CRIMINAL APPEALS BULLETIN
DECEMBER 2024

Address
54 Doughty Street
London, WC1N 2LS

Follow Us
X: @DoughtyStCrime

E: crime@doughtystreet.co.uk
Tel: 0207 400 9088

Farrhat Arshad KC

Head of the Doughty Street Criminal Appeals Unit

Welcome

Welcome to the December 2024 issue of the bi-monthly Criminal Appeals Bulletin. This issue contains a range of interesting cases for you. I would recommend saving it to read on the afternoon of 25th December, once you are sick of turkey and family and have an overwhelming urge for intellectual stimulation.

Amanda Clift-Matthews, very recent Times Lawyer of the Week, writes about her JCPC case of **Washington**, where the appellant's conviction for murder was quashed due to criticisms of the DNA evidence presented by the Crown at trial.

Sarah Vine KC discusses **R v Roehrig**, a renewed application for leave to appeal against conviction, concerning the admissibility of an extract from a Defence Statement, which may have far-reaching consequences.

Tayyiba Bajwa writes about **R v Campbell**, an appeal against conviction referred by the CCRC, based on fresh evidence undermining the reliability of the appellant's purported admissions in police interviews. 23 years, two applications to the CCRC and two appeals later the conviction was quashed.

Omran Belhadi writes about **R v O'Donnell**, an appeal against conviction, where the CACD re-affirms a Defendant's right to reveal his character, warts and all; **R v Vilhete**, a case stated on the admissibility of res gestae evidence in circumstances where the Prosecution may not have done all they could to bring a witness to Court; and **R v Lewis White**, a rare Attorney-General's Reference where the "unduly lenient" custodial sentence was replaced with a community order.

Rabah Kherbane writes about two protest cases: his case of **R v Joshua Smith and others**, where the Court of Appeal considered the ambit of the new statutory offence of causing a public nuisance, under section 78 of the Police, Crime, Sentencing and Courts Act 2022, and **R v Rennie-Nash**, an appeal against a punitive costs order.

In Appeals against Sentence, I write about **R v Hilling**, an appeal against an IPP imposed 13 years before and Daniella Waddoup writes about two cases on the proper approach to youth sentencing – **R v Smith** and **R v Watson-Berry**.

Our Crime Team is ranked # 1 in both Legal 500 and Chambers and Partners. We have a wealth of talent in Criminal Appeals. Please feel free to e-mail us or to call our crime team on 0207 400 9088 to discuss initial ideas about possible appeals. More information on our services can be found on our website.

I hope you enjoy this issue of the Bulletin and wish you a very merry Christmas and a Happy New Year!

Farrhat Arshad KC
Head of the DSC Criminal Appeals Unit

In this issue

England & Wales:

- Appeals against conviction
- Appeals by way of case stated
- Appeals against sentence
- Attorney-General's Reference

Julian Washington v The King [2024] UKPC 34

- By Amanda Clift-Matthews

Contact us

If you would like to know more, or discuss how our barristers may be able to help you and your clients, please contact Senior Crime Clerk, Matthew Butchard on 0207 400 9088 .

Useful links

Julian Washington v The King

[2024] UKPC 34

By Amanda Clift-Matthews

The Appellant was convicted of murder on 6 May 2014. He was sentenced to life imprisonment with an overall minimum term of 30 years' imprisonment.

The prosecution case rested on two main planks: Particle evidence alleged to be GSR that on its own was equivocal, and DNA evidence provided by Ms Candy Zuleger of Trinity DNA Solutions, Florida. Six bullet casings were found at the scene of the shooting. Ms Zuleger gave evidence that the appellant had been excluded as a possible contributor to the DNA on two of the six casings. On the remaining four she found a very small amount of DNA ('low template DNA') which yielded a partial profile at 13 loci from at least three individuals. She said the appellant could not be excluded as a possible contributor to the profile. Ms Zuleger's evidence was that the frequency of occurrence from an unrelated individual to the Appellant was one in 46 million in the black population of Bermuda. The total population of Bermuda is approximately 60,000. At trial Ms Zuleger did not seek to qualify or draw any potential flaws in her evidence to the attention of the jury or the trial judge. Given the statistic of one in 46 million, "Ms Zuleger's evidence effectively compelled the jury to the conclusion that the appellant's DNA was on the four casings".

On appeal to the JCPC, the Appellant sought to adduce fresh evidence from DNA expert Professor Dan Krane. He made a number of criticisms of Ms Zuleger's evidence:-

(i) The sample of DNA obtained came from the four casings swabbed together, when this is only permissible when it is known that same person or persons handled all of the items making up the sample. By Ms Zuleger's own analysis the Appellant was not a contributor to the DNA on the other two casings.

(ii) Ms Zuleger carried out multiple amplifications of the DNA (six test runs) which all produced different sets of results. This was not generally accepted practice. She then aggregated all the peaks ('alleles') that she had designated in each of the test runs, even if a peak appeared in only one test run and not in the others. There was a clear risk that she included false peaks (stutters). It was on the basis of this aggregation that Ms Zuleger concluded that the Appellant was a possible contributor to the sample.

(iii) Ms Zuleger relied upon assumptions and, potentially, 'suspect-centric' circular reasoning. Where the results at a locus corresponded with the Appellant's genotype, Ms Zuleger assumed that there was a complete set of alleles for this locus. However, where the results at a locus did not correspond to the Appellant's genotype, she assumed that there was not a complete set of alleles.

(iv) Some of the results provided grounds for positively excluding the Appellant as a contributor to the DNA mixture, since his genotype was not represented at two loci of the profile, but the jury was not informed of this.

