SWEET & MAXWELL

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Archbold Review

Cases in Brief

Indictment—course of conduct amounting to multiple offences—multiple incident counts under Criminal Procedure Rules, r. 14.2(2)—correct approach to—sample counts and

A [2015] EWCA Crim. 177; February 19, 2015

A was convicted of a count of rape and of sexual assault by penetration, it being alleged by the prosecution that he had carried on a course of conduct involving very many incidents against his wife over a period of years. Generally, when the prosecution alleged that a defendant had perpetrated a number of similar acts on different occasions, it was impermissible for the accused to be charged with a single offence as representing, or constituting, the entire course of conduct for the purposes of sentence. While the Criminal Procedure Rules, r. 14.2(2) allowed more than one incident to be included in a count where they amounted to a course of conduct, problems could arise when the extent, seriousness and timespan of the defendant's offending was unclear from the jury's verdict. The answer was to be identified in the purpose underpinning multiple counts: to enable the prosecution to reflect the defendant's alleged criminality when the offences were so similar and numerous that it was inappropriate to indict each occasion, or a large number of different occasions, in separate charges. The provision allowed the prosecution to reflect such offending in a single count. However, when the prosecution failed to specify a sufficient minimum number of occasions within the multiple incident count or counts, they were not making proper use of the procedure. In cases of sustained abuse, it would often be unhelpful to draft the count as representing no more than two incidents. In A's case, it would have been desirable if there had been a multiple incident count alleging, for example, "on not less than five occasions" with an alternative of one or more specimen counts relating to single incidents for the jury to consider if they were unsure the offending had occurred on multiple occasions. The judge would then have had a solid basis for understanding the ambit of the jury's verdict. The prosecution needed to ensure that there were one or more sufficiently broad course of conduct counts, or a mix of individual counts and course of conduct counts, such that the judge would be able to sentence the defendant appropriately on the basis of his criminality as revealed by the counts on which he was convicted. In most cases it would be unnecessary for the counts to be numerous, but they should be sufficient in number to enable the judge to reflect the seriousness of the offending by reference to the central factors in the case: the number of victims, the nature of the offending and the length of time over which it extended. Therefore, in drafting the indictment, a balance needed to be struck between including sufficient counts to give the court adequate sentencing powers and unduly burdening the indictment. As the editors of Archbold 2015 at § 1-225 have observed, the indictment must be drafted in such a way as to leave no room for misinterpretation of a guilty verdict and regard must be had to the possible views reached by the jury.

Money-laundering—offences contrary to Proceeds of Crime Act 2002 ss. 327, 328 and 329—whether property must be criminal property before arrangement operated on it—property comprising choses in action—need for identification—whether character of property changed on crediting to fraudulent bank accounts—whether "acquisition" severable from "retention, use and control"—warning as to inappropriate use

R v GH [2015] UKSC 24; April 22, 2015

GH was alleged to have set up bank accounts, practical control of which was handed to a fraudster who set up bogus websites selling insurance. The victims transferred money from their bank accounts to those set up by GH. GH was

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charged with an offence contrary to s.328 of the Proceeds of Crime Act 2002, particularised as involving the facilitation of "the retention, use or control" of criminal property. The prosecution appealed the trial judge's ruling that there was no case to answer, and the Court of Appeal refused the appeal. While the case concerned s.328, the Court considered that similar arguments applied throughout to the offences in ss. 327 and 329, where relevant.
(1) The offence required the property concerned to constitute "criminal property" (as defined in section 340(2)) prior to the arrangement, entry into which is charged, coming into operation, upholding an "unbroken line" of Court of Appeal authority that the property must have that quality at the time of the offence (*R v Loizou* [2005] 2 Cr.App.R. 618; *Kensington International Ltd v Republic of Congo (formerly People's Republic of Congo) (Vitol Services Ltd, Third Party)* [2008] 1 W.L.R. 1144; *R v Geary* [2011] 1 WLR 1634 and *R v Amir and Akhtar* [2011] 1 Cr.App.R. 464). This conclusion was consistent with the ordinary meaning of "money laundering" (correctly described the Explanatory Notes to the 2002 Act, paragraph 6) and the definition in Council Directive 91/308/EEC, in force at the time the Act was drafted. Sections 327, 328 and 329 were parasitic offences, predicated on the commission of other offences yielding proceeds (per Moses LJ in *JSC BTA Bank v Ablyazov* [2010] 1 W.L.R. 976, [14]). A wider interpretation would have serious potential consequences for third parties including banks and other financial institutions.
(2) The Court of Appeal in this case was right to find that it was immaterial whether the criminal property existed when the arrangement was made ([2013] EWCA Crim 2237). What mattered was that the property should be criminal at the time when the arrangement operated on it. The contrary interpretation conflicted with both the natural meaning of the words and the obvious purpose of the section.
(3) The prosecution argued that the money paid by the victims to the bank accounts set up by GH was criminal property at the time of payment because it represented a chose in action, to wit the obligation of the purchasers of the insurance to pay the price (voidable for fraud, but valid until avoided). The Act's definition of property included choses in action, but the prosecution had to identify and prove the nature of the proprietorial right concerned. Any presumed contract would have been between the victim and the (non-existent) fraudulent insurance company, and there was no evidence to show what form such a contract might take—indeed, the Crown would have to establish the existence of a prior bilateral contract, not merely the unilateral contract constituted by the offer by the fraudulent company on the website. There would also be a question as to whether the chose in action existed before the payment. There was no material before the Court to substantiate such a case. There might be cases properly founded on the laundering of property in the form of a chose in action, but it was not a subject with which jurors (or judges of the Crown Court) were likely to be readily familiar. If the prosecution advanced a case on that basis, it had not only to consider whether the case could be comprehensibly presented, but also it must ensure that its tackle was properly in order. Abstract references to a chose in action, without the basis being clearly and properly identified and articulated, were a recipe for confusion.
(4) However, unlike the property in *Geary*, the character of the money did change on being paid into GH's accounts. It was lawful property in the hands of the victims at the moment when they paid it into the GH's accounts. It became criminal property in the hands of the fraudster, not by reason of the arrangement made between him and GH but by reason of the fact that it was obtained through fraud perpetrated on the victims. It was therefore legitimate to regard GH as participating in (or, in the language of section 328, entering into or becoming concerned in) an arrangement to retain criminal property for the benefit of another. It was, unlike *Geary*, not wrong to sever the facilitation of the "acquisition" of the money from facilitation of "retention, use and control". The appeal was accordingly allowed.
(5) The courts should be willing to use their powers to discourage inappropriate use of the provisions of the 2002 Act to prosecute conduct which was sufficiently covered by substantive offences, as they had done in relation to handling stolen property. A person who commits the offence of handling stolen property (Theft Act 1968, s.22) was also necessarily guilty of an offence under section 329 of the 2002 Act, but the Court of Appeal has discouraged a practice of prosecuting such cases under the 2002 Act: (see *R (Wilkinson) v Director of Public Prosecutions* [2006] EWHC 3012 (Admin) and *R v Rose* [2008] 1 W.L.R. 2113, [20]). It was unlikely that the prosecution would fail to respect the view of the court in such a matter and it was unnecessary to consider what power the court might have in such an unlikely event.

