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Cases in Brief

Assault—Assault on emergency workers—Assaults on Emergency Workers (Offences) Act 2018—guidance as to "functions" and "execution of duty"

DPP v AHMED [2021] EWHC 2122 (Admin); 29 July 2021

The magistrates' court erroneously acquitted A on the basis that whether a constable was exercising his or her "functions" for the purposes of Assaults on Emergency Workers (Offences) Act 2018 was the same question as whether the constable acted in the execution of his or her duty (cf Police Act 1996 s 89(1)): *Campbell v CPS* [2020] EWHC 3868 (Admin), [2021] 7 *Archbold Review* 2. The court was invited by both parties to provide general guidance as to the scope of the term "functions".

(1) It was clear that (a) whether an emergency worker was exercising a function at the time of an alleged assault was a fact-specific and objective question, and (b) there were limits to the concept of function, so that not everything done by an emergency worker when apparently going about his or her day-to-day business, could properly be so described. To take an extreme example, if a police constable committed a sexual assault in the course of an arrest, the constable would not be carrying out his or her functions.

(2) Proportionate and good faith actions by the police to assist those who appeared to be in distress, or to be at risk of causing harm to themselves or others, would in principle likely be within the concept of police "functions". It was counterintuitive that where the police were trying to protect an individual from harm to themselves or others (because for example, the individual was intoxicated or under the influence of drugs or highly vulnerable or distressed), some reasonable preventative physical intervention could not take place without it being characterised as unlawful, or in excess of police functions, unless the police had when so intervening, an intention to arrest.

(3) It was necessary to approach sometimes unfocussed submissions that a police officer had acted unlawfully and therefore outside his or her formal functions with some caution, for the following, often overlooked, reasons: (a) while, like any public body, the police were subject to the constraints of public law, police officers had the same powers and rights as ordinary citizens, so they may, as a matter of vires, do anything that a natural person could do without the use of coercive powers; (b) it was accordingly wrong to proceed on the basis that unless there is some defined common law or statutory power being exercised by a constable, he or she would be acting unlawfully, and not be fulfilling a function within the 2018 Act; (c) When considering the broad functions of a constable, some assistance could be obtained from the discussion of "police purposes" in *Centre for Advice on Individual Rights in Europe v Secretary of State for the Home Department* [2018] EWCA Civ 2847, [46]-[48]. As explained there, the purpose of the police service was to uphold the law fairly and firmly; to prevent crime; to pursue and bring to justice those who break the law; to keep the Queen's Peace; to protect, help and reassure the community; and to be seen to do all this with integrity, common sense and sound judgement.

Dangerous dogs—Dangerous Dogs Act 1991 s. 3(1)—postal worker—trespass—defences

ROYAL MAIL GROUP LTD v WATSON [2021] EWHC 2098 (Admin); 28 July 2021

Where a postal worker delivering letters inserted part of a finger into a letterbox, and it was bitten by a dog, the postal worker was not trespassing; and it was not a defence if the postal worker failed to use due diligence. The "householder defence" (Dangerous Dogs Act 1991 ss.3(1A) and 3(1B)) to a charge under s.3(1) of the 1991 Act had no application. *A feature analysing this case will be published in a future edition of Archbold Review.*

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Joint enterprise—overwhelming supervening event—Jogee; Ruddock *[2016] UKSC 8, [2016] UKPC 7, [2017] AC 387—causation—encouraging and assisting crime. Trial—written directions/route to verdict—whether lack rendered convictions unsafe—desirability of re-consideration of Crim PR and Crim PD*

GRANT, KHAN AND ANOTHER [2021] EWCA Crim 1243; 12 August 2021

(1) The judge had not been wrong to decline to direct the jury as to overwhelming supervening event at G's murder trial. G had submitted that he should do so, where K was driving a car in which G was a passenger with (*ex hypothesi*) the intention of finding the deceased and doing him grievous bodily harm in a face-to-face confrontation, but on seeing the deceased crossing the road, K ran him down, fatally, instead. G relied on *Anderson and Morris* [1966] 2 QB 110 to argue that in such circumstances G was not causally responsible for the death, and that the case had not been overturned by *Jogee*; *Ruddock* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387. On appeal, the Court of Appeal concluded that the Supreme Court's disavowal of the suggestion that the secondary liability of a person who encouraged or assisted a crime was based on causation (*Jogee*, [12], [97] – [98]) was fatal to the suggestion that the concept of overwhelming supervening event should be viewed through the lens of causation. Rather, the Supreme Court in *Jogee* significantly limited the circumstances in which a jury would need to consider the possibility that there had been a departure from the agreed plan. As regards murder, the effect of the decision in *Jogee*, (particularly [12]) was that the principal focus of the court as regards overwhelming supervening event would be on whether the alleged encouragement or assistance "has faded to the point of mere background", or "has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed". Thus the precise manner in which the victim happened to be killed and whether the perpetrator intended to kill as opposed to inflict really serious harm were by the way, so long as the encouragement or assistance of the accessory has not been "relegated to history". Save perhaps for exceptional circumstances which were not readily easy to envisage, there would be no need to direct the jury on the concept of overwhelming supervening event simply because the fatal injuries were inflicted using an entirely different kind of weapon or method of killing than that originally contemplated and/or the perpetrator intended to kill rather than to inflict really serious harm.

(2) Were the acquitted defendants in *Gamble* [1989] NI 268 to be tried in this jurisdiction post-*Jogee*, they would not have been able to rely on overwhelming supervening event, and would be convicted of murder.

