clinicians);

(ii) ability to recall based on likely or actual deterioration in mental state (rather than on the basis of behaviour that might manifest at a later stage),

(c) The level of specialist input and support required from those supervising and managing the offender in the community. The mental health pathway almost always provides more robust guarantee of specialist supervision, as well as greater continuity of care in practice throughout the gradual process of discharge from hospital and thereafter in the community. The nature of many disorders is such that this consistency in care is often an important factor in maintaining positive progress and managing risk,

(d) The extent to which prison (or the prospect of potential return to prison) is likely to have a destabilising impact and/or to undermine the Appellant's progress and treatment.

Finally, it should be noted that both extensions of time and applications to admit fresh evidence are rarely, if ever, refused in meritorious appeals of this kind. These cases tend to arise in the context of clinical information which emerges a significant time after sentencing – often following the offenders' transfer to hospital under section 47 MHA. Even where there has been a very lengthy period since the sentence date, it is the nature of these cases that "*far from causing additional difficulty in considering the subject matter of the appeal, has in fact improved and enhanced the material before the court, in particular the fresh evidence.*" (§74). It follows that, where the Court agrees a hospital order is the most appropriate sentence and will best protect the public, they will be very likely to extend time – not least because refusal to do so would necessitate a cumbersome process of application to the Criminal Cases Review Commission only to have the case referred back to it on the merits (a point reflected at §75 of the judgment). In this case an extension of time to appeal was therefore granted of 14 years and 11 months.

*See **Taylor on Criminal Appeals,** Chapter 10 (appeals against sentence)*

Mr Surrey was represented by Edward Fitzgerald KC and Pippa Woodrow, instructed by Laura Janes of GT Stewart Solicitors.

Serious sexual offences – multiple offences - extended determinate sentence – special custodial sentences

R v AYO and others [2022] EWCA Crim 1271

By Omran Belhadi

The CACD heard appeals against sentence of six defendants. Each was found or pleaded guilty to serious sexual offending, including multiple rapes, sexual offences committed against children and in a domestic context. Each defendant was sentenced to extended determinate sentences or special custodial sentences for an offender of concern.

The CACD set out the statutory regime applicable to each type of sentence. Extended sentences are governed by ss. 279 to 281 of the Sentencing Code. They must be informed by assessments of dangerousness governed by s. 308 of the Sentencing Code. Special custodial sentences are governed by s. 278 of the Sentencing Code.

The CACD reminded itself of the following guiding principles:

(a) The assessment of dangerousness must be made at the date of sentencing and on the premise the offender is not in custody. In making the assessment, the Court may take into account the offender's age and the likely impact of maturation.

(b) A finding of dangerousness only makes an extended sentence available; it is not a mandatory sentence. It remains open to sentencing courts to pass a long determinate sentence.

(c) Under s. 231(2) Sentencing Code, sentencing courts are duty bound to pass the shortest term of imprisonment commensurate with the seriousness of the offence. The Court emphasised this requirement applies "however grave the offending."

(d) In considering the appropriate length of a custodial sentence for grave sexual offending, the Court found comparators are of limited value. Each case will turn on its own facts. However, the comparison in the present case illustrated that:-

> "It will be comparatively rare for the total custodial term of an extended sentence for multiple sexual offences to exceed about 30 years after a 1trial. Sentences of greater length have been reserved for particularly serious offending."

(e) The sentencing court must not lose sight of the purpose of certain phrases such as a "campaign of rape", featured in the Sentencing Guideline for rape. It is not a term of art. It merely indicates that sentence for multiple offences may exceed the sentence for a single offence. At §29 the Court stressed "the important question is what total sentence is just and proportionate for the offending as a whole."

(f) The principles of totality continue to apply. Where consecutive sentences are to be imposed, great care must be taken. The Court reminded "sentencers should where possible avoid making a determinate sentence consecutive to an extended sentence." An extended sentence may, however, be consecutive to a determinate sentence.

Comment:

The appeal provides a structural basis for the sentencing of multiple serious sexual offences in two respects.

First, it addresses the length of the sentence. While emphasising that comparators are of limited value, the CACD reiterated the principles that govern the determination of the length of sentence: seriousness of the offence; totality; and the duty to pass the least sentence possible. The judgment, and the successful appeals for the first four appellants, serve as a reminder there is no upward trend in the length of sentences for serious sexual offences. Sentences for serious sexual offending must be approached holistically.

