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Criminal Appeals Bulletin

Welcome

Paul Taylor KC

Welcome to the May 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), and the Judicial Committee of the Privy Council. We also have the round up of appellate judgments from the Caribbean courts provided by members of Allum Chambers, Trinidad and Tobago. 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. See here for details.

Please feel free to email Matt Butchard or Sarah Reynolds or call our crime team on 0207 400 9088 to discuss instructing us in appeal cases. We also offer our instructing solicitors a free Advice Line, where they can discuss initial ideas about possible appeals, at no cost to them or their client. More information on our criminal appeal services can be found on the Criminal Appeals page of our website including links to back copies of the Bulletin and other resources.

Paul Taylor KC
Head of the DSC Appeals Unit

(Editor of *Taylor on Criminal Appeals*)

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Contact us

If you would like to know more, or discuss how our barristers may be able to help you and your clients, please contact Senior Crime Clerk, Matthew Butchard on 020 7400 9074.

Useful links

Latest News:

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- Taylor on Criminal Appeals
- DSC Appeal Seminars

England & Wales:

- Conviction appeals (CACD)
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JUDICIAL COMMITTEE of the PRIVY COUNCIL

Privy Council:

Appeals from the Turks and Caicos and The Bahamas

The Caribbean:

Round up of cases from the appellate courts in Belize, Trinidad and Tobago, Guyana, Barbados, and The Bahamas

LATEST NEWS

NEW SILKS

Congratulations to our newest silks! Jonathan Lennon KC, Garry Green KC, Joe Middleton KC, Fiona Murphy KC and Benjamin Newton KC. 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]. *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 has so far presented four of the series of five seminars to celebrate the publication of *Taylor on Criminal Appeals*. In September 2022 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.

- In January 2023 Nichola Higgins (Matrix), author of the chapter on Judicial Review, and Edward Fitzgerald KC presented ***Judicial Review of criminal proceedings***. This seminar examined the issues within criminal proceedings that are amenable to judicial review and the approach of the Administrative Court to such challenges. The recording of this seminar can be found here on our appeal page.

- In May 2023, Paul Taylor KC chaired ***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). The seminar discussed topics including the independence of the Commission, its relationship with the MoJ and CACD, funding, referral rates and potential changes to its statutory remit. The recording of this seminar can be found here on our appeal page.

The final seminar in this series will be ***The Court of Appeal (Criminal Division)'s approach to good and bad character evidence*** presented by Professor David Ormerod and Emma Goodall KC. This seminar will look at the CACD's approach to grounds based on good and bad character evidence. Date to be confirmed. Register your interest here.

CASE SUMMARIES AND COMMENTARY

APPEALS AGAINST CONVICTION

Facilitating the commission of a breach of immigration – guilty plea – asylum

Procedure - Application for permission out of time – extensions of time

R v Khodamoradi [2022] EWCA Crim 37

By Omran Belhadi

The CACD heard an appeal against conviction following a guilty plea to one count of facilitating the commission of a breach of immigration, contrary to s. 25 Immigration Act 1971.

K was a migrant. His vessel was intercepted and taken directly to the approved area within the Port of Dover. He subsequently claimed asylum. He was prosecuted, in part, because he was identified as sitting at the rear of the boat with his hands on the engine. Originally, advised that he had no defence, K pled guilty. He was sentenced to 18 months' imprisonment.

K applied for permission to appeal against conviction 503 days out of time. The CACD first addressed the merits of the appeal. It held that K's case was "indistinguishable" from *R v Bani and Others* [2021] EWCA Crim 1958, and reiterated that *R v Kakaei* [2021] EWCA Crim 203 and Bani clarified the law: the offence is not made out if a migrant is intercepted or rescued at sea and taken to an approved area within a port.

The CACD then conducted a review of the principles governing the discretion to allow out-of-time appeals. At §12 it reiterated the guidance in *R v Patterson* [2022] EWCA Crim 456. And, at §13 it added that

> "an applicant who seeks an extension of time should give a detailed description of the delay and the reasons for it. In all but an exceptional case, the information should be provided in a witness statement which complies with the requirements of section 9 of the Criminal Justice Act 1967."

Neither K nor his legal advisers provided a witness statement in support of the application for extension of time. This was described this as "most unsatisfactory". An explanation was provided in counsel's advice, but the Court did not consider it sufficient. At §15, the Court indicated it was not given enough information "to assess whether or not the applicant or his new lawyers acted with despatch." At §16 the Court indicated that if there existed a practice to not provide evidence in cases such as these, "it should cease".

The CACD allowed the appeal because it was indistinguishable from others in this situation. It would have been unfair to treat K differently.

Commentary

The case highlights the importance of acting swiftly and/or providing a sufficient explanation for delay when appealing convictions.

Providing a witness statement explaining the delay in submitting an appeal should now be the norm.

Where a case may be distinguished from *Kakaei* and *Bani*, speed and an explanation take on even greater importance. Unexplained delay may well provide a reason to refuse an otherwise meritorious appeal.

The CACD did not set out which explanations and level of delay would be satisfactory. Promptness appeared to be a prime consideration. At §15, it deprecated the lack of information to assess if K and his newly instructed legal advisers acted with "despatch." It found that K's original legal team could not be blamed for the delay when they responded to requests within 14 days of receiving his waiver of legal privilege.

Asylum seekers are among the most vulnerable members of society. Their access to legal advice can be limited by financial, social and language barriers. Delays in finding and securing funding for legal advice are inevitable. Such delays now need to be documented and evidenced to avoid prejudicing an otherwise meritorious appeal.

'Small Boats'– Arrival without leave – Facilitating breach of immigration law

R v Ashari Mohamed and others [2023] EWCA Crim 211

By Richard Thomas KC

The vast majority of those arriving in 'small boats' from France have sought asylum in the UK. Those steering the boats were themselves also almost invariably seeking protection in the UK. However, the prosecuting authority has asserted that the act of steering can amount to the facilitation of a

commission of a breach of immigration law, namely the unlawful entry of the others on the boat. The CACD (*R v Kakaei* [2021] EWCA Crim 503; *R v Bani* [2021] EWCA Crim 1958 had quashed a number of convictions on the basis that the law, as it then stood, required proof of an intent to facilitate illegal entry and there was a distinction between arrival and entry; arrival at a designated port did not amount to entry until an individual had passed through immigration control. It followed, if those on the boat surrendered to officials at Dover and claimed asylum, this did not amount to unlawful entry.

The Nationality and Borders Act 2022 ('the 2022 Act') set out to overcome this obstacle, as identified by the Court, and to, prima facie at least, criminalise all those arriving on small boats. A new offence of arriving without leave (s.24(D1) Immigration Act 1971) was created. And the facilitation offence, in section 25 of the 1971 act was amended to mean that for the purposes of the offence, 'immigration law' now includes a law which controls entitlement to arrive in the UK. From June 2022, when the 2022 Act came into force, the prosecuting authority commenced prosecutions (i) for the new offence of arriving without leave and (ii) for facilitating a commission of a breach of immigration law on the basis that the new offence, of arriving without leave, was an 'immigration law' that controlled arrival and thus there was now no need to prove an intent to facilitate unlawful entry because all those arriving without leave to enter were breaching immigration law.

Therefore, the position for those seeking asylum in the UK is now bleak: There is no provision in the immigration rules to apply to leave to enter for the purposes of claiming asylum. Claiming asylum under the rules is only possible if he or she had arrived in the UK. But to arrive in the UK without leave is to commit a criminal offence.

The Appeal

The Resident Judge at Canterbury Crown Court sought to case manage the large influx of new cases by listing a number of cases for a conjoined preparatory hearing. That was heard by Cavanagh J. Cavanagh J heard submissions on five issues of law and found for the Crown on each issue. Permission was granted for an interlocutory appeal to the CACD:

The CACD addressed the arguments in the following order:

Issue 5: Does section 24(D1) apply to a person seeking asylum in the UK?

The Court rejected a submission that the offence did not apply to those seeking asylum because no such clearance is available. The Court recognized that entry clearance cannot be obtained for the purposes of seeking refuge but held that the combined effect of rule 24 Immigration Rules and rule 6.2 is that all visa nationals require entry clearance before arrival in the UK for any purpose. The Court found this application of the rules did not amount to a penalty on those seeking asylum for the purposes of Article 31 Refugee Convention because the penalty was in the criminal offence. The Court did not explain how, in these circumstances, a penalty could be avoided given the combination of the immigration rules and the new offence.

