

CRIMINAL APPEALS BULLETIN JUNE 2024



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Farrhat Arshad KC

Head of the Doughty Street Criminal Appeals Unit

Welcome

Welcome to the June 2024 issue of our bi-monthly Criminal Appeals Bulletin.

We have a bumper crop of case summaries and case summary writers for you in this issue:

Annabel Timan writes about **Cuciurean** (where she acted as junior counsel with Richard Thomas KC leading) and the circumstances in which the right of appeal to the Crown Court is and is not lost.

I write about base offences and manslaughter in the notorious cyclist death case of **Auriola Grey**; what is “assault” in indecent assault offences in **Price**; SOPOs and SHOPOs in **Codd**; the ambit of section 98(a) CJA 2003 in **Grundell**; and experts' reports and the necessity to “tether” them to the evidence in **Mazzer**.

Violet Smart writes about the use of res gestae evidence where the complainant is not called in domestic violence cases in **Barton** and “effective good character” and good character directions in **Sedeqe**.

Hayley Douglas writes about firearms and possession in **Kyei**.

Louise Willocx, our specialist crime pupil, writes about Modern Slavery defences in **Moussa** and the line between bias and bringing life experiences to the task of being a juror in **R v L**.

Omran Belhadi considers two terminatory ruling appeals – **ATT and BHY** on the necessity of proving a significant risk of serious physical harm in s. 5 Domestic Violence, Crime and Victims Act 2004 offences and **Ng** and **O'Reilly** -whether a case can be stayed as an abuse where the Prosecution cannot provide an advocate for trial.

In the Sentence Appeals section, Daniella Waddoup considers **Abdul**, which concerns when disputed material can be taken into account in an assessment of dangerousness; **Hassan Mohammed** and “ill-advised” indications of sentence; **El-Arby** on the calculation of time served and credit for guilty pleas and **Harris and Plume** on when a Newton hearing is a Newton hearing.

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
Head of the DSC Criminal Appeals Unit

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CASE SUMMARIES AND COMMENTARY

APPEAL BY WAY OF CASE STATED

By [Annabel Timan](#)

Elliott Cuciurean v CPS [2024] EWHC 848 (Admin)

Appeal by way of case stated – loss of right to Appeal to Crown Court

In *Cuciurean v CPS*, the Divisional Court held that the right to appeal to the Crown Court under s108 Magistrates Court Act 1984 (the 1984 Act) was an important protection conferred by Parliament against the possibility of injustice. That protection would be subverted if a successful appeal by a prosecutor, on a point of law to the Divisional Court, followed by a direction to convict, could deprive a defendant of any appeal rights at all, including the ability the defendant would otherwise have had to challenge the findings of fact by the magistrates [through an appeal by way of re-hearing in the Crown Court] had they not erred in law in the first place.

Background

The Magistrate's Court Trial and DPP application to State the Case

The appellant, Elliott Cuciurean, is a well-known environmental activist who was tried in the Magistrate's Court for an offence of Aggravated Trespass contrary to s68 of the Criminal Justice and Public Order Act 1994. It was alleged that he trespassed on land referred to as Access Way 201, off Shaw Lane in Staffordshire, and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

The District Judge found all of the elements of the offence under s68 proved, but acquitted on the basis that they were not satisfied the prosecution was a proportionate interference with the defendant's rights under Articles 10 and 11 of the European Convention on Human Rights.

The DPP appealed to the Divisional Court by way of a case stated under section 111(1) of the 1980 Act on a number of points of law; the key question was

whether the District Judge was correct to consider the defendants article 10 and 11 rights at all. The Divisional

Court held, in summary, that there is no need for a court to be satisfied that a conviction would be proportionate, if the offence is one where proportionality is satisfied by proof of the ingredients of the offence itself [i.e. where proportionality is not itself an ingredient of the offence].

The Divisional Court reversed the acquittal and remitted the matter to the Magistrate's Court with a direction to convict. Application for leave to appeal to the Supreme Court was granted but in the event the appellant did not pursue that avenue of appeal.

Proceedings Before the Recorder of London at the Central Criminal Court

Following the remittal of the case to the magistrates' court and the entering of a conviction, the appellant lodged an appeal to the Crown Court against conviction and Sentence.

The Crown objected to the application to list the appeal against conviction. It was submitted by the Crown that Sections 111(1) and 111(4) of the 1984 Act operate to bar an appeal to the Crown Court where an application **by any party** had been made to state the case for the opinion of the High Court, and the Divisional Court had ultimately directed a conviction.

It was said that section 111(4) should be given a purposive construction, taking into account the importance of finality of litigation and the desirability of avoiding multiple co-existing appeal routes. The Crown Court had no jurisdiction to hear the appeal and any such hearing would amount to an abuse of process, since it would invite the Crown Court to contradict the ruling of a superior court, namely the decision by the Divisional Court that the appellant was guilty.

The Recorder of London accepted that analysis, concluding that, "*Once the Divisional Court has considered the issues in a Case Stated Appeal there is simply no room for an appeal to the Crown Court and no right of appeal for someone in the position this applicant*

finds himself here. The applicant had an opportunity to appeal his conviction to the Supreme Court and has not done so". He agreed to list the appeal against sentence which was successful to the extent that the prison term imposed was reduced.

The Divisional Court Proceedings

The appellant applied to state the case for the opinion of the High Court pursuant to section 28 of the Senior Courts Act 1981 *vis-a-vis* the ruling on jurisdiction to hear the appeal against conviction. That application was granted by the Recorder of London who stated the case at the conclusion of the successful appeal against sentence. Two questions were posed:

I. Was the Recorder of London, HHJ Mark Lucraft KC, right to find that s111(1) and s111(4) of the Magistrates Court Act 1980 operate to bar an appeal against conviction to the Crown Court, where a previous application to state the case for the opinion of the High Court was made by the prosecution, and had resulted in the Divisional Court reversing the acquittal and remitting the case back to the magistrates court with a direction for that court to convict?

II. Would it have made a difference if the Divisional Court had substituted a conviction for the acquittal and remitted solely the sentence to the Magistrates Court?

The Divisional Court answered both questions in the negative.

Statutory Construction

S108(1) of the 1980 Act confers the right of a person convicted by a Magistrates' Court to appeal to the Crown Court against his conviction. Such an appeal encompasses a right to a rehearing. That is a full retrial before a judge of the Crown Court sitting with justices; it is the ordinary avenue of appeal for a defendant who complains that the magistrates court reached a wrong decision of fact or a wrong decision of mixed law and fact [see **R v Hereford Magistrates Court ex parte Rowlands [1997] 2 Cr App R 340**].

s111(1) and s111(4) of the 1980 Act provide that:

"Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceedings on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices

composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved". [s111(1)]

...and...

"On the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision to the Crown Court shall cease" [S111(4)]

The Divisional Court held that the language and purpose of section 111 is clear. It is obvious that *the applicant* for the purposes of s111(4), is the party or person aggrieved, making the application under s111(1). It is that applicant who loses any right to appeal against the decision to the Crown Court.

It was noted that the right to appeal to the Crown Court is not limited to appeals by defendants under section 108 of the 1980 Act. The same applies to appeals to the Crown Court by defendants under section 45 of the Mental Health Act 1983 and section 42 of the Counter Terrorism Act 2008. And the prosecution right to appeal under section 14A(5A) of the Football spectators Act 1989 and section 147(3) of the Customs and Excise Management Act 1979. There are also various rights of appeal accorded to "persons" more generally, as listed in Part 34 of the CrimPR at Rule 31(1)(d). The formulation "*any right of the applicant to appeal against the decision to the Crown Court shall cease*" in section 111(4) means that any person who applies to state a case under section 111(1) loses any right which *they* have to appeal to the Crown Court in respect of that proceeding.

The Divisional Court held that there was simply no room for the purposive approach to statutory construction urged by the Crown. The clear purpose of s111(1) and s111(4) of the 1984 Act is to impose a choice on a party to any proceeding before a magistrate's court who is aggrieved by the conviction order, determination or other proceedings of the court: they may appeal to the Crown Court for a rehearing on questions of fact and law. Or they may appeal to the High Court on questions of law or jurisdiction. But they may not do both. In the case of the appellant, Mr. Cuciurean had done neither.

Abuse of Process

Further, the Court did not accept that an appeal to the Crown Court in these circumstances was an abuse of process. The Divisional Court in this case had ruled on the questions of law on which its opinion was sought,

assuming the facts to be as set out in the case stated for the purposes of that appeal. It concluded that, *on those facts*, the appellant was guilty, and a conviction should be entered by the Magistrate's. The Crown Court is entitled to reach different conclusions of fact and is bound by any points of law decided by the Divisional Court.

The Second Question

The Court considered whether the position would have been different if the Divisional Court had itself substituted a conviction. It concluded that this would make no material difference since the conviction would still be a conviction of the Magistrate's Court, recorded at the Magistrates Court, on the relevant court record. It was not a conviction of the Divisional Court.

Comment

The case essentially confirms that parliament intended defendants facing trial in the Magistrates Court to have the right (there is no requirement to seek leave to appeal) to a complete rehearing, a "fresh trial" heard *ab initio*, by a superior court. That right is an important protection that cannot be unduly fettered. The "check" against unmeritorious appeals to the Crown Court is likely to be an order for costs.

Richard Thomas KC and Annabel Timan acted for the appellant Elliott Cuciurean, instructed by Nichola Hall at Robert Lizar Solicitors.

