

36

CRIME

36 Crime Criminal Updates

Summer 2021



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Welcome to the 36 Crime Criminal Updates: Summer 2021

Christopher Donnellan Q.C.

Head of 36 Crime

Although the pandemic rolls on, the work of the Criminal Courts continues to gather pace and there will be a great deal of work to be done to reduce the backlog. As more court space is created, and more sitting days allocated, together with the efficiencies gained by the use of CVP, we are making progress, but there is a long way to go.

We are grateful to the contributors to this Newsletter. **Sam Skinner's** case note on the recent decision in *R v Brečani* addresses the consequence of this important shift away from accepting as expert evidence the conclusive decisions made by civil servants within the Home Office on referrals for human trafficking and modern slavery. **Kate Kelleher** provides a timely reminder that the provisions of the Animal Welfare (Sentencing) Act 2021 is in force from 29th June 2021 and provides a commentary on the most notable recent developments in the prosecutions of animal welfare offences. In April and May **Catherine Rose** and **Tom Parker** ran a 2-part webinar session on Open-Source Evidence with contributions from a panel of leading experts from the US and UK. Their article is just a taster of the material covered in greater depth in the sessions. A timely warning to apply the basic critical analysis we use in relation to evidence from many scientific fields to all such evidence before relying on it at face value. **Mary Prior Q.C.** has provided a comprehensive round up in the Crime Bulletin of all the recent decisions of importance in a broad spectrum of procedural and offence-based areas.

Some new faces: Since our last newsletter we are delighted to announce that **Emma Rance** (formerly of Fenners Chambers) and **Georgina Blower** (formerly at Farringdon Chambers) have joined 36 Crime. Welcome.

Farewell to **Jake Sperinck**. Jake joined our clerking team in 2016 and has grown into a valued member of the Team. Jake is leaving clerking altogether and we wish Jake all the very best, and success, in his new career. We are really pleased to announce that **Nathan Warren** will be joining our clerking team.



Has the Court of Appeal had enough of experts?

Samuel Skinner

Barrister

[Case Note: R v Brečani \[2021\] EWCA Crim 731](#)

Five months ago, the High Court thought that civil servants who worked on referrals for human trafficking and modern slavery were experts. Now, the Court of Appeal has decided that they are not experts after all and that conclusive grounds decisions are inadmissible as evidence in criminal trials. What's been going on?

One of the Home Office's many functions is to work out whether people referred to it are the victims of modern slavery. Many of the people referred for assessment are defendants in criminal prosecutions. Civil servants at the Home Office are supposed to decide swiftly if a person is a victim of human trafficking, or is a modern slave, but they can be very slow to reach a 'conclusive grounds decision'. If the Home Office decides that there are conclusive grounds to believe that a person is a modern slave, a civil servant will provide written reasons. Various administrative consequences then arise. One consequence is that the CPS will need to work out if it will accept the Home Office's decision and divert a defendant away from prosecution, or whether it will disagree with the Home Office and prosecute regardless. The CPS is not bound by the conclusive grounds decision but will need good reasons to prosecute someone the Home Office thinks is a modern slave. If the CPS decides to carry on, a defendant can place a conclusive grounds decision before the court to support an application to stay the proceedings as an abuse of process.

But what happens if the application to stay is refused? At trial, a defendant may raise a statutory defence under [s.45 of the Modern Slavery Act 2015](#). This is a complete defence to a relevant charge. The defendant bears an evidential burden, and the prosecution must disprove it to the criminal standard.

If a defendant tries to raise a s.45 defence at trial, what status does the Home Office's conclusive grounds decision have? Is it admissible evidence in support of the defence? The Court of Appeal has given us the answer – a resounding 'no'.

Nevertheless, as recently as December 2020, the High Court in [DPP v M \[2020\] EWHC 3422](#) held that conclusive grounds decisions were admissible, because the civil servants who drafted them were experts, giving their expert opinion. This situation lasted until 19 May 2021. The Court of Appeal in [R v Brečani \[2021\] EWCA Crim 731](#) disagreed with the High Court's reasoning in *DPP v M* and decided that conclusive grounds decisions are inadmissible evidence. The Lord Chief Justice, giving the judgement of the Court, said that the junior civil servants making the conclusive grounds decisions were fulfilling an administrative role.

They were simply assessing a person's credibility and applying written guidance to the facts before them on the papers. Whilst they may have had some training, these civil servants do not meet the criteria for expert evidence laid down in the [CrimPR at Part 19](#) and their assessment of credibility and their conclusive grounds decisions are not expert opinion evidence.

Does this mean that expert evidence of modern slavery and human trafficking can never be admitted at trial? No - such evidence remains admissible if it meets the criteria for expert opinion evidence. One example that the Court of Appeal gave was if an expert could give opinion evidence of something outside the jury's knowledge, such as context of a cultural nature.

Where does this leave us? Contrary to some commentary, this decision is not a whittling away of the s.45 defence. The Court of Appeal has reminded us that juries are still best placed to assess a witness' credibility, and that experts still need to meet a common set of criteria before their opinions become admissible.

Samuel prosecutes and defends in the most serious and complex criminal cases. Samuel's recent caseload involves murder, terrorism and high-value, international fraud. Samuel also has expertise in corruption, cybercrime and substantial experience in judicial review cases.

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Animal Welfare: Changing Times

Katherine Kelleher

Barrister

2021 is developing into a big year for Animal Welfare law. This article discusses the change in sentencing law, further developments to expect in animal welfare and a brief review of the changes that have led us here.

On 22nd April the Animal Welfare (Sentencing) Bill passed Committee Stage in the House of Lords (no amendments and therefore, no debate; the Bill was discharged straight away). It received Royal Assent on 29th April and will come into force on 29th June 2021.

It is a very short amendment – to section 32 of the Animal Welfare Act (AWA) 2006 only – but it is a giant leap in the protection of animals, recognising the gravity of the offences.

