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Archbold Review

Cases in Brief

Double jeopardy—acquittal—quashing—Criminal Justice Act 2003 Pt.10—s.79—interests of justice—approach; s.78—compelling evidence—approach

BISHOP [2018] EWCA Crim 27; 23 January 2018

The Crown applied to quash B's acquittal on charges of murdering two children in 1987, and for a re-trial, under the Criminal Justice Act 2003 s.76(1).

(1) B submitted that, in relation to the matters to which the court was directed to have particular regard in determining whether the order should be made in s.79(2), those in s.79(2)(a) (whether a fair trial was unlikely) and (b) (the length of time since the offence had been committed) were an absolute bar to the quashing of an acquittal both at common law and under the European Convention on Human Rights Art.6. There was no substance in the submission in relation to s.79(2)(b) when viewed in isolation. Although relevant to the issue of fair trial, lapse of time without more could never amount to an absolute bar or a trump card. If that were the position, s.79(2) would not have been framed in the way that it has been (the court found reinforcement for this conclusion in the observations as to the quality of delay in *Dunlop* [2006] EWCA Crim 1354, [2007] 1 Cr.App.R 8, [28] and [29]). In the reference in s.79(2)(b) to delay being relevant "for the purposes of that question and otherwise", "that question" related to the question whether making the order was in the interests of justice, as set out in s.79(1) and referred to in the opening words of s.79(2), and not to the "question" in s.79(2)(a).

(2) Section 79(2) contained a list of non-exhaustive factors which the court must consider and there was no question of priority or hierarchy. Neither did ss.79(2)(c) or (d) have any enhanced status: they were factors to be taken into account as a matter of fairness between the parties. It was not difficult to visualise the possibility that, as the definition of "new and compelling" evidence would include evidence that was available and known about at the time of the first trial, unless due diligence and expedition had to be demonstrated, it would be far too easy for the prosecution to seek a second bite of the cherry in circumstances which would be entirely inimical with the interests of justice.

(3) Although not described in s.79 as a factor which had any more enhanced significance than the other factors, in practical terms (even if not as a matter of statutory construction), s.79(2)(a) was obviously of critical importance. If an application to stay a prosecution on the grounds of abuse of process based on the inability for there to be a fair trial were to succeed, it would make no sense to grant an application under s.76. B's counsel realistically recognised that, if his argument on unfairness was rejected by the Court of Appeal, a later application for a stay would be precluded unless based on events which came about or emerged after the Court of Appeal proceedings.

(4) Failings by those conducting forensic scientific examinations were relevant to the decision whether or not to overturn an acquittal since, although such roles would not, as a matter of strict construction, come within the ambit of s.79, any failings on their part might go to the broader "interests of justice" test, or, at any rate, the court would proceed on that basis. It did not follow, however, that it was appropriate to adopt too stringent or exacting an approach. The question was whether what was regarded as appropriate to be done by the forensic scientists at any particular stage was, indeed, appropriate from a professional viewpoint; it was not whether, theoretically, something could have been done at an earlier stage. If there were complete inaction or indifference when there ought to have been action or interest, that would be relevant. Sloppiness or lack of care would equally be relevant (*Weston* [2010] EWCA Crim 1576, [55]; *MH* [2015] EWCA Crim 585).

(5) The approach to the making of rigorous and focussed

CONTENTS

enquiries of trial counsel in conviction appeals in which grounds of appeal were settled by fresh counsel involving criticism of trial counsel (see *Grant-Murray* [2017] EWCA Crim 1228, [2018] Crim.L.R. 87) was not directly comparable to prosecution applications under s.76. There was a distinction between s.76 applications, where the focus was on the prosecution's ability to establish the existence of "new and compelling" evidence and cases where, in support of his or her appeal, a convicted defendant alleged failings on the part of trial counsel. In the s.76 case, the issue was whether the prosecution had satisfied the statutory criteria, which did not depend on whether trial counsel had been at fault. That was not the position in the case of conviction appeals, hence the need in the latter (but not the former) case to have the input of trial counsel to provide an explanation for the suggested failing. Given this distinction, the court did not accept that a prosecution decision at the first trial could bind any new prosecutor to put the case in the same way.

(6) There was no necessity for evidence to be conclusive or unanswerable to meet the criteria establishing that it was "compelling" in s.78(3). The availability of realistic defence arguments did not preclude an order quashing the acquittal (*Dobson* [2011] EWCA Crim 1256, [2011] 1 W.L.R 3230, [8]). Such arguments were open to B to explore at re-trial.

Entry to courts—policy or practice of preventing entry during parts of criminal proceedings—extent to which reasonable and lawful—nature of published policy if made

R (EWING) v ISLEWORTH CROWN COURT [2019] EWHC 288 (Admin); 16 January 2019

(1) Decisions as to when and whether members of the public may be denied entry to the Crown Court during particular parts of criminal proceedings were not aptly described as "court etiquette". Rather, they were matters of policy or of practice.

(2) There were some moments in a criminal trial where, as a matter of policy, it was reasonable and lawful for members of the public to be stopped from entering the courtroom or moving about. Arraignment, the empanelling and swearing in of a jury, a witness taking the oath or making affirmation, the return of verdicts by the jury and the passing of sentence by the judge were all in this category. These were sensitive moments, generally of brief duration, when it was necessary for the court to be still so that the process could take place without distraction and in a manner which preserved the dignity and solemnity of the proceedings. But a general or blanket policy which went further than that could not be justified. In particular (the issue arising in the application), a Crown Court judge giving a reasoned ruling on an appeal against conviction was not to be treated in the same way as the foreman of a jury returning a verdict. Even more unacceptable was the suggestion in the witness statement of HMCTS' National Director of Operations that it would be lawful for a Crown Court to have a policy that nobody should be allowed to enter or leave the court at any stage during a judge's summing-up.