(v) The statistical calculation - common probability of inclusion ('CPI') - given was only possible if two preconditions were fulfilled. First, there must be no possibility of allelic drop out at a locus and, second, the number of contributors must be known in order properly to assess the risk of allelic drop out at each locus. Neither of these pre-conditions for performing a CPI calculation was satisfied. Ms Zuleger knew that the profile did not have a complete set of alleles because the profile was a partial one, and she had already relied on allelic drop out where the results did not match the Appellant's genotype in order to include the Appellant as a possible contributor.

(vi) CPI statistics are now considered an unreliable means of attaching a statistical weight to mixed DNA profiles and have been replaced with probabilistic genotyping.

Ms Zuleger responded to Dr Krane's report in two statements and disputed Dr Krane's assertion that combining multiple amplification runs was not a generally accepted practice and that including all the peaks in all the test runs was a conservative approach. She asserted that at no point in her analysis would the Appellant be excluded from the sample.

The Respondent instructed DNA expert Dr Barbara Llewellyn to provide her opinion on the DNA results obtained by Ms Zuleger. She found that Trinity Solutions did not have protocols for creating composite profiles from multiple test runs, nor interpreting them. She agreed with Dr Krane about the problems with the statistical calculation. She also agreed with Dr Krane that the sample should have been considered inconclusive and it should not have been used for comparison. It should also not have been used for statistical weighting. As a result of Dr Llewellyn's report, the Respondent accepted that the DNA evidence presented at trial was flawed and withdrew its challenge to the appeal.

The Board concluded that Ms Zuleger's evidence came across as "powerful evidence which led to the wrongful conviction and incarceration of the appellant". They considered it appropriate to reiterate the duties of expert witnesses because (a) the flaws in the DNA evidence were not disclosed by Ms Zuleger to those conducting the trial; (b) basic assumptions were omitted from Ms Zuleger's report; and (c) factors which clearly undermined her opinion were omitted from Ms Zuleger's report. The Board restated the duties of expert witnesses set out in *Myers v The Queen* [2015] UKPC 40, [2016] AC 314 para 59, *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at 81 and *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5, paras 271-272. The duty of an expert was to provide assistance to the court by way of objective unbiased opinion in relation to matters within their expertise. But Ms Zuleger's reports prior to trial did not contain any declaration that she understood her duty to the court to give independent evidence, nor that if there was any material which weighed against any proposition which she was advancing that it was her duty to bring that evidence to the attention of the court. It was incumbent upon those instructing experts and also the trial judge to be satisfied that these exacting standards are recognised and discharged by expert witnesses. Ordinarily, the trial judge will be so satisfied if the expert's report contains a suitable declaration.

The Board noted that all DNA analysis for the Bermuda Police Force between 2009 and 2015 was undertaken by Trinity DNA Solutions (247 cases) and the flaws which occurred in the appellant's case may have occurred in other cases and put on record the Respondent's representations as to the substance of the review:

(a) As soon as it becomes apparent that any individual in the 247 cases has been convicted then that individual will immediately be informed that a review is being conducted by Dr Llewellyn.

(b) Once informed the individual can make their own submissions to Dr Llewellyn and instruct their own expert.

(c) Dr Llewellyn's report will be disclosed to the individual as well as being provided to the DPP.

(d) It is anticipated that the review will be concluded by the end of July 2024.

(e) Any case in which the individual is in prison will be prioritised.

Comment

This case is a reminder that interpretation of DNA mixtures and low template DNA is not straightforward. While this was a historic case and methodologies have since improved, guides for courts such as those available from the Forensic Science Regulator, as well as industry guidelines, are fertile sources of information about areas of subjectivity and best practice.

The egregious breaches by Candy Zuleger of Trinity DNA Solutions of their duties to the court may have been caused by the fact she primarily gave evidence in the USA, where the obligations are different. If so, the Board said it was, "even more important for those who instruct experts who ordinarily practise in the USA to bring these exacting standards to the expert's attention".

Progress with the review appears to have been slow. The DPP in Bermuda indicated that they would have an update in December 2024.

Amanda Clift-Matthews represented Mr Washington in his appeal before the JCPC, along with Icah Peart KC of Garden Court Chambers.

CASE SUMMARIES AND COMMENTARY

APPEALS AGAINST CONVICTION

By Omran Belhadi

R v Anthony Terence O'Donnell
[2024] EWCA Crim 1115

Summary

The appellant was convicted of violent disorder after a trial. Violence broke out between two groups after an amateur boxing match. The appellant was part of the larger group. There was CCTV. At trial the appellant claimed he was acting in defence of others. He gave evidence.

The appellant appealed against conviction on three grounds. He also appealed against sentence.

On conviction, the appellant's first ground was that the judge was wrong to refuse the application to adduce non-defendant bad character. The appellant's case was that there was previous animosity and the jury could not understand the case without background. He wished to introduce the previous convictions of certain members of the opposing group. The appellant was refused leave on this ground.

The appellant's second ground was that the trial judge wrongly prevented him from adducing evidence in support of his case that he had no history of violence. The appellant wished to adduce the statement of two individuals who provided character references. They both asserted the appellant was not violent. The appellant was given leave on this ground.

The third ground was that the judge asked the appellant a question which was a prosecution minded suggestion which undermined his case. This question related to something the appellant said on CCTV. The appellant was refused leave on this ground.

On sentence it was submitted the judge wrongly categorised the offending. Leave was refused.

Decision

The court held grounds 1 and 3 to be unarguable. On ground 1, the court held that it is "impossible to argue" that the jury could not understand the case without the proposed evidence. The jury had the benefit of CCTV showing the second group displaying animosity towards the appellant's group. The proposed evidence had no bearing on the issues in the case.

On ground 3, the court held the judge was permitted to ask the appellant the question in the way he did. It was put neutrally. It sought clarification of something the jury were likely considering.

On ground 2, the court held the judge "fell into error by acceding to a submission by the prosecution which was unsupported by authority and wrong in law."

