SWEET & MAXWELL

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Archbold Review

Cases in Brief

Appeal—order for retrial—process and responsibility for securing retrial—guidance as to procedure

AL-JARYAN [2020] EWCA CRIM 1801; 7 December 2020

A's appeal was allowed and a re-trial ordered. The deadline of two months for arraignment was missed. The Crown applied to the Court of Appeal to arraign A nine months after the conviction was quashed (Criminal Appeal Act 1968 ss.8(1) and 8(1B)(a)).

(1) It was important that a retrial ordered by the Court of Appeal should take place swiftly. Very little would usually need to be done in terms of further preparation for trial. The prosecution papers would have been served earlier and the defence should be ready for trial. Two important stages had to be accomplished with some speed: first service of the indictment, and secondly, arraignment. The focus of s.8 was upon arraignment to ensure judicial control and oversight. Arraignment engaged active judicial oversight in order to ensure the case could be listed for trial at the earliest practical opportunity. When this was not done, the Court of Appeal only had power to permit arraignment out of time when the cumulative requirements of s.8(1B)(b) were met – the prosecution must have acted with "all due expedition" in relation to securing arraignment, and there must be a "good and sufficient cause". The primary duty to ensure that arraignment took place within the time allowed was upon the Crown Court. Both the prosecution and the defence were required to be proactive, but ultimately it was the duty of the court to ensure the case was listed within time. Orders of the Court of Appeal usually arrived in the court office within a short space of time following the decision of the court, and prompt action by court staff was generally to be expected thereafter. In the circumstances of this case, the Crown had not acted with due expedition and the mandatory requirements of s.8(1B)(b)(i) were not met. Leave to arraign outside the two months permitted by s.8(1) was refused and the retrial order was set aside (s.8(1A)).

(2) The court gave guidance to avoid such delays. First, it was the duty of the CPS to upload the new indictment to the Digital Case System at the first reasonable opportunity. Secondly, once the notification from the Registrar of Criminal Appeals arrived at the Crown Court, accompanied by the order of the court, the Crown Court should list the case before a judge for directions or pre-trial review on a fixed day within one month of the order to enable arraignment to take place. Thirdly, the date should not be altered or adjourned without the express permission of the Resident Judge, and only then to a date within two months of the order of the Court of Appeal. This should be no later than several days before the expiry of the deadline. This regime required proper judicial oversight and control of the date for arraignment and would lead to securing the earliest reasonable trial date. Should there be any lack of expedition on the part of either party, it could be corrected by the intervention of the court at an early stage. The second and third stages were pivotal to the efficient operation of the retrial process.

Endangering safety at aerodromes—Aviation and Maritime Security Act 1990 s.1(2)(b)—approach to construction—international Conventions—elements of the offence

THACKER [2021] EWCA Crim 97; 29 January 2021

T and a number of other protestors prevented a Home Office-chartered aeroplane effecting deportations from taking off from Stansted Airport by blocking its path by locking themselves together and erecting obstructions. This resulted in the closure of the runway for a time, causing disruption to the working of the airport. They should not have been prosecuted for the extremely serious offence under Aviation and Maritime Security Act 1990 s.1(2)(b) ("by

CONTENTS

means of a device, substance or weapon unlawfully and intentionally … to disrupt services of an aerodrome … in such a way as to … be likely to endanger the safe operation of the aerodrome or the safety of persons…") because their conduct did not satisfy the various elements of the offence. There had been no case to answer.

(1) The court accepted T's argument that the purpose s.1 of the 1990 Act was to implement the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 and the Protocol of 1988 supplementary to the Convention. As to the utility of (particularly) the Protocol as an aid to construction, an international instrument should be construed in a uniform and harmonious manner across the contracting states, and that "if it be possible" (per Lord Scarman in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 290G) to do so our courts should speak in harmony. A clear and unambiguous provision would not lend itself to this method but wording that was unclear, ambiguous or, if construed literally, would lead to a result which was manifestly absurd or unreasonable, would (the court considered *Lyons* [2003] 1 AC 976; *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116; *Fothergill; ITC v Commerzbank AG* [1990] STC 285; and *Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 AC 628).

(2) Considering the bigger picture, the Protocol introduced a further layer of protection against activities which were essentially of a violent nature and "of a certain level of magnitude". Section 1, in consonance with the policies and objects of the Protocol, created an offence of universal jurisdiction attracting a maximum sentence of life imprisonment. The offence was so serious that the court was enjoined to consider the dangerousness provisions of the Criminal Justice Act 2003 and it was also a "Convention offence" for the purposes of the Terrorism Act 2006. The actions of the appellants were not readily captured by the language and purposes of the Protocol.

(3) In context, the words "device" and "substance" were ambiguous and unclear – literally, they could be seen as very broad indeed, but were used in a more limited sense in s.11 of the Act (relating to a device or substance likely to damage or destroy a ship), and should be construed as devices or substances which were intrinsically dangerous, by way of implied statutory limitation on the otherwise extreme breadth of the terms (and it was not apposite to so describe the scaffolding poles and builders' foam used by the demonstrators). Similarly, the device or substance contemplated by s.1(1) and 1(2)(a) must be intrinsically dangerous to cause the sort of damage contemplated by those provisions. The same conclusion flowed from a consideration of the Convention, the Protocol and the latter's *travaux préparatoires*.

(4) "[B]y means of" in the provision required proof of a causal link between the use of the device or substance and the disruption. On the Crown's case, the disruption was caused by the presence of the demonstrators near the aeroplane, before the devices/substance were used at all.

(5) The "likely to endanger" requirement did not entail an examination of what might have happened had the appellants behaved differently (cf *McIntosh v HM Advocate* [1994] SLT 59), but it did entail consideration being given to what might have ensued because of what they did. However, the creation of a risk to safety, however low, was not enough. Proof was required of likely endangerment to safety. To satisfy this, the chances of the danger arising must transcend a certain degree of likelihood; and it must be of a sufficient nature and degree to be something that might properly be described as a peril. The available evidence fell well short of meeting these tests. While the court did not consider it necessary to describe the level of likelihood necessary in this context (noting the fluctuating meaning of "likely" in statutory provisions), there was force in T's submission that if the underlying activity were not inherently dangerous, it was impermissible for the judge to direct the jury that all that was required was proof that the danger "could well" have happened. If the meaning of "likely to" did vary according to the context, proof of a low degree of likelihood could only be justified if the underlying activity was inherently dangerous.

