CRIMINAL APPEALS BULLETIN
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Address 54 Doughty Street, London, WC1N 2LS

Follow Us X: @DoughtyStCrime

E: crime@doughtystreet.co.uk
Tel: 0207 400 9088

Farrhat Arshad KC
Head of the Doughty Street Criminal Appeals Unit

Welcome

Welcome to the March 2025 edition of the Criminal Appeals Bulletin.

In December 2024, the Crown offered no evidence against **Robert and Lee Firkins**, thus ending a saga that had lasted over 20 years, following the murders of Carol and Graham Fisher in 2003. The Court of Appeal quashed their convictions for murder in December 2023, a decision that can now be reported following the conclusion of the re-trial. I summarise the winding road the appeals took and the conclusions of the Court of Appeal in allowing the appeals.

Daniella Waddoup considers **Oni**, which deals with separate agreements and conspiracies as well as issues of racial stereotyping and adultification of young black children; Omran Belhadi looks at **ABJ and BDN**, appeals against rulings made in preparatory hearings re the interpretation of section 12(1A) of the Terrorism Act 2000 and at the meaning of "criminal property" in **Kamran**; Hayley Douglas looks at whether section 75A of the Serious Crime Act 2015 created one offence or two in the case of **Jones**; Jake Taylor considers fitness to plead in the context of elderly defendants in **Vinnell**, and Violet Smart considers **Cannon and others** – what must be proved for trespass in an offence of aggravated trespass.

In Appeals against Sentence, Maryam Mir re-visits the issue of children and sentencing in **BGI** and **CMB**, in the context of the starting-points in Schedule 21 for offences of murder, and Natalie Lucas considers **Hallam** which is a reminder of the principles that apply in sentencing protestors.

Our Crime Team is ranked # 1 in both Legal 500 and Chambers and Partners. We have a wealth of talent in Criminal Appeals. Please feel free to e-mail us or to call our crime team on 0207 400 9088 to discuss initial ideas about possible appeals. More information on our services can be found on our website.

We hope you enjoy this issue of the Bulletin.

Farrhat Arshad KC
Head of the DSC Criminal Appeals Unit

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CASE SUMMARIES AND COMMENTARY

APPEALS AGAINST CONVICTION

By Farrhat Arshad KC

R v Lee and Robert Firkins
[2023] EWCA Crim 1491 [2023] 12 WLUK 683

Although decided in December 2023, this case was subject to reporting restrictions until December 2024 when the Crown offered no evidence at the re-trial.

Summary

In 2006, the Firkins brothers were convicted after trial of the murders of Mr and Mrs Fisher in Cornwall. The key witness at trial was a cell-mate of Robert Firkins, "Z", who purported to have heard a cell confession from Robert Firkins. Such a confession was always denied by Robert Firkins. The Prosecution accepted that other evidence was supporting at best and that without Z's evidence there would be insufficient evidence to convict Robert Firkins. The jury were directed that if they accepted that Robert Firkins was guilty they could use this finding of guilt against Lee Firkins in accordance with ***R v Hayter*** **[2005] UKHL 6; [2005] 1 WLR 605**. Both men were convicted of the murders.

The appellants first appealed against conviction in 2008 and the grounds included the credibility of Z. In refusing the appeal, the CACD in 2008 held that the assessment of Z's credibility was properly left to the jury, and that other evidence provided some support for Z.

There then followed repeated applications to the CCRC to refer the matter back to the Court of Appeal. The solicitors acting for the Firkins brothers raised repeated concerns about Z's credibility and reliability. In due course, they submitted to the CCRC that a psychopathy assessment should be undertaken on Z. In 2018, the CCRC eventually agreed to commission such an assessment. The CCRC instructed a consultant forensic psychologist, Professor Craig, who carried out a paper-based psychopathy assessment of Z. The results of his assessment showed Z to meet the diagnostic criteria for psychopathic personality disorder and antisocial personality disorder. The psychopathic personality disorder was a lifelong condition, and would therefore have been operating on Z at the time when he gave evidence at the appellants' trial. Professor Craig also indicated that a common feature of persons with such a disorder is that they often lie for personal gain and do not experience the usual sense of shame or embarrassment if their fabrications are discovered: they can be "pathological liars", for whom lying is an innate part of their personality. He observed, on the basis of the material he had seen, that Z was primarily motivated by self-gain and what he could achieve in order to advance his own agenda, which called into question the extent to which he could be considered a reliable witness. The CCRC considered that the new medical evidence, had it been available at trial, would have significantly assisted the Defence and that therefore, as there was a real possibility that the convictions would not be upheld, the cases would be referred back to the Court of Appeal.

Following the referral to the Court of Appeal, the legal teams instructed further psychologists and psychiatrists on the issue of Z's psychopathy and other mental disorders. In joint reports the experts concluded *inter alia* that the severity of Z's psychopathy was extreme – in the top 1% of psychopaths. At the time of the Firkins' trial in 2005, Z would have met the criteria for severe Anti-Social Personality Disorder and statistically extreme psychopathy. In their expert opinion Z was highly likely to provide unreliable testimony as a result of his mental disorder.

Additionally, the Defence relied upon other matters about Z not disclosed previously: In 2003 he had contacted the police to report that a fellow prisoner had approached him and asked him to move items upon his release from prison. The Crown had resisted disclosure of this evidence and it was ordered to be disclosed by the Court of Appeal.

In 2013, Z was convicted of an offence of murder and two offences of attempted murder, which he committed in 2010. He had been hired as a contract killer for the sum of £1000. At his trial for those offences in 2013, Z blamed his co-defendant and asserted that he had made a cell confession to him. At the appeal of that matter he persuaded his co-defendant to give false evidence that Z had not been involved in the offences.

Further material had also emerged during the currency of the Appeal proceedings relating to Z's pursuit of reward monies, following the Firkins' convictions. Disclosure issues were being pursued throughout the appeal proceedings and relevant material was ordered to be served by the Court of Appeal.

The CACD's decision

The Court of Appeal could consider evidence of events post-trial which are relevant to the credibility of a witness [63].