By [Violet Smart](#)

R v Barton [2024] EWHC 1350 (Admin)

Appeal by way of case stated - Res gestae – fair trial – abuse of process – domestic violence – discretion to call witnesses – stay of proceedings – s78 power to exclude

The District Judge had ordered a stay of proceedings in respect of a domestic assault allegation which was said to have occurred a year earlier, relating to the defendant's wife. On 2 June 2021, Mrs Barton made a 999 call to the police, immediately after the alleged assault. She repeated the allegation on the attendance of the police at her home and this was captured on body-worn video, along with evidence of visible head injuries which concurred with the account given by her. Some months after her husband's charge, Mrs Barton wrote

to the CPS indicating both that she did not support the prosecution and retracting the account she had given. She expressed anxiety at the thought of being called as a witness to the case. Mrs Barton then wrote three further emails expressing her distress at the case. Police witness care responded, confirming that she was not a prosecution witness. The Crown did not disclose this correspondence to the defence until the day of trial. It was accepted that there was no foul-play involved in the disclosure failure.

In relation to Mrs Barton, the position was that the Crown had never taken a statement from her and had never intended to call her at trial, believing that her evidence would be incapable of belief. Instead, they sought to rely on the body-worn video and the initial 999 call as *res gestae* evidence. The defence opposed the reliance on the *res gestae* evidence, submitting instead that the Crown's failure to call Mrs Barton when she was both available and not in fear was an unfair tactic denying them the opportunity to cross examine her. An initial application to exclude the evidence under s78 PACE had been dismissed by a judge on a previous occasion.

On the day of the trial listing, the judge invited the prosecution to consider whether it wanted to take a statement from Mrs Barton, who had attended the trial with her husband. The prosecution indicated that it did not and invited the judge to proceed with the trial. However, the defence sought an adjournment, which was granted, to prepare written submissions on abuse of process and an application to stay proceedings, predicated on the above failure of the Crown to call the witness and their reliance instead on the *res gestae* evidence.

The judge, on hearing the submissions at the next hearing, which were opposed by the Crown, imposed a stay of proceedings as an abuse of process. His record of decision gave the reason as the impossibility of a fair trial owing to the significant disadvantage Mr Barton would be put at if the defence were unable to cross-examine Mrs Barton in relation to her inconsistent statements. As a supplemental reason for the stay, the judge also referred to a disclosure failure on the part of the Crown in relation to the non-disclosure of Mrs Barton's correspondence to them retracting her account.

The DPP appealed by way of case stated. The particular issue, as set out at paragraph 3 of the judgment, was

“the fairness of a prosecution which relies upon res gestae hearsay statements made by a domestic violence complainant in circumstances where:

- a) *The prosecution has never intended to call the complainant*
- b) *The complainant has retracted her complaints*
- c) *The prosecution declines the judge’s invitation to call her as Crown witness despite her availability at trial*

The appellant contended that (1) the Crown had no obligation to call Mrs Barton as a witness, that (2) in any event there were other measures short of a stay of the prosecution (namely, the defence calling her as a witness or the court calling her as a witness of its own volition) that could have been taken and that (3) any disclosure failure was so far short of reaching an abuse of process that it could not have justified the decision. The respondent argued that a stay had been within the judge’s discretion and in any event submitted that the judge would, in the alternative to ordering a stay, have been bound to exclude the evidence under s.78 PACE (in turn forcing the prosecution to offer no evidence) thereby rendering the appeal academic.

In allowing the appeal, **the Divisional Court held** that the judge’s approach had been wrong in principle and that it was contrary to authority (paragraph 46).

In particular, it found that (1) the starting point is that the prosecution is only obliged to call witnesses whose statements have been served as relied on. In the present case, the Crown had never indicated an intention to call or rely on Mrs Barton – it had never taken a statement from her, and it was obvious from her correspondence that she would neither support the prosecution case nor give evidence against her husband. The Crown is not obliged to call a witness whose evidence it anticipates, with good reason, will be untruthful, and it was entitled to form that belief in relation to Mrs Barton in the present case owing to the evidence it had before it.

In any event, it had been open to the defence to call Mrs Barton as a witness had they wished to, and they were aware of what her evidence would likely be from the contents of her correspondence with the CPS which had been disclosed to them at the first trial listing. There was, therefore, no basis for concluding that the prosecution had to take a statement from her. The decision not to call Mrs Barton did not preclude Mr Barton from having a fair trial – the question of whether the defence’s inability to cross examine a witness puts them at a fatal disadvantage is always a fact-sensitive issue (citing **R**

v Harringey Justices, ex p DPP [1996] QB 35). In the present case, the defence could easily have elicited the desired information through examination in chief and, in the words of the court *“it could not be a valid objection that this would have been unfair simply because it might have undermined her evidence in support of Mr Barton”* (paragraph 53).

(2) That in the alternative, and if, contrary to its judgement, unfairness were perceived by the defence having to call her as a defence witness, then it was open to the court to call Mrs Barton itself, thereby allowing both parties to cross-examine her (again citing **R v Haringey and R v Oliva [1965] 1 WLR 1028**).

(3) In relation to the question of whether the judge would have inevitably excluded the res gestae evidence under s.78, the authorities (and in particular **Barnaby v DPP [2015] 2 Cr. App. R. 4**, which had been relied on by the respondent) do not establish that a court must always exclude evidence where the witness is not in fear and the prosecution do not propose to call her. On the contrary, it will often be the position that in cases of domestic abuse it will not be unfair to allow the prosecution to rely on *res gestae* evidence: the cooperation of a complainant in such cases is affected by a number of things and is often a sensitive and delicate balance, but the public interest in prosecuting such cases remains even where the support of the complainant does not (see paragraph 64).

Having made those findings, the court concluded that the judge had erred in principle by ordering a stay of proceedings: it had not been an abuse of process for the prosecution to decline to call Mrs Barton – rather, it was a *“legitimate exercise of the prosecution’s well established discretion to choose which witnesses it calls”* (paragraph 55) and authority makes clear that the exceptional course of staying proceedings was not, in this case, open to the judge.

Commentary

This case is a helpful reminder that ordering a stay of proceedings is reserved for exceptional circumstances and will always be a final resort. Where there are other avenues for ensuring a fair trial, then these must be exercised by the court and the parties. Parties should ensure they are well apprised of authority, which will often indicate whether a stay is open to the court.

However, it also provides helpful confirmation and clarification of the position in relation to the

prosecution's duty to call a witness. The starting point is that the prosecution is only required to call witnesses whose statements have been served in evidence relied upon. The decision makes clear that the prosecution are not obliged to call or take a statement from a witness whose evidence they anticipate will be incapable of belief; there is a wide discretion in this regard, which must be exercised in the interests of justice. The general rule remains that a witness should be called by the party wishing to adduce their evidence, however where the prosecution improperly refuses to call a witness, the court can either invite them to do so or call that witness of its own volition, to enable the defence to cross-examine them (citing **R v Wellingborough Justices, Ex p. Francois (1994) 158 J.P 813**).

Finally, the context of the case can come to bear on whether or not it is just to admit *res gestae* evidence. In the current case, the allegation was one of domestic violence. It is frequently the case that victims and alleged victims of this kind of violence withdraw their support for a prosecution, for a number of potential reasons. This does not diminish the public interest in the prosecution of such cases and, as the court stated, may rather "demand the use" of such evidence irrespective of the complainant's cooperation with the prosecution.

APPEALS AGAINST CONVICTION - CACD

By [Farrhat Arshad KC](#)

R v Auriol Grey [2024] EWCA Crim 487

Unlawful act manslaughter – identifying base unlawful act – necessity to set out the elements of the base offence

The Appellant had been convicted of unlawful act manslaughter after a cyclist, with whom she had a confrontation on a pavement, fell into the road and was run over and killed by a passing car. The Appellant had previously appealed against the three year sentence imposed and had been refused leave to appeal against sentence at a hearing of the Full Court. Following a change of representation, she sought leave to appeal against conviction and was granted an extension of time and leave to appeal by the Full Court.

It was conceded by the Prosecution, that by the time the judge summed up the case to the jury, there was no evidence which could make the jury sure that the appellant had made any physical contact with the victim. The evidence was that the appellant had gesticulated and shouted at the victim using a swear word but there was no evidence to make the jury sure that the appellant pushed or in any way touched the victim.

The grounds argued at appeal were that the judge failed to specify to the jury the act constituting the relevant “unlawful act” that was the alleged cause of death. Neither the judge nor the parties identified any such act during the trial. As a consequence, the elements of the base offence were never left for the consideration of the jury. It was further argued that there was insufficient evidence for the jury to be sure that any base offence had been committed, so that the elements of unlawful act manslaughter could not as a matter of law be proved. The Respondent argued that on the facts of the case the only base offence that could have been applicable was common assault, defined as an act by which a person intentionally or recklessly causes another to apprehend immediate unlawful violence.

The Court reviewed the authorities and reiterated that, “A person is only guilty of manslaughter, therefore, if he or she has carried out an act that itself contravenes the criminal law. All elements of the base offence must be proved before a jury can properly find that a person

is guilty of manslaughter” (at para [19] of judgment). It was common ground that the only possible base offence was common assault. It was also common ground that the elements of the base offence were not specified at trial. The jury were provided with no directions at all about any of the elements of the base offence, whether relating to the *actus reus* or the *mens rea*. This amounted to a failure to direct the jury about an essential ingredient of the offence of manslaughter.

The elements of common assault, which should have been identified for the jury, were:

- i) The *actus reus* or conduct element, namely that the appellant’s conduct caused the deceased to apprehend immediate unlawful infliction of force;
- ii) The *mens rea* or mental element, that is, that the appellant’s threat of force was intentional or reckless.

To prove recklessness, the prosecution had to prove that the appellant:

- i) Was actually aware of the risk that the deceased would apprehend immediate unlawful violence; and
- ii) Nevertheless went on to take the risk; and
- iii) In the circumstances known to the appellant, it was an unreasonable risk for her to take.