(6) To "disrupt the services of an aerodrome" must mean more than one flight. In relation to intention, the judge should have left to the jury the issue of whether the appellants intended to (a) disrupt the services of the airport beyond the targeted flight, at least on an oblique basis; and (b) thereby, to endanger the safe operation of the airport and the safety of people there. He did not do so.

The court rejected grounds of appeal challenging the judge's withdrawal of the defence of necessity and the judge's directions on inferences from failure to give evidence, and on the lawfulness of the Attorney-General's consent to prosecution.

Evidence—hearsay—whether E-Fit hearsay—Criminal Justice Act 2003 Part 11

THOMASSON [2021] EWCA Crim 114; 4 February 2021

The judge had not been wrong to refuse to allow T to adduce evidence that police officers had identified people other than T on the basis of an E-Fit representation created from the recollection of a witness. The approach that a photofit or sketch (and so also an E-Fit) was admissible as a sui generis form of evidence and not subject to the hearsay rule (*Cook* [1987] QB 417; *Constantinou* (1990) 91 Cr App R 74) had been overtaken by the reformulation of hearsay in the Criminal Justice Act 2003. The definition of a statement in s.115(2) as including "a representation made in a sketch, photofit or pictorial form" clearly included an E-Fit, and its admission was regulated by s.114(1). The court noted that the Law Commission had described the difference of approach between the words of a witness and a photofit image as "distinctly anomalous" in its consultation paper *Evidence in Criminal Proceedings: Hearsay and Related Topics*" (1995), para.13.16. Parliament undoubtedly intended Pt.11 of the 2003 Act to regulate the admission of an E-Fit picture. At T's trial, the admission of the E-Fit had been agreed under s.114(1)(c) of the 2003 Act because the witness had referred to it during her interviews, and on the basis that it was potentially a previous inconsistent statement (s.4 of the Criminal Procedure Act 1865, s.119 of the 2003 Act). There were other potential routes of admissibility, such as s.120. The commentary in *Archbold* 2021 at 14-70 was out of date.

(2) T's proposal would have involved a number of police officers viewing the E-Fit picture and comparing it to their memory of the appearance of various other people. The officers would, therefore, have been expressing their opinion as to the match between (a) the perception of the artist

who compiled the E-Fit picture as to the perception of the witness and (b) a range of other people. This position was markedly different from the process approved in *Att.-Gen.'s Reference (No. 2 of 2002)* [2002] EWCA Crim 2373, [2003] 1 Cr.App.R 21, where a witness, not present at the scene, gave identification evidence from photographs or film footage. This was not hearsay. Unlike an E-Fit, the individual or machine taking the photograph or compiling the film footage which captured the image had no part to play other than the mechanical one of recording the image. The witness viewing a photograph was undertaking essentially the same task as an eyewitness at the scene. It would not have been in the interests of justice to have admitted the prior identifications of the officers from the E-Fit.

Procedure—magistrates' courts—Magistrates' Courts Act 1980 s.142(2)—nature of provision—not applicable after sentence in the Crown Court on committal; papers in support of appeal by way of case stated

RH v DPP: [2021] EWHC 147 (Admin); 29 January 2021

(1) RH entered unequivocal guilty pleas and was committed to the Crown Court for sentence. After sentence, he applied under the Magistrates' Courts Act 1980 s.142(2) to set aside his guilty plea to enable him to adduce evidence and argue the defence under the Modern Slavery Act 2015 s.45 (the competent authority having made a conclusive decision that he had been trafficked). The district judge had been right to refuse the application. The statement that s. 142(2) could not be used in such circumstances in *R v RD* [2019] EWCA Crim 1545, [33] was not *obiter* and was binding on the court. Once the Crown Court had passed sentence s.142(2) had no application. That was clear from the statutory language. The scheme of s.142 was to enable the magistrates' court to intervene when the impact of an order only affected its own determinations. The reference to the consequence of a direction under s.142(2) being that "the conviction and any sentence or order imposed or made in consequence thereof" was to have no effect, in context, meant a sentence or order of the magistrates' court. Section 142(2) was akin to a slip rule and did not effectively provide an appeal (*Croydon Youth Court, ex parte DPP* [1997] 2 Cr.App.R 411; *Roman Zykin v Crown Prosecution Service* [2009] EWHC 1469 (Admin); and *R (Williamson) v City of Westminster Magistrates' Court* [2012] EWHC 1444 (Admin), [2012] 2 Cr App.R 24). This conclusion was not affected by the line of cases relating to trials in the magistrates' court that had proceeded in the absence of the defendant and where an application was subsequently made under s.142 to re-open the trial (*R v Ealing Magistrates' Court ex parte Sahorta* (1998) 162 JP 73; *R (Manorgale Limited) v Thames Magistrates' Court* [2013] EWHC 535 (Admin); *Houston v Director of Public Prosecution* [2015] EWHC 4144; and *R (Suraj Rathor) v Southampton Magistrates' Court* [2018] EWHC 3278 (Admin), [2019] Crim. L.R. 431).

(2) The case stated (here, 13 pages) set the four corners of the factual material on which the High Court considered the appeal. The appellant then has an opportunity to comment on its content and make suggestions. The court had repeatedly issued reminders that extrinsic material should not be produced. That message continued to not get through, the court noting and deprecating an appellant's bundle comprising 992 pages.

Trial—withdrawal of counsel—change of instructions—when justifying withdrawal

DANIELS [2021] EWCA Crim 44; 21 January 2021

D's legal team withdrew on the basis of embarrassment during the course of D's trial for murder. Counsel was entitled to cease to act and return instructions, inter alia, "if there were some substantial reason for doing so" (*Bar Standards Board Handbook*, r C26.8). Such a reason of substance would potentially exist if there had been, for instance, a truly material change of instructions which involved the defendant resiling from his or her earlier acceptance of one or more significant elements of the prosecution case (as in *Ulcay* [2007] EWCA Crim 2379, [2008] 1 Cr.App.R 270). By contrast, B had not "completely changed his instructions" in a manner which involved him resiling from an earlier acceptance of one or more significant elements of the allegations made against him. To the contrary, the change to his detailed account of a struggle which resulted in the death of the victim took him substantially closer to an acceptance of the prosecution's case. The acceptance by an accused of a significant part of the case against him or her would not, save exceptionally, constitute a change of instructions that caused defence counsel professional embarrassment. D's conviction was not, however, unsafe as a result and his application for leave to appeal was dismissed.