[Section 1 of The Animal Welfare \(Sentencing\) Act 2021](#) amends the AWA as follows:

Mode of trial and maximum penalty for certain animal welfare offences

- (1) Section 32 of the Animal Welfare Act 2006 (post-conviction powers: imprisonment or fine) is amended as follows.*
- (2) In subsection (1) (penalty for offence under any of sections 4, 5, 6(1) and (2), 7 and 8 of the Animal Welfare Act 2006), for the words from “on summary conviction” to the end substitute “—*
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;*
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both.”*
- (3) After subsection (4) insert—*

“(4A) In relation to an offence committed before the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020, the reference in subsection (1)(a) to 12 months is to be read as a reference to 6 months.”
- (4) In subsection (5), omit “(1)(a),”.*

Previously, the 2006 Act provided that the penalties (amongst others) were summary only; imprisonment to a maximum of 51 weeks and / or an unlimited fine. A number of offences, namely S4 (suffering), S5 (mutilation), S6 (1) & (2) (Tail docking), S7 (Administrations of poisons) and S8 (fighting) in the AWA 2006 are now either way offences with a maximum term of imprisonment of up to 5 years.

This change follows the consultation in December 2017 (Scotland 2019) on what was originally the [Animal Welfare \(Sentencing and Recognition of Sentience\) Bill](#). The original draft bill included a section recognising animals as sentient beings and requiring Ministers of the Crown to have regard to this in formulating and implementing policy (sentience is defined by the Oxford Dictionary as the ability to perceive or feel things).

Although the sentence provision was ultimately removed from this Bill, [the Government has made clear](#) it intends to recognise the sentence of animals in law.

Further, on May 12th 2021, DEFRA (Dept for Environment, Food and Rural Affairs) published its Policy Paper entitled "[Action Plan for Animal Welfare](#)". In this, it recognises the need to further protect animals from cruel treatment, both in the domestic sphere and internationally. Furthermore, it places sentence at the forefront of its policy. It deals with all aspects of animal cruelty. One of the most interesting is that it acknowledges that, even though the UK has "a strong track record in marine conservation", for example pressing for further international action against unsustainable fishing and banning the practice of shark fishing for its fin, the UK still imports shark fins. The Paper specifically states that it intends to introduce legislation to ban the import and export of detached shark fins.

Additionally, in January of this year, the RSPCA published its [10-year Strategy](#). Incorporated into that 10-year strategy is a move to transfer the prosecution function of the RSPCA to the Crown Prosecution Service (CPS). The RSPCA has, for almost 200 years, been the leader in prosecutions and is responsible for the prosecution of 83% of animal welfare offences annually. However, these are private prosecutions.

The rationale to move prosecutions to the CPS is based on differing issues, including the increase in sentencing and recent attention on private prosecutions.

Historically, [the Wooler Review](#) – commissioned by the RSPCA and published in 2014 – looked into its prosecutorial function. There were 33 recommendations made and each was achieved and implemented by the RSPCA over 18 months, including (as regards prosecutions) having a lawyer at its head, ensuring the independence of the prosecution department, and having an independent oversight panel.

Then, in November 2016, The EFRA Committee [recommended that the RSPCA cease prosecuting](#). The [Government response in Feb 2017](#) to that recommendation was that there was an issue with resources and it felt the RSPCA should not be barred from taking private prosecutions and should be given an opportunity to fully implement the Wooler review. The RSPCA had passionately argued that they were best placed to prosecute and that all procedures implemented were now (in 2017) more than adequate to ensure a separation of function and to ensure a fair and transparent process. It also argued that the CPS did not have the resources to prosecute these sensitive cases; it noted that the RSPCA success rate following prosecution is significantly higher than that of the CPS.

Now, in 2021, the decision to move the prosecution to CPS is a strategic one, rather than any question about the success of the current prosecutions department (its current head is ex-CPS with a formidable track record). Instead, it reflects the RSPCA's overall strategy to focus its resources in other areas.

It has primarily been driven by important changes in society and the changes in legislation as discussed above. Tougher sentencing law means that animal abusers are facing potentially lengthy sentences of up to five years imprisonment – that is a heavy responsibility for a charity.

The CPS is the statutory body for prosecuting and, by passing on evidence to the CPS, the RSPCA can redeploy resources to the frontline where it believes it can make the most difference to the lives of the animals it cares for.

The manner in which cases are dealt with has also changed – for example, lesser offending is handled in a diversionary manner – away from the courts and by the giving of advice and support.

Lastly, there is an increase in organised criminal gangs in areas such as puppy farms and wildlife crime. These cases can involve complex and other serious offences such as fraud or prohibited weapons, e.g. firearms. The prosecutions of these offences go beyond the remit of an animal charity.

Through this strategic change the Charity will focus on rescue and investigation. The Charity will seek statutory powers for its inspectors to reach animals more quickly and effectively. The RSPCA also plans to retain its recognition as a body which can investigate animal welfare in England and Wales, such that it will allow cases to continue to be properly investigated and the evidence passed to the CPS.

Additionally, this change will bring the operations and work of the Charity in line with SPCAs in Scotland and Ireland.

Of course, these changes are at least partly in response to [the recent review in relation to private prosecutions generally](#).

Clearly the sea change is in favour of the animal and against the organised criminals in this area. And it is for the better.

***Kate's** practice comprises criminal defence work and environmental crime. She also appears as an advocate in regulatory hearings before the Nursing and Midwifery Council. Her work as counsel and her scientific background have given her expertise in forensic pathology and medical jurisprudence.*

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Deepfakes in Court: Open Source Evidence Examined

Catherine Rose – Barrister

Tom Parker – Barrister

Youtube, Facebook, Twitter; these aren't just social platforms – they are also potential sources of evidence.

The information on these websites can be termed 'open source', which simply means publicly available. Publicly available sources are not exclusive to the internet (a library, for example, would also be an open source), but the growth of the internet has seen an explosion of information, much of which is available to anyone, anywhere.

The opportunities for criminal investigations are obvious: Google Maps can show how long it would take to get from A to B; a tweet may give us an insight into the mind of a suspect; videos posted to Youtube may capture an offence being committed from multiple angles. Organisations such as [Bellingcat](#) and [WITNESS](#) have conducted remarkably thorough and compelling investigations, based almost entirely on open source evidence.