As to expert evidence going to a witness' reliability, the Court referred to ***Pinfold and Mackenney* [2003] EWCA Crim 3643; [2004] 2 Cr App R 5** where Lord Woolf had stated that, "*The court has to determine whether the evidence could be considered credible evidence by the jury as to an abnormality from which the witness suffered at the time of giving evidence and which might mean that the jury would not attach the weight it otherwise would do to the witness' evidence… .. What a court must be on its guard against is any attempt to detract from the jury's task of finding for themselves what evidence to believe. The court should therefore not allow evidence to be placed before a jury which does not allege any medical abnormality as the basis for the evidence of a witness being approached with particular caution by the jury. Ultimately, it remains the jury's task to decide for themselves whether they believe a witness' testimony*."

There were limits to the expert evidence which might be given when an abnormal disorder was said to render a witness unreliable – the abnormal disorder must not only be of the type which might render a confession or evidence unreliable there must also be a very significant deviation from the norm shown [65]. In ***Pora v R* [2015] UKPC 9** the Privy Council made important observations about the role of expert evidence and the boundaries of such evidence: "*The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter which is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to given an opinion on such a matter, but this is not one of them. It appears to the Board that, in general, an expert should only be called upon to express an opinion on 'the ultimate issue' where that is necessary in order that his evidence provide substantial help to the trier of fact*."

As for cell confessions, the Privy Council in ***Benedetto v R, Labrador v R* [2003] UKHL 27, [2003] 1 WLR 1545** reflected on the inherent unreliability of evidence by a prison informer of a confession by another prisoner, and the consequent need for a trial judge to be alert to the possibility that the evidence was tainted by an improper motive and to direct the jury to be cautious before accepting the evidence [66].

The CACD agreed that the expert evidence would be admissible at trial. It showed that Z was far out of the norm and that features of his personality disorders made it necessary to exercise particular caution before accepting his evidence on any matter [72]. It was for a jury to evaluate the credibility of a witness and to decide whether his evidence was truthful, accurate and reliable [73]. A jury would not normally need expert evidence to assess aspects of human behaviour and motivation with which everyone is familiar; expert evidence therefore only has a limited role to play in relation to issues of credibility. As to the boundaries of that role, the Court adopted what was said in ***Pora*** [74].

The CACD stated, "*Thus expert psychiatric or psychological evidence is in principle admissible if it is necessary to explain that a witness suffers from a disorder or abnormality which may cause him to give untruthful and unreliable evidence. As Pinfold confirms, the disorder or abnormality must be such as to set the witness well outside the norm, and must be supported by some feature of the witness' history*." [75] However, even when those criteria are met, an expert witness could not be permitted to give evidence which amounts to telling or advising the jury whether or not they should believe a witness – the role of the expert is limited to explaining reasons, which are by their nature outside the knowledge and experience of most persons, why the witness may be more likely than others to give untruthful and unreliable evidence. It remains a jury's task to decide whether they believe a witness' testimony. Within the limits the Court had indicated, however, the expert witness may properly give his or her professional opinion as to the nature of, the reasons for, and the extent of the risk that, because of the relevant medical factors, the witness may give untruthful or unreliable evidence [76].

In the present case what remained in the joint statements of the experts provided clear evidence that this was an exceptional case: Z's psychopathy rendered him well outside the norm. He had a concern solely for his own advantage and had an ability to make false statements without compunction or embarrassment. His condition also meant that some features of any evidence he would give, such as consistency, may not be as safe a guide as to whether he was telling the truth as they would with other witnesses [78]. The Court accepted that expert evidence was necessary to assist

the jury with such matters which were likely to be outside their knowledge and experience [79].

The CACD admitted both the expert fresh evidence and the non-expert fresh evidence and gave leave to argue the grounds additional to the CCRC referral. The Court referred to the very belated disclosure of material showing that Z pursued reward money after the convictions and pressed for an increase of the reward. That went to his assertion at trial that he was not interested in the reward and to the Prosecution's assertion at trial that he had nothing to gain. In the Court's view the very late disclosure of this further material was another indication that a much fuller picture would now be before a jury than was considered by the jury at trial [82]. Whilst there was a great deal of material at trial to challenge Z's credibility, the fresh evidence in this case could not be considered "more of the same". The expert evidence identified Z as suffering from severe psychopathy with consequences for the reliability of his evidence which a jury could only properly assess with the assistance of expert evidence. It was therefore of a "different order". The convictions were unsafe; the appeals would be allowed and a retrial ordered [83].

The retrial was scheduled for January 2025. In December 2024 the Prosecution took the decision to offer no evidence. Both Robert and Lee Firkins were acquitted of both counts of murder, 19 years after they were first convicted.

Comment

The interplay between expert evidence as to a witness's *reliability* and a jury's assessment of that witness's *credibility* is a complicated one. The case-law does not always maintain a distinction between reliability and credibility. What the Court in the present case confirmed is that where there is evidence that might assist a jury with an assessment of the veracity of a witness and that evidence is outside the knowledge and experience of most people, expert evidence can be called on the issue. However, an expert must be careful not to stray too far into the territory of the jury, as the Court warns at para 76 of the judgment. An expert cannot be permitted to give evidence which amounts to telling, or advising, the jury whether or not they *should* believe a witness. This is so even though case law recognises that in some areas of expertise an expert witness may be permitted to give his or her opinion on "the ultimate question".

The case is, sadly, another example of the CCRC refusing a number of applications before eventually accepting that the real possibility test was met. Of concern in the present case, is that despite the CCRC's attention being drawn both to the fact of the murder and attempted murders committed by Z, the initial requests that an expert be instructed to assess the issue of psychopathy was refused on more than one occasion. Startlingly, in 2018, having undertaken their own review of Z's prison records, the CCRC concluded, "there was nothing to suggest that witness Z had a mental disorder". Three psychologists and two psychiatrists were to unanimously disagree with this assessment. It was only due to the persistence of solicitors Rhona Friedman and Jane Hickman in repeatedly challenging the CCRC's refusals that the CCRC eventually did agree to instruct a forensic psychologist to review this material.