Trial—interventions by the judge—approach of Court of Appeal

MUSTAFA [2020] EWCA Crim 1723; 3 December 2020

(1) The court allowed M's appeal, the grounds being that the conduct of the judge amounted to unfair judicial treatment and undermined the fairness of the trial. A trial may have to be condemned as unfair and a conviction quashed as unsafe, however strong the grounds for believing the defendant to be guilty. In every case, the ultimate question was whether a conviction was unsafe because of defects in the process. In approaching that question, the court should always be astute to distinguish between questions that were merely intended to clarify ambiguities or to enable a judge to take an accurate note and those which constituted entering unfairly into the arena. There may be occasions where the former ran the risk of morphing into the latter, a risk that must be avoided at all costs if the trial was to be seen to be fair. The court recognised that the move towards greater case management and proactive involvement of the judge in the trial process may mean that some of the older statements of principle had to be seen in the light of an altered landscape. What remained unchanged was that the touchstone was fairness. In M's case, the criticisms could be supported by a broad analysis of the scale of the judge's interventions. During the relevant passage of M's examination in chief, 257 questions were asked, of which 116 were by the judge. During cross examination, of 327 questions, 110 were put by the judge. The judge also asked a number of questions of a defence witness whom Crown counsel had declined to cross-examine. During these interventions the judge clearly and repeatedly descended into the arena, and did so unfairly.

(2) The court at [7] adopted a summary of the principles to be derived from *Serafin v Malkiewicz* [2019] EWCA Civ 852, [2019] EWCA Civ 852 (upheld [2020] UKSC 23, [2020] 1 W.L.R. 2455); *Inns* [2018] EWCA Crim 1081, [2019] 1 Cr.App.R. 5 and *Michel v R* [2009] UKPC 41, [2010] 1 W.L.R. 879.

SENTENCING CASE

Totality

BAILEY [2020] EWCA Crim 1719,18 December 2020

The Court of Appeal heard five appeals brought by appellants who had each either pleaded guilty to or been convicted of offences of conspiracy to supply a controlled drug contrary to s.1(1) of the Criminal Law Act 1977. This note considers a ground of appeal common to a number of the appeals, which was in relation to totality. It was submitted that the sentencing judge had erred in making only brief and general reference towards the end of her sentencing remarks to the effect that she had taken totality into account. It was submitted that there was a duty to explain how totality applied in each case, rather than making a "single, isolated, fleeting reference to totality", and that this duty flowed from the staged approach to the determination of totality set out in the Sentencing Council Definitive Guideline on "Offences taken into Consideration and Totality" ("the Totality Guideline").The court made the following observations in relation to totality:

(i) The application of totality is a question of substance and not form. A single generalised statement towards the end of sentencing remarks to the effect that a judge had considered totality is perfectly adequate. (ii) The Totality Guideline makes it plain that the purpose behind a judge considering totality is to ensure that the final sentence is just and proportionate. It is not necessary for a judge to expressly use the phrase "just and proportionate". What matters is whether the final sentence is just and proportionate, taking into account all relevant facts and matters. (iii) The application of the totality principle is not designed to lead to the judge applying an appropriate reduction to sentence. As stated in the Totality Guideline, it is usually impossible to reach a just and proportionate sentence simply by adding up together notional sentences. Totality therefore assists the judge to arrive at the correct sentence; it is not about reducing sentences as opposed to simply reaching the correct final sentence. (iv) There is no inflexible rule that sentences should be structured as concurrent or consecutive. The overall sentence must be just and proportionate. Merely imposing consecutive sentences does not indicate, of itself, that totality has not been adequately considered. (v) The stages set out in the Totality Guideline under the heading "General Approach" (in relation to determinate sentences) do not need to be expressly referred to in a judge's sentencing remarks. The stages set out in the Guideline are intended to guide how the judge should consider the structuring of the sentence to arrive at a just and appropriate end result. The Court of Appeal, when considering a judge's conclusion on totality, will consider whether the judge has taken the correct matters into account and whether in the final analysis the sentence, in the round, is just and equitable. The Totality Guideline provides a structured approach to guide judges. What matters on an appeal is the final sentence, and whether it is just and proportionate, not the articulation of the reasoning which led to that sentence being imposed.

Case in Depth

National Crime Agency v Baker [2020] EWHC 822 (Admin)[1]

On 22 May 2019 Unexplained Wealth Orders (UWOs) and Interim Freezing Orders (IFOs) were granted by Supperstone J in respect of three properties in London at an *ex parte* hearing of the NCA's without notice applications. Properties one and three were registered in the names of two Panamanian foundations while property two was registered to a Curaçao foundation and Anguillan company. The NCA contended there were reasonable grounds to suspect that the properties had been acquired by Rakhat Aliyev or his family or associates as a means by which to launder funds derived from his unlawful conduct. Mr Aliyev was a senior political figure in Kazakhstan who fled the country in 2007 and died in prison in Vienna while awaiting trial on money laundering charges in 2015. The respondents to the applications were, importantly, the corporate entities to which the properties were registered along with Andrew Baker, a solicitor, who was president of the entities which owned properties one and three. They and the ultimate beneficial owners (UBOs) of the properties approached the NCA and voluntarily provided a large quantity of material purporting to rebut the allegations by setting out the purchase, transfer and ownership of the properties and the source of funds used to acquire them.[2]

Following a refusal by the NCA to withdraw the UWOs (and by extension the IFOs) notwithstanding the material voluntarily provided, the respondents and UBOs issued judicial review proceedings and sought interim relief from the deadline to respond to the UWOs. Supperstone J granted interim relief and the judicial review proceedings were stayed pending determination of the respondents' application to the Administrative Court to have the orders discharged.

The application was allowed and the orders discharged accordingly.

Lang J made the following findings:

(1) To grant a UWO the High Court must be satisfied that the conditions under s.362B of the Proceeds of Crime Act 2002 (POCA) are met at the date of the hearing[3] – viz (a) there is reasonable cause to believe the value of the property exceeds £50,000 ("value requirement"); (b) there is reasonable cause to believe that the respondent "holds" the property ("holding requirement"); (c) there are reasonable grounds

1 By Rachel Barnes and Ryan Dowding, barristers at Three Raymond Buildings. We are grateful for comments on an earlier draft by Ben Watson and Professor John Spencer. Any errors remain our own.