Unsurprising, then, that open source evidence has found its way into our courts. It is being used by both prosecutors and defence lawyers more regularly and more readily, often with little objection or scrutiny.

But there are real risks. Text, images, or videos may have been manipulated. They may be entirely faked. Or, more common, they may be decontextualised and misleading.

Many of our readers will have heard of '[deepfakes](#)' – recordings whereby a person's face or voice is convincingly replaced with that of someone else. More prevalent, however, is media that is real, but deceptive: for example, the description may be wrong, dates changed, or locations confused. And anyone with a reasonable degree of computer-literacy can now edit images and videos. These are what WITNESS has coined '[shallowfakes](#)' – videos posted without context or doctored with simple editing tools.

These risks highlight the importance of ensuring this easily accessible evidence is trustworthy and verifiable, and that its admissibility is properly scrutinised by the court. This is unlikely to be a simple task, given that the admissibility of open source evidence has not been tested in our courts, and our domestic law on the admissibility of audio-visual evidence comes from the analogue age of cassettes and camcorders; how much assistance can it give us in the digital age?

Key Domestic Cases

In **Maqsood Ali [1966] 1 Q.B. 688**, the Court of Appeal considered the admissibility of an audio tape recording of the defendants confessing to murder. They concluded: *"it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible"*.

In **Robson [1972] 1 WLR 651**, the defence objected to copies of tape recordings being admitted in evidence, submitting that the originals (the "best evidence") should be used, or their absence accounted for before copies could be relied upon. Shaw J highlighted that the question of admissibility was *"rendered the more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it upon examination by technical experts."* He considered that the judge must be satisfied that a *prima facie* case of originality or authenticity has been made out *"by evidence which defines and describes the provenance and history of the recordings up to the moment of their production in court"*.

In **Kajala v Noble (1982) 75 Cr App R 149**, a copy of a video tape recording depicting a public order offence was admitted into evidence, the justices having been satisfied that it was an authentic copy of the original film and that there was a good explanation for the original not being available.

More recently, in **R v Amjad [2016] EWCA Crim 1618**, the Prosecution relied on open source evidence in proving a charge under s.58 Terrorism Act 2000. The evidence adduced was a document found online titled "Crusaders War on Iraq", authored by a man who was, according to Wikipedia, a terrorist. The document contained a list of fitness requirements that closely matched a handwritten list found at the appellant's home. The Court of Appeal upheld the trial judge's decision to admit the evidence but expressed surprise that *"the Crown made no effort to canvass expert evidence at least capable of establishing the provenance of some if not all open source material and perhaps of establishing authenticity and accuracy"* [37].

Analysis

The risks associated with physical photographs and tapes were undoubtedly lower than they are with digital open source evidence: digital evidence is easier to manipulate and harder to trace. Parties are unlikely to be able to produce the original footage at court or prove that the copy at court is a true copy of the original, and they may not know the provenance or history of the footage.

Until we have some authoritative guidance on this evidence from the higher courts, admissibility arguments are therefore likely to involve some degree of creativity in the application of our case law to a new type of evidence.

Perhaps we should also look outside our own borders for guidance: significant efforts have been made to create standards and guidelines for the use of open source evidence in international trials and investigations. Chief among these is the [Berkley Protocol on Digital Open Source Investigations](#).

Having said that, the principles to be applied are likely to remain the same and are principles that practitioners will find familiar: relevance, reliability, provenance, and authenticity.

The real difficulty for many of us will be grappling with the complexities of this new type of evidence itself, and for that, expert evidence is likely to be needed. But whether courts are willing to admit as “expert evidence” opinion in an area without a recognised body of expertise or qualification is yet another aspect of this brave new world that remains to be seen.

Catherine and Tom recently chaired a two-part webinar series on Open-Source Evidence, which featured a panel of leading experts who explored in greater depth the issues discussed in this article.

The webinars are available to watch online:

Part 1: <https://36group.co.uk/webinars/open-source-evidence-risks-and-opportunities-a-36-crime-webinar>

Part 2: <https://36group.co.uk/webinars/open-source-evidence-in-criminal-proceedings-a-36-crime-webinar>

Should you wish to be added to our mailing list for future webinars and events, please email michelle@36crime.co.uk

Catherine's practice encompasses crime, extradition, consumer and trading standards work for both the prosecution and defence. In the Crown Court she has experience beyond her call conducting jury trials across the spectrum of criminal offences. She has a particular interest in public order and protest, recently defending in cases involving violent disorder and affray.

Tom is building a busy practice in crime, extradition and trading standards, both defending and prosecuting in the Magistrates' and Crown Court. He recently completed a 6-month secondment at the Serious Fraud Office.

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Crime Bulletin

Mary Prior Q.C.

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ABUSE OF PROCESS

R v Alison [2021] EWCA Crim 324

It was not an abuse of process to try a defendant for possession of indecent images because the defendant had mental health difficulties and had threatened to commit suicide. The trial process could be adapted to fit the defendant's neuro-diverse problems.

APPEALS / WITNESS STATEMENTS

R v Warren and others [2021] EWCA Crim 413

The 14 A's challenged their convictions via a reference under section 9 of the Criminal Appeal Act 1995. They had been trade unionists who picketed during the National Building Workers strike in 1972. Their convictions were for affray, unlawful assembly and conspiracy to intimidate on one day when they were picketing building sites. They were amongst the Shrewsbury 24 who stood trial in 1973 and 1974. The points on appeal were that the police revisited witnesses who had made statements and got them to add to their original statements in respect of identification of the defendants. In several incidents the additions significantly altered the witnesses accounts. Some of the original statements were destroyed once the amendments were made. The new statements did not indicate that they were amended. The defence were advised that they had been given all the witness statements in the case, both as used and unused material. On the day that the prosecution closed its case a TV programme "Red under the bed." was broadcast. The programme consisted of a discussion on trade union conduct, communism, and violent picketing. The footage showed some of the defendants picketing. The applicants submitted that the direction of the trial Judge to ignore the programme was inadequate. Police radio traffic on the day did not suggest any major concerns as to public disorder. Reports were made after the event once employers had raised concerns with the Chief Constable. The CACD quashed the convictions. There was a real risk that the amended statements reflected knowledge of what the Crown were seeking to prove. It was not possible for the defendants to know what the original statements said or to explore differences in the accounts. The Court referred to the CPIA codes which would have prevented this occurring nowadays. By present standards what occurred was unfair to the extent that the verdicts were unsafe. The Court was not persuaded that the broadcast would have caused the convictions to be quashed.