(3) It was not necessary for the court to say whether there should be a published policy governing the matter, but if there were to be one it should take the form of nationally applicable guidance given by the Senior Presiding Judge of England and Wales. It would only be justifiable to have local policies where the exigencies of a particular courtroom or building made special arrangements necessary. Even then, if a courtroom was so physically cramped that it was impossible for members of the public to enter or leave without causing serious disruption to the proceedings, such a room was not fit for use in jury trials.

Homicide—diminished responsibility—Homicide Act 1957 s.2—approach where only expert evidence supports defence; appeal– extension of time—whether exceptional leave

HUSSAIN [2019] EWCA Crim 666; 2 April 2019

H was convicted of murder in 2013, his defence of diminished responsibility being unanimously supported by the psychiatric evidence. He applied for an extension of time, and leave to appeal conviction, in the light of the decisions in *Brennan* [2014] EWCA Crim 2387, [2015] 1 W.L.R 2060 and *Golds* [2016] UKSC 61, [2016] 1 W.L.R 5231.

(1) The extension of time application had been referred for consideration whether exceptional leave pursuant to the "new law" test in *Jogee* [2016] UKSC 8, [2017] A.C. 387 should be granted. It was not an exceptional leave case: *Brennan* applied the principles set out as long ago as *Matheson* (1958) 42 Cr.App.R 145. In *Golds* the Supreme Court had been primarily concerned with the interpretation of Homicide Act 1957 s.2(1)(b), but Lord Hughes also considered, under a heading referring to *Brennan*, the position in relation to uncontradicted medical evidence going to diminished responsibility. In doing so, he endorsed only part of the judgment in *Brennan*, that is, the long-standing principles that there must be some rational evidential basis for challenging agreed expert evidence, but the decision as to whether a defendant fell within the provisions of s.2 was for the jury, not the doctors to determine. The Supreme Court in *Golds* did not suggest that a trial judge should withdraw a charge of murder from the jury simply on the basis that the medical evidence pointed one way. Thus, neither the judgment in *Golds* nor the judgment in *Brennan* to the extent it survived *Golds* changed the law. In future, the court did not expect reliance to be placed on any judgment predating *Golds* on this issue. The case was accordingly one in which a very lengthy extension of time was required and the usual principles applied. It follows that H faced a very high hurdle in persuading the court that the merits of the case were so compelling that an extension of time should be granted to prevent a miscarriage of justice.

(2) Although the evidence of two defence expert witnesses, and the prosecution expert, who was not called but whose opinion was elicited via the defence experts, supported the defence, the prosecution had been justified in challenging that evidence on the basis that, first, H may have been faking psychotic illness and fooling the experts, and, secondly, even if he was not, the defence had not established to the relevant standard that all four of the questions in s.2 had been answered in favour of H. The question remained: was the recognised medical condition sufficient, at the time of the killing, to provide an explanation for the killing and substantially impair his responsibility?

(3) No doubt had the judge had the benefit of the judgment in *Golds*, he would have directed the jury not to turn themselves into amateur psychiatrists as Lord Hughes suggested, but the court concluded that, taken as a whole, the summing up could not have been fairer to the defence.

The court refused leave and refused the extension of time application.
[*The issue in* Golds *was whether, and if so, how, a judge should direct the jury as to the meaning of the word "substantial" in the Homicide Act 1957 s.2(1)(b). The passage in the judgment relating to* Brennan *was obiter. The court in this case considers that some part – the part indicating the basis on which a judge should stop a case where the expert evidence goes all one way – has not "survived"* Golds*. So here, again, as notoriously following* Ivey v Genting Casinos [2017] UKSC 67, [2018] AC 391, *the Court of Appeal is treating obiter dicta in the Supreme Court as authoritative and binding on the Court of Appeal, notwithstanding the existence of binding contrary Court of Appeal authority. RP*]

Miscarriages of justice—judicial review of Criminal Cases Review Commission decisions—status of previous Administrative Court decisions relating to the same conviction—procedure on renewed applications for leave to apply for judicial review
R (CLEELAND) v CCRC [2019] EWHC (Admin) 1175; 10 May 2019
(1) The court rejected C's contention that the CCRC should not have relied on the conclusions of a previous judicial review of the CCRC's decision-making in respect of the same conviction (*R (Cleeland) v CCRC* [2015] EWHC 155 (Admin)), and that that decision was not binding on the court on this application: *R v Manchester Coroner, ex p Tal* [1985] 1 Q.B 67. The suggestion that the CCRC should disregard previous decisions of Divisional Courts dealing with an issue was unsupported by precedent or principle. The CCRC would deal with an issue on the merits, but that did not mean that they should engage in reviewing matters previously decided, save in a clear case.
(2) It was important that the courts did not allow the CCRC to be sucked into judicial review proceedings which necessarily detract from it fulfilling its important statutory role and impact on scarce resources: *R (Charles) v Criminal Cases Review Commission* [2017] EWHC 1219 (Admin), [2017] 2 Cr.App.R 14. In the present case, permission had been given at a renewed hearing, having only heard from the claimant. In future, the court would expect the CCRC to be given an opportunity to make representations at an oral renewal hearing before permission were given to bring judicial review proceedings against it.

