# CRIMINAL APPEALS BULLETIN
## NOVEMBER 2025


**Address**
54 Doughty Street
London, WC1N 2LS

**Follow Us**
Bluesky: @doughtystcrime.bsky.social

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

**Farrhat Arshad KC**

Head of the Doughty Street Criminal Appeals Unit

## Welcome

Welcome to the November 2025 issue of the Criminal Appeals Bulletin. Thank you to Emma Goodall KC for editing the September 2025 issue.

In this issue, Emma writes about consent and what vitiates consent in **BVA**, pointing out that the case-law is not necessarily entirely consistent on this topic. Peter Wilcock KC wites about the consequences of a failure to give an undertaking before a Prosecution Appeal in **AWY**, David Bentley KC writes about bad character triggered by counsel's cross-examination of a co-defendant in his case of **Al-Shumari** and I write about fresh evidence available but not called at trial in **HCF** and about the Supreme Court's reversal of the Court of Appeal's decision in **Layden**, re the effect of the failure to arraign a defendant in a re-trial within the two month time limit imposed by the Court of Appeal.

Unusually for the Bulletin, we cover an appeal case from the Court of Appeal of Trinidad and Tobago – **A-G v Jason Jones**. Amanda Clift-Matthews writes about the Appeal Court's important decision in respect of offences criminalising same sex sexual activity. The case is due before the Privy Council next year. Jacob Bindman writes about contempt of court and s. 20 of the Juries Act in **Szobollodi**, Natalie Lucas considers the admissibility of body worn footage as the main evidence in domestic violence cases in **Danilowski**, and judicial interventions and their effect on the safety of a conviction are the subject matter of **Mathurin** by Violet Smart, who also writes about the section 45 Modern Slavery Act 2015 defence versus the defence of duress in **Baniulyte**.

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.

We hope you enjoy this issue of the Bulletin.

Farrhat Arshad KC
Head of the DSC Criminal Appeals Unit

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# CASE SUMMARIES AND COMMENTARY

## APPEALS AGAINST CONVICTION

By Emma Goodall KC

### *R v BVA* [2025] EWCA Crim 1359

This was an appeal against a conviction for sexual assault contrary to section 3 of the Sexual Offences Act 2003. A ninety second recording was retrieved from the appellant's mobile phone. The footage showed the complainant, with whom the appellant had a sexual relationship, apparently asleep, with her top half exposed. The appellant was touching her breasts and resting his penis on her hand. It was the defence case that the complainant was aware of the appellant's fetish for "sleep play" and gave consent to both the sexual activity and it being filmed. The prosecution conceded that although the complainant may have allowed the appellant to touch her in a sexual manner while she slept, she would not have done so had she known it was being recorded. As the filming was integral to the sexual activity the non-disclosure negated her consent.

The appellant contended that the judge should have ruled, as a matter of law, that the filming was not capable of negating consent to the sexual touching as it was a separate act. It was common ground that the appeal turned upon the application of the definition of consent within section 74 of the SOA 2003 and did not engage the presumptions in either section 75 or 76 of the SOA 2003.

### CACD Decision

The CACD acknowledged that the facts of the case gave rise to novel circumstances which had not previously been addressed. After reviewing the authorities four basic propositions were identified [46]

i) there is no material difference for present purposes between an express deception or, as here, a failure to disclose;

ii) the "but for" test is insufficient of itself to vitiate consent;

iii) consent is capable of being negated as a matter of law if the deception (or failure to disclose) relates to the sexual activity itself rather than the broad circumstances surrounding it. The issue is whether the relevant matter was sufficiently closely connected to the sexual activity (by reference to its nature, purpose and performance), rather than the broad circumstances surrounding it;

iv) broad common sense has a role to play in finding the answer but does not relieve a court from the obligation of identifying the boundaries within which a jury should be asked to bear its common sense. So, a vitiating deception is not limited to the strict (narrow) physical performance of the act.

The CACD held that the trial judge was right to conclude that the filming was sufficiently closely connected to the sexual touching that a failure to disclose it was capable in law of negating consent. On the facts, the filming was temporally and proximally connected to the touching and was also integral to the sexual touching. If not the sole purpose, then the filming of the sexual activity was a central purpose of the sexual touching. The appellant had created a pornographic video for his immediate and potential future sexual gratification (and potentially the gratification of others). It transformed what might otherwise have been a transient sexual touching into a permanent medium that could be watched in the future. Using the terminology of section 74, non-disclosure deprived the complainant of the freedom to make the relevant choice. That conclusion also accorded with a broad common sense (yet principled) approach to the facts.

### Comment

The CACD acknowledged that the authorities on section 74 of the SOA 2003 are not always easy to reconcile, and there may be no bright lines to draw. The decision adopts the "close connection" framework found in the authorities [*R(Monica) v DPP* [2018] EWCH 3505 (undercover police officer); *R Lawrence (Jason)* [2020] EWCA Crim 971 (lie as to vasectomy)]. The court were unpersuaded that the existence and availability of an alternative lesser

offence of voyeurism altered their analysis.

In our digital age it is perhaps surprising that the interplay of consent and the recording of sexual acts has not previously been litigated. This authority provides precedent for a covert recording being capable of transforming the nature and validity of consent to a sexual act. However, it was emphasised that the conclusion in this case was reached on the specific facts. Failing to disclose filming that is incidental to or no more than a background circumstance, whilst an aggravating factor, may not of itself vitiate consent [54] which leaves scope for further litigation.

By David Bentley KC

***R v Nasir Al-Shumari* [2025] EWCA Crim 1317**

**Introduction**

This case involved a bad character application made by one D against another in the context of a "cut throat" defence, and looked at the operation of **section 101(1)(e) CJA 2003**.

**Brief facts**

NAS (then aged 16) was one of six defendants tried on an indictment alleging murder on V1 and Attempted Murder/GBH with intent on V2. This related to a stabbing incident in the Piccadilly Basin in central Manchester. P's case was that NAS and his co-defendants were jointly responsible for attacking and stabbing V1 & V2. There was some evidence from V2 that NAS was, at the relevant time, wielding a flick-knife, though he did not see him using it.