(3) The jurisprudence of the court strongly supported judges providing juries, in all but the simplest of cases, with written assistance in the form of written directions and/or a route to verdict (see *Atta-Dankwa* [2018] EWCA Crim 320, [2018] 2 Cr App R 16). The court quoted Crim PR 25.14(4) and Crim PD paras 26K.11 and 12, and the more forceful treatment in the Crown Court Compendium at 1-9. However, the lack of either in this case did not render the convictions unsafe (following the approach in *R v N* [2019] EWCA Crim 2280; [2020] 4 W.L.R. 64). Nonetheless, whether the essentially permissive approach within the present Rules and Practice Directions should become more directive should be considered afresh by the Criminal Procedure Rule Committee.

Jury—Brown *(1984) 79 Cr App R 115 direction—when required—when not required*

CHILVERS [2021] EWCA Crim 1311; 27 August 2021

C was convicted of coercive controlling behaviour (Serious Crime Act 2015 s.76), the particulars alleging nine specific behaviours. On appeal, he argued that the judge should have given a *Brown* (1984) 79 Cr.App.R 115 direction (i.e. to the effect that when a number of matters were specified in the charge as together constituting one ingredient in the offence, and any one of them was capable of doing so, then it was enough in order to establish the ingredient that any one of them was proved but it must be proved to the satisfaction of the whole jury). The Court of Appeal reviewed the case law on when the direction was necessary.

(1) It was clear from the authorities that the jury must be agreed that every ingredient necessary to constitute the offence had been established. The court had, nonetheless, repeatedly stated that a *Brown* direction was only necessary in comparatively rare situations.

(2) There were three such situations. The first was where there was an appreciable danger that, when the jury in deciding whether they were agreed on the matter that constituted the relevant ingredient of the offence, some may convict having found a particular matter proved as constituting the ingredient whilst others may find a wholly different matter or different matters proved as constituting the ingredient. Therefore, when the factual bases of the crime charged (e.g. as set out in the particulars) were, in reality, individually coterminous with an essential element or ingredient of the offence, then it was necessary for a *Brown* direction to be given. This did not require each juror to follow the same route through the evidence to reach the decision that a particular ingredient was made out: see *Giannetto* [1997] 1 Cr.App.R. 1, 7, per Kennedy LJ, accepting a formulation of Professor Sir J Smith at [1988] Crim.L.R. 344. Examples were *Brown* itself and *Smith* [1997] 1 Cr App R 14; *Mitchell* (1994) 26 HLR 394, [1994] Crim LR 66; *Boreman* [2000] 2 Cr App R 17; *Carr* [2000] 2 Cr App R 149; and *R v D* [2001] 1 Cr.App.R. 13.

(3) The second situation in which the direction should be given was when two distinct events or incidents were alleged, either of which constituted the ingredient of the offence charged (see *Smith*, 17, per L Bingham CJ, and *Boreman*).

(4) The third situation was where two different means of committing the offence may give rise to different defences (see *Carr*, 157F, per L Bingham CJ).

(5) However, when the individual particulars were not said to be coterminous with an essential element or ingredient of the offence and when the individual particulars did not involve different defences, a direction in accordance with *Brown* was unnecessary: see *Sinha* [1995] Crim LR 68; *Ibrahima* [2005] EWCA Crim 1436, [2005] Crim. L.R. 887; *Budniak* [2009] EWCA Crim 1611; and *Hancock* [1996] 2 Cr.App.R 554.

(6) Further, when alternative specified allegations related to one of the ingredients of the offence, a *Brown* direction was unnecessary if there were "minor differences between the facts alleged and the evidence given by various witnesses" (*Carr*, 159G, per Lord Bingham CJ) or if the allega-

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tions formed part of a continuing course of conduct (e.g. cruelty to a child as described in *Young* (1993) 97 Cr.App. R 280). Unless the incident involved different "sequences" in the sense described in *Smith* (at [17] – an affray involving a series of distinct passages of violence rather than being continuous), the various means of committing an offence would not lead to the need for a *Brown* direction.
(7) C's case was a considerable distance from those referred to in (2) above. The actus reus of the offence was C's repeated engagement in behaviour that was controlling or coercive. The nine particulars were examples of how that coercive behaviour was manifested, not coterminous with the actus reus. There was no realistic danger that the jury might not have appreciated that they must all agree on the particular ingredient (i.e. the actus reus). The jury's task was to evaluate the entirety of the behaviour in question and decide whether it was controlling or coercive in light of all the evidence. It was not necessary for them to be agreed as to the parts of the evidence which led them to their conclusion.

