CRIMINAL APPEALS BULLETIN
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Welcome

Welcome to the April 2024 edition of our bi-monthly Criminal Appeals Bulletin. My first as Head of the Doughty Street Criminal Appeals Unit.

In this edition, Amanda Clift-Matthews looks at the issue of re-sentencing in those cases where the death penalty has been commuted in **The State v Maharaj and others** from the High Court of Trinidad and Tobago. I look at expert evidence and inadequate representation by trial counsel in the JCPC case of **Anderson**, Omran Belhadi looks at defences to criminal damage in protest cases in **Attorney General's Reference on a Point of Law No 1 of 2023** and the proper procedure when a defendant denies the previous convictions the Prosecution seek to adduce as bad character in **R v Caine,** Violet Smart considers summary contempt of court proceedings in **R v Jordan** and the latest Court of Appeal case on the modern slavery defence and conclusive grounds decisions, **R v Gjikola** and Graeme Hall looks at two recent Supreme Court judgments concerning extradition and trial in absence – **Bertino v Italy and Merticariu v Romania**.

We also have a new feature which we hope you will find useful. A list of recent decisions from the CACD, both appeals against conviction and against sentence, summarising key findings.

Doughty Street Chambers is renowned for housing many of the leading specialist criminal appeal barristers working on cases both in the England and Wales jurisdiction and internationally. Doughty Street barristers have appeared in some of the most important miscarriage of justice cases over the last 30 years including the Birmingham six, Myra Hindley, Ahluwhalia, Guildford four, the "Karl Bridgewater" murder, the Cardiff three, Venables and Thompson, Sarah Thornton, Michael Stone, Derek Bentley, Mackenney and Childs, post-*Jogee* joint enterprise appeals, including Crilly, the Shrewsbury 24, the "Horizon" Post Office appeals, Robert and Lee Firkins, and many of the challenges to sentences of Imprisonment for Public Protection, as well as in challenges to capital murder and other convictions and sentences to the Privy Council. We have a wealth of unrivalled experience in Appellate work.

Please feel free to e-mail us or to call our crime team on 0207 400 9088. We are happy to discuss initial ideas about possible appeals. More information on our services can be found on our website.

Farrhat Arshad KC
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CASE SUMMARIES AND COMMENTARY

APPEALS AGAINST COVICTION

By Omran Belhadi

Attorney General's Reference on a Point of Law No 1 of 2023 [2024] EWCA Crim 243

Summary

C was acquitted of one count of conspiracy to commit criminal damage. Her prosecution arose from a series of climate change protests. C and her co-accused were members of a group called "Beyond Politics" which grew out of the Extinction Rebellion movement. Between July and August 2020, the defendant targeted the offices of various charities and political parties. They threw pink paint and smashed glass. It was also alleged they conspired on Zoom to target the headquarters of various trade unions. This latter agreement was not put into effect.

One of the defences raised was belief in consent pursuant to section 5(2)(a) of the Criminal Damage Act 1971 ("the Consent Defence"). Before the case was opened, the prosecution applied for a ruling as to whether the defences were open to the defendants where the acts were not denied and the limits of any such defences.

The Judge's conclusions were as follows (summarised at para 13 of the judgement):

> "(i) A judge may withdraw a defence from a jury if there is no evidence to support it. Where there is evidence it is not for the judge to evaluate its sufficiency. That will be a matter for the jury.
>
> (ii) There was no evidence to support any defence of lawful excuse based on Convention rights or on section 5(2)(b) of the 1971 Act or on necessity/ duress of circumstances/defence of another. Those defences could not pursued in the trial.
>
> (iii) Due to the subjectivity of the defence of lawful excuse in section 5(2)(a), it was impossible for him to rule on its applicability before evidence had been called. He permitted that defence to be put before the jury."

C gave evidence at her trial. She gave evidence to the effect that she genuinely believed the occupiers would have consented to the damage had they been aware it was, "carried out to alert those responsible for the premises to the nature and extent of man-made climate change."

Issues raised on appeal

Following the acquittal, the Attorney-General referred the matter to the Court of Appeal pursuant to section 36 of the Criminal Justice Act 1972. The Attorney-General referred two points of law said to have arisen:

1. What matters are capable, in law, of being the "circumstances" of destruction or damage under section 5(2)(a) of the Criminal Damage Act 1971?

2. Was the judge right to rule that the defence should not be withdrawn from the jury?

In relation to the first question, there was limited authority to assist the court on the ambit of the defence (§34). It was necessary to interpret section 5(2)(a) of the Criminal Damage Act 1971. The Court held that the fact this was a protest case, "cannot affect the proper construction of the subsection; there are no special restrictions to be imposed on protest cases" (§38). The Court held:

1. The words "at the time of the act or acts alleged to constitute the offence" mean that the defendant's belief must be held at the time of the commission of the offence (§40). It cannot be formed to explain the conduct after the fact.

2. The belief must be genuine and honestly held (§41).

3. The defendant must be sure that the owner would have consented (§42).

4. It is only the circumstances of the damage which are relevant (§44). The Court held:

   "The circumstances must relate to the destruction of, or damage to, the property. Thus, the relevant circumstances may include matters such as the

time, place and the extent of the damage caused. These factors would be linked to the damage and directly relevant to the owner's hypothetical decision as to consent. They do not include the political or philosophical beliefs of the person causing the damage."