NAS denied possession of any knife, and asserted that his only involvement was to try to break up a fight. He did not stab anyone, nor did he see anyone else with a knife and/or stabbing anyone.

NAS was convicted of the murder of V1 and of s18 in relation to V2.

**The bad character application**

D2 gave evidence before NAS. D2 asserted that he saw D1 being attacked (having heard him shout for help) and ran to stop the fight. He denied having a knife. He stated that he saw NAS fighting with V1, although he made no reference to seeing him with a knife.

D2 was then cross-examined on behalf of NAS. Not only was the suggestion that NAS had been "fighting" challenged, but counsel for NAS also suggested that D2 was lying to cover up the fact that he had stabbed V2 and "probably" also V1. This was not on instructions (it not being NAS's evidence that D2 had a knife or stabbed anyone), but was founded on an earlier account from V2.

At the conclusion of NAS's EIC, D2 applied to adduce bad character evidence against him – arguing that NAS had (through his counsel's XX) mounted a direct attack on him in relation to an important matter in issue, namely who carried a knife and stabbed the deceased.

The BC material in question consisted principally of two allegations contained in crime reports and an Instagram exchange relating to knives. It was argued by D2 that these matters had substantial probative value as it supported the proposition that NAS was willing to associate himself with, carry knives and to supply them to others. (NAS had no criminal convictions or warnings recorded against him).

Despite opposition (based both on lateness of the application and on failure to satisfy the substantial probative value test), the judge allowed XX to take place on three matters:

(i) A Crime Report entry stating that (three years earlier) NAS took an 8 inch bread knife into school, and had told a teacher this was for self-protection against a fellow pupil;

(ii) A further Crime Report (a month later) stating that NAS had told a teacher that he was going to go round to another pupil's home address and stab him;

(iii) An Instagram message between NAS and another co-D (some 3 months after the index offence) where NAS offered to help that co-D to buy a knife.

Objection was first based on the breach of r21.4(4) CPR 2020, which required an application to admit BC evidence to be made by written notice as soon as is reasonably practical and in any event not more than 10 days after the BC material had been disclosed. The "cut throat" had been clear from the time NAS's counsel had XX'd D2, and waiting until NAS had concluded his evidence in chief before making the application amounted to an "ambush".

Further, the entries in the two crime reports were hearsay, and lacked "substantial probative value". The case of ***R v Braithwaite*** **[2010] EWCA(Crim) 1082** was cited as to the limitations on relying on entries in crime reports to establish BC.

The judge having ruled as he did, these matters were put to NAS in subsequent XX by D2. NAS accepted (i). As to (ii) he said that "I don't remember saying that." As to (iii) he again said he could not remember the exchange but accepted that the exchange took place as a screen shot of it was exhibited.

There were no agreed facts in relation to (i) & (ii), and so the suggestion that NAS had threatened to stab a fellow pupil remained unadopted and lacked any evidential value.

In summing up, the judge only referred to matters (i) and (iii), and directed the jury (with P's agreement) that they could only be used by the jury in support of D2's case, but that they could not be used as evidence against NAS in support of P's case against him.

**The CA judgment**

The single ground of appeal for the CA to consider was whether the trial judge had erred in allowing XX to take place on the BC material, and whether the convictions were as a result rendered unsafe. (Given the high bar to refusing a BC application due to a procedural failure (absent bad faith), the breach of r21.4 was not pursued). The challenge to the judge's decision under s101(1)(e) was that he was wrong to treat each item of BC evidence as having substantial probative value in relation to who out of D2 and NAS was carrying a knife and did the stabbing. The alleged threat to stab a fellow pupil was not adopted in XX – nor was a direction given to the jury to ignore it as questions from counsel are not to be equated with evidence. As to the breadknife matter, NAS should not have been put in a position of having to answer questions based only on a crime report entry. Further, this matter failed to establish a propensity to carry knives, and thus lacked probative value. As to the Instagram exchange, at its highest all it suggested was that NAS was prepared to help someone else obtain a knife but not that he himself would carry one.

The CA found the convictions to be safe, and dismissed the appeal. They distinguished the facts as being "very different" from those that had arisen in Braithwaite. Here the first crime report recorded NAS's acceptance that he brough a knife to school for self-protection. The second crime report (relating to a threat to stab a fellow pupil) was said to a named teacher and the matter was dealt with by the school and a safeguarding team. Taking the three items together, the CA found that the judge was entitled to find they had substantial probative value, and were capable of showing a propensity on NAS's part to carry knives. That decision was not Wednesbury unreasonable. Finding the question of whether the judge should have allowed XX to be "fact sensitive", when NAS's counsel had stated that there would be no agreed facts , the Court levelled no criticism at the judge. They noted that the XX was "limited in duration and scope". The Court further noted that the judge had unambiguously directed the jury that they should ignore it in relation to whether P could prove their case.

**Comment**

The author was brought in to conduct this appeal after NAS had lost confidence in the legal team who represented him at trial.

By that time, trial counsel had drafted (unperfected) grounds and permission had been given by the Single Judge to appeal against conviction based on the single ground outlined above.

Despite dismissing the appeal, the Court did opine that it would have been "preferable" had the judge given a direction to the jury immediately following the XX that there was no evidence to support the stabbing threat allegation, and that they should therefore ignore it.

The Court went on to say that had the application by D2 been made solely on the two BC matters which NAS accepted "we doubt whether it would have been granted."

The reader will form his or her own judgement, but it may be thought that the above comment itself might have been enough to render the convictions unsafe, and doesn't sit well with the rest of the judgment.

Ultimately however, this case does not establish any

new legal principles, but is a useful example of how serious problems can arise in multi-handed trials where cut throat defences are being run. It also serves as a reminder that if counsel choose to put damaging propositions to a co-D in XX (even where their client's own evidence does not support such propositions), then they open the door to a bad character application being made against their own client.

Lastly, this case is of some factual complexity, so the reader is invited to read the judgment in full to get a comprehensive understanding of how the issues arose and evolved.