ASSAULT

R v Atkinson [2021] EWCA Crim 153

A was admitted to hospital under s2 of the Mental Health Act 1983. She assaulted two nursing staff after having been injected with medication against her will. She indicated that she had been acting in self-defence. A psychiatric report indicated that A was fit to plead, to stand trial and to understand the difference between right and wrong. Initially A pleaded not guilty but then entered guilty pleas albeit she told the Judge when doing so that she was acting in self-defence. Defence Counsel confirmed that the guilty pleas were correct. A then obtained fresh representation and argued unsuccessfully that she should be allowed to vacate her guilty pleas. The Court had to assume that experienced trial Counsel had discharged the duty not to allow a client to plead guilty unless there was a clear acceptance of guilt and not to tell the Judge that the pleas were correct without that acceptance.

BAIL AND CUSTODY

R (DPP) v Woolwich Crown Court and Others; Lucima v Central Criminal Court and Others [2020] EWHC 3243 (Admin)

Both cases concerned the interpretation of what might amount to 'some other good and sufficient cause' for the purposes of the Prosecution of Offences Act 1985, s.22(3)(a)(iii). The Court offered guidance on what amounts to good and sufficient cause during the national pandemic. Delay attributable to the pandemic, which means that it is neither practicable nor safe to hold the trial in question within the CTL, provides a good cause for an extension. Whether it provides a sufficient cause depends on the facts of each individual case and of the circumstances of the defendant in question. The Court must consider moving the trial to another Court or vacating a trial of a defendant on bail to deal with a custody case. In some cases, a defendant should be released on bail conditions. Factors which may come into play include:

- a) Duration of the delay before trial;
- b) Any previous extension of the CTL;
- c) The age and previous convictions of the defendant;
- d) Sentence in the event of conviction if a remand in custody would mean a longer term of incarceration than the defendant would be likely to receive.
- e) Why bail was refused;
- f) Vulnerabilities of the defendant which make remand in custody particularly difficult.

In multi-handed trials, consideration should be given to separate trials. No formal evidence about the impact of the pandemic will be needed in the light of the publicly available material and the judgment. Enquiries must be made to see if another court can deal with the case sooner. Any extension of a CTL should not generally exceed 3 months. The Court must review it on a regular basis.

The maximum period of 182 days for custody time limits was increased (temporarily) to 238 days for cases sent for trial on or after 28 September 2020.

In *R. (McKenzie) v Crown Court at Leeds* [2020] EWHC 1867 (Admin), the extension of a CTL was challenged on the grounds that the Lord Chief Justice's statement on 23 March 2020, that jury trials should be suspended, could not amount to a good and sufficient cause for an extension of a CTL, and that the Protocol was unlawful, because it subverted the statutory scheme and/or fettered the discretion of a judge hearing an application for an extension of a CTL. The court rejected those challenges. It emphasised the continuing need for a judge who is considering an application to extend a CTL to assess the specific circumstances of the case being considered.

BURGLARY

R v Chipunza [2021] EWCA Crim 597

The issue for the jury was whether a hotel room being occupied for three days was a dwelling. The CACD quashed a conviction in this case on the basis that the judge had failed to assist the jury with what constituted a dwelling. This will include the frequency of the stay and length of the stay, control of the dwelling, check out and check in times, being bound by the rules of others.

CHARACTER s.101 – SUPERVENING EVENTS

R v Lanning and Camille [2021] EWCA Crim 450

The crown relied on L's previous conviction for wounding as being relevant in determining the issue as to whether this was a deliberate stabbing or whether the victim turned into the knife. They did not rely upon it to show intent to kill. It was important matter in issue for the purpose of s 101(1)(d). Relevant and probative evidence could be called to rebut the contention that it was an accident. The CACD indicated that this was permissible. The evidence was also admissible under s101(1)(g) to assist the jury in correcting a false impression. It is possible for death to be caused by an overwhelming supervening act which the defendant could not have contemplated might happen. The difference between a planned and spontaneous killing in circumstances where a co-accused knew that the accused carried a knife does not provide a distinction so far as provision of a judicial direction in relation to supervening events.

CHARACTER – SINGLE PREVIOUS CONVICTION AS PROPENSITY

R v Hamilton and others [2021] EWCA Crim 424

H and L were aged 16 and with others were convicted of killing two members of a rival gang. The judge admitted H's previous conviction aged 14 for possession of a bladed article. He received a referral order. At the murder trial H accepted that he was in a rival gang. He accepted that the CCTV showed him with the other defendants who were all armed. H could be seen on the footage with a large knife at the end of the incident. His defence was that he was handed a knife at the point that he rode away in shock having seen the incident. The Judge admitted the evidence as propensity to carry a knife and to rebut an innocent explanation. He argued that one single conviction had insufficient probity.

L appealed because prosecuting Counsel failed to comply with the questioning rules agreed in the ground rules hearing in that cross-examination by the co-accused should not be repeated by the Crown and that questioning should be in accordance with toolkit 6. The CACD dismissed the appeals. The Court could see no reason why L's conviction should be kept from the jury. The cross-examination of L was carried out with care and courtesy.

CROWN COURT JUDGES – s.66 COURTS ACT 2003

R v Gould and others [2021] EWCA Crim 447

The CACD discussed s66 powers for a judge exercising his powers as a DJ and gave guidance on the procedures to be followed. There is no power to quash an irregular order. This is a matter for the Divisional Court. Where the order is bad on its face, the Crown Court may hold that nothing has occurred which can confer any jurisdiction to deal with it. The Judge can vacate a guilty plea sparingly.