The judge’s legal directions did not address any of these issues.

Furthermore, in the view of the Court, had the need to identify and prove a base offence been recognised, the evidential insufficiency of the prosecution case would have been recognised. In the Court’s view, there was, “simply no proper basis for the appellant to be convicted of manslaughter..”

Commentary

This appeal was brought with the pro bono assistance of a number of fresh counsel. What is odd, is that the case had previously been subject to appeal against sentence and reached the Full Court stage and been refused, without anyone appearing to pick up that an essential element of the offence was missing.

R v Edward Price [2024] EWCA Crim 463

Indecent assault – where “assault” is invitation for another to act – Fairclough and Whipp line of authority

In July 2023 the appellant was convicted of historic offences of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. The Prosecution case in relation to the indecent assaults was that thirty years previously the appellant, the complainant’s step-father, had on a number of occasions invited the complainant to perform oral sex on him when she was 14 or 15 years of age. She had then done so. There was no allegation of physical force or threats. Section 14(2) of the Sexual Offences Act 1956, provided that a girl under the age of 16 could not give any consent which would prevent an act being an assault for the purposes of that section.

The Defence case was that no sexual activity took place between the appellant and complainant before the appellant was 16. Nevertheless, both at trial and at appeal, the appellant argued that as indecent assault required an assault and as the Prosecution case was that he had merely asked or invited the complainant to do something, which she had then done, the act was not an assault. He relied on a line of authority starting with **Fairclough v Whipp (1951) 35 Cr App R 138**. The Prosecution accepted the line of authority from **Fairclough** but sought to distinguish the instant situation, relying on **R v Brooks [2021] EWCA Crim 1468**.

Since the alleged acts occurred in 1991-1992, the appellant could not have been charged under section 1 of the Indecency with Children Act 1960 (“the 1960 Act”), which did not require an assault, because that section only applied to children under the age of 14.

That section was amended by section 39 of the Criminal Justice and Court Services Act 2000, to increase the age to 16, but only with effect from 11 January 2001.

In refusing the appeal, **the Court held that:**

The offence of indecent assault required proof that there was an assault and that it occurred in indecent circumstances. There was no dispute at trial that, if the assaults occurred, the circumstances were indecent. Although section 14(1) of the 1956 Act referred to “assault”, it was well-established that this included both an assault in the strict sense (which did not require any touching) and a battery (actual infliction of

unlawful force). As was held in **Collins v Wilcock [1984] 1 WLR 1172**, in the case of battery: “The fundamental principle ... is that every person’s body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery”, whilst the law recognised that a principle so widely drawn must inevitably be subject to exceptions, e.g. jostling in the street etc which fell within the general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. **Collins v Wilcock** also established that it was not the case that a battery was only committed where the action was, “angry, revengeful, rude or insolent” (as had been suggested in earlier case-law). The present case therefore was an example of alleged battery rather than assault in the non-physical sense.

Fairclough was a decision of the Divisional Court and would not by itself be binding on the Court of Appeal. Nevertheless, the Court of Criminal Appeal followed **Fairclough** in **R v Burrows (1951) 35 Cr App R 180**. It was again followed by the Divisional Court in **DPP v Rogers (1953) 37 Cr App R 137** and, most importantly, was followed and applied by the Court of Criminal Appeal in **R v Dunn [2015] EWCA Crim 724; [2015] 2 Cr App R 13**.

In **Dunn** the defendant had asked the complainant, who was a 15-year old girl, to masturbate him, and she had done so. He was charged with an offence of indecent assault, contrary to section 14(1) of the 1956 Act. His appeal was allowed by the Court of Appeal on the ground that an invitation to another person to touch the invitor could not amount to an assault on the invitee. The Court in **Dunn** followed the decision in **Fairclough** and noted that the 1960 Act had been enacted on the very premise that, as the law stood before that Act, there was no indecent assault without some form of threat or show of force to the victim: see paragraph 10 (Laws LJ). The Court in **Dunn** had described the position as “settled law” ever since **Fairclough** was decided in 1951.

The present Court was therefore bound by that line of authority. However, on its facts, the present case could be distinguished. In those cases the invitation which had been taken up was for the complainant to touch the appellant. Here, following the invitation, the appellant had penetrated the mouth of the complainant. This would involve some force and could not be said to be merely a passive invitation. **R v Brooks [2021] EWCA Crim 1468** applied. Counsel’s submission that the appellant was merely a passive recipient, who did not

move or otherwise do anything, was roundly rejected by the Court.

Commentary

Counsel for the appellant sought to argue that it was significant that the Court in **Brooks** did not simply hold that the act of penetration was enough to constitute a battery. The Court rejected that argument stating it was, “to read too much into that decision. First, it was not a substantive appeal; it was a renewed application for leave to appeal. Secondly, the judgment was unreserved (as they usually are on applications for leave). Thirdly, and most importantly, the Court dealt with the argument as it was presented to it, no more and no less: that is usually what courts do, as it is often unwise to address issues of law which are not before the court and which may be important in other cases. The decision in **Brooks** should not be read as deciding the issue of law which now arises on this appeal.”

R v Codd [2024] EWCA Crim 339

SOPO- breach – judge’s power to revoke - SHPOs

In January 2019 the applicant had pleaded guilty to five breaches of a Sexual Offences Prevention Order (charged, it transpired erroneously, contrary to section 103(1) and (3) of the Sexual Offences Act 2003). Having been committed to the Crown Court for sentence, he was there sentenced to 18 months’ imprisonment. The SOPO was revoked and a Sexual Harm Prevention Order (SHPO) was instead imposed for a period of ten years with additional conditions.

Subsequently, in March 2022, the applicant was charged with breach of the SHPO imposed for the January 2019 breach offences. However, having been committed to the Crown Court, the designated judge alerted the prosecution to the fact that the SHPO should never have been imposed as it could not be imposed for breach offences, since they did not fall within schedules 3 and 5 of the Sexual Offences Act 2003. The Prosecution conceded that the SHPO was unlawful and offered no evidence, leading to the applicant’s immediate release.

The sole ground of appeal was that there was no power for the Crown Court to make the Sexual Harm Prevention Order.

The Court noted that the applicant had been charged under the wrong provision: as originally enacted, a

breach of a SOPO was an offence contrary to section 113 of the Sexual Offences Act 2003. On 8 March 2015, section 113 of the 2003 Act was repealed by section 113 and paragraph 3(1) of Schedule 5 of the Anti-Social Behaviour, Crime and Policing Act 2014. Transitional provisions provided by section 114 of that Act, provided that for a period of 5 years from the commencement date of 8 March 2015, any breach of a SOPO, made under section 104 of the 2003 Act would still be an offence contrary to section 113 of that Act. The charges in this case were brought before 8 March 2020; it followed that the applicant should have been charged with the offences contrary to section 113.

The Court did state, “A legal error made in the formulation of charges, whether arising from a drafting or administrative error which causes no prejudice or embarrassment to the defendant, will not result in those charges being invalid or a nullity (see *R v Stocker* [2014] 1 Cr App R 18, at paragraphs 42 and 45) and *R v Sheldrake* [2023] EWCA Crim 95, at paragraph 16.”

However, more problematic was that, “the judge in March 2019 had no power to revoke the SOPO... An application to discharge a SOPO must, in accordance with the Criminal Procedure Rules 31, be made by either the defendant or a Chief Officer of Police (see *R v Hamer* [2017] 2 Cr App R(S) 13 at paragraph 21; *R v Ashford* [2020] 2 Cr App R(S) 57 at paragraph 18 and also *R v Keywood* [2021] EWCA Crim 1692).” At para [9] of judgment.

The Court gave leave, allowed the appeal and quashed the order which had revoked the SOPO and which had substituted the Sexual Harm Prevention Order. The SOPO was thereby revived.

R v Mazzer [2024] EWCA Crim 557

Expert evidence – PTSD – self-defence

The appellant had been convicted after trial of section 18 offences of stabbing a number of boys in the street outside a house party. Subsequent to conviction, fresh counsel sought to argue that at the time of the offence, the appellant had been suffering from PTSD, due to having on a previous occasion been seriously attacked by pupils of another school resulting in his hospitalisation for several days. Those same pupils were in attendance on mass outside the house party and the appellant went out into the street armed

because he feared attack. Subsequent to conviction, fresh psychological evidence stated that the appellant did have PTSD linked to the previous serious assault he had suffered.

The Court re-iterated the principles relating to PTSD and its potential relevance in self-defence cases: In **R v Press and Thompson [2013] EWCA Crim 1849**, the Court had accepted the potential relevance of PTSD to a defence of self-defence (paragraph 36 to 44). If a jury should find that a defendant was not under attack, PTSD could be relevant to their assessment of whether the defendant genuinely or honestly believed that he was under attack or threatened so as to require a physical response, or may have done so. If so, that may also be relevant to the final and objective question for the jury as to whether the force used by a defendant was no more than reasonable. Their assessment of whether a defendant honestly believed that he did no more than necessary to defend himself is not conclusive, but it is a relevant factor and therefore any effect of PTSD on that issue is also relevant.