By Farrhat Arshad KC

***R v HCF* [2022] EWCA Crim 917**

Whilst this case was decided in 2022 it was only reported recently after no evidence was offered by the Prosecution. The Applicant had been convicted of a number of offences of common assault and one offence of sexual assault against his wife. Their 12 year old daughter, H, had been called as a witness for the Prosecution and gave evidence of a toxic atmosphere and outbursts of physical and sexual assault by her father against her mother. The Appeal was brought on the basis of fresh evidence of H's previous inconsistent statements, namely a number of audio recordings of H telling the applicant that she had never witnessed the applicant physically or sexually abuse her mother and that her mother "exaggerated" matters.

This material had been available at trial but had not been deployed due, the CACD found, to a misunderstanding by trial counsel. Trial counsel had drafted a number of questions about the recordings in readiness for the Ground Rules Hearing. Following submissions made by Prosecution counsel, the judge commented that she would need some persuasion that the audio taped transcriptions were admissible and made comments that they were "highly improper" and "abusive of the child". She went on to say that she was not at present convinced that they were admissible and there would need to be proper argument if it was to be pursued. No argument was subsequently made and the recordings were not adduced nor questions asked about what the child had said in the recordings. Trial counsel's McCook response set out that he (and his instructing solicitor and the applicant himself) had not heard the trial judge say that there would need to be proper argument. The hearing had been conducted over the CVP link which might be why this had not been heard. He had merely heard that the trial judge was not convinced that the recordings were admissible at all and understood that she had made a ruling to that effect.

The CACD had regard to the factors set out at (a) to (d) of section 23(2) of the Criminal Appeal Act 1968 and in relation to (d) found that there was a reasonable explanation for the failure to adduce the evidence in the proceedings. It was not unknown for there to be poor transmission and distortion on the link. In the Court's view it was clear that trial counsel proceeded under a genuine misapprehension and this was not a case where he thought better of his view at trial or another counsel taking on the case formed a different view. In relation to (a) to (c), the CACD was of the view that the evidence was capable of belief, was "clearly" admissible and did afford a ground for allowing the appeal. The conviction was unsafe and there would be a re-trial despite the age of the case and the fact that the applicant had served the community penalty. (Subsequently the Prosecution offered no evidence).

**Comment**

Trial counsel questioned the accuracy of the transcript which set out that the judge had not made a final ruling, but in the CACD's view, given that trial counsel had proceeded under a genuine misapprehension that the judge had ruled against the admissibility of the recordings, it was not proportionate to enquire into the accuracy of the transcript. Given that counsel had only "proceeded under a misapprehension" if the transcript was correct, this is a somewhat circular argument. Nevertheless, the CACD was clearly of the view that the fresh evidence ought to have been deployed at trial and would have been but for trial counsel's view (whether erroneous or not) that he was not permitted to adduce that evidence. A warning to all who attend over CVP and perhaps a reminder that where important rulings are made, written reasons should be requested of the judge as soon as possible. This case is also a useful reminder that the factors in 23(2)(a) to (d) CAA 1968 are considerations to which the Court must have regard rather than criteria which must all be answered in the affirmative before the fresh evidence can be adduced: *The answer to these questions are not determinative of any application but may well inform the decision as to whether to admit fresh evidence* [para 23]. That statement of the CACD's is a welcome corrective to a number of judgments where

the considerations have been treated as criteria to be met.

### *R v Layden* [2025] UKSC 12

This was an appeal to the Supreme Court by the Prosecution, following the Court of Appeal's decision in ***R v Layden* [2023] EWCA Crim 1207**. There the CACD had quashed L's conviction for murder and held that upon the ordering of a re-trial, where a defendant was not re-arraigned within the two month time time-period directed by the CACD and where no application for an extension had been made to the CACD, the Crown Court had no jurisdiction to hold a re-trial. Having so held, the CACD certified a point of law of general importance and the Supreme Court gave leave to appeal.

The CACD had found that the Crown Court only had jurisdiction to conduct a re-trial as a result of an order under section 7 of the Criminal Appeal Act 1968, and Parliament had made that jurisdiction contingent on the fulfilment of the supplemental requirements of section 8. In the event of such procedural failure, it found that Parliament had intended total invalidity of the Crown Court proceedings.

The Supreme Court allowed the appeal. The decision required a close analysis of the history, meaning and purpose behind sections 7 and 8 of the Criminal Appeal Act 1968. The SC held that a failure to comply with the procedural requirements in section 8(1) CAA 1968 (in this instance to re-arraign the defendant within two months) did not deprive the Crown Court of jurisdiction to re-try a defendant following an order of the Court of Appeal for retrial under section 7(1) CAA 1968. Parliament had not intended total invalidity. The SC considered the alternative to total invalidity: where there had been conviction on the re-trial but no arraignment before re-trial (as in this case), or a late arraignment without leave of the Court of Appeal (as in ***Llewellyn* [2022] EWCA Crim 154**), the defendant had the right to appeal against conviction. Pursuant to s.2 CAA 1968, such an appeal would be allowed if the conviction was unsafe. In the SC's view, it would be a good ground of appeal if it could be shown that, had an application been made under section 8 before the re-trial, leave to arraign would have been refused and the order for re-trial set aside: "A conviction is obviously unsafe if it results from a re-trial that should never have taken place." [79] The Prosecution accepted this would be a good ground of appeal. In such an appeal against conviction, "the question of whether there should be a re-trial in the light of procedural non-compliance would be determined by the Court of Appeal and by reference to the statutory criteria. Such a hypothetical application should be determined on the basis that it was made immediately before the commencement of the re-trial. This would be to the advantage of the defendant since it would involve the maximum possible period of time over which there might be prosecutorial delay and the maximum lapse of time since the order for re-trial." [81]

In the SC's view, adopting this approach afforded a defendant significant protections in the event of non-compliance with the section 8 requirements: (1) The defendant had the right to apply to set aside the order for re-trial under s.8(1A); (2) If, for whatever reason, this right was not exercised, and he was convicted after the re-trial, the defendant had the right to appeal that conviction on the grounds that had a s.8 application been made the order for re-trial would have been set aside; (3) That issue was to be determined on the basis of the position immediately before re-trial, which was to the maximum advantage of the defendant.