Issue 4: Is there a statutory defence in section 37 of the 2022 to a charge contrary to section 24(D1)

The Court held there was no such defence. Section 31 of the 1999 Act had not been amended and section 37 of the 2022 Act, whilst addressing the interpretation of Article 31 of the Refugee Convention, could not be construed as providing a defence.

Issue 1: Does 'the commission of a breach of immigration law' include the offence arrival without leave contrary to section 24(D1) of the 1971 Act

On behalf of the Appellants, it was argued that the amendment of the facilitation offence to include any immigration law regulating arrival had not achieved its apparent purpose. This was because 'immigration law' relates to entitlement to be in the UK and the new criminal offence in section 24(D1), whilst criminalizing arrival without leave, did not amend immigration law insofar as substantive *entitlement* was concerned. The Court rejected this argument, finding "a person is not entitled to do something which is illegal by virtue of being a criminal offence". The Appellants had argued that to adopt such an approach would be contrary to clear authority.

Issue 2: Must the facilitator be aware or have reasonable cause to believe that the conduct of the passenger was criminal?

In Parliament, the Minister had made it plain that whilst the scope of the new offence in section 24(D1) was extremely broad, it was intended to criminalise only egregious cases and those not protected by Article 31 of the Refugee Convention. This was to be achieved by the exercise of prosecutorial discretion. Guidance introduced for prosecutors has meant only

a tiny proportion (less than 1%) of those arriving on small boats have in fact been prosecuted. It was submitted, on behalf of the Appellants, that if the new criminal offence was to be read as an 'immigration law', then it would only be unlawful to facilitate those who were indeed criminalized. The Court rejected this argument, finding '[T]he conduct facilitated need not be criminal at all. It need only be a breach of immigration law". It has to be noted the Court held the breach of immigration law was the criminal offence.

Disposal

The appeals were dismissed. Despite the very significant public interest in the government's approach to those arriving on small boats, and despite the impact of this new legislation on the penalization of refugees, the Court refused to certificate a point of public importance, thus prohibiting any appeal to the Supreme Court. The usual reporting restrictions that apply to an interlocutory appeal were lifted.

Richard Thomas KC leading John Barker and Charlotte Oliver represented Ashari Mohamed and Khdeir Mohamed, instructed by Tuckers Solicitors (KM) and Graham & Co (AM)

Admissibility - Bad character - Co-defendants - Drug trafficking - Fresh evidence –

Criticism of trial lawyers

R v Roe [2023] EWCA Crim 316

By Yvonne Kramo

R was convicted, after a re-trial, on an indictment containing six counts: offences of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of goods (Class A drugs and Class B drugs); possessing a prohibited firearm; possessing ammunition without a firearm authority. The total sentence was one of 18 years' imprisonment. The application for permission to appeal was some 3003 days out of time.

In 2011 R worked as a lorry driver and mechanic for the Kawasaki Motorcycling team. The Kawasaki Motorcycling team sent two lorries to attend a race meeting in Assen, Holland. On 18 April 2011, the lorries were returning to the UK through the port of Dover. One lorry, registered "3MX", was driven by R. The other lorry, with the registration "B9RDY", was driven by Gary M. Both vehicles were stopped by the UK Border Force Agency and were searched. During the search of "B9RDY", a significant amounts of controlled drugs was discovered: approximately 7kgs of cocaine, 250,000 ecstasy tablets, 19kgs of skunk cannabis and 78kgs of cannabis resin. A handgun was also discovered in Gary M's lorry, together with 35 live bullets.

The Prosecution case was that R was part of a criminal enterprise that was involved in smuggling the contraband items found in "B9RDY" into the UK. It was alleged that the criminal enterprise was based in Ireland and that someone variously identified as "R-man" or "R-fella" was integral to this enterprise.

The Prosecution relied on various strands of evidence including phone calls and text messages that revealed contact between R and a man called Mitchell who, like R, was an HGV driver. Mitchell had been arrested in the Republic of Ireland on 10th March 2011 and charged with serious drug offences. At the time R's trial, Mitchell had not been tried. (In March 2015, he was tried and acquitted by the jury.).

The Defence case was that R was not part of any criminal organisation and he had no knowledge of the drugs found in the lorry. R said that Mitchell and the R-man were involved in a separate tobacco smuggling operation, where they would source tobacco and R would simply be the transporter.

Grounds of Appeal

R applied for permission to appeal against conviction out of time (over 8 years and 2 months.) R argued that: the trial judge wrongly admitted the evidence that Mitchell had been arrested and charged with drug offences; and his legal team failed to call evidence that they should have called, which might have had an important impact on the outcome to the trial. Ancillary to this ground was an application under section 23 Criminal Appeal Act 1968 to adduce the evidence of ten additional witnesses who were not called at trial.

The additional evidence: The CACD was not persuaded that any of the additional evidence to which they were referred to was more than peripheral or that, if admitted, afforded any grounds for allowing an appeal. Equally, it was not persuaded that the failure to call the evidence amounted to incompetence on the part of R's original legal team. To the contrary, in each case the Court found that there were sensible reasons as to why, if the legal team had been in a position to call the evidence, they may have decided not to.

Mitchell's arrest: The CACD held that the difficulty for R was that this material was admitted by agreement. It was therefore admissible pursuant to section 100(1)(c) Criminal Justice Act 2003. The Court rejected outright the suggestion that the evidence of the existence of such a conspiracy, or the R-man's involvement in it, was either tenuous or "thin". The fact of Mitchell's arrest and charge was held to be clearly relevant to provide the context for R's later communications with his partner and the R-man which indicated a close connection between them.

The CACD was not persuaded that (subject to the giving of proper directions to the jury) counsel for R were wrong to concede the admission of the limited information about Mitchell's arrest, as they did. The CACD held that it was relevant contextual evidence and counsel were right to recognise that it should be admitted.

The extension of time: The CACD took as its starting point the criteria laid down in R v O [2019] EWCA Crim 1389, highlighting that the passage of time, in cases where the delay has been considerable, may put the court in difficulty in resolving whether an error has occurred and, if so, to what extent. The Court did not consider it arguable that an appeal on the merits would have any prospect of success.

Commentary

This case serves to highlight the difficulties in bringing an appeal after a substantial delay. The Court was of the view that a fair retrial would realistically be impossible. Given the lapse of time of over eight years, the Court observed that the substantive issues which were the subject of the appeal had been given a far greater prominence than the Applicant's advocates had given them at trial, suggesting that the trial was considered fair by those present. In the circumstances of this appeal, the Court did not consider it necessary to analyse why it had taken since 2014 (when the Applicant first contacted Junior Counsel) for the application to reach fruition. It did note, however, that if there had been arguable merit in the substantive application, the balancing of the interests of justice would have been a difficult exercise, the outcome of which may have been uncertain.

R v Ulas [2023] EWCA Crim 82

By Melanie Simpson KC

U appealed against his conviction for wounding with intent; possession of an imitation firearm, with intent to cause fear of violence; and violent disorder. The trial judge allowed evidence from a police officer (P) who did not know U but was able to recognise him from CCTV images of the incident. U appealed on the basis that the judge erred in admitting the evidence since P did not have any special knowledge capable of assisting the jury.

It was held that where an officer did not know an individual beforehand, he could acquire special knowledge or skill in relation to those appearing in a video by frequent playing and analysing it, in accordance with *Attorney General's Reference No 2 of 2002* [2002] EWCA Crim 2373. The appeal was dismissed.

On 7th August 2020, CCTV captured a white BMW being driven into a London Estate. CCTV shows three males entering the Estate. "Suspect 3" pulled out a plastic bag in the shape of a handgun pointed it at the victim and, during the ensuing tussle, Suspect 3 stabbed the victim in the head. "Suspect 1", U's co-accused, admitted presence and pled guilty to possession of a knife and violent disorder.

The prosecution case was that U was Suspect 3 and relied on three pieces of evidence. First, the prosecution relied on CCTV footage from the scene, which they said showed that Suspect 3 was U. Secondly, U's DNA had been found in the white BMW. Thirdly, Suspect 3 was wearing a distinctive top and shoes which matched ones found at U's home address.

In addition, the prosecution relied upon evidence from a police officer P. P's evidence was to the effect that on 11th August 2020 he had been on duty and had viewed photographs from the incident. He said that he viewed the images on his own and in accordance with Code D of the Police and Criminal Evidence Act 1984 (PACE); a code of practice for the identification of persons by police officers. P said he recognised and could identify one of the men, Suspect 1.