DISCLOSURE

R v Charnock [2021] EWCA Crim 100

The complainant in a rape trial refused to provide the police with her telephone. The defence had obtained by other means exchanges between her and her mother in the days leading up to the allegation included the complainant saying that she had a plan. She intended to do him over. She was biding her time. After she talked of revenge being sweet. The Court refused to allow the appeal. It indicated that either side could have obtained a witness summons with a notice to produce the telephone.

EXPERT EVIDENCE

R v Byrne and Others [2021] EWCA Crim 107

AA was called as an expert by the Crown to explain carbon credits. The defence did not call any expert evidence in rebuttal. At a subsequent trial AA was demonstrated to have no relevant qualifications and had received no training as an expert witness. AA showed a flagrant disregard for the duties of an expert witness in that trial. The jury were discharged and the Judge commented that AA should never be relied upon as an expert witness again. The Court ruled that the convictions were safe as there was substantial other evidence that the defendants knew that the schemes were fraudulent. An individual could give expert evidence without qualifications. The Crown must take all necessary steps to ensure that inappropriate expert evidence is not called in criminal trials in the future.

EXPERT EVIDENCE – LOW IQ

R v Murphy and others [2021] EWCA Crim 190

M with 24 others faced trial on conspiracy to supply controlled drugs. A psychological assessment revealed that M's IQ placed her in the lowest 1% of the population.

Special measures as to questioning were permitted. The defence asked that the jury be advised as to the defendant's limited intellectual capacity. The Judge refused indicating that the defendant had denied involvement, did not appear to be confused to him and that the issue had no relevance to the issues that the jury must determine. The CACD refused the appeal. It was accepted that a jury may be advised in rare cases where a defendant suffers from a recognised mental disorder as to medical reasons for the presentation of a defendant.

EMBARASSMENT – PROFESSIONAL

R v Daniels (2021) EWCA Crim 44

The defence team withdrew on the basis that they were professionally embarrassed when the defendant changed his instructions at trial when the defence expert altered his opinion to indicate that the bullet must have been fired at close range. The Court of Appeal did not think that Counsel should have withdrawn (despite Counsel having contacted the BSB and the Circuit leader before doing so.) Counsel was entitled to cease to act and to return instructions if there was some substantial reason for doing so such as a defendant resiling from an earlier acceptance of a significant element of the prosecution case. A full and contemporaneous record should be made of the change of instructions, signed by the accused and timed and dated.

EVIDENCE – BAD CHARACTER

R v Gregson [2020] EWCA Crim 1829

In relation to adducing evidence of bad character by one defendant against another the first issue is whether it is substantially probative of the fact in issue between the defendants in the context of the case as a whole. If there is already evidence which has the same probative effect the Judge must assess whether further evidence has substantial probative value in respect of the same issue.

R v Mohammed (2021) EWCA Crim 201

M, a Somali, who sadly suffered from mental health problems was found to have committed the acts of two indecent assaults which occurred in 2001. There were a series of such offences where a male described to be of Mediterranean appearance on a bicycle. The defendant was prosecuted for two of the offences as a result of positive identifications. At one scene a mobile phone was left behind with Turkish messages upon it and the DNA upon it was not the defendant's. The defendant had not been fit to plead or to stand trial. The CCRC tested the DNA on the phone and traced it to another male who was Turkish and who was cautioned for similar offences committed whilst he was on a bike in 2003. The CACD overturned the finding. The identification evidence was more in keeping with the Turkish male and the male's caution would have been adduced as bad character evidence.

EVIDENCE – LIES AND SILENCE

R v Wainwright [2021] EWCA Crim 122

The defendant denied being present at the scene of a murder when interviewed by the police. When shown CCTV from the scene the defendant said that the images were of his twin. In a second interview the defendant was silent. The Judge directed the jury on lies (with the explanation that the defendant gave for them and silence.) On appeal it was submitted that both directions should not have been given. The Judge was entitled to give both directions. The jury could understand the relationship between them. It is ordinarily expected that a combined direction would be given. See R v Rana (2007) EWCA Crim 2261.

EVIDENCE – HOSTILE WITNESSES

R v Muldoon (2021) EWCA Crim 381

The defendant was convicted of section 18 Offences against the Person Act 1861. At trial the victim and the victim's girlfriend refused to answer questions, remaining silent other than on preliminary matters. They were treated as hostile witnesses and the Crown put their statements to them under section 3 of the Criminal Procedure Act 1865. The trial judge ruled that their statements were admissible under s119(1)(b) of the Criminal Justice Act 2003 as evidence of their truth. The CACD held that the statements should not have been admitted under s119 as the statute required that they had given oral evidence before s119 was engaged. The Crown would have been entitled to cross-examine them as to the content of their previous statements. It was in the interests of justice that their statements were admissible under s114(1)(d) of the 2003 Act.

HARASSMENT

R v Damji [2020] EWCA Crim 1774

Section 5 (5) of the Protection from Harassment Act 1997 s.5(5) did not create an offence of strict liability. It would depend on the facts of any individual case whether criminal liability would arise from publishing material on Twitter. The author must ensure that no offence was being committed by sending the material. Section 5(5) did not state that it required actual or constructive knowledge of the conduct amounting to the breach. It expressly states that an offence was committed only if the defendant did not have a 'reasonable excuse' for committing the prohibited act. This can allow a jury to convict where a defendant should have known, namely where the lack of knowledge was not reasonable.

IDENTIFICATION EVIDENCE

R v Dickens [2020] EWCA Crim 1661

The defendant was convicted of murder -a contract killing in which the defendant acted as the getaway driver. Shortly before the shooting the victim's wife noticed a car pull up and drive off. She was not at the house when the shooting took place.

A year later, she took part in a video identification procedure where she identified the defendant as the driver of the car. The defence was alibi. The defendant and his co-accused (the shooter) said that at the time of the murder they were at work at the skip yard. The defendant provided the name of a co-worker X as an alibi witness. On appeal, the defendant relied on post-trial disclosure by the Crown of material that should have been provided at trial which suggested that others might have been the driver including evidence that X was the driver of the car. In addition the defendant submitted that the video identification procedure had been flawed and that the judge had erred in directing the jury that the identification of D and his co-defendant by two different witnesses was mutually supportive. There was also evidence after the trial which suggested that the co-defendant had been saying that the defendant was not the driver as the defendant had pulled out at the last minute. The Court rejected the appeals. It decided that if two witnesses identified two different individuals who both suggested that they were not present that could be supporting evidence for the identification of each as it was a potential unexplained 'odd coincidence' under *Turnbull* [1977] Q.B. 224. The Court rejected the argument that the jury had to first be sure that one of the identifications was correct before they considered whether it provided support for the identification by the other witness.