This alternative to total invalidity undermined the foundational reasoning of the Court of Appeal in *Llewellyn*. The section 8 procedure would not be avoided or neutered and the defendant's section 8 protections would not be lost. As such, "it is difficult to discern any good reason why Parliament should have intended total invalidity." [83] The SC overruled the CACD's decision in *Llewellyn* and concluded that a failure to comply with the procedural requirements in s.8(1) of the 1968 Act did not deprive the Crown Court of jurisdiction to re-try a defendant notwithstanding an order of the Court of Appeal under s.7(1) of the 1968 Act. The respondent's conviction on the count of murder was restored.

By Violet Smart

### *R v Andre Mathurin*

*Judicial intervention – safety of conviction – cross examination – excessive questioning*

The defence appealed the safety of the defendant's conviction based on the manner and terms of the questions asked in intervention by the judge, during

the Crown's cross examination of him.

The appellant was convicted of an offence of supplying a drug of Class A to another. The facts, in brief, are as follows: On 26th October 2023, police officers were preparing to execute a warrant at a property owned by a Mr Banda. Before this was done, the appellant pulled up in the car park outside the property and Mr Banda was seen to cycle over and speak to him. Shortly after, the appellant got out of his van carrying a bag and entered Mr Banda's flat. When he came out, he no longer had the bag. He then drove away. Around an hour later, the warrant was executed and a bag matching the one the appellant had taken in was found. It contained just under 1kg of heroin. While the police were still in the property, around an hour later, the appellant returned but was greeted at the door by a plainclothes police officer rather than Mr Banda. He ran off. The Crown's case was that the appellant had conveyed the heroin to Mr Banda at his flat. The defence case was that the appellant had gone to the flat to drop off a charger and tools rather than any drugs.

Much of the prosecution case was adduced by way of agreed facts. The only live witnesses to be called at trial were the officer in the case, and the appellant himself.

On appeal, the appellant argued that during the course of his cross examination, the judge's several interventions amounted to testing the appellant's evidence, rather than merely clarifying and in so doing he had gone beyond his role as a "neutral umpire". There were instances throughout the transcript where prosecution counsel had taken up a line of questioning initiated by the judge.

The court considered the case of *R v Inns* [2018] EWCA Crim 1081; (2019) 1 Cr App R 5, at paragraph 13 of the judgment, and adopted the six fundamental principles set out therein: (1) the jury is the tribunal of fact (2) the judge's role is that of neutral umpire (3) a judge is perfectly entitled to ask questions to assist the jury (4) the prosecution must prove its case and it is for them to cross-examine the witness (5) the defendant should be allowed to give his account to the jury in the way they would like to and (6) this is not impacted where a defence account seems implausible or fanciful.

The Court of Appeal, in granting the appeal and quashing the conviction, held that, "Unhappily on a number of occasions he [the judge] asked questions which were not clarification of anything said by the appellant. Nor could they be said to be clarification of what might have struck the judge as being an omission by oversight of something the appellant had intended to say. Rather, they were in the nature of testing the appellant's account in a manner which pointed out weakness in it" [para 25]. In the CACD's view, whether or not the points raised by the judge were ones that would in any event have been raised by the Prosecution was not to the point; it was the judge who in fact raised them, and did so in a manner which would have left the jury with the impression that he was sceptical about the appellant's defence. That was an impermissible entry into the arena, giving to the jury the appearance that the judge was taking sides. The defence was significantly weakened by the inappropriate interventions of the judge and as such the conviction was unsafe. A re-trial was ordered.

**Comment**

When a judge has inappropriately 'entered the arena' to such an extent as to suggest to the jury that they are taking a side, the conviction is unlikely to be safe irrespective of an evidentially strong case against the defendant. It is for the prosecution to prove the case that they bring and it will always be inappropriate for a judge to take on the function of cross-examining the defendant. It is therefore important to be mindful of judicial intervention and to raise the matter in a timely fashion, where it is obvious there is need to do so. Of course, there will also be many instances where a judge's questions are perfectly permissible and helpful for the jury. The six 'fundamental principles' as set out in the case of *Inns* provides helpful guidance for advocates when considering what constitutes acceptable, helpful intervention.

### *R v Baniulyte* [2025] EWCA Crim 1205

*s45 Modern Slavery Act 2015 defence – duress – fresh evidence – extension of time -*

The applicant had, in 2021, been sent to the Crown Court for trial on charges of two offences of possessing a Class A drug with intent and two offences of being concerned in the supply of a Class A drug. She had been seen by police supplying three wraps of class A drugs to a known user and found to be in possession of

additional wraps of heroin and cash, as well as further wraps of both heroin (22) and cocaine (40) having been found alongside her belongings.

At the time of charge, the applicant had two pre-existing convictions for possession with intent to supply cocaine and heroin when she was 19, which dated back to 2014.

The BCM form listed both that she was potentially a victim of modern slavery and that there was a potential duress defence. At the Crown Court, the applicant's defence statement set out that she had acted under duress – she was a drug user, in debt and believed that threats against her and her family would be carried out if she did not supply drugs to pay off the debt.

The applicant stood trial in 2022. The prosecution alleged that she was knowingly involved in the supply of class A drugs. The two previous convictions from 2019 were admitted as bad character under gateway (d) (propensity). The defence relied on the defence of duress, rather than the statutory defence under s45 of the Modern Slavery Act 2015. The applicant's case was that she feared death or serious injury to herself, her mother or sister if she did not carry out the drug supply as directed. She gave evidence that she had been threatened and sexually abused by the men directing her.

The jury was directed in relation to the defence of duress and the burden on the prosecution to disprove it. They returned verdicts of guilty on all counts. No appeal was brought at the time of conviction, and the applicant later sought an extension of time of roughly 2 years, having instructed fresh legal representatives (it was noted by the court that there was a lack of sufficient explanation for the reasons the applicant had not sought to appeal immediately following the conviction but the extension was granted as "the merits of her appeal [were] sufficiently strong to justify our granting the necessary extension of time" [para 66].)

