SWEET & MAXWELL

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Archbold Review

Cases in Brief

Abuse of process—conduct by non-state actors—approach to applications to stay

TL [2018] EWCA Crim 1821; 31 August, 2018

At L's trial for attempting to meet a child following sexual grooming, the judge stayed proceedings as an abuse of process on the basis that L had been entrapped where the person with whom L had actually been communicating with online was not a 14-year-old girl, but an adult member (U) of a group dedicated to exposing adults seeking to have sex with children. The prosecution appealed.

(1) The principles in *Looseley* [2001] UKHL 53, [2001] 1 W.L.R 2060 applied to the conduct of agents of the state. Involvement of agents of the state in unacceptable behaviour was at the heart of the reasoning – it was the court's unwillingness to approbate seriously wrongful conduct by the state, by entertaining a prosecution, that was the foundation of this aspect of the abuse jurisdiction. So much was clear from *Looseley* itself and was recognised in the non-state actor cases of *Shannon*, both domestically ([2001] 1 W.L.R 51) and in *Strasbourg* (admissibility, 67537/01, [2005] Crim LR 133), and in *Marriner* [2002] EWCA Crim 2855. The judge's approach in TL's case allowed no distinction between the conduct of U, as a private citizen, and agents of the state, when considering whether to stay the prosecution as an abuse of process. Nonetheless, in both domestic jurisprudence (*Council for the Regulation of Health Care Professionals v The General Medical Council and Saluja* [2006] EWHC 2784 (Admin), [2007] 1 W.L.R 3094) and in Strasbourg *(Shannon)* it was recognised that the conduct of a private citizen could, in theory, found a stay. While the underlying purpose of the doctrine of abuse of process was not present where the state did not seek to rely on evidence flowing from its own misuse of power, it was not inconceivable that given sufficiently gross misconduct by a private citizen, it would be an abuse of the court's process (and a breach of art.6) for the state to seek to rely on the product of that misconduct. The issue would be the same: would the prosecution be "deeply offensive to ordinary notions of fairness" or "an affront to the public conscience" or "so seriously improper as to bring the administration of justice into disrepute", and (per Goldring J in *Health Care Professionals)* "so serious would the conduct of the non-state actor have to be that reliance upon it in the court's proceedings would compromise the court's integrity". Such cases were likely to be rare.

(2) A starting point in considering whether the conduct of a private citizen should result in a stay of proceedings was to ask whether the same, or similar, conduct by a police officer would do so, albeit a precise comparison may be difficult given the different institutional setting. In TL's case, whilst U may not have had sufficient information to support a reasonable suspicion that the site through which he made himself available to TL was being used for grooming purposes, as the judge found, he was pointed in the direction of the site by others in similar organisations. The police might have commenced an investigation on an intelligence-led basis, albeit featuring more sophisticated evaluation, which would not be objectionable. If they had then engaged in just the same way as did U, their conduct would not have supported a stay for abuse, provided care were taken to do no more than give an opportunity for others to commit offences, as U did. Even if U's choice of the site had been random, that would not support a suggestion that his conduct had been so egregious that the integrity of the court would be compromised by allowing the prosecution to proceed.

(3) In so concluding, the court did not seek to undermine or contradict the stated position of the police. They discouraged private individuals from setting out to identify those who groom children and arrange to meet them for sexual purposes. Police investigations might be compromised, pri-

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vate investigations may not produce admissible evidence, there may be risks to the safety of the investigators and their targets and the zeal of some "vigilantes" may lead them to seriously improper conduct. It would be much better for those in U's position immediately they have suspicions about the conduct of an identifiable individual to involve the police and leave them to investigate.

Evidence—bad character—Criminal Evidence Act 2003 s.101(f) and (g)—application

OMOTOSO [2018] EWCA Crim 1394; 21 June 2018

O was convicted of possessing a firearm with intent to endanger life. Following an invitation to make an application by the judge at the close of the defence case, an application was made and allowed to adduce O's previous convictions (including robbery, possession and possession with intent of drugs, possession of a knife and of an offensive weapon and minor assaults) under the Criminal Evidence Act 2003 s.101(1)(f) and (g).

(1) In respect of gateway (f), the false impression said to have been given by O was that, in answer to a question in examination in chief, he said that during the time between the offence and his arrest, he was working in "auditing", and applying for a heavy goods vehicle driving licence. He meant that he had been working as a stock-taker. The court was very doubtful whether the words used by O could have conveyed the impression that he was acting in some professional capacity. The court would also have expected the application to have been made while O was still giving evidence. It was clear that the introduction of his previous convictions went considerably further than was "necessary to correct" any false impression (s.105(6) of the Act).

(2) In his ruling in respect of gateway (g), the judge had referred to what had been said in the absence of the jury (an abuse of process application having been made) as helping him interpret or as relevant to his understanding, of what had been said before the jury. It was clear that gateway (g) applied to an attack on another person's character in front of the jury. The nature and content of an abuse application could not form the basis of an application to adduce bad character under gateway (g). The judge should not have taken into account what had been said in the absence of the jury, other than providing a focus for what was said in front of the jury. In cross-examination, counsel had questioned the effectiveness of the investigation conducted by the officer in the case. The judge characterised the cross-examination as an attack on the officer's integrity, in that he had failed to do his job properly. It may be that cross-examination of a police officer to suggest that an investigation was flawed may amount to an attack on his character, but judges should be careful to ensure that gateway (g) was not invoked too lightly in such cases, and thereby inhibited a legitimate line of questioning. A gentle hint should be sufficient to alert trial counsel of the potential dangers of pursuing a particular course. In O's case, the judge had said that the cross-examination went "beyond the issues in the case". Plainly gratuitous insults should not be permitted, but the judge provided no examples of how the cross-examination went too far (the court did not have a transcript of the cross-examination). The judge also took into account the calling of a witness as "intended to undermine the evidence of the officer". The witness' evidence was inconsistent with what the officer had said, but was not itself materially objectionable. Most importantly, the judge did not refer to the fairness test in s.101(3).

