Tel: 020 7404 1313
54 Doughty Street
London, WC1N 2LS
E: crime@doughtystreet.co.uk

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Criminal Appeals Bulletin

Welcome

Paul Taylor QC

Welcome to the February 2022 edition of the DSC Criminal Appeals Bulletin.

The Bulletin is aimed at assisting those involved in appellate work in England & Wales, Northern Ireland and the Caribbean.

In this edition we look at the latest appeal cases from the Court of Appeal (Criminal Division), the Northern Ireland Court of Appeal, and the Supreme Court. In addition, following the two successful appellate crime training sessions, given by myself and Edward Fitzgerald QC last week to the Law Association of Trinidad and Tobago and the Organisation of Commonwealth Caribbean Bar Associations, we are also delighted to announce the first of a regular series of contributions to the Caribbean section from members of Allum Chambers, Trinidad and Tobago.

The citations of the cases are hyperlinked to the judgements.

Going forward, the bulletin will be bi-monthly to allow more preparation time; so the next issue is due in April. In the meantime, we hope to launch Appealcast early in March. (If you are not on our mailing list but would like to subscribe to the Bulletin and our upcoming podcast click here).

DSC Criminal Appeal Unit

Doughty Street has some of the most experienced appellate practitioners at the Bar, including the contributors to the leading works on appellate procedure – ***The Criminal Appeal Handbook***, *Blackstones Criminal Practice (appeals section)*, and *Halsbury's Laws (Appeals)*.

The third edition of *Taylor on Criminal Appeals* is due for publication later this year.

Please feel free to email Matt Butchard or Marc Gilby or call our crime team on 0207 400 9088 to discuss instructing us in appeal cases. We also offer our instructing solicitors a free Advice Line, where they can discuss initial ideas about possible appeals, at no cost to them or their client. More information on our criminal appeal services can be found on the Criminal Law and Appeals page of our website including links to back copies of the Bulletin and other resources.

Best wishes,
Paul Taylor QC
Head of the DSC Appeals Unit
(Editor of Taylor on Criminal Appeals)

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If you would like to know more, or discuss how our barristers may be able to help you and your clients, please contact Criminal Practice Manager, Matthew Butchard on 020 7400 9074.

Useful links

England & Wales: Conviction appeal, case summary and commentary

England & Wales: Sentence appeals, case summaries and commentaries

Financial Crime Appeal: Confiscation, case summary and commentary

Supreme Court: Conviction appeal, case summary and commentary

Northern Ireland: Conviction appeals, case summaries and commentaries

The Caribbean: Conviction and sentence appeals, case summaries and commentaries

ENGLAND & WALES

Court of Appeal (Criminal Division)

The Annual *Review of the Year in the Court of Appeal (Criminal Division) 2020-21* has just been published and includes: Overview of the Year, The Post Office "Horizon" Appeals, Victims of Trafficking, Justice for the Shrewsbury 24, The Freshwater Five, Diversity on the Bench, Cases of Note.

Appeal against conviction

Appeals against conviction based on guilty pleas – indication of sentence - undue pressure to plead – failure to follow Goodyear procedure

AB [2021] EWCA Crim 2003

AB and others appealed against their convictions. The appeal arose following a successful Attorney General's reference [2021] EWCA Crim 1959 in respect of the sentence imposed upon guilty pleas.

The appellants were charged on a 15 count indictment with a range of fraud offences. They had entered not guilty pleas and there had been considerable delay in proceedings; as such the case was listed for a mention to resolve progress. At the end of this mention hearing counsel were invited to attend the Judge's chambers. There was no transcript of that meeting, but in short, the judge gave an indication that were the defendants to plead guilty, a suspended sentence of imprisonment would be passed. There was no indication in court or otherwise of the possibility that this sentence remained subject to the entitlement of the Attorney-General to refer an unduly lenient sentence to the Court of Appeal.

Following that exchange, all the defendants were arraigned and pleaded guilty. They were sentenced to 2 years imprisonment suspended for two years.

Those sentences were subsequently referred to the CACD who substituted the sentences for three defendants to 40 months immediate custody, and for one defendant to 32 months' custody (see, [2021] EWCA Crim 1959).

The CACD then considered the appeal against conviction on the basis that the judge's indication was so generous that the offer was irresistible to any defendant and operated to apply inappropriate pressure so that the pleas should not be regarded as truly voluntary and had failed to comply with the procedure outlined in Goodyear [2005] EWCA Crim 888.

The CACD emphasised the importance of the protections inherent in the process and the need to ensure that defendants understand the freedom of choice which exists after a sentence indication and that defendants are warned that they can receive a higher sentence than that indicated by the judge.

The CACD concluded that the approach of the judge and of counsel had placed inappropriate pressure on the appellants and so as to deprive them of their free choice on whether to plead guilty. In reaching that conclusion the Court observed that (i) it was relevant to the safety of the convictions that the appellants were not aware that they were liable to an increase in sentence; (ii) that the impetus for the indication came from the judge; (iii) the indication was not given in open court and (iv) the personal situation of the appellants – namely that they were family – placed them in a very difficult position and (v) there were concerns about the strength of the evidence against some defendants on certain counts increasing the concern about inappropriate pressure. Further the Court found that the indication that there would be no immediate custodial sentence was *"so far below the proper level of sentencing that however it was given it would impose real pressure on the defendant"*.

The appeals were allowed and the convictions on all counts quashed.

Commentary by Tayyiba Bajwa

This decision emphasises the importance of following the proper procedure when seeking and receiving *Goodyear* indications as to sentence.

The need for any decision as to plea to be freely made has been repeatedly emphasised by the CACD. While it is recognised that that does not mean free from all pressure, as the circumstances of a criminal charge themselves create pressure, any indications as to sentence must not place inappropriate pressure upon the defendant so as to narrow the proper ambit of his freedom of choice (*Nightingale* [2013] EWCA Crim 405). Similarly, the Court has previously emphasised the obligation upon prosecution counsel to draw

the court's attention to any minimum or mandatory sentencing requirements in the context of *Goodyear* indications (*Kulah* [2007] EWCA Crim 1701).