The grounds of appeal, as set out at paragraph 25, were that: (1) there had been clear indicators of the applicant's status as a VMS but the police failed to refer her to the NRM, (2) the CPS had not reviewed the public interest in continuing to prosecute her, (3) the prosecution was an abuse of process, (4) the s45 defence would likely have succeeded if advanced at trial, (5) the judge's directions on bad character were insufficient and wrong.

The Crown conceded that there had been failures by both the police and the CPS as per grounds 1 and 2, but contended that in relation to any abuse, this would not have succeeded as the errors could have been corrected at the time, and in any event, had the case been reviewed it was not inevitable that the prosecution would not have proceeded. They accepted the distinction between the defences of duress and the statutory defence under s45 MSA and the fact that a failed duress defence does not necessarily mean that a MSA defence could not have succeeded.

The CACD considered the authorities [71-73], outlining that any abuse argument post the 2015 Act would have to be made on the basis of "unfairness, oppression and illegality, consistent with the conventional limb 2 type of abuse" (*R v AAD* [2022] EWCA Crim 106). Ultimately, the Court agreed with the respondent that there was no guarantee an abuse application would have succeeded as the court would have been entitled to adjourn the application for the police and CPS to belatedly comply with their duties [75].

Nonetheless, the Court found that the strength of the applicant's case lay in the combination of grounds 1, 2 and 4. The fact of the CPS/ police's failures to investigate the applicant's status as a potential modern slave meant that the defence would not be considered by the court unless raised by the applicant at trial. Whilst trial counsel's decision to focus only on duress may have been an understandable one, the key point, in the CACD's view, was that it was not a decision taken by the applicant. She had not been advised on the possibility of advancing the s45 defence, notwithstanding the issue of modern slavery having been raised on the BCM form and it appearing that she would have had detailed instructions to give at the time. Trial counsel's acceptance that such advice had not been given allowed the CACD to accept that the appeal was not an attempt by the applicant to put forward on appeal a defence which she had chosen not to rely on at trial. The CACD regarded this as a very important point. The failure to advise had the effect of denying the applicant the opportunity to put forward a defence which quite probably would

have succeeded and the applicant "thereby suffered a clear injustice" [para 82].

By Natalie Lucas

### *R v Danilowski* [2025] EWCA Crim 1279

This appeal concerned the admissibility of body-worn video ("BWV") evidence as *res gestae* in a domestic abuse context, and the proper approach to s.78 PACE in respect of such evidence.

The appellant had been convicted of intentional strangulation of his domestic partner, contrary to s.75A Serious Crime Act 2015. The prosecution's central evidence consisted of BWV recording the complainant's immediate account to police in a distressed condition shortly after the incident. The complainant did not make a witness statement and was not called at trial.

The Court of Appeal dismissed the appeal, affirming the admissibility of the BWV *as res gestae* and the recorder's refusal to exclude the evidence under s.78 PACE.

**Decision**

*Res Gestae – Admissibility*

The Appellant argued that the complainant's account was unreliable, distorted by intoxication, and improperly prompted by police questioning.

The Court rejected these arguments. It concluded:

- The complainant was visibly distressed, breathless, partially undressed and climbing out of a window moments after the altercation—this behaviour was strongly indicative of an event occurring in close temporal proximity.
- The complainant's gestures and verbal responses (including demonstrating strangulation with "two hands") were instinctive and not the product of reflective thought.
- Police questions were posed as confirmation of what she had physically demonstrated; the complainant added detail unprompted.

The Court endorsed the recorder's assessment that the complainant was "*so emotionally overpowered by the event that the possibility of concoction or distortion could be disregarded*."

In coming to its decision, the Court considered ***DPP v Barton*** **[2024] EWHC 1350 (Admin)** and emphasised the important role evidence of this nature can play in cases of domestic violence. The Court observed: "*the fact the complainant does not support the prosecution should not be viewed as an insurmountable obstacle in most cases, and the question of whether it will be fair to proceed without calling the complainant will depend upon the circumstances of the individual case and on the strength of the available evidence."*

The Court agreed that *Barton* had not changed the law on *res gestae* evidence. However, it rejected the Appellant's argument that *Barton* was a case confined to its own facts. Instead, the Court clarified that in cases where the complainant is "unwilling or unable" to give evidence, *res gestae* evidence may be admissible.

*Section 78 PACE*

The recorder refused to exclude the BWV evidence, finding that any prejudice could be addressed by the jury's direct assessment of the footage. The Court agreed, noting that the BWV provided an unfiltered record of the complainant's demeanour and account. The defence remained free to challenge reliability based on intoxication or misunderstanding through submissions. Similarly, the Appellant had the choice of providing his own account as to what had occurred. Accordingly, the Court agreed with the recorder that the absence of the complainant did not create unfairness justifying exclusion.

**Comment**

This decision confirms and strengthens the significant evidential role which BWV *res gestae* statements can play in domestic abuse prosecutions. Several observations can be made regarding *res gestae* evidence in such circumstances in light of this appeal and the earlier *Barton* case:

- *Res gestae* statements are commonly relied upon as the only or main evidence in domestic abuse cases.
- The absence of the complainant will not ordinarily render proceedings unfair where

BWV exists and can be challenged by the defence.

- Courts will likely be slow to exclude *res gestae* evidence under s.78 PACE given its probative value.
- Concerns around intoxication or language barriers go to weight, not admissibility.
- The case provides clear guidance that BWV capturing an immediate, emotionally charged complaint—using spontaneous speech and gesture—will readily satisfy the *res gestae* test.

## PROSECUTION APPEALS

By Peter Wilcock KC

***R v AWY* [2025] EWCA Crim 754**

*s. 58 Prosecution appeals – failure to give acquittal undertaking -*

The Court of Appeal concluded that the failure of prosecuting counsel to give "anything resembling" the statutorily required acquittal undertaking at the time of notifying the Court that they intended to appeal an adverse ruling under s58 CJA 2003 deprived the CACD of jurisdiction to hear such an appeal even though "everyone present thought that there would be an appeal".

