Law Commission
Reforming the law

Criminal Appeals: Issues Paper

July 2023

This publication is available at https://www.lawcom.gov.uk/project/criminal-appeals/.

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines KC. The Chief Executives are Joanna Otterburn and Stephanie Hack.

Topic of this consultation: We are conducting a review the law governing appeals in criminal cases, including appeals against conviction and sentence, with a view to ensuring that courts have powers that enable the effective, efficient and appropriate resolution of appeals.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 27 July 2023 to 31 October 2023.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/criminal-appeals. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:
By email to criminal.appeals@lawcommission.gov.uk
OR
By post to Criminal Appeals Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The issues paper is available on our website at https://www.lawcom.gov.uk/project/criminal-appeals/.

We are committed to providing accessible publications. If you require this issues paper to be made available in a different format please email criminal.appeals@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our provisional proposals for reform, which we will publish in a consultation paper.

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Chapter 1: Introduction

Introduction

1.1 A person who has been convicted of a criminal offence can seek to challenge either their conviction or sentence by way of an appeal. Appeals serve a vital corrective function for individuals, whether this is to correct a miscarriage of justice (for instance, the conviction of someone who is factually innocent) or to correct a legal error (for instance, imposing a harsher sentence than is legally permissible). They also serve important public functions, in ensuring that the criminal law is interpreted and applied consistently and predictably, and in developing the common law.

1.2 However, there can be a tension between the principle of justice – in the criminal context this is particularly concerned with convicting the guilty and acquitting the innocent – and the principle of finality – that limits must be placed on the ability of parties to legal proceedings to re-open disputes.[1]

1.3 The law mediates this tension by imposing lime limits and leave (permission) requirements on the right to appeal, with flexibility to allow an appeal out of time.[2] In addition, a person is only entitled to a single appeal: any further appeal can only be brought by way of a referral by the Criminal Cases Review Commission ("CCRC"), which will only refer a case to the appellate court if there is a "real possibility" that the conviction, verdict, finding or sentence would not be upheld on appeal.

1.4 Criminal justice, perhaps to a greater extent than the civil courts, tends to favour justice over finality.[3] In the 1933 case of *Behari Lal v King Emperor*,[4] Lord Atkin commented:

> It would be remarkable indeed, if what may be a "scandal and perversion of justice" may be prevented during the trial, but after it has taken effect the Courts are powerless to intervene. Finality is a good thing, but justice is better.

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1 *The Ampthill Peerage* [1977] AC 547.

2 In *The Ampthill Peerage*, Lord Wilberforce said, at [569] (albeit in a civil context):

> For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

3 Lord Dyson has made the point that the criminal law in England and Wales also demonstrates a preference for justice over finality in having no time limits on the prosecution of serious offences: Lord Dyson, "Time to call it a day: some reflections on finality and the law", 14 October 2011.

4 [1933] UKPC 60. This was an appeal to the Privy Council from the High Court of Judicature at Patna. The appellants had been convicted of murder and rioting. Six were sentenced to death; one to transportation for life. The appeal was brought successfully on the ground that one of the jurors did not understand English, in which counsels' addresses and some of the evidence had been given.

Background to this project

1.5 In July 2022, the Law Commission was asked to conduct a review of the law relating to criminal appeals. This reference followed a number of calls from respected bodies for a review of various aspects of the law:

(1) The "real possibility" test applied by the CCRC: In 2015, the House of Commons Justice Select Committee published a report on the CCRC.[5] The report considered calls for a change in the "real possibility" test which the CCRC is obliged to use when considering whether to refer a case to the Court of Appeal (or, for cases tried summarily, the Crown Court). This requires the CCRC to conclude that there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made … because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it".[6]

In 2021, the "Westminster Commission", set up by the All-Party Parliamentary Group on Miscarriages of Justice, conducted a further inquiry into the CCRC.[7] The Commission recommended that the "real possibility" test be replaced with a "non-predictive" test. Noting that "[a]ny change would have to be undertaken in light of a change to the Court of Appeal's grounds for allowing appeals", it recommended that the Law Commission should review the Court of Appeal's grounds for allowing appeals.

In their response to the Westminster Commission, the CCRC supported a review by the Law Commission of the referral test.[8]

(2) The "safety" test and "substantial injustice" tests applied by the Court of Appeal Criminal Division ("CACD"): In their 2015 report, the Justice Select Committee also recommended that the Law Commission should review the Court of Appeal's grounds for allowing an appeal against conviction. The Westminster Commission made a similar recommendation in 2021. The Westminster Commission also recommended that the Law Commission should review the "substantial injustice" test applied by the Court of Appeal when considering whether to grant leave for an appeal brought out-of-time on the basis of a change in the common law.

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5 Criminal Cases Review Commission, Report of the House of Commons Justice Committee (2014-15) HC 850 ("Justice Committee CCRC Report").

6 Criminal Appeal Act 1995, s 13. "Verdict" refers to a verdict of not guilty by reason of insanity (s 9(5)) and "finding" to a finding of fact that the person did the act of commission charged, where they were found unfit to plead (s 9(6)). In the case of an appeal against sentence the second part of the test refers to "an argument on a point of law, or information, not so raised". Section 13(2) provides that nothing in this test "shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it".

7 Westminster Commission on Miscarriages of Justice, "In the Interests of Justice: An inquiry into the Criminal Cases Review Commission" (2021) ("Westminster Commission Report").

8 Criminal Cases Review Commission, "CCRC releases official response to the Westminster Commission report", 2 June 2021, available at https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/.

(3) The law on disclosure of reasons by the CCRC: In their response to the Westminster Commission, the CCRC supported a review by the Law Commission of the provisions in the Criminal Appeal Act 1995 covering disclosure of information obtained by the CCRC to enable more information to be published about decisions in individual cases.[9]

(4) The law on retention of court records: In the "Shrewsbury 24" case,[10] the Court of Appeal suggested that consideration should be given as to "whether the present regimen for retaining and deleting digital [court] files is appropriate, given that the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether an historical conviction is safe".

1.6 The terms of reference for this project therefore include a number of issues relating to the tests that are used in relation to appeals, including the "safety test", the "real possibility test" used by the CCRC; and the "substantial injustice" test. Other "policy" issues include the right to a full rehearing following conviction in summary proceedings; the power of the Attorney General to refer a sentence to the CACD on grounds of undue leniency; the ability of the Attorney General to refer a point of law following an acquittal; and the law regarding retention and disclosure of evidence and records of proceedings.

1.7 However, we will also look at a number of more technical and procedural issues with a view to enabling courts to deal with appeals in criminal cases effectively, efficiently and appropriately. For instance, section 23A of the Criminal Appeal Act 1968 permits the CACD to direct the CCRC to investigate and report to the court on any matter relevant to the determination of an appeal. The Criminal Justice Act 2003 extended this power to include applications for leave to appeal. However, no corresponding change was made to the restriction on which powers might be exercised by a single judge, so while a single judge may grant or refuse leave, where the assistance of the CCRC is required to inform that decision, that direction must be made by the full court.

1.8 The focus of this paper and consultation is on the "policy" issues. We are also engaging with relevant stakeholders on the more technical issues. Although these more technical matters are not the focus of this issues paper, we are happy to receive representations at this stage on any matters that stakeholders have identified.

1.9 The terms of reference for this project, agreed with the then Lord Chancellor, require us to consider the need for reform of the law, with a view to ensuring that courts have powers that enable the effective, efficient and appropriate resolution of appeals. This includes consideration of whether there is evidence that the tests employed in the Court of Appeal hinder the correction of miscarriages of justice, and whether the current arrangements for appeals from the magistrates' court are an efficient and effective use of court resources and judicial time.

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9 Criminal Cases Review Commission, "CCRC releases official response to the Westminster Commission report", 2 June 2021, available at https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/.

10 *R v Warren and others* [2021] EWCA Crim 413, [2021] 3 WLUK 373 at [102].

1.10 At this stage, we are expressing no views, even provisional ones, on whether reform is necessary. Rather, we are seeking evidence on whether reform is or might be necessary. The consultation paper will focus on those areas where we think reform is or might be necessary (including technical reforms to improve the efficiency and effectiveness of the appeals process), with provisional proposals for reform in those areas. There will be a further consultation on these provisional proposals before we make recommendations in a final report.

1.11 This paper therefore serves as a call for evidence. By evidence, we include the experience of practitioners, academics, representative groups, and individuals who have been involved in criminal proceedings, whether as a defendant or appellant, or as a complainant or witness.

1.12 However, we are unable to become involved in individual cases.

1.13 Where respondents favour reform of the law in a particular area, we would welcome specific proposals for change, so that these can be assessed alongside the current law.

The structure of this paper

1.14 Chapter 2 serves as a background discussion of the functions of a criminal appeals system, the principles which it should reflect, and aspects of international human rights law which have implications for the criminal appeals system. It also includes a brief history of the current arrangements for criminal appeals, especially in relation to trials on indictment.

1.15 In chapter 3, we look at the routes available for challenging decisions of the magistrates' court in summary cases, and proposals which have been made in recent years for reform of these arrangements.

1.16 In chapter 4, we consider the tests used by the CACD when considering appeals against conviction and/or sentence.

1.17 In chapter 5, we examine the role and powers of the CCRC, and in particular the "real possibility" test it applies when considering whether to refer a conviction, verdict, finding or sentence to the appellate court for appeal.

1.18 Chapter 6 examines the "substantial injustice" test which is applied by the CACD and the CCRC when considering appeals brought out of time on the basis of a change in the common law. This chapter also include a discussion of the law on joint enterprise, and in particular of "parasitic accessory liability", a form of joint enterprise liability, which is the subject of many current appeals affected by the "substantial injustice" test.

1.19 In chapter 7 we review appeals in criminal proceedings by parties other than a convicted person: by the prosecution, by the state, and by third parties.

1.20 Finally, in chapter 8 we consider the law governing retention and disclosure of evidence and records of proceedings.

1.21 Several “case studies” are included within this issues paper. These are not part of the main text, and are not necessarily intended to illustrate points in the surrounding text. We have deliberately chosen examples which have now been recognised by the legal system as having constituted a miscarriage of justice; it would not be appropriate for us to cast doubt on the safety of particular convictions which have not been found unsafe by the courts and which may yet be the subject of appellate proceedings. Inevitably, this has meant that these case studies comprise cases which have ultimately been resolved (albeit in some cases belatedly) *within* the existing appeals system. This fact, therefore, should not be taken as constituting proof that the existing system can adequately correct miscarriages of justice generally. Rather, this is the issue on which we are seeking evidence.

Acknowledgements

1.22 The Commissioners would like to record their thanks to the following members of staff who worked on this paper: David Connolly (team manager); Dr Robert Kaye (lead lawyer); Emira Al-Dimashki (research assistant).

Chapter 2: Background

Introduction to this chapter

2.1 This chapter serves as an introduction to some of the important theoretical and factual matters which underlie discussions in subsequent chapters.

2.2 First, we discuss some theoretical considerations which apply in relation to the role of appeals in criminal proceedings.

2.3 Second, there is a discussion of the extent to which international law obligations, in particular international human rights instruments to which the UK has subscribed, affect the right of appeal in criminal proceedings.

2.4 Finally, there is a brief history of legal developments in the United Kingdom relating to criminal appeals, including recent changes in the nature of criminal proceedings which may have implications for how appellate courts fulfil their functions.

The functions of the right of appeal

2.5 Criminal appeals serve a number of overlapping functions, both private and public. Literature on criminal appeals identifies these functions as including:

(1) as a safeguard against wrongful convictions;[11]

(2) to remedy violations of the right to a fair trial in earlier proceedings;[12]

(3) to provide legal consistency by correcting anomalous application of the law[13] and resolving conflicting interpretations of the law;[14]

(4) to encourage better decision-making through the prospect of review;[15] and

(5) to enable the development of substantive and procedural doctrines relating to criminal justice.[16]

2.6 The existence of a system of criminal appeals is thus designed to give effect to broader principles of criminal justice – including the rule of law. However, it may also

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11 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021); PD Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

12 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021).

13 PD Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

14 Above, 4.

15 Above, 3.

16 American Bar Association, Standard 21-1.2(a)(ii).

be in tension with some of those principles. It is therefore worthwhile to consider what general principles should apply to the criminal justice system.[17]

2.7 Arguably the prime objective of the criminal trial is to convict the guilty and acquit the innocent.[18] However, given the fallibility of the process, there is a risk of two types of error: conviction of the innocent and acquittal of the guilty. The criminal justice system can try to reduce both types of error, but in many cases, reducing the risk of an innocent person being convicted will increase the risk of a guilty person being acquitted and vice versa.

2.8 It is a longstanding core principle of criminal justice in England and Wales to favour the acquittal of the guilty over the conviction of the innocent.[19] Many other tenets of the criminal justice system, including the presumption of innocence, the burden of proof being on the prosecution,[20] the standard of proof requiring acquittal if there is reasonable doubt as to the defendant's guilt, and rules on the admission of prejudicial evidence reflect and operationalise that core principle.[21]

2.9 So does the fact that appeal rights for a convicted person are more extensive than those available to the prosecution. In summary proceedings the convicted person has a right to a full rehearing whereas the prosecution has a much more limited right to a review, largely constrained to points of law. In trials on indictment the convicted person can seek to appeal both their conviction and sentence, while an acquittal can only be challenged for certain very serious offences and on the basis of compelling new evidence, and a sentence can only be challenged upon a reference by the Attorney General.

2.10 Among other important principles which can be identified in the literature are:

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17 Criminal justice is being used here in contrast to substantive criminal *law*. Jeremy Horder, in *Ashworth's Principles of Criminal Law* (2023), distinguishes between "'criminal law' and related disciplines such as the law of criminal procedure, the law of criminal evidence, and the law of sentencing". The former is concerned with "a range of obligations (not to kill, not to steal, and so on), breach of which exposes someone to punishment by the state, … rules and standards governing special permissions to breach those obligations [and] some of the exemptions and excuses for breaching those obligations". In this section, we are not concerned with the principles which should govern the substantive obligations placed on persons (ie criminal law), but the mechanisms for dealing with alleged breaches of those obligations (ie an aspect of criminal justice).

18 *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 at [12]: "In any criminal prosecution for a serious offence there is an important public interest in the outcome. The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed."

Criminal Procedure Rules 2020, r 1.1 states that the "overriding objective" of the rules "is that criminal cases are dealt with justly". It goes on to list various matters which dealing with a criminal case justly involves, of which the first listed is "acquitting the innocent and convicting the guilty."

19 Sometimes referred to as "Blackstone's ratio", after a maxim of Sir William Blackstone, in his *Commentaries on the Laws of England*, that "it is better that ten guilty persons escape than one innocent suffer".

20 It is recognised that there can be derogations from this principle in the interests of justice – for instance, the application of "reverse burdens" of proof in relation to some defences.

21 F Allhoff, "Wrongful Convictions, Wrongful Acquittals and Blackstone's Ratio" (2018) 43 *Australian Journal of Legal Philosophy* 39.

(1) the right to a fair trial before an impartial tribunal;

(2) the principle of finality[22] and the "one trial" principle (that is, a party is not entitled to deploy one case at trial while "holding back" an alternative case to be deployed upon appeal);[23]

(3) respect for the rule of law;

(4) legal protections against "double jeopardy", including the principle that a person should not (with limited exceptions) be retried for an offence of which they have been finally acquitted.

2.11 It can be seen that some of these principles are in tension with each other, and in the case of the principle of finality, with the institution of appeal proceedings in general. Moreover, where an appellant has been found guilty, they no longer enjoy the benefit of the presumption of innocence in appellate proceedings.[24]

2.12 In addition, it must be recognised that in England and Wales criminal justice is delivered through adversarial proceedings and, for the overwhelming majority of trials on indictment, with a jury.[25] While the courts have challenged the idea that the trial is a "tactical game",[26] it remains the case that the defence will sometimes have to take strategic decisions – for instance, choosing not to call witnesses or introduce exculpatory evidence where the effect would be to allow other evidence to become admissible. It might, for example, suit a defendant to make a case "all or nothing" when the evidence might point to them being not guilty of the offence charged, but guilty of a lesser offence. These decisions will often be made, or at least heavily influenced, by counsel.

2.13 Moreover, although jury trials represent only a small fraction of criminal proceedings, they involve the most serious offences. The fact that juries are ultimately responsible for deciding the guilt of the accused, and the unique nature of a jury's verdict, has consequences for the appeals system which are discussed more fully in the following chapter.

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22 As Lord Dyson has noted ("Time to call it a day: some reflections on finality and the law", lecture at Edinburgh University, 14 October 2011), the principal of finality is given greater expression in civil than criminal law with greater use of mechanisms such as limitation periods (which generally only apply in criminal courts in England and Wales in relation to summary proceedings), estoppel, and *laches* (although delay may sometimes be invoked to stay criminal proceedings as an abuse of process).

23 For instance, in *R v Kyte* [2001] EWCA Crim 3, [2001] 1 WLUK 217 at [31], Laws LJ said: "It cannot be consistent with the elementary imperative of fair trial that a defendant should be allowed to say on appeal that his/her conviction is unsafe because, on what we must assume were good tactical or strategic grounds, he/she declined to call a piece of available evidence."

24 But see A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021), para 4.2, and *Konstas v Greece* App No 53466/07 in which the ECtHR held that there had been a violation of the right to be presumed innocent where a government spokesperson had made comments relating to the applicant's guilt while an appeal against her conviction was pending.

25 Non-jury trials may take place where there is a risk of jury-tampering or jury-tampering has taken place: Criminal Justice Act 2002, ss 44 to 50.

26 *R v Hakala* [2002] EWCA Crim 730, [2002] 3 WLUK 532 at [81]; *R v Asiedu* [2015] EWCA Crim 714, [2015] 2 Cr App R 8 at [32].

Acquittal of the innocent, conviction of the guilty, and "Blackstone's ratio"

2.14 It is an inevitable consequence of the imperfections of the trial system that even if a trial is properly and fairly conducted, there is no misconduct by the police or prosecution, the jury is properly directed and tries the case on the evidence before it, it is possible for a factually innocent person to be convicted. Witnesses may be honest but mistaken, or there may be an overwhelming body of circumstantial evidence pointing to an innocent defendant.

2.15 The conviction of the factually innocent is something which many people would believe would constitute a "miscarriage of justice", even if, in fact, there was no procedural or legal error.[27] Indeed, some of the cases which first led to the creation of the Court of Criminal Appeals in 1907 – such as that of Adolf Beck[28] – did not involve procedural or legal error, or police or prosecutorial misconduct.

2.16 It is also recognised that the perception (especially where accurate) that a guilty individual has been acquitted on a "technicality" can undermine confidence in the justice system, and even the rule of law. While this is as much an issue with trials generally as with appeals, where a procedural issue arises during the trial it may be possible to address the procedural irregularity – whether by correcting a defect,[29] or providing suitable directions to the jury.[30]

2.17 However, and as discussed at paragraphs 2.7 to 2.9 above, criminal justice in England and Wales prioritises acquittal of the innocent over conviction of the guilty through measures such as the burden and standard of proof, rules on prejudicial evidence (and other forms of evidence such as hearsay), and having more extensive rights of appeal available to convicted persons than to the prosecution.

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27 Convicting the innocent will often, but not always, involve a failure to convict the guilty party, whereas acquitting the guilty need not mean convicting the innocent. (There are some exceptions to this: for instance, where a person was convicted but no offence actually happened, or where an innocent person is wrongly convicted as a co-defendant alongside those actually guilty.)

28 Beck was convicted of fraud in 1896 and sentenced to seven years' imprisonment having been wrongly identified by various women as being the man who had defrauded them out of watches and jewellery. After his release, further similar incidents occurred, and Beck was again identified by the victims and convicted. However, while he was in prison awaiting sentencing, a further similar incident occurred which Beck could not have committed. The perpetrator of that offence, Wilhelm Meyer, was apprehended and the victims who had identified Beck at his second trial identified Meyer as the man who had defrauded them. Beck was pardoned and received compensation of £5000.

29 An example might be failing to sign an indictment, which until statutory reform in 2008, had been held to render the trial proceedings a nullity. In *R v Clarke* [2008] UKHL 8, [2008] 1 WLR 338, where the House of Lords ruled that an unsigned indictment rendered the whole trial a nullity, the Lords held that the defect was not rectified by "the somewhat adventitious addition of a signature at the eleventh hour". It is unclear whether the appellants might have been successfully re-arraigned on a newly signed indictment earlier in the proceedings.

30 For instance, where oral testimony results in a jury hearing inadmissible evidence. In *R v D'Ambrosia* [2015] EWCA Crim 182, [2015] 2 WLUK 120, the complainant had gone further in her evidence than had been agreed between counsel, and the transcript provided to jurors of the defendant's interview had mistakenly included a question about the defendant's conduct to other women which should have been excluded. The Court of Appeal Criminal Division ("CACD") held that the directions given by the judge (including an instruction to disregard the passage from the interview) were appropriate and the conviction was safe.

Finality and the "one trial" principle

2.18 In *Campbell*,[31] Lord Bingham said:

> This Court has repeatedly underlined the need for defendants in criminal trials to advance their full defence before the jury and call any necessary evidence at that stage. It is not permissible to advance one defence before the jury and, when that has failed, to devise a new defence, perhaps many years later, and then seek to raise that defence on appeal.

2.19 There are several arguments in favour of the "one trial" principle. Retrials run counter to the principle of finality. They can cause uncertainty and distress for victims and witnesses. They may also make it difficult for those convicted to begin rehabilitative work, whether in prison or the community, which is often premised on the offender accepting their guilt.

2.20 Moreover, there is also a question of fairness. Allowing the defence to run, in effect, different defence strategies at the trial and the appeal – the success of either of which might lead to acquittal with (subject to limited exceptions) no possibility of retrial – tips the balance arguably unfairly in favour of the defence. Courts are understandably reluctant to allow someone to run one defence at trial and, that defence having failed, to run at appeal a defence that they had previously chosen not to run.[32]

2.21 A similar issue arises where a person appeals a conviction having pleaded guilty. There are undoubtedly circumstances in which an innocent person might plead guilty, including: misunderstanding the scope of the offence with which they are charged, so

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31 [1997] 1 Cr App R 199 at 204.

32 See for instance *R v Richardson* (1991, unreported) and *R v Ahluwalia* (1993) 96 Cr App R 133.

One exceptional case where the court did permit an appeal to be brought on a wholly different basis to the defence at trial is *R v Solomon* [2007] EWCA Crim 2633, [2007] 10 WLUK 554. The appellant was convicted of rape and buggery of two girls. At trial he had denied any sexual activity at all. Following his release from prison, police searched his home and found a hidden recording of the activity which formed the basis of the charge, and which appeared to be consensual (although as the girls were under 16, it would still have constituted indecent assault, for which consent was no defence). The recording was also inconsistent with the girls' account of crying and attempting to fight him off. Upon a referral by the CCRC, the CACD held that there were exceptional circumstances in that this was not a case where the appellant sought to change his defence after conviction, but rather the evidence had come to light when police discovered it; his decision to suppress the evidence had led to him being convicted of more serious offences than those he had actually committed; and he had fully served the sentence for those offences. Quashing the convictions for rape and buggery and substituting verdicts of indecent assault would therefore "simply be to permit the record to be put straight".

not realising that they are in fact not guilty of it; poor legal advice;[33] an incorrect legal ruling; mental or psychological vulnerability;[34] or improper pressure by the judge.[35]

2.22 However, the effect of a guilty plea is that, as a result of a decision taken by the defendant, the evidence is not tested. The Court of Appeal has thus held that where a person has pleaded guilty, a conviction will not be found unsafe on the basis of "lurking doubt", and positive evidence that the person was factually innocent will be required.

Double jeopardy

2.23 Double jeopardy encompasses a general principle and a specific rule. The specific rule is against trying a person for an offence of which they have been "finally" acquitted. More generally, it encompasses other forms of potentially oppressive conduct, such as trying a person for an offence when they have already been acquitted of another offence arising out of substantially the same set of facts.

2.24 The rule against double jeopardy is not absolute. In summary cases, the prosecution may appeal an acquittal by way of case stated or apply for judicial review. In relation to indictable offences, the Criminal Justice Act 2003 allows the Court of Appeal to quash a conviction for certain serious offences and order a retrial where there is compelling new evidence.[36]

2.25 In many jurisdictions, although not England and Wales, a conviction only becomes "final" once an appeal is heard. An acquitted defendant is therefore at risk of conviction while an appeal is pending, and conviction upon an appeal against the acquittal by the prosecution does not amount to a breach of the principle.

2.26 Until 1964, the appeal court did not have the power to order a retrial; putting a defendant on trial for an offence for which they had previously been tried and convicted was seen as breaching the principle of double jeopardy. However, a consequence of this was arguably a reluctance to quash a conviction when a person could have been properly convicted on the remaining evidence and might – had a retrial been a possibility – be convicted at a retrial if the verdict were quashed.

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33 For example, *R v Boal* [1992] QB 591, where the appellant's solicitors had failed to recognise that a junior manager of a bookstore was not a "manager" for the purposes of the Fire Precautions Act 1971 and would have had a complete defence to the charge.

34 For example, *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62: the appellant had pleaded guilty to eleven charges of arson, and twenty-six manslaughter charges, in 1981. One arson conviction (and eleven related manslaughter convictions) had been quashed after a public inquiry found the fire was accidental. In 2022, the CACD quashed two further convictions for arson (and three related manslaughter convictions) concluding that it would have been impossible for the appellant to have committed them, and his guilty pleas were therefore false. However, it concluded that the remaining convictions were safe.

35 For example, *R v Nightingale* [2013] EWCA Crim 405, [2013] 3 WLUK 314, where the judge at a court martial had given an unsolicited indication that in the event of a guilty plea to two offences under the Firearms Act 1968, he could find exceptional circumstances so as not to apply the mandatory five-year sentence. See also the recent cases of *R v AB, CD, EF and GH* [2021] EWCA Crim 2003, [2022] 2 Cr App R 10, and *R v Rees* [2023] EWCA Crim 487, [2023] 4 WLUK 375.

36 Criminal Justice Act 2003, ss 77 to 79.

2.27 A wider application of this principle can be found in the practice of courts "discounting" a sentence to reflect the fact that a person has faced trial on more than one occasion. For instance, it was previously commonplace for courts to discount a sentence imposed following a retrial to reflect the fact that the defendant had had to face a second trial. Likewise, where a sentence was successfully challenged as "unduly lenient" by the Attorney General, the courts frequently imposed a sentence which reflected the fact that the offender had had to go through further court proceedings.[37]

The right to a fair trial

2.28 The right to a fair trial encompasses a variety of principles and requirements. Article 6(3) of the European Convention on Human Rights requires that an accused person have the right:

> to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> to have adequate time and facilities for the preparation of his defence;
>
> to be able to defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and
>
> to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

2.29 Other elements seen as part of the right to a fair trial include the principle of "equality of arms",[38] the entitlement to disclosure of evidence, the right to remain silent and the privilege against self-incrimination.