With regards to the fourth element, the Court held there needs to be a

> "a direct nexus between the circumstances of the damage and the anticipated giving of consent is implicit in the statutory language. The circumstances must belong to the damage, not to the defendant. To this extent there is an objective element to the defence" (§46)"

At §47 and §48, the Court drew a distinction between the assertion, in evidence, that the reason for the damage was an act of protest against climate change and the extent of wider motivations. The Court held that the former was admissible evidence and part of the circumstances. However, "what C had to say about the facts of or effects of climate change could not amount to the circumstances of the damage" (§48) and was not admissible evidence.

With regards to the second question posed, the Court declined to answer it in the terms posed because it might have the effect of calling into question C's acquittal. The Court instead reiterated the principles applicable to when it is appropriate not to leave a possible defence to the jury.

Reviewing the authorities, the Court held that the applicable principles remain those state in ***Attorney General's Reference (No. 1 of 2022)*** [2022] EWCA Crim 1259:

> "A judge may withdraw a defence from a jury if no reasonable jury properly directed could reach a particular conclusion. We emphasise that a judge must exercise considerable caution before taking that step. It is not for the judge to substitute his or her decision for that of the jury when deciding to withdraw the defence. The judge is only entitled to withdraw the defence from the jury where no reasonable jury, properly directed, could find the defence to be made out."

Comment

This judgment is likely to stifle the ability of protestors—climate or otherwise—to raise the subject matter of their protest as part of their reasons for committing acts of criminal damage. The defence has been raised in other protest related cases, including the trials of Palestine Action activists involved in the shutdown of the operations of Elbit Systems.

The judgment arguably creates an artificial distinction between the reason for the damage (admissible evidence) and the beliefs underlying the reason for the damage (inadmissible evidence).

In coming to its conclusion, the Court relied on a "commonly postulated circumstance" (§45) of a stranger who discovers a child locked alone in a car on a hot day. The circumstances in this case are the need to free the child. In this hypothetical scenario, the strangers state of mind is dictated by the underlying facts: the heat, the closed space, the potential absence of water and cooling.

Arguably, a protestor's reasoning is governed by the same principles. Climate protestors, arguably, act on the basis of scientific evidence of the impact of climate change on the human population. The hypothetical owner could not make a decision on consent armed only with the protestor's assertion that it is for climate change. It would be necessary for them to understand the full context.

In the context of protest, the line between a protestor's belief and the facts known to them spurring them to action is a fine one. The Court's decision does not prevent defendants adducing evidence of fact that goes to the reason for their act. It may therefore still be possible to adduce evidence relevant to the defence without falling foul of this judgment.

R v John Mylrea Caine [2024] EWCA Crim 225

Summary

On 22 July 2022, the applicant was convicted of three counts of indecent assault against a male person contrary to section 15 of the Sexual Offences Act 1956. On 3 August 2022, he was sentenced to a total of 8 years' imprisonment and made subject to a Sexual Harm Prevention Order ("SHPO") for 20 years.

These were historical allegations which occurred between September 1977 and December 1978. At the time, the applicant was in his mid 20s and the complainant ("C") was 13 or 14. The applicant was a radio presenter for BBC Radio Merseyside. On weekends he presented a youth

show which publicised youth activities through which he met C's parents. The applicant became a friend of the family. C alleged that the applicant would sexually assault him by touching whilst giving him lifts to and from the radio station where the applicant worked and on one occasion, when C was staying overnight with him, the applicant and another male had violently sexually assaulted him. The applicant denied knowing C or his family and denied that anything at all had happened.

At the time of his trial, the applicant had a previous conviction. On 8 February 1999 he had been convicted after trial of six counts of indecent assault on a male person under 16. The earliest assault occurred in December 1977, the same time as the allegations made by C, whilst the remaining assaults occurred some years later, between December 1989 and June 1995. Because of the age of the convictions, the Crown had been unable to retrieve any details of the offences. There were press reports, but these were potentially inaccurate. The trial judge allowed the prosecution to rely on these previous convictions.

In his defence statement, the applicant maintained his innocence in respect of the previous allegations . He gave evidence to the effect that the incidents which gave rise to his previous conviction never happened.

At the close of the evidence, defence counsel submitted that the issue whether the applicant was guilty of the previous conviction should be left to the jury. The trial judge rejected that submission. He directed the jury as follows, set out at §21 of the appeal judgment:

> "You have heard that the Defendant has previous convictions... and you have details of them in the agreed facts document. Although he denies that he was correctly convicted, for your purposes, you must work on the basis that he was correctly convicted of those offences. However, that does not mean he must have lied to you about the offences with which he is charged in these proceedings."

The issues on appeal

The applicant sought leave to appeal his conviction and his sentence.

Re conviction, the Court of Appeal granted leave on the ground that the trial judge misdirected the jury as to how to treat the applicant's denial of his guilt for the previous conviction.

Section 74(3) of the Police and Criminal Evidence Act 1984, creates a rebuttable presumption of guilt (§35). It is "open to a defendant to prove, on the balance of probabilities, that despite his conviction, he did not commit the offence in question" (§36).