AWY was charged on an indictment alleging 12 counts including false imprisonment, coercive and controlling behaviour, violence and serious sexual offences against the complainant with whom he had been in a lengthy relationship. He initially pleaded NG to all 12 counts, and, in November 2023, the complainant attended for her cross-examination to be recorded under the provisions of s28 Youth Justice and Criminal Evidence Act. Due to faults in the recording equipment, that recording could not be completed in the allocated time. As a result, the complainant agreed to give live evidence at trial.

AWY then pleaded G to five of the alleged offences many months later and a jury was empanelled to try the remaining counts of very serious sexual offences and false imprisonment in September 2024. The jury heard the complainant's ABE interviews and what recordings of her cross-examination had been completed 10 months earlier. She then gave evidence behind a live screen but became distressed. The trial was adjourned to the next day. At this stage, the complainant made a withdrawal statement explaining why she had decided not to continue with her evidence and why she could not do so in the future. Her reasons included a fear of violence. The jury was discharged and the trial was adjourned until 4th March 2025.

The prosecution subsequently applied to introduce the ABE interviews and statements that the complainant had made under the hearsay provisions of the CJA 1988. The application was opposed on behalf of AWY and, on the 5th March 2025, refused by the trial Judge on the basis that he was not sure that

the complainant's refusal to give evidence was caused by fear of violence or, alternatively, if it was such fear was caused by AWY's conduct. The prosecution sought to appeal that ruling.

**The CACD's decision**

The CACD concluded that it was bound by the established line of authority (*R v PY* [2019] EWCA Crim 17 and *R v BJF* [2024] EWCA Crim 1670) that the CACD has no jurisdiction to entertain any appeal under s58 unless the prosecution complies with the "clear words" of s58(8) to, "at or before" informing the court that it intends to appeal, also inform the court that it agrees that, in respect of the offence or each offence that is the subject of the appeal, the defendant in relation to that offence should be acquitted should their appeal effectively be unsuccessful.

Just as in BJF where the CACD had no jurisdiction where the acquittal agreement was emailed around 90 minutes after the first notification of an intention to appeal under s58 so the "less than satisfactory oral exchange in court between the prosecution and judge" at the time of their notification of an intention to appeal under s58 could not be "regularised" in this case by later further communication to the court.

**Comment**

This case highlights the potential consequences of the sorry state of technology in the criminal justice system. It also reinforces the importance of the prosecution complying with all the requirements of s58 CJA 2003 should they wish to use this as a basis of appeal. Some commentators have described it as "open to question whether the safeguards of s58 are too strict. The Court of Appeal … made it clear that it was expressing no view on the correctness or otherwise of the decision of the trial judge. However, if that decision was in fact wrong, there is some injustice in the fact that the Court of Appeal was unable to intervene." (Crim LR 2025 10 633 -635) In the words of the CACD , however, "whatever the merits of the rigid procedural requirements which have resulted from the interpretation of s58 by successive decisions of this court, it is quite clear that those decisions are strictly binding on us."

The effect of the CACD's ruling that it had no jurisdiction to hear an appeal in this case was that the proceedings in the Crown Court were still live. Theoretically, therefore, the trial could continue if the prosecution felt that, notwithstanding the lack of the complainant's evidence, it had enough evidence to do so!

**OTHER**

By Jacob Bindman

***R v Istvan Szobollodi* [2025] EWCA Crim 1204**

*Contempt of Court – s. 20 Juries Act*

Mr Szobollodi ("S") was summonsed to attend court for Jury service in April 2024. Having attended as required, he was one of a panel of prospective jurors who were asked to attend a particular courtroom for the purposes of a ballot to hear a sexual offence trial. Before the process of empaneling began, S sent a note to the recorder who was trying the case which said, "I personally don't believe the jury system, and I will not participate on any decision making, and I can't read the affirmation in the courtroom. In my country, we never practice this system, so it's just strange, alien to me."

It was established that S had no difficulty with reading but his inability to read the affirmation was due to his objection on principle to the jury system. The recorder was asked to investigate the matter and considered whether to deal with it himself or refer to the Resident Judge. Having considered s.20 of the Juries Act 1974 and the common law offence of contempt of court he gave an initial indication that S was not yet within s.20 Juries Act 1974 and referred the matter to the Resident Judge ("the judge").

S.20 Juries Act states that if a person is summoned to jury service and fails to attend (on the first and/ or any subsequent day they are required to) (s.20(1)(a)), or after attending in pursuance of a summons is not available when called to serve as a juror, or is unfit through drink or drugs (s.20(1)(b)) he shall be liable to a fine not exceeding level 3 on the standard scale.

S.20(2) states that an offence under (1) shall be punishable either as if it were a summary conviction or a contempt of court committed in the face of the court. By virtue of s.20(4) a person shall not be liable to be punished if they can show good cause for his failure to comply with the summons, or for not being

available when called to serve.

S appeared before the judge later that same day. There was a discussion in which S explained that he did not believe in the jury system and that no such system existed in his native Hungary. The judge explained his obligations as a resident of this country to take part in jury service and that he may be punished with a financial penalty for refusing to do so. The judge asked if he wanted to think about the risk of a penalty and whether he would be willing to change his mind. S said he understood and explained his principled stance. The judge then asked him if that was his decision and reminded him that it would be a contempt of court. He then gave S an opportunity to persuade him that no financial penalty should be imposed.

The judge gave a short ruling setting out that having given S a chance to reflect he had maintained his stance which amounted to a contempt. He fined him £700 and gave time to pay. S was then discharged from jury service. Unfortunately, the court office wrongly recorded the judge's decision as a conviction and sentence. In a further error, it recorded the decision as contempt by breach of s.17 of the Criminal Procedure and Investigations Act 1996 which had no relevance to the case at all.

When S learned that the court record showed a conviction, he commenced an appeal as he believed that the conviction would prevent renewal of his doorman's license. He was right to be concerned as he did in fact lose his job as a result of the conviction.