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37 The "discount" was abolished in respect of references brought by the Attorney General in relation to the minimum term for a life or indeterminate sentence in the Criminal Justice Act 2003, s 272 and the Criminal Justice and Immigration Act 2008, s 46. In *Attorney General's Reference (No 45 of 2014)* [2014] EWCA Crim 1566, [2014] 7 WLUK 21, the CACD said that "although the principle of "double jeopardy" remains for consideration in the kind of case identified in *Attorney General's Reference Nos 14 and 15*, subject to the observations we have made, the practice has evolved that no reference is made to it, save in the category of case in which it is likely to arise… [T]hose cases have become, and are likely to remain, rare".

In *Attorney General's Reference 14 and 15 of 2006* [2006] EWCA Crim 1335, [2007] 1 Cr App R (S) 40 at [61], the court had said that the case for a reduction to reflect double jeopardy was "particularly great where the decision of the Court resulted in a defendant being placed in prison, where originally no custodial sentence was employed, where a custodial sentence had been completed, where the defendant was young, or where the defendant was about to be discharged from prison".

38 The European Court of Human Rights has described the principle of "equality of arms" as requiring that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent" (*Bulut v Austria* App No 17358/90 at [47]; *Foucher v France* App No 22209/93 at [34]; *Öcalan v Turkey* App No 46221/99 at [140]).

2.30 However, the courts have been clear that not every procedural error will mean that the defendant did not receive a fair trial. The European Court of Human Rights has held that there can be a breach of article 6, by virtue of a breach of a right associated with article 6, without this meaning that the defendant did not receive a fair trial overall.[39]

2.31 Moreover, even a finding by the European Court of Human Rights that a person did not receive a fair trial overall, will not necessarily mean that the defendant did not receive a fair trial for the purposes of the domestic courts.[40]

2.32 However, where a person did not receive a fair trial, then a conviction will not be "safe" – however strongly probative of guilt the evidence is.[41] The right to a fair trial applies to the plainly guilty as much as it does to the innocent.

However, Professor Paul Roberts criticises the term "equality of arms", saying "the seductive image of 'equality of arms' is apt to mislead, inasmuch as it implies that genuine parity of resources between the parties is the desired objective. In reality, the bulk of criminal accused could never be equipped with sufficient resources to match the state apparatus of criminal investigation and prosecution, and nor should they be. The real objective imperfectly expressed by the 'equality of arms' slogan is to find ways of mitigating the unavoidable structural imbalance between prosecution and defence", P Roberts, *Roberts and Zuckerman's Criminal Evidence*, 3rd ed (2022), p 65.

39 *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [250]; *O'Halloran and Francis v UK* App Nos 15809/02 and 25624/02 (Grand Chamber decision) at [53]; *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [101].

40 *Dowsett v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin), [2007] 6 WLUK 164; *R v Abdurahman* [2019] EWCA Crim 2239, [2020] 4 WLR 6.

41 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45; *R v Randall* [2002] UKPC 19, [2002] 1 WLR 2237; *R v Edgar* [2018] EWCA Crim 1857, [2018] 7 WLUK 920. Insofar as *R v Abdurahman* [2019] EWCA Crim 2239, [2020] 4 WLR 6 suggests otherwise ("it is clear on the domestic authorities (especially *Lambert* and *Dundon*) that a conviction may be regarded as safe where the evidence against the appellant is overwhelming, even though the trial has been unfair for the purposes of Article 6"), we suggest that this cannot be reconciled with other jurisprudence of the Court of Appeal (including the cited *Lambert* [2001] UKHL 37, [2002] 2 AC 545 itself), with binding case law of the House of Lords, and with rulings of the European Court of Human Rights.

In particular, while *Abdurahman* points to *Lambert*, specifically Lord Slynn at [18] and Lord Steyn [43], neither Lord Slynn nor Lord Steyn found that there was a breach of article 6 and paragraphs [18] and [43] do not address this issue. (Lord Slynn did not find that there was a breach of article 6, having held that the Human Rights Act 1988 was not retrospective, while Lord Steyn found that the reverse burden in question was proportionate and therefore did not infringe the right to a fair trial.) Of the five Law Lords who gave judgments, only Lord Clyde and Lord Hutton directly addressed whether a breach of the right to a fair trial rendered a conviction unsafe. Lord Clyde, at [159] said, "Ultimately what is in issue is the fairness of the trial. No doubt in many cases an unfair trial in contravention of article 6 will constitute an unsafe conviction… But *an unfairness* [emphasis added] is not always fatal to a conviction… But if there is no doubt about guilt it is not every case where *an unfairness* [emphasis added] can be identified that will necessarily and inevitably lead to a quashing of the conviction". At [202] Lord Hutton said, "There will be cases where a conviction cannot stand and must be quashed irrespective of the strength of the evidence against the defendant because the trial as a whole is judged to be unfair". Lord Clyde's comments seem to suggest that a conviction might stand even though the trial was unfair, something which Lord Hutton rejects. However, the two can be reconciled if one takes Lord Clyde's repeated references to "*an* unfairness" as something less than "the trial as a whole" being unfair. The case does not, therefore, support the proposition that a conviction may be regarded as safe where the evidence is overwhelming even though the trial, as a whole, was unfair.

2.33 The European Court of Human Rights has accepted that the fact that a person did not receive a fair trial does not mean that the conviction must be overturned, and it may be possible to provide adequate redress through a declaration or compensation.[42]

The "no greater penalty" principle

2.34 Related to both finality and double jeopardy is a principle which is sometimes (but not always) applied in relation to appeal proceedings in England and Wales. This is the principle that a person who exercises their right to appeal should not be at risk of receiving a greater penalty than the one already imposed for the offence.

2.35 Where a person appeals their conviction and/or sentence to the Court of Appeal, the sentence cannot be increased.[43] (Although if the Attorney General is challenging the sentence as unduly lenient, this challenge may be considered alongside the convicted person's appeal.) If the appellant is successful in their appeal against one or more convictions, but remains convicted of one or more offences dealt with at the same time, the Court of Appeal must resentence for the remaining offences, but cannot impose a penalty for those offences "of greater severity" than the sentence originally received.[44]

2.36 In addition, where a person successfully appeals their conviction, and the Court of Appeal orders a retrial, if convicted, the retrial court cannot impose a sentence "of greater severity" than the sentence originally received. (For this reason, where the Court is also considering a reference from the Attorney General on the grounds that the sentence is unduly lenient, this will be heard before the appeal against conviction, so that if the conviction is quashed, the court at retrial will not be restricted to the sentence passed at the first trial.)

2.37 The aim of these provisions would appear to be to ensure that a person is not discouraged from pursuing a legitimate (if ultimately rejected) appeal by the risk of receiving a greater sentence.

2.38 However, the Court of Appeal does have power (as discussed at paragraph 4.21 below) to order that a specified number of days spent in custody while an appeal is pending should not count as part of the sentence served. In effect, this has the result of adding days to the time to be served, and is used by the court to punish and deter unmeritorious appeals. As we discuss at paragraph 4.27, it has been suggested that this might have the effect of discouraging not just appeals which are arguable but also appeals which would in fact be successful.

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42 N Mole and C Harby, *The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2006 2nd ed), at p 70:

"Frequently, particularly in Article 6 cases, [the ECtHR] makes no monetary award at all, holding that the finding of a violation constitutes sufficient just satisfaction". In *Assanidze v Georgia* App No 71503/01, the ECtHR exceptionally directed the appellant's release from prison.

43 Criminal Appeal Act 1968, ss 4(3) and 11(3).

44 They may, however, receive a sentence that is greater than that imposed at trial for the particular offence(s) remaining. This reflects the fact that those sentences will often have involved a reduction by the trial court on account of the penalties imposed for the (now quashed) convictions, to reflect the principle of totality.

2.39 The principle is not applied at all when a person appeals against conviction or sentence in the magistrates' courts, and sentencing when the case is appealed to the Crown Court is "at large". While this might be thought to follow from the fact that an appeal to the Crown Court is by way of rehearing, sentencing is also at large when the appellant is only appealing their sentence, and the factual findings are not the subject of an appeal. (Moreover, as noted at paragraph 2.36, a person who faces a retrial following a successful appeal against conviction in a trial on indictment does have the protection, even though the retrial will be a full rehearing.)

The rule of law and wider integrity of the justice system

2.40 A recurring issue in relation to criminal justice is how far procedural rules in criminal cases should sanction unlawful or otherwise impermissible conduct. This finds expression in rules controlling the admission of evidence obtained in contravention of the Police and Criminal Evidence Act 1984 ("PACE") and the ability of judges to stay a case for abuse of process where it would "offend the court's sense of justice and propriety to be asked to try the accused".[45] In appellate cases, this finds expression in the question of to what extent an appeal should be allowed on the basis of misconduct by those charged with investigating and prosecuting crime.

2.41 The majority of the Runciman Commission[46] took the view that the process of trying defendants was distinct from punishing malpractice by police and prosecutors, concluding:

> that the Court of Appeal should not quash convictions on the grounds of pre-trial malpractice unless the court thinks that the conviction is or may be unsafe. In the view of the majority, even if they believed that quashing the convictions of criminals was an appropriate way of punishing police malpractice, it would be naïve to suppose that this would have any practical effect on police behaviour. In any case, it cannot in their view be morally right that a person who has been convicted on abundant other evidence and may be a danger to the public should walk free because of what may be a criminal offence by someone else.[47]

2.42 Compared with other jurisdictions, criminal courts in England and Wales are much more flexible in admitting evidence obtained unlawfully. Section 78 of PACE gives courts a discretion to exclude prosecution evidence if it appears that, having regard to all the circumstances including the circumstances in which the evidence was obtained, admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. However, a confession is only *required* to be excluded where it is or may have been obtained by oppression of the person who made it, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render the confession unreliable.[48]

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45 *R (Bennett) v Horseferry Road Magistrates Court* [1993] 3 WLR 90, [1994] 1 AC 42 at [74].

46 The Royal Commission on Criminal Justice, chaired by Viscount Runciman, was set up in 1991 in the wake of the quashing of the convictions of the "Birmingham Six", and following other cases including those of the "Guildford Four" and the "Maguire Seven". See further discussion at 2.80ff.

47 Report of the Royal Commission on Criminal Justice (1993) Cm 2263 ("RCCJ Report"), p 172, paras 48 and 49.

48 PACE, ss 74 to 76. Where an issue as to oppressive conduct is raised, it is for the prosecution to prove to the criminal standard that the evidence was not obtained by oppression.

Consequently, unlawfully obtained evidence may well be admissible in a criminal trial. Moreover, there is no equivalent to the "fruit of the poisonous tree" doctrine[49] in England and Wales. Under section 76 of PACE, evidence discovered as a result of a confession is admissible even if the interview itself is excluded.[50]

2.43 However, the law contemplates situations where, even though the defendant could receive a fair trial, it is necessary to stay proceedings as an abuse of process to protect the integrity of the justice system or, if discovered post-trial, to quash the defendant's conviction. In *Bennett*, for instance, the circumstances included the defendant being forcibly abducted and brought to the UK in disregard of extradition laws.[51]

2.44 *Mullen*[52] concerned similar allegations to those in *Bennett*: there had been an international conspiracy to have the appellant deported to the UK, which involved depriving him of the legal protections he would have had if he were to have been extradited (including access to legal advice), and deliberately circumventing protections he might have had as a dual national by dishonestly casting doubt on the authenticity of his passport. The court held that, in such circumstances, the conviction would be quashed as "unsafe", notwithstanding the evidence of guilt, because the conduct was such an affront to the rule of law that the conviction could not be allowed to stand.

2.45 As will be discussed in chapter 4, following this ruling the then Government consulted on possible reform to prevent convictions from being quashed in such circumstances. Reform was not, ultimately, pursued. A particular difficulty is that, if police or prosecutorial misconduct is the basis for a stay on grounds of abuse of process at trial, but not for quashing a conviction, there would be an unfairness between cases in which the abuse is identified and dealt with properly at trial, and cases in which the abuse is not identified until after conviction, or is identified before or during the trial but the trial is wrongly allowed to proceed.

Trial by jury

2.46 Although the vast majority of criminal cases are tried by magistrates, and the majority of trials on indictment are dealt with by guilty pleas, it is recognised that the criminal justice system of England and Wales places great importance on the role of the jury in indictable cases. For most either-way offences, the defendant has an absolute right to trial by jury.[53] The magistrates' court can also send an either-way offence to the Crown Court, even if the defendant objects.

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49 *Silverthorne Lumber Co v United States* (1920) 251 US 385; *Nardone v United States* (1939) 308 US 338.

50 PACE, ss 76(4) to (6). See the discussion of *Weir* at page 138 below.

51 *R (Bennett) v Horseferry Road Magistrates' Court* [1994] 1 AC 42.

52 [2000] QB 520.

53 Some either-way offences are triable only summarily in certain circumstances: for instance, criminal damage, where the value of the damage was less than £5,000 is only triable summarily, except in cases involving arson, or damage to a memorial; low-value shoplifting (where the goods are valued at less than £200) is summary-only, but an adult accused has the right to elect to be tried by the Crown Court (Magistrates' Courts Act 1980, s 22A). Trials on indictment may also take place without a jury where there is a danger of jury tampering or jury tampering has taken place (Criminal Justice Act 2003, ss 44-50).

2.47 The jury is the primary finder of fact in trials on indictment, and the courts have been concerned to ensure that the trial judge does not intrude on the jury's role.

2.48 However, the fact that the jury is the primary finder of fact, and delivers the verdict of the court, has certain consequences for the appeal process. Some of these stem from the fact that the trial judge is obliged to allow a case to go to the jury if a properly directed jury could *properly* convict on the evidence – the judge is not permitted to withdraw a case on the grounds that a conviction would be unsafe. Some stem from the fact that the jury's verdict is unreasoned.[54] Some stem from the privacy afforded to juror deliberations[55] meaning that some allegations that juror misconduct may have caused a miscarriage of justice cannot form the basis of an appeal.

2.49 It was because of the primary role of the jury that the House of Lords ruled in *Galbraith* in 1981 that a judge must allow a case to be put to the jury where the prosecution evidence, taken at its highest, would allow a properly directed jury to convict, notwithstanding that in the view of the court itself such a verdict would be "unsafe".[56] To do otherwise, carried the risk that the judge would "appl[y] his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on" and thus "usurp the function of the jury".[57]

2.50 It has been suggested that this approach is "sound" because "if there is a conviction the Court of Appeal will decide whether the conviction can stand".[58] However, as we discuss in the following chapter, the Court of Appeal has been very reluctant to find a jury's guilty verdict unsafe in the absence of new evidence or legal error. The Runciman Commission in 1995 recommended that *Galbraith* should be overturned, but this recommendation was not implemented.

2.51 The compatibility of unreasoned jury verdicts with the right to a fair trial has been considered by the European Court of Human Rights ("ECtHR"). In *Saric v Denmark*,[59] the ECtHR held that article 6(2) does not prevent a defendant being tried before a jury which gives unreasoned verdicts. However, for the requirements of a fair trial to be satisfied, the defendant must be able to understand the reasons for the jury's verdict. Directions from the judge, coupled with a presumption that the jury has followed them, will often be sufficient for the convicted person to know the basis on which they have been convicted.

2.52 A potential complication here may arise from the fact that in some circumstances it may be legitimate to convict the accused on more than one basis, and therefore even if the jury follows the judge's route to verdict properly, it may be difficult for a convicted person to know the basis on which the jury convicted. This affects the convicted

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54 Coen and Doek note that "[u]ntil the eighteenth century judges sometimes asked juries to provide the rationale for verdicts, particularly in instances in which they disagreed with the outcome": M Coen and J Doek, "Embedding Explained Jury Verdicts in the English Criminal Trial" (2017) 37 *Legal Studies* 786.

55 *R v Galbraith* [1981] 1 WLR 1039.

56 Above.

57 *R v Galbraith* [1981] 1 WLR 1039; *R v Barker* [1975] 65 Cr App R 287.

58 A Samuels, "No case to answer: the judge must stop the case" (1996) 9 *Archbold News* 6.

59 App No 31913/96.

person's ability to pursue an appeal, and is particularly problematic where fresh evidence or identification of a legal ruling vitiates one of the routes by which the jury could have convicted, but not the other.

2.53 One example where a verdict may be open to more than one interpretation is on a conviction for manslaughter.[60] Here the judge may ask the jury the basis for its guilty verdict, but cannot require them to give one.[61]

2.54 There have been proposals in recent years for juries to give a fuller explanation of their verdicts, whether by giving reasoned decisions, or giving answers to questions from the trial judge that show how they have come to their verdict. Lord Justice Auld in his review of criminal courts recommended that "the judge should devise and put to the jury a series of written factual questions, the answers to which could logically lead only to a verdict of guilty or not guilty [and] where he considers it appropriate, should be permitted to require a jury to answer publicly each of his questions and to declare a verdict in accordance with those answers".[62]

2.55 Coen and Doek suggest that reasoned verdicts "would assist both the defence and prosecution in understanding the range of appeal options that may be available".[63]

2.56 John Spencer has noted that:

> A reasoned decision, surely, is indeed a vital safeguard, in particular for innocent defendants... In the first place, there is no means of telling whether the jury have understood what the judge in his direction told them: a serious matter, since a substantial body of research suggests that juries frequently do not. And secondly, there is no guarantee that, assuming they did understand it, they followed it.[64]

2.57 In *Mirza and Connor and another*,[65] the House of Lords made clear that the courts may not inquire into the jury's deliberations, even where allegations have been made that the jury's verdict was tainted by inappropriate considerations. In Mirza's case, there was evidence that the jury had ignored the judge's direction and the verdict was tainted by racial prejudice;[66] in the case of *Connor*, considered by the House of Lords

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60 This can occur both where manslaughter is the charge – it may be unclear in the circumstances whether the jury is convicting on the basis of gross negligence or an unlawful act – and where it arises from a partial defence for murder – for instance, where the defendant pleads both loss of control and diminished responsibility.

61 *R v Cawthorne* (1996) 2 Cr App R (S) 45.

62 Auld LJ, *A Review of the Criminal Courts of England and Wales* (September 2001), p 538, para 55 ("Auld Review").

63 M Coen and J Doek, "Embedding Explained Jury Verdicts in the English Criminal Trial" (2017) 37 *Legal Studies* 786.

64 J R Spencer, "Strasbourg and defendants' rights in criminal procedure" (2011) 70 *Cambridge Law Journal* 14.

65 *R v Connor and another, R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118.

66 A letter sent subsequent to the trial claimed that some jurors had taken into account the fact that the defendant was using an interpreter. There was evidence to support this: the jury at one point sent a note to the *interpreter* asking, "would it be typical for a man of the defendant's background to require your services, despite living in this country as long as he has?". The judge gave directions that they were not to draw

alongside it, there was a suggestion that the jury might have convicted two appellants jointly despite the possibility that only one was guilty because "this would teach them a lesson, things in this life were not fair, and sometimes innocent people would have to pay the price".

2.58 Lord Justice Auld's review expressed concern that the rule of jury secrecy "prevents any effective enquiry by the Court of Appeal into possible misconduct in the jury room", and suggested it was also "highly vulnerable" to a challenge at the European Court of Human Rights.[67] He recommended changes to the law to enable the Court of Appeal to enquire into juror misconduct, including allegations of "impropriety of reasoning".[68]

Rights of appeal under international law

2.59 The International Convention on Civil and Political Rights ("ICCPR"), which the UK ratified in 1976, does include a right to an appeal in criminal proceedings. Article 14(5) provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Requiring leave to appeal does not violate this right "as long as the examination of an application for leave to appeal entails a full review of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case".[69] Nor does the imposition of time limits for bringing an appeal, provided that they are not so short as to prevent defendants being able effectively to appeal. Certain fair trial rights which apply at the initial trial may be disapplied on appeal,[70] and defendants' rights to adduce new evidence may be limited.

2.60 The European Convention on Human Rights ("ECHR") does not deal with the right to an appeal in the main text. Article 2 of Protocol 7 provides a similar right to an appeal in criminal proceedings as the ICCPR. However, the UK has not ratified Protocol 7 (and consequently it is not incorporated into domestic law by the Human Rights Act 1998 ("HRA 1998")). The existence of article 2 of Protocol 7 also makes it unlikely that the ECtHR can develop a right to an appeal out of the general right to a fair trial found in article 6 of the main text.

2.61 Article 13 of the Convention provides that "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority".[71] Article 13 does not guarantee a right of appeal, and, as this is separately recognised by article 2 of Protocol 7, it is unlikely that the ECtHR would interpret Article 13 as requiring a right to an appeal in criminal proceedings.[72]

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adverse inferences from this, but the letter writer claimed that they continued to do so and that she was shouted down when she reminded them of the judge's direction.

67 Auld Review, pp 172 and 173, para 98.

68 Above, p 173, para 98.

69 HRC, *Lumley v Jamaica* (1999) UN Doc CCPR/C/65/D/662/1995.

70 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021), para 8.1.

71 Article 13 is not incorporated into domestic law in the HRA 1998, since the Act is itself a way in which the UK secures the convention rights and provides an effective remedy in case of a breach of those rights.

72 *Pizzetti v Italy* (App No 12444/86), Report of the Commission, para 41.

Moreover, a person who has been properly convicted of an offence of which they are factually innocent has not necessarily had their rights violated.

2.62 However, a person who has been convicted following a trial which is unfair has had their rights violated (although they may, in fact, be guilty). To this extent, where a person has suffered a breach of their article 6 rights, there must be a remedy, and a fair and effective right of appeal can amount to an effective remedy for this purpose.[73]

2.63 Where domestic law *does* provide a right of appeal (as it does in England and Wales), the proceedings must comply with article 6 – that is, there must be a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law.[74]

2.64 The ICCPR also includes a right to compensation for victims of a miscarriage of justice whose conviction has been quashed (or who have been pardoned) on the basis that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. This provision is mirrored in article 3 of Protocol 7 to the ECHR (which the UK has not ratified). Again, it is questionable whether a right to compensation for a miscarriage of justice could be inferred from other Convention rights as it is explicitly dealt with in Protocol 7. However, two cases – *Hallam*[75] and *Nealon*[76] – are pending before the Grand Chamber of the ECtHR, in which it is argued that the refusal of compensation (on the basis that it had not been proved beyond reasonable doubt that the applicants were factually innocent, as domestic law requires)[77] breaches the presumption of innocence.

Question 1.

2.65 What principles should govern the system for appealing decisions, convictions and sentences in criminal proceedings?

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73 The ECtHR held in *Condron v United Kingdom* [2000] 31 EHRR 1 (App No 35718/97) that proceedings in the Court of Appeal had not provided a remedy to the breach of the appellants' right to a fair trial because they were "concerned with the safety of the appellants' conviction, not whether they had in the circumstances received a fair trial". However, this appears to have been based on an understanding that safety was narrowly concerned with factual innocence. This may have represented a misunderstanding on the part of the Strasbourg Court, or may have reflected that at the time of the domestic appeal proceedings, the CACD appeared to construe the "safety test" narrowly, even though this had been corrected by the time the case was heard in Strasbourg.

74 *Meftah and others v France* (App Nos. 32911/96, 35237/97 and 34595/97), para 40.

75 App No 35049/19.

76 App No 32483/19.

77 Criminal Justice Act 1988, s 133(1ZA).

Criminal appeals in England and Wales

Before 1907

2.66 The common law did not, historically, provide a right of appeal in criminal proceedings, although there were "various archaic forms of review … available to defendants".[78]

2.67 Any right of appeal must be conferred by legislation.[79] This was recently affirmed by the Supreme Court in *Crosland*,[80] which found that any power for the Supreme Court to hear an appeal from its own decision to punish for contempt "must be found, if at all, in primary legislation".

2.68 The right of appeal in criminal proceedings, especially those tried on indictment, is circumscribed. Appeals to the Court of Appeal Criminal Division ("CACD") are restricted to those permitted under the Criminal Appeal Act 1968 (or where legislation on a particular matter creates a right of appeal to the CACD in respect of it).[81] The CACD has interpreted this as providing only for a single appeal.[82] Section 18(1)(a) of the Senior Courts Act 1981 (which reproduces a provision introduced in the Supreme Court of Judicature Act 1873) provides that there is no right of appeal to the Court of Appeal Civil Division "in a criminal cause or matter"; this means that where the High Court has a role in relation to criminal proceedings (for instance, where the High Court hears an appeal by way of case stated or an application for judicial review against a decision of a magistrates' court) the only appeal from that decision is to the Supreme Court, and must involve a point of law of general public importance.[83]

2.69 Before 1907 a limited route of appeal was available on a point of law. The Court of Crown Cases Reserved was created in 1848.[84] A trial judge could be asked to state a case for the court on a point of law. If the Court of Crown Cases Reserved considered that the point of law had been wrongly decided, it could quash the conviction.

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78 PD Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1. See also L Oldfield, "History of Criminal Appeal in England" [1936] *Modern Law Review* 1; R Pattenden, *English Criminal Appeals 1844-1994: Appeals against Conviction and Sentence in England and Wales* (1996).

79 *R v Hanson* (1821) 4 B & Ald 519; *Attorney General v Sillem* (1864) 10 HLC 704.

80 [2021] UKSC 58, [2022] 1 WLR 367 at [37]. This concerned the question of whether any appeal lay from a finding of contempt by the Supreme Court, acting as a court of first instance. The Supreme Court held that it did, since the Administration of Justice Act 1960, s 13, provides "an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court".

81 For instance, several statutes relating to terrorism include provisions that where an order is made under that legislation, and subsequently quashed, a person convicted of breaching such an order may appeal their conviction to the Court of Appeal Criminal Division: Terrorism Act 2000, s 7; Terrorism Prevention and Investigation Measures Act 2011, sch 3; Counter-Terrorism and Security Act 2015, sch 4.

82 *R v Pinfold* [1988] Q.B. 462.

83 Administration of Justice Act 1960, s 1.

84 Crown Cases Act 1848.

1907: The Court of Criminal Appeals

2.70 A series of cases in the late Victorian and Edwardian period, including those of Florence Maybrick,[85] George Edalji,[86] and Adolf Beck,[87] led to the passage of the Criminal Appeal Act 1907. The Act created the Court of Criminal Appeal (and abolished the Court of Crown Cases Reserved).

2.71 The Court was empowered to hear both appeals against conviction and against sentence in cases tried on indictment. The test used is discussed in more detail in chapter 4. For now, it is worth noting that the Court was empowered to uphold an appeal against conviction "if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice".[88] Thus, the Court from its inception had the power to find, even without fresh evidence or the identification of an error of law, that the jury's verdict could not stand. However, in practice it was highly reluctant to exercise this power.