Two days later, on 13th August 2020, P arrested Suspect 1 after Suspect 1 ran into a flat with other males. P said that he instantly recognised one of the other males as Suspect 3, from the photographs he viewed on 11th August, due to Suspect 3's distinctive beard. On 16th August, P attended an identification

procedure and identified U.

U denied that he was present at the scene and denied he was involved in any way. The identification of Suspect 3 was therefore a critical issue at the trial.

U applied to exclude P's evidence either on the basis that it was not admissible, or that it should be excluded under section 78 of PACE because of its adverse effect on the fairness of the trial.

The trial judge held that the evidence of P was admissible. He referred to the decision in *Attorney General's Reference No 2 of 2002* [2002] EWCA Crim 2373, [2003] 1 Cr App R 21. In AG's Ref No 2 of 2002, the court identified different categories of cases where evidence is admissible. The third category of cases identified, is where a witness, who does not know the individual defendant, spends substantial time viewing and analysing the photographic images, thereby acquiring special knowledge that the jury did not have. The judge inferred from P's statement of 11th August that he undertook an analysis of the photographic images and therefore fell within this third category. P had spent time viewing the material and, as such, had acquired a degree of special knowledge.

The judge went on the consider whether he should exclude the evidence under section 78 PACE. The judge considered the presence of the supporting evidence, namely, clothing, the appellant's distinctive beard, DNA from the BMW and the identification procedure. The judge therefore declined to exclude the evidence.

The Appeal

The question of the admissibility of evidence of identification, based on photographic images taken at the scene of a crime, was dealt with in *Attorney General's Reference No 2 of 2002* [§19]. The case outlined at least four circumstances in which, subject to the judicial discretion to exclude evidence and the giving of appropriate directions, a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of the crime.

Applicable to this case was the third category, where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have. Such a witness can then give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury. This category was derived from *R v Clare & Peach* [1995] 2 Cr App r 333.

It may have been preferable for the officer (P), in his statement, to have given more detail of the time spent and the nature of the exercise he performed; but, overall, it was open to the judge to infer, as he did, that the officer had spent time viewing and analysing the relevant images and in so doing had acquired a degree of special knowledge.

Further, the judge was right to say that the amount of time or study required to demonstrate the acquisition of special knowledge would depend on the particular facts of the case.

Two other matters of interest occurred during the trial. First, in response to a question regarding the police attendance at the flat on 13th August, P said that they had found a firearm there. Secondly, the officer in charge of the case said in evidence that she had viewed the CCTV images and had come to the view that P's identification of Suspect 3 was correct. The judge agreed that in both instances this evidence was inadmissible and should not have been placed before the jury but refused to discharge them.

It was held that, although it is correct that some inadmissible evidence once given may be so prejudicial that a judge's direction could not avoid the prejudice that arises, in this case the judge's clear, unequivocal and detailed direction was sufficient to avoid any potential prejudice.

Commentary

The CACD said that the amount of time or study required to demonstrate the acquisition of special knowledge is fact specific. However, the court gave no guidance as to what amounted to substantial viewing or what the nature of the exercise should involve. It was nonetheless open to the judge to infer that P acquired special knowledge simply because he spent time viewing and analysing the relevant images.

Although this case is confined to its facts and does not contain a wider principle, the potential danger is that a police officer can be deemed to have acquired special skill and knowledge without having to demonstrate substantial viewing or even explaining the nature of the exercise carried out. As this type of evidence is increasingly common it is perhaps time for further guidance, given the inherent danger that

exists in disputed identification cases.

EncroChat – applications for leave unsuccessful; attempt to challenge admissibility of evidence rejected; adjournments properly refused

R v Murray [2023] EWCA Crim 282

By Harriet Johnson

The Applicants had been convicted after trial of conspiracy to evade the prohibition on the exportation of a controlled drug of Class A, imposed by s. 3 (1) Misuse of Drugs Act 1971, contrary to s. 170 Customs and Excise Management Act 1979.

Applications for leave to appeal were made on two key grounds:

1. That the judge at first instance ought to have adjourned the trial pending the outcome of outstanding litigation concerning EncroChat evidence; and
2. That the applicants had been disadvantaged during their trial by not being permitted to call expert evidence concerning the reliability of the EncroChat evidence.

Both grounds failed, as did subsidiary and discrete grounds advanced by individual Applicants Futher, two applications for leave to appeal sentence, advanced by two Applicants, failed as well.

With respect to ground one, it was noted that the key points concerning the admissibility of EncroChat evidence have already been resolved by the Court of Appeal in *R v. A, B, D and C* [2021] EWCA Crim 128 (before Lord Burnett of Maldon CJ, Edis LJ and Whipple J, 5 February 2021) and *R v. Atkinson and others* [2021] EWCA Crim 1447 (before Fulford LJ, Vice President of the Court of Appeal, Criminal Division, Murray and Wall JJ, 7 October 2021). In *A, B, D and C*, the Court held that EncroChat material is admissible in evidence in criminal proceedings because the moment of interception occurred, not at the time of transmission but, when the data was stored on the phones themselves. In Atkinson, the Court, having heard further expert evidence, discounted the alternative hypothesis, i.e. that the EncroChat material was extracted during transmission.

The only outstanding litigation of potentially material importance is that concerning a complaint made to the Investigatory Powers Tribunal ("IPT") questioning the legality of the Targeted Equipment Interception Warrant which allowed the EncroChat material to be obtained. The resulting hearings concluded in December 2022 and judgment is awaited.

An application had been made ahead of the trial in *Murray & Ors* to adjourn the trial to await the outcome of the IPT proceedings. That application was refused, the trial judge finding that, per *A, B, D and C* and *Atkinson*, the EncroChat material was admissible and that the application in respect of the IPT ruling was speculative. The judge found there was a clear public interest in the trial going ahead. The Court of Appeal agreed, describing the decision to refuse the adjournment as "unimpeachable":

> [46] The overall interests of justice, including the public interest, militated against a further adjournment for what in effect would have been an indefinite period on no more than a hope that the outcome of the IPT proceedings might assist the defendants. In any event, the issue before the IPT is not the admissibility of the EncroChat material.

With regard to Ground 2, the Applicants argued that the Defendants had been further disadvantaged by not being permitted to call expert evidence concerning the reliability of the EncroChat evidence. The evidence concerned a report by Professor Ross Anderson, FRS FREng, Professor of Security Engineering at the Universities of Cambridge and Edinburgh ("the Anderson report"). Professor Anderson had been instructed by the Claimant in the IPT proceedings and in *Atkinson* (though did not give evidence in the latter). It is understood that he is no longer accepting instructions in matters relating to EncroChat.

On the second day of trial, the defence had sought to introduce a report from a forensic digital expert, Ms. Victoria Saunders, ("the Saunders report") relating to the EncroChat evidence. The judge at first instance held that the Saunders report was essentially a review and adoption of the Anderson report, the conclusions of which Saunders described as "plausible". The Saunders report did not attempt to form independent conclusions, or to address the analysis of the legal position regarding EncroChat evidence from *A, B, D and C* or *Atkinson*. The judge at first instance found that the Saunders report was merely an attempt to introduce the Anderson report by the back door and was thus inadmissible.

At the close of the Crown's case, an application was made by the defence to exclude the EncroChat evidence on the grounds that the Anderson report, while not in evidence, cast considerable doubt on

the admissibility of the EncroChat evidence and that the same ought to be excluded under s. 78 Police and Criminal Evidence Act 1984. This argument was also rejected by the judge at first instance. The judge held that the defence had had ample time to instruct their own experts on the EncroChat material; and that the Anderson report, as well as not being in evidence, strayed beyond technical matters and into legal interpretation.

The CACD agreed and leave on ground two was also refused.

Applications for leave to appeal against sentence were also refused – see paragraphs 57 to 74.

Historic sexual offences – delay – loss of evidence – abuse of process – deceased applicant – approved persons

R v Pipe [2023] EWCA Crim 328

By Hayley Douglas

P was convicted of 27 counts of serious sexual offences in relation to five child complainants. The convictions related to allegations dating back to 1966 while he worked in a children's home in Nottinghamshire. It was the Prosecution's case that P repeatedly sexually abused a number of young boys under his care.