In this decision, the CACD, quite properly, recognised that where an indication is too good to be true, it places a defendant in an impossible position. The combination of the irresistible offer of sentence, with the failure by counsel (both prosecution and defence) and the court to inform the appellants of the risk of an increase in sentence and the personal circumstances of the appellants, being family, combined to create real pressure upon the appellants depriving them of free choice.

This decision does not mean that any particularly generous indication of sentence pursuant to Goodyear will itself render the decision-making process unfair; the CACD was quite clear that it was the combination of circumstances that rendered this particular process unfair, even going so far as to consider the strength of the evidence on certain charges.

In those circumstances, a formal approach to seeking and obtaining such indications must be followed and careful consideration given to the particular circumstances of any such indication for an individual defendant and steps taken to ensure that any decision ultimately made is free from inappropriate pressure.

Appeals against sentence

Historic sex offences – Article 7 ECHR – maximum penalty at time of offence

Limon [2022] EWCA Crim 39

L was granted leave to appeal against his sentences totalling four years' imprisonment for eight offences of indecent assault, contrary to section 14 of the Sexual Offences Act 1956, committed when he was aged between 14 and 17.

On appeal, the CACD held that the sentencing judge had fallen into error. The sentences on counts 4 and 8 were reduced to 12 months' imprisonment. The sentences shorter than 12 months remained as before.

The CACD held that:

a. Article 7(1) ECHR requires a court to sentence within the maximum sentence prescribed at the time of the offending [19-24];
b. At the material time, the maximum sentence proscribed for an offence contrary to section 14 was ten years' imprisonment [24];
c. The fact that L would have been subject to a different sentencing regime as a child did not assist in relation to Article 7, and as a result there had not been a breach of this [24];
d. The effect of sections 1A and 1B of the Criminal Justice Act 1982 was to place a limit on the total term of the detention, which at the start of L's indictment was one of 12 months [26];
e. The Sentencing Council's definitive guidelines on sentencing children and young people ('the Children guideline') contained "important guidance" and they could see "no reason in principle or logic not to apply them also to a case in which many years have passed between the offending and conviction and sentence" [31], [27 - 31];
f. In accordance with the Children guideline, the sentencing judge "should have taken has his starting point the sentence likely to have been imposed at the time of the offending, and the maximum sentence which could then have been imposed" [34];
g. The starting point should have been 12 months and there was no good reason why L should be sentenced more severely than he could or would have been sentenced in 1994 or 1995.

Commentary by Peta-Louise Bagott

With frequently changing legislation, care should be taken to identify the relevant provisions for the purpose of sentence at the start of the indictment period. Recourse can, and should, be had to the Children guideline in historic cases to assist with the sentencing exercise.

The CACD's decision is consistent with the line of authorities on sentencing an offender who crosses a significant age threshold between the date of commission and conviction, but clarifies the approach to be taken to historic cases.

Sentence – manslaughter – mental health – fresh evidence - hospital order

Sanjay Nijhawan [2022] EWCA Crim 10

The appellant (of previous good character, described as "*somebody who would not hurt a fly*") was convicted of the manslaughter of his wife on the grounds of diminished responsibility. The expert evidence at trial was that he was, at the time, suffering from a depressive disorder, although the prosecution expert did not accept that this provided an explanation for his actions. The killing was precipitated by an argument in which the appellant's wife threatened to leave him if he did not "*snap out of it*". What followed was a "*frenzied and sustained attack*". The appellant tried to commit suicide at the scene and, when the police arrived, immediately admitted the killing, saying it was to do with financial pressures and building works being carried out on the house. He expressed severe remorse for what he had done.

Having found that there was insufficient evidence to justify a disposal under the Mental Health Act 1983, the judge went on to impose a sentence of life imprisonment with a minimum term of ten years. He considered that the appellant was dangerous, as evidenced by the settled intention to kill the appellant that had formed in the hours before the killing, the planning involved and the brutal nature of the attack. The judge was concerned that the appellant's inability to withstand inevitable life pressures and the risk of humiliation within relationships had not disappeared. A life sentence was appropriate in view of the appellant's significant level of residual culpability, the presence of aggravating factors, the level of danger he continued to pose and the difficulty of estimating when that risk would subside.

The appellant sought leave to appeal against his sentence and to call fresh evidence. This took the form of expert evidence from a psychiatrist, Prof. Healy, to the effect that the appellant had, at the time of the killing, been taking medication for depression which, it was said, could induce suicidal and homicidal tendencies in people. Since ceasing that medication the appellant had become a "*different man*".

The CACD received the expert fresh evidence of Prof. Healy *de bene esse*, and invited cross-examination of both him and a prosecution expert, Prof. Fazel. Further reports addressing the points raised were also provided by the experts who had given evidence at trial and sentence.

The CACD dismissed the appeal. It was clear from the contemporaneous evidence that none of the psychiatrists who had assessed the appellant at the time had found any evidence of psychosis consistent with the reaction to medication described by Prof. Healy. The psychiatrists involved had given active consideration to the question of whether the appellant's medication could have played any part in the killing and had concluded that it did not. Prof. Healy's evidence that the medication explained the killing rested on an "*insecure foundation*": the expert had wrongly discounted the possibility that a deterioration in the appellant's mental condition, triggered by the argument with his wife and other pressures, provided a possible explanation. This killing was not an "*inexplicable event*" which could only be understood by reference to the appellant's medication: there was, therefore, "*no need to speculate (and it could not be more than speculation) that the real cause of the killing was the appellant's medication*".