(3) It was not objectionable in itself for a judge to suggest that the prosecution consider making a bad character application, provided that the judge was scrupulous in not taking on the function of the prosecutor, or appearing to do so. Any such suggestion should be carefully expressed, not least because the judge may not be aware of what has been agreed by trial advocates.

Conviction quashed and retrial ordered.

Professional conduct—barristers—breach of Core Duty 5—comments on victim of sexual assault in renewed application for leave to appeal against sentence

HOWARD GODFREY QC v BAR STANDARDS BOARD [2018] EWHC 1409 (Admin); 8 June, 2018

G had rightly been found to have breached BSB Core Duty 5 ("You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession") by the Disciplinary Tribunal of the Council of the Inns of Court where, on a renewed application for leave to appeal against sentence for sexual assault, he had referred to the 16-year-old step-daughter victim of the applicant he represented as "not unaccustomed to alcohol" and "not a young innocent girl", and had stated that she had "made a rape allegation against two boys that was then withdrawn". Both of the first two comments were, on analysis, irrelevant to the sentence application, and G had found it difficult to justify them before either the tribunal or the court. In relation to the supposed withdrawn allegation, it had not formed any part of the evidence at trial (an application to adduce it under Youth Justice and Criminal Evidence Act s.41 had been refused), was not mentioned in the grounds of appeal, and no application under Criminal Appeal Act 1968 s.23 had been made to admit it as fresh evidence, as would have been necessary if it were to be put before the Court of Appeal as evidence material to sentence: *Rogers* [2016] EWCA Crim 801, 2 Cr.App.R.(S.) 36. An advocate was in no different position before the Court of Appeal than at trial, and could not give evidence or make un-evidenced assertions, and nor was he or she the client's mouthpiece – see *Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr.App.R. 8 [108], [111]. It was no more appropriate to make derogatory and irrelevant assertions about third parties in the appellate process than it would be at sentence (the court noting the well-established procedure for notification and challenge of assertions in mitigation derogatory to a person's character). In making grave and derogatory allegations about a 16-year-old girl who had been sexually assaulted by a member of her family, G's conduct was clearly improper; and the tribunal had been right to find that the breach had been so serious as to amount to professional misconduct.

Psychoactive substances—definition—whether included indirect as well as direct production of relevant effects

ROCHESTER [2018] EWCA Crim 1936; 17 August, 2018

(1) In adopting the language of the Psychoactive Substances Act 2016 s.2(2) ("…a substance produces a psychoactive effect in a person if, by stimulating or depressing the

person's central nervous system, it affects the person's mental functioning or emotional state"…), Parliament was not concerned to distinguish between direct and indirect production of the effect in question. If the definition had been intended to be confined to direct effects, the drafter would have so stated. Whether something was capable of producing a psychoactive effect was a question of fact, no doubt sometimes assisted by expert evidence. This conclusion was not affected by the fact that the Advisory Council on the Misuse of Drugs, having been asked to do so by the Home Office, had concluded that alkyl nitrate was not caught by the definition in s.2(2) because it had "peripheral effects" rather than "direct action" on the brain. The results of the report, and its acceptance by the Minister, which took place after Royal Assent, were not an admissible aid to construction of the statute. Accordingly, where R was convicted in connection with the supply of nitrous oxide following a direction to the jury that direct or indirect effects were sufficient, the Crown and defence experts having differed as to whether it was clear that the effect of nitrous oxide was direct, the conviction was safe.

(2) The court noted the appellant's argument that absurd consequences could follow if the Act was so construed. It was not impossible that some everyday substances might be caught by the definition, and which are not currently exempted. There were many substances which would fall within the definition were it not for s.2(1)(b), s.3 and Sch.1, including alcohol, tobacco, caffeine and foods. The list of exempted substances in Sch.1 may be amended by statutory instrument.

Theft—land—Theft Act 1968 s.4(2)(a)—whether requires power of attorney be valid

GIMBERT [2018] EWCA Crim 2190]; 10 October, 2018

G was wrongly convicted of theft where he dishonestly effected the transfer of land beneficially owned by another to a member of his family for negligible consideration.

(1) Although G purported to act under an enduring power of attorney, in fact, the power of attorney was void, by reason of never having been registered, as then required, under the Enduring Power of Attorney Act 1985, and the beneficial owner's lack of capacity to sign it, as she purported to do. As a result, the land was incapable of being stolen because the transaction did not come within the relevant exception to the rule that land may not be stolen in Theft Act 1968 s.4(2): "A person cannot steal land … except in the following cases, that is to say (a) when he is … authorised by power of attorney … to sell … land belonging to another, and he appropriates the land … by dealing with it in breach of the confidence reposed in him". The trial judge was wrong to accept the Crown's argument to the contrary (and to direct the jury accordingly), that it sufficed that G had acted as though he were the beneficial owner's attorney and a fiduciary and in the belief that he was her attorney, it being said that it would be paradoxical that what could be criminal if the power of attorney were valid would not be criminal if the power of attorney were invalid. The argument required the court to read s.4(2)(a) as though it read "… is (or purportedly is; or believes himself to be) authorised …", and there was no justification, particularly in a criminal statute, for writing in such words. Such a "broad, purposive interpretation" should not be adopted on the basis that otherwise injustice would be occasioned where dishonest purported attorneys might escape criminal sanction. Where no conspiracy to defraud were involved, most cases of this general nature were likely on their facts to fall within the ambit of the Fraud Act 2006: whether as involving fraud by misrepresentation or as involving fraud by abuse of position or both.