P was aged 86 when he was convicted in 2021. He died in custody in 2022 but leave was granted for his widow to continue with the application for permission to appeal, by virtue of section 44A Criminal Appeal Act 1968.

The primary question raised by the appeal was whether the judge was right to allow the case to proceed against the Appellant in respect of allegations that dated back 55 years when evidence, gathered as part of an investigation in 1966, was no longer available and this was said to cause the Appellant prejudice in defending himself at trial. The appeal relied in part on the fact that a previous criminal prosecution against the Appellant for similar allegations, but in relation to different complainants, was stayed as an abuse of process in 2008 because of the missing 1966 material.

The first ground of appeal was that the judge erred in concluding that the abuse of process argument should be heard at the conclusion of the prosecution case, rather than before the trial began. The second ground was that the judge erred in concluding that a fair trial was possible. The third ground was that the Appellant did not and could not receive a fair trial.

The CACD dismissed the appeal, finding that the trial judge was fully entitled to reach the conclusions she did. The Court was satisfied that any residual prejudice was fully addressed by the judicial directions given to the jury, so that the delay and missing material did not render a fair trial impossible. The Court considered the judge's directions amply fulfilled the requirements identified by Fulford LJ in *PR* [2019] EWCA Crim 1225 at [73].

Key to its decision was that this was not a case in which the missing material was determinative of any specific issue before the jury. Furthermore, the Court wholly agreed with the timing of the decision on the abuse of process argument, finding that it was essential for the judge to be in a position to evaluate the significance of the lost material and to assess the extent to which the defence were, in fact, impeded. In any event, the Court considered that the abuse of process application was likely to be unsuccessful whenever it was made.

Commentary

The CACD's rejection of this appeal is a further example of its increased reluctance to find convictions unsafe where trial judges have declined to grant a stay on the grounds of delay and/or loss of evidence. While the Court has not ruled out the possibility that a fair trial may sometimes be unachievable when relevant material cannot be deployed, it has emphasised the importance of considering the particular prejudice that is raised. Where the missing material is not potentially determinative of a particular issue (e.g. misidentification) it seems to be unlikely that the trial process itself, including the judge's directions, would be unable to sufficiently deal with the prejudice caused to the defence by the absence of the materials that have been lost.

APPEALS AGAINST SENTENCE

Gross negligence manslaughter – parent - guidelines

Laura Heath
CAO No: 202201646 A3 MRM

By Isabella Forshall KC

This is not the first case of gross negligence manslaughter by a parent to be considered by the CACD since the GNM sentencing guideline came into effect on 1st November 2018. Had *R v Elaine Clarke* [2022] EWCA Crim 1109, a decision made by Holroyde LJ, then Sentencing Council [SC] chair, and others, been available to the parties when Ms

Heath was sentenced in April 2021 in a blaze of publicity, her trips to the Court of Appeal may have been unnecessary. As it was, eventually her 20-year sentence was reduced to 15-years by the Court.

On the way to that outcome, Ms Heath was refused leave by the Single Judge and found herself the subject of a tick in the "unmeritorious" box (with the consonant threat of an additional short period of imprisonment). This is in itself a shocking reproach to our appellate system, amended only when Holroyde LJ and others granted the Appellant's renewed application for permission.

Ms Heath was sentenced for the GNM of her asthmatic son of seven whose care his mum neglected in favour of her heroin and crack habit, with the dreadful result that he died unmedicated of an exacerbation of his asthma, while she slept off, unroused, her daily intake of heroin.

Two twin pairs of counts of neglect were punctuated only by a brief holiday out of the jurisdiction. These concerned Ms Heath's failure, over a period of about 7 months before her son died, to follow medical advice regarding Hakeem's asthma care and in particular her exposure of him over those months to heroin and crack, as evidenced by hair testing. To all of these neglect counts she pleaded guilty before the trial. The same features of her behaviour underlay the count of gross negligence manslaughter of which she was convicted (which settled her additionally with criminal responsibility for his death).

At sentencing, it was accepted that Ms Heath was in the highest culpability bracket in the GNM guideline because of her continued or repeated conduct in the face of obvious suffering, and her blatant disregard of a very high risk of death to Hakeem. This combination of high culpability factors resulted in a 12-year starting point, in itself a very significant hike from the next starting point down of 8 years. Counsel for Ms Heath submitted that all the offending was within the same course of conduct; that double counting was to be avoided; and that sentence lay at or near the 12-year point.

The Trial Judge, in passing sentence, treated the later pair of neglect counts as "part and parcel" of the manslaughter; but the earlier pair he characterised as "separate" offending which he decided qualified as a "context of other serious criminality" for purposes of his assessment of culpability.

In addition, the Trial Judge decided that intoxication by heroin and crack was an aggravating factor, and along with the three identified higher culpability factors and with mother's breach of trust, was a reason why the manslaughter sentence was "towards the top of the bracket" of 10 to 18 years. Further he remarked that the earlier neglect counts could have resulted in a consecutive sentence and he applied an uplift (of at least two years) to arrive at his final sentence of 20 years.

On appeal Davis LJ, now SC chair, and Choudhury and Eyre JJ upheld submissions that the earlier neglect counts did not constitute a "context of other serious criminality"; nor yet were they "separate" offending requiring an uplift to deputise for a consecutive sentence; let alone both. Rather, all the indicted offending constituted a course of conduct. The CACD questioned whether the use of drugs in itself was serious criminality at all. Further, the Court agreed that intoxication with drugs could not aggravate offences of which the gravamen, or an aspect of it, was intoxication with drugs.

The Court set the sentence for the manslaughter offence and all the other offending at the 12-year starting point. This the Court then aggravated by 3 years, thus arriving at a total of 15 years, to reflect a mother's grievous breach of trust to her young dependent son.

Isabella Forshall KC represented Ms. Heath.

Approach to sentencing an adult for offences committed in childhood

Ahmed, Stansfield, Priestley, RW and Hodgkinson [2023] EWCA Crim 281

By Pippa Woodrow

In these five conjoined appeals, a senior panel of the CACD (including the Lord Chief Justice and the Vice-president of the Criminal Division) convened to give guidance on the approach to be taken when sentencing an adult for offences committed in childhood. The need for authoritative guidance on the sentencing of matured "child offenders" (i.e., those whose offences occurred in childhood) had arisen in the context of a perceived tension between previous decisions of the Court of Appeal.

On the one hand, cases such as *Forbes and others* [2017] 1 WLR 53 had held that adult offenders ought to be sentenced in accordance with the regime applicable at the date of sentencing, rather than the regime in force at the time of the offence. According to this approach, the only real restraints arising from the existence of a different regime at the relevant time (by virtue of the offender's age) were that (i) the sentence imposed should not exceed the maximum that would have been available at that time, and (ii) that it would not be right having regard to common law requirements of fairness and Article

7 ECHR to impose a custodial sentence where that would not have been available at the time of the offence. The Court considered that the Sentencing Council guidelines applicable to children and young people ("the Child Guidelines) was therefore of limited relevance where a child offender had reached majority prior to sentencing.

On the other hand, *Limon* [2022] 4 WLR 37 and *Priestley* [2023] 1 Cr pp R (S) 18 had appeared to reject the *Forbes* approach in the generality of cases and limited it to cases involving historic sexual offending where it was undesirable to consider general sentencing levels which no longer reflected societal attitudes. These cases emphasised the significance, when assessing culpability, of the offender's age at the time of his offending and held therefore that the principles contained in Child Guidelines ought not to be ignored. According to these authorities, the appropriate starting point for an adult offender was the sentence likely to have been imposed at the time of his offending. Absent any good reason why the offender should now be treated more severely, the Court indicated that this starting point would be likely to reflect the correct sentence whatever the passage of time since the offence was committed.

Having considered the various practical and policy considerations highlighted in competing submissions, the Court preferred the *Limon* approach. Taking the opportunity to re-state the need for a "special approach" to sentencing those who offend as children, the Court emphasised the importance of the long-standing principle that child offenders are less culpable for their criminality and *"are not to be treated as if they were just cut-down versions of adult offenders".*

The CACD therefore rejected the distinction drawn in *Forbes* of whether or not some form of custody would have been available stating *"there is, in our view, no reason why the distinction in levels of culpability should be lost merely because there has been an elapse of time which means that the offender is an adult when sentenced for offences committed as a child."* These principles were held to apply with equal force to cases of historic offending as to cases where the offender had only recently attained majority. Having regard to Section 59(1) of the Sentencing Code the Child Guidelines remain relevant regardless of how many years have elapsed prior to sentencing.

