made under the 1981 Act will not fall within the ambit of s.39 or 49 of the 1933 Act as currently drafted.

If s.39 of the 1933 Act is amended as planned by the 1999 Act (so that is applies only to civil proceedings), it will continue to cover only newspaper reports, and sound and television broadcasts. It will require further amendment in order to cover other forms of publication (as the present case clearly demonstrates).

If s.45 of the 1999 Act is brought into force (to cover criminal proceedings other than in the youth court), it will apply to "any publication". However, if the amendments to s.49 of the 1933 Act are brought into force (to cover youth court cases), the reporting restrictions under that section will apply to "any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public". It is submitted that this definition would be broad enough to include social media and similar forms of publication. Logic would seem to dictate that the same, broad definition should apply both to s.39 of the 1933 Act and to s.45 of the 1999 Act.

There is a strong argument for the repeal of all of the existing legislation on reporting restrictions to protect the identity of juvenile defendants and witnesses, and its replacement with a single, coherent set of provisions which cover modern forms of communication as well as the more traditional ones.

Report by Dilys Tausz
Commentary by Peter Hungerford-Welch

Safety of Conviction

R. v Pope (John Randall)

Court of Appeal (Criminal Division): Lord Judge C.J., Wilkie and Singh JJ.: November 1, 2012; [2012] EWCA Crim 2241

Three trials—husband acquitted at first trial—appellant convicted at second trial following DNA evidence—conviction overturned on appeal—convicted on retrial—whether there was a "lurking doubt"—whether conviction safe

LT Grounds for appeal; Miscarriage of justice; Murder; Unsafe convictions

In 1996 Karen Skipper was murdered. Her murder produced three trials. During the course of the police investigation a small blood stain was discovered on the outside surface of her front jean pocket, on the side of the cloth nearest to her skin. What was not discovered at that time was a second, microscopic blood stain on her knickers, on one side of the valley of one of the ribs at the front top. In early 1997 her husband was tried and acquitted of her murder. The case against him was based on circumstantial evidence in which motive and opportunity were at the forefront of the prosecution's case. However, there were three aspects of the evidence which undermined that case. First, the small blood stain on the outside surface of the lining of Mrs Skipper's front jean pocket was tested for DNA purposes. This blood was neither the victim's, nor that of Mr Skipper. Secondly,

a man was sighted in the area shortly before Mrs Skipper was attacked, wearing a three-quarter length waxed coat and a rucksack on his back. He was never identified during the original investigation despite widespread publicity, but he was not Mr Skipper. Thirdly, the prosecution evidence itself provided powerful evidential support for his alibi.

In 2006 the appellant, P, was arrested for an unrelated offence of which he was subsequently acquitted. He provided a sample of his DNA. This was later examined and found to provide an overwhelming match for the blood stain on Mrs Skipper's jeans and, as a result of improvements in profiling techniques, on the second tiny blood stain on her knickers. The appellant was arrested and interviewed. His initial statement, given during the 1996 investigation, was put to him. In that he had denied knowing Mrs Skipper. This, he accepted, was not true. He then gave an explanation of how he had indeed met her some three weeks before she was murdered. This, he said, was a chance encounter one Sunday morning when he saw her dogs waiting outside a shop. One of them had a thorn in its paw; he stopped to help and removed the thorn. However, the dog bit his finger and caused it to bleed heavily. Mrs Skipper came out of the shop, and offered him a paper handkerchief or tissue to stem the bleeding. He discarded the tissue, but said that Mrs Skipper must have got his blood on her hand either from touching his own blood-stained hand or from touching his blood which had got on to the dog's coat. At this stage the appellant was not told that the evidence linking him to the offence resulted from an examination or finding of his blood on the deceased's clothes. Before he was interviewed again, he was told that the scientific evidence which implicated him was DNA from a smear of his blood on the outside surface of the lining of the pocket of her jeans, touching her skin, and the blood stain on her knickers. He was unable to proffer any explanation for the presence of his blood on these clothes. He said that Mrs Skipper "clouted" the dog for nipping him, and she produced a tissue from her jeans pocket. He put it on his finger and went into the shop holding the tissue over the cut. In January 2009 he was tried for Mrs Skipper's murder. His case at trial was that he had not killed Mrs Skipper and that either her husband, or someone else, but probably her husband, had been responsible. All the material available to the prosecution at the trial of Mr Skipper was deployed, and in effect, he was re-prosecuted on his behalf. The jury was sure that he was guilty and convicted him. He appealed against his conviction. The appeal was allowed and a fresh trial was ordered. The reasons why the verdict of the jury was set aside were first, a witness, Mrs Horton, came forward after the appellant's conviction with evidence which tended after all to incriminate Mr Skipper and which in the view of the Court of Appeal should be considered by a jury. Secondly, evidence from the appellant's former wife about his or their sexual practices was considered by the jury when it was never tested because she did not give evidence and could not be cross-examined. At the appellant's second trial the jury knew and considered the evidence of Mrs Horton, and did not hear any evidence about the sexual practices of his and his former wife. Once again the evidence that Mr Skipper was guilty of this murder was deployed before them, and again he was re-prosecuted. Yet again, the jury rejected this possibility. They were sure that the appellant had killed Mrs Skipper and convicted him.