Kidnapping—whether continuing offence—aggravated form of false imprisonment—secondary liability
DEAN [2021] EWCA Crim 1157; 28 July 2021
The complainant H was kidnapped and then taken some distance to a car driven by D, in which he was transported to a location where he was assaulted. There was no evidence of D's involvement prior to H's arrival at the car. On appeal, D argued that the judge had been wrong to dismiss a submission of no case, made on the basis that *Reid* [1973] 56 Cr.App.R. 703 was authority for the proposition that kidnaping was not a continuing offence, and had therefore been completed by the time H was put in the car. The appropriate charge would have been one of false imprisonment. The Court of Appeal dismissed the appeal.
(1) *Reid* considered whether an additional element of "secretion" or "concealment" of the victim was an essential ingredient of kidnap and determined that it was not. *Reid* was not authority for the proposition that kidnap was not a continuing offence. The Court in that case decided, in its specific factual context, that the offence of kidnap could be legally complete once a victim has been seized and carried away against his or her will, without the need for there to be concealment or secretion. The observations of the Court in *Reid* did not establish a legal principle that would require separate counts of kidnap and/or false imprisonment covering the different stages of what occurred in the circumstances of the present case.
(2) The Court followed the reasoning of the Supreme Court of Canada in *Vu* [2012] 2 S.C.R. 411, that kidnapping was a form of the lesser included offence of false imprisonment, aggravated by the element of movement (while a statutory Code offence in Canada, the SCC found that their Parliament had not changed the common law definition of the offence). The crime of kidnapping continued until the victim was freed, and a person who chose to participate in the victim's kidnapping, after having learned that the victim had been kidnapped, may be held responsible for the offence. Once it was accepted that kidnapping was an aggravated form of unlawful confinement, the conclusion that kidnapping was a continuing offence was virtually axiomatic. The Court of Appeal followed the SCC in finding the New South Wales Court of Criminal Appeal case of *Davis v R* [2006] NSWCCA392 persuasive as to the relevance of *Reid* and the nature of kidnapping. In *Vu*, the Court was concerned with two questions: first, whether kidnapping was a continuing offence; and secondly, whether a person who had played no part in the original taking, but who learned of it and chose thereafter to participate in the kidnapping enterprise, may be found liable as a party to the offence of kidnapping. The Court of Appeal had not heard argument on the second question, it being unnecessary to address it in this case. But the Court was bound to say that should that question have arisen, the Court, applying the law of joint enterprise, could see no reason why it would not agree with the SCC that such a defendant would be so liable.

Robbery—use of force—property "grabbed" or "snatched" from hands—whether properly left to jury
MARTINS [2021] EWCA Crim 223; 18 February 2021
M, the jury found, took a bunch of keys and an iPhone from the complainant. As a result of a change in the way the prosecution put the case, the mode of taking was not significantly explored in evidence, but the phone and keys were described as having been "grabbed" or "snatched". The Court of Appeal dismissed M's appeal, brought on the basis that that was insufficient evidence to establish that "force" had been used to accomplish the theft of the items. Having discussed *Dawson and James* (1977) 64 Cr.App.R 170; *Clouden* [1987] Crim.L.R 56; and (particularly) *P v DPP* [2012] EWHC 1657 (Admin), [2013] 1 W.L.R. 2337, the Court concluded that there was, on these facts, a sufficient evidential foundation for use of force. Although at the close of the prosecution case it was not a strong case of robbery, it was properly open to a jury to find that the complainant, when carrying his phone and keys, was gripping them so that they would not fall or slip from his hands, that his description of the appellant "grabbing" or "snatching" the items connoted that the appellant had pulled the items free from that grip, and that the action of pulling the items from his grasp amounted to the use of force. The use of a word such as "snatch" or "grab" would not necessarily and in all circumstances connote the use of force. But in this case, it was not a matter of impermissible speculation for the jury to be permitted to conclude that the complainant would inevitably have been gripping his items of property sufficiently tightly that his grip had to be overcome in order for the appellant to take them from him.

SENTENCING CASE

Post-sentence information; clemency
WATSON [2021] EWCA Crim 1248, 4 August 2021
The applicant, W, sought leave to appeal against sentence and for an extension of time. The basis of the applications was that following sentence, his physical health had degenerated subsequently and suddenly to such a degree that, as an act of mercy, the Court should quash the sentences imposed.
A recidivist burglar, W had pleaded guilty to three offences of dwelling-house burglary, five offences of theft and an offence of unlawful wounding. In August 2020, he was sentenced to a total of four years and four months imprisonment (see para [2] of the judgment for the individual sentences imposed). Two days after sentence, W suffered a

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serious medical emergency leaving him with severe impairments of both mobility and speech. (For details of his treatment and prognosis see [7]). There was evidence that his consequent significant care and therapy needs were very unlikely to be met in prison, and it was suggested that his custodial sentence could be managed with his healthcare needs in a non-secure care home setting.

After referring to the power contained in s.11 of the Criminal Appeal Act 1968, the Court emphasised that it is a court of review. It will consider whether the sentence was wrong in principle or manifestly excessive. It does not, in the light of something that has happened since sentence, consider whether an offender should be sentenced in an entirely new way. This was not to say that the Court will never consider updated information about an offender, such as updated pre-sentence and prison reports on conduct in prison (per Lord Thomas CJ in *Rogers* [2016] EWCA Crim 801). However, in this case information about the offender was not being updated. What was sought was a wholesale revision of the sentencing exercise by reference to entirely separate events which occurred only after sentence and of which the sentencing judge was unaware. The fact that the events relied upon took place very shortly after sentence made no difference to the correct approach as a matter of principle. It was not for the Court to re-open and restart the sentencing process on a completely fresh basis.

Referring to a sentencing court's power to impose a lesser sentence than might otherwise be appropriate as an act of mercy in an individual case, the Court stated that appellate interference on the basis of a significant deterioration in a medical condition may be appropriate if the condition was known at the date of sentencing, though the cases in which it would be appropriate to do so would be rare (see *Stevenson* [2018] EWCA Cro, 318; [2018] 2 Cr.App.R(S) 6 at [10] to [20]).

The Court concluded that on the facts of this case, it would not be appropriate to intervene with the lawful and appropriate sentences passed. It stated that the appropriate course may be for the Home Secretary to consider exercise of the royal prerogative of mercy or her powers of release on compassionate grounds under s.248 of the Criminal Justice Act 2003, and emphasised that in circumstances such as those raised by this case, appeal to the Court on grounds of clemency is not the appropriate course.