Robert Firkins was represented at appeal by Sarah Elliott KC leading Farrhat Arshad KC. Sarah and Farrhat were instructed by Rhona Friedman of Commons Solicitors, who acted for Robert throughout. Lee Firkins was represented at appeal by James Wood KC and John Lyons, instructed by Steve Bird of Birds solicitors with Jane Hickman, who had acted for Lee at first instance and throughout the CCRC referrals, remaining as a consultant in the appeals proceedings. At the re-trial, Robert Firkins was represented by Sarah Elliott KC and Philippa Eastwood and Lee Firkins by James Wood KC and David Rhodes KC.

By Omran Belhadi

R v Mohsin Ali Kamran [2025] EWCA Crim 247

Summary

The appellant stood trial for an offence contrary to s. 328(1) of the Proceeds of Crime Act 2002, namely entering into an arrangement which facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.

The appellant was a jeweller. During the pandemic, he was contacted by individuals posing as an elderly lady. They contacted him by email and telephone and sought to buy gold bullion. The appellant processed those transactions and personally delivered the gold bullion to his customer. The customer was aware of the transactions and approved the bank transfers from her account to his.

However, the customer was the victim of a fraud by people posing as police officers. They asked her to purchase gold bullion under the pretext that her accounts were compromised. They would then collect the gold bullion. There was no suggestion the appellant was part of the underlying courier fraud.

Over the course of several months, the appellant sold over £1 million worth of gold bullion to the victim. He was subsequently convicted of the s. 328 POCA offence.

He appealed, with leave, on the basis that:

- The Judge erred in rejecting his submission of no case to answer. The submission was that the gold did not have the quality of "criminal property" at the time the appellant was involved in the arrangement. It only took this quality after being taken over by the predicate fraudsters.
- The Judge erred in prohibiting defence counsel from addressing the jury on whether the property was criminal at the time the arrangement was live.

The CACD decision

The Court rejected both grounds of appeal.

At §23, the Court held that the appellant's case fell squarely in § 47 of the Supreme Court authority of ***R v GH*** **[2015] UKSC 204**. Because the monies transferred from the victim's account to the appellant's were transferred as a result of the fraud they were criminal property. The arrangement then acted on that criminal property (the money transfer) was the purchase of gold bullion.

As a consequence, the trial judge's ruling on the submission of no case to answer was a ruling on a point of law (§24). The Judge was correct to prevent counsel from making a submission to the jury which would have undermined the direction of law. Trial counsel did not "transgress the judge's direction" (§11).

Comment

The ruling has important consequences for small and medium businesses, such as the appellant's. These businesses often do not have the manpower or financial resources to put in place robust anti-money laundering policies. They can often be the targets of fraudsters attempting to launder their ill-gotten gains.

The facts of this case were not straightforward. This was not a case of the bank accounts being completely taken over by a group of fraudsters. Rather, the victim was duped into making the purchases. She, however, authorised the transactions and was aware gold was to be delivered.

The ruling means that even in such circumstances, the only possible defence for potential money launderers is their lack of knowledge or suspicion that the property was the result of criminal activity. It is insufficient for them to say that they played no role in the subsequent collection of the gold and were not aware of it. The onus is therefore on the businesses to have robust anti-money laundering policies to avoid falling foul of s. 328.

By Jake Taylor

R v Vinnell

[2024] 4 WLR 100

Historic offences - fitness to plead – expert evidence – approach to assessment

Facts:

The Appellant was convicted of four counts of indecent assault, contrary to section 14 of the Sexual Offences Act 1956. All offences were committed in the 1970s when the Appellant was in his 30s and the two complainants were young children.

The Appellant was aged 86 at the time of the appeal. He suffered from vascular dementia, chronic kidney disease, a previous stroke and heart attack and was medically declared housebound (permitted to appear at trial via video link).

Prior to trial, fitness to plead was explored. Two experts instructed by the Defence determined that the Appellant was not fit to stand trial. The expert instructed by the Prosecution, Professor Grubin, initially determined that the Appellant was fit following a first consultation. At a later assessment closer to trial, Professor Grubin determined that there had been a further deterioration in the Appellant's cognitive functioning and that, on balance, the Appellant was now unfit to plead and stand trial. Professor Grubin gave evidence prior to the trial that the Appellant was unable to follow court proceedings or to provide ongoing instructions. He also found that the Appellant's ability to give an account in cross-examination was compromised because he was unable to provide any explanation for the events, beyond a repetition of his initial account.

Despite this expert evidence, the trial judge determined that the Appellant was fit to plead, reasoning that the trial would be short and that special measures—such as frequent breaks and shortened court days—would allow him to follow the proceedings. Additionally, the judge ruled that since the Appellant had provided a full account of the incident during police interviews, the trial could proceed without him giving evidence or being cross-examined.

At the conclusion of the evidence, the judge refused an application for a good character direction on the basis that the Appellant had a caution from 1995 for indecent assault on a male.

Following conviction, the Appellant was sentenced to concurrent suspended sentence orders comprising two years' imprisonment suspended for two years. He was also ordered to pay each of the two Complainants £5,000 compensation.

Grounds of Appeal:

The grounds of appeal against conviction centred on two issues:

- whether the judge's determination that the Appellant was fit to plead and stand trial was flawed, and
- whether the judge should have provided the jury with a good character direction.

The Court of Appeal Decision:

The Court of Appeal allowed the appeal, holding that the trial judge had erred in finding that the Appellant was fit to plead. The Court of Appeal reaffirmed the legal principles governing fitness to plead under *R v Pritchard* (1836) 7 Car & P 303 and reiterated in *R v M (John)* [2003] EWCA Crim 3452; [2004] MHLR 86 that all the constituent elements of fitness must be met: "(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of proceedings; (6) giving evidence in his own defence."

The Court of Appeal reiterated that a trial judge's assessment of these matters should be made in the context of the case in hand, rather than in the abstract. In the present appeal, the Court of Appeal determined that the expert evidence of Professor Grubin concerning the Appellant was not limited to the Appellant's ability to follow the course of the trial, but included the Appellant's inability to give evidence in his own defence.

The Court of Appeal found that the trial judge had failed to appreciate the significance of the Appellant's inability to be cross-examined and instead focused on the Appellant's inability to follow the course of the trial. The expert evidence was clear that this was not a case where it was merely undesirable for the Appellant to be cross examined. Rather, the expert evidence showed that, due to his lack of mental capacity, the Appellant was unfit to be cross examined. The trial judge failed to appreciate the effect of the Appellant's lack of mental capacity on his ability to give evidence in his own defence.