On appeal, counsel submitted that (1) it was incomprehensible that the jury could have excluded the real possibility that Mr Skipper had murdered his wife. In effect the conviction was perverse; (2) given the microscopic findings of blood on the clothes of Mrs Skipper, combined with the flaws in the scientific evidence called by the prosecution, the appellant's explanation for the presence of his blood on the deceased's clothes could not safely have been rejected. There was a "lurking doubt" about the conviction.

Held, dismissing the appeal, as a matter of principle, in the administration of justice when there was trial by jury, the constitutional primacy and public responsibility for the verdict rested not with the judge, nor indeed with the Court of Appeal, but with the jury. If, therefore, there was a case to answer and, after proper directions, the jury had convicted, it was not open to the Court of Appeal to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction was or might be unsafe. Where it arose for consideration at all, the application of the "lurking doubt" concept required reasoned analysis of the evidence or the trial process, or both, which lead to the inexorable conclusion that the conviction was unsafe. It could therefore only be in the most exceptional circumstances that a conviction would be quashed on this ground alone, and even more exceptional if the attention of the court was confined to a re-examination of the material before the jury. In the present case an examination of the appellant's account at interview, and indeed his evidence at trial, meant that, however one looked at it, first, if either the jeans or the knickers had been washed between the date when he said he was bitten by the dog and the murder, then the blood on the jeans or the knickers respectively would have been washed away. The evidence suggested that Mrs Skipper was careful about matters of hygiene. Nevertheless, the credibility of the appellant's explanation depended on the coincidence that Mrs Skipper washed neither of the two items of clothing, and then some three weeks later, quite by coincidence, put on exactly the same (unwashed) jeans and exactly the same (unwashed) knickers as those which had been stained with the appellant's blood after her dog had nipped him. It remained the case that the blood stain on the inside of the jeans was found at the tip of the pocket. For this to happen the tissue used to staunch the blood from the appellant's fingers, or the blood which found its way from the cut caused by the deceased's dog to the appellant and which had then leaked onto her finger would, whether tissue or finger, have had to be pushed right down to the very depth of the pocket for the blood to be deposited there. If a tissue soaked in blood or a hand with blood on it was pushed into the pocket it would be very unusual for a stain to end up at the bottom of the pocket without there being some staining or smearing higher up the pocket, nearer to the entrance, as the blood on the finger or blood-soaked tissue was pushed down. Moreover, if the blood was deposited inside the lining of the pocket, in order to arrive where it was found, it had to make its way through the fabric to the other side of the pocket. There was in fact no record of any blood found on the inside of the surface lining of the pocket. It was recorded as only being on the outside surface of the lining. If blood had soaked through from the inside surface of the pocket, then there would have been a larger stain of blood on the inside surface. It was true that no specific record was made that the inside of the pocket was checked for blood during the course of the initial investigation, but such a check

would have been routine, certainly if any blood at all had been found on the outside of the pocket. The lining of the pocket of the jeans was highly absorbent and the blood dried very quickly, experiments showing that it dried within three seconds or less. Yet for the appellant's explanation to be credible the blood found on the outside surface of the lining of the pocket had to remain wet enough for it to be transferred onto the front of the knickers. This blood, on the appellant's account, must have found its way from the tissue of the deceased's hand or finger through the pocket without leaving a trace, and onto the front of the knickers. It was found towards the centre and top of the knickers and, again, for the blood to have been deposited from the pocket onto the knickers the pocket itself must have been fully extended and at the same time the blood must have remained wet. If so, smearing of the blood on other parts of the knickers would have been anticipated, but in fact none had ever been found. All these considerations bore on the credibility of the appellant's evidence, as he gave it before the jury during the course of his second trial. The evidence, and the submissions to them, were both comprehensively analysed in the summing up. Mr Skipper was acquitted when he was tried. In two further trials every effort to demonstrate the possibility that he killed his wife was rejected by two juries, and so was every effort to demonstrate that someone else may have killed her. The verdict of the jury was entirely supported by the evidence.