Second, it addresses the types of sentences which may be imposed. At §37 to §42 the Court provides a road map for sentencing courts in deciding what kind of sentence should be imposed. Different sentences are available if different criteria are fulfilled. An extended sentence is discretionary. It may be avoided if the same level of public protection can be achieved through standard determinate sentences.

In contrast to special custodial sentences, extended sentences exist for a wide array of offences. They are set out at Schedule 18 of the Sentencing Code. The clarity of the CACD's approach is applicable to all offences included in Schedule 18. The judgment serves as a helpful blueprint for any court contemplating an extended sentence.

Limits of trial judge's discretion to sentence on a basis contrary to the prosecution case

R v Cole Jarvis [2022] EWCA Crim 1251

By David Bentley KC

D (aged 21 and with no previous convictions) was convicted of the murder of V in October 2021. In November, he was sentenced to life imprisonment with a minimum term to be served of 25 years.

The Prosecution case was that the cause of death was drowning, but there was also evidence of strangulation which might have been carried out with a ligature. D and V were previously known to each other and that there was evidence of prior bullying of V by D. The prosecution asserted that D had strangled V (with at least an intention to cause GBH) and then left him for dead in mud on the banks of the River Hull. Post-killing, D tried to sell V's bicycle. There was also the possibility (but no count on the indictment) that D may have robbed V of a bracelet and a mobile phone. Importantly, however, the Prosecution did not feel able responsibly to advance the case on that basis. – namely that it was a murder done for gain.

In written submissions prior to sentencing, P submitted that the case fell within para 5 of Schedule 21 – thus attracting a minimum term starting point of 15 years. They pointed to (non-statutory) aggravating features including a history of bullying, potential use of a ligature and exploitation of the death by attempting to sell V's bicycle. P also submitted that the court could not be sure that there had been an intention to kill, nor that there had been premeditation. P submitted that there could properly be a modest uplift from 15 years, but no more than that.

The Judge concluded from his own analysis of the facts, that he could be certain that D had lured V to the murder scene intending to take property from him. He also concluded that, having robbed V, he formed an intention to kill him, which he gave effect to by strangling him with a ligature. He thus concluded that this was a murder done for gain in furtherance of the robbery, and therefore attracted a starting point of 30 years for the minimum term to be served. He identified some aggravating features, but also some mitigating ones – including D's age, the lack of previous convictions and that the intention to kill was only formed shortly before the murder. He then reduced the minimum term to 25 years, though did not give an explanation for that reduction.

On appeal, both those for D and P were in agreement that the appropriate starting point for the minimum term was 15 years – representing a fair application of the criminal standard of proof to the facts of the case.

In allowing the appeal, the CACD found that the minimum term should indeed have been 15 years. Balancing afresh the aggravating and mitigating features, that would be increased to 21 years. Whilst acknowledging that a trial Judge is not bound by the way that P put their case, the Court was of the view that any findings of fact had to be properly founded. Whilst the absence of a count alleging robbery did not preclude the Judge from making a finding that this was a murder done for gain, here such a finding was not properly founded. The Judge's basis for so deciding was observed by the Court to be "tenuous".

Although fact specific, this case illustrates the limits of a trial Judge's own views of the evidence, and of how that impacts upon sentence. Any conclusion must be proved to the criminal standard, and be based on a clear and reasonable interpretation of that evidence.

Court of Appeal (Civil Division)

Approach to sanctions in contempt cases arising from political protest - extent to which criminal sentencing principles apply.

Breen v Esso Petroleum [2022] EWCA Civ 1405]

By Annabel Timan

The Appellant is an environmental protestor known as "Digger Down". On 31 July 2022 he dug a pit on land, East of Chertsey, where the Respondent is replacing a pipeline intended to transport fuel from its refinery in Fawley to Heathrow Airport. An injunction was ordered against the Appellant requiring him to remove his person and possessions from the pit within 72 hours of service of the order, and to refrain from erecting any further structure on the land. The Appellant breached the order and contempt proceedings were brought against him. In the High Court, he was committed to an immediate term of imprisonment for 112 days alongside a fine of £1500. He appealed to the Court of Appeal (Civil Division).