(2) Although the court's decision was based on the reasoning in (1) above, the court noted as an antecedent difficulty in the Crown's case that the relevant transfer of land had in fact been signed by the incapacitated beneficial owner herself, and thus the void power of attorney was not directly causally implicated in the transfer. The court recorded that it had also raised the issue of the actus reas with counsel, given these facts. Crown counsel had explained that the prosecution had put forward the act of appropriation as being the transfer itself by reference to the decision of the House of Lords in *Hinks* [2001] 2 A.C 241. While, the court noted, this area was fraught with difficulty and referred to the discussion (in the context of theft of a chose in action) in *Darroux* [2018] EWCA Crim 1009, [2018] 2 Cr.App.R 21, given the reasoning in (1) above, the court declined to discuss, obiter, the issue of appropriation.

SENTENCING CASE

The appellant had pleaded guilty to causing death by careless driving and was sentenced to two years' imprisonment. The deceased was one of his passengers. The offence arose from a collision which occurred on a winter night when it was dark, but the road was illuminated. It had been raining heavily and the road was wet. The appellant, who was familiar with the road, drove through a series of bends before losing control at the bend on which the accident took place, when his car veered across the road and collided with some trees. The prosecution expert concluded that the collision was caused by the appellant driving at an excessive speed such that he could not negotiate the bend safely.

Applying the Sentencing Council's Definitive Guideline on Causing Death by Driving, the sentencing judge found that this was a case falling not far short of dangerous driving and the appropriate sentence before credit was 30 months' imprisonment. The appellant had not pleaded guilty at the first opportunity but had done so before trial. He was given 20% credit, leading to the sentence of two years' imprisonment. The appellant submitted that the judge had erred in treating the standard of driving as falling not far short of dangerous driving.

The Court of Appeal began by emphasising that no prison sentence can sufficiently reflect the loss of someone's life. The role of the sentencing court therefore involves assessing the offender's culpability and the harm caused, applying the Definitive Guideline, and subject to the maximum penalty applicable. Sentencing for offences of this kind is highly sensitive to the circumstances of each case.

The judge had not misapplied the sentencing Guideline. The fact that the speed at which the appellant was driving fell below the speed limit of 60 mph was of no consequence. That limit did not indicate a level of speed at which it could not be careless, let alone safe, for the appellant to negotiate the bend, less still when it had been raining heavily and the road surface was wet. The appellant's culpability was not

reduced because there was no warning sign about the bend or reduction in speed limit. In any event, the road markings included hazard lines. The defendant knew of these bends and ought already to have been driving at an appropriate speed. For an inexperienced driver to drive at a maximum speed, or towards the very limit at which the bend could be negotiated in the wet, was undoubtedly careless driving falling not far short of dangerous driving.

The court also referred to Annex A on p.18 of the Guideline, which gives driving at a speed "which is highly inappropriate for the prevailing road or traffic conditions" as an example of dangerous driving, even where that driving is not "aggressive" and does not involve racing or "competitiveness". The difference between a "highly inappropriate" speed in this context and an "excessive speed" amounting to careless driving falling not far short of dangerous driving would be a matter of degree. The judge was fully justified in treating the excessive speed in this case as falling within the top category of carelessness.

Features

Drafting Grounds of Appeal in the Court of Appeal Criminal Division

By Sarah Bergstrom[1]

For those practitioners who do not regularly appear in the Court of Appeal, settling an application for leave to appeal can seem daunting. It is hoped that this article will be of help to them, as well as to criminal practitioners more generally[2].

Most applications for leave are now decided on the papers by a High Court Judge. This means that the written grounds of appeal must present the appellant's case in a way that best persuades a senior judge that the grounds of appeal are arguable. The application therefore needs to be legally sound and credible, but also compliant with the Criminal Procedure Rules and the Practice Direction. Issues such as extension of time, the duties of fresh representatives and fresh evidence, all need to be addressed by practitioners from the outset.

The framework

On 1 October 2018, procedures came into effect through the Criminal Procedure Rules and Practice Direction, which requires each substantive application to be drafted separately as a stand-alone application (CPD IX Appeal 39C). The application must be accompanied by the correct Form NG (e.g. conviction, sentence or confiscation order) and then lodged directly on the Registrar of Criminal Appeals, instead of on the Crown Court as was formerly the position (Crim PR 39.2).

Lodging of the application is usually by email and for cases prosecuted by the CPS, practitioners should identify any relevant appendices to the grounds by reference to the Digital Case System ("DCS") and ensure those documents are uploaded. At present, not all High Court Judges have access to DCS, but the Criminal Appeal Office does have access and so can obtain these documents for judges from DCS once an application has been lodged on the Registrar. Detailed guidance accompanies the forms and is available at the link below.[3] Any authorities cited must be identified in a separate list accompanying the application.

It should be noted that the Criminal Procedure Rules are now much more prescriptive about the structure of the grounds of appeal then they used to be in the past.

Crim PR 39.3 sets out the information which must be contained and stipulates the structure required. It has long been the practice of the Court to require a single document which incorporates the grounds of appeal and advice. The language of the Rules clearly requires a concise and well-structured document, which is targeted towards the Court and not the lay client.

Practitioners would be wise to note that the Court is not impressed by unnecessarily voluminous and prolix documents and has repeatedly said so in the plainest of language (see, for example, *James & Selby*[4]).