M. Evans QC appeared for the appellant.
I. Murphy QC for the respondent.

Commentary

The "lurking doubt" ground is a means by which the Court of Appeal can rectify miscarriages of justice arising from trials that otherwise appeared technically beyond reproach, but in which the appeal court has a "lurking doubt" as to whether an injustice has been done. In *Cooper* [1969] 53 Cr. App. R. 82 at 86, Lord Widgery C.J. stated that the court's approach to this question "may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it". The court must make a subjective judgement based largely on the experience of the judges (*Pattinson and Laws* (1973) 58 Cr. App. R. 425 at 426; *Wallace and Short* (1978) 67 Cr. App. R. 291).

The Lord Chief Justice in this case made it clear that in order to succeed on this ground there is an exceptionally high threshold, with the nature of the burden on the appellant being described as "formidable". The court requires more than "some collective, subjective judicial hunch that the conviction is or maybe unsafe". The reasoned analysis of the evidence and/or trial process must lead "to the inexorable conclusion that the conviction is unsafe" (at [14]).

The terms used appear to raise the required threshold from the court's earlier approach to this ground. An "inexorable conclusion" appears to be far more demanding than the test set out by Lord Bingham C.J. in *R. v Criminal Cases Review Commission Ex p. Pearson* [2000] 1 Cr. App. R. 141 at 146 DC that there are

> "cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done … If, on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was guilty … the court will consider the conviction unsafe. In these less obvious cases

> the ultimate decision … will very much depend on its assessment of all the facts and circumstances."

Moreover, whilst the court dismissed as inadequate "some collective, subjective judicial hunch that the conviction is or maybe unsafe", it seems that this is the starting point taken in earlier decisions which spoke of a subjective reaction produced by the general feel of the case based on the experience of the judges. This cannot mean that the court is exempt from giving a reasoned judgment in "lurking doubt" cases. The basis of the decision must be set out in full. But the factors undermining the conviction, whilst having little impact individually, may cumulatively cause the required level of judicial unease. One commentator has argued that "there must be some combination of evidence and circumstance which leads the court to that conclusion" (L.H. Leigh, "Lurking Doubt and the Safety of Convictions" [2006] Crim. L.R. 809). Such matters relied upon by an appellant must be clearly identified.

The court carried out a detailed analysis of the evidence in P's case. It also noted the fact that there had been two trials involving P in which the issues were aired, analysed by the judge in summing up, and where the expert evidence had already been examined by the Court of Appeal previously. These factors were seen to undermine the idea that a lurking doubt as to the safety of P's conviction could still exist despite this extensive judicial consideration.

The ground itself is in many ways an odd one. Whilst recognising the constitutional primacy of the jury, the court is willing to analyse the evidence at trial and to a certain extent consider the same issues that were before the jury. This may cause difficulties if the court is required to analyse the reasoning of the jury as this would fall foul of the warnings given in *Pendleton* [2001] UKHL 66; [2002] 1 Cr. App. R. 34; [2002] Crim. L.R. 398, although the court appears content in some fresh evidence cases to follow this route. See, for example, *Earle* [2011] EWCA Crim 17.

The ground does not require a finding that the jury's verdict is perverse or unreasonable. It is a far lesser test of a lingering feeling of injustice. Even where there was evidence supporting a case to answer, the court has recognised that its supervision extends beyond and operates at a later stage than the discretion of the trial judge at the close of the prosecution case (*Ariobeke* [1988] Crim. L.R. 314). The "lurking doubt" concept is an essential safeguard against miscarriages of justice, and is often the last hope of righting a wrongful conviction. In those circumstances its use should not be unnecessarily restricted.

Report by David Hargreaves, Solicitor
Commentary by Paul Taylor, Barrister