The "Tariffs": In calculating the length of imprisonment, the High Court Judge adopted a nominal "tariff" of 5 days for every day the Appellant was in breach of the injunction. He then applied a further "tariff" of 21 days imprisonment for every identified aggravating feature, before reducing the overall term by 40%, in recognition of the Appellant's conscientious motives.

It was argued on appeal, and accepted by the Court, that in the absence of definitive sentencing guidelines beyond the maximum penalty available for a contempt of court, this approach was wrong in principle. The individual tariffs were arbitrary and would likely encourage the sort of close textual comparison between cases that the authorities expressly warn against.

The Fine: The Court held that the imposition of a fine in addition to a period of imprisonment was wrong in principle. Following the case of *Crosland*[2], the question of whether a fine is a sufficient penalty comes early on in the process. If it is sufficient then custody is not an option; if the custody threshold is crossed, then a fine will never be sufficient. As regards the imposition of a fine in combination with a custodial sentence, the Sentencing Council gives specific guidance that such a course would only be appropriate in exceptional circumstances given the effect of imprisonment on the means of a defendant. No such circumstances arose in this case where the Appellant had no means and was of no fixed abode.

Lies given in evidence - aggravating feature: In the course of the contempt proceedings, the Appellant had served a witness statement averring that he had not read the injunction in its entirety. Following service of further evidence, the statement was abandoned and breach, in full knowledge of the terms of the order, accepted. In the High Court, this was considered an aggravating feature. On appeal,

2 *AG v Crosland* [2021] UKSC 15

the Court held that, whilst it would be very unusual in a criminal case for a matter relied on as part of an unsuccessful or abandoned defence to be treated as an aggravating feature warranting an additional custodial term, a committal application, "*is a different creature: it has at its heart a defendant's flouting of court orders*".

Comment

The case demonstrates the complexity of applying criminal sentencing principles to contempt cases. Whilst the prospect of imprisonment dictates that such guidance applies by analogy, there are limits. No definitive guidelines exist, indeed the court specifically considered that cases of contempt vary so widely that such a guideline would be inappropriate. Further, one key purpose of sanction is to give effect to the court order, as such, any ancillary flouting of court orders *could* be regarded as aggravating in the particular circumstances of a particular case.

Mr. Breen was represented by Annabel Timan instructed by Simon Natas of ITN solicitors

UK SUPREME COURT

Anti-abortion protesters – prohibited behaviour – Arts 9, 10, 11 ECHR - proportionality

Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32

By Amanda Clift-Matthews

The Abortion Services (Safe Access Zones) (Northern Ireland) Bill is intended to protect women accessing lawful abortion services in NI from being subjected to pressure by anti-abortion protesters. It is also intended to protect individuals who provide such services. Measures include a "safe access zone" of 100-150m around the premises where abortion services are provided. In those zones certain behaviours are prohibited by s. 5(2), such as intentionally or recklessly –

> "(a) influencing a protected person, whether directly or indirectly,
>
> (b) preventing or impeding access by a protected person, or
>
> (c) causing harassment, alarm or distress to a protected person, in connection with the protected person attending protected premises ..."

A breach may incur a fine of up to £500, or up to £2,500 where the offender resists removal by police or refuses to leave the zone.

Question: The Supreme Court was asked to consider whether clause 5(2)(a) of the Bill would be outside the legislative competence of the NI Assembly for being a disproportionate interference with the freedoms in Articles 9, 10 and 11 European Convention on Human Rights.

General issues of principle

The SC confirmed that, providing a provision is capable of being operated in a manner that does not result in unjustified interference with Convention rights in all or almost all cases, the legislation will not be incompatible with the Convention: *Christian Institute v Lord Advocate* [2016] UKSC 51. The SC also confirmed *AG's Reference No 1 of 2022* [2022] EWCA Crim 1259 statement of principle that *DPP v Zeigler* [2021] UKSC 23 did not hold that there must be an assessment of the proportionality of a criminal sanction restricting rights under Articles 9, 10 and 11 in every individual case.

The SC confirmed *DPP v Cuciurean* [2022] EWHC 736 (Admin) that where the ingredients of an offence struck an appropriate balance between competing rights or objectives, there was no further need for a proportionality assessment. General restrictions on Convention rights incurring penalties applying to pre-defined situations, regardless of the individual facts, have already been held to be compatible with the Convention: *Animal Defenders International v UK* (2013) 57 EHRR 21. The SC saw no reason why different principles should apply to criminal penalties than to the civil penalties.