Features

Benefit and Brothels

By Polly Dyer and HHJ. Michael Hopmeier[1]

Billed as providing massage services, in fact no massage tables were in sight in February 2015 when the police raided the "Libra" club in Birmingham. Rather, they found approximately 20 women providing sexual services – and it transpired that up to 200 clients a day attended the premises. Such was the tabloid interest, one press website provided a video showing a tour of the interior. The Libra club apparently came to the attention of the police following a series of incidents, including a firearms discharge, several outbreaks of disorder, and one case where a petrol bomb was thrown at the entrance. A number of defendants were subject to prosecution, but the organisers of the operation were a father and son, Achilleos Neophytou and Stefanos Neophytou. On 21 September 2016, they both pleaded guilty to a charge of conspiracy to manage a brothel. On 17 October 2016, each was sentenced to 27 months' imprisonment. At sentencing, the judge described the operation as a "highly organised conveyer-belt of prostitution."[2]

After entering his guilty plea, Achilleos Neophytou had given statements to the press, including to the BBC, where he denied that the Libra club was a brothel and claimed he had lent his ill-gotten gains to the Greek Prime Minister, Alex Tsipras, to help the country out of its current financial crisis. The latter statement had significant implications in the confiscation proceedings that followed!

On 17 January 2020, HHJ Bond had made a confiscation order against each of the defendants in the sum of £3,174,809.18, to be paid within three months, with the term of imprisonment in default fixed at 10 years. Those confiscation proceedings, in relation to both Achilleos Neophytou and Stefanos Neophytou, were subject to appeal, with the Court of Appeal judgment handed down on 9 February 2021.[3]

It is that judgment, which the authors seek to analyse – and assist by summarising the principles that can be gleaned from it which will be relevant to a practitioner or judge when dealing with confiscation proceedings.

Calculating the benefit & uplift

This case is helpful to practitioners and judges alike in providing assistance on the type of practical approach that may be taken in assessing the value of the benefit a defendant obtained from running a business that was involved in criminal conduct and there is no direct evidence, such as accounting records.

During the confiscation proceedings in the Crown Court, the applicants had not provided any business records or given any evidence in relation to how much the business had earned. They had chosen simply to rely upon their forensic accountant's criticism of the prosecution's methodology. It was therefore left to the judge to make an assessment as to the benefit figure under s.76(4) of POCA. The judge concluded that the best method for estimating the income from the operation of the club was to base it on police surveillance, conducted outside the Libra Club, of the number of people entering the club on a total of six days from 23 to 26 May and 3 and 4 June 2014; in short, an assessment from footfall.

1 Polly Dyer is a barrister at QEB Hollis Whiteman. HHJ.Michael Hopmeier is a Circuit Judge at Southwark Crown Court, Deemster on the Isle of Man and Honorary Professor of Law at City, University of London.

2 https://www.bbc.co.uk/news/uk-england-birmingham-37691231.

3 *Achilleos Neophytou and Stefanos Neophytou* [2021] EWCA Crim 169.

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The police had observed and recorded over this period of six days a total of 999 people entering the club. The police then discounted anybody who had stayed inside the premises for less than 10 minutes as not being paying customers. The estimate of takings for the Libra Club was extrapolated from this customer sample using the charging rates known to have applied – being conveniently posted up inside. The judge found that the estimate made generous assumptions in the applicants' favour by ignoring the fact that the VIP area could be rented out, which would have resulted in higher earnings; and by the prosecution officer making a 30 per cent reduction in relation to each business to reflect an 18-month trading overlap between their previous club, "Bunny's", closing and the Libra Club opening. The same Libra customer sample data was used for the purposes of assessing the income from Bunny's, which was of a comparable size and layout and appeared from other evidence to be run on a similar scale. The judge accepted that there was no method for calculating the income figure which would be 100% accurate, but concluded that on the balance of probabilities the findings based on the sample customer data were correct. In relying on this methodology, the judge rejected the applicants' contentions that money found in envelopes when the police raided Bunny's provided any useful guide, rejecting Stefanos Neophytou's evidence that these represented weekly takings. He also rejected the applicants' contentions that text messages from the phones of Stefanos provided any reliable guide as to the number of customers.

Applying the footfall methodology, the prosecution officer had calculated the total income for Libra to be £5,655,028 and for Bunny's to be £1,258,784. The judge then made a series of adjustments:

a. he deducted five per cent to take account of seasonality;
b. he deducted a further five per cent to reflect the number of men who had paid to enter the brothels but would not have paid for sexual services;
c. he decided that the officer's estimate of the proportion of individuals who paid for a one hour slot (with a higher house fee than the more usual half-hour slot) should be reduced to 15 per cent.

These reductions resulted in the judge finding that the income received from Libra was £4,758,708 and from Bunny's, £685,930. To these figures, he added £598,910.18 to reflect the subsequent change in the value of money, as required by s.80(2) of POCA. The final benefit figure was £6,043,548.18. This figure applied to each of the applicants as the judge found that they had jointly benefited.

Calculating the benefit

Like the judge below, the Court of Appeal, in rejecting the applicant's submissions, found that the use of the footfall methodology was consistent with other evidence, whereas the applicants' contention that the monies in the envelopes reflected the weekly takings, and the texts indicative of the number of customers, were not.