The Court referred to ***R v C*** [2010] EWCA Crim 2971 where the Court of Appeal held that a defendant cannot be prevented from seeking to demonstrate that he did not in fact commit offences he was previously convicted of. The Court referred to ***R v Carter*** [2007] EWCA Crim 1307. This was a case where the appellant had previously pleaded guilty to dishonesty offences. At a subsequent trial he asserted he had only pleaded guilty to prevent his brother being prosecuted.

In ***Carter*** the Court of Appeal ruled that the Police and Criminal Evidence Act 1984 did not impose any restrictions on the kinds of evidence to be adduced to rebut the presumption of guilt. It can be sufficient for the defendant to give evidence on the matter. Whether the defendant's evidence sufficiently rebuts the presumption is a matter for the jury not the judge.

On appeal, the prosecution conceded the trial judge misdirected the jury. The question was whether this misdirection led to the conviction being unsafe. In granting leave but refusing the appeal, the Court held the conviction was safe. The trial judge's direction caused the Court some "disquiet" (§52). It amounted

> "in effect to directing them that they should disbelieve the applicant's evidence that he had not committed the bad character offences or, in other words, that he was lying to them in his evidence when he said that he was not guilty." (§52)

The Court referred to ***Carter*** where the Court of Appeal held that what mattered was whether there was any basis, had the jury been properly directed, that a jury could have concluded that a defendant had successfully rebutted the evidence of guilt. Applying that test, the Court ruled that a properly directed jury "could not possibly have" found the presumption rebutted (§54). They ruled the conviction safe.

On sentence, the Court granted limited leave and allowed the appeal in part. The Court ruled that the SHPO was not necessary. The applicant had not offended for many years. By virtue of the nature of

his conviction he would be barred from working with children. The trial judge did not explain why a SHPO was necessary, particularly given the applicant's advanced age.

Comment

On conviction, the judgment emphasises the difficulties a defendant faces if he denies having committed previous convictions. While a simple denial is sufficient to trigger section 74(3) of the Police and Criminal Evidence Act 1984, it may often be insufficient to overcome the hurdle the section creates. Although it need only be rebutted to the balance of probabilities, in refusing the appeal the Court highlighted that a defendant's evidence on the matter may not be sufficient to discharge the burden. It is, however, necessary to ensure that the jury are directed that it is for them to decide, on the balance of probabilities, whether the previous offences were committed.

One key difference between *Carter* and the present case is the way in which the applicant was convicted of the previous offending. *Carter* involved a guilty plea whereas the present case involved a full trial. In its judgment, the Court of Appeal does not appear to have considered how this may have affected a jury's perception of the applicant's evidence on the issue. In *Carter* the Court of Appeal drew a distinction between:

> "a jury being faced, on the one hand, with a defendant who is shown to have lied on the previous occasion to the court and who offers some sort of reason for having done so, and, on the other, with a defendant in relation to whom it is told by the judge "He has lied to you in this case on his oath". In the first case the jury can address the question of whether the explanation offered is good enough or not. In the second, the question of the defendant's credibility is concluded by the judge's direction."

On one view, Mr Caine was consistent in his denials of the offending. The conviction represented the view of a previous jury rather than an admission of guilt from which he sought to resile. In Mr Caine's case, the gulf between the direction given and that which ought to have been given was arguably greater.

On sentence, this judgment is a reminder of the importance for counsel and the sentencing judge to scrutinise the necessity for a SHPO. They are onerous orders that carry criminal consequences if breached. There should be a complete assessment of whether they are required in the first place in light of all the circumstances. In particular, SHPOs are often unnecessary where other mechanisms—such as automatic barring from working with children or vulnerable adults—perform an equal protective function.

By Violet Smart

R v John Jordan [2024] EWCA Crim 229

Contempt of court – articles 10 and 11 - summary jurisdiction – judicial bias – specific intent – Insulate Britain

Summary

On 30th March 2023, during the trial of a number of Insulate Britain protestors, Mr Jordan was found in contempt of court and committed to prison for 14 days, conditionally suspended for 12 months. The facts are that on that same morning, he had been witnessed by the trial judge playing music loudly, in the park which backed onto the court, from a megaphone which was aimed at the court. That music had been heard by the judge and parties during the course of one of the defendant's evidence in chief and had been remarked upon by one of the jurors as a distraction. It had also caused disruption to a neighbouring courtroom which had had to close its windows in an attempt to minimise the noise. The judge, having identified the cause of the sound, caused Mr Jordan to be arrested and brought to court. He was tried summarily by the judge that afternoon.

Mr Jordan did not dispute the act in question. He accepted that he was playing music and that the amplification system was pointed towards the court. He also conceded that he had on occasion also been responsible for playing music at the front of the court building in the past. However, he disputed that his intention was to cause disruption (rather it was a show of solidarity) and stated that he had no knowledge of the stage of the proceedings and thus had not intended to disrupt the evidence.

Mr Jordan appealed against both the finding of contempt and the sentence. The eight grounds were summarised as five main points by the CACD at paragraph 20, namely:

1) Seriousness
2) Specific intent

3) Fairness
4) Incompatibility with article rights
5) Excessive penalty

In dismissing the appeal, the court found that:

(1) Although the law of contempt incorporates a threshold of gravity, the conduct did not have to be "grave" to qualify as contempt. It was clear in the caselaw that the requirement was for "conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice" (*Director of the Serious Fraud Office v O'Brien [2014] AC 1246 [39]*) but that incorporated conduct which was less than "grave".

