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Criminal Appeals Bulletin

Welcome

Paul Taylor QC

Welcome to the latest 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, the Privy Council, and from the Caribbean appellate courts. The issues covered include hearsay, victim trafficking, fresh evidence, abuse of process, insanity, retrials, criticism of trial lawyers, fair trial, the mandatory death penalty in Trinidad, and gunshot residue evidence.

The citations of the cases are hyperlinked to the judgements.

We are delighted to welcome Amanda Clift-Matthews to DSC. Amanda is an appellate specialist in crime and human rights, with a particular focus on the Caribbean and hearings before the Privy Council. She joined DSC from the Death Penalty Project where she was in-house counsel. (See her report and commentary on the *Chandler* case).

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 – *Blackstones Criminal Practice (appeals section)*, *Halsbury's Laws (Appeals) and the Criminal Appeal Handbook*.

The third edition of *Taylor on Criminal Appeals* is due for publication shortly.

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

In this issue

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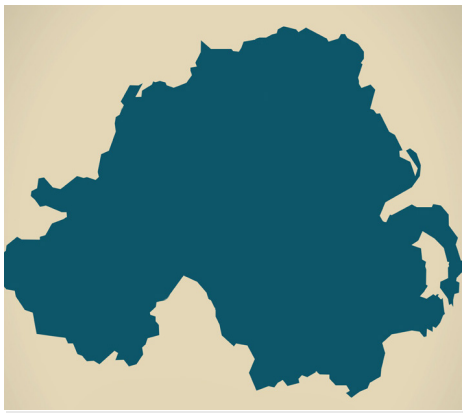
If you would like to know more, or discuss how our barristers may be able to help you and your clients, please contact Criminal Practice Manager, Matthew Butchard on 020 7400 9074.

Useful links

England & Wales: Conviction appeals, case summaries and commentaries



Northern Ireland: Conviction appeals, case summaries and commentaries

Privy Council: Case summaries and commentaries

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

ENGLAND & WALES

Court of Appeal (Criminal Division)

Hearsay evidence – attempt to revive the 'sole and decisive' rule rejected

Spraggon [2022] EWCA Crim 128

By Daniella Waddoup

The 78-year-old applicant was convicted of one count of indecent assault and three counts of indecency with a child. The counts were paired and related to two separate complainants. The prosecution case was that the applicant had been a volunteer working in an orphanage in the early 1960s and had sexually abused the two complainants, then teenagers, in a shared dormitory. The matter did not come to trial until 2021. By then, the two complainants and another key witness (who had alleged abuse against the applicant's co-accused) had all died. Their evidence – in the form of a witness statement and two video recorded interviews – was admitted as hearsay evidence. The trial judge's decision to admit their evidence was challenged on the basis that the case against the applicant was wholly dependent on hearsay evidence. Admitting this evidence, it was said, rendered the trial unfair, not least because the applicant was not in a position to challenge it.

The application for permission was refused.[1] The trial judge had followed the steps set out in *R v Riat & Ors* [2013] 1 Cr App R 2 (described as "essential reading" in the Crown Court Compendium) in the course of a careful, detailed and unimpeachable ruling:

a. He conducted an admissibility exercise in relation to each of the three witnesses individually. This was not a case of "admit one, admit all". The judge avoided falling into that trap.

b. The applicant's central submission was that the trial was "devoid of the essential adversarial element of challenge synonymous with fairness in the common law tradition". This was in truth a submission reviving the "sole or decisive" rule, which, as *Riat*, made clear, does not apply in English law.

c. The hearsay evidence was provided many decades after the alleged events. Hearsay may be more reliable if contemporaneous with the events. It was important to recognise, however, the well-recognised phenomenon of delay in reporting in cases of this nature. Also relevant to reliability was the fact that very similar complaints had been made by three wholly unconnected individuals.

d. The fact that the allegations were made in an institutional context, with the nuns who had worked there all deceased and availability of records "patchy", were matters relating to whether it was fair to try someone in relation to such historic allegations. They had nothing to do with the fact that the evidence relied upon was hearsay.

e. It was not possible to explore the reasons for delay with the witnesses. That was because they were dead. But some reasons were given in their evidence. It was for the jury to assess whether those reasons were sensible. The Court of Appeal was "quite satisfied" that in a "normal case" witnesses stick to the reasons given for delay. The absence of cross-examination on this point was of "relatively tangential effect".

f. The trial judge had carefully analysed the suggestions of unreliability made in relation to each witness. Many of the matters relied upon had been reduced to agreed facts, leading the Court of Appeal to conclude that this level of detail was unlikely to emerge in any admissible form if the witness were alive. Moreover, the jury had been able to see two video recorded accounts: this was not simply a case of "trying to assess somebody on the basis of written words on the page". The judge's directions included the questions that would have been put to each witness in cross-examination, and he had set out the evidence which potentially undermined each witness's credibility. He was "acutely aware" of the need for all possible steps to be taken to achieve a fair and balanced trial.

Comment

The decision highlights that there is little scope for re-inventing the wheel in the context of hearsay evidence. As the CACD made clear, the guidance in *Riat* is comprehensive and applied up and down the country in Crown Courts every week. An appeal based on unfairness occasioned by the admission of hearsay evidence must carefully isolate the ways in which this guidance has not been properly unfollowed to the detriment of an applicant.

If you would like to discuss this case with Daniella Waddoup, please click here.

1 A second ground in relation to bad character evidence was also rejected: see [23] to [28].

Guilty pleas – appeal against conviction – victim trafficking – fresh evidence – SCA decision

***AAD, AAH, AAI* [2022] EWCA Crim 106**

By Rabah Kherbane

The Registrar invited the CACD to hear these three appeals against conviction together, in order to provide guidance on nine main issues that have arisen in similar authorities concerning the prosecution of victims of trafficking.

The facts of each appeal related to various scenarios of trafficked victims. Each appellant sought to challenge their conviction following trial or Guilty pleas. Each had subsequently achieved a positive Conclusive Grounds decision by the Single Competent Authority ('SCA'). Each sought to adduce the SCA decision, and other material, as fresh evidence under Section 23 Criminal Appeal Act 1968.

Admissibility of SCA decision at trial and on appeal

Despite the view in *Brecani* [2021] EWCA Crim 731 that a decision of the SCA is not admissible as expert evidence in a criminal trial, the CACD held SCA decisions could continue to be admitted as 'fresh evidence' on appeal under Section 23 CAA 1968. The CACD observed that the statutory wording of Section 23 permitted a broader flexibility to consideration of material to test the safety of a conviction.

The CACD refused to cast doubt on *Brecani*, notwithstanding arguments advanced by the Appellants on the status of the SCA as an expert body. The CACD observed that an individual (i.e. an SCA decision maker) does not become capable of expressing an expert opinion – in the manner defined within criminal proceedings – simply because of the 'statutory role' of the organisation that is their employer.

Admissibility of evidence of 'human trafficking' experts

The CACD held the evidence of a 'human trafficking' expert that expressed a view on the credibility of a defendant's trafficking account, their vulnerability, or attempted to provide an assessment on whether their experiences met the legal definition of trafficking, was inadmissible.

The CACD noted this did not stop expert evidence given on discrete issues that were relevant in a case and were outside the ordinary experiences or knowledge of a jury, such as the structure of organised criminal groups, or country-specific issues. These were plainly areas capable of forming the subject of expert evidence, and the standard test applied.

Abuse of process where victims of trafficking are prosecuted

Importantly, the CACD held key aspects of the controversial decision in *R v DS* [2020] EWCA Crim 285 had been wrongly decided. The second limb, abuse of process jurisdiction to protect victims of trafficking from an unfair or oppressive decision to prosecute by the CPS, continued to apply. The CACD highlighted:

a. The broad abuse of process jurisdiction where the prosecution fails to apply their own policy or guidance to cases of prosecution of victims of trafficking fell under the second limb, to the effect it would be unfair or oppressive to prosecute;
b. There is an international law obligation on the CPS to provide for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities to the extent that they have been compelled to do so;
c. In practical terms, this obligation is that a prosecuting authority must apply its mind conscientiously to this question of public policy and reach an informed decision on whether to prosecute or not;
d. If, however, this exercise of judgment was not properly carried out and would or might well have resulted in a decision not to prosecute, then there will be grounds for a stay. This includes where the CPS has no rational basis for departing from a positive conclusive grounds decision made by the SCA. Likewise, if a decision has been reached at which no reasonable prosecutor could arrive, there will be grounds for a stay. In part, this jurisdiction seeks to protect the legitimate expectation of a victim of trafficking to a process of review that is obliged on the part of the CPS.