In the circumstances, the methodology used by the judge was surely a sensible and proper approach, reflective of the evidence and thus rationally addressing a situation where there were no records produced by the applicants. Indeed it is difficult to see what other approach could have been properly adopted. It may well be an approach that can be adopted in analogous cases. It demonstrates that judges and counsel alike have to be prepared to think practically and logically, and have at times to be able to use mechanisms that allow them to come to the best estimates in the circumstances. If a reasoned approach is used, the Court of Appeal will not interfere. Thus, in the case of *Muddassar*,[4] the Court made an assessment of the number of drug deals and the relevant benefit figure from 20449 calls relating to drug deals recorded on a mobile phone, in circumstances where there had been direct evidence of only 14 drug deals.

Uplift

Section 80 of POCA addresses the "value" that is to be put on the property obtained from the criminal conduct (the benefit). Pursuant to s.80(2), the court is required to make an adjustment to the value of the property when it was obtained, by applying an uplift to take into account the changes in the value of money (inflation). This is usually done by reference to a UK index of inflation (usually RPIJ).

In this case, it was submitted by the applicants that the judge should not have applied the s.80(2) POCA adjustment to the whole of the income when calculating the benefit figure because the applicants had incurred the expenditure on running the businesses, so that they only had the use of the net difference as money on which they were able to earn interest or investment income.

The Court held that the judge was bound to increase the value of the benefit ("property obtained") to take account of the time value of money by the terms of s.80(2). The "benefit" is all the property obtained i.e. the gross figure. As such, there was no proper criticism of the judge having applied this uplift to the total income figure which was the property received from the criminal conduct. The Court of Appeal has repeatedly made clear that "benefit" in POCA does not equate to gain or profit, as it did in *Chahal and Singh*, for example.[5]

However, when dealing with the available amount (as opposed to the benefit figure), the Court did interestingly comment that "it may be that in an appropriate case in which the available amount is calculated as income less expenditure, all of which is treated as hidden assets, an adjustment for the time value of money should also be made to the expenditure to reflect the fact that the recipient would only have had the use of the assets represented by the net difference at any stage, not by the gross income" – thus resulting in a lower figure for the available amount. The example was given by the Court of investment growth at 20 per cent over five years. A person who received £100,000 and spent £90,000 in year one without making any adjustment would be treated in year six as having available £30,000 (i.e. £100K x 20% x 6 less £90k), whereas in fact he would only have had the use of £10,000 for five years, yielding £12,000 (i.e. £10K x 20% x 6). From these dicta, a question might in a future case arise as to whether a failure to make such an adjustment on the expenditure side rendered the confiscation order disproportionate.[6]

4 [2017] EWCA Crim 382.
5 [2015] EWCA Crim 916.
6 As readers will remember, a general requirement of proportionality in confiscation orders was resoundingly affirmed by the Supreme Court in *Waya* [2021] UKSC 51, [2013] 1 AC 294.

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Available amount - Hidden assets

Achilleos Neophytou had asserted at the hearing that he had no available assets. This was not accepted by the judge. In particular, he noted that in his interview to the BBC, Achilleos had suggested some of the proceeds from the brothels had been lent to the Greek Government and was satisfied that this was an indication as to where some of the money had gone. In reaching an assessment on available assets, it was not disputed that the businesses would have incurred some expenditure. The judge reached a total expenditure figure that ought to be deducted, of £2,868,739. Deducting this figure from the benefit figure meant that £3,174,809.18 was unaccounted for. The judge was satisfied that this represented hidden assets, which were available.

On appeal, it was submitted that the judge should not have treated what Achilleos said to the BBC journalist as a basis on which to find that money had been lent to the Greek Government. The Court of Appeal did not agree: the judge was entitled to treat Achilleos as meaning what he said. In any event that finding by the judge was not material to the outcome, given the judge's conclusion that the applicants had hidden assets because they could not account for expenditure reflecting the level of income.

Other grounds

Other grounds were advanced, including that the default term was too long on the basis that: the judge should have realised that the applicants would not, or might not, be able to pay; that Achilleos was 70 years old; that because of the passage of time the confiscation proceedings had dominated a large part of Stefanos's life, and by reliance on the present coronavirus conditions and the judgment of the Court of Appeal in *Manning*.[7] It was held that none of those factors made it arguable that the default period was too long.

The applicants also sought to argue that the judge ought to have recused himself from the confiscation proceedings because in his sentencing remarks he said that the business took several million pounds on the basis that the surveillance evidence gave a good indication of the number of customers using the premises. Such an argument was described as "hopeless": the reasons for the same included the fact that a judge "was bound to make some estimate of the severity of the offending for the purposes of sentencing". In *Hussain*[8] the Court of Appeal rejected a submission that there was an appearance of bias in circumstances where the trial judge at the sentencing hearing had referred to the defendant as being "devious and manipulative".

In relation to a ground pursued in relation to delay, the Court of Appeal commented that evidence of prejudice would need to be demonstrated. Finally, the Court of Appeal made clear that any matters to be argued before the Court of Appeal should be part of the written documentation e.g. in the grounds, with any evidence relied upon referenced and served in good time.

Conclusion

This case not only is of interest because of its rather dramatic and tabloid-friendly facts, but because of the assistance that can be gleaned on the principles relevant to confiscation proceedings, particularly when dealing with an analogous case. It shows how the criminal courts have to try to apply the principles enshrined in the legislation to complex and varied factual circumstances, and the importance of pragmatism.

7 [2020] EWCA Crim 592.
8 [2021] EWCA Crim 108.

Digital Working in the Court of Appeal (Criminal Division)

By Chris Williams and Sarah Hannah, Criminal Appeal Office[1]

The purpose of this article is to explain some procedural changes that will need to be known about by those who regularly appear before the Court of Appeal (Criminal Division). The article largely focuses on the use of digital technology which is being used to change the way that appeals are now to be prepared, but it also deals with some recent decisions which have an impact on those procedures.