2.72 The Court did not have a power to order a retrial. It followed that if the conviction was quashed, the strict application of the double jeopardy principle would mean that the appellant would not face prosecution for the offence.

2.73 Moreover the grounds for a successful appeal against conviction were subject to a "proviso" (discussed at paragraph 4.46 below) that the Court could refuse an appeal if they considered that "no substantial miscarriage of justice had actually occurred".[89]

2.74 Before the Act, the main way in which a convicted person could seek to challenge their conviction was to petition the Home Secretary for a pardon under the Royal Prerogative of Mercy. The 1907 Act did not abolish this, but section 19(a) of the Act made provision for the Home Secretary to refer a case to the Court of Criminal Appeal, which would then hear the case as an appeal by the convicted person. Where the Home Secretary referred a case, there was no requirement for leave. This was a mechanism by which an appeal might be brought out of time, and in particular where the convicted person had already made an unsuccessful appeal to the Court. In practice, the Home Secretary came to be supported by an office known as "C3 Division", whose functions included assisting the Home Secretary in discharging

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85 Florence Maybrick, an American woman, was convicted in Liverpool in 1889 of murdering her British husband, and sentenced to death. Her husband's body was found to contain non-lethal levels of arsenic. The Home Secretary and Lord Chancellor subsequently commuted her sentence to life imprisonment on the basis that the evidence established that she administered poison with intent to kill, but there was reasonable doubt as to whether that had in fact caused his death. The case was widely seen at the time as a miscarriage of justice, with Maybrick's admitted adultery being seen as having influenced the jury.

86 George Edalji, a solicitor (whose father was of Parsi heritage) was convicted of maiming a pony (following a series of similar attacks in the surrounding area), and sentenced to seven years' hard labour. In 1907, Home Secretary Herbert Gladstone appointed a special committee of inquiry, which concluded that Edalji was not guilty of the mutilation offence, and he was pardoned.

87 See note 28 above.

88 Criminal Appeal Act 1907, s 4(1).

89 Above.

responsibilities in relation to the Royal Prerogative of Mercy, references to the appellate Court, and payments of compensation to the wrongly convicted.[90]

1964-68: The Donovan Committee and the Court of Appeal Criminal Division

2.75 A series of reforms to the law of appeals took place between 1964 and 1968. The intention was to enable more appeals to succeed.[91]

2.76 In 1964, the Court of Criminal Appeal was given a limited ability to order a retrial, where the ground for quashing the conviction was one of fresh evidence.

2.77 In 1964 the Government set up an interdepartmental Committee under Lord Donovan to consider:

(1) whether it would be in the public interest to transfer the hearing of all or some of the cases now heard by the Court of Criminal Appeal (namely appeals and applications for leave to appeal against conviction, appeals against sentence and references by the Home Secretary) to the Court of Appeal or some other Court; and if so as to the manner in which that Court should be constituted, the powers it should have and the procedure to be followed;

(2) if in the view of the Committee the Court of Criminal Appeal should retain the whole or part of its current jurisdiction whether any and if so what changes are desirable:

(a) in the constitution, powers, practice and procedure of the Court;

(b) in the system and procedure for giving notice of appeals and applications and in the functions and practice of the Criminal Appeal Office.

2.78 The Committee reported in August 1965 and its recommendations were accepted by the Government.[92] The recommendations were implemented in the Criminal Appeal Act 1966. The provisions of this Act and the 1907 and 1964 Acts were subsequently consolidated in the Criminal Appeal Act 1968, which (amended) remains the governing legislation for appeals to the CACD.

2.79 The main reforms enacted by the 1966 legislation were:

(1) The Court of Criminal Appeal and the Court of Appeal (which hitherto dealt only with civil matters) merged to become a single Court of Appeal, with two Divisions.

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90 *Hansard* (HL), 17 May 1993, vol 545, col 75WA.

91 Introducing the Criminal Appeal Bill in Parliament in 1966, the then Attorney General said that the Bill was "extending the grounds on which an appeal against conviction is to be allowed", *Hansard* (HL) 11 July 1966, vol 731, col 1110.

92 There had been a change of Government between the setting up of the Committee and its reporting.

(2) The test for quashing convictions was expanded "with intention of widening the scope of effective appeal, particularly where the primary dispute concerns fact issues".[93]

(3) Provisions relating to the receipt of fresh evidence by the Court of Appeal were relaxed.

(4) Time spent in prison awaiting appeal would count towards a person's sentence unless the Court of Appeal ordered otherwise (reversing the previous position, under which it did not count, unless the Court of Criminal Appeals ordered that it should).

(5) The power to increase a person's sentence on appeal was removed.

The Runciman Commission, the Criminal Appeal Act 1995 and the Criminal Cases Review Commission

2.80 The Royal Commission on Criminal Justice chaired by Viscount Runciman (the "Runciman Commission") was set up following the acquittal of the Guildford Four[94] and the Birmingham Six[95] in 1991.

2.81 The remit of the Commission was deliberately wide-ranging, including the conduct of police investigations, the role of the prosecutor, arrangements for disclosure of material (including unused material) to the defence, the role of experts in criminal proceedings, the relationship between forensic science services and the police, arrangements for the defence of accused persons, access to legal advice and expert evidence, the powers of the courts in directing proceedings, the courts' duty in considering evidence, the role of the Court of Appeal, and the arrangements for considering and investigating alleged miscarriages of justice.

2.82 The review recommended, among other things that:

(1) the grounds for quashing a conviction should be redrafted;

(2) (in the view of the majority) the grounds of appeal against conviction should be replaced by a single test of whether the conviction "is or may be unsafe";

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93 D A Thomas, "The Criminal Appeal Act 1966" (1967) 30 *Modern Law Review* 64, 64.

94 Paul Hill, Gerry Conlon, Paddy Armstrong and Carole Richardson were convicted in 1975-76 in relation to the IRA bombings of two pubs in Guildford. Hill and Armstrong were also convicted of the bombing of a pub in Woolwich, SE London in which two people were killed, and Hill of the murder of British soldier Brian Shaw; all the convictions were supported by confessions made in custody. While an appeal was underway (and adjourned to January 1990), a review of the case by Avon and Somerset Constabulary found evidence of widespread police misconduct in relation to their detention and evidence, following which the Crown stated that it did not wish to defend the convictions.

95 Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McIlkenny, William Power and John Walker were convicted in 1975 in relation to the IRA bombings of two pubs in Birmingham, in which twenty-one people were killed. The convictions were upheld by the Court of Appeal in 1976 and 1988. In 1991, the Crown indicated that it would not defend the appeals, and their convictions were quashed, the Court of Appeal finding that evidence of police misconduct in the case and new scientific evidence both independently rendered the convictions unsafe.

(3) as part of that redrafting, it should be made clear that the CACD should quash a conviction, notwithstanding that the jury reached the verdict having heard all the evidence and without any error of law or material irregularity, if, after reviewing the case, it concludes that the conviction is or may be unsafe;

(4) appeals against acquittal should be available where a person is convicted of conspiracy to pervert the course of justice by jury tampering in relation to a trial;

(5) the Home Secretary's powers to refer cases to the CACD should be transferred to a new Authority, independent of both Government and the court structure; and

(6) that authority should consist of several members, with both lawyers and lay members.

2.83 Those recommendations were taken forward, although with some changes, in the Criminal Appeal Act 1995. The grounds for an appeal against conviction were replaced with a single "safety test". A new Criminal Cases Review Commission ("CCRC") was introduced to take over the Home Secretary's role in referring cases to the CACD and the investigatory functions of the Home Office's "C3" Division, which advised the Home Secretary on exercise of this power. Because the Home Secretary would retain responsibility for use of the Royal Prerogative of Mercy to pardon a convicted person,[96] the Act made provision for the Secretary of State to "refer to the Commission any matter which arises in the consideration of whether to recommend the exercise of the Royal Prerogative of Mercy".[97]

2.84 The Act also included provisions allowing the CCRC to deal with appeals against convictions in summary cases. As we discuss in chapter 5, at paragraph 5.43 and following, these provisions were included in the legislation, although the Runciman Commission had only considered referrals to the CACD; and it has been suggested that the "real possibility" test which the Act requires the CCRC to apply is hard to reconcile with the way that appeals in summary cases are dealt with.

The Auld Review

2.85 In 1999, Lord Justice Auld was invited by the Government to review the operation of the criminal courts in England and Wales. His remit was to review:

> the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law.

2.86 On appeals, Auld aimed to improve justice and efficiency by establishing broadly similar grounds of appeal at each jurisdictional level, simplifying overlapping appellate

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96 Following the creation of the Ministry of Justice in 2007, that power now lies with the Secretary of State for Justice.

97 The power is now exercised by the Secretary of State for Justice.

procedures and jurisdictions, and better matching the appellate tribunal to the seriousness and complexity of the case. In particular, he recommended:

(1) reforming appeals in summary cases, so that there was a single route of appeal from the magistrates' court to the Crown Court. This would be subject to a requirement for leave. On appeal from the magistrates' court, the Crown Court would not rehear the case, but would apply the same tests as the Court of Appeal (Criminal Division) uses for appeals in indictable cases. These proceedings would be heard by a judge sitting alone;

(2) that the existing methods of challenging magistrates' court decisions in the High Court should be abolished;

(3) that the jurisdiction of the CACD should be expanded so that it could hear appeals from the Crown Court presently dealt with by the High Court on an appeal by way of case stated or by way of judicial review; and

(4) that simpler cases in the CACD could be heard by two High Court judges, or a High Court judge and a circuit judge.

Sir Brian Leveson's Review of Efficiency in Criminal Proceedings

2.87 In February 2014, Sir Brian Leveson was asked to conduct a review into the efficiency of criminal proceedings. The review was limited to reforms which could be undertaken without legislation, although Sir Brian did include a chapter identifying reforms which would require legislation.

2.88 Although out of scope, Leveson considered reform of the right of appeal in summary proceedings, considering replacing the right to a rehearing with a review of the type conducted in the CACD, with a requirement to seek leave. He did however note a countervailing consideration:

> reasons provided by the bench would be subject to much greater scrutiny and could require more detail than is presently provided. In that event, more time would be taken fashioning and deploying them: to that extent, the restriction could be counter-productive.[98]

Recent developments

2.89 Although the recommendations of the Auld and Leveson reviews were not implemented in full, a series of changes that have been implemented in recent years have implications for how the CACD fulfils its functions in respect of appeals against conviction and sentence.

2.90 First, judges now have more detailed guidance on how to direct juries, with the Crown Court Compendium providing example directions. Since 2022 the Criminal Procedure Rules relating to jury directions state that the court should "give those directions orally and, as a general rule, in writing as well".[99]

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98 Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (January 2015) ("Leveson Review").

99 Criminal Procedure Rules 2020, r 25.14(3)(b).

2.91 Second, it is now expected that juries in all but the simplest cases will be provided with a written route to verdict.[100]

2.92 Third, it is now commonplace for judges to share both draft directions and draft routes to verdict with counsel for their comment and agreement. This should reduce the scope for error. Moreover, where a defendant's counsel has agreed to the judge's directions in advance, it is harder for an appellant subsequently to cite them as a ground of appeal.[101]

2.93 Fourth, sentencing guidelines have been published for the most commonly prosecuted offences. In addition, Parliament has provided a statutory framework for setting the minimum term of the mandatory life sentence for murder. Historically, the Court of Appeal, through sentencing appeals, played an important role not only in ensuring sentencing consistency, but in providing authoritative sentencing guidance for trial courts. However, since 2003, the Court's role in setting sentencing guidance has been reduced, with the Sentencing Council now responsible for drafting, consulting on and issuing guidelines.[102] At the same time, because the guidelines are issued in a more technical format than guideline appeal judgments typically were, the Court is more likely to be faced with appeals which turn on the application of those guidelines – for instance, whether an offence was properly categorised for the purposes of the guidelines.

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100 *R v Grant* [2021] EWCA Crim 1243, [2022] QB 857 at [47].

101 Complaints about the defendant's representation can result in a finding that the conviction was unsafe. While, in earlier cases, the CACD required "flagrant incompetence", or actions taken "in defiance of or without proper instructions", the focus now is on the issue of whether the incompetence rendered the trial unfair or the conviction unsafe.

102 Under the Crime and Justice Act 1998, the Sentencing Advisory Panel ("SAP") was introduced to draft and consult on sentencing guidelines, which were then referred to the CACD to inform the issue of a guideline judgment. Under the Criminal Justice Act 2003, s 167, the Sentencing Guidelines Council ("SGC") was created: the SAP would continue to consult and draft but it would make proposals to the SGC, rather than the CACD, and the SGC would then issue the guidelines. The Coroners and Justice Act 2009 replaced both the SAP and the SGC with the Sentencing Council.

The case of Andrew Malkinson[103]

In 2003, a woman in Bolton was violently attacked. She was raped twice and strangled until she became unconscious. The police treated this as a case of both rape and attempted murder.

Andrew Malkinson was arrested the following month. He immediately denied committing the offence, telling detectives that they had the wrong man. He had no convictions for violence or any sexual offence. Although he matched some aspects of the victim's description of her attacker, there were also significant differences. The victim said that the attacker had a smooth chest and spoke with a local accent (neither of which Malkinson had), and although she said the attacker was shirtless, she had made no mention of tattoos (Malkinson had prominent tattoos on his arms). Crucially, the victim claimed to have scratched her attacker's face with her left hand. Malkinson had been seen by police officers the following day, and his face was not scratched.

Nonetheless, he was identified by the victim in an identification parade. Two eyewitnesses also identified him as someone they had seen in the vicinity shortly after the attack.

There was no DNA evidence linking Malkinson to the offence. Police concluded that this demonstrated that he was "forensically aware". There was forensic evidence that the attacker had used a condom.

At trial, the judge instructed the jury that they could only convict Malkinson if they were sure that the victim was mistaken in saying she had scratched her attacker. The jury convicted Malkinson of two counts of rape, and one count of attempting to choke in order to commit rape. He was acquitted of a charge of attempted murder. He received a life sentence with a minimum term of over six years.

The trial judge granted leave to appeal to the Court of Appeal after the forensic scientist disclosed that swabs used to take vaginal and anal samples from the victim had been contaminated with silicone oil which could be misinterpreted as lubricant from a condom.

The Court of Appeal rejected the appeal. First, there had also been examination of the victim's underwear which confirmed the presence of lubricant. These were uncontaminated. More importantly, there was the identification evidence of the victim. The court heard evidence from her and found her "a convincing witness … truthful and accurate". They concluded that even if the jury had had the fresh evidence, they would have convicted.

Andrew Malkinson continued to deny that he was the person responsible. As a result, he was effectively unable to take part in rehabilitation programmes in order to demonstrate that he could be safely released. While in prison, he twice applied to the Criminal Cases Review Commission. They rejected both applications.

Despite receiving a minimum term of just over six years, he served seventeen years before the Parole Board judged he was safe to release. He was released on life licence in December 2020, subject to stringent restrictions and liable to recall to prison.

After his release, Malkinson worked with the charity APPEAL to challenge his conviction. As a result of their enquiries and legal challenges, it emerged that the police had failed to disclose that the two witnesses had convictions for dishonesty. There had also been a failure to disclose a photograph showing that the victim had a broken fingernail on her left hand, strongly suggesting that her claim to have scratched the attacker was correct.

Most fundamentally, testing found the presence of DNA from another man – neither Andrew Malkinson nor the victim's partner. The CCRC agreed to test the samples and found that the DNA matched to another person who was on the National DNA database, who lived locally, and better matched the physical description of the attacker.

The CCRC referred the conviction to the CACD, and both the Crown Prosecution Service ("CPS") and Greater Manchester Police said that they would not oppose the appeal, on the ground that the new scientific evidence rendered the conviction unsafe. However, the CPS opposed the application insofar as it related to non-disclosure.

On 26 July 2023, the Court of Appeal held that Malkinson's conviction was unsafe on the basis of the new scientific evidence and quashed it. It reserved judgment on the other grounds.

[103] *R v Malkinson* [2006] EWCA Crim 1891, [2006] WLUK 176; BBC News, "Andy Malkinson wins fight to clear name 20 years after rape conviction", 26 July 2023, https://www.bbc.co.uk/news/uk-england-manchester-66302740.

Chapter 3: Appeals in summary proceedings

3.1 The law on criminal appeals in England and Wales draws a sharp distinction between cases tried summarily (that is, in the magistrates' court, whether by a lay bench or by a District Judge (Magistrates' Court)), and cases tried on indictment (that is, in the Crown Court, usually before a jury).

3.2 The vast majority of criminal cases in England and Wales are dealt with in summary proceedings in the magistrates' court. These include less serious offences which are "summary only", plus most "either way" offences.[104] It also includes the overwhelming majority of trials involving minors.[105] Appeals against conviction and sentence in summary proceedings are heard in the Crown Court (although as we discuss in this chapter, there are routes for challenging magistrates' decisions in the High Court). A magistrates' court is not a court of record, and while the magistrate(s) will give reasons for their verdict (unlike a jury in the Crown Court) and sentence, proceedings are not routinely recorded, and the reasons may be given extemporaneously.

3.3 The main route of appeal in summary proceedings is by way of retrial in the Crown Court, before a judge, sitting alongside two or more magistrates. In contrast, appeals against conviction and sentence in trials on indictment are appealed to the Court of Appeal Criminal Division ("CACD").

3.4 In general, therefore, the jurisdiction of the CACD is limited to trials on indictment. There are, however, certain exceptions. A sentence imposed by the Crown Court in a summary case (whether after an appeal from the magistrates' court or where the magistrates have referred the case for sentencing) can be appealed to the CACD. Moreover, certain orders which may be imposed in magistrates' courts can be appealed directly to the CACD.

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[104] "Either way" offences are those which may be prosecuted either summarily or on indictment. The defendant may choose to be tried in the Crown Court, and the magistrates' court may conclude that the case should be sent to the Crown Court if the outcome would clearly be a sentence in excess of its sentencing powers or, for reasons of unusual legal, procedural or factual complexity, the case would best be tried in the Crown Court.

[105] The Youth Court is a type of magistrates' court, dealing with most cases involving defendants aged 10 to 17. The main exceptions to this are:

1. homicide offences and firearms offences where the minimum term provisions apply, which must be heard in the Crown Court;
2. "grave crimes", including sexual offences and offences carrying a sentence of fourteen years or more when committed by an adult, which may be sent to the Crown Court if there is a real possibility that the defendant will be sentenced to a custodial term of two years or more;
3. specified offences punishable in the case of an adult by life imprisonment or imprisonment for ten years or more, which must be sent to the Crown Court if there is a significant risk to members of the public of serious harm occasioned by the commission by the defendant of further serious offences; and
4. offences for which the minor defendant is to be tried alongside an adult, in which case the minor defendant will be tried in the same court as the adult defendant(s).

3.5 Where the High Court has a role in relation to criminal proceedings, any appeal lies directly to the Supreme Court.

APPEALS FROM THE MAGISTRATES' COURT

3.6 There are currently three potential avenues for challenging a decision of the magistrates' court:[106]

(1) an appeal to the Crown Court;

(2) an appeal to the High Court by way of case stated; and

(3) an application to the High Court for judicial review.

3.7 The vast majority of appeals from the magistrates' court by a defendant are by way of appeal to the Crown Court.

3.8 These avenues are substantively and procedurally different, but there is also some overlap between them.

Appeal to the Crown Court

Right of appeal

3.9 A person convicted of an offence by the magistrates' court may appeal against the conviction and the sentence imposed in relation to the offence by the magistrates' court to the Crown Court.[107] However, if they pleaded guilty to the offence of which they have been convicted, they may only appeal against their sentence,[108] if:

(1) the guilty plea had been equivocal;[109]

(2) the guilty plea had been entered as a result of duress;[110] or

(3) the person had previously been convicted or acquitted of the offence (ie *autrefois convict* or *autrefois acquit* arises).[111]

3.10 Where the person has pleaded guilty to the offence of which they have been convicted and their case does not fall within the limited exceptions set out above, they may apply to the Criminal Cases Review Commission ("CCRC") for the referral of their

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106 This term includes the youth court (see s 148 of the Magistrates' Courts Act 1980).

107 Magistrates' Courts Act 1980, s 108(1). The right of appeal against sentence includes any order made by the magistrates' court on conviction, with the exceptions of orders for the payment of costs, in relation to the destruction of an animal under s 37(1) of the Animal Welfare Act 2006 and where the court does not have a discretion in respect of the making, or the terms, of the order (see s 108(3) of the Magistrates' Courts Act 1980).

108 Magistrates' Courts Act 1980, s 108(1)(a).

109 *R v Plymouth Justices ex p Hart* [1986] QB 950.

110 *R v Huntingdon Justices ex p Jordan* [1981] QB 857.

111 *Cooper v New Forest District Council* [1992] *Criminal Law Review* 877.

appeal to the Crown Court. A referral may be made by the CCRC regardless of the plea entered by the applicant in relation to the offence.[112]

3.11 The right of appeal to the Crown Court ceases where an application has been made to the magistrates' court to state a case for the opinion of the High Court (see paragraph 3.23 and following below).[113] Therefore, a person may not appeal both to the Crown Court and to the High Court by way of case stated in respect of the same conviction or sentence.

3.12 The exercise of the right of appeal against conviction or sentence does not result in the suspension of the sentence imposed in relation to an offence pending the determination of the appeal.[114] This includes an order in relation to the payment of costs or a fine.[115] Therefore, the sentence remains enforceable pending the determination of the appeal.[116]

Notice of appeal

3.13 The appellant must give notice of appeal not more than 15 business days after:

(1) if appealing against conviction, the date of the sentence, the date sentence is deferred or the date of committal for sentence, whichever is earlier;

(2) if appealing against a sentence, the date of sentence.[117]

3.14 The Crown Court may shorten or extend the time limit, including after it has expired.[118] The appellant does not require leave (permission) to appeal from the Crown Court, where notice of appeal is given within the 15-day time limit. As such, there is an automatic right of appeal within the time limit. However, leave from the Crown Court is required to appeal out of time. The Crown Court has a broad discretion to grant permission for an out-of-time appeal and may take into account a range of factors, including the length of and reason for the delay, the strength of the case and the practicalities of there being an effective rehearing.[119]

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112 Criminal Appeal Act 1995, ss 11(1)(a) and (2).

113 Magistrates' Courts Act 1980, s 111(4).

114 *R v May* [2005] EWCA Crim 367, [2005] 2 WLUK 419 at [5].

115 *R (Natural England) v Day* [2014] EWCA Crim 2683, [2015] 1 Cr App R (S) 53 at [56].

116 This also applies in relation to appeals by way of case stated and applications for judicial review. Where a custodial sentence has been imposed, the magistrates' court, the Crown Court or the High Court, depending on the type of challenge, has the power to grant bail pending the determination of the appeal (see s 113(1) of the Magistrates' Courts Act 1980, s 81(1) of the Senior Courts Act 1981, s 37(1) of the Criminal Justice Act 1948 and s 22(1) of the Criminal Justice Act 1967). The magistrates' court and the appellate court may also have the power to suspend certain orders pending the determination of the appeal, for example, a driving disqualification order may be suspended (see ss 39(1) and 40(2) of the Road Traffic Offenders Act 1988).

117 Criminal Procedure Rules 2020, r 34.2(2).

118 Criminal Procedure Rules 2020, r 34.10(a).

119 *R (Customs and Excise Commissioners) v Maidstone Crown Court* [2004] EWHC 1459 (Admin), [2004] 5 WLUK 35 at [33]; *R (Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin), [2015] 3 WLUK 889 at [12].

3.15 It will be seen that the time limit for bringing an appeal against a decision in the magistrates' court is even more restrictive than the limits in the Crown Court. The Westminster Commission[120] expressed concern that the 28-day limit in the Crown Court caused difficulties for vulnerable offenders when a custodial sentence is given. Similar concerns may arise where a person is imprisoned following magistrates' court proceedings.

Determination of the appeal

3.16 The Crown Court hearing an appeal against conviction or sentence must consist of a High Court judge, a Circuit judge, a Recorder or a "qualifying judge advocate"[121] and at least two[122] magistrates who did not take part in the original proceedings.[123]

3.17 An appeal to the Crown Court operates by way of rehearing, which means that an appeal against conviction proceeds as a new trial and an appeal against sentence as a new sentencing hearing.[124] Both the appellant and the respondent may present evidence that has not been presented at the original trial or sentencing hearing.[125] In contrast to appeals against conviction and sentence on indictment, the Crown Court does not undertake a review of the magistrates' court's decision, but instead formulates its own view based on the evidence presented to it by the parties.[126] In relation to appeals against sentence, this means that the Crown Court is required to determine the appropriate sentence and the extent to which that differs from the original sentence.[127] If the sentence differs to a "significant degree" from the original sentence, the Crown Court should allow the appeal.[128]

3.18 Upon hearing the appeal, the Crown Court may:

(1) confirm, reverse or vary any part of the magistrates' court's decision appealed against, including a determination not to impose a separate penalty in respect of an offence;

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120 See para 1.5. The Westminster Commission was established by the All-Party Parliamentary Group on Miscarriages of Justice, and chaired by Baroness Stern and Lord Garnier.

121 The Judge Advocate General or a person appointed under s 30(1)(a) or (b) of the Courts-Martial (Appeals) Act 1951 (see s 151(1) of the Senior Courts Act 1981).

122 The Crown Court may proceed or continue to hear an appeal with only one magistrate if the presiding judge decides that otherwise the start of the appeal hearing would be delayed unreasonably or one or more of the magistrates who started hearing the appeal are absent. An appeal may be heard by a single High Court judge, a Circuit judge, a Recorder or a qualifying judge advocate if the appeal is against conviction and the respondent agrees that the court should allow the appeal. Criminal Procedure Rules 2020, r 34.11(2).

123 Senior Courts Act 1981, s 74(1); Criminal Procedure Rules 2020, r 34.11(1)(a). If the appeal is from the youth court each magistrate must be qualified to sit as a member of the youth court (see r 34.11(1)(b) of the Criminal Procedure Rules 2020).

124 Senior Courts Act 1981, s 79(3).

125 *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614.

126 *R v Swindon Crown Court ex p Murray* [1997] 7 WLUK 37.

127 *R v Knutsford Crown Court ex p Jones* (1985) 7 Cr App R (S) 448.

128 *R v Knutsford Crown Court ex p Jones* (1985) 7 Cr App R (S) 448.