Contrary to the view expressed in *DS*, this abuse jurisdiction survived the 2015 Act. This does not subvert the provisions of or purpose of the 2015 Act. Rather, it would complement them and supplement them. The CACD described the logic otherwise propounded in *DS* as 'puzzling', and held it was inconsistent with the United Kingdom's positive obligations under Article 4 ECHR, and its international obligations more broadly.

The CACD emphasised that where the CPS failed to consider its own guidance or departed from an SCA decision without rational basis, it had failed to comply with its legal obligations, and the redress in those circumstances must be an application to stay proceedings. The required approach is by reference to public law principles, akin to judicial review.

Appeal against conviction for a victim of trafficking following a Guilty plea

The CACD held the ordinary principles where the Court considered the safety of a conviction post-Guilty plea applied:

a. A conviction was unsafe where the Guilty plea was equivocal;
b. A conviction was unsafe where the defendant felt compelled to enter a Guilty plea as a matter of law following a (wrong) adverse ruling from the trial judge which left no arguable defence before jury;
c. A conviction was unsafe where the guilty plea was vitiated either by improper pressure from the trial judge, or from the defendant's legal team; and
d. If it is established that incorrect legal advice had been given, this too can result in the conviction being quashed/treated as a nullity, certainly in the restricted circumstances where the wrong advice went to the heart of the availability of a defence.

The CACD noted two sets of circumstances that were of particular relevance to victims of trafficking that had entered Guilty pleas:

a. An appeal can succeed if vitiated by failure to advise as to a possible defence, even where the advice may not have been so fundamental as to have rendered the plea a nullity, if its effect was to deprive the defendant of a defence which would probably have succeeded; and
b. The last category of distinct cases does not depend on the circumstances in which the plea was entered or indeed upon whether the accused is innocent or guilty, but instead arise when there is a legal obstacle to the defendant being tried for the offence, for instance because the prosecution would have been stayed as an abuse of process.

Comment

In criminal courts, the CPS will routinely express a view at an early stage in proceedings that they intend to continue with a prosecution of a victim of trafficking regardless of the results of an SCA determination, or any informed review. This judgment should embolden practitioners to assert the right of victims of trafficking for the robust review to which they are entitled and apply to stay proceedings that arise out of a (continued) failure by the CPS to apply its own guidance. Likewise, this judgment should encourage the CPS to apply minds conscientiously to whether victims of trafficking and modern slavery should be prosecuted in the first place. CPS lawyers should proactively seek information to be able to make informed decisions on particular cases in this sensitive area.

As to appealing against a conviction following a guilty plea see *Tredget* below.

If you would like to discuss this case with Rabah Kherbane, please click here.

Abuse of process – non-disclosure – modern slavery

***Miller-Cross* [2022] EWCA Crim 346**

By Peta-Louise Bagott

MC was given leave to appeal both his conviction and sentence (five years and 4 months imprisonment) for two offences of possession of class A with intent to supply, and one of possessing criminal property. At trial, the Appellant relied on the defence under s.45 Modern Slavery Act 2015.

Three grounds of appeal were advanced against conviction. First, that the proceedings should have been stayed as an abuse of process due to a disclosure failing. Second, that the prosecution's questioning was at times erroneous and made the trial unfair. And third, the Judge erred in exercising their discretion to admit evidence that rebutted a defence witness's suggestion that an incident of kidnapping was reported to the Police.

The CACD dismissed all three grounds for the following reasons:

(a) The Judge applied the correct legal principles and reasonably concluded that the effect on the trial of the non-disclosure was not such that the only reasonable course was a stay, as, despite being late, the material supporting the Appellant's case was served and put before the jury to consider as part of the evidence [22];
(b) The core submission criticising the comments made by, and way in which, prosecution counsel cross-examined witnesses was well-founded, but as the errors were corrected and the appropriate directions given, they had a 'marginal' effect and did not affect the safety of the convictions [30];
(c) The Judge was 'misled' into admitting evidence in rebuttal on the basis of a it being relevant to the witness's state of mind – it was in fact irrelevant and inadmissible hearsay – and in doing so fell outside the bounds of what was reasonable [36];
(d) However, the admission of this rebuttal evidence did not affect the safety of the convictions as the jury had been properly directed on the core issues in the case (the elements of the s.45 defence) and the overall case against the Appellant was 'strong' [37, 38].

In relation to the appeal against sentence, it was argued that the Judge erred by placing the Appellant in a

significant role and the sentence did not adequately reflect the mitigating factors. The CACD found there was no justification for saying that the sentence was manifestly excessive or wrong in principle because:

(a) The Judge's assessment of the Appellant's role was based on the evidence and the Judge was in 'the very best position to reach a proper judgment about his participation and role' [41];
(b) The aggravating factors required a substantial increase from the starting point [43];
(c) The mitigating factors were limited, and where a sentence is substantial in length the effects of conditions in prison created by the pandemic will be of 'limited significance' [45].

Comment

This decision reminds us of three important points. First, the CACD is unlikely to find that a conviction is unsafe if an error is raised and satisfactorily corrected, one way or another, during the trial itself. Second, the CACD will give considerable weight to strength of the evidence against an appellant when determining the safety of the conviction. The stronger the evidence, the less likely it will be to find the conviction unsafe. Finally, it does not automatically follow that a judge will find a defendant played a lessor role in cases where the s.45 defence is raised at trial, and ultimately rejected. In line with the relevant sentencing guidelines, a judge will assess the extent to which a defendant was under pressure, short of the statutory defence, as part of the sentencing exercise. They would then be entitled to conclude that there is insufficient evidence to suggest that a defendant was 'engaged by pressure, coercion, intimidation' based on the evidence.

If you would like to discuss this case with Peta-Louise Bagott, please click here.

Murder – Insanity - procedure

***Jonathan Keal* [2022] EWCA Crim 341**

By Richard Thomas QC

The appellant was convicted of three counts of attempted murder. He appealed on the grounds that the Trial Judge erred in his direction to the jury in respect of the defence of insanity. The judgment of the Lord Chief Justice re-affirms the law as it set out in the Crown Court Compendium and the leading practitioner texts. It serves as a useful reminder of the test and the procedure to be adopted.

The trial judge gave legal directions and a route to verdict that were both adapted from the specimens provided in the Compendium. The central issue on appeal was whether the trial judge misdirected the jury by failing to direct them that, even if the appellant knew what he was doing was wrong, the defence of insanity would be established if he believed he had no choice but to commit the act. The CACD addressed these submissions in the following way:

Meaning of 'wrong' in the M'Naghten Rules: The Court endorsed the analysis of the key authorities (*Windle* (1952) 36 Cr App R 85 and *Johnson* [2007] EWHC Crim 1978) in paragraph A3.33 of the 2022 edition of *Blackstone's Criminal Practice*. In order to establish the defence of insanity on the ground of not knowing the act was 'wrong', the defendant must establish both that (a) he did *not* know that his act was unlawful (i.e. contrary to the law) and (b) he did not know that his act was 'morally' wrong (also expressed as wrong 'by the standards of ordinary people').

Do the M'Naghten Rules themselves include an element of 'lack of choice': The Court did not accept that, in principle, the concept of knowledge of wrongdoing necessarily imports choice and, in any event, the suggestion that a trial judge should have directed the jury that a defendant acting under the impulse of a disease of the mind should be acquitted was rejected in *R v Kopsch* (1927) 19 Cr App R 50. The Law Commission has acknowledged that the law as it currently stands does not include an element reflecting lack of capacity to control one's actions. For those reasons, the Court concluded that the defence of insanity is not available to a defendant who, although he knew what he was doing was wrong, believed that he had no choice but to commit the act.