2 For example, see *NCA v Baker* [2020] EWHC 822 at [6] and [71]-[75].

3 *Baker* at [60].

to suspect that the respondent's known sources of lawfully obtained income would be insufficient for the purpose of enabling them to obtain the property ("income requirement"); and (d) the court is satisfied that (i) the respondent is a politically exposed person (PEP); or (ii) there are reasonable grounds for suspecting that the respondent is involved in serious crime (whether in the United Kingdom or elsewhere); or a person connected with the respondent is or has been so involved. Provided the above requirements are met the court may make a UWO but has a residual discretion not to do so.[4]

(2) The parties agreed that the "value" requirement was met as the properties were all worth significantly more than £50,000.[5]

(3) The "holding" requirement was met in respect of property two, but not properties one and three as the respondent, Mr Baker, was not vested by the company formation documents or any subsequent declarations made by the Panamanian foundations connected with those properties with effective control over them.[6]

(4) To satisfy the "income" requirement the NCA was required to consider the actual extent of the respondent's interest before assessing whether their known sources of income would be insufficient for the purpose of enabling them to obtain that extent of an interest in the property. This requirement was not met in respect of any of the properties.[7]

(5) The NCA's assumption that Mr Aliyev was the purchaser of the properties and/or the founder of the entities which owned them was rebutted by cogent evidence adduced by the respondents.[8] That material showed that the owner and source of funds for properties one and three was Dariga Nazarbayeva (DN): the ex-wife of Mr Aliyev who was a successful businesswoman in her own right. It also demonstrated that the owner and source of funds for property two was Nurali Aliyev (NA): the son of Mr Aliyev who was sufficiently independent of his parents by 2008 to acquire the property himself.[9] The respondents also adduced evidence that DN and NA had been estranged from Mr Aliyev for some time prior to the purchases, and there had subsequently been confiscation proceedings against Mr Aliyev in Kazakhstan which had resulted in the removal of his tainted property alongside a finding that he had not transferred any illegally acquired assets to DN or their children.[10] The respondents' documentary evidence appeared genuine and much of it was capable of verification by the NCA.[11] There were no reasonable grounds for suspecting that the properties were acquired by a PEP or associated person; or that the funds used to purchase the properties were derived from Mr Aliyev's criminal conduct.[12]

(6) The evidence as to how the properties were handled in this case (i.e., through complex off-shore corporate structures) did not of itself give rise to an "irresistible inference"[13] that they were the product of unlawful conduct.[14]

(7) There was no material non-disclosure by the NCA at the ex parte hearing. However, the case it presented at that ex parte hearing was flawed by inadequate investigation into some obvious lines of enquiry. Further, the NCA failed to conduct a fair-minded review of its case following voluntary disclosures made by the respondents.[15]

Recognising the importance of this decision on future cases, the NCA sought leave to appeal Lang J's decision.[16]

The NCA's application was refused by Carr LJ on 17 June 2020.[17]

Comment

This case remains an important decision for UWO and other POCA Pt.5 applications. It serves as a reminder that notwithstanding the low standards of proof required to obtain asset freezing and disclosure orders during financial investigations, there should be some meaningful investigation prior to applying for these orders and investigators are obliged to conduct a "fair-minded evaluation" of all the information available to them and not simply that which supports their application. To this extent, the significance of this case extends beyond UWOs. It should act as a cautionary tale to the NCA and other enforcement agencies.

After a run of successful UWO applications, the NCA emerged from this episode with a bloody nose and a heavy costs bill. The NCA had very publicly sought to position itself at the "forefront" of using new tools granted to law enforcement to tackle financial crime such as UWOs,[18] describing itself as "tenacious"[19] and "relentless" in pursuing illicit finance.[20] To date, it is the only enforcement agency to have exercised the power to obtain a UWO[21] and it had led the initial charge in using other civil recovery tools now available to enforcement agencies to investigate and recover the proceeds of crime, most notably bank account freezing and forfeiture orders.

As we have written previously, while UWOs grabbed headlines with tales of dirty money used to fund shopping sprees and lavish properties, their application, in practice, is limited.[22] They can only be sought in respect of persons – politically exposed or suspected of involvement in serious crime – in relation to whom all of the s.362B requirements are met. They are only "one of a number of investigative tools contained in Part 8 of POCA 2002 … whose purpose is simply to obtain information".[23]

4 *Baker* at [16] and [21]-[64]. A PEP is "an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State", a family member or close associate of, or "otherwise connected with" such a person (POCA s. 362B(7)).
5 *Baker* at [125], [170] and [199].
6 *Baker* at [101]-[124], [168]-[169] and [198].
7 *Baker* at [128]-[139], [171] and [200]-[210].
8 *Baker* at [75], [100], [152], [161]-[167], [197], [209]-[215] and [217].
9 *Baker* at [178].
10 *Baker* at [71].
11 *Baker* at [74] and [160].
12 *Baker* at [153]-[154], [172] and [215]-[216].
13 *Anwoir* [2008] All ER 582.
14 *Baker* at [98]-[99], [165]-[166] and [195]-[196].
15 *Baker* at [217].
16 This recognition was contained within a press release (originally but no longer) available on the NCA website. A copy of the press release is available at: https://www.wired-gov.net/wg/news.nsf/articles/NCA+to+appeal+discharge+of+Unexplained+Wealth+Orders+09042020141500?open.
17 Written Order of the Court of Appeal in *NCA v Baker* (17.06.2020) (Case Ref C1/2020/0723) (Carr LJ found that the appeal had no real prospect of success and that there was no other compelling reason to grant leave).
18 NCA Annual Report and Accounts 2019-20: https://www.nationalcrimeagency.gov.uk/who-we-are/publications/467-national-crime-agency-annual-report-and-accounts-2019-20/file.
19 NCA press release 8 April 2020 (n.16 above).
20 See, e.g., NCA, 'Eight-year NCA investigation results in multi-million pound asset recovery including luxury hotel and £100k Bently' 12 May 2019: https://nationalcrimeagency.gov.uk/news/eight-year-nca-investigation-results-in-multi-million-pound-asset-recovery-including-luxury-hotel-and-100k-bentley.
21 The other enforcement authorities with this power are the following: Director of Public Prosecutions (or the DPP for Northern Ireland), Director of the Serious Fraud Office, HMRC and the FCA: POCA, s.362(7)(a)-(e).
22 Barnes and Dowding, "*Account Freezing Orders: Part 1 – An Introduction*" (2020) 1 *Archbold Review* 1 at 6; see also the submissions made by Andrew Sutcliffe QC on behalf of the NCA in *NCA v Hussain* [2020] EWHC 432 at [84] ("[t]he considerable media interest in UWOs is undeserved").
23 *Baker* at [61]-[62].