In that sense, this is both a legal and practical guide to digital working in the Court of Appeal (Criminal Division).

Introduction

Since March 2020 the Criminal Appeal Office (CAO) has been providing the judiciary with digital bundles by making use of the Crown Court Digital Case System (DCS). This system was being tested prior to the first national lockdown. In December 2019 the Vice President of the Court of Appeal (Criminal Division) dealt with a number of appeals using digital bundles in and out of court. This was a successful test of the concept and led to the planned introduction of electronic bundles. Fortunately, this enabled the CACD to immediately switch to using digital bundles during the pandemic. This allowed hearings to continue, albeit remotely.

Many regular CACD advocates will, by now, have some experience of these digital bundles. For those who have not, the process is straightforward – the CAO continues to provide an index to the judges' bundles in Word format. This is the digital bundle: each item on the index is in fact a hyperlink to the relevant document on DCS. Opening the hyperlink will take the user directly to the DCS platform and the document will appear.

To achieve this the CAO creates two additional sections on the existing DCS record, CACD1 and CACD2. CACD1 is for sharing documents with the parties and the judiciary and CACD2 is for sharing material with judges only. The CAO will upload material into these two sections and create hyperlinks to the material. Additionally, the CAO will upload transcripts into the existing Section Y.

Further hyperlinks will be created to material already on DCS, such as opening notes, PSRs, antecedents. The combination of material from the new sections and the existing sections, provides for all material to be referred to in digital format and accessed by hyperlink via the digital bundle.

In multi-handed cases, CACD1 is configured so that defence advocates only have access to documents relevant to

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their client. There are also some "old style" multi-handed cases in which each defendant has their own record and a consolidated record exists for shared material. The CAO will create a CACD1 for each defendant who appeals, again to ensure that there is no inadvertent access.
Advocates will be able to access all of this material via their existing DCS access. There is no need to create new accounts, or sign up to a different system for appeal purposes. Fresh representatives will be invited into cases as necessary by the CAO.
Not only does this reduce reliance on hard copy bundles, it also provides for more convenient access to appeal documents throughout the process. The CAO will upload transcripts and Grounds of Appeal and when requesting perfected Grounds of Appeal or a Respondent's Notice, send a link to the material on DCS.
To facilitate the use of digital bundles during a hearing, there is WiFi in all of the CACD courtrooms at the Royal Courts of Justice. This is the Professional Court User (PCU) WiFi.

Limitations on the use of Crown Court Digital Case System

The DCS record still remains the Crown Court's record of the trial proceedings. In that sense there is a limitation on the addition of, or movement of, documents on DCS. The existing DCS folders make up the formal Crown Court record and should not be varied in any way.
To preserve the integrity of the record, advocates are not permitted to upload any further material to DCS after the conclusion of the trial.
At the appeal stage only the CAO is permitted to upload. Additionally, DCS is not a method of service that is recognised by the CAO. Advocates should continue to serve documents directly to the CAO by email. Documents should be served in pdf format wherever possible (see below).
Further, not all Crown Court cases are on DCS. In these cases the CAO will either make use of HMCTS' Document Upload Centre, or provide paper bundles in exceptional circumstances. In those circumstances advocates will still be provided with an index and can request copies of any material from the Criminal Appeal Office.

Changes to Criminal Procedure Rules

In April 2021 Criminal Procedure Rule Amendments came into force. The key rule changes, from a digital working perspective, concerned the use of DCS in the Court of Appeal. It is now a requirement for the parties to include hyperlinks to material on DCS in their grounds. The guidance notes to the rules changes explain the rationale for this:

> Most documents needed for a Crown Court trial now are delivered and stored electronically, so that the court and the parties to the case have easy access to them. On an appeal from the Crown Court to the Court of Appeal the staff of the Registrar of Criminal Appeals also have electronic access to those documents, and if the parties to the appeal identify the electronic documents and electronic case reports that they want the Court of Appeal to read then the appeal can be prepared and dealt with more efficiently.
>
> For that reason, the Registrar of Criminal Appeals asked the Rule Committee to make it a requirement for the parties to an appeal to include with their appeal notices electronic links to each stored document to which they want to refer, and electronic copies of case reports on which they rely. The Committee agreed to do so. Rules 20, 21, 22, 23, 24 and 25 of these Rules make the necessary amendments to the relevant Parts of the Criminal Procedure Rules.

Part 39.3 now reads (emphasis in italics added):

> 39.3—(1) An appeal notice must—
>
> (a) specify—
>
> (i) the conviction, verdict, or finding,
>
> (ii) the sentence, or
>
> (iii) the order, or the failure to make an order about which the appellant wants to appeal;
>
> (b) identify each ground of appeal on which the appellant relies (and see paragraph (2));
>
> (c) identify the transcript that the appellant thinks the court will need, if the appellant wants to appeal against a conviction;
>
> (d) identify the relevant sentencing powers of the Crown Court, if sentence is in issue;
>
> (e) include or attach any application for the following, with reasons—
>
> (i) permission to appeal, if the appellant needs the court's permission,
>
> (ii) an extension of time within which to serve the appeal notice,
>
> (iii) bail pending appeal,
>
> (iv) a direction to attend in person a hearing that the appellant could attend by live link, if the appellant is in custody,
>
> (v) the introduction of evidence, including hearsay evidence and evidence of bad character,
>
> (vi) an order requiring a witness to attend court,
>
> (vii) a direction for special measures for a witness,
>
> (viii) a direction for special measures for the giving of evidence by the appellant, or
>
> (ix) the suspension of any disqualification imposed, or order made, in the case, where the Court of Appeal can order such a suspension pending appeal;
>
> *(f) identify any other document or thing that the appellant thinks the court will need to decide the appeal and include or attach an electronic link to each such document that has been made available to the Registrar under rule 36.8(1)(a) (Duty of Crown Court officer); and*
>
> *(g) include or attach—*
>
> *(i) an electronic copy of any authority identified by the grounds of appeal (see paragraph (2)(f)), or*
>
> *(ii) if two or more such authorities are identified, electronic copies of each together in a single electronic document.*