Should the Rules be interpreted to involve an element of choice?: The Court declined to embark upon judicial rewriting of the law as it has been understood for over 150 years: "Significant changes to an aspect of our criminal law that has remained undisturbed for so long, laden with policy choices as they would be, are more properly for Parliament".

If you would like to discuss this case with Richard Thomas QC, please click here.

Retrials ordered by CACD – failure to arraign within 2 month period – re-trial was a nullity

***Llewelyn* [2022] EWCA Crim 154**

The appellant and his co-accused successfully appealed against their convictions for s.18 gbh. The CACD considered that the interests of justice required that they should be retried, pursuant to section 7(1) Criminal Appeal Act 1968 ("CAA"). The CACD's order, in accordance with section 8(1) CAA, stipulated that a new indictment should be preferred, and the defendants were to be arraigned within two months, that is by 14 July 2020. In the event, the applicant was not arraigned until 30 September 2020, when he pleaded not guilty.

On 18 February 2021 those representing the appellant served a written application to quash the indictment as

a nullity, on the basis that arraignment had taken place outside the two-month time limit. It was submitted that the provisions of section 8 CAA constitute an absolute bar on any arraignment taking place outside of the two-month time limit unless an extension has been granted by the Court of Appeal. The judge rejected the application and the trial proceeded, and he was convicted.

The present appeal was on the basis that the (re) trial was a nullity.

The CACD analysed the authorities in this area and concluded that:

(a) If the mandatory time limit within which arraignment is to take place has been exceeded, it is clear that pursuant to section 8 the trial should not then take place unless an application is made under section 8. On receipt of an application under Section 8, this court will only grant leave to arraign out of time if i) the prosecution has acted with all due expedition and ii) there is good and sufficient cause for a retrial in spite of the lapse of time since the court's order under section 7. [39]

(b) "These, in our view, are critical protections for an accused, protections which Parliament has reposed in the Court of Appeal (Criminal Division). The provisions of section 8 provide a signal distinction from other instances of procedural failure which may occur during the course of first-instance proceedings…." [40]

(c) "In our view, it follows that Parliament clearly intended that material non-compliance in the Crown Court with the provisions of section 8 would have the result that the court in a subsequent trial would have acted without jurisdiction, resulting in the "total invalidity" of the later proceedings. The restricted timetable for arraignment and the bespoke procedure for the Court of Appeal alone to grant leave to arraign outside the two-month time limit, based on this court being satisfied that the prosecution acted with all due expedition and that there remains a good and sufficient cause for a retrial, mean that Parliament did not intend that this procedure could simply be avoided, intentionally or otherwise, thereby depriving an accused of a substantive and unique protection which, for the reasons set out above, would be unavailable in the Crown Court. The decision in Al-Jaryan reveals the potential importance for an accused of this procedural failure being considered by the Court of Appeal." [46]

The appellant's conviction was quashed.

The CACD refused to grant an application to certify a point of law of general public importance for consideration by the Supreme Court. The court declined to order a retrial.

Appeals against conviction based on guilty plea

***Tredget* [2022] EWCA Crim 108**

The CACD identified three main categories of cases in which it had jurisdiction to entertain appeals against convictions grounded on pleas of guilty:

(1) Where the guilty plea was vitiated: This included where the appellant did not plead guilty voluntarily, or the plea was equivocal (i.e. they pleaded guilty without understanding the nature of the charge or without intending to admit that they were guilty of what was alleged); or where a guilty plea was compelled as a matter of law by an adverse and wrong ruling by the trial judge which left no arguable defence to be put before the jury; or improper pressure or incorrect legal advice;

(2) 'Abuse of process' cases where there was a legal obstacle to the accused being tried by the court;

(3) Where it was established that the defendant had not committed the offence.

The Court stated that categories of cases in which such appeals might succeed were not closed.

Seeking to re-open an appeal

***Field* [2022] EWCA Crim 316**

By **Paul Taylor QC**

F was convicted of murdering PF. He was sentenced to imprisonment for life. The appeal against conviction was dismissed and permission to appeal to the Supreme Court and for the certification of a point of law of general public importance were refused. (See [2021] EWCA Crim 380, [2021] 1 WLR 3543.) Following that the applicant applied, pursuant to Crim PR 36.15, to re-open the determination of the Full Court;

"…The essence of the complaint is, among other things, that the decision of the Full Court was incapable of rational justification and involved ignoring or wholly misunderstanding the applicant's arguments; was vitiated by procedural unfairness; and/or was the product of bias (whether apparent or actual or both). Consequently, it is said, there has been manifest injustice."

The application was heard by the Full Court.

The CACD considered the jurisdiction to re-open an appeal under Crim PR 36.15. It noted that:-

"The underpinning rationale for this rule is, of course, the avoidance of injustice. But that has to be set in the context of the need for finality in judicial decision making. A legal system would be unworkable if a party, having no further right of appeal under the Rules, could simply seek to open up a final decision, after a hearing where the respective arguments have been presented and debated, on the ground that that party considers the reasoning and outcome wrong and unjust." [38]

"…this court simply will not, on this present application, entertain an attempt to renew or recast the legal arguments previously rejected by the Full Court and will not entertain a critique of the Full Court's factual analysis or legal reasoning.

"If (as the applicant contends) the decision of the Full Court is legally flawed and profoundly wrong, then there is a potential remedy: in the form of an application to the CCRC."

"We would add, for the future, some more general observations. Parties and practitioners must clearly understand that the jurisdiction conferred by Crim PR 36.15 is extremely limited and that the jurisdiction can indeed only be exercised in exceptional circumstances. Parties may disagree, even profoundly disagree, with the reasoning and conclusion of an appellate decision. But such disagreement gives no basis whatsoever for an application under this Rule. It is inappropriate and wrong to make such an application, with the ultimate aim of getting another constitution of the court to re-consider the merits of an appeal, by means of claims of procedural unfairness or of bias which have no sustainable basis. To do so will be an abuse of process. The court will be vigilant to ensure that applications under the Rule will be confined to those narrow and exceptional circumstances where the Rule is properly to be invoked."

Comment

The NICA has considered two applications to effectively re-open a concluded appeal. In *Skinner and others* [2016] NICA 40 the Court rejected applications based on the change in law brought about by *Jogee* in relation to joint enterprise. However, in *Walsh* [2007] NICA 4 it was held that where the Criminal Cases Review Commission had declined to refer a conviction to the Court of Appeal for a second time, the court could use its inherent power to relist the appeal if it considered that the rules or well-established practice had not been followed, or the earlier court was misinformed about a relevant matter, and consequently an injustice was likely to occur.

If you would like to discuss this case with Paul Taylor QC, please click here.

The test for intervention by the appellate court - the conduct of a convicted person's legal representatives - the issue of an ambiguous plea of guilty (equivocal plea)

***Orhan Koca* [2022] NICA 16**

By **Paul Taylor QC**

This was a renewed application for leave to appeal against the conviction of murder and the sentence of life imprisonment.

The grounds of appeal raised the following issues:

(a) The test for intervention by the appellate court.

(b) Criticism of the appellant's trial legal representatives.

(c) Appeal against conviction based on an ambiguous plea of guilty (equivocal plea).

Background

The indictment alleged that K had murdered EM. Via the defence statement he pleaded his innocence. An aborted trial intervened, and a new team of defence lawyers was instructed. In March 2017 he pleaded guilty to murder and was sentenced to life imprisonment with a minimum term of 14 years. His notice of appeal was dated 1 October 2020.

Interlocutory and Procedural Orders

K provided an unequivocal waiver of privilege and the Court ordered that the written accounts of his previous legal representatives should be admitted in evidence.

The ground of appeal against conviction read:-

"The failure of the Appellant's legal representatives to ensure that an interpreter was present at his pre-trial consultation, and re-arraignment, resulted in [him] not fully and properly understanding the consultations with his solicitor and senior counsel, the 'indemnity' which he signed, nor the charge to which upon re-arraignment he pleaded guilty. The Appellant thus erroneously pleaded to a charge that he continued to deny, and his plea is therefore equivocal.

Thus, the application for leave to appeal against conviction proceeds on the single ground of equivocal plea."