Whilst recognising that this "special approach" may require courts to resurrect and/or recreate historic sentencing exercises, this was a necessary challenge which could not be avoided. In any event, the difficulties involved had been overstated by the Crown and could be readily overcome with the assistance of resources such as previous sentencing guidelines and texts like *Current Sentencing Practice.* (The Court also offered the helpful observation that historic punishment for a child is unlikely to be more severe than that which would be imposed now. On a more practical level the Court assisted by outlining that a previous sentence of Borstal training would translate into modern sentence of up to four years imprisonment, taking into account early release provisions.)

The applicable principles in all cases where a child offender has since attained majority were therefore definitively re-stated as follows:

1. The sentencing guideline for children and young people is always relevant and must be followed unless it would be contrary to the interests of justice to do so;
2. If, at the time of the offending, the offender could not have received a custodial sentence then such a sentence may not be imposed subsequently;
3. Regard must be had to the maximum sentence available at the time of the offence, and should only exceed it where there is good reason to do so – there being doubt whether such a reason could ever properly be found;
4. The starting point must be the sentence that would likely have been imposed at the time of the offence;
5. Sentences may depart from that starting point where subsequent events illustrate a different assessment of culpability or harm than might have been reached at the time.

Commentary

In the context of increasing ministerial attempts to undermine the distinction between adults and children in the criminal justice system (including the removal of minimum term reviews for child offenders subject to HMP detention who have reached majority, and provision for ever greater sentences - even for the very young), this judgment is a very welcome reminder of the importance recognising the realities of neurobiological human development. The scientific evidence-base for a differentiated approach to children (and indeed to young adults) is overwhelming. It is to be hoped that this judgment will assist ensuring this is no longer up for debate,

whether in the courts or elsewhere.

Manslaughter – diminished responsibility

R v Oliver [2023] EWCA Crim 336

By Katrina Walcott

On 14 January 2022, Mr Oliver ("A") pleaded Guilty to the manslaughter of his grandfather. He had been tried for murder and was acquitted due to diminished responsibility. He was 23 at the time of the killing and 25 at the time of sentence.

A was sentenced on 2 August 2022 to life imprisonment with a specified minimum term of 9 years and 124 days. HHJ Munro KC passed the sentence under s.285 of the Sentencing Act 2020, finding that A was dangerous.

A appealed this sentence on the following basis:

a. The sentence was manifestly excessive as did not take sufficient account of A's personal mitigation and mental health issues.

b. The finding of dangerousness was an error in law.

A killed his 74-year-old grandfather on 19 January 2022, with whom he had been living at the time. A committed the killing by cutting his grandfather's throat and thereafter, stabbing him multiple times to the mouth and eyes with a kitchen knife.

The background to this incident is lengthy and complex. The salient fact is that deceased had carried out a pattern of abusive behaviour on members of the family, which A was aware of at the time of the killing.

A's mother had been adopted by the deceased and his wife. A's mother suffered mental and physical health problems throughout A's life. She had a relationship with an abusive man who regularly exerted physical violence on A and his mother.

As a result of this instability, A has been cared for by the local authority and his grandmother and the deceased.

A had various mental and physical conditions as a child, carried into his adulthood. Most significantly, A had autism and suffered from deafness. He was bullied at school and was later moved to a special school where he struggled to settle. A had been exposed to highly sexualised behaviour and pornography as a child. It was later revealed that A had often seen his grandfather watching pornography, with his penis exposed.

In 2016, A was sentenced to 6 years imprisonment for the rape of one of his two younger half-sisters. A was aged between 13 and 16 at the time. At sentence, the learned judge acknowledged the psychiatric evidence and took into account the fact that his learned experiences and *"lack of empathy or understanding"* was rooted in, and exacerbated by, his autism. The same year, A's grandfather suffered a stroke, leaving him bedbound and in need of full-time care.

Upon A's release from prison in September 2019, he was made aware that his half-sisters and his mother alleged serious sexual abuse at the hands of the deceased. This caused tension within the family and the deceased's children had made serious threats to kill his grandfather. A told his grandmother, with whom he had a loving and close relationship, that he could no longer love his grandfather.

A's mental health greatly deteriorated throughout the pandemic. A had suicide ideation and was admitted to hospital in January 2021, following a serious suicide attempt.

Upon release, he went to stay with his grandmother. Despite this, A's mental health worsened, such that his medication was increased. During this troubling time for A, his mother had expressed that she would not have peace until her father was dead. Around this time, A told his grandmother that there were demons who wanted to harm him. He had also watched a film with his grandmother about an orphan who had been abused. Watching this film prompted A to tell his grandmother about his exposure to the deceased sexual activities.

On the morning of the killing, A observed his grandmother as restless and jittery. A texted his mother to tell her about the film he had seen, which reminded him of her experience. He told her he was struggling to stay grounded.

Around midday, A committed the killing. He texted his mother to inform her, and told his grandmother, *"he can't hurt you anymore, Nan"*. Whilst A's grandmother was calling the emergency services, he climbed onto the ledge of the bedroom window. He was persuaded not to jump by his grandmother.

While numerous psychiatric assessments were conducted, HHJ Munro KC based her sentence on the reports of Dr Ian Cumming and Dr Ba Min Ko. They had diagnosed A with autism, depression, and adjustment disorder, arising from being recently informed of the

deceased's sexually abusive behaviour. It was agreed that no form of hospital order would be appropriate.

Sentence:

The learned judge placed the offending at the top of the Medium category in the Sentencing Guideline, which attracts a range of 10 to 25 years imprisonment. The term was set at 24 years before the consideration of the mitigating and aggravating factors and application of credit for Guilty plea.

HHJ Munro KC concluded that a level of responsibility was retained as A's autism was significant, rather than severe and he was not psychotic. Furthermore, his decision to kill his grandfather was deemed purposeful and conscious.

Four aggravating factors were identified - the vulnerability of the victim; the physical suffering caused; A's previous offending; and fact that A was on licence. These factors were balanced with the mitigating features which include - A's troubling childhood experiences; expression of desires to kill the deceased by other family members; recent disclosures of sexual assaults committed by the deceased; the harm caused to A's grandmother; as well as genuine remorse; and A's mental health, for which he had sought support.

The sentencing judge concluded that the factors balanced each other out such that the 24-year term was not deviated from.

The sentencing judge deemed it appropriate to sentence A to a life sentence, as she found there to be significant risk of harm to the public based on A's previous offending; interest in illegal pornography; sudden deterioration in mental health and fierceness of the attack.

Appropriate credit was thereafter applied, and the minimum term determined - 9 years and 124 days was arrived at.

Commentary

Assessment of responsibly in manslaughter cases: This case serves as a strict reminder that diminished responsibility, even in extreme mitigating circumstances such as these, does not negate the retention of some level responsibility.

The sentencing judge reasoned that A was determined and conscious – he knew he was killing his grandfather and why he sought to do so.

The CACD failed to find fault with the decision of the sentencing judge to place A's offending at the top end of the Medium category for the reasons provided. They stressed that the assessment of responsibility is *"not a mathematical exercise", however, does necessitate a "careful analysis of all the relevant factors and a precise calibration of the case within the guideline".*

The CACD also highlights that a conviction for manslaughter under diminished responsibility, already (and necessarily) takes account of the individual's substantially impaired responsibility. The task of the sentencing judge (*executed without issue in this case*) is to identify the relevant aspect of the offending to establish whether the level of impairment falls, and thus how much responsibility remains.

Autism vs psychosis: The sentencing judge concluded A had retained some level of responsibility as he was not *psychotic*, and his autism was *significant* rather than *severe*. The CACD took no issue with the distinction drawn between compulsive irrational behaviour (*as often present with psychosis*) and the mere existence of, albeit, *significant* autism, which had (appropriately) been acknowledged in the sentencing exercise.

The sentencing judge was not wrong to place importance on the *accepted* evidence that A was not psychotic at the time of the killing. This formed a key part of the assessment of A's level of responsibility. A's acts were deemed deliberate and carried out in response to information received about his grandfather's abuse. While A's ability to form a rational judgment had been impaired, as informed by his deeply troubled upbringing and autism, the existence of these factors, as well as the recent disclosure of the abuses, did not preclude responsibility.