The appellant acknowledged his previous conviction for dishonesty. The court found he was "entitled to present his case on the basis that, notwithstanding that conviction, he had never been involved in violence and was not a violent man."

The court held that in principle the appellant was entitled to "adduce other relevant evidence" that he was not disposed to violence. The court did not deem it necessary to decide whether the judge was correct in excluding the specific statements. The court held that the character witnesses added "something" to the simple fact the appellant had no convictions for violence. They gave evidence of circumstances in which others may have displayed aggression. They brought "what the jury could regard as independent confirmation of the appellant's own evidence that he was not violent."

The court held the conviction remained safe. The fact he was not a violent man was unchallenged. There was an appropriate and fair direction. The footage and witness evidence against the appellant was extremely strong.

On sentence, the court emphasised that the judge presided over all the trials arising out of this incident. He was best placed to assess comparative culpability. The court agreed with the judge's sentencing exercise.

Comment

While the appeal was not allowed, the case highlights

principles applicable to the defence adducing evidence in support of character.

The appellant's character was important in this case. He did not seek to portray himself as of good character. The evidence he sought to adduce was limited but helpful to his case. In cases involving violence, the absence of a violent character can often be a valuable asset.

This case emphasises the defence right to make use of such an asset. However, this must be done fairly and not in a way that misleads the jury. The appellant in this case did not seek to mislead the jury given he accepted he had convictions.

The court's power to exclude any such evidence is limited to common law rules of relevance and case management powers. Section 78 of PACE only applies to evidence sought to be adduced by the prosecution. Although the court did not set out its views on the admissibility of the evidence in the witness statements, it emphasised the principle that the appellant was entitled to adduce such evidence.

By Sarah Vine KC

R v Roehrig
[2024] EWCA Crim 539

Summary

This was a renewed application for leave. The facts of this case were perhaps not the most favourable from which to launch the argument, but the ruling is still unsatisfactory. The Applicant sought leave to appeal his conviction for murder principally on the basis that the trial judge should not have permitted the Prosecution to adduce an admission in the Defence Statement. The Prosecution's case lacked any direct evidence of who was responsible for the fatal stabbing. In deciding to admit part of the Defence Statement as a part of the Prosecution case, the judge enabled the Prosecution to circumvent a problem which would otherwise have arisen when the Applicant declined to give evidence. In reality, the circumstantial evidence against the Applicant was fairly described as "significant", including the Applicant's DNA on the handle of the murder weapon, witness testimony that he had been seen running towards the victim with a long metal object and his animosity towards the victim.

In refusing leave, the Court provided a somewhat troubling analysis of the argument. The Applicant advanced the not unreasonable submission that approval of the trial judge's decision would risk a "chilling effect" on the drafting of Defence Statements, presumably because both defendants and their representatives would approach the exercise with an increased degree of risk-aversion where any statement against interest falls to be admitted in evidence, even where a defendant takes the decision not to give evidence (with all the adverse consequences). The Court asserted that the logical conclusion of the Applicant's argument was to "drive a coach and horses through Better Case Management". With the greatest of respect, Better Case Management is no more than a handbook by which it is intended to achieve procedural discipline; it enjoys no legal status beyond that and should not be referred to as though it does.

The Court continued to blur the distinction between the principles of case management and the rules of evidence by citing r25.9(2)(c) of the CrimPRs as support for the admissibility of confessions in a Defence Statement. The stated purpose of this provision is to "help the jurors to understand the case and resolve any issue in it".

The review of the Applicant's authorities concluded that none of them supported an argument that admissions in a Defence Statement can never be admissible. Whether that was, in fact, the Applicant's submission in this case is unclear.

Perhaps the most troubling aspect is the Court's interpretation of R v Sanghera ([2012] EWCA Crim 16). Giving the judgment of the court, Mr. Justice Cavanagh said "the Court in Sanghera was not saying that a part of a Defence Case Statement (sic) can never be admitted in evidence, if, for a particular reason, it is admissible as evidence." He went on to recite an excerpt from paragraph 51 of Sanghera as follows:

"All it can ever do is to refer to matters which may become the subject of evidence. Plainly there may be cases where a defence statement will refer to matters of which evidence may be admissible against one defendant but not another. In that case the judge will have to exercise his discretion under section 6E(4)(a) as to whether or not to direct that the jury be given copies of that statement."

Absent from this judgment was the preceding sentence from the same paragraph:

"But, it is to be noted that the paragraph confirms that the defence statement itself is not evidence."

In this case, the reference to a matter which was the subject of evidence (the identity of the assailant) was treated as direct, and conclusive, evidence of that

matter. The Court in Sanghera did not simply set out "a general proposition", but made clear the limitations of any assertion in a Defence Statement:

"Answers by a defendant in a police interview have an evidential value because they are statements by a defendant under caution. What is said in a defence statement is not any kind of evidence."

If the Court was under the impression that the objectives of Better Case Management will be well-served by defendants being advised that any statements against interest will become Prosecution evidence before they have decided whether to step into the witness box, disappointment may await.

By Rabah Kherbane

Smith & Ors

[2024] EWCA Crim 1040

Summary

*The Court of Appeal (Criminal Division) for the first time gave guidance on the interpretation of the new statutory offence of causing a public nuisance, under section 78 of the Police, Crime, Sentencing and Courts Act 2022 ("**s78**" and "**the Act**").*

Background

S78 of the Act came into force on 28 June 2022. On 3 July 2022, five Just Stop Oil protestors sought to highlight the climate emergency by invading the Silverstone Circuit at the British Grand Prix Formula One race. They were arrested. They were the first to be charged with an offence under S78 of the Act.