INDICTMENTS – ABSENCE OF D AT SENDING

R v Umerji [2021] EWCA Crim 598

U was convicted in absence of conspiracy to cheat the public revenue. U made an application to appeal on the basis that his failure to appear at the initial sending at the Magistrate's Court made the subsequent trial invalid for want of jurisdiction. U was represented at the Magistrate's Court and in the pre-trial hearings in the Crown Court. The first conviction was quashed because a prosecution witness gave an opinion as to whether U had knowingly participated in the fraud. At the retrial U did not appear and was not represented. He was convicted. He remains in the UAE. U relied on numerous authorities that a defendant must attend the hearing at which his case was sent and that s122 of the MCA 1980 did not affect that position. The CACD refused the application for leave to appeal out of time. The CACD concluded that the defendant's personal attendance was not required for transfer to the Crown Court of indictable offences. Parliament could not have intended that where a person was represented the absence of the defendant vitiated the sending.

JUDICIAL INTERVENTION

R v Mustafa [2020] EWCA Crim 1723

During examination in chief of the defendant the judge repeatedly intervened. Examination in chief had 257 questions. 116 were asked by the Judge. Cross-examination contained 327 questions. The Judge asked 110 of those. The probing questions led to the conclusion that he had unfairly entered the arena. The appeal was allowed. The Judge should act as a neutral umpire. The Judge should not enter the arena to be seen to be taking sides. Questions for clarification are acceptable but entering into the arena is not.

R v Binoku [2021] EWCA Crim 48

The Judge indicated before the jury were brought in that there was no sustainable defence. Throughout the trial it was said that he made damaging facial gestures and movements which would have influenced the jury. It was noted that Counsel had not raised all of the issues during the trial. Most of the Judge's interventions were proper but some were not. For example the Judge said when one defendant was being questioned that it looked like he was leading the pack. He did correct that when requested to do so.

JURY BIAS

R v Usman [2021] EWCA Crim 360

One of the jurors was heard to sing the Fleetwood Mac classic "Tell me lies" in a break during the cross-examination of the defendant. Whilst that amounted to contempt it did not require all 12 of the jurors to be discharged. The 11 other jurors had confirmed that they could remain true to their oath.

MANSLAUGHTER – GROSS NEGLIGENCE – CAUSATION

R v Rebelo (2021) EWCA Crim 306

R ran a business selling a weight loss tablet, dinitrophenol, which was not for human consumption. The deceased took the product. She became unable to control her use of the pills, overdosed, suffered a cardiac arrest and died. The Crown argued that the supply of the tablets constituted a gross breach of the duty of care in circumstances where there was an obvious and serious risk of death. The defence argued that the sale of the tablets did not cause the death and that R could not have foreseen that R was overdose on the tablets. The conviction was quashed on the basis that the Judge had not directed the jury properly as to causation. The Judge should have advised the jury that they must consider whether the deceased made a fully free, voluntary and informed decision which eclipsed R's gross negligence. The Court of Appeal gave a direction for the Judge to use in the re-trial. The Judge did use it. The defendant was convicted and appealed again. The application was refused. The Judge had provided a clear and full direction as to the correct legal elements.

THREATS TO KILL – PSYCHIATRIC EVIDENCE

R v Baldwin [2021] EWCA Crim 417

B, 19, pleaded guilty to threats to kill. B pointed a knife at her cohabitee's chest and said she intended to kill him and then kill herself as she had discovered that he had got another woman pregnant. Eventually B stopped and sat on the floor. A psychiatric report showed that B who had no previous convictions and who was described as vulnerable had autism, ADHD, anxiety and depression, developmental immaturity, learning disability and poor impulse control. The Judge determined that the offence crossed the custody threshold and imposed 16 months detention YOI. On appeal CACD the sentence was quashed. The sentence was wrong in principle and manifestly excessive. The mental health disorders sentencing guideline was not referred to. Insufficient weight had been given to the medical report. B had served the equivalent of 7 months imprisonment by the time of the appeal.

An immediate custodial sentence was wrong in principle. A 12 month community order with a RAR of 15 days was substituted. Exceptional circumstances (service of 7 months imprisonment) meant that a punitive order was not necessary.

RE-ARRAIGNMENT FOR A RETRIAL

R v Muner-al-Jaryan [2020] EWCA Crim 1801

The defendant had his conviction quashed at the CACD and a retrial was ordered. The defendant should have been re-arraigned by the 18th May. He was not re-arraigned and this was noted for the first time by the Judge at the PTPH in October. The CPS applied to the CACD for leave to arraign out of time. The application was refused and the defendant was discharged. The CPS had not acted with due diligence and expedition. To have overlooked the deadline was unacceptable. The Court gave guidance as to the steps which must be followed to avoid repetition of the delays which occurred.

SEXUAL ASSAULT

Attorney General's Reference (No. 1 of 2020) [2020] EWCA Crim 1665

The defendant kissed the complainant, who was a fellow passenger on a train, on the lips without her consent. He gave evidence that the kiss had not been sexual and was "a peck on the lips." The jury had to decide whether the touching was sexual. The defence submitted that it was additionally necessary for the prosecution to establish that the defendant intended his touching of the complainant to be sexual. The judge ruled that it was a necessary ingredient of the offence for the Crown to prove that the defendant had intended the touching to be sexual. D was acquitted. The Attorney General asked the Court whether it was necessary for the prosecution to prove that the offender intended his touching of that person to be sexual. The CACD held that s.3 did not bring about a significant change in the law as regards the mens rea of the offence of indecent/sexual assault. The statutory ingredients of the s.3 offence did not contain the requirement that the prosecution prove that the accused intended the touching to be sexual.