Accordingly, the sentence was not manifestly excessive. The sentencing judge had appropriately set the level at 24 years, before considering the impact of the aggravating and mitigating factors. The balancing out of these factors had been reasonable – the CACD underlined that it was for the sentencing judge who had heard the trial and considered the evidence to assess the appropriate weight of aggravating factors.

Finding of dangerousness: The CACD rejected A's argument that the circumstances informing the offending were exceptional, amounting to the *"perfect storm"*, due to A's mental health deterioration in the pandemic and recent disclosures of abuse. The CACD disagreed that such offending was unlikely to be repeated.

The CACD found that the finding of dangerousness was perfectly justified, not least because of the *"ferocity and suddenness"* of the offence itself. The sentencing judge's conclusion was deemed *"unimpeachable"* when considering A's inability to make rational decisions in response to what he had learned and the nature of his previous offending.

The CACD's decision highlights the weight and significance that the facts of the offence alone carry in assessments of dangerousness.

Attorney General's Reference - manslaughter

Parry, Pawley and Brading (Solicitors General Reference under section 36 CJA 1988) [2023] EWCA Crim 421

By Joe Stone KC

The defendants [BP, TP and CB] formed part of a Hells Angels biker gang who hunted down and killed a rival Hells Angel biker, by running over both his body and bike in a van. The prosecution case was that BP was the principal [driver of the van] and that TP/CB were secondary parties who had hunted down the deceased in a separate vehicle and forced him to stop at a slip road, so allowing the principal to kill him with his van. The killing was all videoed with dash cam footage showing the inside/outside of the vehicle. Thus, the jury could see the driver's expression at time of the impact and the impact per se from the perspective of the driver, which was supported by lip reading evidence. The Defendants were all acquitted of murder but convicted of manslaughter. BP had pled guilty to manslaughter in the body of the trial. TP/CB were convicted of manslaughter by the jury. Sentences of 12 years imprisonment for BP and 4 years imprisonment each for TP/CB.

The Solicitor General invited the court to increase the sentences on the basis of being unduly lenient. There was a concerted media campaign, including an online petition and local MP pressure, to increase the sentences on all three offenders. The CACD (Macur LJ, Males LJ and Goose J) increased the sentence on the principal from 12 to 15 years but left the 4-year sentence on the secondary parties undisturbed.

Commentary

It is well known that the defence have an uphill battle in succeeding in AG/SG References. Recent statistics from the MOJ, AG and SG offices show that in over 85% of applications in the last 5 years the prosecution are successful in increasing sentence. The double jeopardy principle that used to take into account the trauma of being resentenced a second time has been considerably diluted and does not count for much, save in special circumstances. It is important to closely examine the factual findings made by the trial/sentencing judge, as the prosecution may well need to challenge these to ensure success. This was critical in this case. It is established law that the CACD will **not** interfere with a finding of fact made by the judge in such circumstances if the judge has properly directed himself, unless no reasonable jury could have reached the judges conclusion: *R v Alan Gore* [1998] 1 Cr.App.R 413. This is a high evidential bar. Further, it is a notorious fact that with unlawful act manslaughter the culpability in cases varies in seriousness while the harm is always of the most serious kind: **death**. The very wide range of culpability spans from just short of murder to a relatively minor unlawful act, but the outcome is always death. Accordingly, the guideline is unusual because of the range and variety of situations it is required to cover with a commensurably wide sentencing range: *R v Gordon (Ally)* [2020] 2 Cr.App.R (S) 356. This was an important consideration in this case when considering which conduct, and for who, fell into Categories A through to D of the Guidelines.

Joe Stone KC represented Chad Brading.

PROCEDURE

R v Zuman [2023] EWCA Crim 79

By Laura Stockdale

In October 2015, Z was convicted, together with AK, SK, M and H, of conspiracy to defraud in relation to 21 mortgage or loan applications made between 2003 and 2010. Each Defendant received a custodial sentence. Various applications for leave to appeal against conviction and sentence were made, all of which were refused by the Single Judge except for SK's appeal against sentence. All refused applications were then renewed. In addition, Z applied to attend the hearing of the renewal application in person from custody as he was then self-represented. That latter application was refused.

The hearing of the renewed applications was listed alongside the appeal against sentence for SK and took place in November 2016. AK, SK and H were represented by counsel. Prosecution counsel was also present. The Full CACD refused the renewed applications and rejected Z's additional submissions and Supplementary Grounds.

Applying to Reopen a Determination of the Renewed Application

In April 2021, Z, represented by new counsel, applied to reopen the determination of the renewed application for leave to appeal against his conviction under rule 36.15 of the CPR. Rule 36.15 requires explanation of (i) the necessity to reopen the determination to avoid real injustice (ii) exceptional circumstances (iii) lack of alternative remedy and (iv) explanation for any delay. Z complained of two procedural irregularities: first, that he was not present at the hearing of the renewal application in 2016; and, second, that the prosecution counsel was present at that hearing, contrary to rule 39A.6 of the Criminal Practice Directions IX.

The CACD held that the limited basis in rule 36.15 for reopening a determination had not been made out. In relation to the first procedural irregularity asserted by Z, the Court held that an applicant in custody has no right to attend a hearing of a renewed application (although the Court had a discretion to allow their attendance); and that such principle did not infringe Article 6 of the ECHR, given the limited purposes of such hearings. It stated that self-represented applicants must therefore ensure that all written materials are before the Court on a renewed application. In relation to the second asserted procedural irregularity, the Court held that there was no inequality of arms between Z and the respondent because the Respondent's oral submissions, in respect of the renewed applications, were brief and directed at submissions advanced by the represented applicants. Accordingly, there was therefore no real injustice.

The Court also held the circumstances were not exceptional as it was usual practice for the CACD to deal simultaneously with applications for leave to appeal by represented and unrepresented applicants. Further, alternative remedies of approaching the CCRC were available. Finally, the Court found thatno good reason for the significant delay in bringing the application had been advanced.

Commentary

The decision in *R v Zuman* demonstrates that the principle of equality of arms in substantive appeal hearings (as set down in the ECtHR's judgment of *Nasteska v the former Yugoslav Republic of Macedonia* (Application No. 23152/05) and embodied in rule 39A of the Criminal Practice Direction IX) has limited applicability in the context of renewed applications. However, the CACD will be careful to ensure that oral submissions by respondent counsel are directed only at oral submissions by represented applicants at such hearings.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Judge only trial – assessment of evidence – interference with findings of fact

Malik Cox v R [2023] UKPC 4

(Turks and Caicos)

By Amanda Clift-Matthews

The Appellant was convicted of murder following a trial by a judge sitting alone. The incident took place outside a nightclub. The prosecution case was that the deceased was not the intended target, and the target was Tyrone Smith, who suffered a gunshot wound to the leg. Smith later gave evidence against the Appellant; as did another man, Anthony Francis.

Francis was initially arrested for the deceased's murder. He answered 'no comment' in interview. Gunshot residue was found on his hand and on the dashboard of his car, and he was charged. Before his second interview, he agreed with the Prosecution that the murder charge against him would be dropped if he provided a statement about the Appellant's involvement in the offence. There were detailed written undertakings between Francis and the Prosecution, which set out the type of information that Francis would supply. In addition, were Francis to give evidence against the Appellant, the Prosecution would withdraw the remaining firearms charges laid against him. However, the whole arrangement was void if Francis deviated in any way in oral evidence from the contents of the statement. These undertakings were not disclosed to the Defence until the morning of the trial. There was no information surrounding how the undertakings came to be made and no Prosecution witness called at the trial could give evidence about them.

Francis's evidence was that he and the Appellant had driven to the club that night. He saw Smith and the Appellant bump into each other, and then he heard a gunshot and began to run. He glanced around and saw the Appellant running too, with his hand extended. Francis heard two further shots and ran to his car. When Francis got into his car, the Appellant knocked on the window and asked him for a ride home. In the car, Francis said he asked the Appellant what had happened. The Appellant replied, "Those boys try bus' me, I bus' back". He also saw a firearm

in the Appellant's hand.

Smith's evidence also implicated the Appellant. In his first witness statement, Smith had denied knowing who had shot him and made no mention of a confrontation with the Appellant. In his second witness statement, he named the Appellant as the shooter. He said he and the Appellant exchanged words after bumping into each other. The Appellant then took out a gun, pointed at him and fired. Smith said that he had never spoken to the Appellant before that night, although he knew who he was from school.