(2) That in cases of contempt in the face of the court, the intention of the defendant was not relevant to the issue of liability, though it may come to bear on penalty.

(3) That where the contempt is contemporaneous and there is a real risk that it will continue or be repeated in the absence of action, the judge was entitled to take immediate steps to procure the arrest and detention of the defendant. Further, that the fairness or otherwise of the judge being both a witness and decision-maker is to be decided on a case-by-case basis and that in and of itself, those facts do not disentitle a judge to conduct the summary proceedings.

(4) That in any serious interference with the course of justice which has been found to be intentional, it is open to the judge to find that a period of committal is necessary to mark the seriousness of the offence. In this case, there was no remorse or insight into the significance of the conduct, the judge instead finding that the evidence had been "glib in the extreme".

(5) That the proceedings were compatible with articles 10/11. They did not restrict either of those rights (in respect of article 11, there was no 'assembly' and in respect of article 10 Mr Jones was doing nothing more than 'making a noise'), however even if they did, Convention rights are qualified rights, the interference with which can be properly justified in the case of a contempt, which Mr Jordan's actions clearly were.

Comment

This case provides another example of the seriousness with which instances of contempt are dealt. The CACD accepted that the conduct did not involve insult, intimidation or defiance of any warning and yet the penalty of committal (suspended) was deemed to be just and proportionate.

It also serves as a reminder both that the jurisdiction to deal with such matters swiftly are not limited to the way the passages in *Balogh v St Albans Crown Court [1975] 1 QB 73* may suggest and may well be properly used by judges where appropriate, bearing in mind the underlying purpose of the jurisdiction and the need for proportionality and fairness. Where a judge does use the summary jurisdiction, it is not the case that his having been witness to the act automatically precludes him from trying it.

Further, this case solidifies the contention that in cases of contempt in the face of court, there is no need for a finding of specific intent where liability is concerned. While it was advanced on behalf of Mr Jordan that there was some ambiguity in relation to this, citing Balogh, the CACD was clear, as are the authorities, in that what must be proved is an act or omission creating a real risk that justice would be impeded. In this case, as neither the actus reus nor its impact on proceedings was disputed, there was no point to be taken in relation to the fact of the contempt on the face of it.

Finally, it is of note that while, clearly, Convention rights can come to bear on questions of contempt of this nature, the judgment makes clear that these are not to be deployed by counsel indiscriminately; the scope of the Convention rights is explored comprehensively in case law and where they cannot be clearly made out on the facts of the case, a court is unlikely to be persuaded that they are engaged. Even where they are, however, the qualifications on those rights and the impact of a contempt on the administration of justice will be closely scrutinised.

R v Sarjo Gjikola [2024] EWCA Crim 207

Modern slavery – Conclusive grounds decisions – fresh evidence

Summary

On 17th October 2019, Sarjo Gjikola was sentenced to 21 months' imprisonment for producing a drug of Class B (cannabis) and six months consecutive for possession of an identity document with improper intention following guilty pleas. He had been arrested on return to

a two-bedroomed terraced house for which he had the keys, where the police lay in wait. Three of the rooms in the house had been adapted to sophisticated cannabis growing and, additional to the plants, police had found three Romanian identity documents and three Romanian driving licenses, each in different names but with a photograph of Mr Gjikola (an Albanian national).

He sought an extension of just over 1,300 days for leave to appeal in light of fresh material that, it was submitted, would have entitled him to a defence pursuant to the Modern Slavery Act 2015 and in the alternative, would have resulted in a successful abuse of process application had the prosecution continued with knowledge of the information.

By the time of lodging the appeal, Mr Gjikola was in possession of a positive conclusive grounds decision made by the Single Competent Authority ('SCA'), having been referred through the National Referral Mechanism by the immigration officer who interviewed him while he was held on remand prior to his sentence. An initial reasonable grounds decision had been made by the SCA shortly after he was sentenced in October 2019, and they had indicated that the case would have to be explored in more detail prior to any conclusive grounds decision.

In that final conclusive grounds decision, the SCA identified Mr Gjikola's explanations as 'plausible' notwithstanding some discrepancies and inconsistencies. His explanation was, in essence, that he had been kidnapped in Albania, later escaping and fleeing to Italy where he was discovered by the kidnappers and transported to London in the back of a lorry and, after some months, made to tend to the cannabis plants. In relation to the identity documents, he stated that he had been told to take them, "no questions asked".

The Court reminded itself (at para 15) that although a conclusive grounds decision was not binding on the Court of Appeal or any court, unless there was evidence to contradict it or other reasons substantially to doubt it, then the court must respect that decision, as per *AAJ [2021] EWCA Crim 1278*. The Court stated that its principal task was to consider whether the material before the SCA and other material in the case would have led a reasonable prosecutor in 2019 to determine that it would not have been in the public interest to prosecute.