The Court considered the ground of appeal against conviction and noted that:

(a) K's account to the author of the pre-sentence report was that he had returned home to see a man in his house. He feared that the man was an intruder and so went round the back of the house and picked up a blade from broken shears. The man then walked into the garden. K panicked and stabbed him in the leg, lost self-control and could not recall the subsequent sequence of events. He strenuously denied that this was a premeditated attack on the deceased. The Defendant admitted to lying to the police in an attempt to avoid the consequences of his actions but also tended to attribute responsibility for this lie to advice given by his legal representative. He stated that he eventually pleaded guilty to the offence when he saw the victim's family at court and felt sorry for them.

(b) In the written submissions to this Court, it is suggested that the pre-sentence report "… did not record [the appellant's] account in full …". The elaboration which follows has no foundation in the extant evidence and is not the subject of any application to this court to receive fresh evidence (e.g. sworn testimony from the appellant). This observation applies to the assertions in counsel's written submissions, which are in effect pure hearsay, that the appellant was acting in self-defence and believed he was entering a plea of guilty to manslaughter rather than murder.

(c) The appellant relied on two expert reports by a chartered forensic psychologist and an educational psychologist respectively. Each contains an assessment that the appellant is a person of very low cognitive and intellectual ability, with a diagnosed moderate learning disability. They emphasise the need to communicate with the appellant in simple English, avoiding complicated language and technical terms. Based on this the following submission is advanced: it was remiss, to say at the least, that no interpreter was arranged for the appellant's pre-trial consultations and trial.

(d) It was contended that:

i) The appellant's plea of guilty to murder was based on a specified belief, namely "…. The prosecution already offered me a deal, if I take all responsibility they will give me ten years deal … [and] … in the court [my solicitor] didn't give the court or judge the ten year deal statement and he still has it."

ii) The appellant "had totally misunderstood" the discussions which he had with his previous legal team constituted by a different solicitor and different senior and junior counsel.

iii) The appellant claims to have misconstrued a without prejudice approach to the prosecution by his first team of legal representatives as a firm offer of a PPS deal.

Governing Legal Principles

(a) The unsafe conviction test is well established. The sole question for this court is whether the conviction is unsafe: R v Pollock [2004] NICA 34.

(b) In cases where an appeal against conviction entails an attack on the conduct of and professional services provided by a convicted person's legal representatives, certain principles are engaged. (See para. 7-83 of Archbold 2022). The NICA "doubted" the correctness of the approach in which the court considered whether counsel's decision was "incompetent".

(c) "In our estimation the correct approach in principle is that adopted in R v Smith [2005] 1 WLR 704, a decision of the House of Lords binding on this court. In that case defence counsel had assented to the course taken by the trial judge of formulating a robust direction to the jury, rather than opting for their discharge, follow receipt of a troubling letter from a juror. The House emphasised that this constituted at most a factor to be taken into account. Lord Carswell, delivering the leading judgment, stated at para [23]:

> "The judge was entitled to be fortified in taking this course by the explicit assent and encouragement of the appellants' counsel. It is clear, however, that the ultimate responsibility was his to determine what course to take.
>
> Not only was he not bound to take the action which counsel agreed, but if he thought that another course was the correct one, he was obliged to follow that, regardless of the urgings of counsel. It might perhaps be regarded as surprising that the law should permit a party to assent to one course, and indeed encourage the judge to take it, then to complain on appeal that he was incorrect to do so.
>
> …
>
> the assent of counsel was at most a relevant factor to be taken into account on appeal in considering the justification for the judge's choice of his course of action."

The Court considered the trial lawyer's responses and the absence of an evidential basis for the appellant's assertions. It noted in particular:

"…the manner in which the appellant has opted to put the central thrust of his case before this court. He has done so through the medium of instructions to the solicitor and counsel appointed by the order of this court in the skeleton argument presented and as developed in counsel's oral submissions to this court."

As a result, the Court found that "a major element of the appellant's case to this court has no evidential foundation, properly so-called. Rather it reposes in the mechanism of counsel relaying to the court his client's instructions provided in consultation. This contrasts sharply with evidential foundation and the mechanism of seeking to adduce fresh evidence. This mechanism is starkly absent from this appeal. Stated succinctly, the appellant has conveyed to his newly appointed legal representatives a series of bare, unsubstantiated assertions in a manifestly self-serving context, and, in turn, these have been presented to the court. The imperfections, shortcomings and frailties in an exercise of this kind require no elaboration.

"In short, the court concludes that there are no reasons for doubting the safety of the appellant's conviction."

Comment

This decision raises a number of important issues that can arise in appeals.

(a) Criticism of trial lawyers: The NICA's scepticism about the need to find trial lawyers "incompetent" is reflected in the CACD's approach. Whilst past tests have included the need to find the trial lawyer's actions amounted to "*Wednesbury* unreasonableness", the appellate court 'no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent'. [*Day* [2003] EWCA Crim 1060.]. The approach is now focused on the *effect* of any failings on the *safety* of the conviction rather than in seeking to quantify or attach labels to the failings themselves. [*Day]*.

(b) Failure of trial lawyers to object or raise point at first instance: This is no determinative of the merit of a complaint raised for the first time on appeal.

However, the trial defence advocates stance 'are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamic.' (*Hunter* [2015] 2 Cr App R 9 [98]).

(c) Appellant's fresh evidence on appeal: The appellate court will be hesitant to accept a new account from the appellant. However, it can do so. Practically, the only way to place such evidence before the court is to seek to adduce it under section 25 CAA in the same way as any other fresh evidence. In such circumstances, the appellant should expect to give oral evidence if the Court so orders.

(d) Equivocal pleas: See *Tredget* above.

Sentencing – Guidance - cases involving multiple incidents of domestic violence

***Christopher Hughes* [2022] NICA 12**

Before: Keegan LCJ, McBride J and McFarland J

KEEGAN LCJ (delivering the judgment of the Court)

[1] In this appeal we provide guidance in relation to sentencing in cases involving multiple incidents of domestic violence.

The Court concluded that:

[51] It will be apparent from what we have said that in future perpetrators of sustained domestic violence such as this can expect to obtain higher sentences for this type of offending. Such sentences are a reflection of the growing appreciation of the seriousness of this type of offending, the frequency of it within our society, the repetitive nature of it and the effects on victims. Higher sentencing reflects society's need to deter this type of behaviour and mark an abhorrence of it. There is also a need for the education of society in general, to understand that this behaviour is not normal, it should not be tolerated, and if it does occur it will result in significant sentences.

If you would like to discuss these cases with Paul Taylor QC, please click here.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Substantial miscarriage of justice – fresh evidence – unfair summing up –
breach of right to trial within a reasonable time – compensation

***Lescene Edwards v The Queen* [2022] UKPC 11**

By Kirsty Brimelow QC and Graeme Hall

The Prosecution alleged that on 5 September 2003, Mr Edwards shot Mrs. Harris-Vasquez, the mother of his children with whom he had an ongoing intimate relationship, in the bathroom of her home in Jamaica, and staged a suicide - including writing a fake suicide note. In 2013, Mr Edwards was convicted of the murder of Mrs. Harris-Vasquez and sentenced to 35 years' imprisonment. In July 2019, an appeal against conviction was dismissed, but the sentence reduced to 20 years.

On 4 April 2022, the Privy Council quashed Mr Edwards's conviction. Applying *Lundy v The Queen*, the Board concluded that expert evidence secured on appeal (ballistics, gunshot residue and blood spatter) was (a) credible (not in dispute), (b) fresh (dismissing the argument that the evidence could have been secured at trial), and (c) had a "significant impact" on the safety of the conviction: [44]-[46]. In particular, the expert evidence demonstrated that:

1. The Prosecution hypothesis of murder was a "near-impossibility", which could not be answered by the jury having visited the locus: [48].

2. The expert evidence debunked a central plank of the Prosecution's case; namely, the absence of GSR on the deceased supported the conclusion of murder: [50].

The Board questioned whether this case would have gone to the jury had the evidence been available at trial: [51].

Criticisms of the judge's summing up

The Board criticised the judge's summing up because:

1. She gave a "powerful" summary of the prosecution case without any equivalent summary of the defence case: [54]-[56].

2. She failed properly to give clear warnings to the jury on the flawed methodology underpinning the Prosecution's handwriting expert's evidence (the most important plank of the Prosecution case: [50]). This was the evidence which the expert had used to conclude that Mr Edwards wrote the suicide note: [57].