Where proof of the ingredients of an offence by itself is insufficient, then other means to achieve proportionality can be adopted – such as construing the legislation in a way that meets proportionality, or by an assessment under provisions allowing for lawful or reasonable excuse. However, the fact there was such wording within the legislation did not mean that the proportionality assessment *was* required.

Where an assessment of proportionality must take place, it was not a fact-finding exercise and included matters of general principle, the statutory context, and case law. That meant it was not necessary or always appropriate for proportionality to be decided by the fact-finder.

Assessment of Bill

Not all prohibited behaviours would fall within the scope of Convention rights e.g. violent protest. Where behaviour was within the scope of rights, a restriction on grounds of prevention of 'disorder' could be applied to any 'reprehensible act': *Kudrevičius v Lithuania* (2016) 62 EHRR.

There was also no dispute that the Bill pursued a legitimate aim of protecting patients and staff accessing or working in the services and that it was sufficiently important to justify a restriction of rights. There was no dispute that there was a rational connection between the pursuance of public health and the measures.

Where the disagreement lay was in relation to whether there were less restrictive means available to achieve the same aims. It was argued that the criminalisation of acts such as praying or handing out leaflets that would fall under s 5(2)(a) was overreach, or alternatively, disproportionate in the absence of a defence of reasonable excuse.

The SC found the provisions of s 5(2) to amount to a fair balance between the rights of women seeking abortion services and the rights of those opposing their provision. The reasons given included: -

- Influencing the behaviour of patients and staff was one way of stopping women from accessing the services.
- If there were no clause 5(2)(a), an obvious defence to defeat the purposes of clauses 5(2)(b) and (c) would be that the defendant did not intend the prohibited behaviour but merely to dissuade a woman from having a termination. Similarly, a defence of reasonable excuse risked abuse: *Animal Defenders*.
- The measures did not restrict Convention rights entirely, since expression of opposition was only prohibited in a small geographical area. Measures that merely restrict location, time or manner of conduct of assembly are afforded a wider margin of appreciation: *Lashmankin v Russia* (2017) 68 EHRR 1.
- The penalty was a relatively minor one.
- The Bill is intended to implement the UK's obligations under the Convention for Elimination of Discrimination against Women. The CEDW Committee had been highly critical of NI's failure to prevent widespread intimidation and pressure on women accessing abortion services.
- Similar restrictions had been upheld as lawful in comparable jurisdictions such as in Australia and Canada and other Convention member states.

The SC concluded that s 5(2)(a) of the Bill was a proportionate general measure and compatible with the Convention. It was not, therefore, outside the legislative competence of the NI Assembly.

Comment

The judgment of the SC has provided some useful clarity on the scope of its previous judgment in *Ziegler*. The SC's general statements of principle on the proportionality of criminal sanctions could have a significant bearing on the interpretation/ compatibility of new police powers to restrict assemblies and new public order offences under the Police, Crime and Sentencing Court Act 2022.

One difference between *AG Reference No 1 of 2022* and this judgement is the SC's view that proportionality is not a question of fact. While the CA considered it undesirable that proportionality should be determined by a jury, it accepted that it could occur in rare cases. The SC's view was that this may not ever be appropriate and that some other measure should be utilised e.g. abuse of process. However, it did not consider it necessary to fully decide the issue in the present case.

*See **Taylor on Criminal Appeals** generally Chapter 15 (Appeals to the Supreme Court), Taylor on Criminal Appeals*

NORTHERN IRELAND COURT OF APPEAL

Historic terrorism convictions – application to extend time to appeal – investigative role of CCRC – fresh evidence on appeal – non-disclosure – "contemporary standards of fairness" - "one trial" principle - fair trial v unsafety

R v Patricia Wilson [2022] NICA 73 (Majority)

R v Patricia Wilson [2022] NICA 74 (Dissenting)

By Paul Taylor KC

PW was convicted in 1978 of various terrorist offences after a trial before a judge alone.

Her statements, taken in Castlereagh Holding Centre in June 1977, formed the sole platform of the prosecution case against her.

PW, aged 17, was interviewed on eight occasions over three days. She was seen by a doctor ("FMO") on arrival and made no complaints at that time. She did not have the support of an appropriate adult or a family member or solicitor. Only after she had been charged did she have access to her parents and her solicitor.