In investigating that issue the Court had heard from the applicant because, as was said in *AAD [2022] EWCA Crim 106*, where there is unsatisfactory and untested hearsay evidence which gives rise to the decision on which reliance is placed, it will often be the case that an applicant has to give evidence before the Court of Appeal. The evidence was heard ***de bene esse***. Notwithstanding the positive conclusive grounds decision, including the written evidence that had been provided by Mr Gjikola and the submission on behalf of the applicant that his evidence was credible, the Court of Appeal, in denying the application for an extension of time found that the evidence was incredible. It went on to say:

> "…the defence requires a jury to conclude at least as a possibility that the applicant had done what he did because he was compelled to do so and the compulsion was attributable to slavery or relevant exploitation…our judgment is that the fresh evidence upon which the applicant seeks to rely is not evidence capable of belief in terms of establishing the defence under section 45 or the situation where any proceedings would have been found as an abuse of process."

Both the extension of time and the application for leave to appeal were accordingly refused.

Comment

In broad terms, this case reiterates that the availability of fresh evidence (and in this case a subsequently undeployed defence) should not be taken as a guarantee that leave will be granted. But more specifically, it is an important reminder that the decisions made by the SCA in relation to modern slavery will not be regarded as sacrosanct. While the case law is clear that the court must respect the decision of the SCA in the absence of any reason to substantially doubt it or contradict it, the court is entitled to, and often will use its own powers of judgment to hear evidence where it finds the untested evidence provided to the SCA to be unsatisfactory. In doing so, it will reach its own conclusions on the efficacy of that evidence. As this case demonstrates, a conclusive grounds decision will be tested just as thoroughly as any other evidence notwithstanding its origin.

Bertino v Italy [2024] UKSC 9 and Merticariu v Romania [2024] UKSC 10

By Graeme Hall

Supreme Court hands down two landmark judgments on retrial rights in extradition proceedings.

On 6 March 2024, the Supreme Court handed down two judgments dealing with the interpretation and application of section 20 of the Extradition Act 2003 ('the 2003 Act'). Section 20 of the 2003 Act poses a series of questions for the district judge to answer including (i) whether the requested person was convicted in their presence or their absence (s.20(1)), (ii) if convicted in his absence, whether the requested person has "deliberately absented himself from his trial" (s.20(3)), and (iii) if the person was not deliberately absent, whether he is "entitled to a retrial or (on appeal) to a review amounting to a retrial" (s.20(5)).

The decision in ***Bertino v Italy*** considered the application of s.20(3). Mr Bertino's extradition was sought by Italy to serve a sentence of one year's imprisonment for an offence of grooming. He was convicted and sentenced in his absence. The district judge found that he had deliberately absented himself from trial as he had failed to inform the judicial police of his change of address when he moved to the UK. He had, in turn, demonstrated a manifest lack of diligence, and it was his fault he was tried in his absence. The High Court (Swift J) upheld that decision and found, in particular, that there was no duty on the requesting state to inform a requested person that their trial could go ahead in their absence.

The Supreme Court unanimously allowed the appeal and quashed the order for extradition. The Court found that the notion of deliberate absence had to be interpreted in accordance with Article 6 ECHR. In particular, the European Court has held that the right to be present at trial is of capital importance, and that a trial in absence can only comply with Article 6 where the defendant has unequivocally waived, in a knowing and intelligent way, his right to attend trial. Ordinarily, this requires the requesting state to demonstrate to the criminal standard that the requested person had been formally notified of the accusation against him, officially informed that he was to be prosecuted, informed of the date and place of the scheduled trial, and informed that a trial may go ahead in his absence. This was not the case for Mr Bertino, who, as the district judge had concluded, left Italy when his trial was a mere "possibility" and not a "certainty".

Importantly, the Supreme Court overturned the principle, first articulated in ***Zagrean v Romania*** [2016] EWHC 2786, that a requested person will be deemed to be deliberately absent from his trial where - at any stage - he demonstrates a lack of diligence that leads him to being unaware of the criminal proceedings or trial. The principle in *Zagrean* - based on a misinterpretation of the Court of Justice of the European Union decision in ***Dworzecki*** (Case C –108/16 PPU) - had taken a firm hold in English caselaw, and had been relied upon by the district judge in Mr Bertino's case.

The decision in ***Merticariu v Romania*** considered the application of s.20(5) of the 2003 Act. Mr Merticariu's extradition was sought by Romania to serve a sentence for burglary. The district judge concluded that Mr Merticariu was convicted in his absence, and that he was not deliberately absent from his trial. However, the district judge concluded that the requested person had a right to a retrial per section 20(5), and extradition was therefore ordered. The district judge essentially found that the requested person had a right to apply for a retrial, which was sufficient for the purposes of s.20(5).

On appeal, the High Court (Chamberlain J) expressed doubts about the district judge's conclusions, but felt bound to follow decisions of the High Court, including ***Zeqaj v Albania*** [2013] EWHC 261 (Admin) and ***BP v Romania*** [2015] EWHC 3417 (Admin), to conclude that s.20(5) would be satisfied "even if the right to a retrial is conditional on a finding by a court in the requesting state that the requested person was not deliberately absent from their trial".