Victims of trafficking—nature of UK international obligations—role of Court of Appeal—expert evidence
R v EK [2018] EWCA Crim 2961; 18 December 2018
(1) The UK's international obligations in respect of victims of trafficking were not confined to cases where a common law defence of duress or necessity was available. In the case of victims of trafficking, it may well be in the public interest not to prosecute even where no such common law defence was available.
(2) The role of the Court of Appeal was in effect one of review of the decision reached by the prosecutor to proceed: *M(L)* [2010] EWCA Crim 2327, [2011] 1 Cr.App.R 12, [19].
(3) Scepticism had consistently been expressed as to the value of expert evidence in cases such as this: *N; L* [2012] EWCA Crim 189, [2013] QB 379; *Joseph (Verna)* [2017] EWCA Crim 36, [2017] 1 Cr.App.R 33; *S(G)* [2018] EWCA Crim 1824, [2019] 1 Cr.App.R 7. When it came to the credibility of accounts given by an applicant or appellant, it was for a jury or the Court of Appeal to evaluate them. It was not the function of experts to do so. When it came to the correctness of a decision to prosecute, expert evidence was ordinarily unlikely to assist.

Victims of trafficking—retrospective review of decision to prosecute—approach of court
O; N [2019] EWCA Crim 752; 9 May 2019
N and O, in unconnected cases, sought retrospective review of the decision to prosecute them on the basis that they were victims of trafficking. Applications for extensions of time and for permission to appeal against conviction were referred to the court by the Registrar of Criminal Appeals (N) and the single judge (O). In neither case did the Modern Slavery Act 2015 s.45 apply.
(1) N had pleaded guilty to production of cannabis, as a gardener, in 2015. He had not been referred to the National Referral Mechanism (NRM) at that time. He relied as fresh evidence on his own witness statements, the "conclusive decision" of the Competent Authority that he was a victim of trafficking and a Home Office file in relation to his proposed deportation and subsequent claim for asylum. Having considered the material, including particularly a "candid" assessment by an anonymous police officer before his plea, the court concluded that (a) he was a victim of trafficking: there was no basis upon which to question the NRM finding to that effect; (b) there was sufficient nexus between N's offending and his trafficking; (c) accordingly, the court extended time, found that it would be unjust not to allow him to rely on the fresh evidence, granted permission to appeal, and allowed the appeal.
(2) O had been convicted of controlling two women for gain as prostitutes in 2014 and sentenced to five years' imprisonment. She sought to rely on the NRM referral form and the decision by the Competent Authority that she had been trafficked, and her own witness statements as fresh evidence. The court (a) expressed misgivings as to her status as a victim of trafficking, noting that the Competent Authority's "conclusive grounds" decision lacked the detailed analysis of that in N's case, but was prepared to give her the benefit of doubt on the issue; but (b) this status did not establish nexus or compulsion at the relevant time: if she had been a victim of trafficking on her arrival in the UK, she was, nonetheless, complicit in the trafficking of the prostitutes thereafter, and not by reason of compulsion; (c) the court accordingly refused permission to appeal; and (d) the judge's assessment of her culpability withstood the finding that she had been a victim of trafficking and her sentence was not manifestly excessive (the single judge having granted an extension of time and permission to appeal sentence).
[*Comment: this case is noted as an illustration of the approach of the court in exercising the victims of trafficking review jurisdiction.*]

SENTENCING CASE

Reconsideration of Confiscation Order
S [2019] EWCA Crim 569 (date withheld)
The appellant appealed against an order made under s.22 (4) (a) of the Proceeds of Crime Act 2002 (POCA 2002) which had increased a confiscation order from £8,550 to £108,642.81.

The original confiscation order had been made on 11 January 2007. The benefit figure was £189,621.36 and the available amount was £18,050. That order was varied on 15 November 2007 to give an available amount of £8,550, which was paid, leaving an unsatisfied benefit figure of £181,071.36.

Following his release from prison, the appellant began a business and acquired a property in June 2014. The CPS began proceedings under s.22 in June 2016. The order was made on 29 March 2018 and the Recorder later gave reasons for the order which took the following considerations into account: (i) the sum outstanding in relation to the original order; (ii) the length of time elapsed since the original order; (iii) the additional amount that might now be available; and (iv) the adverse impact on an offender of the making of a further order for payment weighed against the legislative policy in favour of maximising recovery of the proceeds of crime, even from legitimately acquired assets. The Recorder concluded that (i) the appellant had paid "almost nothing" towards the benefit figure; (ii) there had been no unreasonable delay in the bringing of the application and (iii) the appellant had sufficient assets to discharge the order. As to (iv), the Recorder held that the legislative policy of POCA 2002 prevailed, even where assets were legitimately acquired. The appellant had "sailed very close to the wind" in his business dealings. The Recorder also considered assistance the appellant had provided to the police between 2007 to 2014, payment for which had been used to establish his businesses. This assistance was reflected in a 40 per cent reduction in the sum to be paid (the reduction also taking into account the lapse of time since the making of the original order).

The appellant submitted that the Recorder should have refused to make the order as it was contrary to public policy; that they should have refused to make the order, or applied a greater discount on grounds of delay and that the principle of rehabilitation required a discount of 75-80 per cent.

The Court made the following observations. (i) The statutory language of s.22 gives the court a broad discretion when considering an application; (ii) where the facts justify it, there is no reason in principle why assistance to the authorities cannot be relied on in answer to a prosecution application under s.22; (iii) assistance to authorities is treated in a defendant's favour at sentence; (iv) the decision as to the extent to which assistance will be reflected in sentence is fact specific; (v) the court has to consider the quality and quantity of the material provided; (vi) the court has to consider the nature of the assistance, and the terms on which it was given; (vii) the Court of Appeal will not interfere with findings of the Crown Court unless a decision involves an error of law or principle or falls outside the judge's discretion, in that no court properly directing itself could have come to such a conclusion; or is fundamentally lacking in any underlying reasoning. The Court concluded that none of the factors in (vii) applied and the appeal was dismissed.