Commentary by Daniella Waddoup

The judgment reminds us of the two important points in the context of appeals based on fresh medical evidence. First, the CACD will closely scrutinise the contemporaneous evidence with a view to establishing whether the thesis presented on appeal accords with the medical and factual picture at trial. In so doing, the Court will give considerable weight to the opinions of medical professionals who were involved at the time; in this case, these doctors were "*far better placed*" than Prof. Healy could be to determine what role, if any, the appellant's medication had played. Second, the way in which medical evidence is presented may make a considerable difference. In contrast to the "*strong beliefs*" that Prof. Healy clearly held about the potentially dangerous side effects of anti-depressant drugs, the prosecution witness was a "*rather more impressive witness*". His evidence was "*measured and careful, giving ground where appropriate to do so.*"

Mental health – hospital order – extension of time to appeal

R v BM [2021] EWCA Crim 1955

BM appealed against her life sentence imposed in 1987. The CACD granted an unprecedented extension of time of 33 years allowing the Applicant to renew her previously abandoned appeal against sentence. The appeal was allowed on the basis that she should have been given a hospital order, instead of a life sentence. The decision follows and applies the principle established in the earlier case of *Cleland* [2020] EWCA Crim 906, in which Edward Fitzgerald QC also successfully represented the appellant.
BM was represented by Edward Fitzgerald QC, leading Pippa Woodrow, and instructed by Dr Laura Janes.

Financial crime appeal

Confiscation order – occupational pension – realisable amount

Asplin and others [2022] EWCA Crim 9

The CACD gives guidance on the approach to determining the value of an occupational pension as part of the realisable amount in confiscation proceedings.

The Court had previously dismissed appeals against the making of a confiscation order (CJA 1988), in August 2021, [2021] EWCA Crim 1313, (salaries obtained as a result of or in connection with a fraud could constitute part of the benefit figure), and given directions for the agreement of revised orders. Upon the parties failing to agree terms the CACD heard the case again and considered representations on behalf of the pension trustee as to whether the pensions were realisable assets after all. Having established that the trial Judge had been misled by the prosecution as to the true position, the Court went on to consider whether the pension figures to be included in the realisable assets should be net of tax.

It was acknowledged that in drawing down funds from a SIPP to pay an order the appellants would incur liability to income tax. Whilst it was common ground that costs inevitably incurred in realising an asset should be deducted when calculating its market value, eg estate agent's fees and legal costs (*Cramer* (1992) 13 Cr. App. R. (S) 390), the prosecution contended that a personal tax liability was a different. The prosecution argued that a defendant's personal tax position may be unknown and in any event would depend on the amount realised when the asset was sold. The judgment is silent as to any contrary submissions made on behalf of the appellants.

Having originally decided the case in August 2021, on the basis that the *net* figure should apply, the CACD changed its view, holding that the "practical difficulties" which would result from attempting to take a net figure were "insuperable".
The CACD concluded [36] that the correct solution to this difficulty was to include the gross figure in a defendant's realisable assets. This enabled the funds to be drawn down and the accurate tax liability figure to be determined. If the result is that the defendant becomes subject to a tax liability which he is unable to satisfy in addition to satisfying the confiscation order, the remedy is to obtain a certificate of inadequacy and a reduction of the amount payable under the confiscation order to take account of this liability to tax.

Commentary by Peter Caldwell

It is to be hoped that the application of this reasoning is confined to this troubled case alone. Whilst the difficulties may have been insurmountable in this instance, they will not be so in every case involving a pension. The prosecution's convenient solution was to require the appellants' personal assets to be stripped (through their additional tax liability) to nil and revisited on a redetermination of the order. It is easy to envisage circumstances where a person whose assets exceed the available amount, will be forced to pay a swingeing tax bill without recourse to such a remedy. The time limits under PoCA do not easily allow for this process. Where the recipient of an order is the Treasury, it may be thought disproportionate in A1P1 terms, for the state to force a person to incur a tax liability in order to satisfy a confiscation order. It now appears that the objective of the confiscation regime is not merely to divest a person of the proceeds of their crime, but to tax them for it too.

Supreme Court

By Richard Thomas

Strict Liability – Terrorism – Article 10 ECHR

PWR & others v. DPP
[2022] UKSC 2 (26th January 2022)

For the second time in recent years, the Supreme Court has considered the extent to which terrorism legislation has created an offence of strict liability. The Court concluded that section 13(1) Terrorism Act 2000 is a strict liability offence: there is no extra mental element required, over and above the knowledge required to make the wearing/carrying/displaying of the article deliberate. In doing so however, the Court did emphasise that what was said by Lord Hughes in *Lane* [2018] 1 WLR 3647 should not be read, in any sense, as casting doubt on the strength of the presumption of *mens rea*.

The issue for the Court was whether section 13 Terrorism Act 2000 creates an offence of strict liability and, if it did, whether it is incompatible with article 10 ECHR ("the Convention"). Section 13 provides that it is a criminal offence for a person in a public place to carry or display an article 'in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation'. The offence is summary-only and carries a maximum sentence of six months' imprisonment. On appeal from their conviction in the Magistrates' Court, the Crown Court was sure that each appellant carried a flag in such a way or in such circumstances as to arouse reasonable suspicion that he was a member or supporter of the PKK. The Court made no finding as to whether the appellants knew what the flags were, or their intention in carrying them.

It was accepted that a limited mental element is required under section 13(1) in the sense that the defendant must know that he or she is wearing or carrying or displaying the relevant article. As to whether any further mental element was required, *Sweet v Parsley* [1970] AC 132 and *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 established that where a statute laying down a criminal offence is silent on the relevant mental element, the starting point in interpreting the statute is that there is a common law presumption of *mens rea*. Moreover, that presumption is a strong one so that it will only be rebutted by express words or by necessary implication. More recently however in *Lane* [2018] UKSC 36; [2018] 1 WLR 3647, the Supreme Court discussed the presumption of *mens rea* in the context of interpreting section 17 Terrorism Act 2000. The question was whether, when the defendants sent money abroad, they had 'reasonable cause to suspect' that it would or might be used for the purposes of terrorism. It was held that this was clearly imposing an objective and not a subjective requirement so that it was not open to the courts to interpret the provision as requiring that the defendants actually suspected that the money would be used for terrorism. Lord Hughes said [at para 9]:

> "Whilst the principle [ie the presumption of *mens rea*] is not in doubt, and is of great importance in the approach to the construction of criminal statutes, it remains a principle of statutory construction. Its importance lies in ensuring that a need for mens rea is not inadvertently, silently, or ambiguously removed from the ingredients of a statutory offence. But it is not a power in the court to substitute for the plain words used by Parliament a different provision, on the grounds that it would, if itself drafting the definition of the offence, have done so differently by providing for an element, or a greater element, of *mens rea*. The principle of parliamentary sovereignty demands no less. Lord Reid [in *Sweet v Parsley*] was at pains to observe that the presumption applies where the statute is silent as to *mens rea*, and that the first duty of the court is to consider the words of the statute."