The Supreme Court unanimously allowed the appeal and quashed the order for extradition. In particular, the Supreme Court concluded that the plain meaning of s.20(5) asked whether the person was entitled to a retrial, and that the provision could not be satisfied where a requested person merely has an entitlement to apply for a retrial. In so doing, the Court overruled the High Court decisions of ***Zeqaj*** and ***BP***, which had also taken a firm hold in High Court caselaw.

In ***Bertino***, the appellant was represented by Edward Fitzgerald KC and Graeme Hall.

In ***Merticariu***, the appellant was represented by Ben Cooper KC, Malcolm Hawkes and Mary Westcott.

PRIVY COUNCIL

Anderson v HM's Attorney General [2021] UKPC 20

Judicial Committee of the Privy Council – appeal against conviction - murder - diminished responsibility

By Farrhat Arshad KC

In April 2015, following trial at the High Court of Justice of the Isle of Man, the Appellant, IA, had been convicted of the murder of his wife's lover. During his trial, the Appellant was represented by two local Manx advocates and had not been permitted leading counsel from off-Island. The Defence obtained evidence from a psychiatrist and a psychologist, both of whom provided foundations for a finding of diminished responsibility. The Prosecution also obtained a report from an expert. She originally disagreed as to the possibility of diminished responsibility, but then changed her mind in two subsequent reports. On a Defence application, her evidence was excluded entirely, and no evidence as to "substantial impairment" was adduced at trial (despite its mention in the evidence of the psychiatrist instructed by the Defence). The Appellant sought leave to appeal out of time to the local Isle of Man Courts but was refused. He then made an out of time application to the JCPC and was granted leave.

The issues in the appeal were:

1. Whether the Appellant was inadequately represented by the Defence trial advocate in relation to diminished responsibility;

2. Whether the Deemster failed properly to direct the jury in relation to diminished responsibility;

3. Whether, taken together, issues (1) and (2) deprived the Appellant of proving that his responsibility was diminished, such that a conviction for manslaughter should be substituted.

In allowing the appeal, quashing the murder conviction and ordering a re-trial the Privy Council held as follows:

- The experts were "undoubtedly entitled" to express their opinion on whether the appellant's responsibility for the killing was substantially impaired, even if this was the "ultimate issue" (at paras 54-60 of judgment);

- Trial counsel had not properly handled the experts' evidence. Whilst in his written report the Defence psychiatrist had clearly set out that he thought there was substantial impairment this was not adduced in oral evidence before the jury. The expert made it clear in his fresh evidence to the JCPC that he had not given oral evidence re substantial impairment because he thought he was not permitted to and the Defence trial advocate did not assist him (para 61 of the judgment);

- This error was compounded by the Prosecution closing speech which was significantly (if unintentionally) misleading in suggesting to the jury that neither expert was able to say there was a substantial impairment (at para 62 of judgment);

- As to the Defence advocate's errors, importantly, the JCPC stated (at para 65 of the judgment):

  "The question for the Board is not a qualitative assessment of the conduct of counsel, or indeed the suggested errors in the summing up, but the effect of these factors on the safety of the conviction (whether it is 'safe and satisfactory' pursuant to section 33(1) of the Criminal Jurisdiction Act 1993). Lord Carswell summarised the approach to be followed in ***Teeluck v State of Trinidad and Tobago [2005] UKPC 14; [2005] 1 WLR 2421:*** *'39. […] There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of*

counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude […]'"

Comment

Allegations of inadequate representation by trial counsel are frequently made on Appeal but infrequently made out. What is of particular utility here, is the JCPC's adoption of Lord Carswell's approach in **Teeluck v State of Trinidad and Tobago**, that it is not the Appeal Court's task to be concerned with where on a scale of ineptitude the original advocate's conduct falls (save for egregious cases) but rather to be concerned with the impact the errors have had on the trial. This line of jurisprudence is worth remembering when, as they frequently do, Respondent counsel seek to persuade the Court that the Defence advocate's conduct was not so bad as to deny the defendant a fair trial.

The appeal to the JCPC was heard in 2021 but reporting restrictions remained in place until the re-trial had concluded in 2023. Farrhat Arshad KC appeared as junior counsel for Mr Anderson at the JCPC. She was led by Adrian Waterman KC. Counsel were instructed by Simons Muirhead & Burton LLP.

CARIBBEAN APPEALS

The State v Maharaj & Ors
(Trinidad and Tobago)
CR-HC-POS-IND 1028-2021-1-9 and 1026-2021-1-9
(1 March 2024)

By Amanda Clift-Matthews

Summary

This case concerned the murder of Thackdoor Boodram in 1997, for which 10 co-defendants had been convicted and sentenced to death in 2002. Following an unsuccessful appeal against conviction in the Trinidad and Tobago Court of Appeal[1], the co-defendants appealed to the JCPC in 2006. The JCPC dismissed the appeal against conviction but allowed the appeal against sentence. It found that due to the excessive length of time the co-defendants had spent under sentence of death, it would now be cruel and unusual for them to be executed. The JCPC substituted their death sentences with sentences of life imprisonment[2].