Police officers—obstructing an officer in the execution of his duty—whether unlawful assault negated an officer acting in the execution of this duty—whether assault lawful

METCALFE v CPS [2015] EWHC 1091 (Admin); April 22, 2015

An officer pushed M, at a time when the officer had placed an arrested man in a police car, to which M was objecting, including trying to open the car door. M was properly convicted of obstructing a police officer in the execution of his duty (Police Act 1996, s.89(2)). The Court was told that *Fraser Wood v Director of Public Prosecution* [2008] EWHC 1056 (Admin) was cited in summary proceedings in support of the proposition that an assault by a police officer would negative the claim that the officer was acting in the execution of his or her duty both before and after the assault. Such an approach was a misunderstanding. In particular, Latham LJ's statements at [7] did not support the proposition that the only circumstances in which a police officer could lay hands on a citizen was in the course of an arrest. The context in that case was that W should not have been convicted of assaulting the officers in the execution of their duty when they were not executing their duty, but assaulting him. In M's case, the officer was engaged in securing the arrested man, and more generally keeping the peace, both of which encompassed the duty he was executing. It did not matter whether the push was lawful or unlawful in determining the answer to the question whether M was wilfully obstructing the officer in the execution of his duty. The push had no bearing on whether M's prior conduct was unlawful; and even if it was unlawful, the officer was still acting in the execution of his duty. A person who had been assaulted by an officer was not liberated from the application of the criminal law prohibiting wilful obstruction of a constable (including that constable) in the execution of his or her duty, albeit that the assault itself was not in the execution of his or her duty. In any event, the push by the officer was lawful, as the use of reasonable force in the preventing of crime etc. (Criminal Law Act 1967, s.3).

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Reporting restrictions—Children and Young Persons Act 1933 s.39—"any person who publishes" —whether apt to include an editor—statutory construction—comments on the current law

AITKEN v DPP [2015] EWHC 1079 (Admin); April 23, 2015

A "person who publishes" (Children and Young Persons Act 1933, s.39(2)) any matter prohibited by s.39(1), and thereby commits an offence, included the editor of the newspaper in which the prohibited matter appeared. Applying the golden rule of statutory interpretation and giving the words their natural meaning, "any person who publishes" did not only refer to "the publisher", that is, the individuals, firms or companies responsible for the conduct of the relevant newspaper publishing business or operation. Rather, it referred to any person, natural or legal, who took such a part in the process of publishing the matter that it could properly be said of them that they "publish" it. As a matter of practice, and using language in its ordinary sense, the commercial publisher of the newspaper would invariably be one such person, but it did not follow that they were the only person who would qualify. It was the natural reading of the expression that it encompassed others responsible for bringing about the publication of the particular matter in question, including (depending on the facts) the editor in charge of the newspaper at the relevant time, and the journalist who wrote it. In addition to being the natural meaning of the words employed, there was a long tradition of the common law so understanding "publication" (*Roach v Garvan* (1742) 2 Atk. 469, 26 ER 683; *Ex parte Jones* (1806) 13 Ves. Jun. 237, 33 ER 283; *McLeod v St Aubyn* [1899] A.C. 549; *R v Evening Standard Co Ltd* [1954] 1 QB 578; and *R. v Odhams Press Ltd ex p Attorney General* [1957] 1 Q.B. 73). Parliament must be presumed to legislate against the background of the common law: Bennion on Statutory Interpretation, 6th edn, pp. 929-931. Further, the law relating to the responsibility for publication in the context of newspaper publishing—including where the issue before the court was contempt of court or libel—was the "legal territory" (see Bennion, above) into which Parliament stepped when enacting the 1933 Act. A's counsel had contrasted provisions referring to the liability of "any proprietor, editor or publisher" or similar with the expression used in s.39; but on proper analysis, the statutory provisions undermined, rather than advanced, A's case: in particular, the use of the former terminology was a *restriction* (to those three categories) of the broader expression in s.39, in the amendment to that effect of s.49 in 1994 (Criminal Justice and Public Order Act 1994). In closing remarks, the Court considered the "new regime" that came into effect in April 2015 (the bringing into force of the Youth Justice and Criminal Evidence Act 1999 amendments to s.49, and the discretionary restrictions regime in s.45 of the 1999 Act; amendment to s.39 by the Criminal Justice and Courts Act 2015, and the new s.45A of the 1999 Act introduced by the 2015 Act); noted the differences between the regimes for civil and criminal proceedings; and commented that it was hard to believe that they were deliberate. They were undesirable and liable to generate needless and problematic uncertainty, particularly where there were parallel proceedings involving the same children or young people (principal judgment by Warby J). Bean LJ added that "the scheme of statutory reporting restrictions remains incoherent and is in need of further review".