The protestors planned to trigger a "*red light*" in the race by climbing over the outer fence on the circuit. This would stop the race. The protestors would then sit on the track. The Silverstone Circuit was chosen by the protestors as, in their view, Formula One racing has a significant carbon footprint and its vehicles run on fossil fuels. The Silverstone Circuit was on private land. No member of the public was permitted entry on to the racetrack.

By chance, there had been a serious collision at the start of the first lap. This resulted in a red flag being activated before the protestors climbed the fence. The red flag required all drivers to slow down, not to overtake, and return to the pits. By the time the protestors reached the track, fifteen of the vehicles had passed, with two driving at slow speed further behind. The protestors were removed from the track within one minute by the race marshals, who were private employees at the Silverstone Circuit.

The prosecution case was that the protestors had caused a public nuisance. The prosecution alleged the protestors were reckless as to whether a section of the public would be caused physical harm. The prosecution asserted the "*section of the public*" concerned was constituted by the defendants themselves, the marshals who removed them from the track, and the drivers of the vehicles.

Submission of no case to answer

An offence under S78 is made out where a person's act (or omission) creates a risk of, or causes, serious harm "***to the public or a section of the public***." Serious harm is defined within the Act as including death, personal injury or disease, but also serious inconvenience or serious loss of amenity. The gravamen of the offence, as a "*public nuisance*", is that it must at least affect a "*section of the public*."

The offence may be committed by way of an intention to cause such a risk, or recklessness. In this case, the prosecution alleged the risk was created recklessly, and it was one of physical injury rather than any other limb of "*serious harm*."

At the close of the prosecution case, the Appellants argued:

- The definition of "*a section of the public*" for the previous common law offence of public nuisance in the House of Lords judgment in *R v Rimmington* [2006] 1 AC 459 applied. An essential element was whether the actions contemplated would cause common injury to a significant section of the public. This should be determined by both the quality and quantity of the individuals concerned.
- The defendants themselves could not be included in the "*section of the public*" calculus, as contended by the prosecution.
- As such, the persons affected in this case – race marshals and drivers – were individuals rather than a section of the public. For example, they had rights or privileges on the race track the public did not. The prosecution case must

therefore fail.

The judge refused the submission, finding there was sufficient evidence to constitute a "*section of the public*", including by reference to the risk caused to defendants themselves.

Appeal against conviction

On appeal, the Appellants argued the judge was wrong not to accede to the submission of no case to answer. The judge was also wrong not to provide further guidance to the jury in line with authorities cited by the Appellants on what constituted a section of the public. Altogether, the handful of marshals and two drivers that remained on the racetrack were not of sufficient quality or quantity to properly constitute a section of the public. Accordingly, the conviction was unsafe. The Appellants were granted leave by the Single Judge.

The CACD provided guidance on the statutory offence of public nuisance under S78 of the Act. The key points are as follows:

- It is necessary to distinguish a section of the public from a series of individuals: §51. Conduct specifically concerning individuals or a series of individuals will not be sufficient, even if repeated on a number of occasions. The important consideration is whether it can properly be said that the conduct is directed generally and collectively against a group of persons who can fairly be regarded as "*a section of the public*."
- There must be a focus on the "*risk of serious harm*" in those cases. This must be "*real, not fanciful*": §46. This has elevated the risk requirement under S78.
- The court agreed with the Appellants' arguments that the language of the section as a whole strongly pointed to its application being limited to an act where the accused causes the risk to persons other than themselves: §48. Circumstances where a defendant himself will be considered within the section of the public calculus will be rare and did not readily present themselves to the CACD. The prosecution was wrong to put the case on the basis the defendants caused a risk to themselves or each other as part of the "*section of the public*" calculus.
- It will be a question of fact in each case whether the body of persons within a larger group constitutes a "*section of the public*." In deciding that question, the status held by a particular person, or their reasons for being present, may be relevant considerations: §50.
- Where this is a matter in issue at trial, ideally the trial judge should direct the jury according to the above guidance, including relevant arguments on both sides.

On the facts, the CACD found that although the trial judge erred as above, the conviction was safe. The CACD took the view that in light of the strength of the prosecution case and the risk occasioned to the drivers and race marshals, the terms in which the judge directed the jury did not render the conviction unsafe: §57.

By Tayyiba Bajwa

R v Campbell

[2024] EWCA Crim 1036

Summary

The appellant's case came before the Court of Appeal as a result of a reference by the Criminal Cases Review Commission.

On 22 July 1990, two men were said to have attempted to rob an off licence shop. There was a struggle and it was said that the appellant fatally shot the owner of the shop. An eyewitness noted that the man who had shot the gun was wearing a specific baseball cap. On investigation (i) a baseball cap matching that description was found nearby and hair inside did not match the appellant or his co-defendant (S); (ii) a witness recalled the appellant having purchased such a cap eight days before the shooting and (iii) the appellant made various admissions in interview about the cap.

The appellant and S were charged with conspiracy to rob and murder. S pleaded guilty to conspiracy to rob; and following the trial, the appellant was found guilty on both counts, S was acquitted of murder.

Prior to trial, the appellant had been assessed by a forensic psychologist – Professor Gudjonsson. Agreed facts relating to the appellant's IQ and brain damage were put before the jury but the Professor's report was not before the jury. There was no evidence in relation to the reliability of admissions made in interview.

In 1994 the appellant appealed against conviction seeking leave to admit fresh evidence from a consultant psychologist who had conducted further tests and concluded that the appellant was "more vulnerable in the context of police

interviews than had been thought by the other experts". The Court of Appeal rejected the appeal and found that the fresh evidence was not admissible because (i) it could have been available at trial and (ii) the evidence amounted only to a "conceivable possibility" that the appellant may have been susceptible enough to influence to have agreed with what had been put to him and to say what he thought the police thought he should say.

Thereafter, following an application to the CCRC, in 2020 the CCRC obtained a further report from Professor Gudjonsson and from psychologist Dr Alison Beck and in reliance on that evidence referred the case to the Court of Appeal.