Of significance, the Court noted that Lord Hughes was clearly correct to clarify that the presumption of *mens rea* is a principle of statutory interpretation, but held that passage should not be read as, in any sense, casting doubt on the strength of the presumption of *mens rea* as articulated in *Sweet & Parsely and B*.

On the facts of this case, the Court held that the strong presumption as to *mens rea* was rebutted by necessary implication - in the words of Lord Nicholls in *B* the implication is "compellingly clear" - because of:

i. *The words used*: "Looking first and foremost at the words used, we consider that the objective formulation of the offence - arousing "reasonable suspicion" - indicates that there is no requirement of mens rea. As …, counsel for the respondent,

expressed it, there is difficulty marrying a subjective requirement, such as knowledge or intention, with the objective requirement of arousing "reasonable suspicion".

ii. *The context*: Similar arguments as to those advanced in Lane were employed by the Crown (and accepted by the Court), tracing the historical development of the legislation and the relationship with other sections of the Act.

iii. *The purpose of the provision*: "The offence is concerned with the effect on other people not the intention or knowledge of the defendant. It is designed to deny a proscribed organisation the oxygen of publicity or a projected air of legitimacy. It seeks to avoid others becoming aware of, and potentially becoming supporters of, proscribed organisations."

In dismissing the appeal, the Court went on to hold that such an interpretation is compatible with Article 10 ECHR as the interference is justified. Firstly, Section 13(1) is expressed in clear terms, providing legal certainty. Secondly, the restriction pursues legitimate aims and thirdly, it is necessary and proportionate. The Court rejected the appellants' argument that expressive acts can only be criminalised where the expression includes an incitement to violence.

[*Jude Bunting represented Mr. Pwr in this appeal*]

Terrorism offence – scheduled offence – circumstantial evidence

Robinson [2021] NICA 65

CR appealed against his convictions for murder and for causing an explosion with intention to endanger life. He was sentenced to a total of 22 years imprisonment. CR was charged on the basis of joint enterprise. The prosecution was based on circumstantial evidence.

The appeal was dismissed.

Whilst the judgement is fact specific, the NICA set out a detailed analysis of the legal principles in relation to a circumstantial evidence case [Paras 7- 10].

Bad character – misdirected jury on relevance – impact on safety of conviction

Patterson [2022] NICA 1

P was convicted of possession of ammunition in suspicious circumstances (Count 1). He also pleaded guilty to two counts of possession of a Class B drug (Counts 2 and 3).

The police had searched the home of P's deceased mother and discovered small quantities of Class B drugs and a small box of cartridges found in a glove within a rucksack. The prosecution case was that the ammunition found was under the care and control of the P. DNA provided a forensic link to P, the rucksack and items within it were his, he was present in the house extensively and that there were no other items belonging to any other person other than his wife or mother which were found on the property.

The defence case was that the ammunition was hidden in the rucksack by another individual unknown to the appellant and that he had an innocent explanation as to how his DNA got onto the glove.

The only issue for determination by the jury was whether or not the appellant was in possession of the ammunition in question.

This appeal centred on the decision by trial Judge to admit bad character evidence under the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"), namely convictions at Sheffield Crown Court in January 2004 for (i) Attempted robbery; (ii) Possession of an imitation firearm.

The grounds for admission if the bad character evidence at trial were "…the defendant has a propensity to commit offences of the kind charged…. the previous convictions can be regarded as not bad character because they are simply relevant to the issue of rebutting any defence of innocent association in respect of his association with the drugs and ammunition seized…"

The application was dated November 2019 but according to the prosecution it was not served until October 2020 due to "an oversight." The appellant applied to exclude the evidence on the basis that it was out of time, did not contain details of the convictions from 16 years previously, admission would be unfair, and it does not rebut innocent explanation.

At trial, the prosecution stated that the only details of the convictions was a news report and the criminal record. [There was some subsequent disclosure by the police that was available to the Court of Appeal, but the report does not state what this was.]

The judge expressed concern about the delay in making the application and the lack of detail, but ruled that only the second conviction, possession of an imitation firearm was admissibility under the propensity element and also to rebut innocent explanation.

The appellant gave evidence and was cross-examined about this previous conviction.

In summing up, the Judge directed the jury that the bad character evidence was (i) "relevant to his tendency to commit this type of offence, in other words, the type of offences which arise under the firearms legislation…"; and (ii) "because the defendant has advanced his case as one of innocent association…"

The NICA took into account the following factors:

a. The judge is in a better position than an appellate court to make a judgement on the admissibility of bad character evidence. [36]

b. Judges dealing with such applications have to make decisions under pressure of time and in circumstances where such applications have to be determined in such a way as to minimise inconvenience to juries.
c. An appellate court should be slow to interfere in the exercise of this judgement provided the judge has directed himself or herself correctly. [37]

"All that said, the court has some concerns about the manner in which this application was considered." [38]. These can be summarised as:

a. The lateness of the application, and the absence of any "real inquiry by the [Judge] as to the basis for the delay". One of the consequences was that the court had very limited information about the circumstances of the conviction. The Single Judge, in granting leave on this ground had stated: "As a result, the court could not consider the extent of similarities or differences between the two offences."
b. The prosecution primarily sought to introduce the evidence of the conviction as tending to rebut the appellant's defence of innocent association, but "the [Judge's] decision to admit the… conviction on the further basis of propensity went beyond what the PPS was seeking." This was not appropriate.
c. "In the course of her closing she did say that the fact that the appellant had a conviction for possession of an imitation firearm was relevant to his tendency to commit this type of offence, … In our view this was an error and the LTJ should have confined herself to the issue of relevance in terms of rebutting a defence of innocent association."