SENTENCING CASE

Manslaughter; Ageing; Mental Health; Mercy

BEAVER [2015] EWCA Crim. 653

The appellant, who was 81 at the time of sentence, had pleaded guilty to an offence of manslaughter and been sentenced to three years' imprisonment. He had killed his wife of 60 years, who was aged 82, by stabbing her several times. She had sought to resist the attack.

In the years before her death, the appellant's wife's health had radically deteriorated. The Applicant was her carer. The gruelling demands of this role are detailed in the Court of Appeal judgment.

There were medical reports from four experts before the sentencing judge. In sum, these indicated that, at the time of the offence, D was suffering from depression and was also in the early stages of vascular dementia. He had, in addition, a urinary tract infection—also capable of impairing mental functioning. One of these experts had, however, concluded that D was still fit to undertake a prison sentence, but before the Court of Appeal there was a further report from the prison stating that his dementia was getting worse and he was unsettled by features of the prison regime.

Passing a sentence of three years' immediate imprisonment, the sentencing judge concluded that although it was possible to take a lenient course in cases where the accused's responsibility for his actions was so grossly impaired and his degree of responsibility was minimal, the appellant's mental responsibility was impaired but not so grossly impaired as to justify such an approach.

Counsel for the appellant submitted first that the judge had failed to have proper regard to the interplay and cumulative impact of the various factors operating on the appellant's state of mind at the time of the offence, such that the judge had wrongly found that the appellant's residual culpability was more than minimal. It was further submitted, on the basis of the later report, that the appellant's deteriorating condition meant he was not amenable to a custodial sentence.

Allowing the appeal, the Court of Appeal stated that in a case such as this, the court must keep in mind on the one hand the sanctity of human life, together with culpability for unlawful conduct and on the other hand considerations of mercy having regard to the age, health and frailty of the defendant. Features of the case pointed to the appellant's residual culpability being more than minimal. First, he had obtained a knife. Secondly, the attack was sustained and brutal. Thirdly, this was not a mercy killing.

There was also very considerable mitigation. The appellant, in colloquial terms, snapped. That he did so was attributable to a number of factors: the onset of dementia, depression, the urinary tract infection, sleep deprivation and exhaustion. Those factors did not excuse the taking of human life, but did mitigate the appellant's culpability. There was no suggestion that the appellant was a danger to the public.

The Court concluded that although it was unable to say that the judge's sentence when passed was either wrong in principle or manifestly excessive, the question of mercy remained. Due to the appellant's present condition as described in the latest report, the Court was satisfied that justice would be done by quashing the sentence of imprisonment and substituting for it a suspended sentence of 24 months' imprisonment suspended for 24 months, containing a residence requirement for 12 months with the appellant's daughter-in-law and a requirement that the appellant receives mental health care for 24 months from the Old Age Mental Health Team.

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Archbold
Review

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Case in detail

R. v Hunter and Others [2015] EWCA Crim. 631

By Elaine Freer

A five-judge Court of Appeal was constituted to hear the conjoined appeals in *Hunter and others*.[1] It lost no time in trimming away excess case law surrounding good character directions, and in pronouncing jurors to be capable of applying common sense to these matters without too much assistance. Where such assistance is required, the Court also expressed a preference for substance over form; judicial failures to pronounce the "magic words" should not automatically lead to convictions being quashed.

Some 20 years ago, in *Vye and others*[2] and then *Aziz and others*,[3] it was held that a good character direction needs two limbs: one as to propensity, and the other as to credibility. Therefore the jury should be instructed by the judge to give thought to two matters; a) did D's previous record (or lack thereof) mean that he was less likely to commit this offence, and b) did his lack of previous offences, or their nature, mean that he was less likely to be truthful in his evidence? In *Hunter and others* five appellants in unrelated cases complained that the judges at their trials had failed to give good character directions as required by *Vye*, or by the later cases that "refined" it. All of the appellants were convicted of sexual offences. All had previous convictions, but none for sexual offences. All appealed on the basis that good character directions had not been sufficient; either that one limb had not been given explicitly enough, or that it had not been as favourable to the defendant as it should have been.

In general terms the appellants submitted that the law as to good character was well-established, that it formed an essential part of the judge's duty to fairly sum up a case to the jury [53], and that in each of the five cases the issue was a departure from good practice, the detailed requirements of which were now so clear as to leave no room for deviation either as to content or to scope [54]. Most notably, the appellants' key submission was that an omission of a good character direction to which the defendant is entitled should always be fatal to the safety of a conviction [56].

All of the appellants had chosen to adduce their bad character themselves through gateway (b) of s.101 of the Criminal Justice Act 2003 in an attempt to show that they had no propensity for the sort of crime with which they were now charged [31]. They then sought to argue that, as the Crown had declined to adduce this bad character evidence, it had been implicitly conceded that it had no probative value. On this basis, the appellants submitted that, in such circumstances, it was only where the Crown had sought to adduce the bad character evidence but the judge had excluded it under section 78 of the Police and Criminal Evidence Act 1984 that a good character direction should be declined. This, they said, would "have the benefit of synchronising the judge's exercise of his residual discretion with the admissibility of a defendant's bad character under the CJA" [55].