Counsel for Mr Campbell submitted 17 grounds of appeal. The Court of Appeal emphasised that in line with the Privy Council decision in *Ruhumatally v The State* [2024] UKPC 15 that "it is [...] an important part of the advocate's role to exercise judgment and discrimination in focusing on the arguable points, rather than obscuring them by a plethora of poor points and weak submissions." [§55]. The Court addressed a number of the grounds in short order finding that they were "without merit" as most were wholly or substantially based on jury points which were or could have been made to the jury at the trial.

In relation to the fresh evidence obtained by the CCRC which was the real focal point of the appeal, the Court of Appeal found that Professor Gudjonsson, who had provided a further report "went well beyond the proper ambit of his role" and "engaged in advocacy of the appellant's case". They further found that his "explanations for not having included certain matters in his 1991 report were, with respect, unconvincing". They interrogated his evidence in detail and concluded that they had "considerable reservations" about it, meaning that only limited weight was attached to it.

Rather more reliance was placed on the report of Dr Beck; the Court concluded that they accepted her evidence that "material is now available which is relevant both to the important issue of the reliability of the admissions made by the appellant and to the assessment of his oral evidence".

Notwithstanding that the Court of Appeal in 1994 had found that the prosecution case was a strong one and did not depend substantially on the applicant's confessions, the Court was troubled by the advances of the factors which may contribute to a false confession. The "principal reason for [the Court's] disquiet arises from the fact that the fresh evidence would provide a court with the benefit of much more information than was available at the trial about the appellant's mental state when he made his confessions". That information would have materially changed the conduct of the trial and they were unable to "say that the fresh evidence would make no different to the rulings [on admissibility of evidence] made by the judge". The appeal was therefore allowed.

Comment

The case warrants attention for two rather different reasons. First, the Court of Appeal has signalled a clear warning to advocates to be precise, focused, and rigorous in preparing grounds of appeal. It is apparent from the tone of the judgment that the Court was thoroughly unimpressed with sifting through 17 grounds of appeal only a few of which they considered to be meritorious. In those circumstances, the Court has made it clear that if counsel are not judicious in their selection of grounds, this may well obscure the good points from the bad and ultimately stand in the way of a successful appeal.

Separately, the Court has, albeit extremely reluctantly, agreed to set aside a conviction in circumstances where the scientific picture in relation to susceptibility to pressure and compliance has developed enormously. The Court was careful to grant the appeal on the narrowest possible basis to avoid opening floodgates and has also made it absolutely clear that it will set very little store by an expert who strays into "advocating" for a defendant and who cannot explain inconsistencies or lacunae in their own evidence consistently. Advocates be warned – select and instruct your experts with great care.

APPEALS BY WAY OF CASE STATED

By Omran Belhadi

Carlos Vilhete v Crown Prosecution Service [2024] EWHC 2171 (Admin)

Summary

The defendant was convicted by a Magistrates' Court of inflicting grievous bodily harm, contrary to s. 20 of the Offences Against the Person Act 1861, in a domestic context. He appealed to the Crown Court. His appeal was dismissed. He appealed to the High Court by way of case stated.

In the Crown Court the prosecution had applied to adduce statements made by the complainant on a 999 call and to attending police officers. The prosecution relied on the *res gestae* exception. That application was allowed.

The case was stated posing the following questions:

(1) Did the Learned Recorder err in not looking at the lack of efforts made by the prosecution to secure the attendance of the complainant since the magistrates' court trial?

(2) Did the Learned Recorder err in concluding that the Crown had properly considered if the complainant could or should be brought to court?

(3) Did the Learned Recorder err in admitting the evidence in the case having considered the authority of *Wills v Crown Prosecution Service* [2016] EWHC 3779 (Admin)?

(4) Did the Learned Recorder err in concluding that the inability of the defence to cross-examine the key prosecution witness would not render the defendant's trial unfair.

Decision

Mould J addressed questions 1 to 3 together. He held that *Wills v CPS* is a case with unusual facts. It is not to be read as authority for the principle that where no enquiries are made of a witness' refusal to attend, any application to adduce *res gestae* statements will be refused.

In *Wills v CPS*

> "the justices were simply in no position to consider that question [of *res gestae*] and made no attempt to seek the information which they needed in order to put themselves in a position to do so. Nor did the prosecution seek to assist them in obtaining that necessary information."

In the defendant's case, enquiries had been made. The OIC attempted to persuade the complainant to give oral evidence. He took evidence of her concerns and the effect a summons may have. Mould J found no fault in the Crown Court's approach. He also held that given the complainant's firm position by the time of the Magistrates' Court trial it was reasonable for them to assume that efforts to secure her attendance at the Crown Court would be fruitless.

With regards to question 4, Mould J emphasised that the Crown Court was best placed to assess all the circumstances. The High Court would only intervene if the Crown Court's decision was *Wednesbury* unreasonable. Reviewing *DPP v Barton* [2024] EWHC 1350 (Admin)[1], Mould J held that it was not uncommon for *res gestae to be used* in cases of domestic violence. Mould J relied on *DPP v Barton* to conclude that allowing the use of *res gestae* evidence in the "sensitive and specific context of domestic abuse will often not be unfair." He reviewed the Crown Court's approach and found no fault.

The appeal was dismissed.

Comment

Cases involving domestic violence are replete with factual disputes between prosecution witnesses or informants and defendants. A substantial body of case-law, best summarised in *DPP v Barton*, has developed which creates significant hurdles for defendants seeking to prevent use of *res gestae* evidence. These hurdles arise out of state policy to protect complainants and victims of domestic violence. Arguably, this policy stems from the state's obligation to ensure the proper investigation and prosecution of offences which may give rise to a breach of an individual's human rights.