However, despite these concerns the NICA dismissed the appeal for the following reasons:

a. The Judge had been alive to the two major issues raised by the appellant, namely the lack of any detail as to the circumstances of the commission of the offence and the length of time between the commission of the offence and the current offence.
b. The fact that the appellant had been convicted of the offence of possession of an imitation firearm was relevant to an important matter in issue between the defendant and the prosecution, namely the appellant's defence of innocent association. Therefore, it could lawfully be admitted under section 6(1)(d).
c. The gap in time between the conviction and the offence being tried "is but one factor the [judge] had to take into account. She clearly was aware of the issue and came to the conclusion that the nature of the offence was such as to render it admissible on the relevant issue of the appellant's defence of innocent explanation. There is no rule of law which requires a judge to exclude a conviction having regard to the length of time between the date of the conviction and the offence being tried. The court is obliged to take this matter into account under Article 6(4) of the 2004 Order and this is something the [judge] clearly did."
d. The judge "was in a strong position to assess the strength or otherwise of the prosecution case"
e. It is clear from the arguments put to the Judge and her consideration of the matter that she did have regard to all relevant considerations.
f. When the judge directed the jury on the approach that the jury should take when considering the conviction in relation to *innocent association*, the judge "explained the basis upon which the evidence was admitted in" that context. "She referred to the length of time between the conviction and the matters the jury were considering. In that context she said that the jury might think that the conviction was of "lesser significance."
g. The judge was careful to point out that it was a matter for the jury alone to decide the extent to which, if at all, the conviction assisted in its determination of whether or not the appellant committed the offence. She stressed that it was only part of the evidence, and that he should not be convicted solely or mainly because of it. By way of emphasis she told the jury: "It's only a tiny, tiny part of the evidence."
h. The prosecution case was a strong one and the admission of the conviction did not serve to bolster a weak case. "Overall, …it did not play an inappropriate or disproportionate role in the proceedings."
i. The judge was entitled to admit the evidence on the grounds that it was relevant to an important matter in issue between the defendant and the prosecution.
j. It is significant that she excluded the potentially more prejudicial conviction of attempted robbery.
k. The basis for the admission of the conviction was that the conviction in respect of a firearms offence, even an imitation firearm, was a relatively unusual type of offence by its nature.

l. The bare nature of the detail probably operated to advantage, rather than prejudice, the appellant.

Commentary by Paul Taylor QC

It is arguable that a significant delay in lodging an application to adduce bad character evidence that prejudices a defendant, should result in application being refused. As the English Court of Appeal has stated in relation to the equivalent legislation and procedural rules:

> "The Criminal Procedure Rules are not decorative. They are there for a reason. The structure and language of the rules, if complied with, should ensure that tricky questions of procedure or evidence are addressed by the parties in time, so that, where dispute arises, the parties have developed positions which can be laid clearly before the judge who must resolve the problem. That is the point of the Rules. This court is acutely aware of the pressures upon practitioners. But in our judgment this case represents a good example of the problems which can arise when the rules are not complied with." *Smith* [2020] EWCA Crim 777, [50]

However, as in *P's* case, once the NICA decided that it was within the reasonable exercise of the trial judge's discretion to admit the bad character evidence notwithstanding the delay, the central question becomes: Did the judge misdirect the jury as to the correct approach to this evidence?

The Crown Court Compendium of England and Wales advises that:

> "The jury must be directed to decide to what extent, if at all, the evidence establishes that for which the party relying upon it contends (e.g. propensity/ credibility). It is of equal importance to identify any purpose/s for which the evidence may **not** be used."
> [See the Compendium para 12-6. See e.g. *Fanta* [2021] EWCA Crim 564]

On the basis that the NICA in P found that the evidence was relevant to rebut innocent association but was not relevant to the issue of propensity, the appropriate course would have been for the judge to direct the jury accordingly. Instead, the jury were erroneously told that the evidence was relevant to propensity as well.

The final question is then whether this misdirection rendered the verdict unsafe. The English authorities stress that once evidence of bad character has been admitted under any gateway, it can be used by the jury for any relevant purposes [eg *Campbell* [2007] 1 WLR 2798; *Highton* [2006] 1 Cr App R 7 (125). See also *Sullivan* [2016] Crim LR 644]. However, the test is relevance. In *P* the NICA ruled that it was *not relevant* to propensity. It follows therefore that it should not have been considered by the jury in that context.

It is submitted that the correct test to be applied in an appeal where the jury have been misdirected that the bad character evidence was relevant to a particular issue is whether it might have made a difference to the jury's verdict or, as was found by the NICA, "it did not play an inappropriate or disproportionate role in the proceedings." The answer to this question will depend in each case on the specific facts, evidence and the strength and weaknesses of the respective cases.

THE CARIBBEAN

The Caribbean Court of Justice
(On appeal from the Court of Appeal of Barbados)

Statute – Interpretation – Sexual Offences Act Cap 154, s 3(1) - Meaning of 'rape' - Whether a man can be charged for rape of another man.

Commissioner of Police v Stephen Alleyne
[2022] CCJ 2 (AJ) BB

The issue in this appeal was whether the law permits a man to be charged for rape of another man.

SA was charged with rape contrary to the Sexual Offences Act. He was discharged by the Magistrate after hearing submissions that the charge alleged that he had sexual intercourse with another man without his consent. The Magistrate decided that the crime of rape in (s 3(1)) did not extend to anal intercourse between men. The majority in the Court of Appeal agreed with the Magistrate's decision. The Commissioner of Police appealed to the CCJ.

