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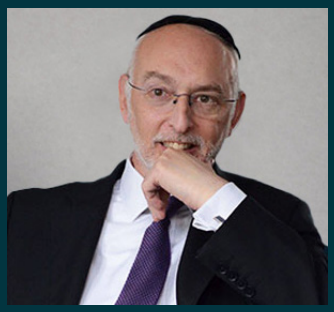
Criminal Appeals Bulletin

Welcome



Paul Taylor KC

Welcome to the September issue the DSC Criminal Appeal Bulletin. In this edition we analyse a selection of the latest appellate cases from the Court of Appeal (Criminal Division), Northern Ireland Court of Appeal, Supreme Court, Privy Council, and local Caribbean appellate Courts.

The citations of the cases are **hyperlinked** to the judgments.

DSC Criminal Appeal Unit

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

Kind regards
Paul Taylor KC
Head of the DSC Criminal 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 Senior Crime Clerk, Matthew Butchard on 020 7400 9074.

Useful links

Latest News:

- Isabella Forshall KC remembered
- Appealcast "ZA – The Court of Appeal "checklist" for sentencing children and young people"
- Sean Summerfield - New member of the DSC Crime Team

England & Wales:

- Conviction appeals (CACD)
- Prosecution appeals (CACD)
- Sentence appeals (CACD)

Northern Ireland:

Decision of the NICA

JUDICIAL COMMITTEE of the PRIVY COUNCIL

Privy Council:

Appeals from Jamaica and The Commonwealth of The Bahamas.

The SUPREME COURT

The Supreme Court:

Jones v Birmingham City Council [2023] UKSC 27

The Caribbean:

Round up of cases from the appellate courts in Trinidad and Tobago, St Lucia, Belize, and Guyana.

LATEST NEWS

ISABELLA FORSHALL KC REMEMBERED

In May we received the devastating news that Isabella Forshall KC had passed away. Issy was one of my closest friends in DSC. I had known her for over 30 years, and she was a constant source of advice, support, and guidance. Issy knew what was important – primarily the client – but also that we traversed daily an ethical and legal minefield. She had both wisdom and integrity. But this was not just my experience of Issy. She was the same for everyone – defendants, staff, junior barristers. There were some wonderful comments about Issy under the tweet that DSC issued in May. One in particular resonated. *"Every robing room should have an Issy corner where people are kind to each other, mischievous and fun."* - Paul Taylor KC

Isabella Forshall KC – a brilliant rebel with a cause – An obituary by Helena Kennedy KC

APPEALCAST

Listen to the latest episode of Appealcast from the Doughty Street Chambers Criminal Appeal Unit: "ZA – The Court of Appeal "checklist" for sentencing children and young people".

The recent Court of Appeal (Criminal Division) judgment in ZA [2023] EWCA Crim 596 represents a sea change in the approach to sentencing children and young people in the criminal courts. Paul Taylor KC discusses the background and implications of ZA with Maryam Mir who was junior counsel.

ZA was Isabella Forshall KC's last appeal case before her tragic passing, shortly before the judgment was handed down. The judgment is a fitting tribute to Issy's brilliance and sensitivity in her representation of the most vulnerable members of society.

SEAN SUMMERFIELD JOINS DOUGHTY STREET CHAMBERS

Doughty Street Chambers is delighted to welcome Sean Summerfield who joins our Crime team. Sean specialises in crime, human rights, and international criminal law. He represents clients charged with serious criminal offences including class A drug supply & importation, high-value fraud, serious violence, historic sexual offences, and human trafficking. Sean also welcomes international law instructions. He holds a doctorate in International Criminal Law, lectures university students on the substantive and procedural aspects of international law, and he is on the list of Approved Assistants to Counsel at the International Criminal Court (ICC).

CASE SUMMARIES AND COMMENTARY

COURT OF APPEAL (CRIMINAL DIVISION)

APPEALS AGAINST CONVICTION

CCRC reference - Fresh evidence – DNA – non-disclosure – s.14(4A) and (4B) CAA 1995 (arguing additional grounds not part of CCRC reference)

Malkinson v R [2023] EWCA Crim 954

By Paul Taylor KC

In 2003, C was attacked and raped as she walked home. In 2004, M, the appellant, was convicted of attempting to choke, suffocate or strangle C, with intent to commit an indictable offence, namely rape, and of two offences of rape. He was sentenced to life imprisonment.

Although the minimum term of his life sentence was set as 6 years and 125 days, he in fact remained in custody for 17 years before being released in 2020 on life licence. Throughout those years, M adamantly maintained that he was innocent, knowing that he was thereby delaying his release from prison.

The CCRC referred the case back to the CACD and the convictions were quashed.

The background

C gave the police a description of the attacker. She believed she scratched his face. C suffered a number of serious injuries, including an injury consistent with a bite. The deputy Police surgeon noted "broken fingernail middle finger right hand". The samples taken included fingernail scrapings and cuttings. Photos of the injuries were taken. C stated that she scratched his face 'with her left hand'

M was arrested hours after the offences were committed. He had no visible injury to his face.

At a video identification procedure C picked out M, saying that she was sure he was her attacker. Two other persons, MS and BC, told the police they had seen a man and a woman near the scene of the crimes. They each gave a description of the man. BC took part in a video identification procedure. After viewing the parade tape twice, she asked to look again at the images of the men numbered 1 and 4. The appellant was number 4. BC picked out number 1. Immediately after the procedure had ended, however, she told a police officer that she had picked the wrong man and that she was sure that number 4 was the man she had seen. MS did not attend an identification procedure until some weeks later by which time he had read descriptions of the attacker in the press and had seen an e-fit drawing of the attacker. He picked out the appellant.

At trial, C gave evidence. She said that she had scratched her attacker's face and must have caused some sort of scratch or mark because she had dug her nail in and had broken the nail.

The statement of the deputy police surgeon was read by agreement, and a small number of photographs of C's injuries were shown to the jury. These photographs were limited to images showing C's face and body, but not her hands.

There was no scientific evidence which could support the identification of the appellant. Although DNA profiles had been detected in samples recovered from C or her clothing, it was only possible to identify a major contribution from C herself, with no clear profile of any other donor. At the time of the police investigation and the trial, the limits of DNA analysis did not permit any further findings.

The appellant gave evidence. He denied any involvement in the offences and said that the identifications of him were mistaken.

In 2006, M's first appeal (based on different grounds to this appeal) was dismissed. Thereafter he made two unsuccessful applications to the CCRC.

M then made a further application to the CCRC, relying on developments in DNA analysis. This led the CCRC to commission further scientific investigations. Important exhibits, including C's vest top and other items of her clothing, had by this time been destroyed by the police; but samples which had been recovered from the clothing had been preserved in a forensic archive. The results of the further inquiries showed:

(a) Cellular material, in which DNA was detected, was recovered from a sample of what could be saliva taken from the left upper front of C's vest top and from a sample taken from the left cup of her bra. The analysis of the sample indicated the presence of DNA from at least two males. Some of the male DNA could have come from C's partner. Some could

have originated from a man who could also have contributed to male DNA in a sample recovered from the left cup of C's bra. A check against a police database showed that the DNA profile on those samples matched the DNA profile of the man referred to as Mr B.

(b) None of the additional testing provided any indication of DNA from the appellant on any of the samples. The findings therefore provided no support for the view that the appellant had been in contact with any of the items examined. However, all of the Y-STR DNA components detected could be accounted for by contributions from C's partner and Mr B.

(c) Some of the male DNA extracted from other samples could have originated from Mr B.

The CCRC concluded that if the DNA now available had been available at the time, there was a real possibility that the appellant may not have been convicted, and indeed may not have been prosecuted at all. The CCRC concluded that there was a real possibility that new evidence would be received by the CACD and that, if it were received, the convictions would be found to be unsafe.

The CCRC referred to two additional issues which contributed to the conclusion that the convictions would be found unsafe and were therefore supportive of the referral. First, the new scientific evidence included further DNA findings which, although of very limited probative value, could have come from Mr B. Secondly, photographs of C's hands which were taken shortly after the incident, but which may not have been disclosed to the defence prior to the trial and have only recently come to light, were relied on by the appellant's advisers as contradicting the Deputy Police Surgeon's evidence and supporting C's account of scratching with her left hand.

The CCRC found no clear evidence of whether or not the criminal records of BC and MS had been disclosed to the defence prior to the trial; but concluded that even if it had not, the information did not give rise to a separate ground for referral, though it might be supportive of the sole ground for referral.

The law – CCRC reasons for referral

By section 9(2) Criminal Appeal Act [CAA] 1995, a reference to the CACD by the CCRC is to be treated, for all purposes, as an appeal under section 1 Criminal Appeal Act 1968 and so no leave is required. However, the effect of subsections 14(4A) and 14(4B) 1995 Act is that any additional grounds not related to any reason given by the CCRC cannot be argued unless the CACD gives leave.

The Grounds of Appeal

Ground 1: This was based on the CCRC referral that the fresh DNA evidence provided no support for the prosecution evidence identifying the appellant and, on the contrary, implicates Mr B. The Crown did not oppose the appeal on ground 1, nor the admission of the fresh evidence relating to the DNA, and they did not seek a retrial.

The CACD allowed the appeal on this ground. It stated that "The new scientific evidence is undoubtedly admissible as fresh evidence" and "there is a reasonable explanation for the failure to adduce it at trial, namely the advances in DNA analysis since that time. The evidence clearly shows the convictions to be unsafe."

The question then arose as to whether the Court should consider the remaining four grounds, all of which required leave because they were not related to the reason for referral. The CACD considered the recent guidance in *Hamilton and others v Post Office Limited* [2021] EWCA Crim 21 where it was held that if the CACD concludes that an appeal must be allowed on one ground, it is not obliged to hear argument on any other ground of appeal, but may in its discretion do so. The guiding principle in such circumstances is that it must act in the interests of justice. The CACD stated "…we are satisfied that in the interests of justice we should exercise our discretion in favour of determining grounds 2-5. We take into account in particular the overall importance of the case; the article 6 rights of the appellant in circumstances where he has spent long years in custody; the importance of maintaining public confidence in the criminal justice system; and the fact that consideration of these further grounds does not result in any undue delay to this appeal."

Ground 2 related to material non-disclosure of the photographs of C's hands, and the damage to her fingernails. The judge had directed the jury that they must acquit the appellant if C may have scratched her attacker's face, and the non-disclosure of the two relevant photographs prevented the appellant from putting his case forward in its best light, and strengthened the prosecution case against him in a manner which the photographs show to have been mistaken. The Court found the convictions to be unsafe on ground 2 (as well as Ground 1).

Grounds 3, 4 and 5 related to the non-disclosure of material that could have undermined the credibility and reliability of BC and MS, the only two witnesses who were relied on as supporting C's evidence of identification.

Ground 3 related to non-disclosure of previous convictions. The CACD accepted "that cross-examination about the witnesses' previous convictions would have been capable of casting doubt on their general honesty and capable of affecting the jury's view as to whether they were civic-minded persons doing their best to assist…the challenge to the character and credibility of those two identifying witnesses would have been capable of affecting the jury's overall view as to whether they could be sure that the appellant was correctly identified. If ground 3 stood alone, we would not regard it as sufficient to cast doubt on the safety of the convictions; but when taken in conjunction with ground 2 we conclude, with some hesitation, that the appeal should succeed on ground 3 also.

Ground 5 related to new evidence showing that MS had been a chronic user of heroin and cannabis for years before he picked out the appellant at the identification procedure, and that he had used other controlled drugs. An application was made to adduce the evidence of a witness who is a postdoctoral researcher with expertise in psychopharmacology and forensic psychology, which it is submitted shows that MS's memory could reasonably have been impaired by his drug use. The CACD declined to admit this fresh evidence on that basis that the expert was not able to link the effects to the actual state of MS's memory at the material time.