This case does not establish any new principles. However, it serves to illustrate the limits of a case such as *Wills v CPS*. The latter was an exceptional case with unique facts. In *Wills v CPS* no efforts were made to ascertain the complainant's whereabouts or secure her attendance.

Applying the principles set out in the present case and *Wills v CPS*, it would appear that only a wholesale failure in enquiries will result in *res gestae* evidence not being admitted. However, each application turns on its own facts and caution should be exercised before relying on case-law as perfect analogies for a particular situation.

1 This case was covered in the June 2024 edition of the Criminal Appeals Bulletin

APPEALS AGAINST SENTENCE

By Daniella Waddoup

R v Smith

[2024] EWCA Crim 1183

Summary

This case concerned the proper approach to sentencing for historical sexual offences committed when the appellant was a child.

Aged 37, the appellant was tried and convicted on an indictment containing 12 counts of indecent assault under s.14 of the Sexual Offences Act 1956. The offences were committed over a number of years when he was aged 10-17, against two younger girls. He had not committed any further sexual offences thereafter. 25 years later, he was an adult *"living an apparently normal life"*; his victims, now themselves adult women, had sustained *"enduring harm from his actions as a boy"* ([22]).

In sentencing the appellant to seven years' imprisonment, the trial judge referred to current sentencing guidelines for equivalent offences, and went on to apply a discount for age and personal mitigation to a notional adult sentence.

The Court of Appeal (Singh LJ, May J and Griffiths J) allowed the appeal, substituting a sentence of four years' imprisonment. It was unfortunate that the judge had not been referred to the case of *Ahmed* [2023] EWCA Crim 281, which was *"essential reading"*, and which would have assisted him in the *"complex sentencing exercise"* he had to perform ([19] and [23]). Similarly unhelpful was the fact that counsel had not put before the judge detailed information about the available sentences for children at the relevant times.[2] The judge's approach thus revealed some of the errors in reasoning which the court in *Ahmed* sought conclusively to address, resulting in outcomes which were *"surprising"* and *"plainly excessive"* ([24]).

The primary problem was the failure to recognise that *"the passage of time does not alter the fact of the offender's young age at the time of the offending. It does not increase the culpability which he bore at that time"* (per Lord Burnett LCJ in *Ahmed* at [22]). Although the trial judge said he had in mind the age of the appellant at the time the offences were committed, there was *"little real consideration of what level of culpability should properly have been attributed, or what sentence a child of the age the appellant was then might have received"* ([24]).

Counts 1 to 8 took place when the appellant was aged 10-14. Had these offences stood alone, the youth court would not have referred the case to the Crown Court, with a referral order the most likely outcome.

Crucially, however, these offences did not stand alone: as demonstrated by the convictions on Counts 9 to 12, the appellant continued to offend against the second complainant over the next three to four years until he was 17. By this time, his level of culpability was far greater, both because he was older and because of the multiple occasions of abuse to which he had regularly subjected the complainant.

As set out in *Ahmed* at [30], the correct approach to offending which starts at a young age and continues over a number of years is to pass a sentence on the later offending which takes into account earlier offending, passing concurrent sentences for the earlier offences. It will also be necessary to consider the key principles applicable to child sentencing (of welfare and prevention of offending, as well as the need to consider emotional and developmental age and maturity) even if the Sentencing Council's guideline on sentencing children and young people had not been published at the time of the offending.

The correct approach in this case, therefore, was to pass a sentence of four years in respect of counts 9 to 12 and, as it was technically open to a youth court in 2001 to pass a short custodial sentence on a child of 14 convicted of an offence under s.14, to replace the sentences on each of Counts 1 to 8 with one of four months concurrent.

---

2 As was noted in *Ahmed* at [25], there is a section in *Current Sentencing Practice* where the editors provide a series of helpful tables showing what types of disposal would historically have been available for children of a specific age charged with sexual offences.

By Rabah Kherbane

R v Rennie-Nash

[2024] EWCA Crim 987

Summary

Background

The Appellants, self-representing, appealed against costs orders made against them following convictions in a seven-day trial at Lewes Crown Court. They were both protestors convicted of causing a public nuisance. They received community sentences. They were each ordered to pay £3,000 in costs to the prosecution within six months.

Under s. 18 of the Prosecution of Offences Act 1985, following a conviction in the Crown Court, the court may make an order for costs to be paid by the accused to the prosecutor as "*just and reasonable*."

Under the applicable Criminal Practice Direction at para. 3.4, "*Where the prosecutor makes an application for costs, the general rule is that the court must make an order if it is satisfied that the defendant can pay*."

Appeal

The Appellants were granted leave by the full court following a prior refusal by the Single Judge. The Appellants argued the costs ordered against them were excessive, principally because the judge had failed to give reasons for not considering their different means.

The first Appellant had a disposable income of only £150 a month. She noted the costs order should have been around £500 in total, repayable over 20 months. The second Appellant had a disposable income of £170 a month.

Allowing the appeals, the Court of Appeal (Criminal Division) held that:

- The amounts ordered by the judge were excessive, having regard to the means of the respective Appellants: §14.
- Each of the costs orders were reduced to £1,600, allowing two years for these to be paid: §15. The court had regard to a detailed assessment of each Appellant's income and outgoings to calculate what was fair and reasonable.
- In general terms, there is no principle of parity, each case is distinct and must have reference to the individual circumstances of the defendant concerned: §13.

Comment

Parties in the Crown Court should undertake a cautious approach to any application by the prosecution for costs. As much information as possible should be made available by a defendant. The purpose of the order is not to further punish a defendant, but only to order them to contribute what is reasonably within their means.