The Crown, in response, highlighted that both *Vye* and *Aziz*, the "original" decisions on good character, had concerned defendants who had no previous convictions at all, as opposed to ones that were not of probative value in the current proceedings [58].[4] Later cases, such as *Durbin*,[5] had added a gloss that was more favourable to defendants, allowing the good character direction in modified form where old or irrelevant convictions existed, at the discretion of the trial judge.

Dismissing each appeal, the Court of Appeal said that a defendant is only "entitled" to a *Vye* direction, with both limbs, where he is of "absolute good character" or of "effective good character". Absolute good character is where no cautions or convictions exist, and no reprehensible conduct is admitted, alleged or proven against D [78]. Effective good character is where D has convictions for old, minor or irrelevant offences. In such a situation, it is for the judge to decide on the basis of fairness whether D is of effective good character [79]. IF the judge decides that D is of effective good character, s/he MUST give both limbs, modified as necessary. This, however, is an exercise of judicial discretion with which the appellate courts would be slow to interfere. The Court then turned to the situation where D has no previous convictions, but has admitted reprehensible behaviour which is not relied on by the Crown as probative of guilt. On this, they said that the decision as to what directions to give should also be left "to the good sense of the trial judge."

The Court stated

> "It is clear to us that the good character principles have therefore been extended too far and convictions have been quashed in circumstances we find surprising" [70].

Furthermore, there is no direct link between the operation of the rules on bad character evidence, and the operation of the good character direction:

> "It may sound like a statement of the obvious but only defendants with a good character or deemed to be of effective good character are entitled to a good character direction" [72].

Therefore, any previous convictions and any reprehensible behaviour under s.98 CJA 2003 will trigger the judge's discretion. The glosses added by cases subsequent to *Vye* and *Aziz* had potentially made the direction too favourable to defendants who were not deserving of it.

In conclusion, the Court dispelled the notion that whenever a judge fails to give a good character direction as required the conviction will be quashed as a matter of course [92].

The (understandable) frustration of the Court at the excessive number of appeals that this area of law had generated is hinted at in the Court's postscript:

> "We have deliberately conducted a very thorough review of the case law so that it will be unnecessary in future for other courts to do the same. Reliance on this judgment, *Vye* and *Aziz* should suffice." [103].

Let's hope so.

1 [2015] EWCA Crim. 631.
2 [1993] 1 W.L.R. 471.
3 [1996] A.C. 41.
4 Although Hunter proceeds on the basis that the defendants in *Aziz* had no previous convictions, this is not strictly true. At [1996] A.C. 47, the defendant *Aziz* is described as having no "relevant" convictions.
5 [1995] 2 Cr.App.R. 84.

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Comments

Myth-busting in Sex Trials: Judicial Directions or Expert Evidence?

By Dr Emily Henderson & Judge Duncan Harvey[1]

Many criminal lawyers will be familiar with cross-examination in a child sexual abuse trial along the following lines:

"If Uncle did all these things, why did you send him a birthday card saying you loved him?"

"If what you say is true, why didn't you tell your mother?"

"When you told your mother about the touching, why didn't you tell her about the rape?"

Such questions capitalise upon what research tells us are common misconceptions amongst the community (and therefore potential jurors) about the behaviour of "genuine" sex assault victims. Research from Australia, New Zealand & the UK indicates that a significant percentage of people believe "real" complainants disclose the assault immediately and fully (rather than late and incrementally), stick to their stories without retraction and shun the perpetrator. Complainants are more likely to be believed if they did not know the offender beforehand, are chaste and were not intoxicated. Many also expect "real" complainants to be visibly upset when testifying, and want their allegations to be corroborated. Unfortunately, research and clinical experience shows that these stereotypes are quite mistaken: many genuine victims behave quite differently, and corroboration is rarely available.[2]

Research suggests that jurors' preconceptions have a strong impact on their decision-making, whatever the strength of the evidence, and there is, accordingly, widespread concern that misconceptions about rape may create unfairness when it comes to the evaluation of the complainant's credibility.[3] Moreover, prosecution and police prejudices, and/or their fear of community prejudice may contribute to the low rate of prosecution comparative to the incidence of complaint.[4]

There is some debate about these concerns. Some advocates argue that conviction rates in the UK at least are quite high, and so jurors in actual cases must be quite ready to set aside their prejudices. It is not prejudices against rape complainants which need debunking, they say, but rather juries need reminding to be on their guard against false complaints.[5] In either case, the question is how to correct juror misapprehensions and ensure a level playing field.

There are four basic alternatives when it comes to myth-busting. The first is public education: an ongoing and uphill battle. Second, there is juror education, by pamphlet or pre-trial programme. However, this (a) needs to be tailored to the facts of the case and (b) tailored education is obviously expensive and time consuming.[6] This leaves two perhaps more practical responses: education by judicial direction or education by expert witness.

The English response, of course, has been to allow judicial directions.[7] This is, however, problematic. First, research on jurors' reactions to instructions generally suggests that they do not necessarily obey them.[8] Moreover, even if jurors are amenable to judicial instructions per se, research over many years has found that they often do not understand them (although they generally think they do).[9] The recent work by Prof Thomas with English jurors confirms this. [10]

In child sex abuse cases, the New Zealand judiciary's answer is to allow the calling of what we call "counter-intuitive" expert evidence.[11] To quote our Supreme Court:

"Counter-intuitive evidence is evidence admitted in cases involving allegations of sexual abuse of young persons for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning. . . . the purpose of such evidence is "to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance"."[12]

The test for admitting expert evidence in New Zealand is that it is "substantially helpful,"[13] and the position is that correcting common misconceptions about sexual assault meets that threshold.[14]

Experts' evidence typically states that delayed and incremental disclosure of sexual abuse, retraction of allegations, and continuing contact between victim and perpetrator do not necessarily signal a false allegation.[15] They may also

1 Judge Duncan Harvey is a New Zealand criminal trial District Court Judge; Dr Emily Henderson is a New Zealand barrister and solicitor.