The Court of Appeal noted that while adjustments such as shortened court days and frequent breaks can assist defendants with cognitive impairments, they cannot compensate for a fundamental inability to participate in proceedings. The Court of Appeal emphasised that judicial discretion in fitness to plead assessments must be exercised with full regard to expert medical opinions and the overarching principles of a fair trial.

The convictions were substituted with findings under Section 6(1) of the Criminal Appeal Act 1968 that the Appellant was under a disability and had committed the acts charged. Given his deteriorating health and end-of-life care, an absolute discharge was ordered under Section 6(2) of the Criminal Appeal Act 1968.

The Court of Appeal dismissed the second ground of appeal concerning the trial judge's refusal to give a good character direction. The Court of Appeal confirmed that, as *R v Hunter (Nigel)* [2015] EWCA Crim 631; [2015] 1 WLR 5367 made clear, it is for the trial judge to decide whether to treat an appellant as a person of effective good character. The Court of Appeal saw no error in the trial judge's determination of the Appellant's character in this case.

In terms of compensation, the Court of Appeal noted that an error was made when the compensation was processed and paid to the complainants by HM Courts Service before the appeal was resolved, contrary to Section 141 of the Sentencing Act 2020. The Court held it has no jurisdiction to address a situation where a compensation order has been erroneously processed.

Comment

The decision in this case underscores the need to rigorously assess a defendant's fitness to plead and participate in criminal proceedings. It reinforces the principle that a fair trial requires not only the ability to

understand and follow proceedings, but also to engage meaningfully in one's defence, including through cross-examination in circumstances where this arises due to a lack of mental capacity.

By Daniella Waddoup

R v Oni and others
[2025] EWCA Crim 12

Conspiracy

Summary

Four appellants were convicted of conspiracy to murder; a further six were convicted of conspiracy to cause grievous bodily harm with intent. The judge found that the background to the offences lay in rival 'gang' culture, and that the conspiracies were formed in response to an earlier incident of violent disorder between rival two groups which had culminated in one young person being fatally stabbed.

There were a number of grounds of appeal, but the core complaint was that there had been a failure at trial to confront the fact that there were two separate agreements, one to kill and one to cause really serious bodily harm. The indictment, which provided for one count of conspiracy to murder and another of conspiracy to cause really serious harm, was said to be flawed and defective.

Various submissions were advanced in support of this ground. It was contended that it was not possible as a matter of law to have one conspiracy with two intentions; that the prosecution's approach was effectively alleging a conspiracy to "do bad things", which was not a conspiracy known to the law; and that the convictions for conspiracy to murder should have been for conspiracy to cause really serious bodily harm with intent, as the reality of the prosecution case was that there was an agreement to take revenge, and it had not been proved that all parties to that agreement had an intention to kill.

The CACD rejected these submissions. It had not been impermissible to try all of the defendants on the two counts.

The course of conduct for both of the separate conspiracies was the same, i.e. to pursue a course of conduct of taking violent revenge against those involved in an earlier murder. The difference was the *intention* of those involved in the separate conspiracies. On these specific facts, it was inevitable that those who were guilty of the conspiracy to murder were necessarily also guilty of the conspiracy to cause grievous bodily harm with intent (because of the gruesome reality that the course of conduct pursued by the defendants intending to kill those involved in the earlier murder would inevitably have caused those victims grievous bodily harm on the way to their deaths).

Comment

It was in direct consequence of the approach to conspiracy in this case that the judge went on to give a misdirection about the admissibility of acts and declarations of those convicted on count one as against those convicted of count two. The judge erred in treating what were in law two separate conspiracies as one, and directing the jury that "you may take into account what each of the conspirators said or did as being relevant evidence of the scope of the conspiracy, whether it was to kill or to intentionally cause grievous bodily harm".

Although a misdirection, it did not render the convictions unsafe. The jury could not have used the evidence of the intentions of those who intended to kill against the other conspirators – otherwise all of the defendants would have been convicted of conspiracy to murder.

'Gang' evidence

Summary

The judge had been entitled to admit photographs of two of the defendants holding cash by their ear. The issue of whether this was an imitation of celebrity culture or an indication of gang membership was fairly left to the jury. It had been accompanied by careful judicial directions emphasising that evidence of gang membership, affiliation and drug dealing, or a generalised interest in drill music, could not "of itself prove the case against the defendants or any of them", and that the jury should not convict any defendant "largely upon the basis of this background evidence".

Comment

The CACD rejected the submission that the admission of, and reliance on, these photographs was an example of racial stereotyping and adultification of young back children. The court was similarly unpersuaded that use of the word "gang" should be avoided altogether, although it did underline how important it is in any case "to ensure that separate individuals are not unfairly treated as one entity, and that groups or

friends or individuals sharing an interest in music are not unfairly labelled as gangs".

In cases of this nature, the battleground is likely to be fairly narrow – for example, around whether there is reliable evidence that the action relied on to show gang membership is evidence of the way that the relevant gang operated. Here, too, the court accepted that it was vital "to avoid the unfair stereotyping of individuals, based on their race, as members of gangs". Turning this guidance into a practical reality remains a challenge.

Garry Green KC and Yvonne Kramo appeared for the appellant Oni. Ben Newton KC appeared for the appellant Ojo. Dr Tunde Okewale OBE intervened by written submissions on behalf of Justice.

By Omran Belhadi

R v ABJ and BDN
[2025] 1 Cr. App. R. 17; [2024] EWCA Crim 1597

Summary

The appeal jointly dealt with two trials for offences contrary to s. 12(1A) of the Terrorism Act 2000, namely recklessly expressing an opinion or belief that is supportive of a proscribed organisation.

At a preparatory hearing for ABJ, the Crown Court judge ruled that:

- s. 12(1A) of the Terrorism Act 2000 does not require proof that the defendant was aware the organisation in question was proscribed;
- proof of the ingredients of the offence is itself sufficient to ensure that a conviction is a proportionate interference with a defendant's rights under Article 10 of the European Convention on Human Rights.