The Court (Barrow JCCJ) found that a man can be charged for the rape of another man.

a. The Act uses gender neutral language and extends the definition of rape to include anal penetration.
b. Considering the literal meaning of the words used in the Act, their context, and comparable legislation, any person, male or female, can be the offender or victim of rape.
c. The retention in the legislation of the offence of buggery did not prevent males from being charged with rape, as the Interpretation Act (s 22) allows offenders to be charged with either offence, as long as they are not punished twice for the same act.
d. The Court was aware that the issue of the constitutionality of the offence of 'buggery' has been adjudicated in several courts, including within the Caribbean. However, the issue did not arise for decision, and in the circumstances, it was the duty of the Court to exercise proper judicial restraint and refrain from deciding an issue that was not argued before it.

In a separate judgment, Jamadar JCCJ, entirely supported the opinion of Barrow JCCJ and agreed that the Act permits a man to be charged for rape of another man and found that:

a. When judges are interpreting legislation, they must also respect the fundamental rights in the Constitution and consider a State's international treaty commitments.
b. A gender-neutral interpretation of the Act respects the right to protection of the law regardless of sex, and the prohibition against discriminatory laws under the Constitution. It also respects Barbados' international law commitments to ensure equality before the law regardless of gender and the enjoyment of fundamental rights and freedoms without restrictions based on sex.

In a dissenting judgment, Burgess JCCJ found that the Act does not create an offence of rape of a male by another male and would have dismissed the appeal on the basis that:

a. Under the common law, only a man could commit rape and only against a woman.
b. s 3 of the Act does not purport to do anything as revolutionary as changing the common law to create an offence of rape by a male of another male. For Parliament to do so, it would have had to express that intention in clear and unambiguous language.
c. He considered the natural and ordinary meaning and legal meaning of the words used in s 3, as well as their context in the Act as a whole and the rules of natural justice.
d. The words 'sexual intercourse' used in creating the statutory offence means penile-vaginal penetration.
e. s 3(6) of the Act, modifies the common law by providing that, not only a man can commit the *actus reus* of rape, but any of the parties to sexual intercourse, a male, or a female, can do so.

The following summaries were prepared by Rajiv Persad, Shalini Sankar, Ajesh Sumessar and Gabrielle Hernandez of Allum Chambers, Trinidad and Tobago.

Bahamas

Appeal against Sentence - Fraud- Forgery- Whether sentence was too harsh

Thompson v Commissioner of Police MCCrApp No. 22 of 2021

In Feb 2018, the appellant was charged with multiple counts of falsification of accounts, possession of a forged document, uttering a false document, fraud by false pretences, conspiracy to commit fraud by false pretences and laundering the proceeds of criminal conduct. In May 2018, after an agreement with the prosecution, the appellant entered a plea of guilty. The magistrate then sentenced her to give compensation to the National Insurance Board in the amount of $179,557.06. Default in payment would result in a custodial sentence of five (5) years. The appellant eventually defaulted on her payments.

In August 2020 a warrant of apprehension was issued for the appellant. The appellant applied to the Court of Appeal for an extension of time to appeal both conviction and sentence. On 27 January 2021, the Court denied the application to appeal the conviction as the guilty plea was given unequivocally and section 233 of the Criminal Procedure Code (CPC) applied, but the application to appeal the sentence was allowed. The 5 year sentence was quashed and the matter sent back to the magistrate for resentencing. The Court of Appeal agreed that the CPC did not permit the magistrate to impose imprisonment for 5 years in default of a compensation order. On resentencing, the magistrate again imposed a sentence of 5 years, which the appellant appealed once more as being unduly severe.

The Court of Appeal found that the magistrate did not indicate the basis of that decision, nor did the decision reflect that he addressed his mind to each count separately. The Court of Appeal could not determine if any consideration was given for a discount for a guilty plea, the fact that the appellant had no antecedents or that there was a change in the appellant's circumstances since 2018, when the sentence of a compensation order was first imposed. The magistrate imposed the maximum sentence on the appellant, notwithstanding her guilty plea and the fact that the appellant had no antecedents. As a matter of principle, the sentence cannot be correct.

Principles of sentencing require that although sentences must meet the individual circumstances that present themselves to a sentencing court, there should be parity as between persons who have been convicted of similar offences. Accordingly, the Court of Appeal found that this case was not one where the maximum penalty ought to be imposed, nor should the maximum penalty be the starting point. The Court of Appeal understood that it could not have sent the appellant back to the magistrate for another resentencing and substituted a sentence of 12 months.

Procedure – Application for Extension of time – Delay – Prospects of Success – Exercise of Discretion

Barrington Darling MCCrApp & CAIS No. 266 of 2018

D charged with 2 counts of possession of marijuana and cocaine with intent to supply in the Bahamas. D plead guilty at earliest opportunity and had no known antecedents. Sentenced to 4 years and applied for extension of time of 10 months to file appeal citing inability to get forms from prison authorities. Delay was deemed inordinate. Prospects of his case considered as no account was previously taken for time spent in remand by Magistrate. Sentence considered unduly harsh given the defendant entered a guilty plea at the earliest opportunity, had no known antecedents and the time spent in remand. Sentence reduced from 4 years to 3 years 1 month. Appeal allowed.

D'Angelo T Adderley v Regina SCCrApp. No. 199 of 2018

In 2016, D was convicted of the murder of Sheria Curry and the attempted murder of Shanko Smith in the Bahamas. During the police interview, D declined to answer most of the questions put to him but is alleged to have acknowledged his familiarity with both co-accused and acknowledged being with one of the co-accused the entire day in question. D participated in an identification parade and was positively identified by three witnesses. At trial, one of the co-accused admitted his role as the driver and named the D as the front seat passenger. D did

not testify nor call any witnesses. In 2017, D was convicted and sentenced to 35 years on the charge of murder and 15 years on the attempted murder to run concurrently. In 2018, almost two years out of time D filed a Notice of Appeal against his conviction citing the reason for delay as not knowing how to lodge an Appeal.