However, Press and Thompson also cross-referred to, “the important decision of this Court of **R v B (MA) [2013] 1 Cr App R 36**. That leads on to the judgment of Davis LJ, given on behalf of this Court in **R v BRM [2022] EWCA Crim 385**. These authorities were reviewed by Lady Carr LCJ in **R v Jacobs [2024] 4 WLR 8**.” The Court summarised the principles arising from those cases (at para [27] of the judgment):

“In summary, an expert’s report is not admissible unless inter alia it is sufficiently reliable (see the Criminal Practice Direction 2023, paragraph 7.1.1 and the Criminal Procedure Rules 19.4(h)). In that context it is usually necessary for the expert’s report to be tethered to the evidence in the case about the events which took place, in particular, any account given by the defendant. Otherwise, it is likely only to confuse a jury. For example, it is unlikely to be helpful for a psychiatrist or a psychologist to give general evidence diagnosing a condition in a defendant saying that it was present at the time of the offence and what effects of the condition might have been without also saying how, in the opinion of the expert, that relates to accounts given by the defendant, and by any relevant witnesses, as to what took place. The report must also set out the expert’s reasons for the opinions given.”

In the Court’s view, in the present case, the post-trial expert had not dealt with the evidence given at trial. Further, the applicant’s case at trial was that he was

being seriously assaulted. He waved the knife around to deter others but with no intention to cause injury or serious injury. His defence was not based upon a miscalculation of a threat posed to him, or to anyone else for that matter, by people in the vicinity. The expert did not appear to give a view as to how any particular circumstance could have been viewed differently by the applicant because of PTSD and hypervigilance. In the Court’s view the convictions were not arguably unsafe.

Commentary

In tethering their report to the evidence in the case and saying how, in their opinion, that relates to accounts given by the defendant and any relevant witnesses as to what took place, is the expert in danger of giving evidence on the “ultimate issue”? Given that experts are being told to engage in the particulars of the case in detail, can it be safely said that the ultimate issue prohibition is dead and buried? Almost certainly not but can it be said it is clear to experts (and those instructing them) what they are and are not permitted to give their opinion on? Almost certainly not.

R v Grundell [2024] EWCA Crim 364

Section 98(a) CJA 2003 - Bad character evidence

The appellant was convicted of two counts of rape against the same complainant, which happened four weeks apart. Approximately 14 hours after the second rape, there had been an incident of violence and aggression by the appellant towards the complainant, partly inside the house and partly outside. That part of that incident that had taken place in the street was witnessed by a neighbour. The neighbour had then called the police and it was in the context of that attendance by the police that the complainant had made the two allegations of rape. In relation to the alleged violence, the episode seen in the street was admitted by the appellant but the allegations of violence inside the house were not admitted by him.

At trial, the Defence argued that the above allegation did not fall within section 98(a) of the Criminal Justice Act 2003 (that it “has to do with the alleged facts of the offence with which the defendant is charged”) and should be the subject of a bad character application. The trial judge disagreed, ruling that the evidence did fall within section 98. He also stated that in the alternative it was admissible pursuant to s. 101(1)

(c) of the gateways as it was important explanatory evidence as to why the police had been called 14 hours later. In his direction to the jury he directed them that the reason they had heard evidence of that later incident was because it was relevant to understand the circumstances in which the complaints were made. He also specifically directed them that the disputed evidence was not relevant to the question of whether the defendant had raped the complainant and should not be used as evidence that the defendant had a propensity to commit sexual offences against the complainant.

The Court of Appeal agreed with the appellant that the disputed evidence did not fall within s 98(a) of the CJA 2003. The Court reviewed the authorities and commentary on this area quoting Phipson on evidence which stated, "As to the exact division between s.98(a) and s.101(1)(c), the authorities are in considerable disarray." Having considered some of the case-law in this area, at para [43] of the judgment the Court stated:

"In our judgment the principled construction of section 98 commended in *R v Mullings* is the right one. Section 98 and section 101 read together provide a route to admissibility which covers all the ways in which evidence of reprehensible conduct extraneous to the facts immediately surrounding the commission of the offence or offences themselves may be admitted. That is a carefully calibrated scheme which imposes a discipline upon the decision maker, who must in due course give the jury a direction about the significance of what has been admitted which is helpful and consistent with the statute. It is in our judgment inappropriate to permit a construction of section 98(a) which creates a wide exemption from that scheme for evidence of reprehensible conduct. It is clear in our judgment that Parliament intended that evidence of reprehensible conduct should only be admitted outside section 101 if it had 'to do with the facts of the offence charged.' The expression 'has to do with' is indeed a broad and open textured expression viewed on its own but the expression 'the facts of the offence charged' is not."

The Court went on to apply those principles to the facts of the particular case: "...applying that approach to the Prosecution submission that the evidence of the incident in the early hours of 4 February 2020 should have been admitted as having to do with the facts of the second rape in count 2, we have concluded that that submission is unfounded. We conclude that the judge was wrong to admit the evidence as having to do with the facts of count 2. The 14-hour gap between the

two incidents and the difference in the nature of them means that they were in truth separate events."

The Court then turned to consideration of 101(1)(c), which was the only other gateway presented to the trial judge. The Court engaged in an overview of s. 101(1)(c) case-law, concluding at para [51] of the judgment:

"Following those decisions, we consider that it is not possible to say that the evidence concerning the allegations of rape on 6 January and 3 February was either difficult or impossible to understand in the absence of the evidence concerning the episode on 4 February. On the contrary, C's evidence concerning those two alleged acts of rape was perfectly clear and intelligible and not remotely difficult to understand. Accordingly, we consider that the judge erred in admitting the evidence under that provision."

That was not the end of the matter, however. In the Court's view, the disputed evidence was admissible pursuant to s. 101(1)(d). Not as propensity evidence, which gateway (d) often mistakenly gets reduced to, but as relevant to an important matter in issue. At para [52] of the judgment:

"The question is whether it is relevant to an important matter in issue between the prosecution and the defence. Here there was an important matter in issue between the prosecution and the defence, as the judge observed in explaining the prosecution's submission in the ruling cited above. This concerned the nature of the relationship at the time of the second rape between the C and the appellant, and his state of mind towards her, both generally and in the predicament to which she had been reduced by the car crash. The fact that he was willing to treat a woman in that condition in the way that he did in the early hours of 4 February demonstrates a state of mind in him which was relevant to his state of mind at the time when he inflicted a different kind of abuse against her, so it was said, on the morning of 3 February to which the second allegation of rape relates." As such, the evidence was admissible. Having analysed the direction, the Court was satisfied that the direction, in the event, covered the important points that would have been required had the evidence been admitted pursuant to gateway (d).

Commentary

This case contains a useful overview of the ambit of

section 98(a) CJA 2003. As is stated in Phipson on Evidence the authorities are in considerable disarray. Indeed, almost as an aside in the present case the Court stated that the view expressed by the Court in **AAM [2021] EWCA Crim 1720**, that the evidence there (in broadly similar circumstances to the present case), fell within section 98(a) was wrong. This decision is a reminder that material (whether disputed or not) said to fall within section 98(a) should be scrutinised extremely carefully, as prosecutors frequently seek to introduce bad character evidence via section 98(a) as going “to the background” or “having to do with” the facts of the offence in question. In the view of the Court, the narrow interpretation of section 98(a) is to be preferred and if the evidence is considered relevant, it needs to be properly analysed to ascertain which of the bad character gateways, if any, it falls within. The judgment also emphasises the importance of a discussion prior to the summing-up as to the appropriate direction to the jury as to how they can use such evidence and how they cannot.

Whilst the Court noted that the judge had failed to give a direction that as the bad character evidence was disputed the jury should be sure that it had occurred before they used it against the appellant, it felt satisfied that it mattered not as the judge had given the usual general direction as to the burden and standard of proof. With due respect to the Court, it has to be said that given that the general direction as to the burden and standard of proof is clearly tied to the offences for which the jury is trying the defendant, in the absence of a specific direction that they need to be sure of the disputed bad character evidence before they could rely on it, that fact would not necessarily be clear to the jury. Counsel need to ensure that where the bad character evidence is disputed evidence the jury are properly directed that they have to be sure of it before using it against a defendant in whatever way – see **R v Gabbana [2020] EWCA Crim 1473; [2020] 4 WLR 160**.

By [Violet Smart](#)

R v Sedeqe [2024] EWCA Crim 611

Effective good character – judicial discretion – credibility – volunteering previous convictions

The appellant was convicted of s.20 GBH, following a trial at Woolwich Crown Court. The prosecution case was centred around the read evidence of the complainant and CCTV evidence, the complainant having passed away in unrelated circumstances prior to the trial. The facts were as follows: on the 20 September 2021, the complainant, who was sitting in his van with a friend, had heard something hit the door of his vehicle and on exiting had seen the appellant sitting in his car. There was an unfriendly exchange of words between the two and the appellant then attempted to drive away, the complainant standing in front of the appellant’s car to prevent this. The appellant drove towards him, causing him to stumble back and then got out of his vehicle and punched the complainant in the face, causing him to fall and lose consciousness. His injuries consisted of a broken jaw, requiring the surgical fitting of plates and screws. The defence case was that the appellant had gone to that place in order to smoke cannabis, and he had acted in self-defence, having felt threatened by being trapped in by the complainant following their argument.

The defence put the appellant’s previous convictions, consisting of (1) driving under the influence of drugs and (2) possession of cannabis and driving under the influence of drugs (both also from 2021), before the jury as agreed facts.

At the close of the case, after the jury had been read the agreed facts, the defence asked the trial judge for an effective good character direction and requested that a direction that the appellant had no propensity to commit violent offences be given. The judge declined to give a direction, indicating that the defence could deal with the previous convictions in their speech. The judge gave his reasons for refusal as: (1) Lack of propensity to commit violent offences did not require a direction; (2) the appellant had intentionally put in his convictions and to give an effective good character direction would confuse the jury as it would amount to asking the jury to pretend he did not have convictions; (3) the driving offence was not trivial; (4) part of his case was that he had driven to the location to smoke cannabis.

In his legal directions, the judge did not give a good character direction and made no reference to the appellant's previous convictions, but he highlighted a lack of previous convictions for violence.