Although the Rules do not specify a page limit for grounds of appeal, minimum font size (12) and line spacing (1.5) are stipulated in the Practice Direction,[5] together with a new power granted to the Registrar and the Court to return non-compliant documents to the author for revision. The ultimate sanction of the Court is to refuse permission to appeal on any ground that is so poorly presented as to render it unarguable (CPD IX Appeal 39C.2). This would be an embarrassing situation indeed for any professional advocate to find themselves in and devastating for their lay client.

Applications to extend time

An appellant has 28 days to lodge grounds of appeal. Time runs from the date of conviction, sentence, verdict, finding or decision that is being appealed[6]. In *Wilson*[7] the Court said it was not enough to simply rely on the merits of the grounds of appeal to justify granting an extension of time

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2 The Court of Appeal Criminal Division hears appeals under the Criminal Appeal Act 1968, brought by an appellant against convictions, findings or verdicts and sentences (including confiscation orders) from proceedings in the Crown Court. To appeal, an appellant must first obtain leave (permission) to appeal, either from the Court or from a single High Court Judge, who has the power to grant leave under s.31 of that Act. Other rights of appeal are provided for in various other statutes but appeals under the 1968 Act form the majority of the Court's workload.

3 www.justice.gov.uk/courts/procedure-rules/criminal/forms (Part 39 Appeal to the Court of Appeal – conviction or sentence).

4 [2016] EWCA Crim 1639.

5 CPD IX Appeal 39C.2.

6 Section 18 of the Criminal Appeal Act 1968 and Crim PR 39.2(1).

7 [2016] EWCA Crim 65.

and that an application for an extension of time must be formally made. Practically this could be included within the body of the grounds of appeal or in a separate document. In cases where a long extension of time is sought, preparing a chronology will often assist the Court.

Transcripts and other ancillary matters

Under Crim PR 39.3(2)(c), there is an obligation placed on practitioners to identify any transcripts the Court will need and to provide the dates and times of any proceedings sought. Practically the best way to do this is by the advocate drafting a "Note for the Registrar" and lodging it with the application for leave.

In publicly funded cases, transcripts will be ordered by the Registrar from public funds if, in the opinion of the Registrar, they are essential for the proper conduct of the appeal. In conviction cases the Registrar will normally routinely obtain a transcript of the summing-up and any rulings which are subject to grounds of appeal. If there has been a split summing-up, this should be identified from the outset by the advocate together with any route to verdict or written directions given to the jury (CPD IX Appeal 39C.3). In sentence cases the Registrar will normally obtain transcripts of the sentencing remarks and the prosecution opening of facts. Because the Registrar obtains the transcripts in publicly funded cases, in conviction appeals the advocate is given an opportunity to "perfect" the grounds of appeal by reference to the transcripts obtained by the Registrar. This is also a final opportunity for practitioners to ensure the application is in order before it is considered by a single judge.

In privately funded cases (including where barristers are acting under the direct access scheme), the appellant is required to order the necessary transcripts directly with the transcription company and provide a copy of these to the Registrar. These would normally be lodged with the application for leave to appeal and so perfection of the grounds is often not necessary.

Professional duties in settling grounds of appeal

Advocates have a professional duty not to settle grounds of appeal unless they are properly arguable. This is enshrined in the Practice Direction (CPD IX Appeal 39C.2) It is often said that an advocate is not simply the mouthpiece of their lay client and if a lay client will not accept their advocate's advice, sometimes the only practical answer is to have two separate sets of grounds of appeal, one settled by the advocate and one settled by the lay client. This is obviously not desirable, but if an advocate cannot persuade the client not to pursue a ground of appeal, in all cases the advocate's professional duties must prevail and in some situations it is the most pragmatic solution, with the advocate arguing the grounds they support in Court and the lay client's grounds being considered on the papers only.

An area which still causes practitioners some difficulty is where they come into a case as a fresh representative who did not act in the lower Court. In all such cases, what are their professional duties to the Court and to the lay client?

The Ethics Committee of the Bar Council has issued some helpful guidance on this area[8] and addresses what steps an advocate needs to take with the lay client before approaching previous representatives. All advocates, past and fresh, are bound by legal privilege until that privilege is waived by the client. Whether they can speak to each other about the case is ultimately a matter for the lay client and the lay client's attitude to this may be decisive as to whether the fresh representative feels able to act in the case at all.

As a starting point from the perspective of the Court, it is always necessary for the fresh representatives to approach the solicitors and/or advocate who previously acted to ensure that the facts upon which the grounds of appeal are premised are correct, unless there are exceptional circumstances and good and compelling reasons not to do so. It was said in *McCook*[9] that such exceptional circumstances would be likely to be very rare. The duties set out in *McCook* apply equally to appeals against conviction, sentence and confiscation orders.

In *Lee*[10] the Court said that, where necessary, further steps should then be taken to obtain objective and independent evidence to establish the factual basis for the appeal. An example of such evidence might include a transcript of the relevant part of the proceedings in the lower Court.

In most straightforward sentence appeals, the transcripts and sentencing documents (antecedents, reports, victim personal statements etc.) might be sufficient to satisfy this duty, through providing objective and independent evidence of the facts stated. However, if the grounds of appeal are advocating a completely different disposal (such as a mental health disposal) or if the grounds of appeal raise some factual issue which would need to be verified, then the Court has made it very clear in *Roberts*[11] that the duty of due diligence applies in sentence cases.

The duty to make proper and diligent enquiries of previous representatives is also not restricted to cases where criticism is being made of the trial representatives. *McGill*[12] says it extends to all cases where there are fresh representatives acting and this is essentially a fact-finding exercise, which means that the fresh representatives should be asking mindful questions of the previous representatives to establish the relevant facts and not just sending them draft grounds of appeal.