Commentary:

Additional grounds not referred (s.14(4A) and 14(4B)) CAA 1995): This case is an example of the success of grounds that were additional to those referred by the CCRC. The CACD quashed the convictions on the basis of ground 1(the CCRC referral ground), but also grounds 2 and 3 – which the CCRC declined to specifically refer upon, although the CCRC stated that it did rely upon the basis of these grounds as being supportive of the referral. It may be argued that this approach is likely to cause confusion once a referral has been made. If the CCRC concludes that a specific ground provides *support for the referral,* it is difficult to see why this should not also form part of that referral (and indeed it would appear to be related to the reason for the referral as set out in s.14(4A) CAA 1995). Referring the case on all such grounds would remove the need for the Appellant to seek leave in relation to the additional grounds, (which may have an impact on the availability of public funding for obtaining fresh evidence). [See *Winzar* [2020] EWCA Crim 1628 [3]].

Fresh expert evidence: It is worth contrasting the CACD's approach to the applications to adduce the two types of fresh evidence: DNA and psychopharmacology. The reliance on DNA analysis specific to the exhibits and samples in this case was accepted, in part, on the basis that it relied upon advances in forensic scientific evidence. [See eg. *Hodgson* [2009] EWCA Crim 490; *Nealon* [2014] EWCA Crim 574; *Noel* [2019] EWCA Crim 1059. *Taylor on Criminal Appeals*, para 6.270] However, the proposed expert evidence relating to the impact of drug abuse on memory was rejected, in part, because it did not relate specifically to the factors and witnesses in this case, rather than only general principles. [eg. *Nazish* [2014] EWCA Crim 2947. See *Taylor on Criminal Appeals*, para 6.319]

'Child sex offences - Cross-examination - Extensions of time – Fairness – Historical offences - Jury directions – complainant distress – inconsistencies

R v Gary Bennett [2023] EWCA Crim 795

By Yvonne Kramo

GB was convicted after trial on three counts: exposure (Count 1); causing a child to watch a sexual act (Count 2); rape (Count 3).

There was a determinate sentence of one year imprisonment on Count 2 with a Special Custodial Sentence under s.236A Criminal Justice Act 2003 of 11 years' imprisonment comprising a custodial term of 10 years extended by one year on Count 3 consecutive.

The application for permission to appeal against conviction was some 1,965 days out of time following refusal by the single judge.

The factual background

At the time of the allegations, the complainant was six or seven years old. She was aged nine at the time of the trial. On 26th August 2015, GB was alone at the house that he shared with his partner when the complainant was dropped off unexpectedly by his partner's son (the complainant's father). GB and the complainant were seated in the living room and the complainant's father had gone into one

of the bedrooms to use his phone and to rest. The complainant's father made two telephone calls: the first lasting 39 minutes, starting at 15.46 and ending at 16.25; the second of 15 minutes duration, starting at 16.34 and ending at 16.49.

Later that evening, the complainant told her maternal grandmother that GB had showed her his laptop and she described seeing two women giving oral sex to a man. She said that GB had her arm around her at the time and told her that his partner used to do what the women were doing, but she was too old now. She said that GB told her to keep it secret and not to tell anyone. In response to the grandmother's question, the complainant stated that GB had not touched her and that he had not made her touch him.

The following morning, the complainant gave her mother a similar account. Slightly later, she told her mother that at one stage the applicant had his hands on her thighs. She also said that GB had made her 'suck his things, like on the DVD'.

The complainant gave a recorded ABE interview on 27th August 2016. Her description of what happened was consistent with her account to her maternal grandmother. On the same day, GB took an overdose and wrote a note in which he apologised for being a 'total prick-idiot-fool' and stated that he could not hold his head up if people believed the complainant. He apologised for all the upset that he would have caused.

The complainant gave a further ABE interview in October 2016. This followed her disclosure to a teacher about an event that became the subject matter of Count 1. She said that she and GB were watching a DVD in the living room and he pulled his trousers and pants down. GB then had his hand on "them", by which she meant his genitals. GB, when re-interviewed, denied that this had happened.

GB's laptop was interrogated. This showed that the machine was in use on 26th August 2015 at various times, but the periods between 14.27 and 14.36, and 16.13 and 16.20, were important for the Crown's purposes. As for the first period, GB was viewing websites relating to DIY and share prices, and not pornography. At 14.36, the machine entered what is known as a "clamshell sleep", i.e. the lid was closed. The lid was reopened at 16.13 and reclosed at 16.20. The Crown's case was that it was during this seven-minute window, which corresponded with her father's first phone call, that GB deliberately showed the pornographic clips to the complainant.

GB's account at interview was that he was viewing pornography for about five minutes before 14.36 using the Google private browsing function. He said that he then closed the lid of the machine, hence why when he reopened the laptop lid at 16.13, the same webpage was running.

The Trial

At various points towards the end of her cross-examination, the complainant became distressed (she had shown no sign of distress during the ABE interviews and when giving her earlier complaints), including when she told the jury that GB's computer was on his knee (at which point there was a six minute break) and when she was asked whether she saw GB's willy (at which point there was a three minute break). She also became distressed when she was asked what GB had done with his willy.

Counsel then told the Court that he did not think that it would assist to ask any further questions. The proposed questions uploaded on to the DCS, however, showed that additional questions were to be asked about the description of GB's willy, whether GB put his willy into her mouth and whether she had made up events after watching a video on GB's computer.

The judge's legal directions made no reference to the complainant's evident distress while she was giving evidence.

Grounds of appeal

There were four grounds of appeal.

(a) The judge failed to direct the jury about how to treat the complainant's visible distress when she was giving her evidence.

(b) The judge failed to direct the jury that they should consider the evidence dispassionately and that they should not be affected by emotion and sympathy.

(c) The judge failed to direct the jury regarding the potential unfairness caused to the defence by the fact that cross-examination of the complainant had to be abandoned due to her levels of distress.

(d) The judge failed properly to direct the jury regarding the complaint evidence by failing to point out all the inconsistencies in her account.

Taking each ground in turn:

(a) Distress direction: The CACD referred to the Crown Court compendium, (esp. para. 20-1). It held that the judge's reason for not giving any direction as to the relevance of the complainant's distress – that she manifested it in front of the jury and not during the course of making her complaints – was not a sound basis for not following the recommended wording in the Compendium or any alternative wording tailored to the particular facts of the case. The CACD, however, found it unnecessary to arrive at a final conclusion on this ground. At its very highest, the judge's omission to say anything at all about the complainant's distress was an error, but it did not follow that it was material.

(b) Sympathy and emotion direction: At no stage did the judge give any direction about the need to avoid sympathy and emotion. The CACD noted that the Compendium recommends that the direction should be given "if appropriate", which the CACD took to mean that the direction should be given if the case in question is likely to generate an emotional or sympathetic response. The CACD held that such a direction should have been given in the case, both at the start of the trial during the standard introductory remarks and in the legal directions. The issue, though, was whether this omission was sufficiently material as to undermine the safety of the convictions in the context of the application for an extension of time.

(c) The summing up: The CACD considered that this ground had very little weight because the summing up counterbalanced the inherent difficulties and potential unfairness in cross-examining a child witness. It held that the judge's failure to mention the non-asked question could not significantly have prejudiced GB as there was nothing preventing defence counsel advancing this argument in his closing speech. In addition, GB would have been in no better position forensically had the non-asked question been put.

(d) Inconsistencies in the complainant's account: The CACD rejected the submission that the complainant's developing account demonstrated that she was capable of lying to her elders. Although this was a possibility, another was that it was a "horrible" experience (to describe the complainant's adjective deployed in the context of the videos). The court held that these possibilities were fairly before the jury.

The CACD refused the applicant's extension of time. It held that the ultimate question was whether a sufficiently compelling case had been advanced on Grounds 1 and 2, so as to exceptionally justify a lengthy extension of time. The Court held that the judge's summing up was fair and balanced and that no one put forward an explanation for the complainant's distress consistent with the applicant's possible innocence.

Commentary

This decision demonstrates the high threshold an applicant must meet to justify the very lengthy extension sought, even in circumstances where appropriate legal directions had not been given. It serves as a reminder that in a case such as this where it was not simply the complainant's word against the applicant's, any supporting evidence is likely to be a primary consideration in whether such omissions were significantly material to justify such a lengthy extension of time. It also emphasises that the Court will always examine all the circumstances of the case, including the length of the delay, the reasons for the delay (if any) and the overall interests of justice. In the wake of recent decisions of the Court, including *R v Patterson* [2022] EWCA Crim 456 and *R v FG* [2002] EWCA Crim 1460, this case is another stark warning to prospective appellants and their lawyers that strong merits cannot of themselves be assumed to be a 'trump card' in securing an extension of time.

Amending indictment following half time submission – alternative counts

R v Oleksandr Romanenko
[2023] EWCA Crim 368

By Richard Thomas KC

OR had driven to meet a convicted drug dealer from whom he collected a bag containing approximately £111,000. He faced one count of conspiracy to supply Class A drugs (Count 1) and one count of possessing criminal property (Count 2). In discussions with the trial judge, prosecution counsel clarified that

the Count 2 was "effectively an alternative" to Count 1 – if the jury was not sure of the appellant's involvement in drug dealing, they could consider whether nonetheless he was guilty of possessing the proceeds of drug dealing.

The trial judge upheld the defence submission of no case to answer on count 1. He observed that it was a "perfectly proper inference" in the circumstances that the money was the proceeds of criminal activity, but that, "there is no other evidence, for instance telephone evidence or that sort of thing, that the appellant was "involved…in the wider conspiracy with other people". He concluded that for the appellant to be guilty of conspiracy, he "must know that there is in existence a scheme which goes beyond the illegal act which he agrees to do".

The prosecution was permitted to amend Count 1 to being knowingly concerned in the supply of Class A drugs. A cross-application to discharge the jury (on grounds of prejudice) was refused. The defendant was convicted of both Counts 1 and 2.

The appeal against conviction on Count 1 was dismissed: the CACD noted that, of course, the exercise of the powers to amend indictments, found in section 5(1) Indictments Act 1915 and Crim PD 10A, depended on the facts of a particular cases, but here the amendment reflected a narrowing of the prosecution case in circumstances whether there was plenty of evidence to support the amended count. Furthermore, it would have in any event been open for the jury to have convicted on the substantive even if the indictment had not been amended.

The CACD did however allow the appeal on Count 2. Despite Count 2 having been opened as an alternative, the route to verdict permitted the jury to convict on both. Counsel for both sides had seen and agreed a draft route to verdict and the CACD "regretted" they had not brought the issue to the trial judge's attention. In allowing the appeal, the Court emphasised that in many cases it would not be improper to include a drug supply count and a criminal property count, but in circumstances where it had been advanced as an alternative the conviction could not stand.

Finally, the CACD allowed the extension of time because the delay had arisen because grounds counsel sent were not received by instructing solicitors who continued to await receipt. The Court suggested "in future, that would be good practice when documents have to be filed by particular deadlines. A failure to receive any acknowledgement would highlight to counsel that the documents required by solicitors had not been received".

[*See Taylor on Criminal Appeals* para 9.392]
(Alternative counts)

Juror bias

R v Hernandez [2023] EWCA Crim 814

By Emma Goodall KC

H appealed against his conviction on the sole ground that the conviction was unsafe due to a real possibility of juror bias.