2 E. Mosman et al, *Responding to Sexual Violence: Environmental scan of NZ agencies* (Wellington, Ministry of Women›s Affairs, 2009); S Blackwell, *Child Sexual Abuse on Trial* (PhD thesis, University of Auckland, 2007); N Taylor, *Juror Attitudes & Biases in Sexual Assault Cases* (2007) 344 *Trends and Issues in Crime and Criminal Justice* 1; retrieved from *www.aic.gov.au/media_library/publications/tandi_pdf/tandi344.pdf*; J Temkin & B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford, Hart, 2008); Amnesty International UK & ICM, *Awareness of Sexual Assault in the UK: Sexual assault research summary report* (Amnesty International UK, 2005); E MacDonald & Y Tinsley (eds), *From Real Rape to Real Justice: Prosecuting Rape in New Zealand* (Wellington, VUP, 2011).

3 Taylor, *ibid*; MacDonald & Tinsley, *ibid*; E Henderson & F Seymour, Expert Witnesses Under Examination in the NZ Criminal and Family Courts, NZ Law Foundation 2012, *http://www.lawfoundation.org.nz/wp-content/uploads/2013/03/Final-Research-Report-Henderson-Seymour-Expert-Witnesses-Under-Examination.pdf* at 15-16.

4 Taylor, fn.2 above; MacDonald & Tinsley, fn.2 above; Temkin & Krahe, fn.2 above.

5 D Wolchover & A Heaton-Armstrong, *Debunking rape myths* (2007) 158 NLJ 117; D Wolchover & A Heaton-Armstrong, *Rape Trials* 23 April 2010 *Criminal Law & Justice Weekly* retrieved from: *http://www.criminallawandjustice.co.uk/features/Rape-Trials*. However, they also argue that pre-trial attrition rates are very high and put most of the blame on high CPS thresholds for prosecution, which would suggest that only the stronger cases come to court—and therefore reasonably high levels of conviction might be expected.

6 MacDonald & Tinsley, fn.2 above, at 237-40.

7 *Miller v R* [2010] EWCA Crim. 1578.

8 MacDonald & Tinsley, fn.2 above, at 237; Henderson & Seymour, fn.3 above.

9 MacDonald & Tinsley, fn.2 above, at 238.

10 C. Thomas, *Are Juries Fair?* Ministry of Justice Research Series 1/10 (London: Ministry of Justice 2010).

11 *M v R* [2011] NZCA 191; *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629; *DH v R* (SC 9/2014) [2015] NZSC 35 at [40]; *Kohai v R* (SC 42/2014) [2015] NZSC 36]; Australia also allows counter-intuitive evidence but the Canadians do not: *R. v. DD* [2000] 2 S.C.R. 275.

12 *DH v R, ibid*, at [2].

13 Section 25, Evidence Act 2006 NZ.

14 *DH v R*, fn.11 above at [2].

15 See, e.g.: *DH v R*, fn.11 above; *Kohai v R*, fn.11 above.

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discuss the research on, rate of and reasons for false allegations.[16]

The evidence must be general in nature and experts must be scrupulous in explaining to the jury that they are in no way expressing an opinion on the case at hand. However, the evidence must still be tailored tightly to the issues in the case, counsel must agree what is to be addressed in the expert's brief and, later, the content of the statement, in pre-trial hearings. The second author also warns counsel that any attempt to raise with the complainant matters that should have been but were not raised with the expert may cause counsel real difficulties—including recall of the expert.

Research also suggests (and this may be relevant to judicial directions also), that the timing of the delivery of the information is vital. To be effective, jury education should come early, before the complainant testifies.[17] Jurors' first impressions, like those of Mr Darcy, rarely alter and their good opinion, once lost, is lost forever. Accordingly, the second author allows counter-intuitive evidence, and any medical evidence (discussing, for example, the normalcy of a failure to find injuries in rape cases), to be called first.

Experience suggests that counter-intuitive evidence is successful. Juries appear to focus well and are responsive to the expert, and managing the process is not disruptive or difficult.

Researchers have not yet determined whether counter-intuitive evidence is more effective in correcting prejudice than are judicial directions.[18] However, there are points in favour of experts over judges. Most of all, jury research shows that the way in which evidence is delivered is vital to its impact: expert evidence is more accepted when the expert delivering it is personable and gives, essentially, a persuasive performance.[19] It is suggested, with respect, that one judicial direction amongst many is unlikely to be as engaging or as memorable as evidence from a live witness.

The jurors' preference for a persuasive presentation also militates against the desire (especially noticeable amongst more canny defence counsel) to allow counter-intuitive evidence to be read. As many practitioners will agree, and research suggests,[20] the court clerk reading aloud is unlikely to be as engaging as the actual witness.

Research also suggests that jurors much prefer experts with clinical as well as academic experience.[21] Experts who have experience of working with sex assault victims and offenders in therapy, or of conducting multiple medical examinations of rape complainants, may be listened to more closely than judges repeating, essentially, second-hand information.

If, as we suggest, jury education is important to level the playing field, and, given that it will be, by its nature, challenging for some jurors, it is surely important that the evidence be presented in a way which encourages them to listen closely. The New Zealand experience is that counter-intuitive expert witnesses offer a more effective alternative to judicial directions and are, therefore, likely to be more effective in helping to achieve a fair trial.