This particular tool is designed for use when an investigation is at an "embryonic" stage and, as such, the hearing of an application for a UWO must be in private unless the judge directs otherwise.[24] Despite their limited use UWOs are intrusive and can require disclosure of "confidential records in respect of sensitive personal financial matters" on pain of forfeiture of the property and criminal liability if any statement made is (even recklessly) misleading.[25] Perhaps surprisingly, in this connection, while the enforcement authority can pursue its application ex parte, where a respondent wishes to challenge a UWO they will have to do so in open court with all of the attendant publicity that necessarily involves. This is despite the fact that a challenge may result in a clear decision – as it did in *Baker* – that the UWO ought not to have been made or should have been withdrawn. It follows from the above that applications must be carefully scrutinised and subject to ongoing review.

Such scrutiny is precisely what Lang J's detailed judgment accomplished. We consider three of her findings in more detail, namely (i) the evidential significance of property being held through complex, offshore structures, (ii) the nature of the "income requirement" and (iii) the need for fair-minded investigations.

(i) Property held through complex, offshore structures:

The NCA placed "significant weight" on the suggestion that the properties were obtained and subsequently held in a "complex and secretive" manner through corporate entities based in secrecy jurisdictions such as Panama.[26] It contended that these arrangements constituted grounds for suspicion that the entities were used for illicit purposes and, moreover, that this was capable of generating an "irresistible inference"[27] that the properties could only have been derived from crime. These arguments were roundly rejected. *Candy v Holyoake* [2018] Ch 297, a case involving a civil dispute and an appeal against an order akin to a freezing injunction in which Gloster LJ emphasised that there was "nothing implicit in complex, offshore corporate structures which evidences an unjustifiable risk of dissipation" of assets, was held to apply equally in the context of UWOs. Lang J found that there are a number of lawful reasons (for example "privacy, security, tax mitigation") why complex corporate structures might be used to hold property.[28]

This is a narrow but important point of principle. It emphasises the need for the applicant to produce evidence beyond the simple fact that property has been held or transferred in an unusual or complex way, in order to satisfy the court that there are reasonable grounds to suspect that the property is recoverable. To hold otherwise would be to weight the scales too heavily in favour of the applicant in circumstances where the standard of proof in relation to the threshold requirements is already very low. Parallels might also be drawn here with the use of complex or unusual money transfer arrangements (e.g., informal value transfer systems such as Hawala banking), which are often relied upon by law enforcement agencies as a ground for suspecting that the funds constitute criminal property but which are frequently used either out of necessity, cultural norms or for other reasons unrelated to criminality.

(ii) Income requirement:

The NCA submitted that in a case involving trusts and corporate structures held in the name of a solicitor or other professional the income requirement was intended to be notional because "it could never be satisfied".[29] This point was not considered in either *NCA v Hajiyeva*[30] or *NCA v Hussain*.[31] The NCA's contention was rejected by Lang J, who found that it could "not have been the intention of Parliament to dispense with the need for a meaningful application of the income requirement".[32] Instead, the requirement is closely linked to the "holding" requirement and the NCA was required to consider "the actual extent of [the respondent's] interest in the property and then ask whether the known sources of the respondent's lawfully obtained income would have been insufficient for the purpose of enabling [them] to obtain *that extent* of the respondent's interest in the property" (emphasis added).[33] Mr Baker had no legal or beneficial interest in properties one and three and was not involved in their purchase.[34] The judge acknowledged it would be difficult for the NCA to satisfy the "income requirement" in the circumstances, but this was because Mr Baker – a solicitor practising in England and Wales – did not "hold" the properties; he was, in short, not the appropriate respondent.[35] Similarly, while Manrick Private Foundation and Alderton Investments Limited were found to "hold" property two, the NCA had failed to assess the actual extent of their interest in the property as trustees and had instead valued their interest "on the basis that [they were] purchasing both the legal and beneficial interests".[36]

These findings emphasise the need to consider carefully the target of a UWO. It is plainly still possible to target professional "enablers" provided there is sufficient evidence to satisfy the threshold requirements. In *Hussain,* there was evidence indicating that Mr Hussain, a director of a number of companies purportedly involved in property development, was laundering funds on behalf of criminals operating in the North of England.[37] While he was suspected of holding property as an investment on behalf of those individuals, he was the appropriate target of the UWO by virtue of his position as the registered owner of one property and as sole shareholder or director of the corporate entities which held the remaining properties.[38]

(iii) Fair-minded investigations:

This case arguably demonstrates the value of UWOs as investigative tools in that the NCA elicited information from the respondents as to the nature of the property and its ownership. As described above, the respondents and UBOs voluntarily supplied the NCA with a large quantity of material

24 Civil Recovery Practice Direction (as amended) at [11.1]; see the recent case of *Hussain* (above) at [77]-[78], [84] and [88].
25 *Baker* at [63].
26 *Baker* at [95], [164] and [194].
27 See *Anwoir* [2008] All ER 582 (at [21]); and *NCA v Khan* [2017] EWHC 27 (Admin).
28 *Baker* at [97].
29 *Baker* at [126]-[129].
30 [2018] 1 WLR 5887 (High Court); and [2020] EWCA Civ 108 (Court of Appeal). The NCA adduced evidence to show that Ms Hajiyeva was the ultimate beneficial owner of the property.
31 [2020] EWHC 432. The NCA adduced evidence to show that Mr Hussain directly owned the properties in question, or was either the sole or principal director of the company which did.
32 *Baker* at [130]-[131].
33 *Baker* at [135].
34 *Baker* at [106] [124], [130] and [168]-[169].
35 *Baker* at [137].
36 *Baker* at [207]-[208].
37 *Hussain* at [103]-[108].
38 *Hussain* at [8]-[9].

to show that the properties had been legitimately obtained. The fatal error of the NCA was its refusal, following receipt of that voluntary disclosure, to withdraw the UWOs and its obstinacy in insisting that the respondents comply with their terms. While Lang J fell short of characterising the NCA's position as misleading, she was heavily critical of its failure both to pursue "obvious" lines of enquiry from the outset and to conduct a "fair-minded" assessment of the material supplied.[39] One take-away point from this is that should a court make similar findings in a case in which the *Perinpanathan*[40] test applies, the respondent may have little difficulty in obtaining an order for its costs to be paid by the applicant public authority.