By Farrhat Arshad KC

R v Darren Hilling

[2024] EWCA Crim 1279

Out of time appeal against Imprisonment for Public Protection – sentence of "last but one resort" - Extended Sentence -

Summary

In 2011 the appellant was sentenced to Imprisonment for Public Protection for one offence of wounding with intent to cause GBH. The offence was committed with another and was described by the sentencing judge as, "a vicious and unprovoked attack involving torture."

At the time he was sentenced, the appellant was aged 21 and had 30 previous convictions for 69 offences. Of those, five involved violence: a battery committed when he was aged 14; an assault on a police officer, committed when he was 15; an assault occasioning actual bodily harm, committed when he was 16; a robbery and attempted robbery committed when he was just 17; and an assault on a police officer when he was 18. The longest custodial sentence to which he had been subject prior to the index offence, was one of 14 months in a young offender institution for a non-dwelling burglary.

The appeal required an extension of time of 13 years. That extension was granted by the Full Court. The appeal was allowed. In the CACD's view, whilst the sentencing judge had clearly been entitled to come to the view that the appellant posed a significant risk of causing serious harm from future offending (counsel did not argue otherwise), he had not given any reasons as to why an Extended Sentence would not adequately manage the appellant's risk. It was not clear that the judge had been referred to **Attorney-General's Reference (No 55 of 2008) [2008] EWCA Crim 2790; [2008] 2 Cr App R (S) 22**, where Lord Judge had emphasised that, following the amendments made to the indeterminate sentence regime by the

Criminal Justice and Immigration Act 2008, the IPP was a sentence of last but one resort. It should not be imposed if an Extended Sentence with, if necessary, the additional support of other orders, could achieve appropriate public protection against the risk posed by the individual offender.

In the CACD's view there was nothing in the judge's sentencing remarks to show that the sentencing judge had those principles in mind and that it was necessary for him to conclude that an Extended Sentence could not provide the appropriate degree of protection for the public. He certainly gave no reasons for reaching such a conclusion.

Given that the index offence was committed when the appellant had just turned 21 and was therefore still to mature; given that he was to serve a lengthy period in custody as an adult which was of an entirely different order from any previous custodial sentence which he had served; given that there was in his case no entrenched pattern of offences involving serious harm to the public prior to this offence; and given that the appellant was to undertake programmes whilst in custody followed by stringent release conditions including MAPPA referral, an Extended Sentence would have appropriately protected the public.

The CACD accordingly quashed the sentence of IPP and substituted an Extended Sentence of 12 years' imprisonment, comprising a custodial term of eight years and an extended licence period of four years, resulting in the appellant's immediate release.

Comment

Mr Hilling was represented by Hayley Douglas, instructed as fresh counsel by the Registrar. Mr Hilling's case is another example of the many IPP/DPP cases still remaining, where such a sentence should never have been imposed but where the sentence has never previously been challenged and where the minimum term has long since been and gone. In **Ellerton [2024] EWCA Crim 624**, an appeal against an IPP imposed in 2008 for manslaughter, although refusing the appeal, Lord Justice Edis nevertheless took the opportunity to make the following remarks about the plight of indeterminate sentence prisoners (at [13]):

"*This is a case in which the hopelessness which indeterminate detention, with the lack of any obvious route to release, is abundantly clear from the document which the applicant has submitted to this court. It is a matter of regret that Parliament has not taken the opportunity to remedy the injustices which Parliament has created by the passing of a statute in the form we have just described, and by its abolition prospectively only. There is nothing we can do about that, except to repeat observations which have been made in the past, that it is high time that legislative attention was given to this problem*."

ATTORNEY-GENERAL'S REFERENCE

By Omran Belhadi

R v Lewis White

[2024] EWCA Crim 1390

Summary

The offender pleaded guilty at the Magistrates' Court to offences of making indecent images of children, causing a child to engage in sexual activity and engaging in sexual communication with a child. He was committed to the Crown Court for sentence.

In total he was sentenced to two years imprisonment, suspended for two years with a number of requirements. He was 24 at the time of offending. He was of previous good character. The pre-sentence report disclosed that he had a "very troubled childhood." Both the author of the PSR and the Court of Appeal took the view he had a sexual interest in children. The author of the report concluded that while he presented a high risk of harm, it was manageable in the community. Since his arrest and before sentence, the offender took steps to seek assistance similar to what is offered in a sex offender programme.

The Attorney General applied for leave to refer as unduly lenient the total sentence imposed.

Decision

The Court agreed with the A-G's submissions. The Court took the view that the judge paid insufficient regard to the different types of offending and the aggravating features in the case. Whilst it was permissible sentencing practice to order that the sentences should run concurrently, that ought to have been on the basis that there would be a sentence on the lead offence that would reflect the totality of the offending. The sentence on the lead offence therefore required an uplift. At the invitation of Prosecution counsel, the Court carried out the sentencing exercise anew. The Court agreed that the eventual sentence should have been at or around three years' imprisonment. As such, it could not have been suspended. It was clear, however, that the sentencing judge was of the view that what was required for that particular offender was a rehabilitative sentence. The Court stated that there would be cases in which, whilst a moderate sentence would be appropriate, there was an alternative way of dealing with offenders. This was reflected in the Sentencing Council guidelines for sexual offences with these words:

> "Where there is sufficient prospect of rehabilitation, a community order with a sex offender treatment programme requirement can be a proper alternative to a short or moderate length custodial sentence."

The Court held that a three year sentence was a custodial sentence of "moderate length" [32].

The sentencing judge had clearly held the view that the protection of children was best achieved with rehabilitation rather than punishment. The Court agreed with the judge that the offender would greatly benefit from rehabilitation. Section 36 of the 1988 Act required the Court, where it found that the sentencing was unduly lenient, to quash any sentence passed, and in its place pass any sentence it thought appropriate for the offending, and as the court below had the power to pass. In almost every other circumstance that involved the Court imposing either a sentence of immediate custody or a longer sentence of custody. In this instance, however, the Court considered that whilst the sentence imposed by the judge was unduly lenient in terms of the length of the custodial term, it concluded that once the appropriate custodial term had been determined, the particular circumstances of this case meant that a community order was the better option. The Court therefore imposed a community order for three years with several requirements and imposed a fine of £250.