3. She failed to direct the jury that the police's theories put to Mr Edwards in interview were not evidence: [58].

Substantial miscarriage of justice

The Board further ruled that:

1. A substantial miscarriage of justice had occurred such that the proviso could not be applied and ordered that there be no retrial: [65]-[66].

2. Declared that the 10-year period between arrest and trial, during which Mr Edwards was on bail, breached his right under section 16 of the Constitution to a trial within a reasonable time: [68] (the Board came to no conclusion about the extensive delay during the appeal proceedings: [69]).

3. Commended Mr Edwards's case to the Jamaican authorities for compensation: [70].

Comment

The judgment has important implications as it: (1) sets down that the period of 10 years' pre-trial delay will breach the right to a fair trial, contrary to section 16 of the Constitution, even if the defendant is on bail; this may impact on other cases and should prompt a review of all 10 year delay cases (2) highlights that the lack of public funding for expert evidence at first instance is a highly material factor in assessing the admissibility of such evidence on appeal and, (3) gives a strong indication that compensation ought to be available to those who have served a sentence of imprisonment based on a substantial miscarriage of justice.

Two other points arise: (1) as there is no statutory basis for compensation in Jamaica, unless the authorities make an acceptable offer, there will be further (likely constitutional) litigation (2) the Board did not rule on the delay during the appeal proceedings, which took over 8 years - including the unjustifiable 21-month delay in the Court of Appeal giving judgment which it "sincerely regretted".

Mr. Edwards was represented before the Privy Council by Kirsty Brimelow QC and Graeme Hall.

Watch the hearing here:
https://www.jcpc.uk/watch/jcpc-2019-0097/150222-am.html
https://www.jcpc.uk/watch/jcpc-2019-0097/150222-pm.html
https://www.jcpc.uk/watch/jcpc-2019-0097/160222-am.html

If you would like to discuss this case with Kirsty Brimelow QC, please click here, or to discuss this case with Graeme Hall, please click here.

Appeal against sentence

Mandatory death penalty – stare decisis - constitutional interpretation - savings law clauses - separation of powers – mandatory sentences

***Chandler v State of Trinidad and Tobago* [2022] UKPC 19**

By Amanda Clift-Matthews

In *Matthew v State* [2005] 1 AC 433, the Judicial Committee of the Privy Council considered the lawfulness of the mandatory death sentence for murder in s.4 of the 1925 Trinidad and Tobago Offences Against the Person Act. The JCPC unanimously held that a mandatory punishment of death was a violation of the right to life, and a cruel and unusual punishment. But it ruled, by a five to four majority, that the penalty was saved from unconstitutionality by s.6 of Trinidad's 1976 Constitution which contained a savings law clause for 'existing laws':

> "Nothing in sections 4 and 5 shall invalidate …an existing law…
>
> 'existing law' means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution…"

The majority in *Matthew* found s. 6 conferred on all existing laws immunity from challenge for breaches of fundamental rights.

On the same day *Matthew* was decided, a similar challenge was heard to the mandatory death penalty in Barbados in *Boyce v R* [2005] 1 AC 400, where the JCPC found the penalty to be saved for substantially the same reasons.

In June 2018 the Caribbean Court of Justice, which became the highest court of Barbados in 2005, by six to one majority, departed from the JCPC's ruling in *Boyce* in *Nervais R* [2018] CCJ 19 (AJ). The CCJ found that savings law clauses were transitional and did not oust the jurisdiction of the courts to interfere with existing laws indefinitely (at [53] to [59]). Such laws could be modified by the Order in Council bringing the constitution into effect and stating that existing laws should be brought into conformity through such adaptations or alterations as were necessary.

The CCJ also unanimously found that, by denying a judge discretion as to sentence, the mandatory death penalty was a breach of the separation of powers between the legislature and the judiciary, and an interference with judicial independence.

In light of *Nervais*, the JCPC granted the appellant permission to appeal on the ground that the JCPC should now reconsider its judgment in *Matthew*.

The JCPC set out at length the narrow circumstances in which it would be willing to overturn its earlier decisions ([57] to [64]). Overturning *Matthew*, the JCPC said, would cause uncertainty because the savings clause applied not just to s. 4 OAPA but to all existing laws. A departure would only be justified if it was satisfied that the approach in *Matthew* had been wrong ([65]).

The JCPC accepted that the purpose of s. 6 was to ensure a smooth transition between independent state to republic but found the clause to be "*concrete and specific*" and thus not amenable to the 'living tree' principle of constitutional interpretation (which recognises that the meaning of constitutional provisions evolve with changing times and values ([62] and [73]). Accordingly, determining the effect of s.6 was more akin to an exercise in statutory interpretation.

The JCPC acknowledged that a different interpretation had been given to the savings law clause by the CCJ but was not persuaded by it ([68]). Also, it said the CCJ's interpretation was not essential to its overall decision ([70]). Furthermore, the 1976 Constitution was brought into effect not by a colonial government as in Barbados but by a Trinidadian Parliament which had "*reserved to itself the responsibility for updating laws*" [69].

As to the separation of powers between legislature and judiciary, the JCPC took the view that this was not an overriding constitutional principle, but to be understood by reference to "*the established understanding of those roles that form the legal context in which the Constitution was adopted*" ([75] to [78]). Relying on *Deaton v AG* [1963] IR 170 and *Hinds v R* [1977] AC 195, parliament's fixing of a mandatory penalty for an offence is not a breach of the separation of powers ([79] to [81]).

The JCPC unanimously dismissed the appeal because it was "*not satisfied that the decision [in Matthew] was wrong and that it lacked satisfactory foundation*" [57].

Comment

The decision shows the growing divide between the approach of the CCJ and the JCPC towards constitutional interpretation and fundamental rights. The JCPC's literal interpretation of the savings law clause and originalist approach contrast starkly with the more expansive judicial role assumed by the CCJ in order to protect fundamental rights.

In *Chandler*, the JCPC advocated a strict textual analysis of apparently 'concrete' statements in constitutional instruments and a restrictive interpretation of the separation of powers. For the JCPC, the fundamental purpose and aspirations of a constitution were secondary. It was unmoved by the creative legal arguments put forward to achieve a more just result.

The JCPC did, however, recognise the force in the argument that the savings law clause was a transitional provision. But it also relied heavily on what it said was a deliberate decision by the Trinidad parliament nearly 50 years ago to reserve to itself, exclusively, existing laws' compliance with fundamental rights. The decision leaves unreconciled the contradiction of a constitution, that was designed to guard against arbitrary state power, permitting exactly that.

Edward Fitzgerald QC, Douglas Mendes SC and Amanda Clift-Matthews represented the appellant before the Privy Council.

Watch the hearing here:
https://www.jcpc.uk/watch/jcpc-2020-0051/021121-am.html
https://www.jcpc.uk/watch/jcpc-2020-0051/021121-pm.html
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If you would like to discuss this case with Amanda Clift-Matthews, please click here.

Gunshot Residue evidence – single and two particles – guidance to courts

***Devon Hewey v The Queen* [2022] UKPC 12**

By James Wood QC

The Privy Council considered the, apparently widespread, admission of evidence of findings of single element particulate "consistent with", and two element particulate "commonly associated with", Gun Shot Residue in high profile murder cases in the State of Bermuda.

Such particulate had been admitted in Hewey's case despite the absence of any of the actual three component GSR particles. In allowing an appeal against a conviction for murder by shooting, and remitting the case for consideration of a re-trial to the Court of Appeal in Bermuda, the Privy Council gave some guidance but declined to admit fresh evidence which showed that one and two component particles were commonplace upon clothing and objects within the wider Bermudan community.