In view of those findings, the respondents will have had little difficulty displacing the usual presumption that costs do not follow the event in applications pursued by public authorities acting reasonably and in good faith.[41]

The resounding endorsement of the High Court's judgment by Carr LJ, and the substantial costs bill which reportedly followed, will undoubtedly have caused a degree of introspection within the NCA. It must be right that agencies responsible for investigating the most serious crime are "tenacious" and willing to take on difficult cases. However, *Baker* illustrates that the power to use such invasive measures must come with a concomitant responsibility to pursue all reasonable (a fortiori all obvious) lines of enquiry and to engage in a fair-minded way with the respondent to the application. As such, the case is an important lesson for the NCA and all enforcement agencies using investigative powers and asset freezing measures under POCA.

39 *Baker* at [217].

40 The presumption that costs will not follow the event in applications pursued by public authorities acting reasonably and in good faith: *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 W.L.R 1508.

41 *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 W.L.R 1508.

Feature

Do inconsistent defences matter?

By Paul Jarvis[1]

The title of this article poses a straightforward question: do inconsistent defences matter? For these purposes, inconsistent defences are defences that are destructive of each other, such as alibi and self-defence (the defendant cannot have been both absent and present at the same time), or accident and loss of control (the defendant cannot have both inadvertently and advertently assaulted the deceased). It is often said that where defences are inconsistent in this way they cannot be advanced in the same trial. That is a myth. The authorities in fact establish that the trial judge is required to leave any defence to a jury where there is evidence to support it and that is so even where the evidence supports the existence of a number of entirely inconsistent defences.

Historical perspective

Professor Glanville Williams once told the tale from *Punch* of the son of a King's Counsel who was charged by the headmaster with having broken the schoolroom window. In his defence the boy said this to the headmaster

> In the first place, sir, the schoolroom has no window; in the second place the schoolroom window is not broken; in the third place, if it is broken, I did not do it; in the fourth place it was an accident.[2]

The idea that several defences could be mounted at the same time to the same charge even when they were inconsistent with each other is one that found favour with generations of advocates. Sir Patrick Hastings saw an advocate's ability to successfully raise inconsistent defences as being a laudable attribute. He wrote this of Lord Birkett:

> If it had ever been my lot to take a lady for a stray weekend, and at the conclusion of the entertainment I had decided to cut her into small pieces and place her in an unwanted suitcase,…I should unhesitatingly have placed my future in Norman's hands, relying confidently upon his ability to satisfy a country jury (a) that I was not there, (b) that I had not cut up the lady, (c) that if I had she thoroughly deserved it.[3]

There has never been a legal impediment to running inconsistent defences per se[4] although there may be good tactical reasons why an advocate may wish to mount only one defence. One famous example of a case where inconsistent defences were successfully run in tandem was the infamous trial of Madame Marguerite Fahmy. She was a notorious French divorcee who married an Egyptian playboy prince, Ali Kamel Fahmy Bey, 10 years her junior. On 10 July 1923, they checked into the Savoy Hotel. By all accounts they argued bitterly that evening. At around 01:30 hrs the following morning three shots rang out from their suite. Madame Fahmy had shot her husband three times with a pistol. He died at the scene. She stood trial at the Old Bailey in September of that year accused of his murder. Defence counsel, Sir Edward Marshall-Hall, ran accident, self-defence and provocation at the trial. The evidence established that the defendant's husband had previously threatened her life and had grabbed her by the throat shortly before she shot him. The defendant claimed that she had drawn the pistol in order to protect herself if necessary but that she had fired the weapon inadvertently, being unfamiliar with its use and in a state of terror at the time.[5] The jury acquitted her in under an hour. It has since been asserted that her acquit-

1 Barrister, 6KBW College Hill, and Junior Treasury Counsel at the Central Criminal Court.

2 Williams, G, *Learning the Law*, 11th edition, 1982, London: Stevens, fn 4, p 29, note 36.

3 Hastings, P., *Autobiography* (London 1948), p. 130. Quoted in Gooderson, R.N., "Defences in Double Harness", p. 138, *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, ed. Glazebrook, P.R., 1978, London, Stevens & Sons.

4 See, for example, the Californian case of *People v Conte*, 17 Cal. App. 771, 122 Pac 450 (1912), where the court said "it is well settled that inconsistent defences or claims may be interposed in a criminal case as well as in a civil action, if counsel or defendant…choose to take that course".

5 Majoribanks, E., *The Life of Sir Edward Marshall-Hall* (London 1929), pp. 462 – 468.

tal owed much to a conspiracy between the Royal Household, the DPP, the trial judge and the prosecutor to avoid her revealing lurid details of various sexual liaisons she had enjoyed with the Prince of Wales – and future King Edward VIII – at the end of the First World War.[6]

Modern approach

There are a number of decided cases from this jurisdiction and elsewhere concerning the circumstances that must exist before a trial judge should leave an alternative defence to the jury that is inconsistent with the primary defence. In the main, those cases have arisen in two ways. The first is where defence counsel advanced both defences at trial but the trial judge refused to leave one of them for the jury in the face of objections from the defence. The second is where defence counsel advanced only the primary defence at trial and the trial judge either declined to leave an alternative defence to the jury with the agreement of the parties, or did not even consider doing so, but following conviction complaint was made that he or she should have done so.

In principle, the law should draw no distinctions between these scenarios because if the trial judge is obliged to leave an alternative defence to the jury, the attitude of defence counsel to that decision is immaterial as is the manner in which he or she chose to present the defendant's case. In England and Wales, the earliest decisions focused on the obligation of the trial judge in murder cases to direct the jury on provocation where that was not the defendant's primary defence. In *The King v Hopper*,[7] the appellant had been convicted of murder after he shot a man called Dudley. His defence was accident but defence counsel at his trial did not wholly surrender the idea that the jury could properly return a verdict of manslaughter on the grounds of provocation. In the event, the trial judge refused to offer the jury that option. On appeal, the Court of Criminal Appeal held that the jury should have been directed as to manslaughter. Lord Reading CJ said this:[8]

> We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of the opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even though counsel may not have raised such questions himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence – we say not more than that – upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.