**The CACD's decision**

S appealed 4 days out of time under s.13 Administration of Justice Act 1960. At his appeal he was represented by counsel who put forward a number of grounds, namely that the matter should have been recorded as a contempt rather than a conviction; that S's conduct did not amount to a contempt under s.20 Juries Act 1974; and that there were fundamental errors of procedure such than he was denied a fair hearing and thus the contempt should be set aside.

The Court had little difficulty in accepting the first point, noting that if a contempt is proved and sanction applied, the court record should not refer to a conviction and sentence (see *R v Yaxley-Lennon* [2018] 2 Cr App R 30).

In relation to the other issues the Court observed that the law of contempt has developed in piecemeal fashion and is currently subject to a Consultation Paper by the Law Commission. The CACD considered the requirements of Criminal Procedure Rule 48.5 which sets out the procedure which should apply when dealing with a person either under s.20 Juries Act 1974 or for any other contempt (save for failure to surrender). Rule 48.5 includes a requirement that the conduct in question must be explained and the respondent be given an opportunity to apologise. Importantly, it also requires that they be told of their right to obtain legal advice and a "reasonable opportunity" be afforded for the respondent to reflect, take advice, explain and apologise if he/she so wishes (CrimPR 48.5(2)(b)).

The Appellant argued that it could be inferred that the judge dealt with the matter by reference to s.20 Juries Act 1974 and submissions were heard on when the statutory conditions of "is not available" and when "called upon to serve as a juror" were actually satisfied. However, the CACD held it was unable to decide the issue as the judge below made no reference to it, nor did he hear any submissions on the point.

The CACD observed that, leaving aside the issue of s.20 Juries Act 1974, they could find no reason in principle that the contempt could not have been dealt with under the Crown Court's inherent jurisdiction. However, the CACD held that at no stage had the judge explained to S that he was entitled to obtain legal advice and that a reasonable opportunity for him to do so would be afforded (Rule 48.5(2)(a)(vi) and (b)), nor had he given S a clear explanation of what was alleged against him and the procedure that would be followed (rule 48.8(1)(b)). As a result, S had been deprived of safeguards which should have been afforded to him before a serious finding made against him and significant financial penalty imposed.

Although there had been other departures from the procedure set out in rule 48.5 the CACD held that they alone would not have been sufficient to set aside the contempt.

The CACD therefore granted leave to appeal out of time (had it been brought in time S would have had an appeal as of right) and set aside the finding of contempt and penalty. In view of the detriment already suffered by the Appellant, the Court declined to order the matter be re heard in the Crown Court.

**Comment**

This unusual case brings into focus the difficulties faced in the knotty area of criminal contempt. It is perhaps unsurprising that the Law Commission is proposing that the distinction between civil and criminal contempt be abolished and the different types of contempt be codified across all jurisdictions. No doubt a clear and routine procedure will be recommended to accompany any hearings to establish contempt.

Crown Courts are often called upon to deal with potential contempt of court, usually committed by some form of misbehaviour in the court building. However, as this case shows, the temptation for Judges to deal with such matters swiftly and without the usual rigours of a summary trial can lead to error. In previous decisions the CACD has said it is not obligatory that a respondent be represented, particularly where only a fine is available as a penalty (see *R v Dodds* [2003] 1 Cr.App.R.3), but the requirement that a respondent be given the opportunity to obtain legal advice before a finding of contempt is a vital safeguard and has helpfully been reaffirmed by this decision. As the CACD held, findings of contempt are not convictions, yet the outcome for the respondent is a very serious one, even in cases in which a financial penalty is the only sanction.

The question left undecided by the CACD regarding the reach of s.20 Juries Act 1974 is an interesting one. The language of s.20(1) does not easily lend itself to an interpretation that covers someone who is present and available but simply refuses to serve in accordance with the oath or affirmation. However, despite the Appellant's argument to the contrary in this case, given the vital importance of jury service for the proper functioning of the court system, it would seem puzzling if such action could not be dealt with as contempt under the Court's common law powers.

## INTERNATIONAL

By Amanda Clift-Matthews

**Trinidad and Tobago**
**Attorney-General v Jason Jones**
**Civil Appeal No P337 of 2018**

This was an appeal by the Attorney-General of a decision of the High Court invalidating s13 and s16 of the Sexual Offences Act 1986 ('1986 Act'), which respectively criminalised buggery between consenting adults and acts of "serious indecency" between consenting same sex couples. The High Court found the offences to violate rights respecting private and family life and rights to freedom of thought and expression under s4 and s5 of the Constitution of Trinidad and Tobago 1976. Both offences were held to be null and void.

On appeal, the Court of Appeal reviewed whether s13 and s16 of the 1986 Act were immune from challenge under the savings law clause in s6 of the Constitution, which prevents invalidation of laws in force at the time of the introduction of the Constitution for breaches of fundamental rights. The savings law clause also applies to existing laws that have been repealed and re-enacted "*with modifications or making different provisions in place of [them]*". These modifications are preserved to the extent that they do not derogate from fundamental rights to a greater degree than the repealed law.

At the time the Constitution entered into force, sexual offences were contained in the Offences Against the Person Ordinance of 1925 ('Ordinance'), which was largely based upon the English Offences Against the Person Act 1861, and contained an offence of buggery and an offence of gross indecency between males. Both offences were repealed by the 1986 Act. However, s13 of the 1986 Act included an offence of buggery and s16 included an offence of serious indecency that applied to both male and female same sex couples. In the 1986 Act, the maximum penalty for buggery was increased from 5 years' to 25 years' imprisonment. The maximum penalty for serious indecency was 5 years' imprisonment, whereas the maximum penalty for gross indecency under the Ordinance had been 2 years' imprisonment.

Also relevant was the fact the 1986 Act had been passed with a three-fifths majority by both houses of

Parliament. Section 13 of the Constitution enables Parliament to enact laws that breach fundamental rights, providing the enactment is supported by a three-fifths majority of votes, and providing the restrictions are "*reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.*"

The Attorney-General argued that the 1986 Act was a repeal and re-enactment of the old offences of buggery and gross indecency, with modifications. Thus, s13 and s16 were saved laws under s6 of the Constitution and could not be invalidated. If, however, the broadening of the offence of gross indecency to apply to same sex female couples and the increase in penalties derogated from fundamental rights to a greater extent than the old law, these restrictions were legitimate and proportionate measures in the public interest. Therefore, they were valid under s13 of the Constitution.