The appeal was brought on two grounds. It was submitted that the conviction was unsafe as (1) the judge had erred by inappropriately refusing to provide an effective good character direction and (2) the judge had erred in not directing the jury as to the relevance of the antecedents. It was submitted that the appellant had an entitlement to both limbs of the direction, given he had no history of dishonesty and the issue for the jury in the present case would be dependent on their view of credibility.

In dismissing the appeal, **the Court of Appeal held** that it was within the judge's discretion, which had been properly exercised, not to give an effective good character direction.

Citing **R v Hunter [2015] EWCA Crim 631**, the Court outlined that "only defendants with a good character or deemed to be of effective good character, are entitled to a good character direction" modified as necessary to meet the particular facts of the case (paragraph 23 of judgment). "Effective good character" was described in **Hunter** at para [79] as "extending to defendants whose previous convictions are old, minor and have no relevance to the charge" and, as **Hunter** made clear, whether to treat someone as being of effective good character is a matter of judgment for the trial judge. If a defendant is deemed to be of effective good character, he or she is entitled to the good character direction, both limbs, modified as necessary – **Hunter** para [80]. In the present case, the judge was well entitled to reject that submission, considering the age, seriousness and relevance of the convictions to the present charge.

That was not an end to the matter, however, as the judge still retained a discretion to give a direction dealing with the previous convictions as matters going to credibility or to propensity or both.

The question of whether the judge should have given a direction dealing with credibility or propensity was similarly answered in **Hunter** (paragraph [82]), which the court again cited at paragraph 26 of the judgment:

"In any event, a defendant with previous convictions or cautions to his name has no entitlement to either limb of the good character direction...the discretion is a broad one of the 'open textured variety'...this court should

have proper regard to the exercise of discretion by the judge who has presided over the trial."

Further, the judge had neither been asked by the defence nor had the point been raised regarding any effective good character direction prior to the adducing of the appellant's previous offending history and so any expectation "rested on shaky foundations" (paragraph 27).

Comment

At the time of volunteering the defendant's previous convictions, the defence had no assurance or indication that an effective good character direction would be given. This case highlights the wide discretion of a trial judge to decide what fairness requires when it comes to the provision of such a direction. Where it is clear that the judge's decision was within the ambit of their discretion the Court of Appeal will be unwilling to interfere with that decision. Counsel should, accordingly, exercise caution in adducing a defendant's antecedents if doing so in the hope or expectation of receiving a direction, particularly where this has not been canvassed with the judge.

By [Hayley Douglas](#)

R v Kyei (Christopher) [2024] EWCA Crim 341

Possession of prohibited ammunition – strict liability
– knowledge

Summary

On 15 May 2023, the Applicant was convicted of possessing ammunition without a firearm certificate, contrary to section 1(1)(b) of the Firearms Act 1968. The Applicant had changed his plea to guilty following a ruling from the prospective trial judge that he did not have a defence in law to the charge.

On 17 August 2020, following his arrest for an unconnected matter, police searched the Applicant's car and recovered a shoe box from the boot which contained a further box containing ten unfired rounds of 9 millimetre ammunition. Two of the Applicant's fingerprints were found on the outside of the shoe box. There was a Newton hearing prior to sentence in which the sentencing judge accepted that the box had been placed in the Applicant's car by another man. The Applicant's case was, or would have been before a jury,

that he had seen the shoe box on the back seat of his vehicle a couple of days before the police search and he had pushed it through to the boot. He had no idea of its contents: he had not looked inside; nor had he been told.

When seeking a ruling from the trial judge, the Applicant had contended that the box containing the ammunition was “planted” in his vehicle without his knowledge and consequently he was not in possession of it. This was rejected by the judge who concluded that the Applicant had been in possession of the box and did not have a defence. In the course of his ruling, the judge relied on **R v Hassan (Hannat) [2022] EWCA Crim 786**, which held that a vehicle in which a container had been found was itself capable of description as a container.

The Applicant renewed his application for leave to appeal against conviction following refusal by the single judge on three grounds:

(1) The Applicant did not possess the ammunition since he had no knowledge of it, the box had been “planted” in his vehicle.

(2) The judge should not have found that the principle to be derived from **Hassan (Hannat)** applied to an offence under section 1 of the Firearms Act 1968.

(3) The judge was wrong to conclude that the car and the shoe box were a “container”.

In refusing leave, the Court found that this was not a typical “plant” case since the Applicant was aware of the presence of the box which transpired to contain the ammunition and had moved it from the back seat to the boot. The Court concluded that deliberate ignorance – that is the Applicant’s seeming lack of curiosity of an item located on the back seat of his vehicle and its removal to the boot – did not support the article being “planted” and present without his knowledge.

Comment

The case confirmed that section 1 of the Firearms Act 1968 creates a strict liability offence, not one of absolute liability, a phrase which has unhelpfully found its way into some previous authorities (and indeed the Respondent’s Notice in this case). The Court considered this proposition to be well established by

the recognition that a defendant does not commit the offence where the item had been “planted” and the defendant has no knowledge that the item is in their possession.

In respect of the apparent extension of the definition of “container” in **Hassan (Hannat)** to include the vehicle in which a container was found, the Court observed that **Hassan (Hannat)** was a renewed application for leave to appeal which was refused and there had been no indication that it was intended by that constitution to be authority on the issue. The Court confirmed that the definition of “container” only becomes an issue in section 1 and section 5 offences in terms of considering knowledge and possession. It is submitted therefore that the question remains fact-specific.

The Applicant was represented by Liam Walker KC.

By [Louise Willocx](#)

R v L [2024] EWCA Crim 550

Jury bias – sexual offences

In R v L, the Court of Appeal provided further guidance as to the type of conduct that would meet the threshold to discharge a juror for bias.

Background

The Appellant was accused of sexual offences against his daughter and his nieces. During the closing speech by counsel for the defence, one of the jurors became upset. The judge invited the jury to leave court and received a note from this juror stating that she had personal experience of similar abuse herself and that she found it hard to listen to the defence saying that the girls were lying.

When questioned, the juror confirmed that she had shared with the other jury members why she had become upset. She said that she could not detach herself from her own life experiences. When asked by the judge whether she thought she could return verdicts in accordance with her oath to try the defendant in accordance with the evidence, she answered yes.

The judge found that the test to discharge the juror was not met. The judge then questioned the remaining

jurors, asking whether they were able to return verdicts in accordance with their oaths. One of the jurors answered no, and this was the only juror who was discharged. The Appellant was unanimously convicted.

On appeal, it was argued that the juror's revelation and her influence on the other jurors should have led to the jury's discharge, or at least to the discharge of the juror who became upset. Moreover, the general rule that all jurors bring their life experiences to the case did not apply in the present case, because the similarity of the juror's life experiences placed undue pressure on other members of the jury.

The approach of the CACD

The Court of Appeal put great emphasis on the fact that the criminal justice system depends on members of the public bringing their life experience into the jury box with them. Some degree of similarities in life experience to the case does not disqualify them but enriches the jury deliberation. The Court found it relevant as well that she only became upset towards the end of the case – after she had heard all the evidence without becoming upset.

The Court ultimately attached significant weight to the jurors' own declarations to understand their duties and return verdicts based on the evidence alone. The Court held that judge was entitled to take these declarations at face value and was right not to discharge the jury as a whole, or just the juror who became upset.

Commentary

Generally speaking, diverse life experiences amongst jurors can only be encouraged as their cumulative insights will enhance the level of debate about the evidence. This principle applies as well when it comes to additional insights by having lived similar experiences as the ones on trial. However, the jury must remain able to ensure that these experiences will not distract them from their oath to return verdicts based on only the evidence heard in court.

Whilst the Court of Appeal was content to take the jury's declaration at face value, it could be questioned whether that was sufficient in the case of the juror who became upset. She admitted that her own experience had caused her to become emotional when listening to the defence counsel's speech in the case. This goes beyond simply having similar life experiences and

comes down to an admission that her life experience influenced her in her role as a juror – a clear indication of bias. The Court of Appeal's decision that this does not amount to "a real possibility or danger that the jury would be biased" confirms again that the Court sets the bar very high to discharge a juror for bias.

R v Saddam Moussa [2024] EWCA Crim 214

Conspiracy to supply Class A drugs – defence under s.45 Modern Slavery Act 2015 - age

This case addresses whether there are situations in which the s.45 defence for underage victims of modern slavery can be invoked for acts committed after the defendant turned 18.

Facts

The defendant had admitted to supplying Class A drugs and the only issue before the jury was whether he could successfully rely on the s.45 defence under the Modern Slavery Act 2015 (MSA). The indictment period ran from 1 May 2021 to 30 September 2021, a period during which the defendant was 18 years old.

The defendant's evidence was that he had been exploited by a gang from the age of 16 onwards. He was told that he owed them a debt and was taken to Scotland where he was kept in a flat for days until he was taken to another property where he was required to sell drugs. He thought that he would get stabbed if he left and was only allowed to return home when the property came under attack by men in masks. He avoided contact for six months with the gang members who had exploited him, but was then again placed in a house in Scotland. It was only after he returned the second time from Scotland that he became active in the drug supply for which he was convicted.

Law

s.45 MSA provides a more stringent test for adults. If "the person is under the age of 18 when the person does the act which constitutes the offence", the defence is available if the act was done "as a direct consequence" of the defendant being a victim of slavery or relevant exploitation, and where "a reasonable person in the same position and with the same characteristics would do that act".

For adults, the defence applies only if the defendant was “compelled” to do the act as a result of modern slavery or relevant exploitation and where a reasonable person in the same position and with the same characteristics would “have no realistic alternative to doing that act”.