The same changes apply to Respondent's Notices and submissions (see Criminal Procedure Rules 39.6 (g) and (h)) and all other types of appeal – for example, Prosecution Appeals, Appeals against Reporting Restrictions and other interlocutory appeals.
In short, rather than attach appendices, or copies of trial documents, to the Grounds of Appeal, advocates are now required to identify the item on DCS and create a hyperlink to that document within the Grounds of Appeal or Respondent's Notice.

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Where Grounds of Appeal do not contain hyperlinks to the relevant material, advocates will be directed to remedy this when Perfected Grounds are prepared. A request for a Respondent's Notice will also make it clear that hyperlinks should be included. Failure to hyperlink may lead to unnecessary delay.

The use of digital bundles assists both the CACD and advocates. There is no need to create appeal bundles comprising material already in existence online. For the judiciary, it means that it is possible to go straight to the relevant material as it is referred to in the submissions.

To create a hyperlink, in the review pane use the "Copy Link" tab which takes a URL of the page and allows it to be pasted in a document. When the pop-up window appears, select the text and press "Ctrl+C" on your keyboard to copy the URL.

The Criminal Appeal Office will shortly be publishing video guidance on the DCS training website. In the meantime, there is current guidance on how to create a hyperlink: QRG16_Additional_review_tools.pdf (publishing.service.gov.uk).

Appeal and Authorities Bundles

The changes to the Criminal Procedure Rules, highlighted above, also make it a requirement for authorities to be supplied in electronic format. More importantly, where two or more authorities are relied upon it is a requirement that advocates supply the authorities in a single.pdf bundle.

Below is some useful guidance, issued by the Vice President of the Court of Appeal (Criminal Division), which should also be followed whenever the Registrar, or the Court of Appeal, directs parties to lodge bundles. It should be read in conjunction with the general rules on lodging an appeal as set out in the Criminal Procedure Rules.

PDF Bundles for CACD Hearings

The objective of this guidance is to achieve a level of useful consistency in the provision of PDF bundles for use by judges in hearings.

PDF Bundling should follow the following principles:

1. All bundles must, where the character of the document permits, be the subject of OCR (optical character recognition). This is the process which turns the document from a mere picture of a document to one in which the text can be read as text so that the document becomes word-searchable and words can be highlighted in the process of marking them up. It is acknowledged that some individual documents may not be susceptible to the process, but most should be.

2. All documents should appear in portrait mode. If an original document is in landscape, then it should be inserted so that it can be read with a 90 degree rotation clockwise. No document should appear upside down.

3. The default view for all pages should be 100%.

4. All pages in a bundle must be numbered, and if possible by a computer generated numbering, or at least in typed form (if added by a scanner), and not numbered by hand. If computer generated or typed the number becomes machine readable and can be searched for. Again if possible, the number should be preceded by a letter, whether the letter of the bundle or not. This aids searching. For example, it will be quick to search for and go to page A134 by searching for that. Searching for just "134" may throw up a number of references to that number which are not the page number, which takes the computer time.

5. Pagination should not mask relevant detail on the original document.

6. If practicable any scans of documents should not be greater than 300 dpi, in order to avoid slow scrolling or rendering.

7. All significant documents and all sections in bundles must be bookmarked for ease of navigation, with an appropriate description as the bookmark. The bookmark should contain the page number of the document.

8. An index or table of contents of the documents should be prepared. If practicable entries should be hyperlinked to the indexed document. Common sense will usually dictate the level of detail in this table of contents.

9. All PDF files must, in the filename, contain the CAO Reference number, appellant's surname and a short title for the bundle, i.e "Bundle of Authorities" or "Appeal Bundle".

10. Amended bundles should only be served with the agreement of the Criminal Appeal Office. If an amended bundle is necessary, it should not be assumed the Criminal Appeal Office will accept it as a complete replacement. The office will confirm whether the bundle will be provided to the judges as a replacement or whether any additions are to be lodged as a supplemental bundle.

Case law on electronic versions of the indictment

In *Johnson*,[2] the Court of Appeal confirmed that the effect of s.2(1) Administration of Justice (Miscellaneous Provisions) Act 1933 and Criminal Procedure Rule, Rule 10.2, was that an indictment was validly preferred when uploaded onto the Crown Court Digital Case System (DCS).

This has recently been reiterated by the Court of Appeal in *Jessemey*.[3] The Court gave guidance on two further topics: (a) the possible existence of more than one indictment and (b) the correct sections for the indictment to be uploaded.

The Court acknowledged that if two indictments have been uploaded to the "Indictment" section (as will frequently occur in the course of proceedings) both will have been preferred. In this situation the prosecution will be required to elect the indictment in respect of which they intend to proceed.