At a separate preparatory hearing for BDN, a different Crown Court judge also ruled that proof of the ingredients of the offence is sufficient to ensure that a conviction is a proportionate interference.

The defendants appealed against those rulings—with leave—pursuant to s. 35(1) of the Criminal Procedure and Investigations Act 1996. This permits interlocutory appeals from preparatory hearings.

The CACD's decision

The Court noted that the impetus for the introduction of s. 12 (1A) was the decision in ***R v Anjem Choudary* [2016] EWCA Crim 61** (§12). In ***Choudary***, the Court held that the offence under s. 12(1) did not prohibit the expression of views or opinions supportive of a proscribed organisation.

In the absence of previous appellate authority on s. 12(1A) (§16), the Court embarked on a review of case-law related to the s. 12 (1)(a) offence, namely inviting support for a proscribed organisation. The Court held that for offences under s. 12(1)(a):

- There was no requirement of knowledge that the organisation was proscribed; and
- The ingredients of the offence struck the proportionality balance for the purposes of Article 10 ECHR.

With regards to the submission that the s. 12(1A) offence requires proof of knowledge the organisation is proscribed, the Court rejected the argument. The Court held the presumption of *mens rea* in relation to knowledge was rebutted (§34). Proscription is a matter of law, not fact. It occurs as a result of statutory instruments. Proscription is simple to discover because it is accessible on the Government website. The Court held:

> "It would undermine the utility of the provision if proof of knowledge of proscription were required, since this is easily denied."

With regards to the proportionality argument the Court focussed on the differences between s. 12(1)(a)—already found to be compatible—and s. 12(1A) to assess whether the latter offence was compatible with Article 10 ECHR. It held:

- The offence prohibits the expression of an opinion or belief that is "supportive of the 'organisation'. To express an opinion or belief that is shared by the organisation is not the same thing as to express an opinion or belief that is supportive of the organisation" (§53). The Court held that the requirement of recklessness as to the effects of the expression meant there was no prohibition on holding or merely expressing a belief supportive of a proscribed organisation (§54).
- The Court should pay appropriate respect to Parliament, which has enacted the offence in primary legislation (§55).

- The new offence involves a significantly more culpable state of mind than that required by s. 13 of the Terrorism Act (a strict liability offence). The latter was found to be compatible with Article 10 ECHR in ***PWR v DPP*** **[2022] UKSC 2** (§56).
- There is a strong public interest in countering terrorism, "including in preventing the spread of terrorist ideology though propaganda or public encouragements" (§57).

The Court dismissed the appeal.

Comment

This is the first case addressing the elements of the offence under s. 12(1A) in detail. In light of the ongoing situation in Palestine, it is likely to be an offence that will be charged with growing frequency.

The Court in this case emphasised that expressing an opinion shared by the organisation is distinct from expressing an opinion supportive of it. The Court in ***Choudary*** defined the term "support" in an expansive way. That definition will now apply to the term "supportive" under s. 12(1A). The Court at §46 held that intellectual support was valuable to a terrorist organisation.

Given the breadth of the definition of support, it remains to be seen whether the Court's caveat will have any practical effect. There is a danger that prosecuting authorities will fail to pay sufficient regard to the Court's distinction between committing the offence under s. 12(1A) and expressing an opinion shared by a proscribed organisation. It is a fine line which risks being crossed in charging decisions.

This will have a chilling effect on free speech. Activists are likely to self-censor legitimate messaging (such as an end to the occupation of Palestinian territories) on the basis that a proscribed organisation also shares those messages. The added element of *mens rea* provides little comfort. It leaves activists at the mercy of prosecuting authorities taking a view about a defendant's state of mind and the broader circumstances of publishing. This may mean that activists take a cautious approach to what they express and publish.

By Hayley Douglas

R v Jones (Anthony)[2025] EWCA Crim 195

Summary

Section 75A of the Serious Crime Act 2015 sets out the elements of the offence of "strangulation or suffocation" and provides that an offence is committed if:

(a) A intentionally strangles another person (B), or

(b) A does any other act to B that affects B's ability to breathe, and constitutes battery of B.

The issue of law raised in this appeal against conviction was whether section 75A created one offence, or two.

The Appellant was charged with a number of offences against two women on three different occasions in 2023. Counts 2 and 6 were pleaded as "intentional strangulation contrary to section 75A(1)(a)" and the particulars of offence alleged that on the relevant date the Appellant had "intentionally strangled" the complainant concerned. The Appellant denied any act of strangulation.

At the Appellant's trial, the judge directed the jury on the section 75A offence, a direction which was accepted by both parties. However, during their deliberation the jury sent a note which asked whether force applied to the chest which affects the ability to breathe fell within the strangulation definition. After discussion with counsel, the judge gave a further direction emphasising that the single question the jury must consider was whether they were sure the defendant intentionally applied any force to the complainant which affected their ability to breathe.
With leave of the Single Judge, the Appellant put forward a single ground of appeal, that the Judge failed to properly direct the jury on the elements of strangulation under section 75A(1)(a), by including in her directions elements that fall under section 75A(1)(b), namely suffocation, which was not charged. The Appellant argued that section 75A created not one offence but two, that the Appellant was only charged with strangulation, and that accordingly "any force to the complainant which affected their ability to breathe" could not be a basis for conviction.

The Court of Appeal (Holroyde LJ, Bennathan J and Sir Nigel Davis) held that Section 75A created a **single** offence of non-fatal strangulation or suffocation, which can be committed in either of the ways specified in subsections 1(a) and 1(b). The Court

considered that if Parliament had wanted to create two distinct offences, it could have easily done so and drew support from the Explanatory Notes to the new provision which referred to a single offence. The Court of Appeal had previously confirmed in *Hughes* [2024] EWCA Crim 593 that there are two ways in which the offence under section 75A may be committed, and there was no basis to depart from that decision.

The Court concluded that although the prosecution case was clearly based on intentional strangulation, the judge was nonetheless correct in law to rule that if the jury were sure that the Appellant had committed some other act against a complainant which amounted to a battery and affected her ability to breathe, then the offence charged would be proved. This was not one of those exceptional cases (discussed in *Chilvers* [2021] EWCA Crim 1311) where it was necessary to give a direction that the jury must agree on the precise nature of the act of strangulation or suffocation.