In 2014 their cases were referred back to the Trinidad and Tobago Court of Appeal on the basis that fresh evidence had emerged that was not available at trial. The Court of Appeal ultimately dismissed the application to adduce the fresh evidence[3]. A further appeal was made to the JCPC by 9 of the 10 co-defendants, which included an appeal against the life sentences imposed on them in 2006. The JCPC also dismissed their appeal against conviction. But it adjourned the appeal against sentence because the issues that arose for determination were the same as the issues that the JCPC were to consider in the case of *Boodram v Attorney-General* [2023] UKPC 20[4]. *Boodram* would later hold that the practice of mandatorily imposing life sentences on prisoners in lieu of death sentences was arbitrary and, in some cases, could be disproportionate. Such prisoners were entitled to be resentenced in accordance with established sentencing principles and with the full range of sentencing options available (at *Boodram* [41]-[43]).

On 6 February 2023, the JCPC allowed the appeal against sentence in *Maharaj* and referred the co-defendants' cases to the High Court of Trinidad and Tobago for resentencing. The 9 men first appeared before the criminal division of the High Court on 27 March 2023 and were resentenced on 1 March 2024. When considering the appropriate term to be imposed, the judge took account of local case authority that had found that a life sentence was inappropriate where there was the possibility of a prisoner being rehabilitated and safely returned to society[5]. The judge also took account of the Court of Appeal's judgment in *Boodram*, which held that resentencing following commutation of a death sentence required a consideration as to whether the punitive element of the sentence had been satisfied, and whether any further period of detention was necessary for protection of the public (at [24]).

The judge found that in each of the co-defendant's cases a life sentence was inappropriate and imposed fixed terms of imprisonment ranging from 30 to 32 years' imprisonment. Time already spent in custody was to be deducted from the term imposed. Since all of the co-defendants were entitled to one third remission of sentence under the Prison Rules, 8 of the 9 co-defendants were immediately released. (The remaining defendant was also serving a term of imprisonment for a separate matter.)

Comment

At the time that the appellants in Maharaj were resentenced in 2006, it was assumed by the courts that a sentence of life imprisonment was the automatic alternative to a death sentence that could no longer lawfully be carried out. The JCPC's judgment in ***Pratt & Morgan v R*** [1993] UKPC 37 had indicated that a convenient means of commutation was through executive exercise of the power of pardon. As a result, 46 prisoners in Trinidad and Tobago had their death sentences commuted to 'imprisonment for the rest of natural life' by the President exercising powers contained in s 87 of the Trinidad and Tobago Constitution, and a second group of five prisoners had their death sentences commuted to 75 years' imprisonment via the same route.

Another cohort of more than 50 prisoners had their sentences of death quashed in August 2008 by the High Court following a constitutional motion brought under section 14 of the Constitution. Section 14 grants original jurisdiction to the High Court to provide redress for breaches of fundamental rights. The High Court substituted terms of life imprisonment[6]. One of the prisoners was Naresh Boodram, who would go on to file his own constitutional motion that would eventually reach the JCPC. As a result of the JCPC's judgment in ***Boodram***, all these prisoners became entitled to an individualised re-sentencing hearing before a judge.

The prisoners whose death sentences had been commuted by the President filed constitutional motions too. They came before the JCPC in ***Lendore & Others*** [2017] UKPC 25. As the appellants in ***Boodram*** would later argue, the appellants in ***Lendore*** submitted that their sentences were unlawful because they had been commuted as a group with no consideration given to the individual circumstances of their cases. They also argued that their substitute punishment should have been determined by a court, and that the life sentences substituted were, in effect, irreducible. This was because the review process that provided for early release functioned only irregularly, haphazardly, and not in accorded with general principles of natural justice. Reports, if made, were often not disclosed to prisoners. Frequently, prisoners were not informed in advance about the reviews. The results of reviews were often not communicated to the prisoners.

The JCPC, however, rejected all arguments, save that it agreed that the prisoners were entitled to have each of their cases individually reconsidered by the President. The JCPC found that, while the court could commute death sentences that could no longer be carried out, by using it constitutional powers of redress, there was nothing unlawful or inappropriate in the President commuting the death sentences and fixing new sentences for the prisoners instead. The JCPC also said that any fault in the review process (though not the merits) could be adequately dealt with by judicial review (at [70]).

Nearly seven years later, the ***Lendore*** appellants are still waiting for the President to reconsider their sentences. They remain indefinitely detained. Some have, literally, died waiting. The fate of the ***Lendore*** appellants illustrates the difficulty - and utility - of having a right but no realistic means of enforcing it.

It was fortunate, therefore, for the co-defendants in ***Maharaj*** to have had their original deaths sentences quashed by a court. Had the co-defendants not taken their initial appeal to the JCPC, they could have been in the same uncertain position as the ***Lendore*** appellants. The decision of the JCPC to refer the co-defendants' cases directly to the criminal division of the High Court was just and pragmatic. It enabled the co-defendants to have their sentences considered swiftly (in relative terms) without the need to file a separate constitutional motion. It also enabled reports on prisoner progress to be ordered. More judgments that reflect the practical realities faced by prisoners in the local jurisdiction are to be welcomed.

Edward Fitzgerald KC and Amanda Clift-Matthews represented the nine defendants in the JCPC.