SEXUAL BEHAVIOUR – SECTION 41 YJCEA 1999

R v T [2021] EWCA Crim 318

T was convicted of rape of his wife on two occasions during the course of a marriage in which there had been consensual intercourse and attempts to conceive which interspersed the rapes. The defence case was that the complainant was conflicted as to her sexual persuasion and was claiming rape to be able to explain why she had become a lesbian or bisexual. The defence sought to adduce evidence of the complainant's lesbian/bisexual tendencies and adduce evidence from members of their church as to the complainant's sexual tendencies prior to their marriage. The trial judge refused the application on the basis that the sexual behaviour that it was sought to adduce did not fall within any of the section 41 gateways. The appeal was on the basis that internal conflicts as to sexual preferences did not amount to sexual behaviour. The Court of Appeal dismissed the application.

Sexual behaviour could include sexual orientation and preference. There was no clear evidence of motive from the complainant. It was speculative.

MANSLAUGHTER

R v Long, Bowers and Cole [2020] EWCA Crim 1729

The applicants had stolen a quad bike, which they tied to their car with a strap. When they were approached by a police vehicle responding to the theft Cole detached the strap. The applicants, with L driving, made off at speed when they saw the police get out of the police car. The officer's feet became caught in the strap. He fell onto the road and was dragged along behind the car for over a mile. L tried to detach whatever was caught in the strap by driving side to side. The police officer died. The prosecution put the case on the basis of unlawful act manslaughter, with the 'base offence' being theft or conspiracy to steal. At trial it was submitted that as theft was not an offence of violence it cannot give rise to any risk of harm and cannot provide the foundation for an offence of unlawful act manslaughter. It was submitted that where manslaughter is alleged arising from an act of driving, the jury must be directed in accordance with *Andrews* [1937] A.C. 576 and that the jury should have been directed that 'a serious risk of death' was required. The trial judge rejected this submission. The CACD rejected that position. *Andrews* concerned manslaughter by negligence. The real issue in this case was whether the nature of the conspiracy to steal rendered it a dangerous and unlawful act. Gross negligence manslaughter and unlawful act manslaughter are different offences with different elements.

INTOXICATION – INTENTION – JURY DIRECTIONS

R v Aidid [2021] EWCA Crim 581

CACD accepted that the present state of the authorities as to when it was necessary to give direction on the relevance of self-induced intoxication was likely to create uncertainty for trial judges. If the defendant's case was that there was evidence of drunkenness so that the defendant was so drunk that he did not know what he was doing which might give rise to a need for the jury to determine whether the defendant could form the necessary intent a direction was clearly necessary. The difficulty was when that that was not part of the defendant's case. If there was evidence that the defendant may not have been able to form the necessary intent due to intoxication the direction should be given whether that was the defendant's case or not. Failure to give the direction may not lead to an appeal being allowed. All would depend on the circumstances of each case.

RELEASE DATE

R v Rose [2021] EWCA Crim 155

Rose was sentenced to 9 years imprisonment. The Judge advised Rose that he would serve ½ of that sentence. This was wrong. The period that Rose was to serve was 2/3 of the sentence. The error was noted and the case returned to Court. The Judge then reduced the sentence to 7 years as the defendant would have had a legitimate expectation that he would only have to serve ½ of the original sentence. The Court of Appeal was asked by the Attorney General to consider whether the sentence was unduly lenient.

The Judge when setting sentence should ordinarily have no regard to the release date of the offender. If the Judge makes a mistake an offender should not have a legitimate expectation that the sentence will be reduced. The correct sentence should be passed once the error has been exposed unless there is a rare or exceptional reason not to do so.

SLAVERY

R v BTT [2021] EWCA Crim 4

In 2016 the Defendant was convicted of production of class B drugs. D had been arrested production of cannabis. The defendant accepted he was being paid and was free to leave the building. At trial, the prosecution stance was that there was no evidence that the defendant was trafficked. The defendant had entered the country in a lorry and had walked away from the lorry without being detained. The defendant did not claim that he was a victim of trafficking although Counsel for the defendant was concerned that the defendant might be. Later, the SCA made a conclusive grounds decision that the defendant was a victim of human trafficking from Vietnam. The defendant sought to appeal out of time on the basis of fresh evidence including subsequent witness statements and medical documents. The application was rejected. The Court were not obliged to decide if *R v M* was a correct decision. A defendant will only be permitted to advance a completely different account or defence on an appeal against conviction to that put forward at the original trial in exceptional circumstances. This approach equally applies to trafficking cases: *N and L* [2012] EWCA Crim 189 'It is only in the most exceptional case that this Court will countenance an appeal based on an account which is different from the account which the applicant put forward at trial. Although it is not possible to be prescriptive as to what will constitute "exceptional circumstances", since that is an issue which is fact specific, it seems to us that where there is a change of account, the Court will not allow an application for leave to appeal where there has been a change of account unless the account now put forward is credible and demonstrates a defence which would quite probably have succeeded. One aspect of whether the new account is credible is whether there is a cogent and convincing explanation for the change of account. The requirement that the new account gives rise to a defence which would quite probably have succeeded if advanced at trial is clear from what was said by this Court in *R v Boal* [1992] QB 591.'

SENTENCING – TOTALITY

R v Bailey and Others [2020] EWCA Crim 1719

Five defendants were sentenced for conspiracy to supply class A and B drugs. The Judge failed to mention totality. For one defendant the Judge gave a 25% discount although the sentencing document made it plain that the defendant intended to enter a guilty plea. Held – a full one third discount should have been given. See *R v Handley* [2020] EWCA Crim 361. Whatever method is used where sentences are structured concurrently or consecutively, what really matters is whether the total figure is appropriate for the sum of the offending.

MANSLAUGHTER – LOSS OF CONTROL

R v Brehmer (2021) EWCA Crim 390

The defendant strangled his lover after she told their affair to the defendant's wife. He pleaded guilty to manslaughter. The Judge was satisfied that he intended to kill but lost control for the purposes of the partial defence. A sentence of 10 and a half years was imposed (SP 14, sentence 12 and a half -reduction for plea 25%). The AG referenced the case. The CACD held that the starting point should have been 15 years. Credit was at 10%. There was a trial on murder. Sentence replaced with 13 ½ years.