(2) remit the matter with its opinion to the magistrates' court; or

(3) make such other order as the court thinks just, exercising any power that the magistrates' court may have exercised.[129]

3.19 This includes the power to vary the sentence imposed by the magistrates' court or the Crown Court, where the appellant was sentenced by the Crown Court following a committal for sentence by the magistrates' court.[130] As the appeal takes the form of a rehearing, any decision by the Crown Court to vary the original sentence (or to exercise any of the other powers outlined in paragraph 3.18) will be made following the fresh presentation of evidence by the appellant and the respondent. However, the Crown Court is limited to the sentencing powers of the magistrates' court in respect of the offence.[131] In contrast to the Court of Appeal's powers following the determination of an appeal against conviction or sentence on indictment, the Crown Court may increase the original sentence imposed, provided that such sentence would have been within the sentencing powers of the magistrates' court.

3.20 The Crown Court's power to vary the original sentence is not limited to appeals against sentence; it extends to all aspects of the magistrates' court decision that is before the Crown Court.[132] Therefore, the Crown Court may vary the sentence (whether imposed by the magistrates or the Crown Court) in cases where the appellant unsuccessfully appealed only against their conviction by the magistrates.

Appeal against the decision of the Crown Court

3.21 Where a decision of the magistrates' court has been appealed to the Crown Court, and the Crown Court has given a decision, that decision of the Crown Court may be further appealed to the High Court by way of case stated on the ground that the decision is wrong in law or in excess of jurisdiction.[133] The party seeking to challenge the decision must apply to the Crown Court to state a case within 21 days after the date of the decision, though the time limit may be extended by the Crown Court.[134] The Crown Court may refuse to state a case where the application is considered to be "frivolous"[135] and such refusal may be challenged by way of judicial review.

3.22 Alternatively, the Crown Court's decision may be challenged by way of judicial review in the High Court (see paragraphs 3.35 to 3.38 below regarding the procedure for judicial review).[136] Where the appellant's appeal against conviction or sentence has

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129 Senior Courts Act 1981, s 48(2).

130 Senior Courts Act 1981, s 48(4); *Jones v Crown Prosecution Service* [2019] EWHC 2826 (Admin), [2020] 1 WLR 99 at [12].

131 Senior Courts Act 1981, s 48(4). In relation to referrals by the CCRC, the Crown Court may not impose a sentence of greater severity than the original sentence imposed by the magistrates' court (see s 11(6) of the Criminal Appeal Act 1995).

132 Senior Courts Act 1981, ss 48(4) and (5); *Jones v Crown Prosecution Service* [2019] EWHC 2826 (Admin), [2020] 1 WLR 99 at [14] to [16].

133 Senior Courts Act 1981, s 28(1).

134 Criminal Procedure Rules 2020, r 35.2(1)(a) and 35.5(1); Crown Court Rules 1982, r 26(1) and (14).

135 Crown Court Rules 1982, r 26(6).

136 Senior Courts Act 1981, s 29(3).

been unsuccessful in the Crown Court, they may also apply to the CCRC for a referral of their appeal back to the Crown Court.[137]

Appeal by way of case stated

3.23 Both the defendant and the prosecution may appeal the decision of the magistrates' court to the High Court by way of case stated on the ground that the decision was wrong in law or in excess of jurisdiction.[138] Additionally, any person "aggrieved by the conviction, order, determination or other proceeding" of the magistrates' court may also challenge the court's decision by way of case stated to the High Court.[139]

3.24 Appeals by way of case stated may only be made in respect of a final decision, such as a conviction, acquittal or sentence.[140] Interlocutory decisions may not be challenged by way of case stated.

3.25 Where the defendant makes an application to appeal by way of case stated, their right to appeal in respect of the same decision to the Crown Court ceases (see paragraph 3.11 above).[141]

Application to the magistrates' court to state a case

3.26 The application for an appeal by way of case stated must be made within 21 days after the day on which the decision was given by the magistrates' court or, where the hearing is adjourned after conviction, the day sentence is passed or on which the court otherwise deals with the defendant.[142] The magistrates' court does not have the power to extend this time limit, therefore appeals by way of case stated by the magistrates' court may not be made out of time.[143]

3.27 If the application to state a case is considered to be "frivolous", the magistrates' court may refuse to state a case.[144] An application will be considered to be "frivolous" if it is "futile, misconceived, hopeless or academic".[145] However, the magistrates' court must not refuse to state a case where the application is made by or under the direction of the Attorney General.[146] Additionally, the magistrates' court may also require the

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137 Criminal Appeal Act 1995, s 11(1).

138 Magistrates' Courts Act 1980, s 111(1).

139 Magistrates' Courts Act 1980, s 111(1). A "person aggrieved" may be a body corporate, such as a local authority, or any person who has a decision decided against them, except where the decision is an acquittal of a criminal offence (*Cook v Southend-on-Sea Borough Council* [1990] 2 QB 1, 7).

140 *Loade v Director of Public Prosecutions* [1990] 1 QB 1052.

141 Magistrates' Courts Act 1980, s 111(4).

142 Magistrates' Courts Act 1980, ss 111(2) and (3).

143 *R (Mishra) v Colchester Magistrates' Court* [2017] EWHC 2869 (Admin), [2018] 1 Cr App R 24 at [39].

144 Magistrates' Courts Act 1980, s 111(5).

145 *R v North West Suffolk (Mildenhall) Magistrates' Court ex p Forest Heath DC* [1997] 4 WLUK 476.

146 Magistrates' Courts Act 1980, s 111(5). However, this does not extend to the Director of Public Prosecutions (DPP) or a Crown Prosecutor. In *Director of Public Prosecutions v Highbury Corner Magistrates' Court* [2022] EWHC 3207 (Admin), [2023] 4 WLR 22, the DPP successfully obtained a judicial review of a refusal by the District Judge to state a case after dismissing a case against a protestor for aggravated trespass. The

applicant to enter into a recognizance, with or without sureties, to prosecute the appeal without delay and pay any costs that the High Court may award.[147]

3.28 The decision of the court to refuse to state a case may be challenged by way of judicial review and the High Court may make a mandatory order requiring the magistrates' court to state a case.[148]

Determination of the appeal

3.29 The High Court is required to determine whether the magistrates' court has reached a decision which it was not reasonably open to it to reach.[149] The High Court can:

(1) reverse, affirm or amend the magistrates' court's decision; or

(2) remit the matter to the magistrates' court, with the opinion of the High Court.[150]

3.30 As such, the High Court may uphold or quash both acquittals and convictions and, where appropriate, substitute them for a conviction or acquittal respectively. The High Court may also make such other order in relation to the matter as it thinks fit.[151] This includes the power to order a rehearing, before the same or a different bench, where a fair trial is still possible.[152]

Appeal against the decision of the High Court

3.31 The appellant or the respondent may appeal against the decision of the High Court to the Supreme Court, where leave to appeal has been granted by the High Court or the Supreme Court.[153] Leave to appeal must only be granted by the courts where:

(1) the High Court has certified that the appeal involves a point of law of general public importance; and

(2) it appears to the court that the point ought to be considered by the Supreme Court.[154]

3.32 The party seeking to appeal the decision of the High Court must apply to the High Court for leave to appeal within 28 days, beginning with:

High Court held that the refusal to state a case was unlawful as the request to state a case was not frivolous; in fact, it was well-founded. The High Court also quashed the District Judge's finding of no case to answer and remitted it for retrial before a different judge.

147 Magistrates' Courts Act 1980, s 114.

148 Magistrates' Courts Act 1980, s 111(6).

149 *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 at [23] and [29].

150 Senior Courts Act 1981, s 28A(3).

151 Senior Courts Act 1981, s 28A(3).

152 *Griffith v Jenkins* [1992] 2 AC 76 at [84].

153 Administration of Justice Act 1960, ss 1(1) and (2). An appeal may not be made from the High Court to the Court of Appeal in a criminal cause or matter (see s 18(1)(a) of the Senior Courts Act 1981).

154 Administration of Justice Act 1960, s 1(2).

(1) the date of the court's decision; or

(2) where reasons are given by the court after its decision, the date on which the court gives its reasons.[155]

3.33 Where the application for leave to appeal is refused by the High Court, leave may be sought from the Supreme Court within 28 days beginning with the date on which leave is refused by the High Court.[156] The High Court or the Supreme Court may extend the time limit where the defendant applies for an extension of time.[157]

3.34 For the purposes of the appeal, the Supreme Court may exercise any powers of the High Court or remit the case to the High Court.[158]

Judicial review

3.35 Both the defendant and the prosecution may apply to the High Court for a judicial review of the decision of the magistrates' court on public law grounds (ie illegality, irrationality and procedural impropriety). It is not necessary for the defendant to have exhausted their right of appeal to the Crown Court before making an application for judicial review.[159] Interlocutory decisions may be challenged by way of judicial review; however, such a challenge will only be considered by the court in rare cases if the trial is under way.[160]

3.36 In contrast to appeals by way of case stated, an application for judicial review may only be made where leave has been granted by the High Court.[161] The application for judicial review must be made "promptly" and no later than three months from the date on which the grounds for the claim first arose.[162] Where permission is refused by the High Court, or permission is only given on certain grounds or subject to conditions, the claimant may request that the decision be reconsidered at a hearing within seven days after the service of the court's reasons.[163] Such request may not be made where the court refuses permission on the basis that the application is totally without merit.[164]

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155 Administration of Justice Act 1960, ss 2(1) and (1A).

156 Administration of Justice Act 1960, s 2(1).

157 Administration of Justice Act 1960, s 2(3).

158 Administration of Justice Act 1960, s 1(4).

159 *R v Hereford Magistrates' Court ex p Rowlands* [1998] QB 110 at [125].

160 *R (Parashar) v Sunderland Magistrates' Court* [2019] EWHC 514 (Admin), [2019] 2 Cr App R 3 at [43]. The High Court noted that the threshold of exceptionality is lower in cases where a pre-trial decision is being challenged. The circumstances where a judicial review may be appropriate in such cases are set out at paragraph [42] of the judgment.

161 Senior Courts Act 1981, s 31(3).

162 Civil Procedure Rules 1998, r 54.5(1).

163 Civil Procedure Rules 1998, r 54.12(1), (3) and (4).

164 Civil Procedure Rules 1998, r 54.12(7). An application will be "totally without merit" if it is "bound to fail" (see *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, [2014] 1 WLR 3432 at [13] and [19]).

3.37 The High Court has the power to grant a quashing, mandatory or prohibiting order.[165] Where the High Court quashes a decision it may remit the matter to the magistrates' court and direct it to reconsider the matter and reach a decision in accordance with the judgment of the court, or it may substitute its own decision.[166] Accordingly, the High Court has the power to quash a conviction or may remit the case to the magistrates' court together with a direction to reconsider the matter in accordance with the findings of the High Court.

3.38 The appellant or the respondent may appeal against the decision of the High Court to the Supreme Court. Such appeals follow the same procedure as set out in paragraphs 3.31 to 3.34 above.

Choosing how to challenge a decision of the magistrates' court

3.39 There is some overlap between the three avenues of challenge from the magistrates' court and the High Court has sought to provide some guidance on which may be most appropriate in certain circumstances. The High Court observed in *Rowlands* that:

(1) an appeal to the Crown Court is the ordinary avenue of appeal where an appeal is sought on the basis that the magistrates' court has reached the wrong decision on a question of fact, or a mixture of law and fact; and

(2) an appeal to the High Court by way of case stated is the ordinary avenue of appeal where an appeal is sought on the basis that the magistrates' court has made an error of law.[167]

3.40 According to the High Court in *Lloyd* a judicial review will be the appropriate avenue where it is alleged that the magistrates' court acted in excess of its jurisdiction.[168] A judicial review may also be more appropriate where an issue of fact has to be decided which the magistrates' court cannot have decided for themselves, such as where there has been unfairness in the way the magistrates' court conducted the case.[169]

3.41 In relation to appeals against sentence, these should usually be made to the Crown Court; sentencing decisions can only be challenged by way of case stated or judicial review where there are "clear and substantial reasons" for believing that such avenue of challenge would dispose of the matter in the interests of the defendant.[170]

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165 Senior Courts Act 1981, s 31(1)(a).

166 Senior Courts Act 1981, s 35(5). The High Court may only substitute its own decision in such cases if the quashing order is made on the ground that there has been an error of law and without the error there would have been only one decision which the magistrates' court could have reached (see s 31(5A) of the Senior Courts Act 1981).

167 *R v Hereford Magistrates' Court ex p Rowlands* [1998] QB 110 at [118].

168 *R v North Essex Justices ex p Lloyd* [2001] 2 Cr App R (S) 15 at [11].

169 *R (P) v Liverpool City Magistrates* [2006] EWHC 887 (Admin), [2006] 3 WLUK 415 at [6] and [7]. For example, where it is alleged that there has been bias or the defendant was prevented from properly putting their case.

170 *Allen v West Yorkshire Probation Service Community Service Organisation* [2001] EWHC Admin 2, [2001] 1 WLUK 222 at [17].

Appeals in summary proceedings: the case of Paul Chambers[171]

In January 2010, Robin Hood Airport was closed due to cold weather. Paul Chambers, who was planning to fly to Belfast later that month, posted a message on Twitter in which he joked:

> Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!

Although the message was ostensibly directed at the airport, the airport was not copied into the message (for instance, by including the airport's Twitter "handle" in the message). However, the following week, it was seen by one of the airport's staff while browsing the internet at home. He reported it to his manager, who assessed it as not being a credible threat, but in line with airport policy, notified the airport police. The airport police took no action but passed it to South Yorkshire police.

South Yorkshire Police arrested Chambers while he was at work. However, their investigation concluded "there is no evidence at this stage to suggest that there is anything other than a foolish comment posted on 'Twitter' as a joke for only his close friends to see".

Despite this, the Crown Prosecution Service advised the police that Chambers could be charged with an offence of sending a menacing communication under section 127(1) of the Communications Act 2003. Chambers was convicted of the offence by Doncaster Magistrates' Court, and fined £385 with £600 costs. He lost his job as a financial supervisor as a result of his conviction.

He appealed to the Crown Court. The court found that the message was "menacing per se" and that "an ordinary person seeing the "tweet" would see it in that way and be alarmed. The airport staff did see it and were sufficiently concerned to report it". (In fact, as noted above, the airport staff were not concerned, but reported it in line with corporate policy). It upheld the conviction.

Chambers then appealed to the High Court by way of case stated. The case had by now attracted considerable public interest. The appeal was heard by a three-judge panel chaired by the Lord Chief Justice, who held:

> This message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "Twitter" for widespread reading, a conversation piece for the appellant's followers, drawing attention to himself and his predicament… It was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security... The language and punctuation are inconsistent with the writer intending it to be or to be taken as a serious warning.

The High Court quashed the conviction.

In 2021 we published recommendations for reform of the offences in section 127(1) of the Communications Act 2003. Provisions to give effect to this were included in the Online Safety Bill, currently before Parliament. However, provisions that would have repealed the offence of which Chambers was wrongly convicted have now been removed from the Bill.

Proposals for reform

3.42 Several proposals for reform have previously been made in relation to appeals from the magistrates' court, which have focused on the nature of the appeal in the Crown Court and the consolidation of existing avenues of challenge.

The Auld review

3.43 In his review of the criminal courts Lord Justice Auld noted that the appeal process from the magistrates' court is "very confusing and makes for duplicity of proceedings" and has a number of unsatisfactory features, as follows.

(1) There are three avenues of challenge that overlap and "choosing the most appropriate route and form of relief in the High Court is not always straightforward".

(2) The automatic right of appeal to the Crown Court by way of rehearing is anomalous, given that:

(a) a judicial filter is applied to the other avenues of challenge in the High Court;

(b) the magistrates' court now gives reasons for its decisions;

(c) where the original decision was made by the magistrates, the appeal is heard by a similarly constituted bench, with the only difference being that one of the fact finders is a judge;

(d) where the appeal is from a District Judge (Magistrates' Court), the process is repeated before a mixed bench of professional and lay judges; and

(e) witnesses are required to attend twice to give evidence.

(3) There are two distinct and partially overlapping procedures for challenging jurisdictional and other legal errors in the High Court.

(4) Different time limits apply depending on the avenue of challenge.[172]

3.44 Lord Justice Auld was of the view that there should only be one avenue of challenge. He said in his report that there was strong support for the removal of the right of appeal to the Crown Court by way of rehearing, the introduction of similar grounds of appeal to those in the Court of Appeal and merging the two avenues of challenge in the High Court into a single form of appeal to the Court of Appeal.[173] He made the following recommendations for reforming the appeal process from the magistrates' court:

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171 *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 WLR 1833.

172 Auld Review, pp 620 and 621, paras 24 to 29.

173 Above, p 616, para 14.

(1) The defendant's right of appeal to the Crown Court by way of rehearing should be abolished and replaced by a right of appeal, with leave, to the Crown Court constituted by a judge sitting alone. The Crown Court should apply the same test as applied to appeals by the Court of Appeal.[174]

(2) There should be no right of appeal from the magistrates' courts to the High Court by way of case stated or by application for judicial review.[175]

(3) Appeals by way of case stated and applications for judicial review from the Crown Court in its appellate jurisdiction (as well as in relation to matters tried on indictment) should also be abolished. Such appeals should lie to the Court of Appeal under an enlarged appellate jurisdiction and should require leave from the court, which should only be given where the case involves an important point of principle or practice, or where there is some other compelling reason for the court to hear the case. This would create a single route of appeal in respect of criminal matters, which would lead to the CACD.[176]

The Leveson review

3.45 These recommendations were revisited in Sir Brian Leveson's review concerning efficiency in criminal proceedings.[177] He noted the features of the current appeal process that were highlighted in Lord Justice Auld's review (see paragraph 3.43 above) and contrasted it with the appeal process from the Crown Court.[178] He noted the potential option of adopting the same approach that is currently applied in the Court of Appeal in order to avoid a rehearing taking place.[179] He also noted that such a change would lead to greater scrutiny of the reasons provided by the magistrates' court for its decisions and, as such, could require more detailed reasons to be provided with more time being taken "fashioning and deploying them", which could make such changes counterproductive.[180]

3.46 Such countervailing considerations were not considered in Lord Justice Auld's report. Given the growing backlog of cases and the decrease in criminal justice system and legal aid funding, the practical implications of making such changes may have been different at the time of the two reviews, and may be further different now.

The Law Commission review of the High Court's supervisory jurisdiction in criminal cases

3.47 In 2010, the Law Commission reviewed the High Court's supervisory jurisdiction in relation to criminal cases from the Crown Court and made a number of recommendations for reform, including abolishing appeals to the High Court by way of

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174 Auld Review, recommendations 300, 302, 303 and 304.

175 Above, recommendation 305.

176 Above, recommendation 306.

177 Leveson Review. Whilst potential improvements that would require legislative changes were outside the terms of reference for the review, Sir Brian Leveson sought to highlight a few such options.

178 Above, pp 84 and 86, paras 324, 325 and 330 to 333.

179 Above, p 86, paras 331 and 334.

180 Above, p 86, para 335.

case stated from the Crown Court where it is acting in its appellate capacity.[181] This would have resulted in the decisions of the Crown Court in respect of appeals from the magistrates' court being challenged by way of judicial review only.

3.48 Whilst the jurisdiction of the High Court over the magistrates' court fell outside the review's terms of reference, the report also considered briefly the implications of the removal of the High Court's jurisdiction over the magistrates' court, so that all appeals from the magistrates' courts would simply go to the Crown Court.[182] Based on the assumption that the right to a rehearing in the Crown Court would be retained, we noted that there would need to be a way, which would be available to both the defendant and the prosecution, for a point of law to be taken to the Court of Appeal from the rehearing. This would require a filter mechanism in the form of a leave requirement to ensure that the appeal concerned a point of law, as well as a means of challenging the refusal to grant leave.

3.49 To avoid duplication in the form of a rehearing in the Crown Court in order to get a point of law before the Court of Appeal, we said that there should also be a leapfrog mechanism if an appeal was sought purely on a point of law and the Crown Court certified it as being a point of law of sufficient novelty and/or difficulty that the CACD should hear it. Such cases could then go straight to the Court of Appeal without a substantive hearing in the Crown Court.

3.50 We did not think that there would have to be a mechanism for challenging a decision by the Crown Court to refuse to certify that a point of law was involved, because the refusal would not deny a party a route of appeal; it would just prevent them short-circuiting part of the process. We noted that this would remove the possibility of an appeal being made before there has been a verdict in the magistrates' court[183] and that a third party could bring an appeal on a point of law. We noted that this would transfer work from the High Court to the Crown Court and would, therefore, lead to an increase to the Crown Court's workload.

3.51 The potential reform of the High Court's jurisdiction in relation to the magistrates' court would need to be assessed in light of any possible changes to the appeal process from the magistrates' court to the Crown Court. This is also an area where there are a number of technical discrepancies – for example the magistrates' court may not extend the time limit in relation to appeals by way of case stated, but in relation to appeals from the Crown Court in its appellate capacity, the Crown Court has the power to extend the time limit in respect of appeals by way of case stated. Therefore, depending on any wider proposed changes to the High Court's jurisdiction, there is scope for technical reforms in this area.

Other options for reform

3.52 Lord Justice Auld envisaged the comprehensive reform of appeals from the magistrates' court to the Crown Court, which would result in such appeals mirroring

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181 The High Court's jurisdiction in relation to criminal proceedings (2010) Law Com No 324, para 7.28.

182 The High Court's jurisdiction in relation to criminal proceedings (2010) Law Com No 324, paras 12.11 to 12.18.

183 Currently an interlocutory decision by the magistrates' court may be challenged before the conclusion of a trial by way of judicial review (see para 3.29).

the way appeals from the Crown Court to the Court of Appeal operate. This would involve altering both the appeal process (introducing a leave requirement) and the nature of the appeal (moving from a rehearing to a review of the magistrates' court's decision).

3.53 Other options for reform may include the removal of the automatic right of appeal and the introduction of a leave requirement, with appeals continuing to operate by way of rehearing. However, this raises a question about the test the Crown Court would apply for granting leave. The leave requirement in the Court of Appeal is used to determine whether the grounds for appeal are arguable (ie whether it has a reasonable prospect of succeeding) in order to decrease unmeritorious appeals. As such, the grounds of appeal are linked to the test that the Court of Appeal would apply on appeal, which takes the form of a review instead of a rehearing. Given that the appeal would not take the form of a review which focuses on, for example, particular errors which may have been made by the magistrates' court, it may be difficult to operate a leave requirement in the same form that it currently operates in the Court of Appeal.

3.54 A test which is more general in nature, such as whether the appeal would be in the interests of justice, could avoid creating a disconnect between the leave requirement and how the appeal will subsequently be determined by the Crown Court. However, this would raise further questions about the range of factors the court may take into account when determining whether to grant leave, such as the availability of witnesses or the loss of evidence, given that the appeal would take the form of a rehearing. Leave from the Crown Court is currently required in relation to out-of-time appeals and the Court takes into account a range of factors in relation to the delay in appealing the decision, including the practicalities of there being an effective rehearing.[184]

Discussion

3.55 Lord Justice Auld noted several anomalies in the way appeals from magistrates' courts operate (see paragraph 3.43 above). Sir Brian Leveson noted in addition that the less serious the offence alleged, the greater the possible rights of appeal.

3.56 It is also important to recognise that the right to a rehearing has implications for victims and witnesses, who may be required to give evidence again. It may also encourage those convicted on the basis of evidence given at trial to "take a chance" on a witness failing to show up at the rehearing. It may in some cases even enable a defendant intentionally to "revictimise" their victim by putting them through the process of giving evidence again.

3.57 We recognise, however, that replacing the current appeal mechanism with something more like the system for indictable offences, could have serious implications for how the courts operate. Routine recording of all proceedings in magistrates' courts would also be required. The Leveson review acknowledged that the "reasons provided by the bench would be subject to much greater scrutiny and could require more detail than is presently provided. In that event, more time would be taken fashioning and deploying them: to that extent, the restriction could be counter-productive".[185]

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184 See *R (Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin), [2015] 3 WLUK 889 at [12].

185 Leveson Review, p 86, para 335.

3.58 In pre-consultation engagement with legal stakeholders, it was suggested that the impact on magistrates' courts themselves would be profound: there was a concern that the system would collapse if magistrates were required to provide detailed reasons for their decisions, including their verdicts, and legal advisers were required to provide robust written advice that would withstand judicial scrutiny on appeal. There was also a strong argument made that the right to a full rehearing – which is only used in a small proportion of cases – is a necessary consequence of the fact that summary proceedings do not enjoy the same level of protections for defendants (including publicly funded representation) as in indictable cases.

Question 2.

3.59 Is there a need to reform the processes by which decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed?

3.60 In particular:

(1) Should the ability to challenge decisions of a magistrates' court through appeal by way of case stated or judicial review, be retained, abolished or reformed (and if reformed, how)?

(2) Should a leave requirement be introduced in respect of appeals from the magistrates' court to the Crown Court? If so, should the grant of leave to appeal be followed by a rehearing or a review of the magistrates' court's decision by the Crown Court?

Chapter 4: Appeals in proceedings on indictment

4.1 As discussed at paragraph 2.68 above, general appeal rights in trials on indictment are governed by the Criminal Appeal Act 1968. The powers of the Court of Appeal Criminal Division ("CACD") are statutory. There is no equivalent to the supervisory jurisdiction that the High Court has in relation to magistrates' courts. Most of the legislation dealing with the jurisdiction of the CACD is found in the Criminal Appeal Act 1968. However, the CACD's powers in relation to certain orders, such as a compliance order associated with a confiscation order[186] or a football banning order,[187] can be found in the legislation dealing with those matters.

4.2 In addition to appeals against conviction and sentence, it is possible to appeal to the CACD certain rulings made during trials on indictment. Because a defendant can appeal their conviction after trial (but the prosecution generally cannot appeal an acquittal), some of these appeal rights are limited to the prosecution. We discuss these in the chapter on appeals by the prosecution, third parties and the State, while this chapter concentrates on appeals by a convicted person to the CACD against conviction or sentence.

Right of appeal

Appeal against conviction

4.3 A person convicted of an offence on indictment by the Crown Court may appeal against the conviction to the CACD pursuant to section 1(1) of the Criminal Appeal Act 1968 ("the 1968 Act").

4.4 The right of appeal may be exercised irrespective of the plea entered by the person in relation to the offence. However, the appellant's plea will be taken into consideration by the court in the determination of the appeal.[188] In general, there is a high threshold before a conviction will be found unsafe where the appellant had pleaded guilty, although this does not apply where it is alleged that the prosecution was an abuse of process.

4.5 Since 1995, the sole ground for an appeal against conviction is that the conviction is "unsafe".[189] Section 2 of the 1968 Act provides:

> (1) Subject to the provisions of this Act, the Court of Appeal—

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186 An appeal to the Court of Appeal against a decision of the Crown Court to make, discharge or vary a compliance order may be made by the prosecutor or any person affected. The prosecutor may also appeal a decision not to make a compliance order (Proceeds of Crime Act 2002, s 13B).