Accordingly, the Court found that while the judge's directions might be improved, they were not wrong in law. The Appellant's convictions on counts 2 and 6 were safe and the appeal was dismissed.

APPEAL BY WAY OF CASE STATED (DIVISIONAL COURT)

By Violet Smart

DPP v Cannon and others
[2025] EWHC 520 (Admin)

Aggravated trespass – protest law – meaning of trespass – submissions of no case

The Director of Public Prosecutions appealed by way of case stated the decision of District Judge Brereton to accede to a Defence submission of no case to answer (Trial 1) and her acquittal after trial (Trial 2) of defendants charged with aggravated trespass, the alleged trespasses having occurred in the context of climate protests, on land where Müller Dairies operated, by Animal Rebellion (now known as Animal Rising). The separate but linked appeals were dealt with jointly, with the DPP arguing that the judge had "erred in law and reasoning and/or arrived at a conclusion of fact which, on the evidence was irrational" (paragraph 4).

Trial 1

The respondents in Trial 1 (only one of whom was represented) did not advance a positive case, instead putting the prosecution to proof. It was agreed that they had entered land on which Müller operated and that they (save for one) climbed onto milk tankers. The prosecution called a single live witness at trial: an employee of Müller, Mr Moule, who had been present on the day and seen the respondents. He was the most senior employee on site that day, though he was not part of Müller's legal team, nor did he purport to have any special knowledge about the land. He gave evidence that the respondents did not have permission to be on the land, which was owned by Müller. The prosecution also relied on admissions (para 11): (i) the respondents had answered no comment in interview; (ii) all but one had climbed on top of milk tankers on site; (iii) one of the respondents was stopped by police walking towards the tankers in possession of a ladder; (iv) multiple smoke flares and containers of superglue were seized from the respondents and found on the tankers where they had been. There were also five photographs of the respondents atop the milk tankers.

At the close of the prosecution case, counsel for the represented respondent made a submission of no case to answer on the basis that it had not been established that the land was 'private property' and as such the trespass element of the offences had not been proven. It was further submitted that Mr Moule, the witness, was not in a position to know the legal status of the land.

The prosecution submitted that there was no need to show the land was private property; instead it had to show that the respondents were there without permission, as Mr Moule had said (paragraph 13).

The judge's findings in relation to the evidence of trespass, addressing the half-time submission, were as follows: there had been no evidence concerning land ownership, the boundaries of the land, the precise location of the alleged trespass, or any public rights of way and she could not speculate about any such rights. She had also not been given any explanation as to the witness' knowledge of the ownership of the land or who was entitled to grant permission to be on the land and as such, per Galbraith, no reasonable tribunal could convict upon the evidence she had received, and the case should be dismissed.

The question for the court was in the following terms: "*on the basis of the evidence I received, was I entitled as a matter of law to accede to the Defence submission of no case to answer?"* (paragraph 16).

Trial 2

The respondents in trial 2, none of whom were legally represented, faced the same charge and the prosecution was again put to proof in relation to the elements of the offence. The facts similarly related to the respondents having entered land on which Müller operated and (save for one) climbing onto milk tankers. Each of the respondents was arrested in possession of one or more items; superglue, a harness, wire cutters, chains, carabiners. They accepted that they had climbed a fence in order to gain access to the land but raised the question of where the boundary to the premises actually was. The same witness, Mr Moule, attended trial 2, having again been the most senior person on the premises on the day in question. He gave evidence as to the fence surrounding the land, the access routes and the fact he had not given permission for the respondents to be on the premises. No evidence was provided of the boundary to the premises or who was entitled to give permission to access the land.

Each of the respondents gave evidence. They said, variously, that there had been no evidence in relation to the boundaries of the premises or rights of way; no one had asked them to leave the land; climbing the fence was not suggestive of intent to trespass, merely the best point of entry for the protest; they had been unaware of where exactly the main entrance was or how it was accessed; no permission had been sought before accessing the grounds.

In reaching her verdict, the judge referred to the case of *DPP v Bailey [2023] K.B. 392*. She found that the prosecution had to prove: (1) trespass on land; (2) whether the persons were lawfully on the land and engaged in lawful activity; (3) the doing of some act by the trespassers; (4) the intention to intimidate, obstruct or disrupt. She found that, although the last three elements had been proven, the first had not. In so coming to this conclusion, she commented again on the lack of evidence in relation to land ownership, third party rights of way and the boundaries of the land (paragraph 34).

The question posed for the Divisional Court was: "*on the basis of the evidence I received, was I right in law to find that the [prosecution] had not proved the element of trespass on land beyond reasonable doubt?*".

In relation to trial 1, the DPP submitted that the judge had erred in finding that the prosecution evidence was insufficient in law to prove trespass, relying on the principle that trespass is concerned with possession rather than ownership of land. It was further submitted that any reasonable tribunal would have concluded that the evidence was sufficient to demonstrate the respondents did not have permission to enter the land. Similar submissions were made in respect of trial 2.

In response, the respondents argued that the judge had not erred in noting the lack of evidence as to ownership. Their joint position was that the "*real issue in each trial was an evidential matter and not an issue of law…[had the] prosecution adduced sufficient evidence to reach the required threshold and establish a sufficiently strong prima facie case (Trial 1) or so that the judge could be sure (trial 2) that the respondents were trespassing*" (para 46). Further, that the distinction between owner and possessor was without difference on the facts of the present cases.

The Divisional Court concluded that the judge had indeed erred in relation to both trials, as set out in Ground 1 and Ground 2. It was held that trespass, as a civil law concept, is concerned not with ownership but with possession. As such, the prosecution need not establish legal ownership of land in order to establish trespass. What they must show, rather, is that the accused was present on land with no lawful authority. In both cases, they had done so through the evidence of Mr Moule, namely that Müller occupied the land and that Müller had not given permission for the parties to enter and protest. It had been wrong to conclude that only the landowner could deal with permission to be on the land. The appeal therefore succeeded on Ground 1 in relation to Trial 1.