Features

Whither Confiscation: *May* Revisited

By Andrew Campbell-Tiech QC[1]

At the invitation of the Home Office, the Law Commission has embarked upon a two-year project[2] to review the operation of the confiscation regime under the Proceeds of Crime Act 2002 (POCA). Nestling within the hard-nosed rhetoric[3] is the heartening observation that the review will address "the frequent imposition of unrealistic confiscation orders". Quite how unrealistic these are has been repeatedly demonstrated in the statistics – provided of course they are properly analysed. In December 2013, the NAO reported[4] that since 1987, 52,000 confiscation orders had been made in the sum of £2.1 billion. However, the *benefit* found amounted to £15.8 billion. Rather than query whether the convicted criminal fraternity had indeed received and squirrelled away or squandered so much money, the NAO assumed that courts would not make these findings unless they were soundly based.

It is plain that the NAO did not understand how criminal benefit is assessed.

The same can be said of the Home Affairs Select Committee Report of 2016.[5] It too rehearsed the NAO's figures[6] but recast them; 26 pence recovered for every £100 of benefit, leading to an historic debt of £1.61 billion. The Committee had taken evidence from senior practitioners who accurately described this figure as "a complete fiction". Nonetheless, the Committee concluded that:

> judges have determined that this money is owed to the state … and we believe that it should not just be written off … There is no expiry date on this debt because crime must never pay.

How did we get here? Of the many ills that beset the confiscation regime,[7] a root cause of POCA's systemic unfairness lies in the way that benefit is calculated.

Although convention denies that there is honour amongst thieves, it is nonetheless true that acquisitive crime is largely collegiate. Serious offences of fraud, theft or drug trafficking are rarely committed by a sole actor. Consequently, there will usually be a division of the spoils. It is this commonplace of criminal activity that the law of confiscation deliberately disregards.

In *May,*[8] the HL held that where property is jointly obtained,

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2 *Confiscation Regime Review to Ensure Crime Doesn't Pay*. Law Commission 7 November 2018.

3 E.g "optimise the enforcement of confiscation orders to improve the recovery rate".

4 NAO Criminal Justice System Confiscation Orders, 17 December 2013.

5 Home Affairs Committee, Proceeds of Crime, 29 June 2016.

6 The NAO had produced a "progress" report earlier in 2016.

7 The absence of judicial discretion and inflated estimates of undisclosed or hidden assets to name but two.

8 [2008] 1 A.C. 1028.

the benefit of all is the benefit of each.[9] Apportionment, they declared, would be contrary to principle and unauthorised by statute. Therefore, where two defendants together stole a diamond worth £1 million, each had benefited in that sum. If each had assets of £1m or more, each must pay £1 million. The fact that the state stood to recover multiples of the loss sustained was irrelevant. Moreover, the costs of the criminal enterprise were (and are) not deductible.[10]

In *Islam*[11] (2009), the HL went further still. Even where the proceeds of crime are seized by the police before their realisation, their value must be included in the assessment of benefit.[12]

As should have been obvious at the time, the effect of these decisions is to affix many a defendant with a benefit figure that far exceeded that which he had in fact received.

The justification, if it can be called that, was that a defendant's liability to pay is limited to the available amount, namely the entirety of his assets. Consequently, it was said that no question of proportionality arose.[13]

In addition to their manifest and intrinsic unfairness, these judgments of the HL took no account of the fact that the assessment of benefit imposes a lifelong liability upon a defendant to pay it, should his finances permit.[14]

In late 2012, the SC in *Waya*[15] rowed back a little. It accepted that in limited circumstances, particularly where full restoration has been made to the victim, POCA is capable of operating in an oppressive and consequently disproportionate manner.[16] Multiple recovery by the state henceforth might amount to a breach of A1P1.[17] However, absent such restoration, benefit would continue to be assessed in accordance with *May*.

But if the attribution of benefit equal to the value of restored property is oppressive, how could it be proportionate to assess benefit against defendants without apportioning that benefit?

The SC, in the conjoined appeals of *Ahmad & Fields,*[18] addressed this conundrum by reference to two possible outcomes. Either *May* was wrongly decided, or proportionality required no more than a restriction upon enforcement.

They chose the latter. Consequently:

> the order should be made for the whole value of the benefit … but should provide that it is not enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit[19].

In other words, joint and several liability – in practice if not in theory.

Ahmad & Fields may cause a defendant to behave as though he were a participant in a particularly nightmarish version of the Prisoner's Dilemma, a stalwart of game theory.

Our diamond thieves may choose to co-operate with each other. Each pays £500,000 and therefore neither serves a default sentence.[20] However, if D2 deceives D1 and pays nothing, D1 will serve half that sentence. So will D2, having received credit for D1's payment. On release, D1 will still be liable for D2's share.

D2 may well calculate that his self-interest is best served, not by co-operating with D1 and still less with the prosecutor, but by a campaign of delay and disruption. If he can thereby force D1 to pay the entirety of the order,[21] he escapes scot-free.

Game theory apart, *Ahmad & Fields* otherwise reaffirmed the decision in *May*. Benefit would be assessed as before. Why did the SC go down this route? Would it not have been so much simpler and desirable to reintroduce[22] apportionment?

Two reasons are advanced in the judgment. The first is that:

> … defendants will often, indeed normally, be as misleading and uninformative as they can … Owing to the reticence and dishonesty of defendants there will often be considerable, or even complete, uncertainty as to (i) the number, identity and role of the conspirators involved in the crime, and (ii) the quantum of the total proceeds of the crime, or how, when and pursuant to what understanding the proceeds were, or were to be, distributed …[23]

In short, apportionment is too difficult and vexing an exercise because of the unyielding mendacity of the accused (!) This is quite a proposition, and one that flies in the face of the daily diet of the criminal courts, where judges routinely weigh the assertions, exculpations, accusations and excuses made by defendants in the course of the criminal process. Confiscation does not take place on a different stage.