If it becomes clear to fresh representatives, through communications with the trial representatives, that a criticism must be formally made through the grounds of appeal (this could be express or implied), then following *McCook*, the fresh representatives should establish the facts as far as they are able and then lodge grounds of appeal with a signed waiver of privilege. This will allow the trial representatives to respond in writing when requested to do so by the Registrar (through the Registrar's waiver of privilege procedure[13]) and formally ensure they can set out their position to the Court.

In some situations, the communications between fresh and trial representatives might reveal that the trial representative supports the ground of appeal; even if there is an im-

8 Criminal Appeals – Duties to the Court to Make Enquiries published in June 2016 (although it should be noted that it is not "guidance" for the purposes of the BSB Handbook I6.1).

9 EWCA Crim 734; [2016] 2 Cr.App.R 30.

10 EWCA Crim 2928.

11 *Roberts* [2016] EWCA Crim 71.

12 [2017] EWCA Crim 1228.

13 Where the Registrar, single judge or full court decides to implement the waiver of privilege procedure, the appellant will be invited to sign a waiver if not already provided. Once privilege has been waived, the grounds of appeal will be sent to trial representatives with an invitation to provide a formal response. Any response received from a trial representative will be sent to the appellant and/or fresh representatives for comment. The responses and comments are added to the bundle for the single judge. Failure by an appellant to sign a waiver of privilege will mean that the court will be unable to determine whether there is an arguable ground of appeal and the application may be refused on that basis. See, for example, *Frost-Helmsing* [2010] EWCA Crim 1200, at paras.14-15.

plied or express criticism of their conduct. In such cases it might be appropriate for the trial representative to make a statement (in Section 9 form) setting out their position. That would also require a waiver of privilege from the client, as the matters set out in that statement would otherwise be privileged.
These authorities all establish that due diligence must be carried out by fresh representatives so that the Court is basing any decision on an appeal on a proper understanding of all the relevant facts. Practitioners have always had a duty not to mislead the Court and taking the steps identified by the Court in these authorities ultimately ensures that the Court is not misled by fresh representatives, who clearly never have first-hand knowledge of the facts.

Fresh evidence
If there is an application to rely on fresh evidence, pursuant to s.23 of the Criminal Appeal Act 1968, it must also be formally set out within the grounds of appeal and the statutory criteria addressed.
The fresh evidence itself must also be lodged with the application. It must comply with the formalities of evidence and should be in the form of a witness statement (compliant with s.9 of the Criminal Justice Act 1967[14]) or expert report. It must also be accompanied by a witness statement or affidavit from the solicitor setting out how the evidence came to light and why it was not available at trial. This evidence is required to support the statutory criteria which must be addressed under s.23.
Often an application to adduce fresh evidence will also require an extension of time and there may also be fresh representatives acting and these issues will be interrelated. In *Singh*[15] the Court said that if fresh representatives are acting in a fresh evidence case, the waiver of privilege procedure will almost certainly be instigated by the Registrar, unless compelling reasons are received from the advocate as to why this procedure should not be instigated. The rationale for this is to ensure that the relevant facts are properly established and fully address the statutory criteria under s.23.

The importance of grounds of appeal
The Court of Appeal Criminal Division is a creature of statute and it exercises statutory functions. It does not re-try cases and it considers the merit of cases solely on the basis of the grounds of appeal advanced.
In *James*[16] the Court confirmed that, as a general rule, all the grounds of appeal that an appellant wishes to advance should be lodged with the appeal notice (from the outset). Should further grounds then be advanced after the single judge has considered the case under s.31[17], in addition to requiring leave to appeal on those grounds, it will also be necessary to draft an application for permission to vary the grounds of appeal. The hurdle for the applicant in such cases is said to be a high one, particularly if accompanied by an application to renew out of time (CPD IX Appeal 39C.4).
Practitioners therefore also have to judge carefully when an application should be lodged, bearing in mind their duties of professional diligence, the fact that time may be running and the fact that their lay client is probably in custody.
The importance of well-drafted grounds of appeal, however, cannot be understated. They are the foundation of any successful appeal and should be approached accordingly.

14 Criminal Justice Act 1967.

15 [2017] EWCA Crim 466.
16 [2018] EWCA Crim 285.
17 Of the Criminal Appeal Act 1968.

Intoxication, psychoses, and self-defence: Evaluating *Taj* [2018] EWCA Crim 1743

By Mark Dsouza[1]

In *Taj*,[2] the Court of Appeal attempted to clarify the law applicable to cases in which D mistakenly acts in self-defence, and her or his mistake was attributable to psychosis (not amounting to insanity), which in turn was caused by voluntary intoxication. I argue that, unfortunately, it fell short. To provide clarity, the court ought to have recognised the existence of a common law rule withdrawing mistaken self-defence from D who was mistaken because he or she was suffering an abnormality of mental functioning arising from a recognised medical condition.

Background
Simon Taj began abusing drugs and alcohol as a child. In time, the intoxicants had a detrimental effect on his mental well-being. They sometimes caused him to hear voices, and feel paranoid, aggressive, and vulnerable. These effects lingered even after the intoxication wore off.

Having drunk heavily on the night of 29 January 2016 and into the early hours of the next day, on the afternoon of 31 January, while in the grip of a post-intoxication paranoid psychosis, Taj formed the unshakeable belief that Mohammed Awain, a man that he saw standing next to a broken-down car, was a terrorist trying to detonate a bomb. Not even the fact that the police, responding to his call, found no cause for alarm convinced him otherwise. He attacked and nearly killed Awain with a tyre lever. When charged with attempted murder, he pleaded self-defence and defence of others[3], contending that even though he was wrong about the threat that Awain posed, he was entitled in law to the benefit of his honest, albeit unreasonable beliefs as to the circumstances that existed at the time of the attack.
The prosecution argued that although there was no evidence that Taj still had intoxicants in his system at the time of the attack, his mistaken belief that Awain posed a threat

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2 [2018] EWCA Crim 1743.