He appealed his conviction on the basis that the judge did not adequately and fairly assess the identification evidence, that the statement of his co-accused should have omitted his name and was highly prejudicial against him and the verdict was unsafe and unsatisfactory. D's explanation for his delay was deemed unacceptable. The transcript noted that the jury's attention was drawn to the need to be cautious when considering the evidence of the alleged eyewitnesses, the reason for such caution and the possibility of error being made even in cases of purported recognition. The Court noted that Judge could have told the jury that the evidence of one of the eyewitnesses could be used to support the identification of another of the identifying witnesses but did not do so, which benefited D and as such the judge did adequately and fairly assess the identification evidence. On the second ground, that the statement of his co-accused should have omitted the D's name and was highly prejudicial against him, the Court found that the judge exercised his discretion correctly, and in accordance with the test laid down by the Privy Council in *Dennis Lobban v The Queen* [1995] 1 W.L.R. 887, as the greater prejudice would have been to the co-defendant for any exculpatory explanation to be excluded and that it was necessary be admitted in the interest of justice and as such did not constitute an irregularity. The judge further gave explicit directions to the jury that identification of two persons who were in the vehicle with the co-accused was not evidence against D. The verdict was considered safe and satisfactory and Extension of Time application refused and convictions and sentence affirmed.

Trinidad and Tobago
Judicial Committee of the Privy Council

Admissibility of Fresh Evidence – Incapable of Belief - Unreliable Witness –Test of Credibility - Recantation – Impeachment - Interest of Justice - Safety of Conviction

Maharaj v Trinidad and Tobago [2021] UKPC 27

The central issues in this appeal concerned the admissibility of the fresh evidence of the main witness's retraction, either because it was credible evidence of his perjury or because it otherwise impeached his reliability as a witness of truth. In these circumstances, the appellants argued that the Court of Appeal of Trinidad and Tobago ought to have admitted the evidence which inevitably undermines the safety of their convictions on one basis or another.

In 2001 the nine appellants were convicted of the murder based on the evidence of one witness, Junior Grandison ("Grandison"). Subsequently, in 2011, Grandison swore a statutory declaration in which he stated that the evidence he had given at the trial of the appellants was not true. The appellants' primary position was that the fresh evidence was plainly capable of belief. Alternatively, the fact that Grandison had made multiple inconsistent statements demonstrated him to have been an unreliable witness.

The State, the respondent, opposed the application to adduce the fresh evidence and submitted that it was plainly incapable of belief and should not be admitted. Consequently, in 2014, the President of Trinidad and Tobago referred the matter to the Court of Appeal for reconsideration. The Court of Appeal opted to hear the evidence *de bene esse* before deciding whether to admit the fresh evidence. A subpoena was issued for Grandison's attendance at court. However, he could not be traced, and he did not attend the hearing, albeit that it is said that he was sighted in the precincts of the courthouse during the appeal. At the hearing, the appellants sought to rely on the statutory declaration and other fresh evidence, including taped audio recordings in which, it was said, Grandison admitted he had given false evidence at the trial. The audio recordings were transcribed and submitted to the court. The State adduced fresh evidence in rebuttal to the effect that Grandison's retraction of his trial evidence was unreliable. The Court of Appeal refused to admit the appellants' fresh evidence and dismissed the appeals on 16 May 2018.

The Court of Appeal directed itself conventionally, in accordance with the guidance of *R v Parks* [1961] 1 WLR 1484, as to the "four factors" to be considered when exercising its discretion in admitting fresh evidence. It went on to remind itself that the "Court of Appeal is not simply a conduit through which the proposed additional evidence is uncritically advanced. The evidence must satisfy a minimum threshold standard of credibility and reliability in order to justify its reception, otherwise there would be no proper end to the adjudicative process": Mohammed JA in *Moonsammy v The State* Cr App No 14 of 2014 at para 12. It noted, nevertheless, that the power to receive fresh evidence represented a significant safeguard against the possibility of injustice and the discretion to do so ought to be exercised if, after investigation of all the circumstances, the court thought it necessary or expedient in the interest of justice to do so: Narine JA in *Hernadez v The State* Cr App No 63 of 2004, para 27, referring to Benedetto v The Queen [2003] 1 WLR 1545. The Court then adopted the same course as in *Pedro v The State* Cr App No 61 of 1995 and, in assessing the fresh evidence, found it was logical to ask two questions, the first being the reason the witness had given for lying at trial and the second being the reason he had given for telling the truth now.

Ultimately, the Court of Appeal held that the statutory declaration fell "short of the threshold for admission as fresh evidence in terms of its capacity for belief"; it was not in the interests of justice to admit it. The Court of Appeal also declined to admit the evidence relating to the telephone conversations between Michael Maharaj and Grandison on the basis that the evidence had been "so heavily tainted by the appellants' influence that its capacity for belief has been greatly diminished and it would be contrary to the interests of justice to admit it". Consequently, the Court of Appeal dismissed the appellants' appeals and affirmed their convictions and sentences.

In 2019, the Judicial Committee of the Privy Council granted the appellants permission to appeal. The Committee concluded that the Court of Appeal did not apply too high a test of credibility when deciding whether to admit the fresh evidence. The Court's analysis was comprehensive and necessarily robust. The Court was inevitably required to determine what weight should be given to the fresh evidence. The manner in which the fresh evidence was found to have been obtained characterised it as unreliable. The Court of Appeal was right not to adopt the "jury impact test" to determine whether the fresh evidence is capable of belief.

Trinidad and Tobago – Court of Appeal

Corruption - Bribery - Solicitation - Separate Indictments - Separate Trial - Autrefois Acquit - Abuse of Process - Double Jeopardy - Administration of Justice - Offends Court's Sense of Justice to try Accused.