Further and contrary to the SC's expectation, apportionment would provide a defendant with a real incentive to explain in detail and truthfully how – and with whom – the index offence was committed, for he could thereby reduce his confiscation order to that which he might actually be able to pay.

The second reason is that:

> … it is also important to bear in mind that the issues raised on these appeals have been considered by the House of Lords, the Supreme Court and the Court of Appeal on a number of occasions … it would be wrong to depart from the guidance given in these cases unless it was shown that they were plainly wrong or unless it was established that they had led to problems for courts making confiscation orders …[24]

There is a real and depressing possibility that the doctrine of precedent trumped common sense. *May* was surely wrongly decided. It has not led to problems for courts *making* confiscation orders. But it has led to acute problems for defendants in *meeting* them, as the Law Commission may acknowledge.

A realistic assessment of a defendant's benefit should be at the heart of the confiscation scheme. Instead, inflated benefit, arising from the fiction that the benefit of all is the benefit of each, continues as before. This is the legacy of *May*.

The SC had an opportunity to turn the clock back and restore a measure of fairness to a troubled and troubling area of our criminal law. They did not take it.

Perhaps the Law Commission will succeed where the courts have failed.

9 The key word is "obtained", so that where D1 receives the proceeds into his bank and distributes a third each to D2 & D3, the latter benefit only by the third received, whereas D1's benefit is the entire amount – see *May* above at [16] and [34].
10 *Smith (Ian)* [1989] 1 W.L.R 765, *Banks* [1997] 2 Cr.App.R (S) 110.
11 [2009] 1 A.C. 706.
12 At [35], following *Smith (David)* [2002] 1 W.L.R 54.
13 *May,* above, at [40] and [41], POCA ss.7(2) & 9.
14 POCA s.22.
15 [2013] 1 A.C. 294.
16 [10]–[35].
17 Article 1 of the 1st Protocol to the European Convention on Human Rights.
18 [2014] 4 All ER 767.
19 At [74].
20 Maximum seven years: POCA s.35(2A).
21 Where D1 has identifiable, restrained assets, the temptation must be for the prosecutor to pursue the lowest hanging fruit.
22 As per *Porter* [1990] 1 W.L.R. 1260: overruled by *May*, above, at [27].
23 At [36].
24 At [39] and [40].

A sane world?

By Hannah Hinton[1]

In an earlier Issue, Professor John Spencer, considering the developments in the law of theft, discussed the implications of the decision in *Darroux*.[2] In that case, the Court of Appeal was unable to substitute a conviction under s.1 of the Fraud Act 2006 in place of a charge brought under s.1 of the Theft Act 1968. Ms Darroux was unquestionably guilty of fraud by deception contrary to the Fraud Act 2006, however at her trial the case had been presented as one of theft and that was the basis of her conviction. Professor Spencer said:

> In a sane world, it [the Court of Appeal] would have been able, when quashing her theft conviction, to substitute the fraud conviction that she clearly deserved.

As things stand, where a manifestly guilty defendant was convicted of the wrong offence in circumstances falling outside the scope of s.3 and 3A of the Criminal Appeal Act 1968 the Court of Appeal must either order a retrial (a great waste of time, public money and distress or inconvenience to witnesses) or just quash the conviction – leaving the defendant with an acquittal they do not deserve (and as a paradox) in many cases a period of imprisonment for an offence of which they were not guilty. The constraints upon the Court of Appeal leads to situations which have been described by the judiciary as: "unfortunate"[3]; "deeply regrettable"[4]; the effects of these provisions are known to cause "anguish"[5] to victims and witnesses having to face a re-run of very painful evidence at a re-trial or where no re-trial can be ordered leaving victims understandably outraged.

Section 3 of the Criminal Appeal Act 1968 provides as follows:

> *Power to substitute conviction of alternative offence*
>
> (1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence to which he did not plead guilty and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.
>
> (2) The Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.

Section 3A, which was added by the Criminal Justice Act 2003, provides the power to substitute a conviction for an alternative offence after a guilty plea in circumstances where: (a) an appellant has been convicted of an offence to which they pleaded guilty, (b) if they had not so pleaded, they could on the indictment have pleaded, or been found, guilty of some other offence, and (c) it appears that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of the other offence.[6]

Davis LJ said this of the provisions:

> one has to have regard to the actual terms of s.3 of the Criminal Appeal Act 1968. The question is not just whether on the facts the jury could have convicted of some other offence. The question also is whether on the *indictment* [emphasis added] the jury could have so convicted.[7]

In *Deacon*[8] Lord Widgery CJ emphasised that the court did not have power to substitute a verdict on more general grounds i.e. when it was satisfied that the alternative verdict would have been inevitable had the case been properly presented to the jury, because when considering s.3(1) of the 1968 Act and in particular the words "*and the jury could on the indictment have found him guilty of some other offence*" regard to s.6 of the Criminal Law Act 1967 must be had. Subsection 3 of s.6 provides:

> Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

An attempt to commit the same offence is expressly included by subs.4. As things stand, therefore, a person cannot be convicted of an offence which was not included in the indictment unless that offence expressly or impliedly includes an allegation of the alternative offence or an attempt. A "red pencil test".[9]

Then the Lord Chief Justice, Lord Bingham, stated in *Graham, Kansal, Ali*[10] of the power in s.3:

> ... Before this court could substitute a conviction of an alternative offence the prosecution would have to establish two requirements: (1) that the jury could on the indictment have found the appellant guilty of some other offence (offence B) and (2) that the jury must have been satisfied of facts which proved the appellant guilty of offence B. As to (1) it would be sufficient if looking at the indictment (not the evidence) the allegation in the particular count in the indictment expressly or impliedly included an allegation of offence B. A count charging offence A impliedly contains an allegation of offence B if the allegation in the particular count would ordinarily involve an allegation of offence B and on the facts of the particular case did so. As to (2) this court has only the verdict of the jury to go on. The fact that the jury did not have a proper direction as to offence B is a highly relevant consideration, as is the question whether there are reasonable grounds for concluding that the conduct of the defence would have been materially affected if the appellant had been charged with offence B.
>
> Examination of previous practice indicates that the power in section 3 of the 1968 Act has usually been exercised in relation to offences of violence or public order offences by substituting a lesser offence for the

1 Hannah Hinton is a barrister at Drystone Chambers and a door tenant at St Paul's Chambers.
2 [2018] EWCA Crim 1009; discussed by Professor Spencer in [2018] 8 *Archbold Review* 4.
3 *Maciejczyk* [2018] EWCA Crim 2665.
4 *Walker & Coatman* [2017] EWCA Crim 392.
5 *TF* [2018] EWCA Crim 2823.
6 See generally the Main Work, §7-103 onwards.
7 *Darroux* [2018] EWCA Crim 1009 at [69].
8 (1973) 57 Cr.App.R 688, at pp.693-4.
9 *Lillis* [1972] QB 236.
10 [1997] 1 Cr.App.R 302.

> offence charged, there being in such instances a clear hierarchy of offences at common law or by statute.

That test was met in *Graham* because the indictment, although referring to s.15(1) of the Theft Act and the wrong offence, particularised the offending conduct in terms which reflected the wording of s.20(2) of the Theft Act, by alleging that the defendant had "by deception … obtained … a cheque", thereby implicitly tracking the terms of s.20(2).[11] However, Widgery LJ in *Lovesey and Peterson*[12] considered it impossible to substitute a verdict of manslaughter when a jury had convicted the appellant of murder because it was not possible to discern whether the jury's conclusion upon the result of death was a result of the common design or a result of an unauthorised act by one member. That is understandable.

In practice there are few provisions which involve, sufficiently and precisely, the same elements, although on their face many offences appear to cover substantively the same crime. This means the Court of Appeal's hands are often tied. For example:

> the elements of indecent assault and gross indecency are not necessarily the same and an offence of gross indecency does not expressly or impliedly include an offence of indecent assault,

as was found by Lady Justice Hallett in *Walker*.[13] In that case, the adult defendants were convicted of offences of gross indecency against young boys committed variously in the 1970's and between 1999 and 2002. In each case the statement of offence pleaded a contravention of s.13 of the Sexual Offences Act 1956; however, the prosecution of such an offence became time-barred by s.7 of the Sexual Offences Act 1967. The repeal of this time-limit in Sch.6 of the Sexual Offences Act 2003 did not operate retrospectively. The Court of Appeal had no power to substitute an offence of indecent assault contrary to s.15 of the Sexual Offences Act 1956, or indeed to order a retrial. The result: the prosecution had to "start again on a proper footing" [14] doubtless at great distress, expense and inconvenience to all involved.

The effect of the provisions is that generally speaking substituted verdicts tend to be restricted to lesser offences than those reached by juries. Those outcomes are unlikely to respect the full extent of their decisions.

In two cases last year, where errors had been made, the Court of Appeal was unable to remedy the situation: *Maciejczyk*[15] and *TF*.[16]

Mr Maciejczyk was convicted living off the proceeds of prostitution contrary to s.30(1) of the Sexual Offences Act 1956. The offence had been repealed by Sch.7 of the Sexual Offences Act 2003, yet the defendant was permitted to plead guilty to it. Formal verdicts of not guilty were recorded upon the counts relating to s.2(1) of the Modern Slavery Act 2015 and an offence of controlling prostitution for gain, contrary to s.53(1) of the Sexual Offences Act 2003. When the defendant appealed the conviction, nothing could be done to undo the mistake which arose apparently as a result, simply, of failings in the legal researches before the Crown Court which could not be remedied on appeal when the problem was identified too late. In consequence, (i) the defendant spent a period in prison for an offence that does not exist and (ii) he escaped with a clean record, having avoided a conviction for offences which do exist and which he appears to have committed.

TF was convicted of two counts of rape. In the late 1980s/early 1990s TF, then in his thirties, drove around the Abbeywood area of London in his car targeting male teenagers for sexual encounters, sexually assaulting them either in his car, in their homes, at his sister's flat, or at his own address. He penetrated one of the victim's anus with his penis. The victim screamed in pain and told the appellant to stop several times but he continued until he ejaculated inside him. He did the same thing again some time later.

On appeal, *TF* argued that the counts of rape, pursuant to s.1(1) of the Sexual Offences Act 1956, should have been charged as buggery pursuant to s.12(1) of the Sexual Offences Act 1956. He argued that because the offence of rape did not include anal penetration until the law was amended by s.142 of the Criminal Justice and Public Order Act 1994, which came into effect on 3 November 1994, and as that post-dated the offences charged as rape for which he was convicted, these convictions were unsafe and should be quashed. As a matter of law, he was right and as a result his appeal succeeded. Section 3 of the Criminal Appeal Act gave the Court no power to substitute a conviction for buggery; nor, for reasons explained later, could it order a retrial.[17]

The limited scope of s.3 is further illustrated by the earlier case of *Shields*.[18] Here a defendant had by a slip been charged with the wrong offence – an offence of being in breach of a sexual offences order under the Crime and Disorder Act 1998, rather than, as he should have been, breach of a sexual offences prevention order under the Sexual Offences Act 2003. The Court could not make a substitution. Rix LJ in *Shields* stated that mere drafting defects are not favoured as invalidating an indictment and referred to a number of judgements to that effect[19] but still determined that the defendant's conviction must be quashed and the error could not be cured by s.3.