The statement of Lord Reading LCJ in *Hopper* was cited with approval by Viscount Simon LC in the Privy Council in *Mancini v DPP*.[9] In that case, the appellant was convicted of fatally stabbing a man during an altercation in a club. His defence at trial was that he had blindly lashed out with the blade when he saw the deceased bearing down on him. The trial judge directed the jury as to self-defence and as to manslaughter if they were sure that the appellant had not acted in reasonable defence of himself by stabbing the deceased. On appeal, the appellant argued that the trial judge's directions as to manslaughter had been inadequate. Before turning to that ground, Viscount Simon dealt with the trial judge's obligation to leave manslaughter to the jury and outlined it in these terms:[10]

> Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence … it was undoubtedly the duty of the judge, in summing-up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it.

After referring to the passage, above, from Lord Reading LCJ in *Hopper*, Viscount Simon added this:[11]

> To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads not guilty, the judge must include in his summing-up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt whether this was, or was not, the case.

In the view of the Privy Council, there was no evidence of provocation fit to go before the jury and so the trial judge's failure, if it be such, to give the jury an adequate direction on provocation did not render the conviction unsafe. Following *Mancini*, Lord Tucker in *Bullard v The Queen*[12] said that Viscount Simon:

> was not intending to lay down as a proposition of universal application that the same evidence which has been adduced in support of an unsuccessful defence of self-defence can never be relied upon in whole or in part as affording provocation sufficient to reduce the crime to manslaughter. Conduct which cannot justify may well excuse.

Without delving into the facts, in *Bullard,* the Privy Council held that manslaughter should have been left to the jury because even if they rejected those aspects of the appellant's account tending to establish that he acted in self-defence, there was still sufficient evidence from which they could have held a reasonable doubt about whether his actions had been unprovoked. Indeed, it had been incumbent on the trial judge to leave provocation to the jury even though the appellant had not said one way or another whether he had been provoked, as Lord Tucker noted:

> In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such a kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was

6 Rose, A., *The Prince, the Princess and the Perfect Murder* (Coronet 2013).
7 [1915] 2 K.B. 431.
8 At p.435.
9 [1942] AC 1.
10 At p 7.
11 At p 8.
12 [1957] AC 635 at p. 643.

> unprovoked. Their Lordships do not shirk from saying that such a result would have been improbable, but they cannot say it would have been impossible.

In *Cambridge*,[13] the Court of Appeal, in an appeal where provocation had not been left to the jury, asked itself what sort of evidence gives rise to the duty on the part of the trial judge to leave that partial defence. Lord Taylor of Gosforth LCJ[14] remarked that "it is not for the judge to conjure up a speculative possibility of a defence which is not relied on and is unrealistic" and carried on in this vein:

> In our judgment…there must be evidence…from which a reasonable jury might properly conclude that the defendant was in fact provoked to lose his self-control or may have been so by some words or acts or both together. If the judge decided that there is not such evidence, he ought not to leave provocation to the jury. If, on the other hand, he concludes there is such evidence…the statute obliges him to leave provocation to the jury, even if he himself believes the circumstances be such that no reasonable man would have reacted as the defendant did.

In his commentary on *Cambridg*e in the 1994 volume of the *Criminal Law Review*,[15] Professor John Smith recast that passages in these terms:

> When the court says that there must be evidence from which a reasonable jury might properly conclude that the defendant was in fact provoked to lose his self-control, or may have been so provoked, what is meant is that there must be such evidence as might, at least, leave a reasonable jury in doubt on the matter. If there are grounds for such a doubt, it is for the jury to decide and, if they are left in doubt, to acquit of murder.

Of course, the partial defence of provocation was abolished by s.56 of the Coroners and Justice Act 2009 and replaced with the partial defence of loss of control. By virtue of a combination of sections 54(5) and (6), if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude the defence might apply then the trial judge should direct the jury that it must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not. This places on a statutory footing the obligation on the trial judge to leave an alternative partial defence of loss of control in the circumstances just set out. The Court of Appeal has since emphasised that it is a matter of judgment for the trial judge whether there is sufficient evidence of each of the component parts of the partial defence for the obligation to arise.[16] In *Goodwin*[17], Davis LJ hinted that on account of its more

> "restrictive" nature, the partial defence of loss of control will be left to the jury in murder cases on fewer occasions that the partial defence of provocation had been hitherto.

Sections 54(5) and 54(6) broadly reflect the Law Commission's Draft Criminal Code,[18] the relevant section of which provides that a defence should be left to the trier of fact where "there is such evidence as might lead a … jury to conclude that there is a reasonable possibility that the elements of the defence … existed." If the sufficiency of the evidence necessary to give rise to the trial judge's obligation to leave a defence to the jury is as stated, the question remains what the source of that evidence can properly be. Does that evidence have to come from the defendant, for example? Does it have to be adduced by the defence even if it does not come from the defendant himself? Does it have to be adduced through the oral testimony of a witness, or will an admissible hearsay statement do?

The Supreme Court of Canada addressed this issue in *Cinous,*[19] now the leading authority in that jurisdiction on the circumstances in which defences should be left to be determined by the triers of fact.[20] In Canada, where there is an "air of reality" to a defence it should go to the jury. A defence will have an air of reality where the evidence discloses a real issue to be decided by the jury. The majority of the Supreme Court held that:[21]

> In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true … The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused.

If that statement represents English and Welsh law too, and there is no reason why it should not, then, for example, an out-of-court statement made by a defendant and adduced in evidence at his trial could be sufficient to invoke the trial judge's obligation to leave to the jury a defence disclosed in that statement even if the defence at trial was something different and inconsistent with it.[22] In the Canadian case of *Wied*,[23] the defendant was convicted of murdering his wife. His defence at trial was alibi. At trial, the prosecution adduced evidence that when police arrived at the scene of the killing, the defendant had said that his wife had fallen on the knife. The trial judge refused to leave accident to the jury. The British Columbia Court of Appeal overturned the conviction, in part because an accident direction should have been given.