The Respondent, on the other hand, argued that the legislation was a replacement law, not simply a re-enactment of the old law with modifications, because the new offence of serious indecency applied to both sexes and expressly exempted heterosexual couples. The two offences also derogated from protected rights to a greater extent than the offences under the Ordinance because of the harsher penalties. The provisions were, therefore, outside of the protection of s6 of the Constitution and subject to the scrutiny of the Courts for breaches of fundamental rights. These breaches were not reasonably justifiable in a society that claims proper respect for individual rights and freedoms.

By a two to one majority (Bereaux JA and Pemberton JA, Kokoram JA dissenting), the Court of Appeal accepted the Appellant's argument that the offences were re-enactments with modifications of former provisions under the Ordinance and fell within s6 of the Constitution. The majority said that the 1986 Act consolidated the laws in relation to sex crimes with some modifications by altering penalties, by creating new offences and repealing others. It was not a "*complete change in law*". Even though the introductory section of the Act described it as a repeal and 'replacement' of the Ordinance, this was a matter of form rather than substance.

The Court accepted, however, that s13 and s16 of the 1986 Act infringed fundamental rights to a greater extent than the Ordinance by enacting harsher custodial sentences for the offences and by including women in the crime of serious indecency. These breaches were subject to the proviso in s13 of the Constitution, and only valid if they were legitimate and proportionate restrictions of fundamental rights. The Court said that the test under s13 for laws passed with a super-majority was set out in *Suraj v Attorney-General* [2022] UKPC 26 as one that was similar to the proportionality test for ordinary laws, "*albeit one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest*." The Court found that the modifications failed that test, since they disproportionately infringed rights of same sex couples without serving a legitimate public interest. The Court said the modification of the offence of serious indecency and increased penalties for buggery and gross indecency were a "*clear and deliberate targeting of homosexual men and women*". The interference with freedom of choice in expression of personal sexuality and with adults in the privacy of their own home engaging in sexual intimacy with other consenting adults served no legitimate purpose. The Court ordered the offence of gross indecency in the Ordinance be substituted for s16 of the 1986 Act and the maximum penalty for buggery be reduced to 5 years' imprisonment.

**Comment**

The savings law clause in s6 of the Trinidad and Tobago Constitution that was recently affirmed in *Chandler v State* [2022] UKPC 19 continues to perpetuate breaches of fundamental rights under old colonial laws. Notice of appeal was filed by the Respondent in September 2025 and the matter will now be considered by the Judicial Committee of the Privy Council, which remains Trinidad and Tobago's highest court. The appeal is expected to be heard in 2026.

## APPEALS AGAINST SENTENCE

By Farrhat Arshad KC

### *R v Layden* [2025] 2 Cr App R (S) 45

This appeal against sentence concerned time spent on electronically monitored bail pending an appeal. L's conviction was quashed by the CACD but the point certified and leave to appeal granted to the respondent by the Supreme Court (see case summary on the Supreme Court's decision above). In the meantime, L was granted bail on an electronically monitored curfew from 25 October 2023 and remained on bail until he surrendered himself to the Court of Appeal in April 2025, the respondent's appeal having been allowed and L's conviction for murder having been restored. Had L remained in custody serving his life sentence, he would have served almost the whole of his minimum term and be eligible for consideration for release by the Parole Board. He applied for an extension of time and leave to appeal against the length of the minimum term imposed.

The CACD set out the principles that apply when an appeal against sentence is sought on the basis of matters which occurred after sentence. Whilst the CACD accepted that it had jurisdiction to consider the application, given the wide terms in which the Court's powers on appeal were expressed in section 11(3) of the CAA 1968, it reiterated that the circumstances in which the Court would consider evidence which was not available to the sentencing judge were heavily circumscribed, and in particular that as a general rule, the CACD would not interfere with an otherwise unimpeachable sentence on the basis of events which have only occurred since the sentence was imposed. The Court was not satisfied that the circumstances in the particular case, albeit unusual, had resulted in such injustice as to warrant interference by the Court. The appeal against sentence was refused.

# CONTRIBUTORS TO THE NOVEMBER 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.

David Bentley KC regularly appears in the Court of Appeal and has extensive experience preparing submissions to the CCRC. He advises internationally including in a prospective appeal from Bermuda to the Privy Council and upon securing a pardon for a prominent Malaysian politician. He has recognised expertise in appeals involving contested expert evidence – in particular issues relating to DNA and is co-author of the DNA chapter in the latest edition of Rook and Ward on Sexual Offences.

Jacob Bindman's practice encompasses serious crime, appeals and related public law and extradition. He has appeared at all levels of appeal including the Supreme Court and is an accomplished trial advocate. Alongside his criminal practice Jacob also provides advice and representation in relation to international criminal and human rights law and Public Inquiries.

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.

Emma Goodall KC is a specialist criminal practitioner who is regularly instructed to advise on appeal. She has appeared in a number of reported authorities involving both complex conviction and sentence appeals and has considerable experience in making submissions to the Criminal Cases Review Commission and in Judicial Review proceedings. Emma is a contributor to Taylor on Appeals.

Natalie Lucas has a broad practice spanning extradition, criminal law, inquests, and civil actions against public authorities, with specific expertise in international human rights. Natalie regularly accepts instructions in criminal and extradition proceedings and has appeared before the Magistrates Court, Youth Court and Crown Court as well as in Parole Review hearings. She is particularly interested in developing her practice in sanctions, financial crime and extradition.

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

Peter Wilcock KC is an experienced and busy specialist in criminal defence who, for over 30 years, has been regularly conducting criminal appeals at all levels including the Court of Appeal and Supreme Court. In that period, he has persuaded the CCRC to refer around 14 cases to the CCRC many of which (including the well-publicized cases of Hallam, Nealon, Lalchan & Layden) resulted in the Court of Appeal quashing convictions.