The State v Nawaz Ali Cr. App. No. P025 of 2018

In February 2009, the respondent was charged on an indictment containing one count of corruptly soliciting and one count of corruptly receiving money on 29 December 2005, and one count of corruptly receiving money on 4 January 2006. The respondent was acquitted on the two counts with respect to the incident on 29 December 2005 but convicted on the one count arising from the incident on 4 January 2006.

The respondent appealed his conviction on the sole ground that the verdict against him was inconsistent with the 'not guilty' verdicts on the two other counts on the indictment. The Court of Appeal allowed the appeal on 29 July 2010 where it held that the counts were inextricably linked and that there could be no rational explanation for the jury's verdicts. A retrial was ordered on the basis of the seriousness of the offence, the strength of the prosecution's case and the public's interest in having the matter fully ventilated.

At the retrial, an application was made by the prosecution to admit evidence with respect to the two counts of the first trial, in particular, the evidence of the earlier arrangement as background to contextualise the count before the court. The trial judge declined the prosecution's application on the basis that it would be unfair to admit the evidence from the first trial as, *inter alia*, the evidence on the acquitted counts one and two were inextricably linked to the count now on retrial and if that evidence was admitted, it would lead to satellite issues which would detract the minds of the jury from the central issues in the retrial. The trial judge further believed that the evidence would contaminate the retrial and lead to confusion that could not be cured by any directions given to the jury. The trial judge thereafter stayed the indictment and discharged the respondent.

On appeal by the State, it was contended that the trial judge's decision to exclude admissible evidence leading to a withdrawal of the case from the jury was erroneous in point of law in that the learned trial judge misdirected herself as to:

1. The legal status of the jury's verdict in the respondent's former trial and stayed the indictment without any legal authority to do so; and
2. The legal admissibility of the former jury's verdict in the retrial.

The Court of Appeal found that the legal status of the first verdicts in respect of the first two counts was that such verdicts were irrelevant and amounted to no more than evidence of the opinion of that jury, which did not bind any future juries from examining the same facts and reaching a different conclusion. The fact that the respondent was acquitted of the first and second counts was neither conclusive proof of his innocence in respect of the third count nor did it mean that all issues were resolved in his favour. Accordingly, the trial judge erred when she found that the earlier appeal had endorsed the findings of the jury; and it would be unfair to allow the evidence sought because a jury had already made a finding on what was the initial arrangement.

The Court of Appeal in the second ground found that no issue of double jeopardy arose since the respondent was not being tried again for the offences for which he was earlier acquitted. Rather, the evidence of the two acquitted counts were being sought to contextualise the count before the court. It was important for the jury to be given a full picture of how the events on 4 January 2006 unravelled. Irrespective of whether or not the evidence of the acquitted counts showed or tended to show that the respondent was in fact guilty, it was open to the prosecution to rely on this evidence to prove the respondent's guilt in relation to the third count alone. As such, the evidence of the first trial was clearly admissible.

However, the Court of Appeal had to now consider if it was fair of the trial judge to exclude this evidence as being prejudicial to the respondent now that it became admissible. The trial judge was found to be plainly wrong since her considerations were misplaced. The jury was not being asked to make a new finding on solicitation and any satellite issues causing contamination or confusion of the jury could easily be addressed by carefully crafted robust directions from the trial judge.

Notwithstanding these findings, the Court of Appeal was unable to allow the appeal by the State since the manner in which the DPP framed the indictment was fatally flawed *ab initio* and the continuance of the proceedings offended the court's sense of justice and propriety.

CONTRIBUTORS TO THE FEBRUARY EDITION

Peta-Louise Bagott is an experienced advocate in both domestic and international criminal law, and professional discipline. Within crime, Peta-Louise has particular experience dealing with complex, document-heavy cases involving telephone and cell-site evidence. She is equally adept at acting as a led junior or as a junior alone in cases ranging from complex frauds to organised crime and terrorism offences.

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.

Daniella Waddoup has a keen interest and fast developing practice 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* and in *R v Wright and others* (the latter raising the issue of whether the judge had given appropriate weight to the defendant's age). Daniella has acted in a number of criminal appeals before the Privy Council, building on her experience working as a judicial assistant to Lord Mance JSC: she was led by Edward Fitzgerald QC in *Pitman & Hernandez v The State* (concerning the constitutionality of sentences of death imposed on those suffering from intellectual disability); *AG of the Turks and Caicos Islands v Misick* (concerning the constitutionality of remote evidence in a criminal trial); and *Stubbs v The Bahamas* (in which the Privy Council found that a sentence of indefinite detention in hospital at the Governor-General's pleasure was imposed in breach of the separation of powers).

Peter Caldwell is ranked by Legal 500 and Chambers UK as a leading barrister, (Band 1) in international crime and extradition and in criminal fraud. He has over 20 years' experience in defending people accused of serious criminal offences and preserving the reputations of those wrongly accused.

Richard Thomas has a substantial appellate practice and has been involved in many appeals against conviction and sentence to the Court of Appeal as well as the House of Lords, Supreme Court, Privy Council and European Court of Human Rights. This has included *Fatah Abdullah* [2021] 2 Cr App R (S) 24 (CA) (minimum terms in life sentences), *Davis & Stubbs v The Queen* [2020] UKPC 27 (PC) (hearsay and bad character in Bahamas murder appeal) and *Lane* [2018] 2018 WLR 3647 (SC) (strict liability terrorism offences).

Paul Taylor QC specialises in criminal appeals. He has appeared before the CACD, and Privy Council. He is a member of the Bars of NI, ECSC (BVI), and Trinidad and Tobago. In 2021 he appeared before the Eastern Caribbean Supreme Court of Appeal (BVI), and the Court of Appeal of Trinidad and Tobago. He is head of the DSC Appeals Unit and editor of *Taylor on Criminal Appeals*. Chambers and Partners (2022) described Paul as *"One of the foremost appeals lawyers."*