Ground 2 also succeeded in relation to Trial 1. The court found that the prosecution had adduced sufficient evidence to discharge the evidential burden and that all reasonable tribunals would have rejected as realistic possibilities that (a) Müller had consented to the respondents occupying the land and (b) that there may have been legal authority to enter the land. This was because there had been evidence given by the witness as to the lack of permission, no explanation had been offered or ventured by the respondents to the contrary, the photographs showed the land to be enclosed by high fences (it was not the kind of land where easements or other rights of way were to be expected), and the respondents had entered in order to disrupt the activities of Müller and so it could be logically deduced that permission had not been given. The same was true in respect of Trial 2.

Both of the judge's questions in the case stated were therefore answered in the negative. The Divisional Court, in reaching its conclusion, commented "*the*

judge was not given the assistance by the prosecution as to the law of trespass which should have been provided" (para 68). The cases were remitted back to the Magistrates' court: Trial 1, for a re-trial before a different tribunal and Trial 2 for the register to be amended to substitute the verdicts of guilty for not-guilty, given the judge had found proven all other elements of the offence at the time of trial.

APPEALS AGAINST SENTENCE

By Maryam Mir

R v BGI and CMB
[2024] EWCA Crim 1591

Shortly after 8.15 p.m. on 13 November 2023 two 12-year-old boys, BGI and CMB, were together in a park in the Wolverhampton area. BGI had a large machete with a blade approximately 15 inches long. The victim, a 19-year-old male who was on a bench in the park with a friend, was stabbed in the back with the machete. He also sustained a serious wound to the head. He was dead within a very short time of the attack. BGI took the machete home. It had blood on it. He used bleach to clean the blade and hid it under his bed. It was found by police when he was arrested two days later. Both defendants were charged jointly with murder and possession of a bladed article.

BGI pleaded guilty to that latter offence at an earlier stage of the proceedings. At their trial before Mrs Justice Tipples, each offender blamed the other for inflicting the fatal wound. The independent evidence did not point to one offender rather than the other being responsible. The jury convicted both offenders. They were satisfied that the offenders were acting jointly. CMB also was convicted of having a bladed article.

At sentence, detailed reports were submitted outlining BGI's history of trauma, exploitation and diagnosis of ADHD affecting maturity. CMB had a troubling and unsettled childhood, albeit less severe than BGI's. The judge imposed a minimum term of 8 years 6 months (less 315 days spent on remand) for each boy. No separate penalty was imposed in relation to having a bladed article.

HM Solicitor General applied for leave to refer the sentences as unduly lenient pursuant to section 36 of the Criminal Justice Act 1988. The application was in respect of the minimum term in the case of each offender.

The core submission was, at the outset of determining the appropriate minimum term in a case of murder, the sentencing court must identify the appropriate starting point only by reference to the relevant part of Schedule 21 of the Sentencing Code. In the case of offenders under the age of 18, the starting points are in the table set out at paragraph 5A of the Schedule. Where an offender is 14 or under and the offence would fall within paragraph 4(1) of the Schedule if the offender had been an adult, the starting point is 13 years. Once the starting point is identified, there is no scope to modify it by reference to the offender's age, maturity or role in the offence. It was submitted that the judge had failed to take account of aggravating features (offence committed in public, attempts to conceal) and should have uplifted the sentence first before considering mitigation. It was further submitted that the judge improperly considered lack of premeditation as a mitigating factor (because the knife had been taken to the scene). A downward adjustment of 4 ½ years, it was submitted, was excessive. It was not a sentence reasonably open to the judge : *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41.

In reply, trial defence counsel submitted the judge's reasoning was well founded and appropriate in all the circumstances.

The Court, considering SK [2022] EWCA Crim 1421; Peters [2005] 2 Cr App R (S) 101; Ratcliffe [2024] EWCA Crim 1498 and especially *Kamarra-Jarra* [2024] EWCA Crim 198, reaffirmed the Lady Chief Justice's comments that "the starting points in paragraphs 2 to 6 of Schedule 21 are not to be applied mechanistically, but in a flexible way so as to achieve a just result."
The court was not persuaded that Ratcliffe which postdated *Peters* and *Kamarra-Jarra* made any difference; *Peters* remains the foundation of the court's approach to starting points when dealing with children and young people.

At para 25 of the judgment:

> *It would be contrary to good sense and experience of how children change between the ages of 10 and 14 to apply a starting point of 13 years to every child from the age of criminal responsibility up to those about to*

> *reach their 15th birthday. It may be that it is not a debate worth having given that the huge differences between a 10 year old and a 14 year old might be accommodated by dealing with them via mitigating factors. However, as a matter of principle and having regard to the way in which starting points in Schedule 21 are to be applied, we conclude that the starting point for offenders aged 14 and under must not be applied mechanistically.*

The court was not persuaded by the submission that the starting point for the minimum term for an offender who was only just 12 at the date of the offence will be that identified in paragraph 5A for an offender aged 14 and under:

> *Rather, it must be adjusted to reflect the age of the offender, namely barely 2 years over the age of criminal responsibility. In this case we consider that the judge would have been entitled to take a starting point of 11 years.*

In allowing the AG's appeal to a limited extent, the Court found that there was an uplift required for aggravating features for BGI. The outcome ought to have been a minimum term in respect of the first offender of 10 years less time on remand. That would have reflected the balance of aggravating and mitigating factors. There was no such uplift required for CMB, but his minimum term could not be reduced to the same extent as BGI by reference to lack of maturity and the other matters set out in the reports. His minimum term was also increased to 10 years, less time spent on remand.

The Court emphasised that a mechanistic application of starting points within Schedule 5 was inappropriate; an individualistic approach was essential. That was the approach mandated by the Children guideline which the judge was required to follow.

Maryam was junior counsel in *ZA* [2023] EWCA Crim 596 led by Isabella Forshall KC. In that case, the CA reminded all practitioners that mechanistic application of guidelines and treating children like "mini-adults" is inappropriate; an individualistic approach must be taken. Whilst the Court increased the minimum term in this particular case, that principle still stands.

By Natalie Lucas

R v Hallam & Ors
[2025] EWCA Crim 199

Summary

This appeal addressed the approach to sentencing in non-violent protest cases with specific reference to the principles set out in ***R v Trowland*** **[2023] EWCA Crim 919**.