16 *DH v R*, fn.10 above at [40].
17 MacDonald &Tinsley, fn.2 above, at 239-40.
18 L Ellison & V Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials* (2009) 49 BRITJC 363 at 378; National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, Washington, 2009) at 234; MacDonald & Tinsley, fn.2 above, at 374.
19 Henderson & Seymour, fn.3 above, at 15-16; Blackwell, fn.2 above, at 222-228; Ellison & Munro, fn.18 above, at 378.
20 D Jacoubovitch et al, *Juror responses to direct and mediated presentations of expert testimony* (1977) 7 Journal of Applied Social Psychology 227.
21 Henderson & Seymour, fn.3 above, at 15.

Feature

The CCRC—is it fit for purpose?

By Stephen Heaton

The veteran journalist Bob Woffinden describes the creation of the Criminal Case Review Commission (CCRC) as having "set back the pursuit of justice in the UK by more than twenty years."[1] Des Thomas, a former senior police officer, describes the CCRC as "a badly managed, inept organisation that lacks the knowledge required to conduct high quality and valid reviews."[2] They were among a number of strident critics of the CCRC who contributed to the recently concluded inquiry into the CCRC by the House of Commons Justice Select Committee.[3]

The Select Committee, in a rather lukewarm assessment, opined that the CCRC was performing "reasonably well".[4] The Select Committee urged the Commission to be "less cautious" in making referrals to the Court of Appeal (Criminal Division).[5] It did not favour any change to the "real possibility" test, nor any greater use of the Royal Prerogative option. It recommended the provision of more resources to enable the CCRC to cut delays, the extension of the CCRC's powers to obtain relevant material to cover private sector bodies and stressed the need for lessons learned at the CCRC to be fed back into the criminal justice system more effectively. Finally, the Select Committee suggested that the Law Commission should consider the test to be applied by the Court of Appeal when considering an appeal against conviction.

1 Written Evidence from Bob Woffinden CCR0033. *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Criminal%20Cases%20Review%20Commission/written/16131.html*
2 Written Evidence from Des Thomas CCRC 0010. *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Criminal%20Cases%20Review%20Commission/written/16032.html*
3 House of Commons Justice Committee, Criminal Cases Review Commission HC850.
4 *Ibid.*, Para 54.
5 *Ibid.*, Para 20.

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A persistent thread running through the more strident criticisms of the CCRC asserted a manifest failure to refer sufficient cases, including a number of "obvious" miscarriages of justice. It was further claimed that the CCRC did not investigate cases thoroughly enough, being far too content to rely upon desk-based reviews. The depth of these criticisms led a number of commentators to conclude that the CCRC was not fit for purpose.

Counter-balancing these views were the opinions from a number of academic researchers who had been granted access to the CCRC's internal files and did not consider the CCRC a failed or failing organisation. As one of that group of academic researchers fortunate enough to have been granted access to the inner workings of the CCRC I want to explore some of the many reasons behind the relatively small number of cases that the CCRC refers to an appeal court. These observations are based upon examination of more than 400 case files and semi-structured interviews with Commissioners and Staff at the CCRC.[6]

The CCRC's Role—An Overview

The first point, often overlooked by applicants or their advisers, is that the CCRC is not there to champion the cause of the wrongly convicted. Comparisons with the organisation JUSTICE, which formerly did champion individual cases, are misguided. The CCRC occupies a unique position within the criminal justice landscape. First, it regards itself, very overtly, as an inquisitorial component within an adversarial legal system. This is often the source of tension with representatives accustomed to operating in an adversarial manner who adopt that approach in their dealings with the CCRC. A second unique feature of the CCRC is that, ultimately, it is charged with the responsibility of performing a predictive test of what another body (an appellate court) might do. The forensic application of the "real possibility" test is, however, a relative rarity since in most cases there is little or no prospect of a case being referred to the relevant appeal court. Much of the discussion at the recent Select Committee hearings was focussed on whether the "real possibility" test should be modified, but my findings convinced me that changing the test would have little, if any, impact on the number of cases referred. At its heart the test, however phrased, is a filter mechanism differentiating those cases which merit referral from those that do not. Changing the test to one designed to achieve more referrals, in the view of the Select Committee, would mean referring cases where there was less than a real possibility of the conviction being quashed—a strange proposition.

What's New?

To understand why so few cases require the forensic application of the real possibility test we need to consider what the CCRC is looking for when it considers an application. In laymen's terms it is looking for "something new." The Criminal Appeal Act 1995 puts it rather more formally by setting as a normal pre-condition for a referral:

> "… in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, …"[7]

6 Stephen Heaton, *A critical evaluation of the utility of using innocence as a criterion in the post conviction process* (DPhil Thesis, University of East Anglia 2013), *https://ueaeprints.uea.ac.uk/48765/*

7 Section 13(1)(b).

The importance of providing "something new" cannot be overstated. The CCRC is, as recognised by the Select Committee, overwhelmed with applications, particularly since it introduced an "easy read" application form in 2012. The delays in reviewing cases have become unacceptably long and the Select Committee has recommended the allocation of another £1m per annum to the CCRC to address this.[8] Frankly, the quickest way for the CCRC to eliminate applications is to identify those that contain no fresh evidence or argument and reject them for failing to do so. There is a risk that the pressure on the CCRC arising from addressing delays could result in miscarriages of justice being overlooked.

Review

This may seem a trite point, but I have deliberately extracted the single word "review" from the Commission's full title. I do so to stress a point that seems to be misunderstood. The CCRC is not the Criminal Cases *Re-Investigation* Commission. Where a review leads the Commission to have concerns over a case it will carry out, or arrange for a police force to carry out, a re-investigation of a case. However, that is not the norm. Each application is reviewed to a basic level, but only those which raise something new receive a more in-depth review, which in some cases will develop into a very detailed and lengthy re-investigation.