Appeal

The defendant argued that even though he had been 18 throughout the period covered by the indictment, his offending directly stemmed from being compelled to sell drugs since he was a minor. As the exploitation had been ongoing since he was a minor, the s.45 defence applicable to minors should therefore be available to him.

However, the CACD agreed with the Recorder, holding that the reasons why the defendant first involved himself in dealing drugs formed part of the relevant background when considering the test for adults under s.45(1). This background did not mean that the test for children under s.45(4) applied.

Commentary

It is somewhat regrettable that the facts underlying the case were unhelpful. It is unclear from the judgment that the defendant’s involvement in the drugs supply for which he was tried was directly linked to the prior exploitation when he was a child.

This rendered it much more difficult to argue an otherwise valuable point: whilst the indictment period may be restricted to a certain period, the defendant’s acts may form part of a continuing course of conduct that began before his 18th birthday. Someone’s 18th birthday does not suddenly alter one’s ability to resist exploitation, in which the victim may have been severely entangled by then.

In light of the MSA’s purpose to protect victims and re-victimisation for activities they became involved in as children, it would have been prudent to let the period in which the defendant began to offend as a direct consequence of exploitation be determinative, rather than the indictment period chosen by the prosecution. As long as the defendant’s offending is a continuing act since they were a child, this is supported the language of s.45(4)(a): “the person is under the age of 18 when the person does the act which constitutes the offence”.

PROSECUTION APPEALS (CACD)

By [Omran Behaldi](#)

R v ATT and BWY [2024] EWCA Crim 460

Appeal against terminatory ruling – s5 Domestic Violence, Crime and Victims Act 2004 – proof of significant risk of serious harm

Background

This judgement arises out of a prosecution appeal against a terminatory ruling pursuant to s. 58 of the Criminal Justice Act 2003.

The defendants were parents of a young child, H. They were prosecuted for causing or allowing a child to suffer serious physical harm under s. 5 of the Domestic Violence, Crime and Victims Act 2004.

H was born on 4 December 2017. On 4 March 2018 H arrived at hospital following a 111 call made by a cousin of ATT. A paramedic attended. They assessed the symptoms as consistent with a bleed on the brain.

On arrival at hospital, H had red marks down his left thigh and a mark on his lower right leg. ATT pointed out marks around his neck. A CT scan revealed bleeding beneath the skull on the surface of the brain. The hospital suspected the injuries were non-accidental, given H’s age.

A full body examination revealed H had a number of marks. An independent paediatric consultant reviewed the contemporaneous medical records. He considered that marks to the arms were consistent with gripping injuries. These marks were not visible on the evening of 4 March. Marks on the leg were consistent with an abrasion. The bleed on the brain was likely caused by severe shaking. It was likely there was a single incident which took place between 1 hour and 2 days before the arrival in hospital.

ATT and BWT were arrested. They both denied causing injury to H. They claimed not to know how the injuries occurred.

The police investigated H’s wellbeing in the run up to his admission. The health visitor had no concerns regarding the physical health or physical harm of H or the other children in ATT’s care. She had no concerns of the state of the house. She noted ATT lacked positive parenting skills and was not in tune with the emotional

needs of the children. She had the following concerns about H: his weight and low-feeding, slight nappy rash and H being left propped up against a cushion. Two days before the hospital admission the health visitor made an unplanned visit. She was pleased with his weight. She saw ATT prop up H on his back against cushions while ATT sorted issues between the other children. She saw no marks on H other than nappy rash.

Social services were involved as a result of ATT having previously been a victim of domestic violence. The social worker confirmed the house was always clean. She had no concerns regarding physical harm. She had concerns about a lack of supervision of the children and a lack of emotional warmth from both parents.

A friend of ATT witnessed her pick H out of the Moses basket by his baby grow, with one hand. When this was done ATT's head would be supported. She gave evidence that ATT was fed while propped against a cushion. This was occasional and not for very long.

In the evening of 3 March 2018, friends visited the family home before going out with ATT. One friend held H who appeared to be well. BWY contacted someone he knew to obtain cannabis. This person came to the house around 9pm. She saw H crying as if fighting for breath. She told BWY this was not right. He called ATT telling her to come home as there was something wrong with H. The friend saw no injuries on H.

In February 2018, ATT sent two texts to BWY complaining about the children. She called her daughter an "evil little bitch", complained her son had "trashed my living room up" and H "wouldn't stop cry". She told BWY she could not "cope with these all 3 crying at the same time and can't attend to all 3 at once none of them will shut up."

The Judge's ruling

At the close of the prosecution case, both defendants made submissions of no case to answer. The defence argued that for an offence under s. 5 of the Domestic Violence, Crime and Victims Act 2004, proof of a significant risk of serious physical harm being caused to H was required. As a matter of statutory construction, that risk had to exist prior to and independently of the event causing the serious physical harm in fact suffered. On the evidence before the court, the prosecution had failed to establish the necessary level of risk. The prosecution submitted that on the facts there

was a pre-existing risk of serious physical harm. They submitted that in relation to the person who caused the serious harm (as opposed to allowing it), there was no need to establish a pre-existing risk. The significant risk would be proved by the conduct causing the harm so as long as that conduct carried the necessary risk. The prosecution relied on **Bollom [2003] EWCA Crim 2846** for the principle that what might not be really serious for a grown adult would fit that description for a baby.

The Judge reviewed the evidence of the defendants' parenting. He concluded they were "hard working if stressed parents who kept their children clean and well fed in a tidy house." He held that the matters the prosecution relied on went to ATT's inability to cope with three young children and their emotional and developmental needs. No reasonable jury could conclude they created any risk of serious physical harm.

He carried out an extensive review of the medical evidence. He concluded the injuries were not sufficiently serious to justify a charge of inflicting really serious harm. Because the gripping marks to the arm were only visible on the evening of the hospital admission, they would not have been previously seen by the defendants. If they occurred at the time of the shaking they could not support the proposition there was a significant risk of serious physical harm to H. He concluded the marks on H's body were not sufficiently serious to establish a significant risk of really serious harm being caused to H.

He rejected the prosecution submissions. He concluded the defendants' argument was correct. He relied on the words of the statute, on **Ikram [2008] EWCA Crim 586** and on the content of a Ministry of Justice circular issued in 2012. The Judge accepted the proposition in **Bollom** but ruled that it could be distinguished on the facts. The injuries to H fell far short of really serious harm.

In a supplementary ruling relating to leave to appeal, the Judge addressed prop feeding and carrying H by the grow. He ruled these events did take place. ATT accepted prop feeding H once in interview. The evidence suggested carrying H by the grow was always done while his head was supported. The Judge ruled that nothing in the parenting of either defendant gave rise to the risk required by the offence.

Submissions on appeal

The prosecution maintained their submission in relation to the person who caused the risk. There did not need to be a pre-existing risk if the defendant was the person who caused the serious physical harm. The prosecution submitted the ruling was contrary to paragraphs B1.93 and B1.102 in Blackstones Criminal Practice 2024. The prosecution argued the Judge misinterpreted the Ministry of Justice circular and failed to take account of a previous Home Office Circular which supported the prosecution argument. They argued the offence was a single offence and it was not necessary to prove what role the defendant played. The prosecution further submitted the evidence was capable of establish the necessary level of risk.

The defence relied on the same arguments deployed at first instance. The Judge was correct in distinguishing the risk required by s. 5 of the 2004 act with the specific act giving rise to the serious physical harm. The evidence was insufficient to give rise to the necessary risk. The parenting was sufficient given their circumstances. The marks visible were superficial.

The Court of Appeal's ruling

The Court ruled first on matters of principle before turning to the Judge's ruling on the facts.

Statutory interpretation

At §35 onwards, the Court of Appeal set out its ruling on matters of principle

As first enacted, s. 5 of the 2004 Act created an offence of causing or allowing the death of a child. Its purpose was to plug a lacuna in the law whereby it was not possible to prove who caused the unlawful death of a child. It might only be proved that they were one of a small group of people living in the same household. This would result in unjust acquittals for offences of murder or manslaughter if the members of the household remained silent or blamed each other.

The Court reviewed the wording of the statute and the Explanatory Notes in relation to s. 5(1)(c) which reads:

“at that time there was a significant risk of serious

physical harm being caused to V by the unlawful act of such a person”

At §37, the Court held that the Explanatory Notes supported the proposition the risk referred to must exist prior to the infliction of serious physical harm. The wording of s. 5(1)(c) was clear: the risk must exist before the act causing death.

The wording of ss. 5(1)(d)(i) and (ii) confirmed this interpretation. This is because that sub-section provides for liability on the part of the person who allowed death where they have actual or constructive knowledge of the harm but failed to take reasonable steps to protect the child.

At §38 the Court ruled the offence was intended to capture both those who had caused a death and those who allowed it. S. 5(2) meant it was not necessary to prove into which category the defendant fell. However this did not alter the meaning of s. 5(1)(c). It was still necessary to prove all the elements of the offence.

At §40 to 43 the Court set out the amendments to the 2004 Act. S. 5 was amended in 2012 to include “serious physical harm”. However, the essential ingredients of the offence were not altered. In particular, s. 5(1)(c) remained unchanged. In that context, the differences between the 2004 Explanatory Notes and the 2012 Explanatory Notes were of no significance.

At §44 to §46, the Court disagreed with the proposition that the significant risk of serious physical harm could arise from the unlawful act constituting the offence. The wording of paragraph B1.102 in Blackstone suggested this was the position in law. The Court further disagreed with the draft particulars of indictment set out at paragraph B1.93. They approved of the particulars of the indictment against ATT and BWY set out at §46.

At §47 and 48, the Court addressed s. 5(2) of the 2004 Act which reads:

“The prosecution does not have to prove whether it is the first alternative [causing death or serious injury] in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) [allowing death or serious injury] that applies.”