3 No mention appears to have been made of s.3 of the Criminal Law Act 1967 (use of force in the prevention of crime).

was attributable to psychosis induced by voluntary intoxication. Therefore, in terms of s.76(5) of the Criminal Justice and Immigration Act 2008 ("CJIA") it was "a mistaken belief attributable to intoxication that was voluntarily induced", and he could not rely on it.
The defence demurred on the proper interpretation of s.76(5) and drew support from *Harris*[4] in which the Court of Appeal held that the *Majewski*[5] rule did not apply if D was not intoxicated when offending, even though his or her failure to form the mens rea was due to psychosis induced by prior voluntary intoxication, and the sudden cessation thereof. Along similar lines, Taj's defence argued that s.76(5) only prevented persons from relying on their mistaken beliefs as to circumstances if those beliefs had been formed *while* voluntarily intoxicated, and *because of* the intoxication.

The rulings
The trial judge withdrew self-defence from the jury, ruling that the phrase "attributable to intoxication" in s.76(5) was not confined to cases in which intoxicants were still present in the defendant's system. He distinguished *Harris* on the basis that in that case, psychosis was induced by the sudden cessation of alcohol after a period of abuse, whereas in *Taj*, the psychosis was caused directly by the voluntary consumption of intoxicants. Taj was convicted and received a sentence of 19 years,[6] and a strong bench of the Court of Appeal upheld the conviction and the sentence.

Three substantive points stand out in the CA's judgment:

1. The CA agreed that the phrase "a mistaken belief attributable to intoxication" in s.76(5) is not confined to cases in which alcohol or drugs were then present in the appellant's system – it also encompasses:

> a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned is not drunk or intoxicated at the time, the short-term effects can be shown to have triggered subsequent episodes of *e.g.* paranoia [60].

It seemed[7] also to agree with the trial judge's basis for distinguishing *Harris*, viz. that psychosis in *Harris* resulted from abstinence from alcohol, whereas psychosis in *Taj* resulted from alcohol consumption.

2. In the alternative, the CA was prepared to depart from *Harris* and hold that the common law principle that "self-induced intoxication [is] not a defence to a criminal charge" [53] applies equally when the defendant's "state of mind had been brought about by his earlier voluntary intoxication [57]".
It opined, that *pace* Hughes LJ in *Harris*, the policy considerations motivating that rule are equally apposite to denials of criminal liability due to conditions that are the immediate and proximate after-effects of voluntary intoxication (at [56]).

3. Alternatively, the court found that in any event, no properly instructed jury could have concluded that the extent of force used by Taj in self-defence was reasonable. It ruled that since an objective standard applies to this evaluation, the defendant's paranoia or psychosis has to be discounted entirely. Since an "objective consideration of the facts revealed no reasonable basis for the response of Taj", his conviction was safe (at [62-64]).

Problems/comment
Several interesting points emerge from the Court of Appeal's ruling:

a. The court noted that the *Majewski* rule applies when the defendant relies on voluntary intoxication to deny mens rea. It recognised that while *Harris* was clearly such a case, the issue in *Taj* arose in an entirely different context; in *Taj* the prosecution wanted to rely on D's voluntary intoxication, to prevent D from relying on his mistaken beliefs about the facts while pleading self-defence. Unfortunately, the court did not consider whether this difference in context meant that the *Majewski* rule might be unsuitable for direct application in self-defence cases.
There are reasons to think that might be the case. Unlike the *Majewski* rule, there is now a statutory basis – s.76(5) CJIA – for the intoxicated self-defence rule. Additionally, the harshness of the *Majewski* rule is "capped"; when it applies, at worst the defendant is convicted of a basic-intent offence. However, when s.76(5) applies, a possible basis for pleading self-defence is stripped away, leaving the defendant potentially liable for the full offence. Furthermore, according to one view the *Majewski* rule is a rule of *in*culpation[8] – it supplies mens rea for defendants who do not, in reality, have it, and who would therefore ordinarily be entitled to a full acquittal. Section 76(5), on the other hand, is a rule relating to exculpation. The defendant admits to being prima facie guilty of the offence, but makes the exculpatory claim that she or he acted in self-defence, albeit that she or he was wrong about whether a threat necessitating defensive action had actually arisen. Here, the defendant's voluntary intoxication limits the mistakes she or he can rely upon in exculpation.
One might plausibly think that different policy considerations apply to two rules that differ from each other in such key features.

b. The primary basis for the court's ruling – that *Harris* is distinguishable – is arguable, up to a point. The phrase "attributable to intoxication" is certainly open to a broad interpretation, and *Harris* was indeed a case of psychosis stemming from a voluntary cessation of alcohol intake[9] rather that its voluntary consumption. It is also true that, prior to *Harris*, no case (including *Majewski*) had expressly said that the *Majewski* rule is limited to defendants who were intoxicated at the time of the offence. However, the court's ruling in *Harris* itself was unequivocal: it held that

> … in the present state of the law, *Majewski* applies to offences committed by persons who are then voluntarily intoxicated but not to those who are suffering mental illness (at [59]).