A further illustration of the problem is *MC*.[20] Here an appellant was convicted under s.14(1) of the Sexual Offences Act 1956 but at the date of the indecent assault alleged in the particulars the 1956 Act had long since been repealed and replaced by the Sexual Offences Act 2003. But a verdict for this could not be substituted because

> an offence under the Sexual Offences Act 1956 cannot sensibly be said to amount to or involve an offence under the 2003 Act, which superseded and repealed the 1956 Act.

11 *Shields* [2011] EWCA Crim 2343.
12 [1969] 2 All ER 1077.
13 [2017] EWCA Crim 392, at [25].
14 The case led to a roll-out, in 2017, of guidance to prosecutors working in this difficult area of practice (within the RASSO unit).
15 [2018] EWCA Crim 2665.
16 [2018] EWCA Crim 2823.
17 Though TF's convictions for a number of less serious offences stood and for these he was sentenced to 18 years' imprisonment.
18 [2012] 1 Cr.App.R 9.
19 *Taylor* (1924) 22 LGR 681, 88 JP 152, 18 Cr.App.R 105; *Meek v Powell* [1952] 1 KB 164, [1952] 1 All ER 347, 50 LGR 247; *DPP v Bhagwan* [1972] AC 60, [1970] 3 All ER 97, 134 JP 622, and *DPP v Withers* [1975] AC 842, [1974] 3 All ER 984, 139 JP 94: cf *McVitie* [1960] 2 QB 483, [1960] 2 All ER 498, 44 Cr App Rep 201; *Molyneux* (1980) 72 Cr.App.R 111 and *McLaughlin* (1982) 76 Cr.App.R 42.
20 [2012] EWCA Crime 213.

Richards LJ said of the charging error:

> The mistake does however serve as yet another reminder of how important it is to pay careful attention to dates and to ensure that an offence is charged under the correct statute.

Similarly, in *TF,* Mrs Justice Whipple said:

> We emphasise again the need for all those involved in the preparation and conduct of criminal trials, including prosecutors, solicitors, counsel and the judge, to check that the charges on the indictment are appropriate to the facts of the case, particularly in cases of historic sexual abuse where the relevant provisions have changed over time.

But it is clear that, in the context of an overburdened and controversially underfunded system, mistakes of this sort are certain sometimes to be made. Without either changes to the provisions or extra funding, such outcomes will continue undermining – as they do – our criminal justice system.

The examples discussed above suggest that there are uncomplicated cases where a jury's decision upon facts of a crime are clearly discernible from their verdict and their decisions could be readily respected by the Court of Appeal by way of a straightforward substitution. If the court were given greater latitude, public expense, and professional embarrassment would be spared. Wouldn't it, therefore, make sense for the limited scope of the Court of Appeal to substitute a conviction for a different offence to be wider?

If one were to draw a parallel with the much greater powers that exist to put a matter right by amending the indictment when, during the trial, a defect is identified, the powers of the Court of Appeal seem unnecessarily restricted. *Gleeson*,[21] a case with nostalgic references to the "ambush" defences, pre-CPIA, provides an illustration. Auld LJ said:

> It may not always be possible for amendment of an indictment to be permitted with fairness to a defendant at so late a stage, wherever the fault lies. But, just as a defendant should not be penalised for errors of his legal representatives in the conduct of his defence if he is unfairly prejudiced by them, so also should a prosecution not be frustrated by errors of the prosecutor, unless such errors have irremediably rendered a fair trial for the defendant impossible. For defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is, in our view, no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years.

In that case, the prosecution was permitted to amend its indictment as the trial judge considered the amendment would not give rise to unfair prejudice: and this even though the application was made after the prosecution had closed its case, in reply to a submission of no case to answer.

A possible change would be an amendment to remove from s.3(1) the words "*on the indictment*". Section 3 could be amended by permitting the Court of Appeal to substitute a conviction for an offence "which could properly have been added by amending the indictment at the trial", in cases where it is clear that the jury must have been satisfied of facts which made the defendant guilty of it.

21 [2003] EWCA Crim 3357.

This would not be so dissimilar to the lesser used power to correct a wrong result on appeal against conviction on a special verdict.[22]

In principle, this should be possible, but it is potentially controversial.

First, Phillmore LJ's words in *Woods*[23] should be remembered:

> It is of the first importance that a man charged with an offence should know with certainty what it is he may be convicted of. No court should be encouraged to cast around to see whether somehow or other the words of the indictment can be found to contain by some arguable implication the seeds of some other offence.

Secondly, a possible objection is that the change would deprive the defendant of the benefit of "jury equity". It is a feature of our jury trial that a jury is free to acquit in the teeth of overwhelming evidence of guilt, if it feels that a conviction would be generally unfair. If the Court of Appeal substitutes a conviction for an offence of which it thinks the jury should have convicted, the defendant loses this possibility.

Though the House of Lords saw "jury equity" as a principle of value in the celebrated case of *Wang*[24], not everyone is sympathetic to this view, talking not about "jury equity" but "perverse verdicts". But clearly, in discussions about extending s.3, this is a point that needs to be considered. It would be critical to ensure the substitution respects the jury's verdict in substance.