Following her sixth interview, she was examined by a FMO who recorded a complaint that she had been physically assaulted, verbally abused and intimidated during the two interviews prior to the seventh interview at which she made her admissions. The FMO submitted a record of the applicant's complaint to RUC Headquarters ("HQ") for investigation and there is no record of whether the complaint was investigated. In her seventh interview, the applicant made statements of admissions. Prior to making her admissions she was held incommunicado.

PW pleaded not guilty at her trial. She did not give or call any evidence. She did not raise ill-treatment allegations. She was convicted. She did not exercise her right of appeal.

In 2014, 35 years after her conviction, she applied to the Criminal Cases Review Commission ("CCRC") for review of her convictions. The CCRC investigated the circumstances of her detention in Castlereagh and her conviction. This investigation uncovered material documentation that was never disclosed to the defence nor to the court at the time of her trial (the FMO's notes in relation to alleged ill treatment in the two interviews that preceded the interviews in which she made confessions, the note of a complaint made by the doctor on an RUC form that was submitted to RUC HQ for the purpose of being investigated, and evidence of multiple complaints and the prosecution of some of the officers who were involved in her interviews). The CCRC was unable to recover any record of an investigation following the doctor's referral to RUC HQ, but it obtained a number of files relating to complaints made by other detainees against the officers who also interviewed the applicant and judicial criticism of some of those officers.

The CCRC believed that the Court of Appeal would regard the new evidence as both affording a ground of appeal and being capable of belief for the purposes of section 25 of the Criminal Appeal (NI) Act 1980. However, in 2018, the CCRC decided not to refer the case to the NICA because it said the evidence, which was capable of belief, related to an issue not raised at trial and it considered that the NICA was unlikely to find a reasonable explanation for the failure to raise it.

PW lodged an application with the NICA seeking an extension of time within which to appeal her convictions and to call fresh evidence to demonstrate that her confession statement should not have been admitted in evidence. The new evidence included that there had been a complaint made to doctors which was escalated by a doctor to RUC HQ. It was contended that this was new material documentary evidence which had not been disclosed to the defence. She gave statements to the CCRC and oral evidence to the NICA.

By a majority of two to one, the NICA refused the application to extend the time for her to appeal.

Decision of Sir Declan Morgan and Sir Paul Maguire: The court commented that the accounts given by the applicant in 2019 and 2020 were broadly consistent but were directly contradicted by the account she gave when she made her application to the CCRC in 2014. It said that the only realistic conclusion was that her accounts on recalling the making of complaints were false and they were advanced because she believed that they would help her application to extend time for her appeal by presenting the complaint to the doctor as a new fact.

The court concluded:

"[103] For the reasons given I am satisfied that this

applicant had every opportunity to rely on the complaint she made to the FMO during the period of her detention. I am satisfied that she elected not to do so. She now seeks to pursue a challenge to her admissions but has provided no reasonable explanation for her failure to do so at her trial. Her evidence was deeply contradictory and unreliable, and I am satisfied beyond reasonable doubt that she did not sustain the physical attacks that she alleged in various contradictory ways during her statement interview.

[104] The interests of justice require that those who are involved in the criminal process should make their case at their trial. I would refuse leave to introduce the fresh evidence upon which the applicant relies in respect of the admissibility of her statements of admission.

[105] I do not consider that there was any unfairness in this case by reason of any failure of disclosure. I am also satisfied that the arguments raised, in respect of the reliability of the statements, do not give rise to any concern about the safety of the convictions. We do not have the advantage of a record of the trial or the remarks of the trial judge on conviction. We know, however, that the applicant was represented by experienced counsel in whom she had complete confidence. No appeal was advanced or recommended by the lawyers representing the applicant. The applicant took no further steps for 35 years and cannot now come into court to make a new case which she could have advanced at the trial.

Decision of Lord Justice Treacy: Lord Justice Treacy disagreed with the decision of Sir Declan Morgan and Sir Paul Maguire.