Introduction

The Privy Council reviewed the cases of *Barry George* [2007] EWCA Crim 2722 and later the case of *Dwayne George* [2015] 1 Cr App R 15 in which the Court of Appeal had given some guidance on the caution necessary in deploying and directing upon small numbers of Gun Shot Residue particulate (GSR), in cases concerning the use and discharge of firearms. In Hewey's case, the Privy Council declined to resolve the contested issues on the probative value (if any) of single element and two element particulate, preferring to allow the appeal on the basis of the grossly inappropriate directions of the trial judge. The decision may well foreshadow a more prolonged challenge to the circumstances in which "single" element and "two element" particulate "consistent with" and "commonly associated with" can be deployed, absent findings of the actual component GSR particles. The Bermudan criminal jurisdiction seems internationally and scientifically isolated in the approach to this evidence it has adopted.

The Factual Background

The prosecution contended that Devon Hewey was driving a Honda Scoopy motorbike, at the time his pillion passenger Jay Dill (the co-accused) shot Randy Robinson six times in a gang related ride by shooting, in Border Lane North, Pembroke, Bermuda. Hewey and Dill had been convicted of the murder on the 25th February 2013 and sentenced to life. They had their appeals rejected by the Bermudan Court of Appeal in 2016. After the shooting they had arrived together at Hewey's home on separate motorcyles, and were, some hour later, arrested for the murder and in due course bailed. Over the year that followed the bikes, helmets and numerous items of clothing seized from Hewey's home address were analysed in the US for GSR. On all the items only 4 particles of GSR were recovered, and all such particles were recovered from items associated with Dill. In a practice no longer adopted by the US analysts, the firearms experts reported on all the single and double element particles, and relied centrally upon it in securing Hewey's conviction. Whilst the case had some background evidence of gang association, and some suspicious telephone contact, it largely depended on the GSR findings for the sustaining of any conviction.

The science summarized

In general terms, forensic scientists are agreed that the recovery of particles of fused lead, barium and antimony (three component particles) are actual GSR. The presence of these particles are indicative of some form of contact (primary or secondary) with the discharge of a firearm. The *George* cases effectively rendered the reporting of very small numbers of such particles admissible, so long as the judicial directions associated with it were careful and appropriate. In the case of *Barry George,* a single particle had been admitted. And in the case of *Dwayne George,* a small number of GSR particles, together with a small number of associated 2 element particles, had been admitted.

The issue in Hewey's case revolved around the admission of two element particles of either, lead and barium, lead and antimony, or barium and antinomy (described as "Commonly Associated" with GSR) and single particles of lead, barium or antimony (sometimes described as "Consistent" with GSR). Guidance appeared to show that

these should only be reported when found in conjunction with the finding of full, three component GSR. In Hewey's case, the Bermudan trial court had admitted the finding of large numbers of single element particles, and a few two element particles, even though no particles of GSR had been found on any of the items seized from him.

The Fresh Evidence on GSR

Since the trial there had been some significant developments on GSR. Whilst the experts called at trial had conceded the possibility that single and two element GSR may be found widely within the community, there was no actual evidence to support that contention, The trial judge had sought to criticize the defence on this ground. However, before the Privy Council was material relating to a survey conducted in 2016, in Bermuda, by Angela Shaw (the Appellant's firearms expert). Ms Shaw had discovered the widescale presence of single element and two element particles in many areas of Bermuda upon random sampling. The research had been conducted on a shoestring, and funding for the analysis was only made available shortly before the appeal. Similarly, in about 2016, the same US company used by the prosecution in Hewey's case had chosen to stop reporting on findings of single element particles consistent with GSR. Despite that, and at the instance of the prosecution, a week before the Privy Council hearing they submitted a report robustly seeking to defend their analysis and the evidence given at trial.

The Guidance upon particulate analysis and its interpretation

Even before *Barry George* in 2007, and *Dwayne George* in 2015 the guidance to firearms experts on the reporting of GSR findings was subject to continual modification and updating. The court had before it, ASTM guidance E3309-21, ASTM E1588 for 2017 and 2020, and the SWGGSR Guide for Primer Gunshot residue Analysis from 2011.

The judgment

Whilst the Privy Council found that the full findings of all three kinds of particles had not been wrongly admitted (para 32), they did find that the way the judge dealt with the evidence justified allowing the appeal, relying on the comments of Sir Brian Leveson in *R v George (Dwaine)* [2015] 1 Cr App R 15.

1. They found that the judge had suggested "*there was no credible evidence that the one and two component particles were from an innocent source*". They concluded "*in the absence of any three component particles on the appellant or items associated with him, it would be speculative to suggest that one component particles and two component particles found were or were not GSR particulate, it was for the prosecution to disprove innocent sources. The judge effectively reversed the burden of proof.*" (para 39)
2. They found the judge erred in telling the jury that the mere number of one and two component particles was capable of increasing the likelihood that they were the product of a firearm discharge (para 43). Similarly, he erred in telling the jury that because each of the three different kinds of single element particles were present, this could increase the likelihood they were from a firearm discharge (para 44). Finally, the judge erred in suggesting the multiplicity of clothing containing single element particles could increase the likelihood of them deriving from a firearm discharge (para 45).

In a disappointing outcome, the Board left much for further consideration. It declined to admit the fresh evidence on the ground that it felt unable to make findings on such evidence without hearing witnesses and making detailed findings lest there was any issue as to the state of the science. Thus the contentious issues it found remained unresolved. The first issue was whether the recovery of a small number of three component particles on the co-accused could be aggregated and used against the appellant. The second issue was whether one could aggregate one and two component particles found on separate items and describe them all as a single population. The third issue was whether two component particles and one component particles in a single population could increase the likelihood that they emanated from GSR rather than any other source (para 48). Finally, and most interestingly for the future, the Board declined to rule upon the significance of the survey conducted in Bermuda which tended to show the prevalence of one and two component particles in the wider world, such that all persons are likely to have such particles upon them (para 49).

Comment

Research upon which the Appellant relied appeared to indicate that the courts in Bermuda were wholly isolated from other Caribbean, US and European jurisdictions in having tolerated the admission of single component and two component particulate in a number of high profile gang related case to secure convictions. The Bermudan Court of Appeal has repeatedly upheld the practice in conviction appeals. The remission of Hewey's case for potential re-trial, will test severely the strength of the Bermudan criminal justice system. The concern currently is that the system will seek to condone dubious forensic reporting in order to sustain the detention of people it believes to be murderous gangsters.

Mr. Hewey was represented by James Wood QC, Amanda Clift-Matthews, and Simone Smith-Bean

Watch the hearing here:
https://www.jcpc.uk/watch/jcpc-2019-0055/010222-am.html

https://www.jcpc.uk/watch/jcpc-2019-0055/010222-pm.html

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THE CARIBBEAN

By Rajiv Persad, Shalini Sankar, Ajesh Sumessar, Gabriel Hernandez (Allum Chambers, Trinidad and Tobago)

Trinidad and Tobago

Bail – Murder – whether legislation depriving court of discretion to grant bail in murder cases constitutional

Akili Charles v Attorney General of Trinidad and Tobago & Law Association of Trinidad and Tobago

The central issue in this appeal is whether section 5 (1) of the Bail Act of 1994 ("the Act") is inconsistent with the Constitution and therefore susceptible to being struck down. There was no dispute that section 5(1) was in breach of the fundamental rights provisions at sections 4 and 5 of the Constitution. This was clearly acknowledged in the Act, which was passed by the special majority, contemplated by section 13.

In the course of this judgment the Court considered whether section 5 was protected by virtue of being saved law. It was the unanimous view that it was not.

The legislative history of section 5, along with authorities at common law demonstrate that in 1976, at the inception of the Republican Constitution, there was no general prohibition of the grant of bail to persons who were charged with murder and the jurisdiction to so grant was held by the Court.

The second issue which arose was whether section 5 offended the principle of the separation of powers and/ or was not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual as required by section 13 of the Constitution.

The Courts unanimous view that, while a breach of the doctrine of the separation of powers is not a 'stand-alone' reason for striking down a statute, it is a central consideration in determining whether an impugned statute is outside the umbrella of protection offered by section 13 to an Act, passed by the requisite special majority.

The unanimous view of the panel is that, by removing the jurisdiction of High Court judges to grant bail to persons charged with murder, section 5 has trespassed on a core judicial function. In this way section 5 offends a critical aspect of the rule of law and is not reasonably justifiable in a society having respect for the rights and freedoms of the individuals.