4 [2013] EWCA Crim 223.
5 *DPP v Majewski* [1977] AC 443.
6 A custodial term of 14 years, plus an extended licence of five years (under s.226A of the Criminal Justice Act 2003).
7 At [57]: "… we are not persuaded that the view expressed by Hughes LJ applies to Taj, given that his paranoia was the direct and proximate result of his immediately prior drink and drug-taking." [Emphasis supplied].
8 Per Lord Elwyn-Jones in *Majewski*, [1977] AC 443, 474-5; a view not shared by Hughes LJ in *Heard* [2007] EWCA Crim 125; [2007] 1 Cr.App.R 37.
9 The condition commonly known as *delirium tremens*, alias DTs.

Nevertheless, the primary basis for the CA's ruling seems to have been that the trial judge was right to distinguish *Harris* from *Taj* on the basis that in *Harris*, the defendant's illness arose from his abstinence from alcohol, whereas in *Taj*, it arose from the defendant's consumption of it. Presumably, this would mean that while illnesses resulting from the recent voluntary intake of alcohol would fall under s.76(5) (and possibly the *Majewski* rule), illnesses resulting from the voluntary cessation thereof would not. As a normative legal proposition, this is defensible, but the CA's judgment contains no solid argument of policy in support of it.

c. The court's first alternative basis for its decision (which must technically be obiter dicta) was that it was willing to overrule *Harris* and to hold that a defensive claim is stripped away not just by extant voluntary intoxication, but also by psychiatric conditions caused by recent voluntary intoxication. It relies on the proposition that the same policy considerations apply to the still intoxicated, and the recently intoxicated who are still suffering the proximate and immediate after-effects.
In support of this the court says that

> it is difficult to see why the language (and the policy identified) [in *Majewski*] is not equally apposite to the immediate and proximate consequences of such misuse,

and that:

> a defendant who is suffering the immediate effects of alcohol or drugs in the system is, in truth, not in a different position to a defendant who has triggered or precipitated an immediate psychotic illness as a consequence of proximate ingestion of alcohol or drugs in the system whether or not they remain present at the time of the offence [56].

It adds that since "medical science has advanced such that, in the modern age, the longer-term *sequelae* of abusing alcohol or drugs are better known and understood" [57] there is no reason to restrict the *Majewski* rule to persons intoxicated while offending.
But against this it is certainly arguable that the rule in *Taj* would represent a significantly greater intrusion into liberty by way of the threat of criminal sanction than the rule in *Majewski* ever was. Under the *Majewski* rule, a voluntarily intoxicated D would have the Damocles' sword of criminal liability by public policy hanging over him or her for as long as he or she was voluntarily intoxicated. Under the *Taj* rule, D would be in a legally precarious position not just for that time, but also for the unspecified period thereafter for which he or she continues to suffer the "immediate and proximate" effects of voluntary intoxication. Although the court in *Taj* was at pains to downplay how long this period would last, it is certainly substantially longer than the actual period of intoxication.
Moreover, while it is plausible that the advance of medical science has enhanced medical experts' ability to identify the cause of a psychosis as intoxicant abuse, their improved knowledge does not automatically translate to improved public awareness about the slightly longer-term effects of intoxication. The rule proposed in *Taj* is therefore more likely to result in a defendant being surprised by criminal liability, than the *Majewski* rule.

The policy issues that arise here deserve some further thought.

d. If indeed the criminal law's rule on the voluntarily intoxicated ought to be extended to those suffering the immediate and proximate post-intoxication effects of voluntary intoxication, there remains a problem of scope. How recent must D's voluntary intoxication be? The court in *Taj* did offer some guidance – it held that the mistaken state of mind must be "immediately and proximately consequent upon earlier [voluntary intoxication]" – while clarifying that this "does not extend to long term mental illnesses precipitated [by intoxicant misuse]" [60].
But for how long after being voluntarily intoxicated could one still be suffering the "immediate and proximate" effects thereof? The facts of *Taj* themselves suggest a day or two. But there are indications that the court in *Taj* would have decided *Harris* differently. In *Harris*, the gap between D setting his house on fire, and the last time he drank before then, was nearly a week. So might a voluntarily intoxicated defendant's legally precarious situation last for a week in some cases? Or longer? The guidance in *Taj* does not give us a clear answer. Given the gravity of the consequences for the defendant that may turn on it, this is a serious concern.

e. The court's second alternative basis for its ruling is also obiter dicta, but this is where the real worry, and possibly also the real solution to cases like *Taj*, lies.
The court reaffirmed the well-established position that the defence of self-defence has two limbs: first, one considers whether D genuinely believed it was necessary to use defensive force; and if so, then second, one evaluates whether "the type and amount of force used" was reasonable in the circumstances as D believed them to be.[10] However, the CA read the second limb as saying that in evaluating the reasonableness of the force used in self-defence, the effects of the defendant's psychosis must ordinarily be discounted entirely. In this, it drew support from its own ruling in *Oye,*[11] which in turn had relied on two pre-CJIA cases, *Canns*,[12] and *Martin (Anthony)*.[13]
Accordingly, even allowing Taj the benefit of his genuine, albeit psychiatric illness induced, belief about whether it was necessary to use defensive force, his subjective assessment of the scale of the threat was deemed irrelevant to the question whether the force he deployed was reasonable. Instead, the CA now referred to the facts a reasonable person would have perceived – including that Awain had not been armed (or done anything to suggest that he was), and that it had been "entirely [proper]" for the police to be satisfied that Awain was merely an electrician whose car had broken down. Obviously, this was not how Taj claimed to have seen things. But by reference to these objective facts, the CA thought that self-defence was unavailable.
This reading of the second limb of the test for self-defence is, with all due respect, incoherent[14] and illogical. If the second limb of the test refers to the threat that a reasonable person would perceive, the test for self-defence effectively

10 Section 76(1)(b) Criminal Justice and Immigration Act 2008, read with s.76(10)(c) and s.76(3) thereof. See also *Beckford* [1988] AC 130; *Williams (Gladstone)* (1984) 78 Cr.App.R 276.
11 [2013] EWCA Crim 1725, at [47].
12 [2005] EWCA Crim 2264, at [19].
13 [2001] EWCA Crim 2245, at [67].
14 See for instance *AP Simester, Simester & Sullivan's Criminal Law* (6th edn, 2016) 701.

becomes an objective one; by itself, satisfying the first limb of the test counts for nothing. That would run contrary to settled law,[15] and it is far from clear that the CA in *Oye*, or indeed in *Canns* or *Martin (Anthony)* saw itself as changing the law so radically. Certainly, none of those rulings contained the sort of detailed argumentation one would expect in decisions changing longstanding legal rules.