The juror ("Juror 11") was a retired police officer. Having already deferred service due to illness, he then wrote to the court and the Central Jury Summoning Service stating that he had been "deluded" in believing he could come to an unbiased decision. He explained that his 30 years of experience as a police officer left him with the "unshakeable belief" that whenever authorities decided to prosecute, the individual concerned "is most definitely guilty". He added that his time in any jury room would most likely be spent "persuading the other jurors of the defendant's guilt". Having thus unburdened himself, Juror 11 went on to express a willingness to perform jury service.

Juror 11 was selected by ballot to serve in a trial concerning an allegation of sexual assault where there did not appear to be any challenge to the police evidence. With the agreement of counsel, the trial Judge embarked upon an inquiry into his apparent bias.

The judge reminded juror 11 that jury service is an important civic duty, read the words of the affirmation and asked whether he was able to give a true verdict according to the evidence. Juror 11 initially maintained that he was "biased without a doubt". The Judge stated that jury service is not voluntary and when asked again juror 11 said if he made the affirmation, he would abide by it. Juror 11 confirmed that he understood that meant putting aside bias or preconceptions and being bound by a solemn affirmation. Despite objections by the defence the judge ruled that the test established in *Porter v McGill [2001] UKHL 67, [2002] AC 357*: namely "whether a fair minded and informed observer, having considered the facts, would conclude that there was

a real possibility that the tribunal was biased" was not made out and that the juror should serve.

The CACD explicitly acknowledged the policy considerations in play, namely the importance of guarding against an accused being tried by a juror who was genuinely incapable of returning a true verdict and jurors who may be looking for a means of avoiding their jury duty. To that end, the judge was right not to take the letter at face value and to make further inquiry which the CACD commended as careful and thorough. An inquiry into potential bias will be context specific, dependent on the issues in the trial and the asserted bias. A judge conducting such an inquiry is best placed to evaluate the manner, tone and reliability of the prospective juror's responses and the informed observer is invested with the judge's knowledge and assessment from that inquiry. Consequently, the CACD will be slow to interfere with that assessment.

Despite acknowledging that juror 11's letter and initial communication with the judge were statements of "actual bias", the CACD concluded that juror 11 had not maintained that stance. He had quickly acknowledged what his public duty required of him and twice stated, in unequivocal terms, that he would make and abide by the affirmation. In those circumstances the CACD held the judge was entitled to accept the subsequent answers given and to conclude that the fair minded and informed observer would not think it a real possibility that juror 11 remained biased.

Commentary

This judgment provides another example of the considerable challenges to succeeding on appeal where juror bias has been adversely litigated at first instance.

The CACD's observation that an accused person should not be tried by a jury which includes a person "genuinely incapable of returning a true verdict in accordance with the evidence" looks uncontroversial, if somewhat self-evident. It does, however, raise the question as to how a "genuine" inability might properly be judged in this context. That formulation is perhaps not wholly reconcilable with the test in Porter v McGill, which relies on reasonable perception rather than the CACD's seemingly more empirical approach.

The CACD endorsed the trial judge's inquiry to ensure that the prospective juror was not deliberately misleading the court in order to avoid jury duty. However, relying on juror 11's last answers, the CACD concluded that his expressed "actual bias" was capable of being put to one side when confronted by an understanding of his civic duty. Whilst there is a clear public policy interest in preventing prospective jurors from evading their jury duty, conversely a strong policy argument can also be advanced that citizens who either concoct, or actually hold beliefs antithetical to justice, albeit that they agree to supress them, would not be the most reliable tribunals of fact.

[*See Taylor on Criminal Appeals* para 9.406 (Jury bias)]

Victims of Trafficking - Public Interest in prosecution

R v AJW [2023] EWCA Crim 803
R v Henkoma [2023] EWCA Crim 808

By Benjamin Newton KC

These appeals against conviction came before the CACD on 29th June and 14th July 2023 respectively, argued by the same counsel, and judgment in each being given by Lady Justice Carr. The Court was faced with a similar task in each but concurred with the position taken by the Respondent in relation to the public interest in the prosecution of children for crimes of very different levels of seriousness.

The Appellant in *AJW* had been convicted at trial in 2014 of conspiring to secure the avoidance or postponement of enforcement action by deception. She had arrived in the UK from Nigeria on a student visa in 2012 and in 2013 was arrested in the course of attempting to marry a 43 year old European national, KF, having provided a birth certificate suggesting she was 24. The prosecution case was that the proposed marriage was a sham, planned in order to enable her to reside in the UK permanently. In interview and her first defence statement she maintained that the proposed marriage was genuine, but in a second defence statement she stated that she had in fact only been 15 when she met KF and had not wanted to enter a relationship with him.

At trial the Appellant gave evidence of having run away from home in Benin at the age of 9 to escape female genital mutilation, eventually leaving the country with a false birth certificate. When visiting her older sister in Leicester she met KF, who forced himself on her sexually and made threats to kill her and her sister. She stayed with him out of fear,

including the proposed marriage, which she said was not done to improve her chances of staying in the United Kingdom. No age assessment took place at the time of the trial, and no investigation was ever made into the allegations of criminality by KF. The Appellant was convicted.

Following sentence, the Appellant made an asylum claim and was referred to the National Referral Mechanism, eventually leading to a finding that she had been a victim of trafficking. An age assessment confirmed her date of birth to be as she had claimed, and that she was a child at the relevant time.

On appeal, the Respondent (CPS) submitted that the proceedings did not fall to be treated as an abuse of process on the basis that the Appellant was a victim of trafficking, but that, even whilst maintaining its case that she sought to marry KF in order to regularise her immigration status, an understanding that she was a victim of prior exploitation at the time she sought to marry, at 16, would have meant she was not prosecuted on public interest grounds, and therefore the conviction was unsafe.

Given that concession, the CACD did not consider it necessary to resolve the dispute between the parties as to whether the conviction was unsafe by reference to 'trafficking grounds' (i.e. as an abuse of process) or only 'public interest grounds', and quashed the conviction on the latter basis.

Aisosa Henkoma pleaded guilty at Woolwich Crown Court in 2014 to possessing a firearm without a certificate (and failing to surrender to custody) when he was 15 years old, receiving a 4-month Detention and Training Order. In 2017 he pleaded guilty at Isleworth Crown Court to possessing a prohibited firearm and possessing ammunition without a firearms certificate, by which time he was 19 and received the mandatory minimum sentence of 5 years detention.

Following the commencement of deportation proceedings, a referral was made to the National Referral Mechanism and AH was found to be a victim of trafficking. He came to the UK in 2007 but ran away from home in 2008 to escape torture by his stepmother and was taken into care, at the age of 14, he was disclosing gang associations. Then, as he began missing school, credible evidence developed that he had been recruited by gangs for the purpose of criminal exploitation. He repeatedly went missing in the summer of 2013 and by November 2013 was understood to be in a drug den in Margate. 'Despite the clear risks of harm, of which the police and social services were aware, no referral to the NRM was made'.

The Respondent (CPS) did not seek to go behind the Conclusive Grounds decision that AH was exploited by gangs and accepted that there was a nexus to the offending. In contrast to the case of AJW, however, it was here submitted that prosecution was nonetheless still in the public interest given, in particular, the gravity of the offending.

The CACD recognised the breaches of Article 4 ECHR affecting AH, due to the failures to investigate his possible status, and agreed with the Respondent that they were to be considered as part of the factual matrix. But, the CACD emphasised that breaches of Article 4 do not by themselves render a prosecution unlawful.

The CACD found 'Where the prosecution has applied its mind to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to prosecute unless the decision to do so is clearly flawed. The court does not intervene merely because it disagrees with the ultimate decision to prosecute. It will review the decision by reference to rationality and procedural fairness…

… As indicated above, we are satisfied that the respondent has conscientiously revised the decision to prosecute the applicant in light of the relevant material, and that its position that the prosecution would have been pursued is not flawed, let alone clearly so. There was a balancing exercise to be carried out. Even recognising the applicant's age at the time of the offending, and the circumstances underlying it, there is nothing irrational in the view that it nevertheless remained in the public interest to prosecute. Nor would the court have stayed the prosecutions had any application to that effect been made. In short, there was no abuse of process'.

PROSECUTION APPEALS

Appeal against a terminatory ruling

R v Eleanor Margiotta and others [2023] EWCA Crim 759

By Omran Belhadi

In 2019, the respondents ran a business importing and selling vegetable material. One of these materials was the plant *Cannabis sativa*, grown lawfully in Italy where it was imported. It included the "female" flowering heads of the cannabis plant.

The police investigation determined that the imported plant was cannabis and therefore a controlled drug. However, it contained 0.2% of THC, the psychoactive element of cannabis. The respondents were indicted on two counts namely, being knowingly concerned in the fraudulent evasion of a prohibition on the importation of goods (Count 1) and being concerned in the supply of a controlled drug to another (Count 2).

The respondents applied to stay the proceedings on the basis that the matters with which they were charged were not an offence known to English law. They argued the material was not a narcotic substance, having regard to Articles 34 to 36 of the Treaty for the European Union (TFEU). The Recorder allowed their application. He took the view that the plant was not a "narcotic drug."

The CACD reiterated the biological and chemical characteristics of the *cannabis* plant as set out by Lord Diplock in *DPP v Goodchild* [1978] 1 WLR 578, and also referred to the definitions of cannabis in UN Convention on Narcotic Drugs 1961 and in the Misuse of Drugs Act 1971 which gave effect to the UK's obligations as a signatory of the 1961 Convention.

The CACD set out the provisions and effects of the EU provisions, and referred to the TFEU, regulations on import of and aid for *Cannabis sativa,* and the *Hammarsten* case, where a Swedish farmer was refused permission by the Swedish government to grow hemp from strains whose THC content did not exceed 0.3%.

The Court referred to (EU) No 1307/2013 of 17 December 2013 which set out the rules for direct payments to farmers under the common agricultural policy. Article 32(6) of this regulation provides that areas used for the production of hemp are only eligible if the varieties have THC not exceeding 0.2%. The Court referred to *BS, CA* where two French business owners were prosecuted for importing and selling an e-cigarette with CBD oil containing 0.2% THC. The CJEU concluded the product had no psychotropic or harmful effects; it had been extracted from lawfully grown plants; it was not a cannabis extract.

The Court then turned to the prosecution's appeal.

The first ground was that the Recorder erred in finding that Article 34 TFEU applied to the material imported. The Recorder found that the material was "loose green vegetable matter with the appearance of female flowering heads". It constituted "raw hemp". The Court found that on the facts as found by the Recorder, the material imported fell within the scope of EU law and was not a prohibited item. The court granted the application for leave to appeal but dismissed the appeal.

The second ground was that the Recorder erred in finding that the prohibition on import was not justified. The court refused leave on the second ground on the basis it was not argued before the Recorder. It held that it "would not be appropriate" for the Court to grapple with this argument for the first time on appeal. The court did not grant permission to appeal on this ground.

The third ground was that the decisions in *BS, CA* should not be followed if it renders the prosecution inconsistent with EU law. The Court noted the prosecution did not develop this argument either orally or in writing. It has been informed that Articles 34 and 36 of TFEU no longer have direct effect as a result of Prohibition on Quantum Restrictions Regulations 2020/1625. The Court refused leave to argue it as a separate ground of appeal.

Commentary

This case raises important procedural and substantive issues for consideration.

First, the Court commented that the application raised by the Respondents was "more appropriately advanced" either by way of an application to dismiss or a submission of no case to answer. The case had a complex procedural history with several failed applications to dismiss. The stay application which led to the terminating ruling contained "grounds which overlapped" with those raised in the applications to dismiss. The Court had to contend with the situation before it. The Court made clear at §8 it should not be

considered as accepting that a stay application is the appropriate means to pursue this argument nor that, having failed with this argument when applying to dismiss, the respondents should be allowed to raise it in support of a stay.