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[1] Criminal Appeal Nos 58-61 of 2001 (2 October 2002)
[2] Order dated 13 March 2006
[3] Criminal Appeal Nos 56-65 of 2001 (16 May 2018)
[4] ***Maharaj & Others v State*** [2021] UKPC 27
[5] ***Nicholas and Others v State*** Cr App Nos 1-3 of 2013
[6] ***Dottin v Rougier, Patterson & Attorney General*** HCA No 1412 of 2005

RECENT CASES

Recent CACD decisions – Summaries

By Farrhat Arshad KC

Appeals against Conviction

R v Patrick John Ryan [2021] EWCA Crim 262 (judgment released in 2024 following re-trial) – *Failure to give cross-admissibility direction where two sexual offence complainants - convictions unsafe – retrial ordered*

R v Kamaladin Ismael [2024] EWCA Crim 301 – *Appeal against conviction following guilty plea when D was unfit. "Utter mess". Reason before, at time of and shortly after plea to question D's fitness. Unsafe convictions. Review of the authorities on unfitness and the Pritchard test*

R v Mohammed Abdi Mahmud [2024] EWCA Crim 130 – *Theft – misdirection re dishonesty – jury directions – conviction quashed*

R v Damien Daniel Heaven [2024] EWCA Crim 88 – *Appeal allowed as submission of no case should have been upheld based on missing ingredient of intimidation offence*

R v Steven McInerney [2024] EWCA Crim 165 – *Murder – D did not give evidence – trial judge stopped counsel from advancing "common sense reasons" why D might have chosen not to give evidence – judge right to do so as it invites speculation*

R v Muhammad Hanif Arshad [2024] EWCA Crim 67 – *D tried in absence on sexual offences – no error in very particular circumstances of the case - despite seriousness of offences - where he had absconded and had been warned trial would proceed in absence if he failed to attend*

R v Graeme Brooker [2024] EWCA Crim 103 – *counsel's duty to put his case - inadequate representation by counsel — despite finding multiple failings by counsel and finding that "his performance of his duties fell below the standard to be expected of a member of the Bar of England and Wales" CACD nonetheless found convictions safe*

R v Sheikh Dibba [2023] EWCA Crim 576 – *attempt murder and possession of a firearm - renewed application for leave – drill videos showing D speaking of violence against rival gang members and identifying with other gang members – 5 days after shooting video showing D with alleged references to shootings - CACD: not bolstering a weak case – Renda – bad character would often depend on the feel of a case which judge normally in a better position to assess -due deference given*

Appeals against Sentence

R v James Andrew Ellis [2024] EWCA Crim 115 – *Wrong in principle to increase sentence with reference to an absence of remorse. Offence was, however, in domestic context, where it was in family home between two brothers*

R v Christine Ward [2024] EWCA Crim 282 – *death by careless driving offence by 64 year old grandmother of good character. Immediate imprisonment upheld where judge had had regard to imposition guideline and was of the view that appropriate punishment could only have been achieved by immediate custody*

R v Jia Li and Habou Dou [2024] EWCA Crim 58 – *Section 18 – guilty pleas – two year increase in sentence in the case of one D for previous conviction and in the case of the other because he was intoxicated, manifestly excessive. Should have been nine months for each*

R v Andrew Phillips [2024] EWCA Crim 57 - *Drugs - whilst judge correct to put offending in significant role as for financial gain, being paid £200 was not substantial gain and offending should therefore have been placed in lower end of category*

R v Erik Field [2024] EWCA Crim 59 – *Murder – minimum term – 10 (c) of Schedule 21 - reduction where offender suffers from a mental disorder as may reduce offender's culpability, even where it does not amount to diminished responsibility . Question of degree or extent of the reduction was quintessentially a matter for the sentencing judge.*

R v Kadar and Mustafa [2024] EWCA Crim 117 - *people smuggling – no offence specific Guideline – para 15 of judgment sets out relevant case-law re the*

factors it will be helpful to consider

R v Shakeel Janjua [2024] EWCA Crim 32 – *Sentence reduced from 7 y to 5 y 9 months for a number of offences as insufficient regard to totality*

R v JC (A-G's Ref) [2024] EWCA Crim 104 – *Abduction and rape of two 13 year old girls by youth aged 16 ½ - unduly lenient despite D's age - 9 years not 5 – would have been 15 years if he were an adult*

R v McAllister [2023] EWCA Crim 1661 – *Credit for Guilty plea – indication at Mags Ct that "he was certainly to make admissions as courier of Class A drugs" does not entitle D to full credit as not unequivocal indication of guilty plea. Also open to sentencing judge to decline to follow indication given by judge at earlier hearing*

CONTRIBUTORS TO THE APRIL EDITION

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Farrhat Arshad KC defends in serious criminal cases and is an experienced appellate barrister. Farrhat is recommended in Legal 500, 2021 as: "the consummate appeals barrister, with an instinctive feel for the shape of an appeal. She is a leader in this field." Her appellate practice includes both conviction and sentence appeals to the Court of Appeal, the Privy Council and applications to the Criminal Cases Review Commission.

Graeme Hall specialises in extradition, human rights, public and constitutional law, as well as criminal and death penalty appeals. Graeme is instructed in cases across the globe including the Caribbean, Asia and Africa.

Violet Smart has a broad criminal practice across the spectrum of offences and is particularly experienced in representing youths in serious cases. In her appeal work she has a particular interest in challenging indeterminate sentences.