"[125] By reason of the very particular circumstances of her case and the accumulation of features summarised below I do not consider that her convictions, based on the confessions of this 17 year old girl whilst detained at Castlereagh, confessions which formed the sole platform for her prosecution and conviction, can, in all conscience, be regarded as safe. I have a significant sense of unease about her conviction. Her confession was obtained in breach of the rules at the time – in breach of the common law, the Judges Rules and the RUC Code. Her right to a fair trial was further breached by the failure of the prosecution to comply with its common law duty to furnish all relevant evidence of help to the accused which "*is not limited to evidence which would obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material that the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led*" [per Glidewell LJ at p644 *R v Ward*]. Full disclosure is one of the most important issues in the criminal justice system and is an indispensable element of the right to a fair trial. To recap, she was not furnished with material relevant to any ill treatment she may have suffered or which may have a bearing on the admissibility and reliability of her confession. The prosecution failed to disclose (i) the record of her medical examination and the doctor's contemporaneous record of her complaints of ill treatment; (ii) the document sent by the doctor escalating her complaint for investigation by RUC HQ; (iii) the multiple complaints and charging of officers who were involved in her interviews. The confession was also obtained in circumstances which denied the juvenile defendant important safeguards later thought necessary to avoid a miscarriage of justice.

[126] As the CCRC observed, "there can be no doubt" that she was subjected to a sequence of interviews that, by their number and length, could be described as "oppressive" for an unaccompanied and unrepresented young woman, "even by the standards of the time." There were no countervailing safeguards to offset the obvious dangers of statements obtained in such circumstances. Further, in the present case the applicant was plainly denied a fair trial at common law and in breach of article 6 ECHR.

[127] My conclusions that the convictions cannot be regarded as safe and my significant sense of unease about them have been arrived at without reliance on her much later accounts to the CCRC or her even later evidence before us. I have confined myself to the contemporaneous documents, the indisputable circumstances surrounding the conditions of her detention and the newly disclosed material including the evidence regarding multiple complaints and even prosecution of some of the interviewing team conducting her interviews.

[129] By the standards of today this juvenile was denied all the important safeguards now thought necessary to avoid a miscarriage of justice. It is beyond question that her fundamental right to a fair trial enshrined in art 6 of the European Convention has been violated. She was denied rights she was entitled to at the time. There were also unlawful failures to consider the exercise of available safeguards considering her youth. It is to my mind inconceivable that the confession of this

juvenile, forming the sole basis of her prosecution and conviction, obtained in Castlereagh without any of even the most basic of these safeguards, could be regarded as safe. Accordingly, I would extend time, admit the written material that the CCRC uncovered and allow the appeal.

Comment:

Unusually, the NICA produced two judgments in this application for an extension of time to appeal. The majority judgment (Sir Declan Morgan and Sir Paul Maguire) runs to 36 pages, the dissenting judgment of Lord Justice Treacy to around 40. It addresses a number of significant issues relating to the admission of fresh evidence on appeal, the impact of non-disclosure and the impact of an unfair trial on the safety of a conviction.

In a powerful dissent LJ Treacy sets out why he had a "significant sense of unease about the correctness of the verdict" [See R v Pollock [2004] NICA 34.] The analysis set out above, lists the building blocks that form the basis of this unease. Crucially, there was limited (if any) dispute as to the establishment of these factors:

(a) The sole platform of the prosecution case rested on PW's admissions;

(b) These admissions were obtained from a 17 year old girl, in breach of the common law, the Judges Rules and the RUC Code.

(c) Her right to a fair trial was further breached by the failure of the prosecution to comply with its common law duty to furnish all relevant evidence of help to the accused.

In rejecting the application, the majority judgment relied, inter alia, on the statutory framework that undermined the disclosure duty at the time, the failure to raise the admissibility issue at trial, absence of challenge by the trial lawyers, the failure to appeal the conviction at the time, and the inconsistencies in PW's accounts. Whilst these are all relevant factors in considering whether the convictions are unsafe, the extent to which these should be determinative of the issue is far less clear. Unsurprisingly, the trial lawyers had very limited recollections of the trial and PW's instructions, there was no trial transcript or judgment, and PW gave evidence of events that had taken place over 40 years previously. In such circumstances, and in light of the unfairness identified by Treacy LJ, the Court's reliance on inconsistencies in PW's accounts, and the finding that she had taken a tactical decision not to raise the matter at trial may be seen as compounding the unfairness at trial. Whilst the authorities have emphasised the "one trial principle" – the need for an appellant to run all defences at trial and not hold any back for an appeal – it seems unlikely that the Courts had in mind historic cases such as this, where the trial was tainted by such a level of unfairness. It can be argued that such a failure of due process cannot be remedied on appeal and must result in the convictions being quashed. [See eg. *R v A (No 2)* [2001] 2 Cr App R 351 Lord Steyn stated that: *'It is well established that the guarantee of a fair trial under Article 6 is absolute: a conviction obtained in breach of it cannot stand: . . . The only balancing permitted is in respect of what the concept of a fair trial entails.'* [38] and Randall [2002] 2 Cr App R 17, 267 per Lord Bingham: "*… There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate Court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty*." See generally the analysis in *Taylor on Criminal Appeals* paras 5.42 et al.]