187 Where the Crown Court refuses to make a football banning order on conviction for a relevant offence, the prosecution has a right of appeal to the Court of Appeal (Football Spectators Act 1989, s 14A). There is no corresponding provision for an appeal by the defence as they are able to appeal the banning order through the normal procedure for appealing a sentence.

188 *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62.

189 Criminal Appeal Act 1968, s 2(1).

(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

(b) shall dismiss such an appeal in any other case.

(2) In the case of an appeal against conviction the Court shall, if they allow the appeal, quash the conviction.

4.6 However, in some circumstances, the CACD will declare that a procedural defect relating to the trial was so fundamental that the trial was a "nullity",[190] regardless of whether the conviction was safe or unsafe. This includes cases where a plea was not properly taken, or where a guilty plea was made under undue pressure, or a necessary consent for the prosecution was not obtained.[191]

Appeal against sentence

4.7 A person convicted of an offence on indictment may appeal against the sentence imposed by the Crown Court in respect of the conviction to the Court of Appeal pursuant to section 9(1) of the 1968 Act. An appeal may not be made under section 9(1) of the 1968 Act against a sentence which is "fixed by law"[192] (that is, the mandatory life sentence for murder), but where a life sentence is imposed, the term (whether a minimum or whole life term) can be appealed.[193]

4.8 Where a person convicted on indictment is in addition convicted of a summary offence by the Crown Court, they may also appeal against the sentence imposed in respect of the summary offence to the Court of Appeal.[194] Similarly, a person convicted of an offence by the magistrates' court and sentenced by the Crown Court for that offence may appeal against the sentence to the Court of Appeal, where:

(1) the magistrates' court committed them to the Crown Court for sentence; or

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190 The court's power to do so is not found in the Criminal Appeal Act 1968. In *Crane* [1921] 2 AC 299, it was held that the power came from s 7 of the Criminal Appeal Act 1907 which stated: "The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court." The Court of Appeal Criminal Division ("CACD") inherited the powers of the Court of Criminal Appeal by virtue of the Criminal Appeal Act 1966; in addition, as part of the Court of Appeal it is a superior court of record by virtue of the Senior Courts Act 1981, s 15.

191 For instance, in the recent related cases of *Llewellyn* [2022] EWCA Crim 154, [2023] QB 459 and *Supersad* [2022] EWCA Crim 1166, [2022] 7 WLUK 587 the appellants had been convicted following a retrial after their earlier convictions had been quashed, but they were not arraigned for the retrial within two months and the prosecution did not obtain the CACD's consent to arraign out of time. The convictions from the retrial were therefore quashed, and no further retrial was ordered. In *Lalchan* [2022] EWCA Crim 736, [2022] QB 680 a conviction for stirring up racial hatred was quashed because the Attorney General's consent to prosecute had not been obtained.

192 Criminal Appeal Act 1968, s 9(1).

193 Criminal Appeal Act 1968, s 9(1A).

194 Criminal Appeal Act 1968, s 9(2).

(2) they were given a suspended sentence, conditional discharge order, youth rehabilitation order or a community order by the magistrates' court and were further dealt with by the Crown Court for the related offence.[195]

4.9 The right of appeal against sentence includes the right to appeal against any order made by the Crown Court when dealing with the individual in respect of the offence, with the exception of an order requiring payments to be made in respect of legal aid costs associated with the criminal proceedings.[196]

4.10 The referral of a sentence imposed by the Crown Court to the CACD under section 36 of the Criminal Justice Act 1988 by the Attorney General on the basis that the sentence is "unduly lenient" does not affect the defendant's right of appeal under the 1968 Act.[197]

Permission to appeal

4.11 An appeal against conviction or sentence may only be brought where:

(1) leave has been granted by the CACD; or

(2) a certificate that the case is fit for appeal has been granted by the trial or sentencing judge in the Crown Court within 28 days from the date of conviction or sentence (see paragraphs 4.31 to 4.33 below).[198]

4.12 Leave to appeal against conviction must be sought from the CACD (with the appellant specifying the grounds of appeal) within 28 days from the date of conviction; leave to appeal against sentence must be requested within 28 days of sentencing.[199] This means that where sentencing takes place at a later date than conviction, the time limit for an appeal against conviction will begin to run (and may expire) before sentencing takes place.

4.13 The purpose of the requirement to seek leave and specify the grounds of appeal was explained by Lord Bingham in *Cox*:

> The purpose of the leave requirement in our judgment, like any other leave requirement, is to act as a filter: to weed out appeals that would have no reasonable prospect of success if leave were to be granted, and to enable the Court to concentrate its judicial resources on cases that have something in them. The purpose of requiring grounds to be specified is to require appellants and their

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195 Criminal Appeal Act 1968, ss 10(2) and (3).

196 Criminal Appeal Act 1968, ss 50(1) and (3).

197 *R v Hughes* [2009] EWCA Crim 841, [2010] 1 Cr App R (S) 25 at [19].

198 Criminal Appeal Act 1968, ss 1(2) and 11(1) and (1A). A certificate should only be issued by the trial judge in exceptional circumstances. An example may be where there was a difficult and important point of statutory construction. For instance, in *R v Bradley* [2005] EWCA Crim 20, [2005] 1 Cr App R 24, the judge had allowed bad character evidence under newly commenced provisions of the Criminal Justice Act 2003, but there was uncertainty as to when proceedings should be taken to have "begun", and thus whether the case had begun before commencement and the evidence should not therefore have been adduced.

199 Criminal Appeal Act 1968, s 18(2).

advisers not only to make clear that they are aggrieved at an outcome but also to specify the grounds upon which their grievance is based.[200]

4.14 The 28-day time limit may be extended, before or after it expires, by the court.[201] However, an extension of time will only be granted where the applicant is able to demonstrate that there is a good and exceptional reason for making an appeal outside the time limit.[202]

4.15 An applicant who wishes to appeal against their conviction outside the time limit on the ground that their conviction is unsafe as a result of a change in the law will need to seek exceptional leave.[203] Such leave will only be granted where the applicant is able to demonstrate that they would otherwise suffer substantial injustice (see chapter 6).[204]

4.16 The Westminster Commission[205] recommended that the Law Commission should review the 28-day time limit for lodging an appeal, "to reflect the difficulties faced by applicants, some of whom are unrepresented and vulnerable".[206]

Determination of the application for leave

4.17 Applications for leave to appeal and for an extension of the time limit may be determined by a single judge of the CACD or the High Court.[207] Leave to appeal will be granted where the application discloses an "arguable" ground of appeal.[208] A ground will be "arguable" if it has a "reasonable or real" prospect of success.[209]

4.18 If the application for leave to appeal is refused by a single judge, the applicant may renew their application to the full court.[210] Renewed applications for leave to appeal must be made within 10 business days from the date leave is refused by the single judge.[211] However, the renewed application may result in a loss of time order (see paragraphs 4.21 to 4.27 below).

4.19 Where leave has been granted by the single judge only in relation to some of the grounds of appeal, the applicant may only appeal in respect of those grounds. If the applicant wishes to appeal on the grounds in respect of which leave has not been

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200 *R v Cox* [1999] 2 Cr App R 6 at [9].

201 Criminal Appeal Act 1968, s 18(3).

202 *R v Roberts* [2016] EWCA Crim 71, [2016] 1 WLR 3249 at [39].

203 *R v Jogee* [2016] UKSC 8, [2017] AC 387 at [100].

204 Above at [100].

205 See para 1.5. The Westminster Commission was established by the All-Party Parliamentary Group on Miscarriages of Justice, and chaired by Baroness Stern and Lord Garnier.

206 The Westminster Commission Report, p 68.

207 Criminal Appeal Act 1968, ss 31(2)(a) and (b) and 45(2).

208 *R v Gohil* [2018] EWCA Crim 140, [2018] 1 Cr App R 30 at [125].

209 Above [125].

210 Criminal Appeal Act 1968, s 31(3).

211 Criminal Procedure Rules 2020, r 36.5(2)(b).

granted, they must renew their application for leave in relation to those grounds to the full court.[212]

Vexatious or frivolous applications

4.20 Where the application for leave to appeal does not show any "substantial ground" of appeal, the Registrar of the CACD may refer the case for summary determination by the court.[213] The court may, in such cases, if they consider the application for leave or the appeal to be "frivolous or vexatious", dismiss the application for leave or the appeal without the attendance of the parties.[214]

Loss of time order

4.21 The CACD may make a "loss of time" order where an application for leave to appeal is found to be unmeritorious and leave to appeal is refused.[215]

4.22 In general (and unlike the situation that pertains in some legal systems), time spent in custody pending determination of an appeal is treated as part of the sentence.[216] However, the CACD may direct that this time, or some part of it, is not treated as such, but not where (i) leave to appeal had been granted, (ii) the trial judge had certified the case as being fit for appeal, or (iii) the case was referred by the Criminal Cases Review Commission ("CCRC").[217]

4.23 Such orders enable the court to discourage unmeritorious applications by directing that time spent in custody by the appellant pending the determination of their appeal may not count towards their sentence[218] – effectively extending the time to be served.

4.24 A loss of time order may be made by the single judge or the full court.[219] In general, a single judge will not exercise the power to make a loss of time direction. However, following the determination of the application for leave, the single judge may indicate (by initialling a box on the refusal of leave) that the full court should consider making a loss of time order if the application is renewed.[220]

4.25 The full court, in turn, is only likely to make a loss of time direction if the single judge has made that indication. However, the fact that the single judge has not done so does not preclude the full court from making a loss of time order in an appropriate case.[221]

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212 *R v Hyde* [2016] EWCA Crim 1031, [2016] 1 WLR. 4020 at [16].

213 Criminal Appeal Act 1968, s 20.

214 Above, s 20.

215 *R v Gray* [2014] EWCA Crim 2372, [2015] 1 Cr App R (S) 27 at [1] to [10].

216 Criminal Appeal Act 1968, s 29(1).

217 Above, s 29(2).

218 Above, s 29(1).

219 Above, s 31(2)(h).

220 *R v Gray* [2014] EWCA Crim 2372, [2015] 1 Cr App R (S) 27 at [7].

221 *R v Hart* [2006] EWCA Crim 3239, [2007] 1 Cr App R 31; *R v Gray* [2014] EWCA Crim 2372, [2015] 1 Cr App R (S) 27.

4.26 A loss of time order may also be made by the court where an application to re-open a final determination of the court (see paragraph 4.29 below) is found to be unmeritorious.[222]

4.27 In practice, loss of time orders are rare, and tend to be for a small number of weeks (14 or 28 days seems to be typical, with 56 days for particularly egregious cases). However, research undertaken for the CCRC found that this was not well understood by prisoners and the prospect of a loss of time order could be acting to deter meritorious appeals, with a significant number of prisoners believing that they could be required to begin their sentence again.[223]

Refusal of leave to appeal

4.28 If an application for leave to appeal has been refused by the single judge (and the application has not been renewed to the full court) or the full court, the applicant may not apply for leave to appeal a second time.[224]

4.29 The CACD has limited power to re-open a final determination it has made, including in relation to an application for leave to appeal, in exceptional circumstances.[225] This power may be exercised, where:

(1) the determination is treated as a nullity; or

(2) it is necessary to avoid real injustice, the exceptional circumstances make it appropriate to re-open the determination and an alternative effective remedy is not available.[226]

4.30 The court's decision in respect of an application for leave may not be appealed.[227] Therefore, absent any exceptional circumstances that would enable the re-opening of the refusal of leave to appeal, where the applicant has exhausted their statutory right of appeal their only option will be to apply to the CCRC for the referral of their appeal to the CACD (see chapter 5).

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222 *R v CC* [2019] EWCA Crim 2101, [2020] 1 Cr App R 15 at [47].

223 K Telhat, *Loss of Time Orders: Research Report* (Criminal Cases Review Commission, 2021).

224 *R v Pinfold* [1988] QB 462 at [464]; R v Hughes [2009] EWCA Crim 841, [2010] 1 Cr App R (S) 25 at [6].

225 *R v Yasain* [2015] EWCA Crim 1277, [2016] QB 146.

226 *R v Yasain* [2015] EWCA Crim 1277, [2016] QB 146. In relation to the second category set out in paragraph 4.29(2) above, the decision to re-open the determination is at the discretion of the court and even where the conditions are satisfied the court may decline to re-open the case (*R v Gohil* [2018] EWCA Crim 140, [2018] 1 Cr App R 30 at [111]). In *Yasain*, at [40], the Court of Appeal held that the second category is confined to procedural errors. The court's subsequent decision in *Gohil*, at [129(iv)], reiterated this and made clear that it is reserved for exceptional circumstances that involve "the correction of clear and undisputed procedural errors" where it is easier and more efficient for the court to re-open the determination. However, the court in *CC* (*R v CC* [2019] EWCA Crim 2101, [2020] 1 Cr App R 15 at [32]) clarified that this does not exclude the possibility that there may be other exceptional circumstances that may lead to the re-opening of a determination to avoid real injustice.

227 *R v Garwood* [2017] EWCA Crim 59, [2017] 1 Cr App R 30.

Certificate of fitness to appeal

4.31 Where a certificate that the case is fit for appeal is sought from the trial or sentencing judge in the Crown Court, the application must be made:

(1) if applying orally, immediately after the conviction or sentence; or

(2) if applying in writing, within 10 business days from the date of conviction or sentence.[228]

4.32 A certificate that the case is fit for appeal will only be granted in exceptional circumstances, where the trial or sentencing judge is satisfied that there is a "compelling" ground of appeal.[229]

4.33 If a certificate is not granted by the trial or sentencing judge, an application for leave to appeal may be made to the CACD.

Appellants who have died

4.34 Where a person who might have appealed has died, or a person who has already begun an appeal dies, the CACD can approve a person to begin or take over the appeal on their behalf. This person must be a surviving spouse or civil partner; a personal representative (that is, for the purposes of administering their estate); or any other person appearing to the CACD to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of the appeal.[230]

4.35 An application must be made within a year of death, unless the appeal follows a referral by the CCRC.

Admission of evidence

4.36 Section 23 of the 1968 Act enables the admission of evidence for the purposes of determining an application for leave to appeal or an appeal against conviction or sentence. The CACD may, where necessary or expedient in the interests of justice:

(1) order the production of documents or other materials connected with the proceedings, which appear to be necessary for the determination of the case;[231]

(2) order the attendance of witnesses, including witnesses who have not been called in the Crown Court proceedings; and

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228 Criminal Procedure Rules 2020, r 39.4(1).

229 *R v Atta-Dankwa* [2018] EWCA Crim 320, [2018] Crim LR 685 at [18]. In this case the judge certified the case as fit for appeal as it was clear that he had misdirected the jury as to the requisite mental element (he had directed them to the mental element for the alternative count of unlawful wounding and not the count of wounding with intent that the jury had asked about, and on which they convicted the defendant).

230 Criminal Appeal Act 1968, s 44A.

231 This power may also be exercised by a single judge (see s 31(2)(i) of the Criminal Appeal Act 1968).

(3) receive evidence not adduced in the Crown Court proceedings.[232]

4.37 When considering the exercise of this power the CACD must have regard to whether:

(1) the evidence appears to be capable of belief;

(2) it appears that the evidence may provide any ground for allowing the appeal;

(3) the evidence would have been admissible in the Crown Court proceedings on an issue which is the subject of the appeal; and

(4) there is a reasonable explanation for the failure to adduce the evidence in the Crown Court proceedings.[233]

4.38 However, whilst the court must consider the factors listed in the paragraph above, this list is not exhaustive or conclusive and the court may also take other factors into consideration.[234]

Power to direct an investigation

4.39 In relation to applications for leave and appeals against conviction, the CACD also has the power to direct the CCRC to investigate and report to the court on any matter.[235] We understand that this is generally only used where an allegation is made of juror misconduct, since the court has no investigatory resources of its own, and appellants will generally be unable to make inquiries of the jury. Because the CCRC will be acting at the behest of the court, jurors will be free to respond without being at risk of being in contempt of court.

Determination of the appeal against conviction

4.40 An appeal against conviction will be determined by a court consisting of an uneven number of not less than three judges.[236]

THE "SAFETY TEST"

The meaning of "safety"

4.41 Section 2 of the 1968 Act, as amended in 1995, states that the Court of Appeal shall allow an appeal against conviction if they think that the appeal is unsafe, and shall dismiss an appeal in any other case.

4.42 The "safety test" is thus the sole ground for an appeal against conviction. In *Pearson*,[237] the CACD said:

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232 Criminal Appeal Act 1968, s 23(1).

233 Criminal Appeal Act 1968, s 23(2).

234 *R v Erskin* [2009] EWCA Crim 1425, [2009] 2 Cr App R 29 at [39].

235 Criminal Appeal Act 1968, s 23A(1).

236 Senior Courts Act 1981, s 55(2).

237 *R v Criminal Cases Review Commission ex p Pearson* [1999] 3 All ER 498.

> The expression “unsafe” in section 2(1)(a) of the 1968 Act does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, or where the jury verdict, in the context of other verdicts, defies any rational explanation. Cases however arise in which unsafety is much less obvious: cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done. If, on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe.

4.43 “Unsafe” is thus an umbrella term, apt to cover both factual innocence and the possibility of factual innocence. However, as discussed below, it can also in some circumstances cover serious procedural irregularity or other unfairness, and abuse of process.

4.44 In contrast, prior to 1995, the circumstances in which a conviction could be overturned were discrete, and whether a conviction was “unsafe” was only one of the grounds. However, it is also clear that since 1995 (not least because the Human Rights Act 1998 compels such a reading) “unsafe” now covers grounds which previously fell under a different heading. Thus, safety under the 1995 test must be interpreted as having a broader meaning than pre-1995 (and case law read accordingly).

Background

4.45 The Criminal Appeal Act 1907 required the Court of Criminal Appeals to quash a conviction if:

> they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence,
>
> or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law
>
> or that on any ground there was a miscarriage of justice.[238]

4.46 This was subject to a provision – the “proviso” – that:

> the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.[239]

4.47 It is not clear whether the proviso was intended to apply only to the third limb of the test. On the one hand, it is hard to reconcile use of the proviso with the requirement in the first and second limb that the court should have concluded that the decision

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238 Criminal Appeal Act 1907, s 4(1).

239 Above, s 4(1).

"should be set aside".[240] On the other hand, the reference to "the point raised in the appeal" is more apt to refer to the first and second limb than the third.

4.48 In 1965, the Donovan Committee[241] recommended the first limb of this test – "unreasonable or cannot be supported having regard to the evidence" – should be replaced with "unsafe or unsatisfactory". They suggested that "the advantage to be gained from the provision … is that the safeguards for an innocent person, wrongly identified and wrongly convicted, are sensibly increased".

4.49 This change was effected in the Criminal Appeal Act 1966. This legislation also replaced the third limb – "there was a miscarriage of justice" – with "there was a material irregularity in the course of the trial".

4.50 Consequently, from 1966, the test for an appeal against conviction was (italics denoting changes from the 1907 test) that:

> the Court of Appeal shall allow an appeal against conviction if they think—
>
> (a) that the verdict of the jury should be set aside on the ground that *under all the circumstances of the case it is unsafe or unsatisfactory*; or
>
> (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
>
> (c) that *there was a material irregularity in the course of the trial*…
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no ~~substantial~~ miscarriage of justice has actually occurred.

4.51 Prior to 1964 the CACD could not order a retrial. Therefore, the consequence of a finding that the conviction should be set aside was that the conviction would be quashed, the appellant would be acquitted, and no further trial would be possible under the principle of double jeopardy. Lowering the threshold for a successful appeal reflected the fact that where there was doubt over a conviction, this could now be addressed by quashing the conviction and ordering a retrial.

4.52 A minor change was made in the Criminal Justice Act 1977, when the reference to "the verdict of the jury" in the first limb was replaced with references to "the conviction".[242]

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240 See Sir John Smith, "The Criminal Appeal Act 1995: Part 1: Appeals against conviction" [1995] *Criminal Law Review* 920.

241 The Interdepartmental Committee on the Court of Criminal Appeal, chaired by Lord Donovan, reported in 1965. The Committee recommended replacement of the Court of Criminal Appeal with a new criminal division of the Court of Appeal, along with changes to the test for quashing a conviction. These recommendations were implemented in the Criminal Appeal Act 1966.

242 This addressed a problem that had been highlighted in *DPP v Shannon* [1975] AC 717. Under the 1907 test, the conviction of a person who had pleaded guilty might be quashed where it amounted to a miscarriage of justice. However, in *Shannon*, the court held that under the 1968 test this was no longer possible: the first

The Runciman Commission and the current safety test

4.53 The Royal Commission on Criminal Justice chaired by Viscount Runciman (the "Runciman Commission") was set up following the acquittal of the Guildford Four[243] and the Birmingham Six[244] in 1991.

4.54 The Commission considered the grounds for appeal against conviction. There was agreement that the test should be amended, but the Commission split on how this should be done. The majority favoured a single ground, that the conviction "is or may be unsafe".

4.55 It went on to suggest that if the CACD found that the conviction *is* unsafe, it should allow the appeal outright, but that if it found the conviction *may be* unsafe, it should order a retrial if possible. This suggests that the Commission was equating "unsafe" with actual innocence or the view that no jury could convict on the evidence, whereas the conviction "may be unsafe" if there was evidence on which a jury at a retrial might convict. Accordingly, there would be no need for the proviso.

4.56 That the Commission favoured this interpretation is implicit in its approach to new evidence. It concluded that once the court had decided that the new evidence was relevant and capable of belief it should, if possible, order a retrial (that is, in the light of the new evidence, the conviction might be unsafe). If the court was satisfied that the fresh evidence caused the conviction to be unsafe, it should quash it without ordering a retrial (suggesting that by unsafe the Commission meant that the new evidence showed that the appellant could not now be convicted). Only where a retrial would be impractical or otherwise undesirable should the CACD decide the matter for itself.

4.57 The minority thought that it was confusing to wrap all three grounds for appeal in the one word "unsafe", which implied there was "something wrong" with the jury's verdict.

4.58 In the event, however, the Government favoured an umbrella term, but using the test that the conviction "is unsafe" (superficially more restrictive than that proposed by the Commission). In subsequent Parliamentary proceedings, however, Ministers made

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limb of the test required a jury verdict, while the third limb now required there to have been a procedural irregularity. A conviction following a guilty plea might be quashed under the second limb (a wrong decision on a rule of law) in some circumstances (for instance, where the count to which the appellant had pleaded guilty did not amount to an offence) but this did not apply here. The Court considered that Parliament had not intended to prevent a person from appealing a conviction following a guilty plea, and recommended that this could be addressed in the manner that was adopted in 1977.

243 Paul Hill, Gerry Conlon, Paddy Armstrong and Carole Richardson were convicted in 1975-76 in relation to the IRA bombings of two pubs in Guildford. Hill and Armstrong were also convicted of the bombing of a pub in Woolwich, SE London in which two people were killed, and Hill of the murder of British soldier Brian Shaw; all of the convictions were supported by confessions made in custody. While an appeal was underway (and adjourned to January 1990), a review of the case by Avon and Somerset Constabulary found evidence of widespread police misconduct in relation to their detention and evidence, following which the Crown stated that it did not wish to defend the convictions.

244 Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McIlkenny, William Power and John Walker were convicted in 1975 in relation to the IRA bombings of two pubs in Birmingham, in which 21 people were killed. The convictions were upheld by the Court of Appeal in 1976 and 1988. In 1991, the Crown indicated that it would not defend the appeals, and their convictions were quashed, the Court of Appeal finding that evidence of police misconduct in the case and new scientific evidence both independently rendered the convictions unsafe.

clear that they were not intending this to represent a narrowing of the grounds for a successful appeal:

> The present formula involves three overlapping grounds and is widely felt to cause confusion. Under the Bill, the Court of Appeal will allow any appeal where it considers the conviction unsafe and will dismiss it in any other case. That simple test clarifies the terms of the existing law. In substance, it restates the existing practice of the Court of Appeal.[245]

4.59 They also stated that the adoption of "is unsafe" in place of "is or may be unsafe", as recommended by the Runciman Commission, would not prevent the CACD from allowing an appeal in "lurking doubt" cases.[246]

4.60 Accordingly, the current test for an appeal against conviction is that:

> the Court of Appeal
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
>
> (b) shall dismiss such an appeal in any other case.

4.61 It is clear that "is unsafe" in the 1995 Act is not limited to the narrow meaning used by the Runciman Commission and extends to situations in which, for instance, a jury might have – but need not have – acquitted had the fresh evidence been available, or had they not been misdirected. (If "is unsafe" in the 1995 Act were read in the way that the Runciman Commission appears to have been using it, a conviction would only be quashed if the CACD concluded that the appellant could not have been guilty; and the provisions for a retrial would make no sense.) As we will see, however, the court has adopted an even broader understanding of "unsafe", which includes not just the possibility of factual innocence, but also cases where the prosecution was an abuse of process or the defendant did not receive a fair trial, even though there is no doubt about their guilt.

Case law on the safety test

4.62 In early commentary on the new test, Archbold, in 1997, said:

> The only ground for quashing a conviction (since the amendment by the Criminal Appeal Act 1995) is that the court thinks the conviction is 'unsafe.' This it is submitted, is clearly intended to refer to the correctness of the conviction (ie a conviction is unsafe if there is a possibility that the defendant was convicted of an offence of which he was in fact innocent).[247]

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245 *Hansard* (HC), 6 March 1995, vol 256, col 24.

246 *Hansard* (HL), 15 May 1995, vol 564, col 326.

247 *Archbold Criminal Pleading, Evidence and Practice* (1997), para 7-46.

4.63 In *Graham*,[248] the CACD made clear that – even confining consideration to factual innocence – unsafe included cases where there was a *possibility* of innocence:

> If the Court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the Court will dismiss the appeal. But if, for whatever reason, the Court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe.

4.64 The court in *Chalkley*[249] – endorsing the view of Archbold, discussed at paragraph 4.62 – concluded that the new test was only concerned with factual innocence and not questions of process (unless those questions cast doubt on whether the person was properly convicted of the offence):

> This much simpler form is in essence much the same as the intertwined and overlapping provisions of the old test, as was intended by the Royal Commission in recommending it, the Government in promoting it, the senior judiciary in supporting its parliamentary passage and Parliament in enacting it… Such ECHR jurisprudence on the point as there is suggests that *procedural unfairness not resulting in unsafety of a conviction* may be marked in some manner other than quashing the conviction.
>
> Whatever may have been the use by the court of the former tests of "unsatisfactor[iness]" and "material irregularity" … they are not available to it now, save as aids to determining the safety of a conviction. The court has no power under the substituted section 2(1) to allow an appeal if it does not think the conviction unsafe but is dissatisfied in some way with what went on at the trial.

4.65 *Chalkley* suggested that "safety" would not cover an abuse of process case such as *Bloomfield*[250] (though *Bloomfield* was decided under the new test, albeit that nowhere did the CACD in that case use the word "unsafe"). Thus, the CACD in *Chalkley* did appear to be narrowing the scope of the new test.