Applications to dismiss and to stay proceedings are decided on different tests. There is no reason in principle why an argument having failed in one application cannot be run in another, so long as its effect on the test in question is fully set out.

Second, the Court contained its decisions to findings of the facts before it. In dismissing Ground 1, the Court repeatedly confined its reasoning to the findings of fact by the Recorder. At §72, the Court held that the prosecution's argument was "clearly arguable". The Court did not grapple with the substance of Ground 2 because it was not previously raised. It held that the prosecution arguments in relation to Ground 2 were not negligible.

Third, the viability of the arguments raised by the respondents in this case is now doubtful. At the time of these alleged offences, the relevant EU provisions were still in force. The impact of EU law on the domestic legal landscape remained unchanged by Brexit. Regulation 2 of the Prohibition on Quantum Restrictions Regulations 2020/1625 provides that "any rights, powers, liabilities, obligations, restrictions, remedies and procedures which" are derived from Article 34 TFEU "cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

The rejection of the appeal was no doubt a relief for the respondents. However, the broader impact of this decision is doubtful. The Court sought to limit its decision to the facts in the case. The law has changed in a way that would deprive the respondents of their argument. Legitimate business involved in the importation of hemp products may now need to seek criminal legal advice to avoid falling foul of provisions of current domestic criminal law.

[*See Taylor on Criminal Appeals* Chapter 8]

APPEALS AGAINST SENTENCE

"Just Stop Oil" protesters – PCSCA – approach to sentencing

R v Trowland and Decker [2023] EWCA Crim 919

By Kate O'Raghallaigh

On 17 October 2022, Morgan Trowland (40) and Marcus Decker (34) scaled the Queen Elizabeth II bridge on the M25 carriageway. They displayed a "Just Stop Oil" banner across the bridge and suspended themselves in hammocks until their arrest some 36 hours later. As a result of the protest, the bridge was closed for about 40 hours, causing considerable disruption to members of the public. There is no doubt that, though heavily disruptive, the protest was peaceful.

Mr Trowland and Mr Decker were convicted after trial of an offence of causing public nuisance, contrary to s.78(1)(b)(ii) Police ,Crime, Sentencing and Courts Act 2022. They unsuccessfully sought to invoke the defence of 'reasonable excuse' which the judge withdrew from the jury at the conclusion of the evidence. The trial attracted considerable attention: first, Mr Trowland represented himself. Secondly, the prosecution called detailed evidence about the scale of the disruption caused by the closure of the bridge, which included a member of the public being unable to attend their close friend's funeral (see para 13 of the judgment). Finally, following conviction, the trial judge imposed sentences which are unprecedented in this area of practice: immediate custodial sentences of three years' imprisonment for Mr Trowland and two years and seven months for Mr Decker.

In passing sentence, the trial judge relied on a number of matters, adverse to both defendants: the disruption caused was extreme; he did not accept the apologies which had been offered to the Court; he considered that both defendants were committed to this type of offending (due in large part to their previous convictions); he found that the protest was motivated by a desire for maximum publicity and disruption and had been the subject of detailed planning, and both defendants had offended whilst on bail.

There has never been, as a matter of authority, a 'bright line' which wholly insulates non-violent protestors from a custodial sentence. But, prior to this case, sentences of this length in the context of non-violent protest were, in truth, unheard of. Even in the context of the recent years' increase in high profile

environmental protests, sentences of immediate custody have been uncommon and, where they are imposed, are very rarely measured in years.

The sentences in this case were, however, passed following the passage of the Police, Crime, Sentencing and Courts Act 2022 and the abolition of the common law offence of public nuisance. As explained by Carr LJ at paragraph 42 of the Court's judgment, Part 3 of the Act contains a number of provisions placing limitations on protests, while s.78, which came into force on 28 June 2022, enacted a new offence of intentionally or recklessly causing public nuisance. It was noted by the Court that the provision was introduced "*in the context of increasing non-violent protest offending by organisations such as Extinction Rebellion and Insulate Britain*" [42].

Both defendants were granted leave to appeal – seeking to argue that the sentences were manifestly excessive, a radical departure from ECtHR authority and disproportionate contrary to Articles 10 and 11 ECHR. Though the Court of Appeal accepted that the sentences imposed were severe, a number of factors were cited in dismissing the appeal:

i. Para 50: "The more disproportionate or extreme the action taken by the protester, the less obvious is the justification for reduced culpability and more lenient sentencing. (See R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136 ("Jones") at [89]; Roberts at [33] and [34]; Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29 ("Cuadrilla") at [98] and [99]; National Highways Ltd v Heyatawin and others [2021] EWHC 3078 (QB); [2022] Env LR 17 at [50] to [53]; Brown at [66].)"

ii. Para 57: "S. 78 does not distinguish the sentencing maxima between the two limbs of offending. Similarly, there is no difference in approach by reference to whether or not the offence is caused intentionally or recklessly (for the purpose of s. 78(1)(c)). An offence under s. 78(1)(b)(i) may be more serious than an offence under s. 78(1)(b)(ii), but it does not follow that it will be. A judge sentencing under s. 78(1)(b)(ii) cannot ignore the damage actually caused or risked as a result of an obstruction."

iii. Para 58: "The strength of the protesters' beliefs was on any view material to the question of rehabilitation. As was stated in Roberts at [47], when making a judgment about the risks of future offending, underlying motivations can be of great significance."

iv. The presence of multiple previous convictions for protest offending was a "serious aggravating factor" [61]

Thus, the defendants could not seek refuge in the fact that the case was not one of 'serious harm' for the purposes of s.78(1)(b)(i), nor was it sufficient that far more lenient sentences had conventionally been imposed for non-violent protest offending. In the final analysis, the Court of Appeal seems to have been moved by the unusual scale of disruption caused by the closure of the bridge, and the fact that the defendants' previous convictions made them repeat offenders. Such features are not characteristic of a 'typical' protest case. As such, although the sentences upheld here have set a higher ceiling in the case of large-scale disruptive protests, it is hoped that the judgment in this case will not be interpreted as having authorised a more severe approach across the board in cases of non-violent protest.

Sexual offences – lawfulness of no separate penalty – s.278 Sentencing Code

WJ v R [2023] EWCA Crim 789

By Laura Stockdale

This case involved a "veritable litany of sexual offending" by WJ against his son M between 1975 and 1982. The sexual offending broadly fell into three categories. First, masturbation of M's penis, the subject of Counts 1 and 2. Second, digital penetration of M's anus, the subject of Counts 3 and 4. Third, an incident where WJ penetrated M's anus with his penis, the subject of Count 5. Counts 1 to 4 were offences of Indecent Assault on a Male Person, contrary to s 15 Sexual Offences Act 1956 and Count 5 was an offence of buggery, contrary to s 12 of the same.

The trial judge's approach to sentencing WJ, particularly in respect of totality, was to "aggregate the sentences in this case to reflect the overall gravamen of your offending in the sentence for the most serious of these counts, count 5, and then to pass no separate penalty in relation to the remaining counts". Accordingly, in respect of Count 5, the trial judge noted that the starting point was 13 years' imprisonment, increased to 15 years' because of aggravating features, and then to 18 years to reflect all the offending. She made a small downwards

adjustment to 17 years for mitigation, imposing a special custodial sentence of 17 years under s 278 of the Sentencing Code. She imposed no separate penalty for Counts 1 to 4.

The issue before the CACD was whether the sentences of no separate penalty (NSP) for Counts 1 to 4 was unlawful. The CACD first considered whether the sentences of NSP were unlawful under s 278 of the Sentencing Code. It considered the terms of that provision and held that they do not preclude the imposition of a non-custodial sentence (like its predecessor s236 of the Criminal Justice Act 2003). Although the situations in which a non-custodial sentence for offences of this type would be exceptional.

However, the CACD held that NSP for Counts 1 to 4 was unlawful as it resulted from a misapplication of the totality guideline. A proper application of the totality guideline required either the passing of consecutive sentences for each offence with an appropriate downwards adjustment to ensure that the cumulative sentence was proportionate; or the sentence of the lead offence (Count 5) to be uplifted to take the overall criminality into account, with shorter concurrent sentences for Counts 1 to 4.

The CACD held that the offences underlying Counts 1 to 4 plainly crossed the custody threshold and merited substantial custodial sentences. NSP was only appropriate for additional offences "if the additional criminality involved in the offences concerned has been fully and adequately reflected in the sentences imposed for the other offences". The CACD imposed custodial sentences for Counts 1 to 4 that were concurrent to the sentence for Count 5, which was unaltered.

Proscribed groups – membership of a terrorist organisation – Guidelines – extended sentence

R v Alex Davis [2023] EWCA Crim 732

By Jessie Smith

In 2013 the Appellant was a founder of National Action (NA). NA was a UK-based neo-Nazi organisation, the objective of which was to create an all-white state in Britain. It was a revolutionary movement opposed to democracy and engaged in open incitement to racism and political violence.

On 16 December 2016 NA was proscribed by the Home Secretary. The organisation had made contingency plans to enable it to continue its activities post-proscription, and it did so through a range of regional groups. These groups adopted new names and symbols, and continued NA's activities in a less public manner.

The Appellant was arrested in September 2017 and charged with membership of a terrorist organisation. The indictment covered a nine-month period, commencing the day after proscription. There was a five-year delay in bringing the case to trial, explained by the Crown's decision to conduct a sequence of other prosecutions to strengthen the case against the Appellant.

The Appellant's conduct included contact with other leading figures within the organisation, scheduling regional meetings involving self-defence and combat training, and facilitating the creation of promotional materials. The Appellant did other acts which reflected the depth of his ideological commitment, including campaigning for far-right candidates in local elections, a speaking engagement at the far right 'Yorkshire Forum', and active involvement in the plan to create a 'white community' in Yorkshire.

At the time, the index offence had a statutory maximum of 10 years imprisonment. The Appellant fell within culpability category A of the guidelines, which indicates a starting point of seven years custody and a range from five to nine years. The Appellant was sentenced to a special custodial sentence for an offender of particular concern of nine years six months (pursuant to section 278 of the Sentencing Act 2020). This comprised a custodial term of eight years six months and an extended licence period of one year.

The CACD allowed the appeal, focusing on the placement of the offence within the guidelines and the mitigating factors advanced at sentence. The CACD observed that the top end of the offence range in the guidelines was nine years' imprisonment. In addition, the effect of section 278 was that the trial judge could not impose a sentence with a custodial term in excess of nine years. The CACD found that the trial judge's notional sentence, before considering mitigating factors, was (or was near) nine years. This indicated that there had been very little adjustment for mitigation.

Significantly, the CACD also noted that although the Appellant's founding of the NA was a relevant factor in assessing his culpability, it was necessary to focus

on his actions and his role during the indictment period. The CACD found that a provisional sentence, at or near the very top of the range, was excessive in this context. The CACD's conclusion appears to be reinforced by the fact that all other NA members received lesser sentences than the Appellant. Some of these members had assumed more active roles in the organisation than the Appellant and committed terrorist offences in addition to membership. Although the CACD did not deal with the issue on the ground of disparity, the adjustment in sentence has come to reflect the spectrum of culpability across the organisation.

The CACD found significant mitigating factors which had not been given proper weight. Many of these intersected with delay, and included the Appellants marked decline in health, the suicide of his sister, and the fact that the Appellant had committed no further offences since arrest. The collective weight of these mitigating factors required a greater reduction from the provisional sentence. The CACD substituted a special custodial sentence of eight years, comprising a custodial term of seven years and an extended licence period of one year.