In any event, the appellate courts have received fresh evidence and allowed appeals even where there was no reasonable explanation for not having run the point at trial. See eg. *R v CCRC ex p Pearson* [2000] 1 Cr App R 141 per Lord Bingham CJ. It is unclear why the CCRC refused to refer on this basis.

In rejecting any unfairness in the non-disclosure, the majority relied on the statutory framework in existence at the time. However, it is arguable that the application of contemporary standards of fairness must provide a basis for the admission of the fresh evidence on appeal – even if the prosecution were not at fault within the regime at the time. The fresh evidence is now available. The "interests of justice" do not require fault to be identified for the non-disclosure – only that it may now undermine the safety of the conviction. [See *Taylor on Criminal Appeals, para 6.282]*

Sentencing appeals

Filippo Sangermano [2022] NICA 62

This appeal raises the inter-related issues of the composition and content of so-called "basis of plea" documents; the information which a sentencing judge can permissibly take into account; *Newton* hearings; the right of every accused person to a fair sentencing process as part of their overarching right to a fair trial; the burden of proof on the Prosecution in the sentencing process; the compilation of pre-sentence reports; and the duties owed by counsel to the sentencing court.

CARIBBEAN CASE SUMMARY

Guyana Court of Appeal

Challenge to mandatory death penalty

Gordon, Greenidge and Harte

In a landmark challenge to capital punishment in Guyana, the Court of Appeal declined to strike down the death penalty as unconstitutional. However, three death sentences were overturned and replaced with life sentences.

The Court of Appeal considered the cases of three former Guyana Defence Force Coast Guards, Devon Gordon, Deon Greenidge and Sherwyn Harte, who in 2013, were found guilty of the robbery and murder of Dweive Kant Ramdass. The trial Judge imposed death sentences on all three Defendants. The three men appealed to the Court of Appeal.

Supported by The Death Penalty Project and barristers from Doughty Street Chambers, the Appellants' legal team argued that the death penalty was unconstitutional being arbitrary, irrational, disproportionate, and contrary to the constitutional principle of the rule of law.

The Court of Appeal did not accept these arguments and declined to declare capital punishment unconstitutional in Guyana. The Court of Appeal overturned the Appellants' sentences of death on the basis that it was unconstitutional for the trial Court to hand down the death penalty automatically without affording the appellants individualised sentencing hearings. The failure to do so was a breach of their constitutional rights.

The legal team will now explore a further appeal to the Caribbean Court of Justice.

Saul Lehrfreund, Co-Executive Director of the Death Penalty Project said:

"Whilst we are pleased to see the three Appellants removed from death row, the Court of Appeal's approach to the constitutionality of the death penalty itself is extremely disappointing. The death penalty is inherently arbitrary and contrary to the constitutional rights of those who it affects. We remain resolved to abolishing the death penalty in Guyana and will work with the legal team in this case to mount an onward appeal to the Caribbean Court of Justice. Guyana remains the only country in South America to retain the death penalty and we call on the country's leaders to take the necessary steps to abolish the punishment."

C.A Nigel Hughes (of the Bar of Guyana) and Douglas Mendes SC (of the Bar of Trinidad and Tobago) represent the appellants in this case.

Assisting with this case are The Death Penalty Project and Edward Fitzgerald KC, Joe Middleton and Pippa Woodrow.

Read the press release in full **here**.

CONTRIBUTORS TO THE JANUARY EDITION

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

Tayyiba Bajwa regularly advises individuals on appeal against conviction and sentence. She has a particular expertise in advising victims of trafficking on appealing their convictions.