Resources

The CCRC has a finite budget and resources. It has to use those resources prudently. Accordingly, it places a very clear onus on applicants to provide "something new". Even then it will not simply accept every assertion made by an applicant. An applicant may make all manner of assertions about witnesses or complainants perjuring themselves. The CCRC does not just take those at face value and launch a detailed investigation. Similarly, requests for forensic or psychiatric testing to be carried out will not automatically be met. The CCRC will consider whether, in the context of a case as a whole, such testing might be of significance.

There is, nevertheless, a cause for concern here and the delays in a case reaching review currently stand at about six months for an applicant who is in custody and considerably longer for one who has served his sentence. A review in a complex case involving significant numbers of documents is likely to take at least twelve months or more. If, and it is a large "if", the case is then referred to the Court of Appeal it simply takes its place in the queue. There is no "fast track" for the CCRC's referrals. From application to potential acquittal at a retrial could, fairly routinely, take three or four years.

My Findings

What is the picture that emerges from analysing significant numbers of applications? Are there, as some of the CCRC's critics would suggest, large numbers of cases being refused referrals when they clearly have merit?

The Three Most Common Grounds of Application

I analysed a random sample of cases. By initially focussing on the application form and any supporting submission I was able to identify a very clear pattern. I later tested my

8 House of Commons Justice Committee, Criminal Cases Review Commission HC850, para. 35.

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findings in interviews with staff and commissioners and found confirmation of recurrent themes.
Three themes featured, alone or in combination, in a large number of applications. Collectively they effectively comprise one request. Those themes were:

(1) That the service provided by the legal representatives for the defendant was inadequate and had resulted in a wrongful conviction.
(2) That the prosecuting authorities had, to some degree, behaved in an improper manner. This might include withholding evidence, pressurising witnesses, fabricating evidence or other malpractice.
(3) That the trial judge was, in some manner, prejudiced against the defendant and had colluded, to some degree, with the prosecutor in order to ensure that the defendant was convicted.

These assertions, usually without any supporting evidence, were used either singly or in any combination to try to convince the CCRC that the applicant had been wrongly convicted. In essence, they could usually be distilled to an assertion that the verdict of the jury was misguided and that the applicant should be entitled to a re-run of the trial. A common feature of the Commission's refusal letters was an explanation to the applicant that it was not part of CCRC's function to examine cases simply because an applicant was unhappy with the outcome of his original trial.
I tested these findings in semi-structured interviews with staff and commissioners. There was an overwhelming measure of agreement amongst the eleven interviewees that the three reasons I had identified featured in their most common reasons.
Of course, the fact that these are the most common reasons which applicants put forward does not mean that they automatically lack merit. Inevitably, there are cases where one or more of these factors have resulted in a miscarriage of justice. However, faced with large volumes of such assertions the prospect of the CCRC identifying something new in such cases is inevitably very slim.
The difficulties for applicants do not end there, however. The CCRC has to take into account, or cope with, a wide range of other issues when considering an application. Some of these may not be readily apparent to the external observer and it is worth exploring how some of those factors impact upon a potential referral.

A lack of data
In a world of instant digital availability, I was struck by the number of cases I encountered in which the CCRC was unable to access records relevant to its investigations. In one case the only reason the CCRC knew that the applicant had been convicted of an offence was because he told them so in his application. Although the CCRC tried to locate case papers from the Court authorities they were thwarted by the effects of a re-organisation and no papers could be found. In the absence of such basic material the application was refused. The outcome was not the result of any unwillingness to search on the part of the CCRC or the Court Service.
In other cases the CCRC was reduced to trying to piece together elements of a case from sources such as the judge's trial notebook or even Counsel's papers from trial. A total lack of data or the construction of a partial file meant that some cases, which might have been meritorious, simply had to be refused.

Brawl Cases
A number of the cases I reviewed concerned convictions arising from a brawl. Quite often the outcome was a very serious injury, or even death. Reading the papers on these cases quickly illustrated just how difficult they could be. The participants were usually young people, often under the influence of alcohol or other substances. The incidents happened late at night or in the early hours, often either in a nightclub or in the street in the vicinity. As a result lighting conditions were often poor. In consequence witness statements were often confused and contradictory.
Someone convicted of a serious offence arising from such a brawl is likely to have had the benefit of a jury warning from the trial judge about the dangers of identification in such circumstances.[9] But what is the CCRC to make of applications arising from these incidents? Realistically these cases generally do not lend themselves to the production of any fresh evidence likely to exculpate a defendant.[10]

Delayed Allegation Sex Cases
Anyone who has been involved in defending an individual charged with sex offences where there has been a significant delay in the complainant making the allegations will be aware of the difficulties involved. Although the CCRC has access to documents to which the defendant and his team may not have access, the CCRC faces many of the same problems which a defendant faces. Records have been destroyed, undertakings have changed hands—moving into and out of the private sector perhaps. The result is that a significant number of these cases simply become intractable.

Lack of Power to Obtain Documents
The CCRC enjoys extensive powers to obtain access to documents and other material held by public bodies.[11] It uses these powers on a routine basis to "freeze" documents pending a possible full review. However, the CCRC has complained for a number of years now that, unlike its Scottish counterpart, it has no powers to obtain documents or materials from private bodies. During my research I only identified one case in which this prevented an investigation from proceeding (a newspaper declined to say whether it had a financial arrangement with a complainant in a sex case). With the privatisation of Forensic Science work this problem seems likely to be exacerbated and the Select Committee's strong recommendation that the CCRC be afforded this power is welcome.[12]

Code of Practice on Victims
The last fifteen years has seen an interesting shift in the criminal justice system in this country. If the Runciman Commission's recommendations[13] saw a move to protect individuals suspected of criminal offences the climate had

9 A warning based upon the decision in *R. v Turnbull* [1976] 63 Cr.App.R. 132.
10 Clearly there may be the exceptional case such as *R. v Hallam* [2012] EWCA Crim. 1158—but normally there is little CCRC can do to amass evidence in such cases.
11 Criminal Appeal Act 1995, s.17.
12 House of Commons Justice Committee, Criminal Cases Review Commission HC850, para 45.
13 *The Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993).