ATTORNEY GENERAL REFERENCES

Unduly lenient sentence – absence of sentencing guidelines

R v Walker and others [2023] EWCA Crim 707

By Katrina Walcott

W, D, A were found guilty of conspiracy to pervert the course of justice, contrary to the 1(1) Criminal Law Act 1977 (D was found guilty of the Juries Act 1974 offence in addition to this.) F pleaded to the conspiracy and Juries Act 1974 offence prior to trial.

Facts:

The case is summarised as follows:

1. In 2018, A stood trial for possession with intent to supply, class A (a kilogram of cocaine) and class B (10 kilograms of cannabis). He was also facing one count of possession of a prohibited weapon (pepper spray). The conspiracy charges related to efforts made by the respondents to subvert the trial process in order to secure A's acquittal.
2. There were two parts to the conspiracy. A and two others were involved in the first conspiracy, which concerned the giving of false evidence during the trial. H gave alternative explanations for incriminating text messages exchanged between A and himself. P dishonestly claimed that he was in possession of the drugs because he had been instructed to leave drugs at A's property by a drug dealer, which A knew nothing about. By the time the conspiracy was uncovered, H had absconded, and P had died.
3. The second conspiracy concerns the 3 respondents, as well as A.
4. D had been empanelled as a member of the jury, trying A. He informed his mother, F, about the subject matter of the trial and person being tried, on the first day.
5. F subsequently made contact with A, whom she knew, as well as W. They agreed together that D would attempt to persuade his fellow jurors to acquit A. For his role, D hoped to be paid £5,000.
6. D attempted to execute the plan. Jurors soon became suspicious of his behaviour and left a note for the Judge. The concern was that D knew A or witnesses involved in the trial.
7. D was first discharged, before the entire jury was eventually discharged.
8. The trial judge convicted A under s.46 of the Criminal Justice Act 2003.

The three defendants were sentenced by the original trial judge to the following:

1. F, a 57-year-old, received two years and three months' immediate custody for the conspiracy and 12 months' immediate custody for the Juries Act offence, to run concurrently. She had one historical conviction from 1982. It was accepted that she had genuine remorse.
2. D, a 37-year-old, received four years immediate custody for the conspiracy and 14 months for the Juries Act offence, to run concurrently. He had two previous convictions from 2005. It was accepted that his remorse was genuine.
3. W, a 57-year-old, received 9 months' immediate custody for the conspiracy. He had 17 dishonesty-related offences, dating back to 1996. He was a leg amputee and had kidney problems, including suffering infections while in prison.
4. A, a 66-year-old, received 13 years' custody

for the drug offence which gave rise to the conspiracy and five years' custody for the conspiracy which would run consecutively. He had one previous conviction from 1979.

The AG submitted that each of the sentences imposed were *unduly lenient* in that they failed to reflect the seriousness of the offending and need for punitive and deterrent sentences for conduct of this kind. It was further submitted that the sentences did not reflect the seriousness of the underlying drugs offence, which A was on trial for.

The respondents submitted that the trial judge, who subsequently became the sentencing judge, was best placed to impose the sentences passed, and these sentences were appropriate. The sentences, it was submitted, reflected the seriousness of the offending and served as real deterrence.

The CACD's approach:

It is important to note the lack of sentencing guidelines for the offences concerned. The sentencing judge nonetheless made clear that offences of this kind are very serious as attempt to undermine the criminal justice system. The relevant principles of law, deriving from the case law, were considered. It was however noted that circumstances varied, and therefore the existing case law was of limited assistance.

Consideration of severity of underlying offending: The first consideration for the sentencing judge ought to be the seriousness of the substantive offence. In this case, it was acknowledged that the drugs offence was serious, due to the sheer volume of drugs alone meaning that the combined street value was over £150,000. It was also noted that the conspiracy itself, was also serious as it was "complex", "carefully planned" and "very cynical". The conspiracy was deemed to strike at the heart of the criminal justice system, as it concerned a juror willing to break his jury oath for the benefit of a substantive offender.

Persistence of offending and the effect of the attempt to pervert the course of justice: It was accepted that the offending took place over a short period of time, however, this was balanced by the fact that the conspiracy was unsuccessful. The judge considered the participants to be incompetent and therefore, any mitigation in this respect would be greatly limited. Nonetheless, it was a determined effort to pervert the course of justice. The judge did acknowledge the limited mitigating factors with regards to each of the respondents. For instance, it was noted that no one had been placed under pressure to involve themselves or was made to be involved subject to threats. However, the judge did not consider the fact that Mr Drackley was unlikely to have come up with the conspiracy without his mothers' involvement, which served as mitigation for him.

The personal mitigation of all respondents: This was also carefully considered. In Mr Walker's case, it was considered that while his disability was an important relevant factor, it was not of such a nature that he could not serve an immediate custodial sentence.

Immediate imprisonment and deterrence: The most important point to be derived from the judgment is that an immediate sentence of imprisonment does not "*necessarily have to be of great length*" to serve as deterrence, as was the case here. While the sentence could have been of greater length, this was in the realm of the discretion of the sentencing judge. For this reason, the reference was dismissed as the sentence could not be deemed *unduly lenient,* and the sentence judge had certainly, not misdirected himself in law.

[*See Taylor on Criminal Appeals* Chapter 13 (AG References)]

THE NORTHERN IRELAND COURT OF APPEAL

Failure to discharge the jury – whether jury pressurised to reach verdicts

Sentence – impact of imprisonment on elderly / ill health

The King v Paul Dunleavy [2023] NICA 38

By Paul Taylor KC

PD, the applicant, sought leave to appeal against the convictions delivered by verdict of the jury on Friday 23 December 2022 at 4.40pm.
PD, now aged 87, a member of the Congregation of Christian Brothers, was convicted of 13 counts relating to the sexual abuse of five complainants, all of whom were male students at two primary schools at which PD was either a teacher or the Principal. The period of abuse covered by the indictment was a period ranging from 1969 to 1989. He was sentenced to 7½ years in prison.
The grounds of appeal against conviction were:

(i) The judge erred in declining to discharge the jury on 21 December 2022 following a defence application on 20 December 2022.
(ii) The judge erred by permitting the jury to begin their deliberations on the afternoon of Friday 23 December 2022 and by issuing a majority direction at 4pm on Friday 23 December 2022.

Appeal against conviction
Ground 1 – Failure to discharge the jury
PD complained that the Crown brought certain non-conviction bad character into issue when asking him questions during the close of his cross-examination, and that the trial judge erred in failing to accede to the application to discharge the jury.

The NICA rejected this ground:

[26] The decision whether to discharge a jury is very much a matter within the judgment and discretion of the trial judge. It is well settled that this court will not interfere with the exercise of a discretion by the trial judge unless he has erred in principle or there is no material on which he could properly have arrived at his decision. There is no indication that he erred in principle and there was ample material to explain why he exercised his discretion in the way he did. Nor has there been a failure to take into account a material consideration, and the judge did not take into account an immaterial consideration. Shortly put, we identify no legal error or any basis upon which the exercise of the judge's discretion can be properly impugned."

Ground 2 – Jury deliberations
PD submitted that the jury ought not to have been permitted to commence deliberations at 12:40pm on Friday 23 December 2022 or given a majority direction at 4pm on the same date. The defence had raised with the trial judge that it may have been more prudent to delay the closings, charge, and deliberations until after the Christmas period and reconvene on 29 December so that the deliberations were not rushed.

The NICA rejected this ground on the basis that, inter alia:

[33] We do not accept that the jury were rushed to come to a verdict.
[34] It is common case that the jury were not expressly put under any pressure of time at all….

The judge did direct them that they were under no pressure of time. The impending Christmas break was a factor which was considered by the parties throughout the currency of the proceedings. No explicit request was made by any of the parties to the judge to pause the proceedings at the conclusion of the applicant's evidence. …It was… better to have a decision on the date in question when matters were fresh in the jury's mind as any delay in consideration until after Christmas may have raised issues of its own. There is nothing to suggest that the trial judge put any undue pressure on the jury, and they were properly addressed in relation to how to approach their verdict, initially on a unanimous basis and thereafter on a majority basis.

Appeal against sentence
The index offences were committed between 1969 and 1989, a period spanning 20 years with PD retiring at the age of 60 in 1996.

NICA considered a report by Professor Passmore, specialist in geriatric medicine, who was asked to provide a report on the applicant's general health and in particular his physical ability to withstand a further period of immediate imprisonment.

NICA rejected the submissions that the sentence was wrong in principle or manifestly excessive. It also rejected the applicant's argument that the reduction of 1½ years applied to the sentence in recognition of the advanced age of the applicant was insufficient in all the circumstances. [At paras 53-56 the Court noted the judge's reference to the authorities relating to the applicant's age and the impact that imprisonment would have on him, and the arrangements in custody for elderly defendants in Northern Ireland prisons by reference to the case of *Lewis* [2019] NICA 26, and recent decisions of the Court of Appeal, both in England and Northern Ireland which indicated that the court is entitled to issue a limited degree of mercy to an offender of advanced years because of the impact that such a sentence of imprisonment can have on an offender of that age.

The NICA concluded that "It was a sentence that reflects the sentencing principles applicable to offences against children and the requirements of the twin components of deterrence and punishment and to reflect society's abhorrence towards the exploitation of young children for sexual gratification."

Commentary:

Retirement of the jury: The time at which a jury is sent out to retire may render any resulting convictions unsafe. As this case illustrates, much will depend on the type and length of the case. [See (England and Wales) *Crown Court Compendium* which notes 'It is no longer a rule of law or practice that a jury should not be sent out to commence their deliberations late in the afternoon or on a Friday afternoon.' 21– 24 [7]. *Taylor on Criminal Appeals:* para 9.414]

As to *sentencing elderly / unwell defendants* see *Taylor on Criminal Appeals:* para 10.261

THE SUPREME COURT

Injunction to prevent gang-related violence or drug dealing - anti-social behaviour -Standard of proof

Jones v Birmingham City Council [2023] UKSC 27

By Pippa Woodrow

What is the standard of proof that ought to be applied in cases where public authorities seek to prevent criminal and/or anti-social behaviour via civil proceedings. More specifically, when seeking an injunction to prevent gang-related violence or drug dealing (under s34 of the Policing and Crime Act 2009), or anti-social behaviour (under part 1 of the Anti-Social Behaviour, Crime and Policing Act 2014) should the applicant authority have to prove relevant previous behaviour on the balance of probabilities ("the civil standard") or so that the court is sure ("the criminal standard") often still described as "beyond reasonable doubt". This question has recently been revisited by a seven-judge panel of the Supreme Court in *Jones*.

It is now well established that applications of this sort are characterised as "civil" rather than "criminal" proceedings – both as a matter of domestic law and under the European Convention on Human Rights ("ECHR") – i.e., they are not a "determination of a criminal charge" for convention purposes. Further, both Acts expressly state that the burden of proof is the civil standard. The answer may at first blush have therefore appeared straightforward. However, the appellants sought to argue that Article 6 ECHR, which protects the right to a fair trial, required the criminal standard to be applied because of the far-reaching interference such applications are liable to have with a person's rights under Article 8 (to respect for private and family life) and Articles 10 and 11 (freedom of expression and association). Given the clear wording of the statue, it was accepted that the provisions could not be "read down" pursuant to s3 of the Human Rights Act 1998. Rather, the appellants sought a declaration of incompatibility under s4 HRA.