4.66 However, the subsequent case of *Mullen*[251] made clear that "safety" could still cover serious procedural deficiencies, even where they did not entail that the person was or might have been innocent.[252] *Mullen* was a case about abuse of process. However,

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248 [1996] WLUK 434, [1997] 1 Cr App R 302.

249 [1998] QB 848, 3 WLR 146. Chalkley pleaded guilty to conspiracy to rob after the judge ruled admissible evidence from conversations which had been recorded.

250 In *Bloomfield* [1996] 6 WLUK 307, [1997] 1 Cr App R 135, prosecuting counsel indicated that the Crown would offer no evidence, having accepted that the defendant was the victim of a set-up. However, owing to the presence in court of someone who was part of the wider police operation who would "smell a rat", the prosecutor asked the court to adjourn the matter so that the prosecution could be dropped at a later hearing. The following month, however, the Crown Prosecution Service ("CPS") changed its position. When the judge refused to stay proceedings for abuse of process, the defendant pleaded guilty. On appeal, the CACD held that it would bring the administration of justice into disrepute for the CPS to treat the court that way, and the conviction was quashed.

251 [2000] QB 520.

252 The CACD at [60] said that *Chalkley* "cannot, in our judgment, properly be regarded as having concluded the matter".

similar considerations also apply when the convicted person has not received a fair trial.[253]

4.67 In *Mullen*, the conviction of the appellant for conspiracy to cause explosions was quashed because the UK authorities had conspired with Zimbabwean authorities to have the appellant deported to the UK to stand trial, circumventing protections that would have been available to a person facing extradition.[254] The CACD considered whether the new sole ground "unsafe" was

> apt to confer jurisdiction to quash a conviction when no complaint is made about the conduct of the trial and the sole ground of appeal is that no trial should have taken place, because of the prosecution's abuse of the process of the court prior to trial.

4.68 It concluded, having had regard to Hansard and the discussions cited at paragraph 4.58 above, that unsafe has a broad meaning and is apt to encompass abuse of process considerations.

4.69 This was restated in *Davis, Rowe and Johnson*:[255]

> A conviction can never be safe if there is doubt about guilt. [However] a conviction may be unsafe even where there is no doubt about guilt but the trial process has been 'vitiated by serious unfairness or significant legal misdirection'.

4.70 In *Condron*,[256] the European Court of Human Rights ("ECtHR") held that the appellants had been denied a fair trial because the judge had not directed the jury that they could only draw adverse inferences from the defendants' silence at interview if sure that the defendants' silence could only sensibly be attributed to them having no answer or none that would stand up to scrutiny.[257] The ECtHR held that the defendants had not had a fair trial and the CACD proceedings (which had taken place before *Mullen*) had not rectified the deficiency because:

> The Court of Appeal was concerned with the safety of the applicants' conviction, not whether they had in the circumstances received a fair trial. In the Court's opinion,

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253 Abuse of process is distinct from the right to a fair trial, but the two concepts can overlap (A Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed 2008), pp 18-19). A stay on the grounds of abuse of process is available where it would not be possible for the defendant to receive a fair trial. It is also available when the integrity of the justice system would be undermined by the trial, where a trial would be oppressive, or where it would be unfair for the defendant to be tried (that is, not just unfair in the sense of not receiving a fair trial: it might for instance be unfair for the defendant to be tried after the prosecution had given an assurance that there would be no prosecution, even though the trial itself would be a fair one).

254 It was particularly relevant that Mullen had dual nationality, and was detained without access to legal advice before deportation. Had he been able to challenge deportation, he may have been removed to Ireland instead of the UK. Despite knowing that he held dual nationality, UK intelligence had created a false pretext for the Zimbabwean authorities to disregard any proof of Irish citizenship he might proffer, on the (false) basis that it might be a forgery.

255 *R v Davis, Rowe and Johnson* [2001] 1 Cr App R 115; "vitiated by serious unfairness" is a quotation from *Pearson* [2000] 1 Cr App R 141.

256 *Condron v United Kingdom* [2000] 31 EHRR 1 (App No 35718/97).

257 The defendants had been arrested over drugs charges and appeared to be experiencing withdrawal symptoms. The medical examiner found them to be fit to be interviewed, but their solicitor harboured doubts, and on his advice they gave "no comment" responses to questions.

> the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness.

4.71 Strictly, *Mullen* concerned abuse of process and not the right to a fair trial under the European Convention on Human Rights ("ECHR"). However, if safety can be given an expanded meaning (and *Mullen* acknowledges that it can and, in some circumstances, must), then it can encompass a conviction which was unsafe because the defendant did not receive a fair trial as well as (if not more readily than) convictions which are unsafe because the prosecution was an abuse of process. Such an interpretation was strengthened following incorporation of the ECHR in the Human Rights Act 1998, because section 3 of the Act requires courts, as far as possible, to read legislation in a way that is compatible with – in this case – the right to a fair trial in article 6.

4.72 This approach was confirmed in *Togher*.[258] Following *Mullen*, and rejecting *Chalkley*, the CACD held:

> As a matter of first principles, we do not consider that either the use of the word 'unsafe' in the legislation or the previous cases compel an approach which does not correspond with that of the ECHR. The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance... Since the 1998 [Human Rights] Act came into force, the circumstances where there will be room for a different result before this Court and before the ECHR because of unfairness based on the respective tests we employ will be rare indeed. Applying the broader approach identified [in *Mullen*] we consider that if the defendant has been denied a fair trial, it will almost be inevitable that the conviction will be regarded as unsafe.

Can fairness be outweighed by the strength of the prosecution evidence?

4.73 In *Condron*, the Court of Appeal had found that the judge's direction on the drawing of adverse inferences from the defendants' silence at interview was deficient. However, it did not find the conviction to be unsafe bearing in mind the weight of evidence against the defendants. This reflected established case law which stated that in deciding whether a conviction was safe, the strength of the prosecution case could override concerns about whether the appellant had had a fair trial.

4.74 Against this were some authorities suggesting that while individual deficiencies may not render a conviction unsafe, where they amounted to a failure to provide a fair trial, no conviction could be considered safe. In the Scottish case of *Brown v Stott*,[259] heard by the Judicial Committee of the Privy Council, Lord Steyn suggested that "it is fair that a Court of appeal should have the power, even when faced by the fact of irregularities in the trial procedure, to dismiss the appeal if in the view of the Court of appeal the defendant's guilt is plain and beyond doubt"; but he did so referring to "irregularities *not amounting to denial of a fair trial*". However, "once it has been

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258 [2000] 11 WLUK 239, [2001] 3 All ER 463.

259 [2001] 2 WLR 817 at [34].

determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or on any other ground".[260]

4.75 The judgment of the ECtHR in *Condron* suggests that the right to a fair trial cannot be outweighed by the strength of the case against the defendants. Thus, while "safety" is capable of encompassing more than just factual guilt or innocence, when abuse of process or fair trial issues are in play, separate consideration as to whether they render the conviction unsafe is required; there cannot simply be an overall consideration of the strength of the prosecution case balanced against the irregularities vitiating the fairness of the trial.

4.76 Per Lord Steyn in *R v A (No 2)*:[261]

> the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. … *The only balancing permitted is in respect of what the concept of a fair trial entails*: here account may be taken of the familiar triangulation of interests of the accused, the victim and society.[262]

4.77 That said, not every procedural defect associated with the right to a fair trial or another Convention right will render a conviction unsafe. For instance, where a person is convicted, following a fair trial, on evidence which was obtained unlawfully in breach of the right to respect for private life in article 8, the conviction may nonetheless be safe. Breach of the substantive right can be marked through a declaration or, in an appropriate case, compensation for the interference.

4.78 Taking into account the above case law, we conclude that under the current legal interpretation of the safety test:

(1) A conviction should always be considered unsafe where the person was, or might have been, wrongly convicted.

(2) A conviction may also be unsafe where the prosecution amounted to an abuse of process or the conduct of the authorities fell seriously below acceptable standards. This includes situations such as entrapment, "disguised extradition" and where the prosecution reneges on an agreement.

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260 [2001] 2 WLR 817 at [34].

261 [2001] UKHL 25, [2002] 1 AC 45.

262 [2001] UKHL 25, [2002] 1 AC 45 at [38] (emphasis added). Ashworth and Redmayne concluded that both *Togher* and *R v A* must now be considered bad law, citing *R v Lewis* [2005] EWCA Crim 859, [2005] 4 WLUK 51 and *Dowsett v CCRC* [2007] EWHC 1923 (Admin), [2007] 6 WLUK 164. However, in *Lewis*, although the ECtHR had concluded that there had been a breach of article 6, it had gone on to say "the finding of a violation of Article 6(1) in the present case does not entail that the applicants were wrongly convicted". Thus, this case may best be seen as one where although there was a breach of article 6, it was not such as to render the trial as a whole unfair.

In *Dowsett*, the ECtHR had found unequivocally that the appellant did not receive a fair trial due to non-disclosure, yet the High Court upheld a decision of the CCRC not to refer the case to the CACD. However, it did so on the basis that the defect was curable by the CACD, and that in deciding not to refer the case, the CCRC must have concluded that the disclosure defects that had rendered the first trial unfair could be addressed by the CACD, but that they would still find the conviction safe.

(3) A conviction will also be unsafe where the appellant did not receive a fair trial.

(4) However, not every breach of a right associated with a right to fair trial will mean that the appellant did not receive a fair trial. Such breaches can be recognised in other ways than by quashing a conviction.

4.79 There are therefore certain circumstances in which a conviction will be found to be unsafe, notwithstanding that there is no question that the defendant was guilty. Such cases have given rise to concern, and in 2006 the Government consulted on changes designed to prevent the CACD from quashing the convictions of the plainly guilty.

4.80 This review seems to have been particularly prompted by *Mullen* (see above from paragraph 4.66) and *Smith.*[263] In *Smith*, the appellant's conviction was quashed because the judge had wrongly dismissed a submission of no case to answer, even though the defendant had gone on to admit guilt in cross-examination. The CACD ruled that the defendant had been entitled to be acquitted after the evidence against him had been heard.

4.81 The then Government stated in its consultation paper *Quashing Convictions*:

> The dominant and settled legal interpretation of the statutory test in the Criminal Appeal Act 1968 (as amended) appears to mean that the Court of Appeal may quash a conviction if they are dissatisfied with some aspect of procedure at the original trial, even if the person pleaded guilty or the Court are in no doubt that he committed the offence for which he was convicted.[264]

4.82 However, the case law cited in the consultation paper acknowledges that not every procedural deficiency would render a conviction unsafe; although in *Mullen* the CACD quashed the conviction despite being satisfied as to the appellant's guilt, it referred to "the highly unusual circumstances of this case [where] there is no challenge to the propriety of the outcome". More than mere "dissatis[faction] with some aspect of procedure" is required.

4.83 The Government suggested three possible routes of addressing this perceived problem of the safety test allowing the quashing of convictions where a person's guilt was not in doubt. The first was to reintroduce the proviso, so as to provide that the appeal should not be allowed, even if there is a procedural irregularity, if the court considers no miscarriage of justice actually occurred. (This would go further than the discretionary power in the previous proviso.)

4.84 The second possible reform – which appeared to be favoured – was to replace the proviso with another formulation, perhaps addressing more directly the court's view of the guilt of the applicant.

4.85 The third was to recast the test so as to require the Court of Appeal to undertake a substantial re-examination of the evidence, akin to the task of a jury.

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263 *R v Smith* [1999] 2 Cr App R 238.

264 Office for Criminal Justice Reform, *Quashing Convictions* (September 2006), para 31.

4.86 Following the consultation, no reform was pursued. As discussed at paragraph 2.45 above, one difficulty with restricting appeals in circumstances where the person, although guilty, ought to have been acquitted at trial, is that it creates an unfairness between the person who is acquitted when the abuse of process or procedural failure is identified and dealt with at trial on one hand, and someone convicted because the abuse or failure is not identified at trial, or is identified but not properly dealt with.

Discussion

4.87 It might then be questioned whether, if safety is to have such a broad and qualified meaning, it is a helpful umbrella term. If unsafe can encompass both an affront to justice and a lack of certainty as to the correctness of the verdict, should the law not more clearly lay this out, rather than requiring a single word to be read in two different ways? Would it be preferable to use a different formulation, or to enumerate the grounds separately as was the case pre-1995? Might there be another term which simply implies that the conviction is not one the law can or should recognise, for example "the conviction cannot stand" or "the conviction must be set aside"?

4.88 "Miscarriage of justice" – which is the test used in some jurisdictions, including Scotland – could be thought to present the same difficulty: it is apt to cover more than just factual innocence, and clearly is intended in other contexts (for example, the 1907 Act) to cover procedural failings. However, it also has a strong connotation of conviction of the innocent. Indeed, the only legislation currently using the term in England and Wales – governing compensation for a miscarriage of justice – confines it to factual innocence.[265]

4.89 In his Review of the Criminal Courts, Lord Justice Auld asked:

> Would it not be better to clarify in statutory form the Court of Appeal's power and duty in this respect? In my view, consideration should be given to amendment of the present statutory test to make clear whether and to what extent it is to apply to convictions that would be regarded as safe in the ordinary sense of that word but follow want of due process before or during trial.[266]

4.90 It is recognised that there was criticism of the distinct grounds for appeal that existed between 1907 and 1995 (although some of this criticism reflected the ambiguous way that the grounds were drafted and how they interacted with the proviso).

4.91 At the same time, it is recognised that part of the rationale for having a single ground of appeal was the desire of the majority of the Runciman Commission to focus solely on the question of whether the person was or might have been innocent, which is not how the test has come to be applied (and probably could not be so restricted without breaching the UK's obligations under the ECHR).

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265 Criminal Justice Act 1988, s 133.

266 Auld Review, p 614, para 10.

Question 3.

4.92 Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction?

4.93 In particular, under what circumstances, if any, should a conviction be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant?

Fresh evidence and the "jury impact" test

4.94 Circumstances where a conviction is unsafe even though there is no question about the appellant's guilt are unusual. In this section of the chapter, we discuss situations where fresh evidence or identification of a legal error raises a question as to whether the defendant was properly convicted. Later, we discuss the residual category where even though there is no fresh evidence or legal error, there remains a question as to the safety of the appellant's conviction – what are sometimes referred to as "lurking doubt" cases.

Admission of fresh evidence

4.95 Fresh evidence cases can potentially conflict with the "one trial" principle discussed at paragraphs 2.18 to 2.22 above. The Court of Appeal has been very concerned to ensure that in allowing defendants to adduce fresh evidence they do not thereby encourage defendants to "hold back" material for a subsequent appeal, or to submit evidence supporting one defence at trial, but rely on evidence supporting a wholly different defence on appeal. There has also been a concern, in relation to expert evidence, that defendants might engage in "expert shopping",[267] or seek "bigger and better" experts to make arguments already rejected by the jury at trial.[268] Indeed, drawing these fears together, in *Kai-Whitewind*, Lord Justice Judge (as he then was) warned that allowing expert evidence to be admitted at appeal in support of points made by another expert at trial by jury would mean that "the trial process would represent no more, or not very much more than what we shall colloquially describe as a 'dry run'".[269]

4.96 As discussed at paragraphs 4.36 to 4.38 above, section 23(1) of the Criminal Appeal Act 1968 gives the CACD a broad power to admit fresh evidence "if they think it necessary or expedient in the interests of justice". When considering the exercise of this power the CACD must have regard to whether:

(1) the evidence appears to be capable of belief;

(2) it appears that the evidence may provide any ground for allowing the appeal;

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267 *R v Horton* [2007] EWCA Crim 607, cited in Hoyle and Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019), p 123.

268 Above, pp 123-124.

269 *R v Kai-Whitewind* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31 at [97].

(3) the evidence would have been admissible in the Crown Court proceedings on an issue which is the subject of the appeal; and

(4) there is a reasonable explanation for the failure to adduce the evidence in the Crown Court proceedings.

4.97 These considerations are intended to give effect to some of the principles discussed in chapter 2 – in particular, the "one trial" principle. The fourth consideration in particular discourages a defendant from relying on their own decision not to deploy evidence at trial as a basis for an appeal.

4.98 As with evidence at trial, "fresh evidence" may take many forms. Sometimes it may be forensic evidence such as CCTV footage or DNA evidence. Sometimes it may be testimony from a witness or co-defendant. A particular challenge can arise with expert scientific evidence. In *Jones*, the CACD accepted that "it seems unlikely that section 23 was framed with expert evidence prominently in mind".[270] In particular

> The requirement in subsection (2)(a) that the evidence should appear to be capable of belief applies more aptly to factual evidence than to expert opinion, which may or may not be acceptable or persuasive but which is unlikely to be thought to be incapable of belief in any ordinary sense."

4.99 The main criticism in relationship to the test for admission of fresh evidence would appear to be that the CACD may treat subsection (2) as imposing conditions to be met before admitting evidence, rather than providing considerations to be taken into account when exercising a discretion, where the primary consideration is the interests of justice. Nobles and Schiff say that:

> It would seem that the Court has imported the conditions of the duty of section 23(2) into the exercise of the discretion of section 23(1), thus mainly limiting the power to hear fresh evidence to cases which fulfil the criteria of section 23(2).[271]

4.100 In *Sales*,[272] the court concluded that section 23(2):

> speaks of having regard to these matters, rather than identifying them as necessary preconditions when considering whether to receive evidence. Accordingly, it is possible for this Court to receive evidence, when all four matters are not satisfied, provided the Court has regard to them.

4.101 Dr Stephanie Roberts has observed that:

> the judges are aware that any evidence may be admitted under section 23(1) if it is in the interests of justice to do so… It would appear however, that the judges are reluctant to do this and more likely to apply the conditions in section 23(2) to determine the outcome. So although they do not have to consider the conditions in

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270 *R v Jones* [1997] 1 Cr App R 86 at 93.

271 R Nobles and D Schiff, *Understanding Miscarriages of Justice* (2000).

272 *R v Sales (Mark)* [2000] 2 Cr App R 431 at 437. The court could admit evidence having considered each of the factors, even if none was satisfied.

> section 23(2), they seem more likely to do this rather than any broader considerations of what is in the interests of justice.[273]

4.102 Dr Roberts found that the main reason for the CACD rejecting "fresh" evidence under section 23 was that it was available at trial and there was no good reason for the failure to adduce it.[274]

4.103 It has also been suggested that too rigid a refusal to admit evidence on the grounds that it was available at trial can have the effect of punishing an appellant for decisions taken by their legal advisers.[275]

4.104 "Capable of belief" was introduced as a replacement for "likely to be credible", the criterion under the Criminal Appeal Act 1968. It was recommended by the Runciman Commission as "a slightly wider formulation giving the court greater scope for doing justice". However, Dr Roberts has noted that while the Home Secretary, introducing the legislation in the House of Commons, said that the new wording "lowers the threshold for the admission of fresh evidence along the lines recommended by the Royal Commission", the Minister stated that her understanding from the Lord Chief Justice was that the amendments would not change court practice.[276]

4.105 Nobles and Schiff suggest that the criterion "has been criticized for importing into the preliminary decision, about whether the evidence can be heard, an issue that should be judged once the application to hear has been granted". Similarly, Dr Roberts notes that in *Moate*, *Robinson*, and *Pratt*, the court appeared to suggest that it considered whether the conviction was unsafe as part of process of deciding whether evidence should be admitted.[277]

4.106 In *McLoughlin*,[278] Laws LJ suggested:

> in principle that it is this Court's duty to decide whether to receive any evidence by reference to the matters set out in subsection (2), without the assistance of hearing the evidence live itself.

4.107 However, this was rejected in *Sales*,[279] where the court held:

> Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief… In relation to evidence in the third category, it may be necessary for this Court to

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273 S Roberts, "Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, 324.

274 Above, 322.

275 Cardiff University Law School Innocence Project, Evidence to the House of Commons Justice Committee, at https://committees.parliament.uk/writtenevidence/55121/html/.

276 S Roberts, "Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, 312.

277 Above, pp 324 and 325.

278 *R v McLoughlin* (30 November 1999) (unreported), quoted in *R v Sales* (2000) 2 Cr App R 431 at 437.

279 *R v Sales* (2000) 2 Cr App R 431 at 438.

> hear the witness *de bene esse*[280] in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court.

4.108 It also noted that similar considerations could apply as to whether evidence affords a ground for allowing an appeal.

4.109 Thus, in practice, although the wording of section 23(2) suggests a linear process, the court will frequently apply an iterative process in which it provisionally hears evidence before deciding whether or not to admit it formally, depending on whether – having heard it – the court concludes it is credible or affords a ground for appeal.

4.110 Finally, Dr Roberts also notes that the time limit for bringing an appeal makes fresh evidence appeals difficult: "it is very difficult to find fresh evidence within twenty eight days so the appellant's grounds of appeal at first instance tend to be those alleging procedural errors".[281]

Question 4.

4.111 Is there evidence that the Court of Appeal's approach to the admission of fresh evidence hinders the correction of miscarriages of justice?

Assessing safety where there is fresh evidence or legal error: the "jury impact" test

4.112 As we have discussed earlier, a key consideration of the appellate court since 1907 has been that it should not be seen as undermining the sanctity of the jury's verdict. Thus, it has been extremely reluctant to quash a verdict arrived at on the evidence by a properly directed jury.

4.113 However – and leaving aside the question of whether this approach is desirable – the situation is complicated where the jury's verdict followed an error of law or procedural irregularity, or where new evidence is in play. Here the court cannot simply say that there is no reason to interfere with the jury's verdict, since *prima facie* the jury's verdict is vitiated by the error or called into doubt by the new evidence.

4.114 This then raises the question of whether the appellate court must decide for itself whether the conviction was safe or should try to consider what the impact of the fresh evidence or correct legal ruling might have been on the jury.

4.115 In *Pendleton*,[282] Lord Bingham noted that:

> although the [appeal] court does not have the jury's reasons, it does have the jury's verdict. From this, some inferences may always be drawn. If the issue is consent, the jury must, to convict, have been sure that the victim did not consent. If the issue

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280 "For what it is worth" – evidence considered *de bene esse* is considered provisionally without its admissibility being first determined.

281 S Roberts, "Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, 305.

282 [2001] UKHL 66, [2002] 1 WLR 72 at [16].

is pure identification, the jury must, to convict, have been sure that the evidence identifying the defendant was accurate and reliable. If a proper judicial direction has been given, it will ordinarily be safe for the Court of Appeal to infer that the factual ingredients essential to prove guilt have been established against the defendant to the satisfaction of the jury.

4.116 However, he noted the key practical challenge facing an appellate court in that scenario:

> But the Court of Appeal can rarely know, save perhaps from questions asked by the jury after retirement, at what points the jury have felt difficulty. The jury's process of reasoning will not be revealed and, if a number of witnesses give evidence bearing on a single question, the Court of Appeal will never know which of those witnesses the jury accepted and which, if any, they doubted or rejected.[283]

4.117 The House of Lords therefore affirmed the principle laid down in *Stafford*,[284] in which the House had held that whether a conviction was safe in the light of new evidence was a matter for the court and it was not required to find a conviction unsafe just because a jury might not convict. Viscount Dilhorne, giving the leading judgment, said:

> It would, in my opinion, be wrong for the court to say: 'In our view this evidence does not give rise to any reasonable doubt about the guilt of the accused. We do not ourselves consider that an unsafe or unsatisfactory verdict was returned but as the jury who heard the case might conceivably have taken a different view from ours, we quash the conviction' for Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial, 'they think' the verdict was unsafe or unsatisfactory.[285]

4.118 Lord Bingham reiterated this point, concluding that the Court of Appeal must take as their test the impact of fresh evidence on their own minds, not that of the jury (saying it would "be anomalous for the court to say that the evidence raised no doubt whatever in their minds but might have raised a reasonable doubt in the minds of the jury"). However, he also suggested that:

> The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, *might* reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.[286]

4.119 When his comments about the difficulty in knowing how the jury reached their verdict are read with the "jury impact" test he proposes – "might have affected" – it is clear that the jury impact test as articulated in *Pendleton* is a broad one. If the test is

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283 *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [16].

284 [1973] 3 WLR 719, [1974] AC 878.

285 Above, at [893].

286 *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [19] (emphasis added).

whether new evidence *might* have affected the jury's verdict, this test will be satisfied if the new evidence would or might have made a difference to an issue on which the jury *might have* based their decision.

4.120 Thus, while recognising that it is ultimately for the Court to decide whether a conviction is safe, *Pendleton* can be read as supporting the cautious approach advocated by the Runciman Commission, which said that:

> The Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the fresh evidence.[287]

4.121 It concluded:

> Once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable.
>
> It should normally not decide the question of the weight of the evidence itself unless it is satisfied that the fresh evidence causes the verdict to be unsafe [in the narrow sense that no conviction could be based on the evidence] in which case it should quash the conviction.[288]

4.122 The authors of Ashworth and Redmayne have suggested that:

> Where the jury impact test may be useful is in guarding against the sort of approach the Court of Appeal took to notorious cases such as the Birmingham Six appeals, where it would do its best to explain away any flaw revealed in the prosecution evidence.[289]

4.123 Likewise, the CCRC in 2006 expressed concern that:

> Faced with the transcripts of trial, and the verdict of the jury, the Court may in some cases too readily form its own view that the appellant is "plainly guilty" and it is widely considered that this is what happened in some of the miscarriage of justice cases that preceded the establishment of the Royal Commission on Criminal Justice under the chairmanship of Lord Runciman.[290]

4.124 However, while some commentators concluded that Pendleton represented a new approach, *Noye*[291] (for fresh evidence) and *Garland*[292] (for undisclosed evidence) confirm that the primary question is whether the appellate court considers the conviction safe in the light of the new or undisclosed evidence, and whether that

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287 RCCJ Report, p 175, para 62.

288 Above, p 175, para 62.

289 A Ashworth, L Campbell and M Redmayne, *The Criminal Process* (2019), p 384.

290 CCRC, "Quashing Convictions": Response of the Criminal Cases Review Commission, December 2006.

291 [2011] EWCA Crim, [2011] 3 WLUK 659.

292 [2016] EWCA Crim 1743, [2017] 4 WLR 117.

evidence might have had an effect on the mind of the jury is no more than a "way in which the court could test its view in a difficult case".[293]

4.125 Writing in 2017, Dr Stephanie Roberts said:

> It is difficult not to come to the same conclusion that Kate Malleson did 27 years ago:
>
> > Taken together, the quantitative and qualitative data show that fresh evidence cases are rare and treated with great caution by the Court. Only in very limited circumstances will such evidence be admitted and if admitted, form the basis of a successful appeal.[294]

Question 5.

4.126 Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice?

293 *R v Gordon Park (deceased)* [2020] EWCA Crim 589, [2020] 4 WLUK 373 at [178].