Lord Bingham in *Graham,* a leading case on the meaning of s.2 of the Criminal Appeal Act 1968 and the concept of an "unsafe" conviction, said:

> Our sole obligation is to consider whether a conviction is unsafe. We would deprecate resort to undue technicality. A conviction will not be regarded as unsafe because it is possible to point to some drafting or clerical error, or omission or discrepancy, or departure from good or prescribed practice ... But if it is clear as a matter of law that the particulars of the offence specified in the indictment cannot, even if established, support a conviction of the offence of which the defendant is accused, a conviction of such offence must in our opinion be considered unsafe. If a defendant could not in law be guilty of the offence charged on the facts relied on no conviction of that offence could be other than unsafe.

When considering whether to substitute a conviction for a different offence the Court of Appeal will consider such factors as whether a case would have been defended differently and whether there is an argument the jury's function might be usurped if it were to substitute a new offence in place of the offence in respect of which an "unsafe" verdict was delivered on a technicality. The Court of Appeal's powers under s.3 and 3A are discretionary so, one envisages, it would refuse to exercise those powers unless there was a clear case for doing so, of which *Shields* and *MC* provide examples.

Finally, it should be remembered that under s.3 and 3A the Court of Appeal, when substituting a conviction, is forbidden to impose a sentence of greater severity than the sentence at the trial. If the new offence carried a greater maximum sentence, for example, respecting this requirement need not be problematic as it is the actual sentence passed which ought to matter.

22 Section 5 of the Criminal Appeal Act 1968.
23 [1969] Q.B. 447.
24 [2005] 1 W.L.R 661; [2005] 2 Cr.App.R 136.

Where an obviously guilty appellant was convicted of the wrong offence, the Court of Appeal can sometimes order a retrial. Though obviously more expensive than a substitution under s.3, and more stressful for the witnesses, in some cases this is less objectionable than substituting a conviction under ss.3 and 3A – whether as they are, or would be if extended.

The power to order a retrial arises under s.7 of the Criminal Appeals Act 1968, which reads as follows:

> *Power to order retrial*
>
> (1) Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried.
>
> (2) A person shall not under this section be ordered to be retried for any offence other than–
>
> (a) the offence of which he was convicted at the original trial and in respect of which his appeal is allowed as mentioned in subsection (1) above;
>
> (b) an offence of which he could have been convicted at the original trial on an indictment for the first-mentioned offence; or
>
> (c) an offence charged in an alternative count of the indictment in respect of which no verdict was given in consequence of his being convicted of the first-mentioned offence.

The scope of s.7(2)(b) was considered in *Hemmings*[25] when Clarke LJ said:

> In our judgment para (b) was concerned with, say, an offence of theft where the original indictment had alleged robbery. In such a case the jury could have returned a verdict of not guilty of robbery but guilty of theft. By contrast, a jury cannot return a verdict of not guilty of conspiracy to steal, but guilty of theft."

As a matter of construction, s.7(2)(b) is treated as not wide enough to include an offence for which the defendant could have been convicted as a result of an amendment to the indictment which could properly have been permitted by the trial judge. If such a construction were permitted, the *MC* and *Shields* scenarios could have, at least, led to the appellant's being retried. And likewise in *Darroux* and in *TF,* where no retrial could be ordered under s.7 as currently construed. The possibility of a retrial in a case like *TF* raises possible objections of abuse of process, because of the unfairness of subjecting the defendant to a second trial which would not have been required if the criminal justice system had operated as it should. However, the Court of Appeal is not ill-equipped for dealing with this issue.

In the context of an application under s.76 of the Criminal Justice Act 2003 (governing re-trials for serious offences following acquittal), Sir Brian Leveson P considered it of "critical importance" to consider whether a retrial would make sense if there would inevitably be grounds to stay the proceedings. He said that

> unless a retrial can be fair, it ought not to be ordered. That must be the position even if none of the other section 79(2) factors is applicable since it is difficult (if not impossible) to conceive that the Court of Appeal would ever, in practice, order a retrial which it concluded would be unfair; thus, the considerations relevant to abuse of process are properly considered at this stage.[26]

It is, of course, to be remembered that the main function of the Court of Appeal, pursuant to the Criminal Appeals Act 1968 is to quash convictions if they are unsafe. The Court of Appeal is a court of review. It does not bring charges. It cannot usurp the role of juries which are so vital to our criminal justice system. If underfunding is at the heart of these problems, then perhaps focusing upon the Court of Appeal's powers does not provide the solution. There is a danger that, the easier it is to correct errors, the more errors will be made.

So it may be, in the end, that the problem cannot be solved without unfairness to defendants, in which case "what can't be cured must be endured" and there is nothing to be done beyond inviting the CPS, the Bar and Bench to be more vigilant. But the argument "all solutions are worse than the problem" has been used in the past against introducing a number of changes that we now take for granted – including, many years ago, appeals by defendants from convictions.

The cases discussed above demonstrate the importance of the Court of Appeal's powers to remedy mistakes and the existence, as the law stands, of a problem with them. As Professor Spencer suggested in the article mentioned at the beginning, we need to think about it further.

25 [2000] 2 All ER 155.

26 *Bishop* [2018] EWCA Crim 27; [2019] 1 W.L.R 2489. *Bishop* is summarised on page 1 above.

In the News

The incremental roll-out of pre-trial cross-examination has begun with the Youth Justice and Criminal Evidence Act 1999 (Commencement No. 16) Order 2019/947. This is not easy reading because it is drafted with reference to ss.16 and 17 of the 1999 Act, which are complicated. But the effect, in a nutshell, is as follows. Pre-trial cross examination is now available in the Crown Court at Bradford, Carlisle, Chester, Durham, Mold and Sheffield, provided the witness is under 18 or suffers from certain disabilities. And in Kingston-upon-Thames, Leeds and Liverpool, where it was already available in these cases, it can now also be used for witnesses of any age in trials for sex offences or offences against ss.1 and 2 of the Modern Slavery Act 2015.

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