Even if the above interpretation was somehow tenable before the CJIA, now it is certainly not. Section 76 CJIA, which relates only to the second limb of the test for self-defence,[16] makes that clear. Section 76(3) explicitly states:

> The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances *as D believed them to be.*

The only stated exception to that rule is in s.76(5), which says that D is not entitled to rely on any mistaken belief attributable to voluntary intoxication. Neither that provision, nor the common law rule underlying it, applied in *Martin (Anthony)*, *Canns*, or *Oye*. In *Taj*, the court's argument on this point was presented in the alternative to applying s.76(5).

Of course, the reference to reasonableness in s.76(3) imports an objective standard that cannot take account of D's psychiatric illness. But that reasonableness standard governs only the comparison of the force that D chose to deploy, and the threat that D genuinely (and possibly due to psychosis, but not voluntary intoxication) perceived. Section 76(4) makes it clear that D's perception of the threat facing him or her need not itself be reasonable.

In fact, in *Oye*, the CA reached conclusions that allowed it to form its judgment on this very basis (at [48]). It held that D's response was disproportionate even to the threat that he, in his psychotic state, claimed to have perceived; a reasonable (and not psychiatrically ill) person who perceived the threat that D did, would not have responded with as much violence as D. Therefore, the CA in *Oye* did not need to rule (as the CA in *Taj* thought it had) that D was not entitled to the benefit of his psychosis-induced mistaken beliefs when applying the second limb of the test for self-defence. Indeed, if *Oye* did make that ruling, then on that point it was, with respect, per incuriam, and in following it, so too is *Taj*.

A way forward

People who, due to psychoses, see non-existent threats and feel compelled to respond with force are obviously themselves a threat. And whether or not the psychosis is attributable to voluntary intoxication, allowing such a person to plead self-defence, be acquitted, and potentially do it again, is unthinkable. Yet that is what the test for self-defence seems to demand. So, cases like *Taj* and possibly also *Martin (Anthony)*, *Canns*, and *Oye* pose a real dilemma, especially now that the passing of the CJIA has limited the common law's ability to evolve new rules on matters covered by s.76.

From a public policy perspective, we would want the plea of self-defence to be unavailable where, because D is suffering an abnormality of mental functioning arising from a recognised medical condition,[17] she or he mistakenly believes a threat exists, and responds to it using force. Should the defence of insanity be available (as was the case in *Oye*), the special verdict of not guilty by reason of insanity should result. Otherwise, D should be convicted, and have her or his condition taken into account at sentencing. Where the charge is murder, the grounds for denying D the plea of self-defence would also allow her or him to plead diminished responsibility instead, thereby making sentencing discretion available. Ideally, a case like *Taj* would be decided on this basis alone, with the psychosis being seen as a mitigating factor.

Such a rule could be introduced by legislation, but it is also possible for the common law to evolve it. Section 76 CJIA poses no barrier – it does not occupy the entire field in respect of *when* the plea of self-defence is available. Section 76(1) states cumulative conditions for the application of s.76; s.76 applies when (a) D pleads self-defence, *and* (b) the question arises whether the degree of force used by D is reasonable in the circumstances. The question whether the plea of self-defence is available at all to defendants who use force to respond to imaginary threats perceived because of psychoses, does not meet the second condition, and is therefore outwith s.76.

Arguably, in ruling as it did in *Martin (Anthony)*, *Canns*, *Oye*, and *Taj*, the Court of Appeal has already taken steps towards evolving this common law rule. In *Martin (Anthony)* and *Oye*, the court expressly referred to policy reasons for not letting persons who used force to defend themselves against threats that they imagined due to psychiatric illnesses, plead self-defence.[18] Furthermore, *Martin (Anthony)* and *Canns* were both homicide cases in which the defendants who unsuccessfully pleaded self-defence were instead convicted of manslaughter due to diminished responsibility. All that remains is for the court, in an appropriate case, to weave these strands into a new rule of common law. One hopes that this will happen sooner rather than later.

Such a development would clarify and improve the law of self-defence. It would also obviate the need to adopt an expansive meaning of s.76(5) CJIA. And while there is much about the *Majewski* rule that cries out for better elucidation and improvement, perhaps that task too is better taken up in a more suitable case.

15 *Beckford* [1988] AC 130 *and Williams (Gladstone)* (1984) 78 Cr.App.R. 276.
16 Notice that s.76(1) states *cumulative* conditions for the application of s.76, and subcl.(b) requires that the question be about the second limb of the test for self-defence.
17 This standard is adapted from the test applicable to the partial defence of diminished responsibility, in s.2(1)(a) of the Homicide Act 1957. Each of the conditions suffered by the defendants in *Martin (Anthony)*, *Canns*, *Oye*, and *Taj* would meet this test.
18 At [66] in *Martin (Anthony)*; [45] and [47] in *Oye*.

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