294 S Roberts, "Fresh evidence and factual innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, at 325, citing K Malleson, "Review of the Appeal Process", RCCJ Research Study No 17 (HMSO: London, 1993) at [11].

Fresh evidence appeals: the case of Barri White and Keith Hyatt[295]

In 2002, 19-year-old Rachel Manning was murdered, and her body left on a golf course near Milton Keynes. Her face had been severely beaten with a steering lock from a car, which was found near her body. Her boyfriend, Barri White, was charged with her murder, alongside his friend Keith Hyatt.

There was a strong circumstantial case against White, who was seen on CCTV footage involved in an altercation and subsequently arguing with Rachel immediately prior to her disappearance. Shortly afterwards, a telephone call was made from a nearby phone box to Hyatt's house. White and Hyatt were seen on CCTV driving around the local area in the hours that followed. The following day, Hyatt had turned up at a police roadblock where Rachel's body had been found.

The prosecution claimed that either White and Hyatt had killed Rachel, or White had killed Rachel and Hyatt helped him dispose of Rachel's body. The prosecution adduced evidence from a forensic scientist who said that particles found on Rachel's body matched those found on the passenger seat of Hyatt's van.

White claimed that following the argument he had gone to Hyatt's house. He claimed that the telephone calls to Hyatt's house were made by Rachel calling him asking to be picked up. White and Hyatt claimed to have arranged to pick Rachel up, but when they arrived she was not there, so they drove around trying to find her.

White was found guilty of murder and sentenced to life imprisonment, while Hyatt was found guilty of perverting the course of justice and received a sentence of thirty months' imprisonment.

In 2005, the case was featured on the BBC TV programme *Rough Justice*. Experts identified by Rough Justice showed that the particles in question were not, as the prosecution expert claimed, unique but were given off by any disposable lighter (Rachel was a smoker). The programme also identified a hair on the steering lock which did not match Rachel, White or Hyatt.

White and Hyatt successfully appealed their convictions on the basis that the fresh evidence showed that the particle evidence was unreliable. The Court of Appeal, however, concluded that there was sufficient circumstantial evidence against White and ordered that he should face a retrial. He was cleared by the jury at his retrial in 2008. Both were refused compensation as they could not prove that they were actually innocent of the offence.

In 2010, Shahidul Ahmed was arrested for a sexual assault on a student who had got into his car thinking he was a taxi driver. When his DNA was taken, it matched the DNA found on the steering lock with which Rachel had been attacked. Ahmed was convicted of her murder in September 2013.

Because Ahmed's conviction proved conclusively that White and Hyatt were not guilty, they were awarded compensation for their wrongful conviction.

"Lurking doubt" appeals in the absence of new evidence or material misdirection

4.127 It can be seen from the text of the 1907 Act that Parliament intended the appellate court to be able to quash a decision of a jury even in the absence of new evidence or any error of law or procedural irregularity: the court was permitted to quash the jury's verdict where it was "unreasonable or [could not] be supported having regard to the evidence".[296]

4.128 However, historically the appeal court has been extremely reluctant to interfere with a jury's verdict, especially where there is no new evidence or identifiable error of law that might vitiate its verdict.

4.129 The term "lurking doubt"[297] was coined in *Cooper*.[298] In *Cooper*, the appellant was picked out in an identification parade by the victim of a violent assault. The defendant's case was that while he had been out with the other two men who had been involved in the surrounding circumstances, he was not the one who carried out the assault. The court noted of the man who, according to the appellant, had carried out the assault:

> Doubts are raised in this case by reason of the fact that there is unquestionably a close physical similarity between the defendant and Burke. We have been supplied, as were the jury, with a photograph of Burke; and it is unnecessary to say more than that the physical resemblance is really quite striking.[299]

4.130 However, all this was gone over in the original trial:

> all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed, Mr. Frisby for the defendant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene.[300]

4.131 It is perhaps of relevance that *Cooper* came quite shortly after passage of the revised safety test, the court noting that:

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295 BBC, *Rough* Justice*: Murder Without a Trace*, 24 March 2005; UK True Crime Podcast, "A Drunken Argument", 22 March 2022, https://audioboom.com/posts/8052587-a-drunken-argument-episode-279; BBC News, "Rachel Manning: Barri White and Keith Hyatt compensation 'approved'", 26 September 2013, https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-24284921.

296 Criminal Appeal Act 1907 s 4(1).

297 L H Leigh, "Lurking doubt and the safety of convictions" [2006] *Criminal Law Review* 809 recognises that "lurking doubt" "often serves as no more than a rhetorical flourish". Hereafter "lurking doubt" is used to refer only to cases in which the CACD quashes a conviction where there is no procedural impropriety or error of law, but the CACD is prepared to accept that the jury, although properly directed, might have returned a wrongful conviction.

298 [1969] 1 QB 267.

299 Above at [270].

300 Above at [271].

> until the passing of the Criminal Appeal Act, 1966 – provisions which are now to be found in section 2 of the Criminal Appeal Act, 1968 – it was almost unheard of for this court to interfere in such a case.[301]

4.132 It would have been hard for the court to conclude in a case like this that the jury's verdict was "unreasonable or unsupported by the evidence" – they had the identification, and had seen the witness cross-examined. However, the court came to the conclusion that under the new test they should set aside the conviction:

> Our powers are [now] somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.[302]

4.133 References to "lurking doubt in our minds" and a "reaction [to] the general feel of the case" suggest a subjective approach by the Court of Appeal. Taylor notes that the "judicial hunch" was "the starting point taken in earlier decisions which spoke of a subjective reaction produced by the general feel of the case based on the experience of the judges".[303]

4.134 In the Northern Irish case of *Pollock*,[304] the Court of Appeal said that its:

> task is to review the jury verdict rather than to second-guess it. On the other hand, if the court feels substantial unease about the safety of the conviction, it should allow the appeal.

4.135 Leigh suggests that "substantial unease" represents a narrowing of the test.[305] However, even if this is accepted, "substantial unease" still suggests a subjective test for the appellate court itself, and the court in *Pollock* recognised that *Galbraith* means that the judge's view as to whether the case should go to a jury cannot bind the Court of Appeal in its retrospective evaluation of the safety of the verdict.

4.136 In *Pope*,[306] however, Lord Judge appeared to reject the subjective approach which *Cooper* had suggested, saying:

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301 [1969] 1 QB 267 at [271].

302 Above at [271].

303 *Taylor on Criminal Appeals* (3rd ed), 2022, para 9.439.

304 [2004] NICA 34 at [36].

305 L H Leigh, "Lurking doubt and the safety of convictions" [2006] *Criminal Law Review* 809.

306 [2012] EWCA Crim 2241, [2012] 11 WLUK 3 at [14].

> If therefore there is a case to answer and, after proper directions, the jury has convicted, it is not open to the Court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe.
>
> Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe.

4.137 Shortly after *Pope*, in *R v D*,[307] Treacy LJ said:

> The use of the expression "lurking doubt" is one which is to be deprecated or used very sparingly in modern times. It certainly should not reflect the subjective feeling of members of this court and should only come into play in conjunction with a properly reasoned analysis of the evidence.

4.138 In *Heron*,[308] the CACD seemed to suggest that where there was a case to be left to the jury, "it is difficult to see how the court can be persuaded that there is a lurking doubt about the safety of a conviction *in the absence of some specific factor to create one*".

4.139 "Lurking doubt" seems most clearly to play a role in identification cases like *Cooper*. Eyewitness identification evidence is notoriously unreliable (see the discussion of *Malkinson* at pages 28 and 29 above),[309] especially when the witness and the identified person are from different racial groups.[310] Where a case depends wholly or substantially on the correctness of one or more identifications which the defendant maintains are mistaken, the judge is required to warn the jury of the special need for caution, that mistaken witnesses can be convincing witnesses, and that a number of witnesses can all be mistaken.[311]

4.140 Finally, it should be noted that in *Tredget*,[312] the CACD held that "lurking doubt" had no application in cases where a guilty plea had been tendered:

> It can … exceptionally occur that a reasoned legitimate doubt may be entertained by this court about the verdict reached by the jury following disputed evidence, and this

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307 [2013] EWCA Crim 1592, [2013] 9 WLUK 146 at [30].

308 [2005] EWCA Crim 3245, [2005] 12 WLUK 670 at [37] (emphasis added).

309 In 1974, the Home Secretary asked Lord Devlin to review the law relating to identification following the wrongful convictions of Luke Dougherty and Lazlo Virag. The Report (Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976) Cmnd 338) found (at [1.24]) that

"The problem peculiar to identification is that the value of the evidence … is exceptionally difficult to assess. The weapon of cross-examination is blunted. A witness says he recognizes the man, and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected. If a witness thinks that he has a good memory for faces when in fact he has a poor one, there is no way of detecting the failing".

310 See, for instance, C Harwood, "The own-race bias in witness identification" (October 2017), available at https://www.open.ac.uk/researchcentres/herc/blog/own-race-bias-eyewitness-identification.

311 *R v Turnbull* [1977] QB 224.

312 [2022] EWCA Crim 108, [2022] 4 WLR 62 at [171].

may be sufficient to establish that the conviction is unsafe. But following a freely made guilty plea, the conviction does not depend on the jury's assessment of disputed evidence. The evidence has never been heard, still less tested. It cannot be appropriate to enquire how it might have emerged and might have been assessed if there had been a trial. A submission that the evidence leaves a doubt about the guilt of the defendant is simply inappropriate. In such a case, of a free and informed plea of guilty, unaffected by vitiating factors, it will normally be possible to treat the conviction as unsafe only if it is established that the appellant had not committed the offence, not that he or she may not have committed the offence. Therefore, the test is not that of "legitimate doubt", still less a "lurking doubt", but instead it must be demonstrated that the appellant was not culpable.

4.141 In summary, although the 1907 test (see paragraphs 4.45 and 4.46 above) did envisage that the Court of Criminal Appeal might overrule a jury even in the absence of new evidence or an error of law, in practice the legislation was read down so that where a properly directed jury could properly convict, the Court would not interfere with the jury's verdict. Under the 1968 test, a conviction could be unsafe even though it was properly open to the jury to convict. However, the Court of Appeal has been very reluctant to use this power; even more so since *Pope*, where to do so will require reasoned analysis leading to the "inexorable conclusion that the conviction is unsafe".

4.142 The problem is acute because, as a result of *Galbraith* (see paragraph 2.49 above), a judge is obliged to put a case to a jury if it could properly convict, even if the judge believes that a conviction would be unsafe. The remedy is that Court of Appeal can quash an unsafe conviction. However, in practice, the CACD is highly unlikely to do so if a properly directed jury has convicted on the evidence.

4.143 However, reform of the safety test – or even exhorting the CACD to be more willing to quash convictions on a "lurking doubt" basis – is not necessarily the only way of dealing with this issue. As alluded to in chapter 2, another approach would be to overrule *Galbraith* and require a judge to withdraw a case from the jury if a conviction on the evidence would be unsafe. Such a rule already applies in the case of hearsay evidence,[313] bad character evidence,[314] and a similar requirement applies to identification evidence.[315] The Runciman Commission in 1993 recommended that the Court of Appeal's decision in *Galbraith* should be "reversed so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the jury".[316]

4.144 Were such a change to the law made, one effect might be that there would be less need to bring cases to the Court of Appeal because some unsafe cases would be weeded out before conviction. Another would be that, if convicted, appellants could bring the appeal on the basis that the judge made an error of law in allowing the case

313 Criminal Justice Act 2003, s 125.

314 Above, s 107.

315 *R v Turnbull* [1977] QB 224.

316 RCCJ Report, p 59, para 42.

to go before the jury and the resulting conviction was unsafe, rather than on the basis that the conviction was unsafe despite the jury's verdict.

Question 6.

4.145 Is there evidence that the Court of Appeal's approach to "lurking doubt" cases (not attributable to fresh evidence or material irregularity at trial) hinders the correction of miscarriages of justice?

REMEDIES FOLLOWING THE QUASHING OF A CONVICTION

Power to substitute a conviction for an alternative offence

4.146 The Court of Appeal may, instead of allowing or dismissing the appeal, substitute a conviction for an alternative offence in certain limited circumstances.

4.147 If the appellant had pleaded not guilty to the offence of which they have been convicted, the court may substitute a conviction for an alternative offence where:

(1) the jury could on the indictment have found the appellant guilty of the alternative offence; and

(2) on the finding of the jury, it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of the alternative offence.[317]

4.148 If the appellant had pleaded guilty to the offence of which they have been convicted, the court may substitute a conviction for an alternative offence where:

(1) if the appellant had not pleaded guilty, the appellant could on the indictment have pleaded or been found guilty of the alternative offence; and

(2) it appears to the court that the guilty plea indicates an admission of facts by the appellant which proves them guilty of the alternative offence.[318]

4.149 Where the conditions outlined in paragraphs 4.147 and 4.148 above are met, the court may substitute a verdict of guilty for the alternative offence and pass sentence for that offence.[319] However, the sentence must be permitted by law, and it must not be of greater severity than the original sentence imposed by the Crown Court.[320]

4.150 Where a conviction for an alternative offence is substituted, this does not constitute a "reversal" of the conviction for the purposes of section 133 of the Criminal Justice Act

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317 Criminal Appeal Act 1968, s 3(1).

318 Above, s 3A(1).

319 Above, ss 3(2) and 3A(2).

320 Above, ss 3(2) and 3A(2).

1988, which governs compensation for miscarriages of justice. No compensation is therefore available, even if the conviction is for a less serious offence and the penalty imposed substantially less severe.[321]

Power to re-sentence for related offences

4.151 If the appellant has been convicted of two or more offences and related sentences are imposed, where the appeal is allowed in relation to some but not all offences, the Court of Appeal may re-sentence the appellant in relation to the offences of which the appellant remains convicted.[322] The sentences are related if they were passed on the same day, the sentencing judge states that they are to be treated as one sentence or they are in respect of offences on the same indictment.[323]

4.152 However, the court must not pass a sentence in respect of the remaining convictions that is overall of greater severity than the original sentence, when taking all related sentences as a whole, imposed by the Crown Court.[324]

Power to order a retrial

4.153 The Court of Appeal may "order" a retrial where the appeal against conviction is allowed, and it appears to the court that the interests of justice require it (although the reference to ordering a retrial may be misleading, as ultimately it will depend on the prosecution bringing proceedings).[325] A retrial may only be ordered in respect of an offence:

(1) of which the appellant has been convicted by the Crown Court and against which the appeal has been allowed;

(2) of which the appellant could have been convicted on the indictment at the original trial in the Crown Court; or

(3) which was charged as an alternative count on the indictment in relation to which no verdict was given as a result of the conviction appealed against.[326]

4.154 When determining whether to order a retrial the court will weigh the public interest and the legitimate interests of the appellant.[327] The court will take into account a number of

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321 *R (Christophides) v Secretary of State for the Home Department* [2002] EWHC 1083 (Admin), [2002] 1 WLR 2769. The Court of Appeal quashed the appellant's conviction for murder and substituted a conviction for attempted grievous bodily harm with a minimum sentence of two years. He had by this point served nine years of a life sentence.

322 Criminal Appeal Act 1968, ss 4(1) and (2).

323 Criminal Appeal Act 1968, s 4(4).

324 Criminal Appeal Act 1968, s 4(3).

325 Criminal Appeal Act 1968, s 7(1). Despite reference in the legislation to the Court "order[ing]" a retrial, the Court has no power to compel a retrial, which will ultimately depend on the prosecution choosing to bring proceedings.

326 Criminal Appeal Act 1968, s 7(2).

327 *R v Llewelyn* [2022] EWCA Crim 154, [2022] 2 Cr App R 11 at [37].

factors, including the seriousness of the alleged offence, the time that has lapsed since the alleged commission of the offence and any fresh evidence.[328]

4.155 Retrials are expected to take place expeditiously. Therefore, where the arraignment of the appellant does not take place within two months from the date a retrial is ordered, the prosecution is required to obtain leave from the Court of Appeal to proceed with the retrial.[329] Leave must only be granted where the Court of Appeal is satisfied:

(1) the prosecution has acted with all due expedition; and

(2) there is a good and sufficient cause for a retrial in spite of the lapse of time.[330]

4.156 Following the expiry of the two months' time limit, the appellant may apply to the Court of Appeal to have the order set aside and for a verdict of acquittal to be entered by the Crown Court in respect of the offence.[331]

4.157 If proceedings are brought outside of the two months' time limit without leave, those proceedings are a nullity and any conviction will be quashed, regardless of the strength of the case against the appellant.[332]

4.158 Where the appellant is convicted on retrial, the court may impose any sentence permitted by law.[333] However, the sentence must not be of greater severity than the sentence imposed by the Crown Court in respect of the original conviction.[334]

4.159 As discussed above at paragraph 2.26, the power to order a retrial was introduced because it was considered that the appellate court might be reluctant to quash a conviction where a person was possibly guilty if they could not be retried. Dr Stephanie Roberts has suggested that a similar phenomenon might persist, because the CACD is required to decide to quash a verdict as unsafe before considering whether to order a retrial. She suggests that:

> If the court had the option of ordering a retrial or quashing the conviction, this may benefit the appellant who currently has the conviction upheld because a retrial cannot be considered until the decision is made to quash the conviction. The court

328 *R v Llewelyn* [2022] EWCA Crim 154, [2022] 2 Cr App R 11 at [37].

329 Criminal Appeal Act 1968, s 8(1).

330 Criminal Appeal Act 1968, s 8(1B).

331 Criminal Appeal Act 1968, s 8(1A).

332 *R v Llewelyn* [2022] EWCA Crim 154, [2022] 2 Cr App R 11.

333 Criminal Appeal Act 1968, Sch 2, para 2(1).

334 Criminal Appeal Act 1968, Sch 2, para 2(1). In the recent case of *R v AB, CD, EF and GH* [2021] EWCA Crim 1959, [2022] 2 Cr App R (S) 17, the CACD allowed a referral of several sentences as unduly lenient, even though in parallel proceedings (*AB & Others* [2021] EWCA Crim 2003, [2022] 2 Cr App R 10) it declared the convictions as unsafe on the grounds that the judge had improperly encouraged a guilty plea by promising the defendants' counsel that if they pleaded guilty he would suspend their sentences. The unduly lenient sentence finding was given before quashing the conviction in order that the judge at the retrial would not be bound by the sentence imposed at the first trial.

may be more inclined to order a retrial if it does not have the hurdle of deciding to quash the conviction first.[335]

4.160 Dr Roberts appears to be suggesting that the CACD might be reluctant to quash some convictions where it believes that the appellant might be guilty, because it could not be sure that it would then go on to order a retrial. However, the decision on a retrial will typically be taken immediately after the decision to quash, by the same justices. While sometimes the court will seek argument from counsel on whether there should be a retrial, in other cases the court will hand down its decision on whether to order a retrial at the same time as quashing the verdict. In practice, therefore, it may be that the court is able to take a single, combined decision to quash the conviction and order a retrial.

Venire de novo

4.161 Where the Court of Appeal finds that the trial proceedings amounted to a nullity, the CACD cannot order a retrial under the Criminal Appeal Act 1968 (since the finding is that there was no valid trial in the first place), but can issue a writ of *venire de novo*[336] returning the case to the Crown Court to be tried.

Compensation for miscarriages of justice

4.162 Compensation for miscarriages of justice is dealt with under section 133 of the Criminal Justice Act 1988 (as amended).

4.163 Compensation is only payable where a "conviction has been reversed or [the person] has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice … unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted".[337]

4.164 There has been a miscarriage of justice "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence".[338]

4.165 A conviction is reversed where it was quashed on an appeal out of time or on a reference by the CCRC.[339] Compensation is not payable if the conviction was quashed on a regular "in time" appeal. Compensation is not payable if the CACD substitutes a conviction for another offence, even if it is a substantially less serious offence with a lesser penalty.

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335 S Roberts, "Fresh evidence and factual innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, at 326.

336 Senior Courts Act 1981, s 53.

337 Criminal Justice Act 1988, s 133(1).

338 Above, s 133(1ZA). This provision was added by the Anti-Social Behaviour, Crime and Policing Act 2014 to overturn the judgment of the Supreme Court in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

339 Criminal Justice Act 1988, s 133(5). A conviction also qualifies if it was for breach of an order under certain anti-terrorism provisions and that order was subsequently appealed. It is not clear why a conviction for breach of an order in these circumstances is treated as a miscarriage of justice, since ordinarily the fact that an order was wrongly imposed does not absolve a person of criminal liability for breaching it.

4.166 This provision is intended to give effect to the duties on the state under article 14(6) of the International Convention on Civil and Political Rights ("ICCPR"), which provides that:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

4.167 It can be seen that the requirement in the ICCPR that the newly discovered fact "conclusively" shows that there has been a miscarriage of justice has been incorporated into domestic law as a requirement that it be shown "beyond reasonable doubt" that the person did not commit the offence. Thus, compensation will not be payable if the miscarriage of justice consisted of a failure to afford the convicted person a fair trial. Nor will compensation necessarily be payable even if the preponderance of evidence shows that the person was factually innocent: the convicted person is required to demonstrate their innocence to the standard ordinarily applied only to the prosecution in a criminal trial.

Question 7.

4.168 Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and appropriate?

SENTENCING APPEALS

4.169 Unlike appeals against conviction, where the test is laid out in statute,[340] there is no statutory rule governing how an appeal against sentence is to be decided and the process is therefore governed by common law rules. The Court of Appeal will determine whether the sentence imposed by the Crown Court is "not justified by law", "manifestly excessive" or "wrong in principle" and not simply review the reasons of the sentencing judge.[341]

4.170 Where the appellant has been convicted of multiple offences, the court is required to examine the sentence as a whole. Therefore, in such cases the court is required to determine whether the overall sentence is "manifestly excessive" or "wrong in principle".[342]

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340 Criminal Appeal Act 1968, s 2(1).

341 *R v Chin-Charles* [2019] EWCA Crim 1140, [2020] 1 Cr App R (S) 6 at [8].

342 *R v McGarrick* [2019] EWCA Crim 530, [2019] 2 Cr App R (S) 31 at [15].

4.171 As discussed at paragraph 2.93 above, the introduction of sentencing guidelines for most offences (and statutory provisions[343] governing the "starting point"[344] when setting the minimum term for murder) has changed the nature of sentencing appeals, which now often turn on consideration of whether offences have been properly categorised and the guidelines properly followed.

4.172 However, the Court of Appeal does have a continuing role to play in laying down guidance for sentencing courts. One recent example is *Cook*,[345] in which the court granted leave to an appellant to contest his sentence of fifteen months' imprisonment for non-fatal strangulation, a new offence created in the Domestic Abuse Act 2021:[346]

> Because this is a new offence without any guideline, and without any previous assistance from this court on the proper approach to sentencing for the offence, we shall give leave. We shall thereby b[e] in a position to give such general guidance as we can in relation to the appropriate level of sentence pending any consideration by the Sentencing Council.[347]

4.173 A further example is *Ahmed and others*,[348] in which a Court of Appeal comprised of the Lord Chief Justice, the Vice President of the CACD and the Chair of the Sentencing Council heard five sentencing appeals together in order to establish the principles that should apply when sentencing an adult for offences committed when they were a child.

Grounds of appeal

4.174 A sentence may be "not justified by law" where it exceeds the maximum sentence laid down by law (for the circumstances of the particular offence and offender), or where there is a failure to comply with a statutory requirement (for instance, a failure to comply with the statutory duty to give reasons). However, in the latter scenario, it may be open to the court to rectify the defect and uphold the sentence.[349]

4.175 "Wrong in principle" can apply to a variety of circumstances: where a custodial sentence was imposed when not absolutely necessary; where a community sentence was imposed by way of punishment even though the maximum custody period had already been spent on remand (meaning that the offender received a greater overall penalty than the maximum custodial penalty);[350] or where a combination of sentences imposed at the same time are inappropriate (for instance, combining a discharge with a fine, or a probation order with immediate custody). It will also be wrong in principle

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343 Sentencing Code, s 322 and sch 17.

344 The "starting point" is the minimum term before consideration of aggravating and mitigating factors.

345 [2023] EWCA Crim 452, [2023] 4 WLUK 232.

346 The offence itself is in the Serious Crime Act 2015, s 75A.

347 [2023] EWCA Crim 452, [2023] 4 WLUK 232 at [12]. The CACD upheld the sentence finding that "it was, if anything, lenient" and that the proper sentence would have been eighteen months' detention.

348 [2023] EWCA Crim 281, [2023] 3 WLUK 297.

349 *Taylor on Criminal Appeals*, 10.36.

350 *R v Hemmings* [2008] 1 Cr App R (S) 106.

to sentence an offender for offences of which they were not convicted, to which they did not plead guilty and which they did not ask to be taken into consideration.[351]

4.176 A sentence will be "manifestly excessive" where it is outside the appropriate range of sentences that may be imposed, taking into consideration the circumstances of the offence and the appellant.[352] Taylor says that:

> The CACD has stated that it will not allow appeals if it simply requires 'tinkering' with a sentence, or merely on the grounds that it might have passed a somewhat different sentence if they had been sitting at first instance – although it does sometimes appear to do just that.[353]

Reviews of minimum term for sentences of detention at His Majesty's Pleasure

4.177 Detention at His Majesty's Pleasure is the equivalent of the mandatory life term for murder where the offender was under 18 at the time of the offence.[354] As with other life or indeterminate sentences, the sentencing judge will set a minimum term, or "tariff", to be served before the offender is eligible for parole.

4.178 However, the offender is eligible to have the minimum term reviewed, and potentially reduced. There are three possible grounds on which the tariff may be reduced:

(1) The prisoner has made exceptional and unforeseen progress during sentence;

(2) The prisoner's welfare may be seriously prejudiced by their continued imprisonment and the public interest in the offender's welfare outweighs the public interest in a further period of imprisonment lasting until expiry of the current tariff;

(3) There is a new matter which calls into question the basis of the original decision to set the tariff at a particular level.[355]

4.179 Traditionally, the minimum term was set, and any review of it was decided, by the Home Secretary. Consequently, any review was an administrative matter and the court which could review that decision was the High Court, by means of judicial review. The minimum term is now set by the trial judge in a criminal court.[356] However, unlike appeals against other minimum terms which go to the CACD (whether the offender is an adult or a child), where the minimum term relates to Detention at His

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351 *Taylor on Criminal Appeals,* 10.176.

352 *R v Ramsbottom* [2022] EWCA Crim 417, [2022] 3 WLUK 603 at [20].

353 *Taylor on Criminal Appeals,* 10.129.

354 The change was made by section 60 of the Criminal Justice and Court Services Act 2000, and the provision is now found in the Sentencing Code, s 259.

355 *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51 at [3]. The criteria were originally promulgated by the Home Secretary in an answer to a Parliamentary question; Written Answer, *Hansard* (HC) 10 November 1997, vol 300, cols 421-422.