COMMUNITY ORDER – PUNITIVE ELEMENT – UNPAID WORK DURING COVID-19

Gregson [2020] EWCA Crim 1529

The defendant was convicted of section 18 Offences Against the Person Act 1861. The judge imposed a community order for three years with a 30 days' rehabilitation activity requirement and a six months' alcohol treatment requirement reflecting the serious consequences for the defendant of military service. The Attorney General referred the sentence as unduly lenient. The Court determined that the sentence was not unduly lenient bearing in mind the defendant's mitigation but noted that the sentence was unlawful because it contained no punitive element as required by statute and added 200 hours' unpaid work on the basis that the sentence was unduly lenient in that regard. "Military service, even in the most difficult conditions, does not lead automatically to lenient sentencing for crimes committed later in life – much depends on the circumstances of the case." The CACD indicated that if unpaid work was not available at the time of sentencing, a Court should order that the unpaid work to be carried out within 12 months of making the order, as and when such work became available.

STREET ROBBERY – NEWTON HEARING – APPLICATION OF GUIDELINE

Hewitt [2020] EWCA Crim 1225

The first and second defendants appealed their sentences for robbery which had amounted to 45 months and 4 years 6 months. The robbery was of an intoxicated person by the two defendants. The victim was punched four times and a very expensive watch was stolen. Events were captured on CCTV. The first defendant pleaded guilty after the CCTV had been viewed (six weeks after the PTPH.) A Newton hearing took place as to whether the first defendant threatened to stab the victim and it was determined that he had not. It was argued on appeal that the offence was not category 2B as minimal force had been used and had caused minimal physical or psychological harm, that the judge should have reduced the offence category as he had found in the defendant's favour on the hearing, that the first defendant should have received a one-third reduction for his plea because there had been late disclosure of the CCTV and that the judge failed to have proper regard to the second defendant's lesser role in the offence. All arguments were rejected save for allowance of the appeal because of an arithmetical error in relation to the reduction for plea – the final sentence should have been 40.5 (rather than 45) months.

SHOPO – BREACH

R v McLoughlin [2021] EWCA Crim 165

In 2016, MCL was sentenced to ten months imprisonment for possession of indecent images and made subject of a SHOPO for ten years and was subject to the notification requirements for the same period. In 2019 he was sentenced for two breaches of the notification requirements and two breaches of the SHOPO. Three years imprisonment was ordered. The SHOPO was varied. The sentence was right in principle. The Judge could not alter the SHOPO. For an existing SHOPO to be varied the Court must receive an application to vary from the Chief Officer of Police for the area in which the defendant resides. The Judge had no power of his own motion to amend it. The Court has no power to make a fresh SHOPO. If the defendant had been convicted of a new offence, rather than for breaching the orders, the Court could have made a fresh SHOPO.

SUMMING UP

R v Uddin [2021] EWCA Crim 14

In cases where a defendant does not give evidence it is important to summarise the defendant's case to the jury because the jury does not have the advantage of hearing his case from his own mouth. The absence of such a passage is a default in the summing up.

R v Sakin and Anor [2021] EWCA Crim 411

The CACD quashed a conviction on the basis that the trial Judge had not summed up the defence case of one of the defendants. The transcript of the summing up did not include any summing up of that defendant's case and none of the three Counsel attending suggested that it had been included. Subsequently one of the Counsel appeared before the trial Judge and the matter was discussed. The trial Judge checked the recording and was able to demonstrate that the Judge had summed that defendant's case up. The matter was referred back to the Court of Appeal. The decision that they made was quashed and the conviction stood.

The Court indicated that it is a core duty of advocates to focus on the summing up at the time that it is given. This is necessary for the advocate to demonstrate they have properly discharged their duty to the court in the due administration of justice. It is the advocates' duty to raise what appears to be a material error in the summing up of law or fact at the time of the summing up.

VERDICTS – ALTERNATE COUNTS

R v Dunn and another [2021] EWCA Crim 439

D was convicted of conspiracy to breach immigration laws. He was alleged to have brought 4 Vietnamese nationals to the UK from France in a boat. Evidence of telephone messages suggested that D was involved in the planning.

At the first trial D was indicted with conspiracy to breach immigration laws and in participating in the activities of an organised crime group. The defence challenged the addition of the OCG count on the basis that the two counts overlapped and there was no rational basis upon which a jury could convict on the OCG count and not the conspiracy. The Judge left both counts to the jury as the OCG (count 2) count required a lower mens rea and also required proof of an OCG. The jury convicted the defendant on count 2, having indicated that they were unlikely to be able to reach a verdict on the conspiracy (count one), were discharged from reaching a verdict upon it but at retrial the defendant was convicted of count one. On appeal the argument was that it was an abuse to try the defendant on count 1. If count 2 was not a genuine alternative it should not have been left as a lesser offence to count 1. The CACD dismissed the appeal. There was no scope for *autrefois* convict. The offences were different as a matter of law nor was this a case that engaged the Elrington principle – a rule against prosecuting charges on an ascending scale.

[Prisoners \(Disclosure of Information About Victims\) Act 2020 \(Commencement\) Regulations 2020 SI 2020/1537](#)

The Order brought into force, on 4 January 2021, provisions of the Prisoners (Disclosure of Information About Victims) Act 2020 (which requires the Parole Board to take into account any failure by a *prisoner* serving a sentence for unlawful killing or for taking or making an indecent image of a child to *disclose information* about the *victim*).

[Rights of victims in adversarial criminal justice systems](#)

The Victims' Commissioner has published a report entitled 'The role and rights of victims of crime in adversarial criminal justice systems: Recommendations for reform in England & Wales'.

Mary prosecutes and defends in equal measure and has a reputation for being a powerful, persuasive advocate who gets results. She has particular expertise in dealing with vulnerable witnesses and defendants, and serious sexual offences. Mary runs the RASSO training programme for the Midland Circuit and is often instructed in complex, historic sexual offences.

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With thanks to the 36 Crime Update

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