Accordingly, the appeal was allowed, and the following relief was granted:

a. A declaration that section 5 and Part I of the First Schedule to the Bail Act 1994 are not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.

b. A declaration that section 5 and Part I of the First Schedule to Bail Act 1994 are unconstitutional insofar as their effect is to remove the jurisdiction of High Court Judges to grant bail for persons charged with the offence of murder.

Criminal Appeal – Bail – Appeal Against the Refusal of Bail - Bail Act - Judicial Discretion - Primary Considerations on a Bail Application - Armed Robbery - Conspiracy to Commit Armed Robbery – Kidnapping - Rape - Money Laundering

Randy Williams v Director of Public Prosecutions (Bahamas)
Court of Appeal

The appellant was charged, along with others, with the offences of armed robbery, conspiracy to commit armed robbery, kidnapping, rape and money laundering. He applied for bail from the Supreme Court, though he has not yet been served with the voluntary bill of indictment and he has not been arraigned in the Supreme Court. His bail application was denied. The appellant appealed this decision on numerous grounds inter alia that "the decision is unreasonable having regard to the primary reasons the Learned Judge gave for denying bail to the Appellant".

Held: Appeal allowed. The decision of the learned judge is set aside and bail is granted to the appellant, with terms and conditions.

A breach of any of the terms or conditions renders the appellant liable to his bail being revoked.

A judge in denying bail must have "substantial" grounds for believing an applicant for bail "would", rather than "might" or "may", abscond, interfere with witnesses or commit a crime whilst on bail. There is always a possibility that an applicant for bail may abscond, interfere with witnesses or commit a crime. However, if that possibility, nay probability, was not based on evidence then it would be difficult to see how any person charged with an offence would be granted bail.

The appellant in this case has no antecedents and the Crown in its affidavit evidence did not provide any basis for denying bail save that the evidence against the appellant is cogent. There was nothing in that affidavit which suggests that had anything to do with gang warfare. There was no suggestion that any witness indicated that they were in fear of being attacked by the appellant or other persons

charged with the offences

Unreasonableness of continued prosecution - Inordinate delay - Abuse of process - Fairness of the trial - Discretion of the DPP to continue to prosecute - Judicial review - public interest - public policy

***DPP -v- Kevon Nurse* CV 2020-0386**

The respondent was charged with murder in January 2001. In an application filed on October 12 2020, the Claimant sought, inter alia, a declaration that the failure of the DPP to forthwith discontinue the prosecution for the charge of murder against the Claimant is unreasonable and unfair. The application also sought a consequential order quashing the indictment. This appeal arises from the decision of the trial judge on July 5, 2021, to permit judicial review of the DPP's decisions to continue the prosecution of the respondent.

The trial was listed on five occasions. On one of those occasions, he was tried and convicted on June 2, 2003. That conviction was overturned on appeal and a retrial was ordered. His second full trial on November 14, 2019, resulted in a hung jury. Earlier trials on June 8 2008 and May 5 2011 had been aborted.

Over the more than 20 years since the respondent was charged in January 2001 there were several adjournments, some of which were contributed by the accused, and recusals by various trial judges in the criminal proceedings. Within that period, the accused had made two applications for a stay of proceedings based on an alleged abuse of process caused by delay before trial judges in the criminal proceedings. Both applications were dismissed.

At the time of the application to the trial judge for judicial review of the DPP's discretion and decisions to continue the prosecution, the matter was being case managed by a Master with a view to its progress to a sixth trial. The application for judicial review was based on the alleged unreasonableness of the DPP's decision to continue the prosecution despite 20 years delay, which allegedly resulted in the unavailability of witnesses, the fading of memories, and the deterioration of the evidence generally. The trial judge agreed that the public interest in continuing the prosecution was outweighed by the prejudice suffered by the accused. The trial judge granted leave and the DPP obtained a stay of the judgement pending the determination of the appeal. The accused remained in custody.

The attorneys representing the DPP filed an appeal and requested an expedited hearing and a temporary stay of the judge's order.

On appeal, the DPP contends that the trial judge erred in law in substituting her decision on the merits of the case against the accused and usurping the exercise of the DPP's power under Section 90 of the Constitution. Further, that there was an insufficient basis for the exceptional remedy of reviewing a prosecutorial decision. This is amongst other complaints, including parallel remedies available to the accused at trial.

Held: In their ruling, the Appeal Court said even after more than 20 years of prosecution, there was always available to him the "effective and timely" alternative remedy of asking the trial court for a stay of the proceedings against him on the ground of inordinate delay resulting in an abuse of process and the inability to obtain a fair trial.

Justice Rajkumar also said if such an application failed, then there were other remedies in the trial process which provided additional safeguards as opposed to seeking to have the DPP's wide discretion to prosecute reviewed.

It has not therefore been demonstrated that, despite extraordinary delay, this is such an exceptional case that it requires bypassing the equivalent but specialised jurisdiction of the court before which the matter had already been listed," he added.

Justice Eleanor Donaldson-Honeywell's decision in the case was based on a misconception that such applications before a criminal court could not be made while jury-trials remain suspended due to the COVID-19 pandemic.

The application for judicial review failed to take into account that a case management Master is partnered with a judge, who can hear such an application with having to await the recommencement of jury trials, and without full preparation for such a trial being completed," he said.

Furthermore, Justice Rajkumar suggested that even if such an application was denied, there are additional safeguards within the criminal justice system available to him. In fact, the existence of those additional safeguards makes the criminal trial process a potentially more effective, because it is equally timely, alternative remedy, in comparison to the very rarely granted judicial review of the DPP's wide discretion to prosecute. Justice Rajkumar noted that the accused's lawsuit dealt with application of the DPP's discretion, which includes public interest and policy considerations. However, he stated that "these are not usually suitable for consideration, or readily reviewable, by a court".

Thus, even in the face of such extraordinary delay, this case does not bypass the equivalent but specialised jurisdiction of the additional safeguards within the criminal trial process. The trial court was equipped, on an application before it, to consider the issue of whether a fair trial was still possible in light of the extensive delay. That is because the exercise of judicial review of the DPP's discretion to continue the prosecution necessarily included both (i.) mirroring the very exercise that the trial court in the criminal jurisdiction could be called upon to conduct on the alternative remedy of an application for a stay and, (ii.) reviewing matters of policy unsuited to review "because they are within neither the constitutional function nor the practical competence of courts to assess their merits."

The accused should not have been allowed to pursue the judicial review lawsuit over the DPP's Office continuing to prosecute the case after 20 years. Justice Rajkumar ruled that such civil lawsuits on criminal prosecutions are only permitted in rare and exceptional cases where accused persons do not have redress before the criminal courts.

The appeal of the DPP was allowed. The Orders of the trial judge were set aside.

Appeal Against Sentence - Trial in the Absence of the Appellant - Fairness of the trial - Unduly severe

Johnathan Akeem Fenleon -v- Commissioner of Police

The appellant was charged with Possession of An Unlicensed Firearm, 2 counts of Possession of Ammunition, Possession of Ammunition with Intent to Supply and of Wantonly Discharging a Firearm. On 26 February 2021, he was convicted of all charges, save and except for discharging a firearm of which he was found not guilty.

The appellant was present throughout the trial up to the hearing and just prior to the delivery of the Magistrate's decision. He was represented by competent Counsel at every step in the trial, save for the one occasion when Mr. Cargill intimated that he was not instructed to proceed in the absence of the appellant. This was on 25 February 2021, when the Magistrate was presented with a "sick note". The Magistrate determined to continue with the case despite the appellant's absence and Mr. Cargill's indication that he had no instructions from the appellant to go on with the case in his absence.

The appellant was sentenced to four years' imprisonment on each of the counts with the sentences to run concurrently. He sought to appeal the sentences imposed by the Magistrate on the ground, inter alia, that in all the circumstances, the sentence of the Magistrate is bias, unsafe and/or unsatisfactory and unduly severe in the circumstances.

The main issue raised on this appeal was the appellant's contention that the Magistrate fell into error when he continued with the trial in the absence of the appellant.

Held: It is clear that a defendant ought to be able to participate in his trial, either in person or through his legal representative. However, this requirement of personal presence is not undergirded by an Article of the Constitution. There may be occasions where a court can proceed in the absence of a defendant. What the appellate court must have regard to, are the circumstances of the particular case, and a resolution of the question: 'did the defendant's absence affect the fairness of the trial?'