Ultimately, the appeal was dismissed - the Supreme Court agreeing with both the High Court and Court of Appeal. Having considered Strasbourg's jurisprudence on Article 6 in the context of civil applications, the Court held that it provided no support for the view that a fair hearing under Article 6(1) ECHR required the application of any particular standard of proof - even in potentially far-reaching circumstances such as those arising in this case. Nor was there any sign that there was likely to be such a development from the Strasbourg court. Consistent with its direction of travel in recent years, the Supreme Court again emphasised its unwillingness to "*go further in the development of new rights and remedies than they could be confident that the Strasbourg court would go*". In the absence of any requirement that civil applications with grave consequences necessarily require a criminal standard of proof, the appellants could not succeed. Further, the Court observed that, Parliament had devised a statutory scheme which included procedural and substantive safeguards to ensure the fairness in any trial and the proportionality of any measures imposed having regard to the significant mischief at which it was aimed. As such, the legislative scheme conformed with the requirements of Article 6.

The Court also addressed a previous line of authority, relied on by the appellants concerning ASBOs (Anti-social Behaviour Orders) under s1 of the Crime and Disorder Act 1998 (which, notably, was silent in respect of the applicable standard of proof). Most significantly the House of Lords decision in *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084 has previously been interpreted as confirming the principle that applications concerning allegations and potential consequences of greater seriousness should attract the criminal standard of proof as a matter of common-law fairness. Having traced the relevant line of authority Lord Lloyd-Jones (with whom all agreed) held that *McCann* was not in fact authority for any *requirement* that the criminal standard must apply in relation to such applications. In his assessment, McCann was both unclear and/

or misunderstood, and was, in essence, a pragmatic response to confusion that has arisen in the law at the time following the introduction of a misconceived concept referred to as "*the heightened civil standard*" in cases of particular gravity. In any event, to the extent that *McCann* might have been authority for the proposition that the criminal standard should apply to applications such as these, it should no longer be followed.

The effect of the Supreme Court's judgment is that applications under modern legislation (including the 2009 and 2014 acts currently in force) which involve proving matters amounting to criminal conduct will be determined on the civil standard: "*The court's task is to determine whether on the balance of probabilities the conduct took place. In considering that question, it is a matter of common sense that the more unlikely it is that an event has occurred, the more cogent the evidence will have to be in order to establish that it did. However, there is no such thing as a heightened civil standard.*"

Clarity in this area is welcome, although that may be little comfort for those subject to these applications and the life-changing consequences that often follow. Those defending in such proceedings will need to marshal the evidence (and arguments upon it) with great care, for it is here that the battle must now be fought.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Roger Watson v The King [2023] UKPC 32

On appeal from the Court of Appeal of The Commonwealth of The Bahamas

By Paul Taylor KC

RW had originally been convicted of the murder of a 12-year-old boy and sentenced to death. In 2009, his murder conviction and sentence were quashed by the Court of Appeal of The Commonwealth of the Bahamas, and a manslaughter conviction substituted. RW was then sentenced to 50 years imprisonment.
He appealed to the Privy Council against this substituted sentence on the basis that there was a substantial breach of natural justice and a denial of the right to a fair trial because:

1. The Court of Appeal, having reduced his conviction for murder to one of manslaughter, proceeded to sentence him without inviting the appellant to address the court on the question on the question of the appropriate sentence.
   The Board concluded that this failure "was a serious breach of procedural fairness."
2. The Court of Appeal failed to give reasons for its decision that 50 years' imprisonment was the appropriate sentence.

The Board stated that "It is a basic requirement of procedural fairness that a sentencing tribunal should give reasons for the sentence imposed, in particular so that the defendant may be made aware of the gravity of his wrongdoing and so that he may be advised as to possible grounds of appeal. It is also important that victims and the public should be made aware of the reasons why a sentence has been imposed. Reasons need not be extensive, but they must meet these basic requirements."
"In the Board's view, the failure of the Court of Appeal to give its reasons for the imposition of such a draconian sentence was a further denial of a fundamental procedural right.
"For these reasons the Board will advise His Majesty that the appeal should be allowed, and the sentence of 50 years' imprisonment should be quashed."

Mr. Watson was represented in the JCPC by Paul Taylor KC, Amanda Clift-Matthews and Daniella Waddoup. They were instructed by Saul Lehrfreund of the Death Penalty Project.
See the analysis of this case by the Death Penalty Project here.

Mandatory minimum terms of imprisonment for juveniles

Morrison v The King [2023] UKPC 14

By Sean Summerfield

On appeal from the Court of Appeal of Jamaica

M pleaded guilty to illegal possession of a firearm, aggravated robbery, and wounding with intent. By his guilty plea, he accepted his involvement in the gunpoint robbery of the complainant's mobile phone. When the complainant fled, M and another gunman fired several shots in his direction, causing gunshot wounds that required treatment in hospital. The complainant recalled that after firing shots, M collected the spent cartridges before driving away.

M was 16 at the time of the offences, and 17 by the

time he came to be sentenced. Several mitigating factors were advanced on his behalf. In addition to his age, M was the primary caregiver for his disabled mother. He had no father figure, had been expelled from school, and lived in a community considered vulnerable, exposing him to negative influences from a young age. To his credit, he had no previous convictions.

Despite those factors, the trial judge considered himself statutorily bound to impose the minimum sentence mandated by Jamaican law for the crime of wounding with intent whilst using a firearm. He was sentenced to 15 years.

Appeal

M's appeal against sentence was dismissed by the Jamaican Court of Appeal in 2020, and he appealed against that dismissal to the Privy Council (JCPC) on grounds that mandatory minimum sentences for children are unconstitutional as they are contrary to rights found in international law. It was variously argued that:

i) Jamaica's Charter of Fundamental Rights and Freedoms, passed by Act of Parliament in 2011 to confer more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica, should be given broad and purposive construction to confer the same protections found in Article 37 of the United Nations Convention on the Rights of the Child (UNCRC), which Jamaica had ratified. The UNCRC provides that when sentencing children, detention must be a last resort and for the shortest appropriate period.

ii) The sentence imposed was unlawful because it amounted to inhuman and degrading treatment, contrary to the Universal Declaration on Human Rights, the United Nations Convention on Torture, the ICCPR, the ACHR and Article 3 of the ECHR.

Disposal

The JCPC handed down judgment on 11 May 2023, dismissing the appeal.

It was held that there was no constitutional obligation arising from Jamaica's ratification of the UNCRC, or from Jamaica's Charter of Fundamental Rights and Freedoms, to impose a sentence of detention as a last resort nor for the shortest appropriate period. The domestic provisions contained within the Charter were concerned with the general protection of children rather than sentencing policy and did not operate to transpose the rights of the UNCRC into domestic legislation. Jamaican legislative history demonstrated that parts of the UNCRC were specifically omitted from subsequent legislation passed in response to the Convention's ratification. Jamaica's ratification of the UNCRC did not create an obligation to import requirements of international law into domestic law.

The Board also rejected submissions that the sentence imposed amounted to inhuman and degrading treatment and was therefore unlawful. Such a sentence could only be considered to amount to inhuman and degrading treatment when that sentence was 'grossly disproportionate'. This followed the proportionality test applied in the jurisprudence of the European Court of Human Rights. On the facts of this case, the Board had particular regard to the "casual use of potentially lethal violence by shooting at the victim after the robbery and the disturbing forensic awareness and care in collecting the spent cartridges afterwards." A substantial period of imprisonment was considered appropriate for deterrent effect, "especially where Jamaica has a social reality of the damaging and corrosive effects of the unlawful use of firearms." The Board noted that the Court of Appeal had found that a sentence of just under 13 years' imprisonment would have been appropriate in the absence of a minimum sentence provision, and so it could not be said that sentence in this case was grossly disproportionate.

While accepting that there may be cases where the imposition of a minimum sentence would constitute inhuman and degrading treatment, the Board was satisfied that the minimum sentence provisions need not be struck down wholesale as unlawful, unless the provision would rate incompatibly with the Charter on the basis that it was an inhuman or degrading punishment or treatment "in all or almost all cases". The Board was satisfied that there was no evidence the minimum sentence provisions satisfied that test.

Commentary

This judgment demonstrates the reluctance of the JCPC to impose international standards for the

protection of children into national law when those standards have not been expressly incorporated into domestic legislation. It also confirms a high bar for challenging the lawfulness of mandatory minimum sentence provisions.

The imposition of mandatory sentences deprives the courts of the ability to take proper consideration of the individual circumstances and needs of young people and ensures that detention is mandated rather than a measure of last resort. The appropriate sentence in the circumstances of this case was determined to be under 13 years. The Appellant will serve considerably more.

Correct approach under Bahamian law to the grant of an extension of time

Rodriguez Jean Pierre v The King
[2023] UKPC 15

On appeal from the Court of Appeal of the Commonwealth of the Bahamas

By Paul Taylor KC

This appeal concerns the correct approach under Bahamian law to the grant of an extension of time for the bringing of an appeal in criminal proceedings. An extension of time is required in any case in which the appeal is not brought within 21 days of conviction.

The appellant contended that the correct approach is that set out in the Court of Appeal decision in *Alexander Williams v The Queen* (SCCrApp No 155 of 2016) ("*Williams*") and that this requires an extension of time to be given notwithstanding the period of delay or the reasons for it, if the prospects of success of the intended appeal are good. It is submitted that in refusing the appellant an extension of time in the present case the Court of Appeal erred in failing to follow this approach and/or in failing to give proper consideration to the merits of the appeal.

On 26 February 2013 the appellant was convicted of murder. On 3 May 2013, he was sentenced to 35 years' imprisonment. On 30 May 2019, the appellant filed an appeal against conviction and sentence after obtaining assistance from the Office of the Public Defender. He also sought an extension of the 21-day time limit for the bringing of an appeal. The only explanation advanced for the delay was a statement made by the appellant in his supporting affidavit that it was due to circumstances beyond his control as he "did not have counsel, nor the means to obtain one".

On 24 September 2020, the Court of Appeal gave judgment refusing the appellant an extension of time. Leave to appeal to the Judicial Committee of the Privy Council was granted.

In dismissing the appeal, the Board stated that:

(a) On its face, the legislation confers a wide and general discretion on the Court of Appeal to extend time to appeal against conviction. So far as the exercise of the discretion is concerned, no specific criteria are identified in the legislation. It has been left to the Court of Appeal to develop a principled approach in order that the discretion may be exercised consistently and fairly. [22]

(b) In *Williams*, the Court stated that, as a result of the delay in making the application, an applicant will have lost the right to appeal he would have enjoyed had the application been made in time. He is, therefore, seeking the indulgence of the Court to be permitted to make an application out of time. [25]

(1) The length of the delay and any explanation or excuse will obviously be relevant. The longer the delay the more difficult it will be to justify an extension of time. Similarly, in the absence of a sound explanation for the delay, the more difficult it will be to justify an extension of time.

(2) The prospects of success will be of great importance. It will be necessary to examine the merits of the underlying grounds before a decision is made as to whether to grant an extension of time. In the Board's view, in a case of inordinate and inexcusable delay such as *Williams* the requirement of good prospects of success on the intended appeal, as opposed to mere arguability, will normally be justified.

(3) Furthermore, the formulation in *Williams* correctly takes account of possible prejudice to the prosecution. If an extension of time is granted, and the appeal is successful, it may result in a retrial. It may well be appropriate to consider at the stage of an application to extend time to appeal whether, given the passage of

time, a retrial would be possible.

The Board considered that the formulation provided in *Williams* may be unduly inflexible in two respects.

(a) First, while the existence of good prospects of success on the merits of an appeal is a matter of great importance, it should not necessarily follow that once good prospects of success have been shown an extension of time must always be granted. Good prospects of success will not invariably be a trump card. If it was the intention of the Court of Appeal in *Williams* to lay down a rule that if the underlying prospects of the appeal are good an extension of time must invariably be granted, regardless of the period of delay or the reasons for it, that must be rejected as unduly rigid.