The Court held this provision was introduced to cater

for situations where it was not possible to prove who caused the death or serious injury. If it were otherwise, the offence would be no different to substantive offences. S. 5(2) allows the prosecution to present the case on the basis that someone must have caused serious injury, that it was one of the two adults and the other adult not directly responsible allowed it.

In this case, the prosecution conceded they could not present the case on the basis that one of the defendant caused the brain injury. The Court held the jury would not have been able to place either defendant in the first category and would have had to decide the case on the basis of the second part of s. 5(1)(d). This necessarily required a significant risk of serious physical harm prior to the infliction of the injury.

The Judge's ruling on the facts

At §49 to §58, the Court set out its ruling on whether the Judge erred in his assessment of the facts.

The Court reiterated the principle that in order to succeed on an appeal against a discretionary ruling, it is necessary to demonstrate the ruling was unreasonable. An appeal will not be successful on the basis that another judge reasonably could have reached a different conclusion.

The Court upheld the Judge's ruling on the fact. Neither the social worker nor the health visitor gave evidence that any of the matters they described gave rise to a significant risk of serious physical harm. It would have been reasonable to expect they would have done something urgently to protect H.

At §51 the Court ruled:

"the poor parenting, such as it was, could not be used in combination with other factors since it gave rise to no risk of physical harm. A combination of factors of itself is of no consequence unless each factor is of some probative value."

At §52, the Court addressed the texts ATT in February 2018. The prosecution asserted they demonstrated the reason why she could have shaken H in anger or frustration. The Court ruled this was a further example of evidence which had no probative value of the risk. At its highest it was evidence that supported other evidence ATT caused the brain injury.

At §54 and §55, the Court addressed the injuries seen on H. While a reasonable jury could conclude the injuries were the result of unlawful acts, they did not amount to serious physical harm. **Bollom** was only authority for the principle that the seriousness of the injury should be assessed in context.

At §58, the Court ruled that the judge's conclusion was one reasonably open to him. Any unexplained injury to a small baby must raise concern. That is different to a significant risk of serious physical harm.

Comment

This judgment establishes two important points of principle.

First, it clarifies the elements of the offence under s. 5 of the 2004 Act. The judgment is now clear authority for the principle that a significant risk of serious physical harm must exist **before** the act causing either death or serious physical harm. It will not be enough for the prosecution to point to the physical act to establish the risk. They are distinct elements which must both be proved. There is no distinction between a person alleged to have caused death or serious physical harm and one who allowed it. In both cases it must be proved that there was a pre-existing significant risk of serious physical harm.

Second, it reiterates the principles applicable when assessing the evidence. Every case must be judged according to its context, in line with **Bollom**. Evidence that points towards a person causing the harm is not probative of the pre-existing risk. Evidence which has does not reveal pre-existing significant risk of serious physical harm (in this case the alleged poor parenting) cannot be used in combination with other factors to create risk of serious physical harm. Each piece of evidence must have some probative value in relation to the elements of the offence. If it does not, it cannot be taken into account.

R v Ng and O'Reilly [2024] EWCA Crim 493

Background

This judgment arises out of a prosecution appeal against a terminatory ruling. The defendants faced counts of assault occasioning actual bodily harm, possession of an offensive weapon, assault by beating and malicious

communication.

Both defendants pleaded not guilty at their PTPH on 19 April 2022. The case was placed in the warned list in the week commencing 7 November 2022. On 18 October 2022, the case was taken out of the warned list. It was not considered in the interests of justice for Ms Ng to stand trial alongside Mr O'Reilly until other proceedings concluded. The case was adjourned to the warned list commencing 3 July 2023. This was the first adjournment.

The case was not called in the warned list of 3 July 2023. It was administratively adjourned to the warned list commencing 29 January 2024. In his ruling, the Judge said the case was removed from the warned list at the prosecution's request because of lack of counsel. This was the second adjournment.

On Friday 26 January 2024, chambers for prosecution counsel asked for the matter not to be called on the first day of the warned list. This was because of counsel's unavailability. It was to be listed on 30 January 2024 as a backer trial.

On 29 January 2024, the CPS wrote to the court indicating they had been unable to secure trial counsel. They had contacted over 120 chambers. Original trial counsel had "an important matter later [that] week." They asked for the matter not to be listed on 30 January 2024. On the same day at 4.30pm, Mr O'Reilly's solicitors wrote to indicate he was now in custody and would have to be produced the next day.

The request for it not to be listed on 30 January 2024 was refused. However, the priority trial on that day was effective and Mr O'Reilly was not produced. The trial was adjourned in order to be re-fixed. This was the third adjournment.

The Judge's ruling

As a result of multiple adjournments, the defendants made an abuse of process application. They submitted that the CPS' failure to secure the attendance of prosecution counsel on 30 January 2024 amounted to an abuse of process.

The Judge agreed. He identified the unavailability of counsel as a recurring problem. He cited the significant back log. He set out the procedural background and ruled that all three adjournments were "because of

difficulties caused by the prosecution".

He ruled that the regularity of the situation would not be remedied "unless and until a judge, confronted with the inability of the prosecution to present its case because of a lack of an advocate, is willing to declare such a situation as unacceptable". He found that if he did not stay the indictment he would have no confidence the situation would change.

The Court's ruling

At §20 to 25 the Court reiterated the principles applicable in abuse of process applications. It cited **R v BKR [2023] EWCA Crim 903** as setting out the relevant legal principles.

In summary:

- Abuse of process is an exceptional remedy to be exercised as a last resort with care and restraint;
- There are two limbs. The first is where a fair trial is not possible. The second is where it offends the court's sense of justice and propriety. The second limb is where authorities have engaged in misconduct;
- The second limb requires a two stage approach. First, it must be assessed whether authorities are guilty of misconduct. Second, the court must determine whether this justifies a stay.
- A stay should not be imposed to punish or discipline prosecutorial misconduct.

At §26 to 35 the Court set out its judgment on the Judge's ruling. It held that the Judge had proceeded on a materially incorrect factual basis. The first adjournment was not caused by the prosecution. The trial was adjourned to ensure fairness to the defendants. On 30 January 2024, the trial could not have proceeded even in the presence of prosecution counsel. The priority trial was effective and one of the defendants had not been produced.

The Court's "more fundamental" concern was one of principle. The Court ruled that the Judge's assessment of the prosecution's conduct did not amount to limb 2 abuse. There was "no prosecutorial conduct in this case that could justify a stay." In any event, the Judge had failed to carry out the required balancing exercise. His focus was to punish the CPS hoping that lessons would be learned. The Court quashed the Judge's ruling as there was no justification for it.

Guidance going forward

In addition to allowing the appeal, the Court provided guidance moving forward. At §36 the Court held

“The shortage of advocates to conduct criminal work in the Crown Court is not a problem which the court can solve. It is for the professions to recruit, train and retain members and it is for the Executive, and other agencies engaged in this process, to take steps to ensure that the need for Crown Court advocacy is met.”

At §39 to §57 the Court set down the following guiding principles:

- The Listing Advice published by the Senior Presiding Judge on 9 January 2023 reminds courts that warned lists are not always effective, particularly in light of the shortage of criminal barristers;
- As much as possible, listing of trials should be done with the interests of advocates in mind. The availability of counsel is a greater consideration in light of the shortage of advocates. They are not a determining factor but they are an important consideration;
- If there is a significant risk that an advocate may not be available for trial, this should be communicated promptly to the court. This applies to both the prosecution and the defence;
- Local practices should align with guidance on remote attendance. This will ensure that resources are used effectively. PTPH, trial and sentencing should generally have counsel present “but a great deal of other work can be done remotely.”
- If the prosecution is not represented at PTPH or sentencing it may be possible to proceed in their absence. It cannot be so if defence counsel is absent at a PTPH or trial. At sentence, if the court is considering imposing a non-custodial sentence and the court has full information about the defendant it may be possible to sentence in the absence of defence counsel;
- A judge can terminate proceedings if the prosecution is absent but this does not involve an abuse of process ruling. It will involve some form of application to adjourn the trial. At §47 the Court held:

“In deciding whether to adjourn proceedings, the court is required to consider the interests of justice and to deal with the case justly in the sense described in CrimPR 1.1: the overriding objective.

This is an exercise which addresses all aspects of the case and in which the judge will decide what factors carry most weight in determining the outcome. Each limb of CrimPR1.1 will need to be considered. Amongst other things, the judge will have in mind the public interest in criminal allegations being decided, the seriousness of the case and prejudice to the defendant caused by further delay (although such prejudice may be lessened by the fact that it may not be appropriate to extend custody time limits). The interests of witnesses and complainants will be taken into account as will any impact on public safety. In most cases an adjournment, or even a further adjournment for the same reason, will be the right answer. The more serious the case, obviously, the more likely this is to be true. It is to be hoped that failures to attend trials by advocates in the most serious cases will be rare and, where they happen, explicable by things like sudden illness rather than double booking. It is almost inconceivable that such cases will be terminated by the refusal of an adjournment simply on the ground that there is no prosecution advocate.”

- The refusal of an adjournment will often force the prosecution to offer no evidence. At §54, The Court ruled that a judge has the power to terminate proceedings even where the prosecution does not formally offer no evidence as a consequence of the refused adjournment.

Comment

Absence of prosecution counsel is a systemic issue that affects cases of all seriousness. It is not uncommon for practitioners to hear that trial counsel for serious sexual offences has yet to be identified and trials to be adjourned days before they are due to start.

The Court in this case was reluctant to shoulder the burden the government has ignored for years. The failure to properly resource the criminal justice system impedes the right to a fair trial. The “last minute” nature of many prosecutions means lines of enquiry are missed, cases are not fully and properly reviewed and disclosure is rushed.