The Magistrate ought to have abided by the terms of the Criminal Procedure Code and fell into error when he continued the trial in the absence of the appellant. However, his omission to do so has had no effect on the fairness of the trial. Furthermore, the appellant has not shown any error in principle by the Magistrate when sentencing the appellant and the sentences fall within the range for such offences.

Antigua and Barbuda

Appeal from order made in criminal cause or matter - Appeal as of right – S.121(a) Constitution of Antigua and Barbuda – interpretation of the Constitution –

Whether a judge's order was a final decision (section 18 of the Constitution – Leave to appeal – S.31(2)(a) Eastern Carribean Supreme Court Act

Cheryl Thompson v The Queen
ANUHCRAP2021/0003

Cheryl Thompson ("the appellant") faced an eleven-count indictment for offences contrary to the Trafficking in Persons (Prevention) Act, 2010, as amended. Prior to this, a magistrate had committed her to stand trial, having found that the prosecution had made out a prima facie case. The appellant pleaded not guilty, and her counsel raised preliminary objections seeking to quash the indictment and stay the prosecution at the High Court. Her counsel alleged a violation of her right to a fair hearing, pursuant to section 15(1) of the Constitution of Antigua and Barbuda ("Constitution"), an abuse of process and that the prosecution failed to make out a prima facie case. Smith J, after hearing counsel for the appellant, dismissed the motion to stay the prosecution and to quash the indictment. Smith J also ordered the matter to remain on the court's calendar with a trial date to be set. Dissatisfied with the order of the learned judge, the appellant sought to appeal.

Counsel for the appellant argued that the Court of Appeal had jurisdiction to hear the questions arising on the appeal. He asserted that an appeal lay as of right pursuant to section 121(a) of the Constitution, since it was an appeal from a final decision in a criminal proceeding on questions as to the interpretation of the Constitution. The constitutional provision subject to interpretation, as alleged by counsel for the appellant, was section 15(1), the right to a fair hearing, which counsel also alleged had been breached. Counsel further argued that the appeal lay as of right, as per section 121(b) of the Constitution, since it was an appeal from a final decision given in exercise of the High Court's jurisdiction conferred by section 18 of the Constitution. Alternatively, counsel argued that if the appeal did not lie as of right, the Court of Appeal should grant leave to appeal.

Held, dismissing the appeal and the application for leave to appeal, that:

1. The question of whether a case has received a fair hearing

within the meaning of section 15(1) of the Constitution is not a question of interpretation of that enactment. It is a question of the application of these words to the facts of the particular case. Despite counsel's argument that the appellant's right to a fair hearing was violated, this did not warrant leave pursuant to section 121(a) of the Constitution. Whilst the application of section 15(1) of the Constitution may have been in issue, on the facts no question arose as to the interpretation of that section. Consequently, no appeal lay as of right pursuant to section 121(a). *Eric Frater v The Queen* [1981] 1 WLR 1468 applied; *Eric Joseph v The State* [1988] UKPC 20 applied.

2. For an appeal to lie as of right, pursuant to section 121(b) of the Constitution, there must have been a final decision given in exercise of the jurisdiction conferred on the High Court by section 18 of the Constitution. To determine whether a decision is final, the applicable test is the application test, and the court will examine the application pursuant to which the order was made. If the decision made would be determinative of the issues that arise on the claim, whichever way the application could have been decided, then the decision would be a final one. On the facts, the questions at issue in the proceedings before the High Court included, inter alia, (i) whether the decision of the magistrate to commit was lawful; (ii)whether the magistrate wrongly admitted evidence; and (iii) whether the appellant's constitutional rights were breached. Applying the application test, the judge's decision was not a final once since it would not have determined the matter in litigation for whichever side the decision had been given. Consequently, no appeal lay as of right pursuant to section 121(b) of the Constitution.

Jacpot Ltd. v Gambling Regulatory Authority [2018] UKPC 16 applied; Rule 62.1(3) of the Civil Procedure Rules 2000 applied; *Othniel R Sylvester v Satrohan Singh* [1995] ECSCJ No. 2 followed; *Oliver McDonna v Benjamin Wilson Richardson* AXAHCVAP2005/0003 (delivered 29th June 2007, unreported) followed.

3. Counsel for the appellant contended that section 31(2)(a) of the Eastern Caribbean Supreme Court Act contravened section 121 of the Constitution. However, section 31(2)(a) conforms with the Constitution by virtue of paragraph 2 of Schedule 2 to the Antigua and Barbuda Constitutional Order 1981. Consequently, section 31(2)(a) operates as a jurisdictional bar in circumstances where an appellant fails to satisfy the requirements of section 121 of the Constitution. On the facts, the appellant failed to meet the requirements for leave as of right as per section 121 of the Constitution. Therefore, the judge's order, having been made in a criminal cause or matter, is caught by the prohibition contained in section 31(2)(a). Consequently, no leave to appeal can be granted as no appeal lies.

Section 31(2)(a) of the Eastern Caribbean Supreme Court Act Cap. 23, Revised Laws of Antigua and Barbuda 1992 applied.

Criminal Appeal – Appeal Against Conviction – Appeal Against Sentence – Murder –
Good Character Direction – DNA Evidence – Alibi Direction –
Whether the Judge Ought to Have Left Manslaughter to the Jury –
Whether the Police Investigation Adversely Impacted the Defence.

Dwayne Belazaire -v- Director of Public Prosecutions

Appeal Number SCCrApp. No. 51 of 2021
Jurisdiction: Bahamas

On 14 February 2017, Margaret Smith's son, Jenkin Jr. returned home from work and found his mother unresponsive in the bathroom in a tub of water. Ms. Smith was taken to the hospital via ambulance. She was later pronounced dead at the hospital. The autopsy revealed her cause of death as manual strangulation complicating an immersion event. Fingernail clippings taken from her hands were sent for DNA analysis. The appellant's DNA was found under the nails of her right hand. The appellant was charged with her murder.

He was convicted after a jury trial. He appealed his conviction on the basis that there was some material illegality, and/or irregularity substantially affecting the fairness of the trial and the safety of the conviction, which resulted when the trial judge:

1. a. Failed to give a good character direction;
   b. Insufficiently and or inadequately summed up the case;
   c. Mischaracterized and or misstated the evidence;
   d. Erred by not leaving manslaughter to the jury as an alternative verdict;
2. That a shoddy investigation adversely impacted the defence;
3. That in all the circumstances of the case the conviction is unsafe; and
4. That the sentence is unduly severe sentence.

Held: Conviction and sentence affirmed.

It may well be that it is a salutary practice for a trial judge to ascertain, at some point prior to the start of the trial, whether or not a defendant is entitled to a good character direction or to a modified version thereof. The aim of such practice may also be to ensure that a deserving defendant is given the full benefit of an appropriate direction to the jury when the trial judge is summing up the case. However, the law has not yet made such an discovery and subsequent direction an obligation on the trial judge.

Unless the defendant's good character is raised by the Defence, a judge is under no duty to raise it himself. The

Judge did not give the good character direction as the Defence did not raise it. The court was satisfied that given the cogency of the circumstantial evidence mounted by the Prosecution against the appellant, a good character direction by the Judge to the jury would not have the affected the outcome of the trial. The Judge was required to give a proper alibi direction because the intended appellant relied on an alibi and had called a witness in support of his alibi.

The Judge in the instant appeal failed to give an alibi direction. However, her failure to do so did not render the appellant's conviction unsafe. Once the jury rejected the alibi, they would have considered the case against the appellant based on the evidence adduced through the Prosecution's witnesses. Evidence considered of note included that of the DNA analyst about the appellant's DNA being found under Ms. Smith's fingernails and the scratch marks observed on the appellant's neck and arm.

Further, there was no evidence adduced in the case under appeal, either by the Prosecution or the Defence, from which the Judge could have left manslaughter with the jury. This was a case of murder or nothing. The pathological evidence was that of manual strangulation complicating an immersion event. There was, in the circumstances, and in the absence of any evidence of a provoking event, no issue of manslaughter arising.

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