Smith agreed that he had heard word on the street and on social media about the Appellant's involvement in the offence, and he had also seen a photograph of the Appellant before naming him as the shooter. Smith's explanation for why he did not identify the Appellant in is first statement was that he was letting the police do their job.

Grounds of appeal

The grounds of appeal were that the trial judge's assessment that (i) Francis and (ii) Smith were credible and reliable witnesses was unreasonable and that the Bahamas Court of Appeal was wrong to uphold the judge's assessment of their evidence. In determining the grounds of appeal, the JCPC said that particular deference should be given to the trial judge's assessment of the witnesses' credibility and reliability. Further, the JCPC said it would need to be satisfied that the case was an exceptional one before it overturned the findings of both local courts ([9]). This was because (i) the trial judge had the advantage of seeing and hearing all the live evidence (ii) the appeal turned on the credibility and reliability of Francis and Smith, which the judge was best placed to assess, and (iii), the trial judge had the advantage of having local knowledge when assessing credibility and reliability ([6]).

The Undertakings

The JCPC said that the written undertakings made in this case should not be used as a template in future cases. The Board said care must be taken to avoid leading questions, but also that the immunity promised did not undermine the validity and weight of the evidence obtained ([41]). The Prosecution's approach to its obligation to disclose the undertakings and the circumstances surrounding their making was "unacceptably lax' and placed the Defence at a disadvantage. The JCPC said it was also unacceptable that no witness put forward was able to answer questions about the undertakings. However, the failures did not undermine the fairness of the trial ([43]-[44]).

Decision on Grounds

As to the grounds of appeal, the JCPC found the trial judge was alive to the dangers implicit in Francis' evidence and directed himself to take special care and to apply caution. He was entitled to find that, despite the undertakings, Francis was credible and reliable witness [40]. Similarly with Smith, the trial judge was equipped with local knowledge and was best placed to decide whether Smith's explanation for the delay in naming the appellant was plausible or not [54]. There was no error of law and the CA was correct when it said that it was not entitled to interfere with the trial judge's assessment in this case.

Commentary

This case is a further illustration of how rarely the JCPC will interfere with findings of fact made in the lower courts and that the test of 'exceptionality' is very high. The evidence of Francis, in particular, was concerning. But when deciding whether this was an exceptional case in which to interfere, the JCPC took into account that the other prosecution evidence was consistent with Francis and Smith's evidence, that Francis and Smith were both independent of each other and mutually supportive, and there had been no alternative explanation proffered by the Appellant ([57]-[60]). This suggests that the lack of evidence pointing to the possibility of innocence seems to have been a significant factor in the determination of the appeal.

Section 12 (3) Bahamas Penal Code – Proviso – Sentences murder/attempted murder

Miller v R (The Bahamas) [2023] UKPC 10

By Amanda Clift-Matthews

The Appellant had been convicted of attempted murder, robbery and various firearms offences. The Appellant was carrying out a robbery of a bank, whilst armed with a shotgun. On exiting the bank, he saw police car about 50-60ft away. The car was stationary because it was held up in traffic. Inside it were two police officers. The Appellant fired his shotgun twice in their direction. One of the police officers was hit on the side of the head. She was able to continue driving for a short while before being taken to hospital. She required surgery to remove the shotgun pellets.

At trial, the Appellant's case was one of alibi and the officers were not cross-examined in any detail about the shooting. To prove attempted murder of the officer in the car, the prosecution elected to rely upon section 12(3) of The Bahamas Penal Code, which states:-

> "If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

When summing up the *mens rea* of attempted murder, the judge directed the jury that if they were satisfied that the Appellant "ought to have realised" that there was a great risk of death then this amounted to an intent to kill. The JCPC found this to be a misdirection, since the *mens rea* for murder in section 290 of the Bahamas Penal Code is a specific intent to kill ([42]-[43]). Furthermore, the trial judge had twice erroneously directed the jury that the gunman could have had no other purpose than to kill, and that this was the only inference that could be drawn from the facts ([33]-[38]).

The JCPC explained that section 12(3) Penal Code was an evidential provision that was intended to assist the jury in determining whether or not intent to kill was present, by looking at the Appellant's subjective foresight and the likelihood of the event happening. However, the section did not impose any burden of proof on the Defence and the critical question of the Defendant's intention was to be determined on examination of the whole of the evidence ([14]).

The JCPC observed that the directions on section 12(3) of the Penal Code in Miller's case were unnecessarily complicated and that, even when foresight was properly in issue, the subsection was unlikely to assist the jury. In Miller's case, it would have been sufficient to simply direct the jury that they had to be sure that the Appellant intended to kill, without further elaboration ([41]).

Despite the misdirections, the JCPC found that it was inevitable that the jury would have concluded that the appellant intended to kill one or more of the police officers and so there was no miscarriage of justice ([45]-[46]).

As to the appeal against sentence, the JCPC found that the Court of Appeal did not make an error of principle when it stated that sentences for attempted murder were the same as for murder, and when it imposed a term of 40 years imprisonment (equivalent to terms usually imposed in the Bahamas for murder) ([49]). This was because some attempted murders would be deserving of an equivalent sentence. The JCPC held that the sentence was undoubtedly severe, but not manifestly excessive ([51]).

Commentary

This judgment brings some important clarity to the interpretation of section 12(3) of the Bahamas Penal Code, which has previously been highly problematic. Both judges and prosecutors have sometimes taken the sub-section as equating objective foresight with intention – as illustrated in Miller's case. Prosecutors have mistakenly relied upon section 12(3) as prescribing a less onerous form of intent. The JCPC's judgment also lends authority to the local case of *Pinto v R* (2011) 2 BHS J. No.77, which said that prosecutors should not rely on section 12(3) where a simpler direction, such as that described by the JCPC, was appropriate.

The JCPC's application of the proviso, however, is surprising, given the misdirections were not only serious and repeated, but went to the heart of the offence of attempted murder. The JCPC appeared to rely upon the fact that Miller's defence at trial was based on alibi and, therefore, a lack of intent to kill was not in issue before the jury ([20]).

As to the appeal against sentence, the JCPC's interpretation that the Court of Appeal statements may have been generous. However, the JCPC clearly regarded the offence as very serious and deserving of a heavy penalty.

The Appellant was represented by Edward Fitzgerald KC and Amanda Clift-Matthews.

CARIBBEAN CASE SUMMARY

January – May 2023

Prepared by Rajiv Persad, Ajesh Sumessar and Gabriel Hernandez: Allum Chambers, Trinidad and Tobago(Congratulations to Rajiv Persad and John Heath on being appointed as Senior Counsel.)

Delay – Motion to Quash Indictment – Jurisdiction with no right to trial within reasonable time – need to prove prejudice at common law – applicable principles

The State v Shumba James (Trinidad and Tobago)

14th March 2023

The Defence filed a motion to stay the indictment before the Court based on the lengthy period of time which had elapsed since the alleged commission of the offence, a period of approximately eighteen years (17 years and 8 months).

The fundamental issue was whether the delay of some nine years since the accused's two earlier trials had led the Accused to suffer prejudice to the extent that no fair trial could take place. The Court looked at what specific prejudice was raised by the accused, whilst bearing in mind the impact of the nine-year delay in this case, and examined the type of evidence the State relies upon.

The Court further looked at:

1. The possibility of using judicial directions to ensure that all relevant factual issues arising from the delay will be placed before the tribunal of fact as part of the evidence for consideration.
2. The fact that the Accused remains out on bail.
3. From the material before the Court, the apparent simplicity of the case.
4. The state of the "litigious life" as it relates to the criminal courts in this jurisdiction.
5. The only prejudice which the Accused may have suffered, had the case proceeded with greater alacrity, is the fact that he would not have been able to cross examine the complainant, who absconded after he was charged with murder. This is no longer an issue as the complainant has since surrendered himself into custody meaning the defence could, if they so wished, ask the complainant questions about the framing of the Accused for this case.

The Court concluded that, although the delay in this case is significant, it could not see that the delay had led the Accused to suffer prejudice to the extent that no fair trial can take place.

Summing Up – failure to give adequate direction on inconsistencies in complainant's evidence and alternative offence

Virgilio Banegas v R (Belize)

28 March 2023

The Appellant, Virgilio Banegas, was indicted and tried for the offence of Unlawful Sexual Intercourse contrary to section 47(2) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize Revised Edition) 2011, as amended by the Criminal Code (Amendment) (No.2) Act No. 12 of 2014.