In all of the English cases cited, above, the defendant's primary defence at trial was one of alibi, accident or self-defence and the alternative defence that he argued should have been left to the jury was provocation. The case of *Newell*[24] offers an interesting twist on that common scenario and also affirms what was said in *Creighton* and *Weid* about the possible source of the evidence from which the alternative defence arises. The appellant in *Newell* was convicted of murdering his flat-mate, B, by stabbing him. In his first account to the police, the appellant said that he had arrived home to find B dead. In his second account, he said that B had attacked him with a chain and so he stabbed him because that "was the only way to stop him". In his third account, he said that

13 [1994] 1 W.L.R 971.
14 At p. 975.
15 At pp. 690-691.
16 See *Clinton (Jon-Jacques)* [2012] EWCA Crim 2, [2013] QB 1 at [46], *Dawes (Carlos)* [2013] EWCA Crim 322, [2014] 1 W.L.R 497 at [12], *Martin (Jovan)* [2017] EWCA Crim 1359; [2018] Crim LR 341 and *Goodwin (Anthony Gerard)* [2018] EWCA Crim 2287, [2018] 4 W.L.R 165 at [33].
17 *Above.*
18 Law Com No. 177.
19 [2002] 2 R.C.S. 3
20 For an excellent overview of the position in Canada see Manning, M. and Sankoff, P., *Manning, Mewett & Sankoff: Criminal Law*, 5th ed., Lexis Nexis, Ch.8, pp. 395-417.
21 At [52].
22 See *State v Creighton* (1932) 52 S.W. 2d 556 (Mo), Supreme Court of Missouri.
23 (1949) 95 C.C.C. 108.
24 [1989] Crim LR 906.

he could not have been the person who killed B. At trial his defence was alibi. He did not advance either self-defence or provocation but the trial judge left self-defence to the jury. The appellant audaciously appealed on the ground that the trial judge should also have left provocation to the jury. The Court of Appeal agreed that he should and substituted a verdict of manslaughter for murder.

Conclusions

What principles emerge from these authorities?

First, it is not for the trial judge to direct the jury on defences that are fanciful or outlandish even if those defences have been advanced by the defence before the jury.[25]

Secondly, it is incumbent on the trial judge to direct the jury on any defence that reasonably arises out of the evidence, irrespective of whether (i) it has been advanced at trial by the defence or (ii) the defence object to that defence being left to the jury.

Thirdly, that obligation exists even where that defence (i) is inconsistent with the defendant's primary defence, and (ii) could only succeed were the jury to disbelieve some or all of the defendant's evidence in relation to that primary defence.

Fourthly, a defence (such as self-defence) will reasonably arise where there is evidence from which a reasonable jury might be left in doubt that the defendant did not act in self-defence.

Fifthly, where there are a number of components to a defence (such as loss of control) the court will have to be satisfied that there is sufficient evidence in respect of each of those components before leaving that defence to the jury.[26]

Sixthly, the evidence from which the defence reasonably arises does not have to be oral evidence from the defendant, or a specific witness (whether for the prosecution or the defence) but can emerge from the course of the evidence as a whole, including from things said by the defendant at the time of his arrest and in police interview[27].

Seventhly, where a defence should have been left to the jury and was not, the conviction will generally be unsafe because, in the words of Lord Tucker in *Bullard,*[28] such a failure "must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

25 The Canadian case of *Cinous* referred to earlier is a stark example of this proposition in action. The Supreme Court held that the trial judge should not have directed the jury on self-defence, even where that was the defendant's only defence, because on the evidence it was purely fanciful. The defendant maintained that he had shot the victim in the head from behind in the forecourt of a petrol station because he feared that one of the deceased's fellow gang members might kill him at some point in the future. See, more recently, *G; R v J* [2009] UKHL 13, [2010] AC 43; *Y (CA)* [2010] EWCA Crim 762, [2010] 2 Cr.App.R 15 at [25] and *Dunleavy* [2021] EWCA Crim 39, on whether the trial judge had been correct to refuse to leave the defence of reasonable excuse to the jury where the charge was one of possessing documents of use to a terrorist, contrary to s.58(1)(b) of the Terrorism Act 2000.

26 *Gurpinar; R v Kojo-Smith & Caton* [2015] EWCA Crim 178, [2015] 1 Cr.App.R 31.

27 For the avoidance of doubt, questions put in cross-examination are not evidence: *R v Acott* [1997] 2 Cr.App.R 94.

28 At p.644.

Book Review

Cowe and Cavender, Practical Advocacy in the Crown Court

Mary Cowe and Susan Cavender, *Practical Advocacy in the Crown Court* (Bloomsbury Professional, 2020); paperback, 248 pages; ISBN 9781526516329; £29.99, online price £25.49.

This book is a practical guide to advocacy aimed at new practitioners in criminal law appearing before the Crown Court. It covers tips for starting out and then each stage of a case from bail, pre-trial hearings, evidential submissions, the trial - encompassing witness handling, written advocacy and speeches – sentencing, and appeals. The two editors and fourteen contributors are all drawn from the Crime Team at Guildhall Chambers in Bristol.

The book is an interesting and unique addition to the literature on advocacy. It manages, in a portably slim volume, to cover nearly every conceivable topic that might confront a new practitioner and it combines guidance on advocacy and ethics with information on practice and procedure, and a good dose of sound common sense and experience. All the topics are dealt with succinctly (necessarily, given the size of the book), and in an intensely practical way. Certain topics, such as preparing for the PTPH, using the digital case system and speaking to prosecution witnesses at court, to give just a few examples, are rarely addressed in books on advocacy but will be of great assistance to a new practitioner.

It is important to note, however, that on issues of law, evidence and procedure, it is no substitute for a proper practitioners' guide. It does include reference to key cases, and to *Archbold* and *Blackstone's Criminal Practice*, but unless it is to be re-published every year, even those references are soon likely to be out of date as are, for example, references to the Criminal Procedure Rules 2015.

The multi-author format is at the same time both a strength and peculiarity of the book: a strength in that advice is drawn from a diversity of practitioners, each bringing a different angle to the book and a different style, much as each brings a different approach to their advocacy; however it is a peculiarity in that when reading the book through, the difference in styles is occasionally striking: chapter one closes advising the reader "to avoid eating fish in the robing room", while chapter two starts with a discussion of Aristotle's Rhetoric.

All in all, this book may prove to be a useful ready reckoner for new practitioners. In the current situation, in which for the last year opportunities for meeting other practitioners in chambers or at court have been significantly curtailed and most formal training has to be conducted online, a book which distils advice drawn from years of experience into a short and affordable book may be of particular value.

Nathan Rasiah, 23ES Chambers

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