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changed by the early part of this Century.[14] The greater focus on victims of crime became evident in a number of ways and it may not be readily apparent that it also has had a significant impact upon the CCRC. The Code of Practice for the Victims of Crime introduced in April 2006[15] specifies that the CCRC is one of the bodies to whom it applies.

For the vast majority of applications that the CCRC receives the Code of Practice is relevant. Very few crimes are "victimless" and given that the CCRC's staple diet is murder and serious sexual offences the way that it handles these is important. The CCRC has published its own memorandum on the subject explaining that it will exercise caution before investigating some cases—because of the potential impact on victims. So, for example, an assertion by someone convicted of a serious sexual offence that the complainant has subsequently retracted the complaint will not just be taken at face value. The CCRC will consider whether it is appropriate to re-open the case by talking to the victim. In some cases I reviewed it decided not to do so because the assertion made by the applicant was not corroborated by any independently verifiable evidence.

Multiple Applications

Another factor that may not be apparent to the external observer is the sheer volume of repeat applications which the CCRC receives. I came across one case in which the applicant had applied and been refused seven times. The CCRC has had to issue a policy statement about the treatment of such applications, indicating that in extreme cases it will decline to respond to an applicant or insist that any further applications come from a legal representative. However, the process of checking whether the latest submission from a persistent applicant does raise any different point still engages the use of the CCRC's resources.

Discretion not to Refer

The CCRC has the power to refer a case where it considers the real possibility test is satisfied but it is not obliged to do so.[16] A policy statement issued by the CCRC sets out some of the circumstances where it might choose not to refer even though it considered there was a real possibility in respect of a application. I found this most commonly used where one or two offences among a large number of offences might be quashed, but unless there was likely to be any impact on sentence the CCRC would not refer the case.

Inculpatory Evidence

Though the CCRC is obliged to give reasons, it is, however, prohibited from issuing a statement of reasons as a public document.[17] One of the frustrating consequences of this for the CCRC is that it is not permitted to explain publicly that it has not referred a case because its investigation uncovered evidence strongly probative of an applicant's guilt. There were a number of relatively high profile *causes celebrès* in which such evidence was uncovered.

Conclusions

The CCRC is recognised by the Supreme Court as an important safety net within the criminal justice system.[18] It has been urged by the Justice Select Committee to be "less cautious" in making referrals. Academics who have conducted research within the CCRC have, in differing ways, come to a broadly similar conclusion.[19] However, the notion that it is sitting upon a large number of "obvious" miscarriages of justice does not seem to me to borne out by the evidence of those who have been granted access to the CCRC. I harboured doubts about the refusal to refer 26 cases that I described as "troubling". But they were drawn from a period of 10 years of the CCRC's operation. In none of those cases did I think the case was an "obvious" miscarriage of justice. Indeed, in one of them which was subsequently referred to the Court of Appeal the conviction was upheld as safe.

The reality, it seems to me, is that most applications to the CCRC have little prospect of success. They raise nothing new. Even if they do raise something new there are still other significant hurdles to overcome to get to the point where the real possibility test is applied.

That is when the real difficulty arises, because the CCRC is trying to predict an unpredictable and restrictive Court of Appeal. Some critics suggest that a bolder approach by the CCRC will bring about a change to a more receptive approach by the CACD. It is not clear why that would be the outcome given Professor Zander's assessment that:

> "For more than 100 years, since the 1907 Criminal Appeal Act, the appeal court has notoriously shown itself extremely reluctant to overturn jury verdicts. No one has yet thought of a way of overcoming that reluctance."[20]

The Select Committee adroitly passed that challenge to the Law Commission recommending that it examine the appeal test applied by the Court of Appeal. I would welcome a change at the Court of Appeal and an adoption of the less restrictive approach suggested by the Runciman Commission, particularly a greater use of retrials. Even the adoption of such an approach would not, in my view, see a sudden huge influx of cases from the CCRC. For the reasons set out above, there are only a limited number of cases in the pipeline that would merit referral. The vast majority will continue to fall by the wayside for precisely the same reasons that they have failed hitherto.

14 *Rebalancing the Criminal Justice System in favour of the law-abiding majority*, Home Office, July 2006.
15 Under s.32 of the Domestic Violence, Crime and Victims Act 2004. The most recent version of the code was published in October 2013.
16 See, for example, the comments of Lord Woolf LCJ in *Smith (Wallace Duncan)* [2004] EWCA Crim. 631 [29].
17 By virtue of the Criminal Appeal Act 1995, s.23.
18 *R. (Nunn) v Chief Constable of Suffolk* [2014] UKSC 37 [39].
19 William O'Brian Jr, *Fresh Expert Evidence in CCRC Cases* (2011) 22 Kings Law Journal 1.
20 Professor Michael Zander QC, *The Criminal Cases Review Commission, the Court of Appeal and Jury Decisions* (2015) 179 JPN 134.

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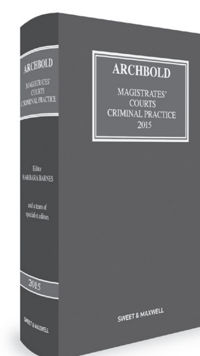

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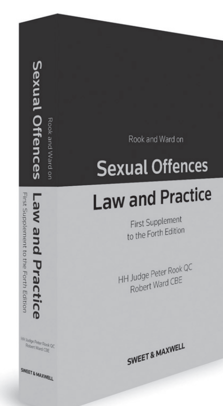

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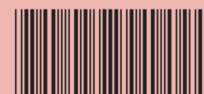

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