The case concerned 16 conjoined appeals of immediate custodial sentences for offences committed in connection with four different Just Stop Oil climate-related protests.

- The "Thurrock Tunnels Case" in which four of the appellants were convicted of conspiracy to cause public nuisance contrary to s. 1(1) Criminal Law Act 1977 and received sentences between 15 and 36 months' imprisonment. These appeals were dismissed by the CACD.
- The "Sunflowers Case" in which two appellants were convicted of criminal damage contrary to s. 1(1) Criminal Damage Act 1971 and sentenced to 20 and 24 months' imprisonment respectively. These appeals were dismissed by the CACD.
- The "M25 Conspiracy Case" in which five of the appellants were convicted of conspiracy to cause public nuisance contrary to s. 1(1) Criminal Law Act 1977 and were sentenced to four and five years of imprisonment. The CACD quashed these sentences in favour of a reduction in sentence.
- The "M25 Gantry Climbers Case" in which five appellants plead guilty to causing public nuisance contrary to s. 78(1) Police, Crime, Sentencing and Courts Act 2022 and were sentenced to between 20 and 24 months' imprisonment. One sentence was quashed in favour of a reduction in sentence with the other four appeals dismissed by the CACD.

Two issues of general importance were addressed by the court: (i) the approach to the reduction of sentences when a defendant's conscientious motivation was identified as a relevant factor; (ii) the applicability and scope of protection afforded by Articles 10 and 11 ECHR in circumstances where a case also involves criminal trespass.

Decision

Conscientious Motivation

The Appellants argued that the sentencing judge in each case erred in declining to make any reduction in sentence to reflect their conscientious motivation. In acknowledging the Appellant's conscientious motivation was a relevant factor to sentencing, the Court reiterated that it should most logically be factored into the assessment of culpability. Notwithstanding any conscientious motivation being found and considered relevant, the Court noted that a defendant's culpability may still be considered high.

The Court also confirmed that there was no parallel to be drawn with the quantifiable approach to determining discounts for guilty pleas. The Court concluded that a sentencing judge is not obliged to specify a specific amount by which they have reduced a custodial term to reflect a conscientious motivation.

Applicability of Article 10 and Article 11 ECHR

The Respondent opposed the Appellant's argument that the sentences constituted a disproportionate interference with Article 10 and Article 11 ECHR. The Respondent's case was that Article 10 and Article 11 were not engaged in a protest case where the protesters were trespassing. This contention had not been advanced in *Trowland*.

Significantly, the Court confirmed that Article 10 and Article 11 are capable of being engaged even in cases of alleged criminal trespass. However, such protection may be significantly weakened in cases where a defendant's expression of opinion involved criminal trespass.

The Appellants made further submissions on the applicability of the Aarhus Convention on Access to Information Public Participation in Decision-Making and Access to Justice in Environmental Matters as something to be considered by a judge in determining an appropriate sentence in such cases. The Court concluded that, on the basis that Aarhus Convention is not incorporated into English law, it would not have been appropriate for the sentencing judge to have regard to it in sentencing.

In obiter remarks, the Court went on to agree with the Respondent's submission that the Aarhus Convention did not apply to the Appellant's activities. The Court's agreement with the Respondent was on the basis that the Appellants had been penalised for committing criminal offences and not in "exercising their rights in conformity with the provisions" of the Convention.

Comment

The decision clarifies the application of the *Trowland* principles in the sentencing of climate activists involved in non-violent protests and will be of particular use to practitioners preparing defendants for sentence in similar circumstances.

Of particular significance is the Court's finding that criminal trespass does not necessarily remove a defendant from the scope and protection of Article 10 and 11 in a protest case. However, defendants in such cases should be aware that the protection offered by these two articles will be significantly weakened where the case involves criminal trespass. This may, in turn, impact on the sentence which is passed.

The Court's confirmation that conscientious motivation is a relevant factor in sentencing, specifically when determining culpability, should be borne in mind when approaching sentencing. However, in factoring in any conscientious motivation, a sentencing judge is not obliged to specify or quantify the reduction to sentence in recognition of this factors. This is to be distinguished from the approach in factoring in the reduction of sentence stemming from a guilty plea.

CONTRIBUTORS TO THE MARCH EDITION

Farrhat Arshad KC defends in serious criminal cases and is an experienced appellate barrister. Farrhat is recommended in Legal 500, 2021 as: "the consummate appeals barrister, with an instinctive feel for the shape of an appeal. She is a leader in this field." Her appellate practice includes both conviction and sentence appeals to the Court of Appeal, the Privy Council and applications to the Criminal Cases Review Commission.

Omran Belhadi is a criminal defence specialist. He is regularly instructed to represent those accused of serious criminal offences including firearms and complex drugs offences. He has a growing appellate practice.

Hayley Douglas specialises in criminal defence, crime-related public law, prison law, and civil actions against the police. She is regularly instructed to advise on fresh appeals against conviction and sentence and to present appeals in the Court of Appeal. She is also experienced in making applications to the Criminal Cases Review Commission.

Natalie Lucas is a general pupil currently completing her crime seat under the supervision of Jake Taylor. Previously, Natalie worked as a legal officer at REDRESS specialising in strategic litigation against torture particularly in cases of dissent and protest. In that role she also led policy initiatives on the UK's use of targeted sanctions and asset recovery in human rights and anti-corruption contexts. Natalie is qualified as a solicitor and spent time practising international arbitration and commercial litigation at an international law firm prior to commencing pupillage."

Maryam Mir has experience in a wide range of criminal offences including homicide, firearms, terrorism and large scale fraud She has frequently been instructed in cases involving young people charged with homicide.

Violet Smart has a broad criminal practice across the spectrum of offences and is particularly experienced in representing youths in serious cases. In her appeal work she has a particular interest in challenging indeterminate sentences.

Jake Taylor specialises in domestic and international criminal law and advises and represents those accused of the most serious offences.

Daniella Waddoup has a keen interest in criminal appeals, particularly those involving appellants with mental disorder and children and young people. Daniella acted as judicial assistant to Lord Mance JSC and is regularly instructed in appeals to the Privy Council by the Death Penalty Project.