Omran Belhadi is a criminal defence specialist. He is regularly instructed to represent those accused of serious criminal offences including firearms and complex drugs offences. He has a growing appellate practice

David Bentley KC frequently appears in the Court of Appeal, often on a referral basis after negative advice from original trial counsel. He has extensive experience drafting submissions to the CCRC. He also advises internationally – current instructions include two (murder) potential appeals from Bermuda CA to the JCPC, and what was widely thought to be a politically motivated conviction of a prominent politician in Malaysia. He has recognised expertise in cases involving contested expert evidence – in particular issues relating to DNA, and is co-author of the DNA chapter in the latest edition of Rook and Ward on Sexual Offences.

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

Hayley Douglas specialises in criminal defence, crime-related public law, prison law, and civil actions against the police. She has a keen interest in criminal appeals is regularly instructed to advise and appear in appeals before the Crown Court and Court of Appeal. She is also experienced in making applications to the Criminal Cases Review Commission.

Graeme Hall practises at the intersection of extradition, crime, public law and international law. Graeme appears regularly before the High Court representing requested persons in extradition appeals. Graeme has conducted significant litigation before the Privy Council, including criminal appeals; and, he is currently instructed in a number of appeals arising from the Post Office scandal. Graeme's practice spans the globe, and he has a number of instructions from the Caribbean.

Yvonne Kramo specialises in criminal defence. She defends individuals accused of serious criminal offences and has expertise in representing young people. Yvonne has been instructed to advise upon appeals where she did not appear at first instance.

Jonathan Lennon is a criminal practitioner who is to be appointed King's Counsel in March 2023. His practice encompasses serious crime with a particular emphasis on white collar crime. Jonathan is frequently instructed in matters

relating to the Proceeds of Crime Act 2002, in particular Part 5 civil cases – Account Freezing Orders and High Court Civil Recovery Orders etc as well as challenges to investigatory orders such as search warrants and Production Orders. Jonathan was junior counsel in the first POCA civil recovery case to reach the Supreme Court on appeal; Gale v SOCA [2011] UKSC 49 and was counsel in the successful appeal by way of case stated in the leading case on cash forfeiture; Angus v UKBA [2011] EWHC 461 (Admin).

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.

Melanie Simpson KC has significant experience in all aspects of criminal law, human rights and judicial review. Melanie has conducted complex cases in the Court of Appeal (Criminal and Civil Divisions) for over 20 years and has appeared in many leading judgements. Melanie has been instructed and advised on appeal cases from the Caribbean, including Jamaica, Turks and Caicos and Bermuda.

Laura Stockdale specialises in crime, defending clients accused of all types of serious offences. She has a keen interest in criminal appeals and has advised on appeals to domestic courts, as well as to the European Court of Human Rights. She also practices in extradition, financial crime and professional discipline and regulation. Prior to being called to the Bar in the UK, Laura practiced as a criminal solicitor in Australia and worked at the International Criminal Tribunal for the former Yugoslavia in The Hague.

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…"

Annabel Timan is a specialist criminal defence practitioner acting in serious and legally complex criminal cases. She is regularly instructed in criminal appeals at all levels (both alone and led). In recent years she has acted in some of the most high profile appeals in the county including the appeal of "The Shrewsbury 24" (*R v Warren* [2021] EWCA Crim 413, for the actor Ricky Tomlinson in the successful appeal against conviction for picketing in the National Building Workers strike of 1972) and the case of "The Freshwater Five" (*R v Beere* [2021] EWCA Crim 432, an appeal against conviction of 5 fisherman for the importing of Class A drugs through coopering in the English channel. The appeal was the subject of a 5-part guardian podcast).

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.

Katrina Walcott specialises in crime. Prior to joining Doughty Street Chambers in 2021, Katrina was a paralegal at a leading specialist criminal firm where she assisted in a range of high-profile Court of Appeal matters, including the Stockwell

Six appeals. Katrina has a background in criminal law and policy research. She was a Legal Research and Policy Intern at human rights charity, JUSTICE, in which she worked on the *'Supporting Exonerees'* report and conducted research into the limitations of CCRC. Katrina was also Research Assistant at the Law Commission for England and Wales from 2019 to 2020.

James Wood KC is one of DSC's most experienced appellate and trial lawyers, being 48 years call this year. His practice remains exclusively defence orientated, with a life-long focus of prioritising work for the young, underprivileged, and politically motivated, be they alleged knife carrying gangsters or Animal Rights Activists. He thoroughly enjoyed working with Daniella Waddoup on the Alexander case, and credits her for the outstanding outcome.

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.

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