Although the Criminal Procedure Rules and Criminal Practice Direction are silent on where the indictment should be uploaded on DCS, the Court (perhaps unsurprisingly) stated that the correct section was the Indictment Section. As the Court observed:

> Nowhere in the Criminal Procedure Rules or in the Criminal Practice Direction, is it said that the indictment must be uploaded to a particular part of the DCS. Mr Jarvis's submission was that the uploading must be to the "Indictment" section of the DCS. An indictment uploaded to another part of the DCS will not have been preferred. Were it otherwise confusion and error would be the likely result. If the indictment were not in the right section there would be no reason for anybody to look for it. In our judgment, although nothing is said whether in the Rules or the

2 [2018] EWCA Crim 2485.
3 [2021] EWCA Crim 175.

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> Practice Direction as to the relevant section on the DCS onto which the indictment should be loaded, we agree with Mr Jarvis that in order for it to be preferred the indictment must be loaded into the "Indictment" section. For it to be otherwise would be a recipe for chaos.

Uploading the Better Case Management Form/ Indication of Plea

Sticking with the theme of ensuring that the correct documents are identified on DCS, it is also important to ensure that the Better Case Management form is uploaded to DCS following a sending for trial from the magistrates' court pursuant to s.51 of the Crime and Disorder Act 1988.

This can impact on the availability of the maximum credit for plea. In *Plaku*[4] Holroyde LJ stressed that for an indication of plea to attract the maximum credit of one third (indicated at the first stage in proceedings), it needs to be unequivocal in the magistrates' court. This means words like "likely", "probable guilty plea", or "likely guilty plea on a basis" will not suffice and that any indication of plea in the magistrates' court needs to be recorded on the Better Case Management form and uploaded to DCS.

In the absence of this information, then maximum credit will only normally be awarded if one of the exceptions set out in the Sentencing Council's "Reduction in sentence for a guilty plea" guidance applies.

Appealing following a retrial

In a recent judgment[5] the Court (Fulford LJ., VP, Holroyde and Edis LJJ.) concluded by saying:

> We suggest that whenever a re-trial is ordered by this court, the Registrar should secure a transcript of the original sentencing remarks, to be available to the judge conducting the further trial to assist, if relevant, when passing sentence.

As a result of this judgment and those comments, in all retrial cases, it is important that the sentence remarks in the original trial are available to the judge presiding over the retrial.

An often overlooked piece of legislation is Sch.2, para.2 of the Criminal Appeal Act 1968, which states that:

> where a person ordered to be retried is again convicted on retrial, the court before which he is convicted may pass in respect of the offence any sentence authorised by law, not being a sentence of greater severity than that passed on the original conviction.

The effect of this is that a sentence imposed at re-trial cannot be of greater severity than the sentence that had originally been passed before the appeal. It is worth noting that in *Skanes*[6] the Court of Appeal considered the position where a guilty plea at the original trial is quashed and an appellant convicted after a retrial. In those circumstances the two sentences may not necessarily be comparable.

In any event, it is important that the judge presiding over the re-trial is aware of the sentence imposed previously, and the reasons for that sentence.

As a result of the recent judgment in *AB*[7] the Registrar will obtain a copy of the Sentence Remarks (if they were not already part of the appeal bundle) and provide these to the Crown Prosecution Service.

To ensure that the remarks are available to the sentencing judge, the easiest method of achieving this is to upload the remarks to DCS as part of the trial preparation material. Again, if the remarks were already part of the bundle, then they will be accessible already.

When a re-trial is ordered the CPS will either (a) create a new DCS record with a new URN number or (b) they will continue to use the existing record for retrial purposes. If the sentence remarks are available on the previous record, they may still be accessible, but should be uploaded to the new record.

Guidance and Feedback

As can be seen, DCS plays a large part in criminal proceedings, and it is important to use it correctly at all steps of the process. Used correctly it is a valuable tool.

Whilst it is hoped that the new ways of working are more efficient, there will be a period of time during which everyone – judges, advocates, and court staff – adapt to new ways of working.

The Criminal Appeal Office is on hand to assist all court users with any difficulties that might be experienced and always willing to give helpful guidance and advice.

The Registrar and Vice President are always interested in any feedback and welcome any suggestions for improvement. Any feedback should be sent to: generaloffice@criminalappealoffice.justice.gov.uk.

4 [2021] EWCA Crim 568.
5 *AB* [2021] EWCA Crim 692.
6 [2006] EWCA Crim 2309.
7 See note 5 above.

A New Justice Minister – yet again

If a constitutional anomaly, the old-style Lord Chancellor was always a weighty figure who could command respect among Cabinet colleagues and speak up for justice if required: a senior politician at the end of a long career, or (occasionally) a senior judge seconded for the purpose. They were invariably lawyers. And they usually held office for long periods. By contrast, the Justice Ministers-cum-Lord Chancellors of recent years have often been junior politicians of little weight, frequently not lawyers and the turn-over has been rapid. Between 2015 to 2021 there were five different Justice Ministers in post. Some were bad and Chris Grayling and Liz Truss were disastrous.

The last one, Robert Buckland, a barrister, was widely thought to have been repairing some of the damage done. And now he has been sacked, seemingly to create a job for Dominic Raab, who had failed as foreign secretary but was thought too big for the back benches. So the previously high office of Lord Chancellor, already downgraded to a lowly post where untried persons could safely be allowed to demonstrate their incompetence, has now also become a convenient dumping-ground for senior persons who already have.

JRS

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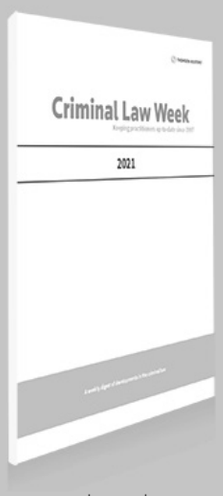

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