He was acquitted of unlawful sexual intercourse but unanimously convicted by the jury of the lesser offence of sexual assault and sentenced to six years' imprisonment. He has appealed his conviction and sentence on three grounds alleging defects in the trial judge's direction to the jury among other issues.

It was argued at the appeal that the learned trial judge did not give clear directions to the jury, regarding the lesser count of sexual assault. Nor were the jury directed as to the elements of the offence and the evidence that was marshalled to support it ("Summation on lesser offence").

The Appeal Court was of the view that the learned judge's summation in relation to the lesser offence of sexual assault is not what is countenanced by the guidelines, and thus undermines the safety of the conviction. They were also satisfied that the learned judge's failure to highlight the inconsistencies in the complainant's evidence could have impugned the complainant's credibility and was sufficient to undermine the safety of the conviction. In the circumstances, the appeal was accordingly allowed, the conviction was quashed, the sentence was set aside, and a retrial was ordered.

Jurisdiction – Caribbean Court of Justice (on appeal from Guyana Court of Appeal) -– Evidence – Confession – Voluntariness of statements – Nothing to undermine probative value and weight of confessions.

Sentence – Life imprisonment – Murder – Class of 'worst murders' – Appellants convicted of murder and sentenced to 81 years imprisonment without eligibility for parole before 45 years - Sentence of life imprisonment – Parole eligibility after serving not less than 20 years - Court of Appeal had no power to impose potentially harsher sentence – Court of Appeal failed to set minimum period to be served before eligibility for parole.

Hinds v The State (Guyana)

OH and CH were convicted for the murder of Clementine Fiedtkou-Parris for the payment of money, contrary to s 100(1)(d) of the Criminal Law (Offences) Act ('the Act'). The Trial Court imposed sentences of 81 years without eligibility for parole before 45 years. On appeal, the Court of Appeal reduced those sentences to 50 years. The CCJ dismissed the appellants' appeals against conviction for murder.

The Court noted that the convictions of the brothers were primarily based on their written and oral confessions, and additionally in relation to OH, on the evidence of an eyewitness who identified him in an identification parade. The Court found that there was nothing in the Appellants' arguments which could undermine the probative value and weight of their confessions.

With respect to the sentences, the Court found that (1) a sentence of life imprisonment is the maximum sentence; (2) it carries with it a statutory entitlement to be considered for eligibility for parole; (3) that eligibility arises after a period of 20 years (in Guyana) or such later period as a court may fix; and (4) that a court has no power to impose a sentence of 50 years imprisonment (or any determinate period) that would exceed the sentence fixed by the Act.

In this case, setting a minimum period that must be served before there could be eligibility for parole was therefore a mandatory obligation, and one which the Court of Appeal did not fulfil. The Court found that the Appellants should become eligible to be considered for parole after a period of 20 years imprisonment including the time spent on remand awaiting trial.

Jurisdiction – Caribbean Court of Justice (on appeal from the Court of Appeal of Barbados)

Practice and Procedure – Appeal – Leave to Appeal – Special Leave – Criteria for granting Special Leave – Raising fresh issues at CCJ hearing – Duty of trial judge to assist unrepresented accused – Right against self-incrimination.

Bynoe v The State (Barbados)

[2023] CCJ 2 (AJ) BB

The Court recognised, as in *Agard v R*, that it will grant leave to appeal where it appears that a serious miscarriage of justice may be left uncorrected. However, after considering the proposed new grounds, the Court found that it would be an abuse of process for an Appellant to be permitted to introduce new grounds at that stage (as in *Alexander v R*). To do so ultimately violated the fundamental principles of the judicial process, which required a litigant to put their whole case forward on appeal, and that a final appellate court must not allow grounds to be argued before it which was not argued at the Court of Appeal. In considering this case, the Court found that there were no exceptional circumstances to justify the departure from the principle as there was no miscarriage of justice not to allow a new ground to be argued.

The Court found that there was no duty on the trial judge to assist the legally unrepresented defendant by asking the Appellant if he wanted a handwriting expert given that he said that he did not sign a confession statement that was tendered. This would have forced the Appellant to disclose to the judge information concerning a central question of fact, namely, whether the signature on the statement was authentic or a forgery. The burden lay on the prosecution to produce evidence to prove the authenticity of the signature and the Appellant's constitutional right to silence protected him from involuntarily giving any information on the matter and, possibly, incriminating himself.

If the judge were to have asked the Appellant if he wanted the assistance of an expert, the judge would have been violating the Appellant's right to silence and, further, gambling with the Appellant's fate depending on the answer he gave. The prejudice to the Appellant is clear – in the judge's mind the Appellant's response would have established his guilt, as disclosed in the confession statement.

Confession – Oppression - Admissibility of evidence - Consent –Evidence for a jury properly directed – Directions to the jury on oral admissions - Section 17 Court of Appeal Act – Section 178 Evidence Act

Williams v DPP (Bahamas)

SCCrApp. No. 140 of 2021

The evidence against the intended Appellant consisted of the records of interviews and the video recordings of these interviews, DNA evidence and oral admissions. The intended Appellant was convicted of murder and robbery. He was sentenced to 55 years imprisonment for murder and 10 years for robbery, to run concurrently from 24 May 2018, less 2 years spent on remand.

On 6 December 2021, the intended Appellant filed an application for an extension of time within which to appeal against his convictions and sentences. The intended Appellant's intended grounds of appeal are that the trial judge erred: in having found the records of interview and their video recordings were inadmissible due to oppression; by failing to rule the medical consent form to draw blood inadmissible due to oppression; by failing to uphold a no case submission; and by failing to give the jury adequate directions on the oral admissions made to police officers.

Held: The application for an extension of time within which to appeal is refused; the convictions and sentences are affirmed.

The intended Appellant's ground is based on the premise that because the Judge was not satisfied that the record of interviews and video recordings were not given voluntarily, she must also have regarded the consent as not having been given voluntarily. However, no objection was made to the admission of the DNA evidence on the basis of oppression.

The no case submission was unsustainable as there was ample evidence that warranted allowing the matter to go to the jury. The intended Appellant was in possession of items belonging to the deceased and her son, the oral admissions of the intended Appellant and DNA evidence.

The judge's omission to give the jury specific directions regarding the oral admissions made to the police, although regrettable, is not fatal and does not make the conviction unsafe as this was not the only evidence against the intended appellant.

Criminal Appeal – Magistrate's court - Application for extension of time for leave to appeal –Appeal against conviction and sentence – Guilty plea not an offence known to law – Illegal embarkation – Facts not disclosing an offence - Section 19(1) of the Immigration Act – Sections 233 & 235(2) of the Criminal Procedure Code.

Fabien Julian Calixte -v- The Commissioner of Police (Bahamas)

MCCrApp No. 187 of 2022

The Appellant, along with others, was charged with illegal embarkation, having embarked in the Bahamas, for a destination outside the Bahamas, without the leave of an immigration officer.

On 6 December 2022, the Appellant plead guilty to the charge and was sentenced to 3 months imprisonment at the Bahamas Department of Correctional Services and fined $300.00. After his sentence was completed, the Magistrate recommended that the Appellant be transferred to the Bahamas Department of Immigration for deportation.

The Appellant's application for leave to appeal against conviction and sentence was filed on 23 December 2022. Procedurally, a person desiring to appeal a magistrate's decision must do so within 7 days from the date the decision was given per section 235(2) of the Criminal Procedure Code Ch .91. The Appellant's application for an extension of time to appeal his conviction and sentence was received 13 days after the time limit for appealing.

The Appellant sought leave of the Court to extend the time within which to file and serve his Notice of Appeal, against the Magistrate's decision on conviction and sentence.

It is settled law that in exercising the court's discretion whether to grant or refuse an extension of time for leave to appeal, the court considers four factors: the length of delay, the reason for the delay, the prospect of success and the prejudice, if any, to the Respondent.

A review of the Magistrate's notes showed that the facts stated by the prosecution and admitted by the Appellant do not constitute an offence under section 19(1) of the Immigration Act.

The court found that the appellants grounds of appeal, inter alia that the facts of the case did not establish all constituent elements of the offence to which he pled guilty, were made out. As a result, the ground of

appeal had merit and the appeal was allowed.

The conviction and sentence were accordingly quashed and set aside.

CONTRIBUTORS TO THE MAY EDITION

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