(b) Secondly, the fact that some prejudice may be caused to the prosecution if an extension of time to appeal is granted should not necessarily defeat the application in all circumstances.

Ultimately, the critical question will be whether it is in the interests of justice that the time limit should be extended, and the court's approach must therefore be flexible. It will be necessary to consider the overall justice of the case. In the Board's view, further relevant considerations will normally include:

(a) The gravity of the offence and the severity of the sentence imposed.

(b) Considerations of legal certainty will also be highly relevant. There is an important public interest in the finality of legal proceedings, the efficient use of judicial resources, good administration and the interests of other litigants (*Liburd v The Queen* (Court of Appeal of the Eastern Caribbean) per Barrow JA at para 4; *R v Thorsby* [2015] 1 WLR 2901 per Pitchford LJ at para 13).

(c) It will also be necessary to take account of the interests of victims of crime and their families, and of witnesses.

The evaluation of the competing considerations is necessarily a balancing exercise. As Lord Hope explained in *Hamilton v The Queen* [2012] UKPC 31; [2012] 1 WLR 2875.

The Board agreed with the observation of Sir Michael Barnett P (at para 10) that the Court of Appeal in *Williams* cannot have intended that no matter how long the delay in appealing and notwithstanding the absence of any reasonable excuse, a court will grant an extension of time if the prospects of success on its merits are good.

The Board agreed with the observations in the recent decision of the Court of Appeal civil appeal, *Flowers Development Co Ltd v The Bahamas Telecommunications Co Ltd* (SCCivApp No 14 of 2022), 29 November 2022:

(a) Firstly, it could never be right or proper to deny an appeal that may expose an injustice, which may have the effect of producing an altogether wrong decision, and to allow it to stand merely due to the time that has elapsed since it was made and where the other party suffers no disadvantage.

(b) Secondly, it is important to recognise that each application will turn on its own facts and circumstances and, more importantly, that the discretion conferred by rule 9 to extend time is unfettered and extremely wide.

(c) Thirdly, rule 9(1)(c) gives the Court of Appeal the power to direct a departure from the Rules where this is required in the interests of justice.

As to the merits of the grounds of appeal, the Board considered that they did not have a good prospect of success and were not arguable.

Commentary:

See also *Ray Morgan* below.

As to the approach of the English CACD to extensions of time see *Taylor on Criminal Appeals*
Para 6.173]

Procedural fairness – delay – obtaining trial records – abandonment – interests of justice

Ray Morgan v The King [2023] UKPC 25

On appeal from the Court of Appeal of Jamaica

By **Amanda Clift-Matthews**

Morgan was convicted of four offences of obtaining money by false pretences in the Magistrates Court ("MC") on 7 February 2011. The Resident Magistrate

imposed consecutive terms of the maximum penalty available of 3 years' imprisonment for each offence, resulting in a total sentence of 12 years. Morgan had spent over one and half years remanded in custody, but this was not taken into account. Morgan gave notice of an appeal against sentence during the hearing.

Upon receipt of notice of appeal, the Clerk of the Courts ("Clerk") was obliged to send the court record to the Court of Appeal ("CA"). Morgan was required to file grounds of appeal within 21 days. Failure to file grounds would deem the appeal to have been abandoned, unless the CA decided to hear the appeal because there had been 'good cause' for the delay. Morgan gave his grounds to prison authorities on 12 February 2011. But instead of sending the grounds to the Clerk, the prison authorities mistakenly sent them to the Registrar of the CA. A year later the CA Registry realised the error and the grounds were forwarded to the Clerk, without informing Morgan of the mistake. Unaware that his appeal against sentence had technically been abandoned, Morgan made several attempts to have the appeal heard. After one enquiry, in 2017, Morgan was informed of the error and told that instructions had been sent to the MC to locate the record so that the matter could be listed before the CA.

In March 2021, Morgan applied for bail pending appeal before the President of the CA sitting as a single judge. It was refused, because the President said he was bound to treat the appeal as abandoned as only the full court could exercise discretion to hear and determine the appeal. However, the President observed Morgan's circumstances to be 'dire' and 'oppressive' and that the justice system had failed him. Morgan was released from prison in April 2021 after he had served 10 years of the 12-year sentence, plus time on remand.

The appeal was heard in June 2021. The CA found that Morgan had a meritorious appeal but declined to hear and determine it for two reasons. First, it said that since Morgan had served the sentence in full, the matter was academic and of no benefit to him. Second, without the record of appeal, the CA did not have the reasons for imposing the sentences and it would not be in the interests of justice to try to unearth them given the time that had passed. Morgan appealed to the Judicial Committee of the Privy Council ("JCPC").

The JCPC said that although a meritorious appeal could constitute 'good cause' to determine the appeal, there may countervailing factors such as finality, and whether the appeal was now 'academic'. In this case, the appeal had merit because no deduction had been made for the time spent on remand. There was also no explanation as to why maximum sentences were imposed; nor why they had been imposed consecutively; nor any indication that the principle of totality had been considered. The JCPC further held that any finding that the appeal was 'academic' depended on a close analysis of the facts and the surrounding circumstances.

There were two benefits for Morgan of having the appeal determined: First, Morgan intended to apply to the Supreme Court for redress for breach of his constitutional right to a review of his sentence by a higher court. That redress would be informed by the difference between the period he was in prison and the period he would have been in prison if he had not been deprived of this right. Second, if Morgan were convicted of further offences, as it stood a sentencing court could take the view that the four offences were particularly serious because maximum, consecutive sentences had been imposed.

Moreover, the JCPC found it would "offend the basic principles of fairness" if failures of the justice system amounted was a good reason not to exercise of discretion to hear and determine an appeal. There was also a public interest in addressing administrative errors so that confidence could be maintained in the judicial system. The appeal against sentence would have provided an opportunity for the CA to set out the practice to be followed in the future cases to avoid a repeat of the errors. Finally, the CA did not give weight to the fact Morgan was blameless for the delay and had suffered a substantial injustice because his appeal was not heard before the expiry of his prison sentence.

The JCPC exercised discretion to hear the appeal and remitted the case back to the CA to determine the merits. It further said that attempts to obtain the record should not delay the hearing and, if there was no further information in relation to the four indictable offences, then the CA should only proceed on facts and circumstances most favourable to Morgan.

Commentary

This is a fair and sensible judgment from the JCPC and one that reaffirmed important principles. During

the hearing, it was accepted by the Respondent that prison authorities have a public duty to properly transmit documents for filing to the appropriate court. The JCPC also confirmed that the inability to obtain the record of proceedings was not a reason to delay the appeal and not a reason for refusing to hear it at all. Furthermore, where there is a lack of information about the charges, trial and sentences, the court could only proceed on the basis of circumstances most favourable to the appellant.

Appeal against conviction – confessions – admissibility – absence of legal representation

Vinson Artiste v The King [2023] UKPC 18

On appeal from the Court of Appeal of The Commonwealth of The Bahamas

By Amanda Clift-Matthews

On 5 June 2012, the Appellant was convicted of armed robbery. He was sentenced to 15 years' imprisonment. The sole evidence against him was a confession made while in police custody. The Appellant had been arrested at home after the police arrived, looking for his brother. The police arrested him instead. At the time, the Appellant was aged 20 and had no previous convictions. While the Appellant was detained in police custody, he confessed to at least seven offences, including the armed robbery. There was no audio or video recording of the interviews. The written record suggested the Appellant had volunteered a full account of his participation in the offence of his own accord without being confronted with any evidence implicating him. The Appellant had no legal representation, and he did not sign the waiver on the custody record to indicate he did not want a lawyer. The Appellant said that the confession was untrue and that it was made by him after he was beaten by the police. When transferred to prison, the doctor recorded that the Appellant had several injuries. The doctor also recorded that the Appellant told him that he had been beaten by the police. The Appellant's custody record stated that he appeared well and in good health when he arrived at the police station.

At the trial the Appellant was unrepresented. The judge conducted a voir dire on the admissibility of the confession. Four police officers were called, and they all denied that the Appellant had been subjected to ill-treatment. The doctor was also called, and he estimated the age of some of the Appellant's injuries to be two-to three weeks' old. The trial judge accepted the officers' evidence and ruled that the confession was admissible. The judge did not give any oral or written reasons for his decision.

The JCPC held that the trial judge should have been concerned by three factors (i) the fact the Appellant was unrepresented at the time of the alleged confessions; (ii) he had no injuries on arrival at the police station; and (iii) he was alleged to have admitted to serious offences when there was no evidence against him. Without written reasons, the JCPC said it was unable to conclude that the trial judge had considered all these factors. Furthermore, the JCPC found it was difficult to see how the judge could rationally have concluded that the prosecution had proved beyond reasonable doubt that the confession was not obtained by oppression. None of these three important factors were referred to by the Court of Appeal ("CA") in its judgment when they dismissed the Appellant's appeal. The JCPC found that there a substantial miscarriage of justice and quashed the conviction.

In its judgment, the JCPC said that it had taken account of four other "significant factors" that supported the view that the verdict was unsafe and unsatisfactory. First, the doctor in his evidence before the jury contradicted his evidence in the voir dire about the age of a facial injury. His later estimate of one to two weeks was consistent with the Appellant's evidence. The JCPC said that "arguably", the judge at this point should have stopped the trial or directed the jury to be "extremely cautious" before accepting the doctor's evidence of two to three weeks, particularly given that the prosecution had offered no alternative explanation for some of the injuries. Second, the Appellant was not legally represented when he made the confessions. The JCPC said that even if the Appellant had validly waived his right to legal representation, it was still a 'significant factor' to be considered. Third, the judge failed to give a good character direction. The JCPC said that it was "strongly arguable" that the omission in itself would have been a good reason for allowing the appeal. Fourth, a prosecution for a different robbery was brought against the Appellant based his confession to one of the other offences. On this occasion, the Appellant was legally represented at trial. The judge in that trial ruled the confession to be inadmissible. Moreover, the Director of Public Prosecutions has entered a *nolle prosequi* in all the cases bar one of all the other offences he had confessed to.

Commentary

This was a clear miscarriage of justice and Artiste is a good example of why it is important that appeals to the JCPC are not restricted to cases involving important points of law. The JCPC's power to review convictions where there has been a risk of a substantial miscarriage of justice is essential to jurisdictions where there may be less stringent safeguards against an abuse of power and wrongful convictions.

CARIBBEAN APPELLATE COURTS

Prepared by Rajiv Persad SC and Ajesh Sumessar of Allum Chambers, Trinidad and Tobago

Admissibility of Fresh Evidence – Provocation – Safety of Conviction – Substitution of Manslaughter

Trinidad and Tobago (Court of Appeal)

Shawn Marcelline v The State

Criminal Appeal No. S015 of 2014

SM was charged with murder which had occurred in 2003. In 2014, he was found guilty and was sentenced to death.

He appealed against conviction relying on fresh evidence in respect of the issues of diminished responsibility and provocation, as well as the cumulative effect of the judge's material non-directions and misdirections on provocation.

The court concluded that there was a strong probability that a jury, properly directed, may very well have arrived at a verdict of manslaughter and (under section 45(2) Supreme Court of Judicature Act Chapter 4:01) the court was of the view that the interests of justice would best be served by substituting a verdict of the lesser offence of manslaughter.