Comment

This is a rare example of the Court of Appeal imposing a lesser sentence once it concluded a sentence was unduly lenient.

Convictions for child sex offences, including indecent images, carry a particular stigma. A community order has clear benefits for rehabilitation because it carries a shorter period of rehabilitation under the Rehabilitation of Offenders Act 1974.

Section 5 of that Act provides for the rehabilitation periods. A community order is spent on the day the order is complete. A sentence of one year or less is spent a year after the licence period is completed. A sentence between one and four years is spent four years after the licence period is completed.

The case is useful authority for first time offenders who have pleaded guilty to child sex offences. It can be used in conjunction with other evidence supporting a submission that an offender is committed to

rehabilitation and committed an out of character offence.

By Daniella Waddoup

R v Cortez Watson-Berry

[2024] EWCA Crim 1098

Summary

This was an application for leave to refer the offender's sentence for review on the grounds of undue leniency.

The offender had committed serious offences aged 17 and 18, for which he received a total sentence of three years and nine months' detention in a young offender institution.

The offences were committed on three separate occasions over a period of around five months:

- The "Basildon offence", involving a guilty plea to possession of a knife (an attempted murder charge was not pursued in the light of the offender's account that the serious injuries inflicted with the knife were in defence of himself and his mother). The offender was 17 years and eight months old at the time.
- The "October robbery", committed six months after the offender's eighteenth birthday and just three months after the guilty plea to the Basildon offence. The offender and two others attacked a young man, repeatedly punching and kicking him, including punching him to the head, and robbed him of an expensive coat and £600 in cash.
- The "November offences", less than two weeks later. The offender responded to a Snapchat advert and arranged to meet the victim, purportedly to buy two expensive electrical bikes. The victim and his stepfather were met by the offender and the same two co-offenders from the October robbery. One of them held a machete against the throat of the stepfather, whilst the offender held an imitation firearm against the victim's stomach. The third man also brandished a machete and threatened to kill the victim, saying he had killed before. The offenders took the bikes and fled on them.

The offender was convicted of all charges relating to the October and November offences (2 x robbery, 2 x possession of a bladed article and 1 x possession of an imitation firearm at the time of committing an indictable offence). Before these offences, he had been of previous good character.

The trial judge treated the November robbery as the lead offence (imposing three years and nine months for the robbery and concurrent sentences of two years for the firearms offence and six months for each of the bladed article offences) and imposed concurrent sentences for all the other offences (two years for the October robbery and a detention and training order of four months for the Basildon offence).

The Court of Appeal (Holroyde LJ, Holgate J and Andrew Baker J) quashed the sentence as unduly lenient and substituted a sentence of six years' detention in a young offender institution.

As had been recently observed in *R v ZA* [2023] EWCA Crim 596, [2023] 2 Cr App R (S) 45, the sentencing of children and young persons is *"invariably complex and difficult"* ([23]). The judge was correct to sentence on the basis that the offender had not become a fully mature adult on his eighteenth birthday. It was a *"sad feature"* of the case that in family or employment settings, the offender appeared to be a *"caring, thoughtful and industrious young man"* ([23]). But when in the company of his peers, he had shown himself capable of committing very serious crimes.

Although reluctant to interfere with the trial judge's judgment as to the appropriate total sentence, the Court felt compelled to do so. The imposition of concurrent sentences was not wrong in principle, but the lead offence failed to reflect the overall criminality of the serious offences committed on separate occasions.

Each of the two robbery offences required an upward adjustment from the guideline starting point to reflect the aggravating features rightly identified by the judge and the fact that the offender was on bail at the time of those offences. Making every allowance for totality, the least total sentence which would be appropriate for a mature adult would be of the order of 11 years' imprisonment. The personal mitigation was substantial, and a further significant reduction had to be made to reflect the offender's youth. But even giving *"as much weight as [the Court] could to those matters"* ([28]), the total sentence could not properly be less than six years' detention.

Although the offender could properly be regarded as dangerous for sentencing purposes, an extended sentence was not necessary. The Court considered it important to take into account the fact that the offender had no previous involvement in the criminal justice system and no previous experience of custody. There was a *"realistic prospect of maturation"* during his sentence, particularly in the light of his family support ([32]). The increased custodial term provided sufficient protection for the public.

CONTRIBUTORS TO THE DECEMBER EDITION

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

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

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

Amanda Clift-Matthews specialises in crime and human rights. She undertakes cases before the UK appellate courts and the Judicial Committee of the Privy Council. She has a particular interest in Caribbean cases and has extensive appellate experience in those jurisdictions. Many of her appeals have resulted in landmark decisions.

Rabah Kherbane practises in all areas of public law, terrorism and homicide cases, sanctions, criminal appeals, public international law, asset recovery, and media cases. He is a specialist in terrorism and national security issues across these areas of practice. He is regularly instructed to advise on fresh appeals against conviction (including CCRC referrals) and sentence. He also has experience in appeals in the Privy Council and the European Court of Human Rights.

Sarah Vine KC is a criminal practitioner, specialising in business crime and homicide. She is widely recognised as a leading expert in cases involving allegations of sexual offending, and has a busy appellate practice. She advises individual and corporate clients on matters ranging from the use of investigatory powers to reputation management and pre-charge strategy.

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 Lord Mance JSC and is regularly instructed in appeals to the Privy Council by the Death Penalty Project. She is a contributing author to the third edition of *Taylor on Criminal Appeals*. Legal 500 (2022) describes Daniella as "intellectually considered and hard working with a brilliant mind".