The judgment does not shut the door on abuse of process applications where prosecution trial counsel is not available. It simply reiterates that the test is a

difficult one. The threshold for abuse is high. There may be circumstances, because of the particular procedure history of a case, where the absence amounts to abuse. Those cases are likely to be rare.

This does not mean defence practitioners are powerless. It is open to the defence to object to an application to adjourn the trial. Factors such as delay, nature of the offence, the interests of the complainants and the circumstances of the defendant are likely to be relevant. Practitioners should remind the court that the right to a fair trial includes the right to be tried within a reasonable time. Repeated adjournments violate that part of the right.

APPEALS AGAINST SENTENCE (CACD)

By [Daniella Waddoup](#)

R v Solomon Abdul [2024] EWCA Crim 236

Aggravated burglary – dangerousness

The issue of dangerousness was the key issue of interest in this appeal.

In sentencing the appellant in respect of two aggravated burglaries against sex workers involving the use of knives, the judge wrongly took into account two similar, but contested, allegations.

The court may, pursuant to s.229(2)(c) of the CJA 2003 (effectively mirrored by s.308 of the Sentencing Act 2020), take into account “any information” about the offender which is before it. This will include evidence which the judge has heard at trial or which the appellant has admitted, for example to writers of pre-sentence reports or other professionals. What it may not include, however, are other matters which are not proved or admitted by the defendant. In reaching a conclusion adverse to the defendant, the judge should not rely on a disputed fact unless it could be resolved fairly to the defendant (**R v Considine [2007] EWCA Crim 1166, [2008] 1 WLR 414; R v Johnson [2006] EWCA Crim 2468, [2007] 1 WLR 585**).

The Court stated it was, “clearly wrong to take into account unproved disputed allegations against a defendant”, unless the dispute had been resolved fairly. In this case, the Crown could have asked for these matters to be taken into account or preferred an indictment and asked whether the appellant was prepared to plead to them. Neither took place.

Although the judge had fallen into error, the finding of dangerousness was nevertheless upheld: notwithstanding the appellant’s comparative youth of 23 years and lack of relevant previous convictions, he had shown a willingness to aggravate and increase his offending through the use of violence and knives.

R v Hassan Mohammed and others [2023] EWCA (Crim) 458

Departure from ill-advised indication of sentence – approaching mitigation “compendiously”

The appellants appealed against sentences imposed in respect of their guilty pleas to two counts of conspiracy to supply Class A drugs. The pleas had been entered following the judge’s indication that it was “vanishingly unlikely” that he would “go any higher” than the roles and starting points contended for by experienced prosecution counsel.

In the event, following a Newton hearing in respect of one

of the appellants, the judge adopted starting points which “would have been higher than the prosecution suggest”, but which he said he had brought down to reflect matters of personal mitigation.

It was unfair, the court held, for the judge not to have kept his word. The court repeated salutary remarks made in cases such as **R v Parish and Redford [2017] EWCA (Crim) 2064** and **R v Martin [2013] EWCA (Crim) 2565** as to the inadvisability of judges giving such indications to counsel, “however tempting it might be to assist them”:

“The Goodyear process has a number of safeguards built into it which are designed to protect everybody’s position. If a Goodyear indication is given then everybody knows where they stand” (para. 15).

The unfairness was compounded by the judge’s failure to explain why he had departed from his earlier indication. Having also erred in approaching the appellants’ personal

mitigation compendiously, it was left to the Court of Appeal to consider afresh their individual mitigation. Each of the sentences were accordingly reduced.

R v El-Arby [2024] 2 WLUK 725

Error in the approach to calculation – time served and credit for guilty pleas

Prior to the applicant’s sentence for a number of drug offences at Southwark Crown Court, he had been sentenced at Woolwich Crown Court for an offence of conspiracy to possess a firearm.

The Southwark judge’s approach to the sentence for the drug offences was to consider what he would have imposed for all the offending, including the Woolwich matter (300 months) and to then reduce that figure “to account for the time served thus far” (68 months). After that, he deducted a further 25% to reflect the credit for the guilty pleas to give a final figure of 174 months (14 years and six months).

The sole ground of appeal argued before the Court was that the judge made an error in his approach to the calculation: the applicant had served the equivalent of 68 months in custody. The aim was to give him credit for that time. By first reducing the sentence for the time spent and then reducing the sentence for credit, the judge had in fact failed to apply credit for the time spent in custody thus far.

The Court agreed that the judge’s approach was flawed. The judge sought to put himself in the position he would have been in had he been sentencing for all matters. Because the time already served would not automatically be deducted, he reduced the sentence to place the appellant in the same position as would have applied if those days were

to be automatically deducted. However, he had erred in deducting time spent in custody before applying credit for the applicant's guilty pleas. The effect was to not apply credit for the lengthy period of time spent thus far awaiting sentence, leading to a difference in sentence of some 17 months. This, the court noted, was an arbitrary result: the amount of actual reduction for credit depended to a significant extent on the delay between the initial remand into custody and the date of sentence.

For that reason the appeal was allowed and the sentence reduced by 17 months (25% of 68 months).

R v Harris & Plume [2024] EWCA Crim 293

Basis of plea – when is a Newton hearing a Newton hearing?

The applicants sought to argue that the sentencing judge was wrong to reject the basis of plea each had submitted in connection with their guilty pleas to conspiring to supply cocaine. Their central arguments were: that they had been sentenced as if they had been convicted of the offence with which they had originally been charged, namely conspiracy fraudulently to import a controlled drug; that the judge erred in sentencing both on the basis that they had played a leading role in the conspiracy; and, in relation to Mr Harris, that he should have been entitled to a full one-third discount for his guilty plea.

Notably – and problematically, as the Court of Appeal went on to find – neither applicant had submitted a basis of plea at the time of entering their pleas.

It was not until the sentencing hearing, and in response to the prosecution's detailed note on sentence, that Mr Harris's representatives uploaded a document entitled "Basis of plea/Note on sentence" which sought to challenge the evidence relied on by the prosecution to show that Mr Harris played a leading role in the organised crime group. Under the heading "Basis of plea", only "starkly minimal" admissions of involvement were made (involvement in the supply of 2kg of cocaine vs 175kg; significant vs leading role). The judge heard submissions but no defence evidence. He accepted the prosecution's interpretation of the evidence on which both the original and subsequent charges had been founded: Mr Harris was sentenced to 19 years and 10 months' imprisonment.

In his renewed application for leave to appeal, Mr Harris sought to argue that the hearing at which his basis of plea was assessed by the judge was not a Newton hearing, such that the judge had been wrong to reduce the credit for his guilty plea. The Court of Appeal gave this argument short shrift. As is made explicit in **R v Newton**, one of the ways of resolving a question of fact relevant to sentence is

to hear no evidence and to instead come to a conclusion on the basis of counsel's submissions. This, the court concluded, is precisely what happened here: this was a Newton hearing in all but name.

Mr Plume uploaded a proposed basis of plea some 10 months after he had pleaded guilty. In it he admitted being concerned only in the supply of 4.5kg of cocaine. A Newton hearing took place; again, the applicant neither gave nor called any evidence. Following a detailed examination of the competing submissions and analysis of the content and pattern of numerous EncroChat messages involving the applicant, the judge concluded that the applicant was dealing in drugs "at the highest level" and sentenced him to 18 years and four months' imprisonment.

The Court went on to reject both applicants' challenges to the factual basis on which they were sentenced. Making clear the Court had "absorbed the extensive timeline" and other relevant material, Cheema-Grubb J emphasised that the court was a "Court of Appeal not a court of re-hearing".

Comment

The court in this case found it necessary to summarise the "ample assistance" in the Criminal Practice Directions to guide those advising defendants who chose to plead guilty. The following features of that legal framework were relevant to these applications:

- (a) The defendant shall always be sentenced on a basis that accurately reflects the facts of the case.
- (b) It is the responsibility of the defence to notify the prosecution of the areas of dispute and a proposed basis of plea should be written and signed by the defendant at the time of or swiftly after entering the plea.
- (c) Any decision of the prosecution to accept a basis of plea is conditional on the judge's acceptance of it.
- (d) If a basis of plea is agreed it must be signed by advocates for both sides.
- (e) Where the defendant's proposed basis is disputed the prosecution must identify specific facts in issue for the court to consider.
- (f) A Newton hearing should be held if a disputed assertion is likely to affect the sentence passed.
- (g) The defendant may give and call evidence.
- (h) Where the specific issues raised require a verdict from a jury because the defendant is denying that a specific criminal offence has been committed, the tribunal for deciding whether the offence has been proved is a jury.

(i) There must be a judgment and if a defendant does not give evidence, subject to any explanation given, the court may draw inferences from that failure to support matters in the basis of plea which are within his exclusive knowledge.(j) The criminal burden and standard of proof applies.

In this case, the surprising departure from these principles rendered much of the argument presented in the appeal “unrealistic”.

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she has acted in the appeal of the Freshwater Five (Fresh evidence case involving an appeal against conviction for the importation of 250 kilos of cocaine through cooping: *R v Beere* [2021] EWCA Crim 432. The appeal was the subject of a 6-part podcast by the Guardian) and The Shrewsbury 24 (representing the Actor Ricky Tomlinson in his successful appeal against conviction for picketing over 50 years ago: *R v Warren* [2021] EWCA Crim 413).



[Daniella Waddoup](#) has a keen interest in criminal appeals, particularly those involving appellants with mental disorder and children and young people. She was junior counsel for the intervener Just for Kids Law in *R v Jogee*; *R v Ruddock*. Daniella acted as judicial assistant to

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