Directions on hostile witnesses – Good character direction – Credibility limb –

Appeal against sentence – judge's consideration of irrelevant matters - failure to adequately take into account delay

The Eastern Caribbean Supreme Court (Court of Appeal: Saint Lucia)

Marius Wilson v The King

SLUHCRAP2021/0003

Hostile witness: A witness may be deemed as hostile where that witness gives evidence adverse to the party calling them or fails to make a genuine effort to give evidence on matters reasonably supposed to be within their knowledge. Once a witness is deemed hostile, they may be cross-examined on previous statements they have made, for the purpose of showing inconsistency between the witness's present testimony and their previous statement(s), which can have the effect of undermining their credibility.

In St. Lucia, the trial judge is required to direct the jury that the previous statement is not evidence in the case and so they cannot treat it as such, unless the witness confirms specific parts of their previous statement.

The trial judge in the present case discharged this requirement and left the jury in no doubt that they could not act on those parts of the hostile witnesses' statements which they claimed not to remember. The judge's additional statement to the jury, that they may form the view that the statements represented the hostile witnesses' recollection at a time when the events were fresher in their minds, must be viewed in the context of the summing up as a whole. When the summing up is viewed as a whole, the jury could not have been in any state of confusion, nor could they have reasonably thought that it was open to them to act on the contents of the witness statements where the hostile witnesses claimed not to remember or which they did not accept. The trial judge had done sufficient to disabuse them of any such notion.

Good character: A defendant who has no previous convictions or who is deemed to be a person of effective good character is entitled to the benefit of a good character direction. The trial judge, in delivering such a direction, must explain the relevance of the defendant's good character to their credibility and their propensity to commit the offence with which they have been charged. In that regard, the good character direction yields two limbs: a credibility limb; and a propensity limb.

In the present case, the trial judge delivered both limbs of the good character direction adequately. The appellant's submission that the credibility limb was "seriously diluted" when the trial judge said that "the fact that the appellant was a lawyer did not mean that he was more or less credible than any other witness" did not operate to attenuate in any way the credibility limb of the good character direction. That statement showed that the trial judge was alive to the varying perceptions which people hold of lawyers, and the impugned direction was intended to disabuse the jury's mind from the inclination to view lawyers in a discreditable light.

Sentencing: An appellate court will not interfere with the judicial discretion of the sentencing court unless: the sentence passed is not justifiable by law; the sentence is passed on the wrong factual basis; the sentence failed to properly account for some matter;

or the sentence was wrong in principle or manifestly excessive. In the instant case, the trial judge did err in sentencing on a wrong factual basis when he had regard to the contents of a presentence report, which suggested that the appellant committed the offences when under the influence of alcohol or drugs, in circumstances where no such evidence had emerged at the trial and was not admitted by the appellant at the sentencing hearing. Practically however, that error did not cause the appellant to suffer prejudice because the trial judge regarded it as both a mitigating and aggravating factor which cancelled out each other thereby producing no adjustment to the 12- year starting point. Dillon Saul v The Queen SVHCRAP2008/020 (delivered 25th January 2011, unreported) followed; R v Newsome; R v Browne [1970] 2 QB 711 followed.

Delay can be a mitigating factor, resulting in a reduction of sentence. This is a discretionary matter for the sentencing judge and it requires the judge to make an assessment of the facts to determine if any discount should be made to the sentence. In the present case, the judge's assessment that the appellant contributed to the delay in "some small measure" warranting a reduction of 1 year was not founded in any satisfactory reasoning. The judge failed to adequately take into account the excessive length of delay of 9 years; his own finding that the prosecution did not satisfactorily explain why the appellant's matter went on hiatus for that lengthy period; and his own finding that the appellant contributed to that period in "some small measure". On that basis, the Court is justified in exercising its discretion to reduce the appellant's sentences by two years. Violet Hodge v Commissioner of Police BVIMCRAP2015/0005 (delivered 27th February 2018, unreported) followed; Akim Monah v The Queen GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported) followed.

Dismissing the appeal against conviction, allowing the appeal against sentence and varying the sentence imposed by the learned judge. The court substituted a sentence of 3 years for the offence of intentionally causing dangerous harm and 2 years for using a deadly instrument with intent to cause grievous harm, with both sentences to run concurrently.

Sentence - Manslaughter – use of inherently non-lethal weapon- whether sentence excessive

Belize (Court of Appeal)

Kevin Jex v The King

Criminal Appeal No. 11 of 2020

In this case, the learned trial judge imposed the following sentence on the Appellant-

"i. taking into account the aggravating, mitigating factors, the circumstances of the offence, the protection of the public, and the rehabilitation, a term of thirty years for the manslaughter of Desmond Miller is the appropriate number of years that should be served before eligibility for parole.

ii. Ten years which is the credit this court is giving for having pleaded guilty at arraignment is to be deducted from the thirty years.

iii. The sentence of twenty years will commence from the date of remand".

The Court of Appeal opined as follows:-

Counsel for the Respondent submitted that the use of the maximum punishment of life imprisonment as the starting point as well as the final sentence was an improper approach to sentencing, and an overall inappropriate sentence. We agree. In this case, the Appellant at the first available opportunity pled guilty therefore saving the court time and expense. He also cooperated with the police and showed his remorse. The weapon used was not one that is considered intrinsically dangerous and this ought to have been taken into account. The only real substantial disagreement between Counsel for the Appellant and the Respondent was the starting sentence. The Appellant submitted that it should have been 12-15 years and the respondent submitted that it should be 'upwards of 15 years' and suggested a starting sentence of 21 years.

We have considered the well-known authorities of Kirk Gordon v The Queen, [2010] UKPC 18 and referred to in paragraph 21 of Shane Juarez v The Queen, Criminal Appeal No. 5 of 2010 and Edwin Hernan Castillo v The Queen, Criminal Appeal No. 11 of 2017. In Juarez and Gordon, the weapon used was not considered inherently lethal. This was therefore a relevant consideration.

Counsel for the Respondent submitted that, although the case before us is similar to Gordon and Juarez (both involve the use of an inherently non-lethal

instrument, and the infliction of fatal head injuries), in the cases of Gordon and Juarez they may have had the partial defence of excessive harm available to them. However, "the Appellant in this case did not have that or any other legal defence available to him for the infliction of the harm". In this regard, learned Counsel submitted that although the sentence imposed below was excessive, this Court should depart from Juarez and Gordon, and depart from the common term sentence of 15 years and impose a more appropriate sentence in excess of 15 years. The suggested starting point was 21 years as in Osmar Sabido v The Queen, Criminal Appeal No. 6 of 2016.

Counsel for the Appellant and the Respondent referred us to Castillo v The Queen, Criminal Appeal No. 11 of 2017 and quoted the judgment of Justice of Appeal Sosa P at paragraph 30 which I will repeat-

"….. A sentencing range is not, however, inscribed in granite. It is no more than a general guideline. There will inevitably arise from time-to-time cases calling from a deviation therefrom. Like Courts in other jurisdictions, this court must be alive to the fact that the variety of factual situations in which manslaughter is perpetrated is unlimited. Quite apart from that, courts interested in maintaining the essential confidence and trust of a law-abiding public must be prepared to make realistic and hard admissions about the lower end of a sentencing range if the prevalence of crime to which it applies is not decreasing, or even worse, keeps increasing. Indeed, this Court regards itself as free, in an exceptional case, to fix a sentence beyond even the higher end of the sentencing range where a particular mix of aggravating and mitigating features so demands. The sentencing range is thus an aide used early on in the sentencing exercise, whereas the features, aggravating and mitigating, of the particular case come into play later."

We agree with learned Counsel for the Respondent that the circumstances under which the injuries were inflicted, not being preceded immediately by an argument or fight, coupled with other serious aggravating factors sets this case apart from Gordon and Juarez. The Court agreed that the starting point ought to be 18 years and not 15. We found the aggravating factors sufficient to add 3 years, making it 21 years. We found that the remorse and cooperation of the Appellant with the police justified a reduction by 1 year, leaving a 20-year sentence. We reduced the 20 years by 1/3 for his guilty plea, a third is 6 years and 8 months. The appropriate notional sentence is therefore 13 years and 4 months. The period of remand to the date of imposition of sentence by the lower court was 7 years and 16 days, which must be deducted from the notional sentence. That deduction leaves a sentence of 6 years, 3 months and 14 days to commence from 21 October 2020.

The Court quashes the sentence imposed by the trial judge on the Appellant and imposes a sentence of 6 years, 3 months and 14 days to commence from the 21 October 2020.

Applicant appealing against sentence – Whether sentence manifestly excessive – Whether sentencing process met acceptable fair hearing standards – Sexual Offences Act, Cap 8:03.

Guyana CCJ

AB v DPP

CCJ Application No GY/A/CR2023/001

Criminal Appeal No 25 of 2018

Examining the sentencing process of the trial judge

The Court noted that in Pompey v DPP, guidance was provided to trial judges on the best practice approaches to be taken on sentencing in cases involving sexual violence on minors. In Ramcharran v DPP, the Court affirmed these best practices with an expectation that they will be applied as and when appropriate. Ideally, this guidance ought to be followed to ensure that constitutional fair hearing standards are satisfied. However, failure to do so was not fatal.

In this case, the trial judge did not receive a victim impact statement, sentenced the Applicant immediately after the verdict was given, and did not consider a social services report. However, it was evident that the trial judge considered the aggravating factors placed before her including the age of the complainant, the special relationship of trust between the Applicant and the complainant, the lack of a guilty plea, the Applicant's attempt to shift blame, the repeated course of conduct, and the consequential emotional damage to the complainant.

Based on these factors, and after having heard and considered the Applicant's plea in mitigation, the trial judge determined that she could not be lenient in the exercise of her discretion. Her approach demonstrated an intention to consider and balance relevant sentencing factors, though not necessarily as fully as advised in Pompey and Ramcharran. Her sentencing remarks also showed that the Applicant's

rehabilitation and re-integration into society were taken into account.

With respect to the sentence, the Court noted that life imprisonment was the maximum penalty under the relevant section of the Sexual Offences Act and was available within the range of punishment options available to the sentencing judge, where the sexual activity included sexual penetration. The Court noted as well that the circumstances of the crime were well placed before the trial judge, who found no mitigating circumstances. Additionally, what made this case distinct in its severity, was the special relationship of trust between the victim-survivor and the perpetrator, and the young age of the victim-survivor.

Considering several precedents in which the crime of sexual activity with a minor was perpetrated by an adult in a position of trust, it was therefore fair to say that the choice of concurrent life imprisonment sentences in this case was neither extraordinary nor manifestly excessive. Indeed, it was reasonably arguable that life imprisonment in the circumstances of this case was within the starting range of sentences that ought to be considered. Furthermore, it was also fair to say that the imposition of a 20-year period of ineligibility for parole was well within the existing range for similar cases. Considering the guidance in Alleyne v R, it was open to the trial judge to conclude that the Applicant deserved a sentence of life imprisonment.

The crimes committed were among the most serious, and in this case included premeditation and involved coercion. The trial judge found no mitigating circumstances capable of lessening such a life sentence, and the Applicant never offered an apology or showed any remorse. The psychological trauma to the victim-survivor, though not investigated, can be presumed. While imprisonment for life was considered sufficient to punish and deter, the opportunity for eligibility for parole after serving twenty years (with the necessary rehabilitation through counselling and therapeutic facilities available in prison) provides the possibility for rehabilitation and reintegration into society within the Applicant's lifetime, and so meets those sentencing objectives.

So, while the sentencing approaches and recommendations made in Pompey and Ramcharran were not precisely followed, it did not necessarily mean that the trial judge in the exercise of her sentencing discretion and the Court of Appeal in its review of the process, erred in law and in fact so as to create any serious manifest injustice or miscarriage of justice.

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