356 Sentencing Code, s 322.

Majesty's Pleasure, a request for a review of the minimum remains to the High Court.[357]

Power to substitute an alternative sentence

4.180 Where the Court of Appeal determines that the appellant should be sentenced differently, it may quash the sentence and substitute it for a sentence it considers appropriate, and the Crown Court could have passed.[358] However, the overall sentence must not be of greater severity than the original sentence, when taking the case as a whole.[359] This means that the Court of Appeal must look at the "totality of the matters" in respect of which the appellant was sentenced by the Crown Court.[360]

Question 8.

4.181 Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate?

357 Police, Crime, Sentencing and Courts Act 2022, s 128.

358 Criminal Appeal Act 1968, s 11(3).

359 Above.

360 *R v Sandwell* (1985) 80 Cr App R 78 at 81.

Sentencing appeals: the case of Francesca Robinson[361]

In April 2012, Francesca Robinson, then aged 22, pleaded guilty to attempted robbery. She had entered a bank, placed a knife in the drawer section under the security screen and demanded money. When the cashier said that she was going to press the panic alarm Robinson put the knife back in her bag and left.

The judge assessed that there was a significant risk of serious harm to members of the public from the commission of further offences, and imposed an indeterminate sentence, with a minimum term of eighteen months.

In fact, under the law as it stood in 2012, an indeterminate sentence for public protection ("IPP") could only be imposed if either the offender had previously been convicted of a serious offence specified in Schedule 15A to the Criminal Justice Act 2003 (which Robinson hadn't) or the judge considered that the offence was sufficiently serious to warrant a notional term of at least two years' imprisonment. Notional term meant the minimum term of imprisonment to be served, before deduction of time spend on remand. The notional minimum term was half the notional determinate sentence that would otherwise have been imposed, reflecting the fact that a prisoner on a determinate sentence would be released at the halfway point of a determinate sentence.

The judge said that had he passed a determinate sentence it would have been one of three years' imprisonment. This meant that there was no power to impose an IPP, since the notional minimum term would only be eighteen months.

Robinson's solicitors wrongly advised her she had no grounds for appeal.

Although the minimum term imposed was eighteen months, Robinson served nine years before being released on parole in 2021. It was only when she was recalled to prison, in 2022, that she learned that another prisoner in a similar position had had their sentence quashed.

The Court of Appeal granted leave to appeal out of time. It quashed the indeterminate sentence and imposed a sentence of three years' imprisonment instead. As she had "already served the appropriate sentence many times over" this meant she was immediately released from custody.

361 *R v Robinson (Francesca)* [2023] EWCA Crim 320, [2023] 3 WLUK 689.

APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEAL CRIMINAL DIVISION

Appeal against the decision of the Court of Appeal

4.182 The appellant or the respondent may appeal against the decision of the Court of Appeal in respect of the appeal against conviction or sentence to the Supreme Court, where leave to appeal has been granted by the Court of Appeal or the Supreme Court.[362] Leave to appeal must only be granted where:

(1) the Court of Appeal has certified that the appeal involves a point of law of general public importance; and

(2) it appears to the court that the point ought to be considered by the Supreme Court.[363]

4.183 The party seeking to appeal the decision of the Court of Appeal must apply to the Court of Appeal for leave to appeal within 28 days, beginning with:

(1) the date of the court's decision; or

(2) where reasons are given by the court after its decision, the date on which the court gives its reasons.[364]

4.184 Where the application for leave to appeal to the Supreme Court is refused by the Court of Appeal, it may not be renewed to the Court of Appeal.[365] In such circumstances, leave must be sought from the Supreme Court within 28 days beginning with the date on which leave is refused by the Court of Appeal.[366] The Court of Appeal or the Supreme Court may extend the time limit where the person who appealed against their conviction or sentence to the Court of Appeal applies for an extension of time.[367]

4.185 In *Garwood*,[368] the CACD ruled that it could not certify that a point of law of public importance arises where it has refused leave to appeal.

4.186 For the purpose of the appeal, the Supreme Court may exercise any powers of the Court of Appeal or may remit the case to the Court of Appeal.[369]

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362 Criminal Appeal Act 1968, ss 33(1) and (2).

363 Above, s 33(2).

364 Above, ss 34(1) and (1A).

365 *R v Ashdown* (1974) 58 Cr App R 339 at [344].

366 Criminal Appeal Act 1968, s 34(1).

367 Above, s 34(2).

368 *R v Garwood* [2017] EWCA Crim 59, [2017] 1 WLR 3182. David Ormerod and Hannah Quirk have described that as "a very narrow interpretation of its powers under the Criminal Appeal Act 1968 s.33(2) — something that is also worthy of review by the Law Commission", D Ormerod and H Quirk, "Reforming Criminal Appeals" [2022] *Criminal Law Review* 791, 792.

369 Criminal Appeal Act 1968, s 35(3).

4.187 Appeals to the Supreme Court are important for the development of the common law, since the Court of Appeal itself will be bound by previous rulings of the Judicial Committee of the House of Lords or the Supreme Court.

4.188 In addition, it will generally only be the Supreme Court which can reconcile conflicts between settled matters of criminal and civil law. For instance, in *Ivey v Genting*,[370] a civil case, the Supreme Court made clear that the test of dishonesty in civil law should also apply in criminal proceedings, a ruling which, while strictly obiter, the CACD followed in *Barton and Booth*.[371] The Supreme Court said:

> Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose. It is easy enough to envisage cases where precisely the same behaviour, by the same person, falls to be examined in both kinds of proceeding. In *Starglade Properties* Leveson LJ drew attention to the difference of test as between civil cases and criminal cases, and rightly held that it demanded consideration when the opportunity arose. Such an opportunity is unlikely to occur in a criminal case whilst *Ghosh* remains binding on trial judges throughout the country.[372]

4.189 The Supreme Court sought to reform the criminal law through a judgment in a civil case, recognising that it was highly unlikely a criminal case on the issue could reach it otherwise.[373]

4.190 The Runciman Commission recommended that the requirement for the Court of Appeal to certify that the case raises a point of law of general public importance (as discussed at paragraph 4.182 above) should be removed, saying:

> it is unduly restrictive to require such a certificate to be issued in addition to the necessity of obtaining leave from the Court of Appeal or the House of Lords itself.[374]

4.191 Lord Hodge has noted that "[i]n the UK Supreme Court it is rare that the Justices hear criminal appeals", but that they do have "experience of such appeals when acting as members of the Judicial Committee of the Privy Council".[375]

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370 [2017] UKSC 67, [2018] AC 391.

371 *R v Barton and Booth* [2020] EWCA Crim 575, [2021] QB 685.

372 *Ivey v Genting* [2017] UKSC 67, [2018] AC 391 at [63].

373 Given that the earlier *Ghosh* test favoured a defendant, there would be no appeal if a jury followed the *Ghosh* test and acquitted the defendant. The only conceivable routes by which the issue might have reached the Supreme Court through criminal appeals would therefore have been (i) if the prosecution sought to challenge an acquittal in summary proceedings, the High Court reaffirmed the test, and the prosecution obtained leave to appeal that decision to the Supreme Court, or (ii) a person was convicted on indictment and successfully appealed to the CACD on the grounds that they should have been acquitted under the *Ghosh* test, and the prosecution then obtained leave to appeal that decision (since although the prosecution cannot appeal an acquittal by the Crown Court, they can appeal the quashing of a conviction by the CACD).

374 RCCJ Report, p 178, para 79.

375 Lord Hodge, Foreword to P Taylor (ed), *Taylor on Criminal Appeals* (3rd ed 2022).

Question 9.

4.192 Does the law satisfactorily enable appropriate criminal cases to be considered by the Supreme Court?

Chapter 5: The Criminal Cases Review Commission

Criminal Cases Review Commission

5.1 The Criminal Cases Review Commission ("CCRC") was established by section 8 of the Criminal Appeal Act 1995 ("the 1995 Act") following the recommendation of the Royal Commission on Criminal Justice (the "Runciman Commission").[376] The CCRC is an independent body responsible for investigating alleged miscarriages of justice in England, Wales and Northern Ireland. It has the power to refer convictions and sentences for appeal to the appellate courts, offering an opportunity to those who have exhausted their statutory right of appeal to have their cases reconsidered by the appellate court.

5.2 Prior to the establishment of the CCRC, alleged miscarriages of justice were investigated by the "C3" Division of the Home Office and could be referred to the Court of Appeal Criminal Division ("CACD") by the Home Secretary. The Home Secretary had the power to refer cases for appeal to the Court of Appeal where the person was tried on indictment and convicted, or was found not guilty by reason of insanity or to be under a disability and to have done the act or made the omission charged against them.[377] This power was not exercised often as, despite a wide discretion to refer cases the Home Secretary "thought fit" to do so, in practice referrals were limited to cases where there was new evidence or other considerations of substance not raised at the original trial.[378] This approach intended to avoid undue interference by the executive with judicial decisions and referring cases where the appeal had no real prospect of succeeding.[379]

5.3 The Runciman Commission recommended the creation of an independent body to investigate alleged miscarriages of justice, as it concluded that the Home Secretary's role conflicted with the separation of powers between the executive and the judiciary and led to a reluctance to investigate cases.[380] This led to the establishment of the CCRC in 1997, the first state funded independent body in the world to perform such a role. The Home Secretary's power to refer appeals to the CACD was abolished.[381]

Referrals

5.4 The CCRC's primary function is to examine cases where a miscarriage of justice may have occurred and where the conditions for referral are met (see paragraphs 5.10 and 5.11 below), refer those cases for consideration by the appellate courts.

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376 RCCJ Report.

377 S 17 of the Criminal Appeal Act 1968 was repealed by s 3 of the Criminal Appeal Act 1995.

378 RCCJ Report, p 181, para 6.

379 Above, pp 181 and 182, para 6.

380 Above, p 182, para 9.

381 Criminal Appeal Act 1995, s 3.

5.5 In relation to cases tried on indictment, the CCRC may refer to the Court of Appeal:

(1) a conviction;

(2) any sentence, except a sentence fixed by law, imposed in relation to a conviction;

(3) a verdict of not guilty by reason of insanity; and

(4) a finding that the person is under a disability and did the act or made the omission charged.[382]

5.6 The CCRC may also refer to the Crown Court summary convictions, including convictions arising from a guilty plea, and any sentence imposed in relation to such a conviction.[383] Additionally, convictions by the Court Martial and the Service Civilian Court and any sentence in respect of such convictions, as well as a finding of not guilty by reason of insanity or that the person is under a disability and did the act or made the omission charged, may be referred by the CCRC to the Court Martial Appeal Court and the Court Martial respectively.[384]

5.7 References may be made by the CCRC following an application by, or on behalf of, the individual convicted of the offence, or they may be made without such an application.[385] There is no time limit within which an application must be submitted to the CCRC, or a reference must be made by the CCRC. The CCRC has a range of statutory investigatory powers, including the power to obtain documents and appoint an investigating officer, to assist with the examination of the case.[386]

5.8 A decision to make a referral to the appellate court must be made by at least three Commissioners.[387] The CCRC does not require leave from the appellate court to make a reference and the CACD may not make a loss of time order (see paragraphs 4.21 and 4.22 above) where the case has been referred by the CCRC.[388]

5.9 Such references are treated by the appellate court as an appeal by the person against the conviction, sentence or finding.[389] Therefore, the CCRC's role in the case ceases upon referral; although the CACD will have the CCRC's statement of reasons for referring the case, the case is presented by the appellant and the appeal proceeds according to the usual appeal process. In relation to references which are made to the Court of Appeal and the Court Martial Appeal Court, the appeal may only be made on

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382 Criminal Appeal Act 1995, ss 9(1), (5) and (6).

383 Criminal Appeal Act 1995, ss 11(1) and (2).

384 Criminal Appeal Act 1995, ss 12A(1), (7) and (8) and 12B(1).

385 Criminal Appeal Act 1995, s 14(1).

386 See Criminal Appeal Act 1995, ss 17 to 21.

387 Criminal Appeal Act 1995, sch 1, paras 6(2)(a) and (3)(a).

388 Criminal Appeal Act 1968, s 29(2)(c).

389 Criminal Appeal Act 1995, ss 9(2), (3), (5) and (6), 11(2) and (3), 12A(3), (5), (6), (7) and (8) and 12B(2) and (3).

a ground which is related to the reasons given by the CCRC for the reference.[390] If the appellant wishes to raise a ground of appeal which has not been raised by the CCRC, they must seek leave from the court.[391]

Conditions for making a referral

5.10 A reference may only be made by the CCRC where:

(1) it considers that there is a "real possibility" the conviction, sentence, verdict or finding would not be upheld, because of:

(a) in the case of a conviction, verdict or a finding, an argument or evidence not raised in the original proceedings or in any appeal or application for leave to appeal against it; or

(b) in the case of a sentence, an argument on a point of law or information not raised in the original proceedings or in any appeal or application for leave to appeal against it; and

(2) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.[392]

5.11 The CCRC may make a reference in the absence of a new argument or evidence in relation to the conviction, verdict or finding (see paragraph 5.10(1)(a)), or where the right of appeal has not been exercised (see paragraph 5.10(2)), if there are "exceptional circumstances" justifying the reference.[393] Circumstances which might be considered exceptional include where there was a guilty plea in the magistrates' court (so an appeal against conviction is not possible),[394] where the applicant is particularly vulnerable, and where there is a need to use the CCRC's investigatory powers. Circumstances which are not considered by the CCRC to be exceptional include receiving legal advice that there are no grounds for appeal and being unable to secure legal representation.[395]

5.12 Because of the requirement that there has already been an appeal against the conviction, verdict, or finding, or leave to appeal has been refused, where exceptional circumstances do not apply, the CCRC will advise applicants to seek leave from the CACD to bring an appeal out of time. If this is refused, the CCRC will be able to consider the case.

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390 Criminal Appeal Act 1995, s 14(4A).

391 Criminal Appeal Act 1995, s 14(4B).

392 Criminal Appeal Act 1995, s 13(1).

393 Criminal Appeal Act 1995, s 13(2).

394 Magistrates' Court Act 1980, s 108(1)(a).

395 Criminal Cases Review Commission, *Exceptional Circumstances* (15 July 2021), p 3, available at https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/5/2021/07/CW-POL-06-Exceptional-Circumstances-v1.0.pdf.

5.13 The Westminster Commission[396] expressed concern about requiring applicants to make an out-of-time appeal in this way, as some applicants may not have "the legal assistance or access to evidence needed to properly pursue a first appeal".[397] A CCRC investigation may provide stronger support for a particular ground of appeal, therefore there may be a risk that if the applicant is required to take their (weaker) case to the CACD, it might then not be possible for the CCRC to refer the case on that same ground. Additionally, whilst a loss of time order (see paragraphs 4.21 and 4.22 above) may not be made by the CACD in respect of a CCRC referral,[398] there remains a risk of such an order being made where the applicant exercises their right of appeal. As noted in paragraph 4.27 above, research suggests that this possibility may deter some applicants from pursuing meritorious appeals.

5.14 When considering whether to make a reference in relation to a conviction on indictment or a sentence for such a conviction to the Court of Appeal, the CCRC may refer any point to the Court of Appeal for an opinion.[399]

Appellants who have died

5.15 As discussed at paragraphs 4.34 and 4.35 above, the Criminal Appeal Act 1968 makes provision for appeal proceedings to be conducted posthumously by a person approved by the CACD (whether the appeal is to the CACD following conviction on indictment or to the Crown Court following summary conviction). The request for approval must ordinarily be brought within twelve months of the convicted person's death.

5.16 The 1995 Act does not actually require a person to make an application to the CCRC in order for it to refer a case, and therefore there is no explicit provision to enable the CCRC to take up a case on behalf of someone who has died. However, the CCRC will need to identify someone whom there is a "real possibility" of the CACD approving in order to be able to refer a case.

5.17 Where a person who might have appealed to the Court of Appeal has died and the person who would bring an appeal on their behalf did not seek to be approved by the Court of Appeal within a year of death (see paragraph 4.35 above), the CCRC can refer the case to the Court of Appeal in order to enable them to be approved.[400]

Discretion to refer

5.18 It is at the discretion of the CCRC whether to refer a case to the appellate court where the conditions for referral are met; the 1995 Act does not impose a duty on the CCRC to make a reference in such cases. Though, the CCRC only expects to exercise its

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396 See para 1.5. The Westminster Commission was established by the All-Party Parliamentary Group on Miscarriages of Justice, and chaired by Baroness Stern and Lord Garnier.

397 The Westminster Commission Report, p 38.

398 Criminal Appeal Act 1968, s 29(2)(c).

399 Criminal Appeal Act 1995, s 14(3). The CCRC has only referred one question to the CACD (see *R v Duggan* [2002] EWCA Crim 2627). They have also used this power to refer a question to the Northern Ireland Court of Appeal (see *R v Gordon* [1998] NI 275).

400 Criminal Appeal Act 1968, s 44A(4).

discretion not to make a referral in rare cases.[401] The discretion must be exercised in accordance with public law principles, and the CCRC takes into account a number of factors, including the public interest, the age and seriousness of the conviction and the benefits of making a referral.[402] In relation to public interest considerations, the Court of Appeal gave the following guidance in *Smith*:

> The Commission's role is to refer those cases to this Court where the Commission considers that there may have been some real injustice or there are other exceptional circumstances which justify referring the case. If a conviction will not be upheld but the conviction of another offence will be substituted, usually there will be no purpose in making a reference in relation to the conviction. The position as to sentence may be different in some cases.[403]

5.19 The Westminster Commission concluded that the discretion of the CCRC not to refer a case should be removed, and that any case which met the referral criteria should be referred. They said:

> We understand why in some extremely rare cases it may be considered against the interests of justice to refer a verdict that the CCRC determines has a real possibility of being overturned. Having said this, we are uncomfortable with the CCRC having such a power, because of the risk, however remote, of preventing a miscarriage of justice case being heard by the Court of Appeal. We also note that any referrals based upon due process failures, even in such circumstances, bring attention to flaws within the criminal justice system and can thus contribute to the prevention of future miscarriages of justice.[404]

Challenging the CCRC's decision

5.20 The CCRC's decision whether to make a referral cannot be appealed. However, the decision may be challenged by way of judicial review.

5.21 The High Court's role on judicial review is limited to reviewing the decision of the CCRC to determine whether it was lawful with reference to public law principles.[405] As such, the High Court's role is not to form its own view of whether the "real possibility" test is met and determine whether the CCRC has made the right decision, as that

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401 Criminal Cases Review Commission, *The Discretion to Refer* (15 July 2021), p 2, available at https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/5/2021/07/CW-POL-07-The-Discretion-to-Refer-v1.0.pdf. See pages 4 and 5 for examples of cases where the CCRC may consider exercising its discretion not to make a referral and also the CCRC's response to recommendation eight of the report of the Westminster Commission on Miscarriages of Justice available at https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/.

402 Criminal Cases Review Commission, *The Discretion to Refer* (15 July 2021), p 3, available at https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/5/2021/07/CW-POL-07-The-Discretion-to-Refer-v1.0.pdf.

403 *R v Smith* [2004] EWCA Crim 631, [2004] QB 1418 at [29].

404 The Westminster Commission Report, pp 39 and 40.

405 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [169].

would result in usurping the CCRC's function.[406] In relation to the extent of the court's review, the Divisional Court in *Pearson* observed that:

> It is not, however, in our judgment appropriate to subject the Commission's reasons to a rigorous audit to establish that they were not open to legal criticism. The real test must be to ask whether the reasons given by the Commission betray, to a significant extent, any of the defects which entitle a court of review to interfere.[407]

5.22 Where the CCRC decides not to make a referral the applicant may reapply to the CCRC. There is no limit on the number of applications a person may make, however a new examination of the case will only be carried by the CCRC if the subsequent application raises something important that has not been considered previously.[408]

5.23 *Cleeland*,[409] overturning *R (Saxon) v CCRC*,[410] established that a decision whether to refer a case by the CCRC is not a "criminal cause or matter", and therefore a decision of the High Court on an application for judicial review of a CCRC decision can be appealed to the *Civil* Division of the Court of Appeal.

"Real possibility" test

5.24 Before a referral may be made by the CCRC it must be satisfied that there is a "real possibility" that the conviction, sentence, verdict or finding would not be upheld by the appellate court. The term "real possibility" is not defined by the 1995 Act; however, the meaning of the term was considered by the High Court in *Pearson*. Lord Bingham observed that

> [the test is] imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld.[411]

5.25 However, the way in which the test is considered by the CCRC (following its own extensive examination of the evidence) is likely to be very different to the way in which it is applied when the application for leave is made to the CACD itself (where the question will normally be decided by the Single Judge "on the papers").[412] To predict

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406 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [169]; *R (Mills and Poole) v Criminal Cases Review Commission* [2001] EWHC (Admin) 1153, [2001] 12 WLUK 631 at [14].

407 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [169].

408 Criminal Cases Review Commission, Next Steps Post-CCRC Decision (15 July 2021), p 4, available at https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/5/2021/07/CW-POL-10-Next-Steps-Post-CCRC-Decision-v1.0.pdf.

409 [2022] EWCA Civ 5, [2022] 4 WLR 8.

410 [2001] EWCA Civ 1384, [2001] 8 WLUK 242.

411 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [149].

412 Judiciary for England and Wales, *The Court of Appeal Criminal Division Guide to Commencing Proceedings*, p 10.

the outcome of the appeal the CCRC must examine the approach the appellate court would take when considering the appeal.[413]

5.26 The case law here has generally concentrated on application of the test where a referral is made to the Court of Appeal. In *Pearson*, the High Court said:

> [The CCRC] could only make that prediction by paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions. It could not rationally predict the response of the Court of Appeal without making its own assessment, with specific reference to the materials in this case, of the considerations to which the Court of Appeal would be obliged to have regard and of how it would be likely to exercise its discretion.[414]

5.27 Therefore, in the case of a conviction, for example, the CCRC must assess the prospect that the Court of Appeal would find the conviction to be unsafe by examining the court's application of the safety test. To assist such examinations the CCRC has developed casework guidance notes, which include analysis of the case law, to enable case review managers, who are responsible for reviewing cases, to interpret the test applied by the appellate court and predict the possibility of a successful outcome.[415] The CCRC also analyses the appellate courts' response to its references to enable it better to predict the court's response in the future.[416]

5.28 The predictive nature of the test can lead to difficulties, as recognised by the High Court in *Pearson*:

> Since no two cases reaching the Court of Appeal are the same, it will often be hard, if not impossible, to predict with confidence how the Court will perceive the merits of any given application in a borderline case, a point which obviously bears on the discharge of the Commission's task under section 13 of the 1995 Act. Judicial reactions, being human, are not uniform.[417]

5.29 The CCRC has indicated that in such cases it would err on the side of referral.[418] The application of the test and the subsequent referral in such cases may be used to give the court the opportunity to develop or clarify the law.[419] Given the predictive nature of the test and the requirement that there only needs to be a "real possibility" that the appeal would succeed, it is to be expected that some referrals will not succeed. In the view of a former chairman of the CCRC, Professor Graham Zellick KC, it is essential

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413 *R (Davies) v Criminal Cases Review Commission* [2018] EWHC 3080 (Admin), [2018] 11 WLUK 180 at [59].

414 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [168] and [169].

415 Hoyle and Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019), pp 29 and 30.

416 Above, p 30.

417 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [164].

418 Criminal Cases Review Commission, "CCRC releases official response to the Westminster Commission report", 2 June 2021, available at https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/.

419 G Zellick, "The Criminal Cases Review Commission and the Court of Appeal: the Commission's perspective" [2005] *Criminal Law Review* 937.

that a proportion of the CCRC's referrals do not succeed, as otherwise the CCRC would be "misapplying the statutory test and usurping the role of the court".[420]

5.30 As the High Court observed in *Mills and Poole*, the conditions for referral under section 13 of the 1995 Act aim to strike a balance between the finality of proceedings and "the need for justice to be done".[421] The test acts as a filter mechanism that seeks to strike a balance between ensuring that the CCRC does not simply perform an automatic function of referral, which could overwhelm the appellate courts with meritless appeals, and that its function is not defeated by a high threshold.[422]

5.31 The same referral test applies to summary cases. We discuss the particular issues that arise in applying the "real possibility" test to appeals which proceed by way of rehearing at paragraphs 5.43 to 5.51 below.

Concerns raised about the "real possibility" test

5.32 Several reviews and inquiries into the CCRC have noted concerns about the statutory framework within which it operates and how its functions are discharged, which have been echoed in the academic literature and media. These include concerns about the "real possibility" test and, in particular, about the formulation and predictive nature of the test and its application by the CCRC.

The formulation and predictive nature of the test

5.33 Concerns about the formulation of the test began to be raised shortly following the establishment of the CCRC. The House of Commons Home Affairs Committee noted in its 1999 report in relation to the CCRC that "there may be problems with the test" and recommended a formal review of the wording after five years of the CCRC being in operation.[423]

5.34 The Westminster Commission concluded in its 2021 report that the "real possibility" test is "problematic" given the way that it is framed.[424] It noted the difficulty in applying the test in view of the "very fine" distinction between a "real possibility" and a "probability", as expressed in *Pearson*[425] by Lord Bingham.[426] The Westminster Commission also criticised the predictive nature of the test; it was of the view that the test:

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420 Above.

421 *R (Mills and Poole) v Criminal Cases Review Commission* [2001] EWHC Admin 1153, [2001] 12 WLUK 631 at [10].

422 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [149] and [150].

423 The Work of the Criminal Cases Review Commission, Report of the House of Commons Home Affairs Committee (1998-99) HC 106.

424 The Westminster Commission Report, p 36.

425 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [149].

426 The Westminster Commission Report, p 36.

> encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice.[427]

5.35 The CCRC disagrees with that assessment and told the Westminster Commission that it does not find that the test inhibits its ability to make referrals or undermines its independence, drawing a distinction between a deferential test and the CCRC itself being deferential to the court.[428]

5.36 The Ministry of Justice's triennial review of the CCRC and the House of Commons Justice Committee's inquiry into the CCRC both received mixed responses when seeking to ascertain whether the "real possibility" test is the right test.[429] Respondents to the triennial review were also critical of the Court of Appeal's approach and were of the view that it prevented referrals by the CCRC in lurking doubt cases.[430] The Ministry of Justice concluded that there was insufficient evidence to justify changing the test, as the ultimate arbiter of the safety of the conviction is the appellate court and the test reflects this.[431] The review concluded that:

> It would be inappropriate for the CCRC to refer cases to the Court of Appeal purely to express disagreement with conclusions which the courts had reasonably drawn on previous occasions from evidence and argument fully and properly placed before them. The statute also provides the CCRC with the option to refer a case in exceptional circumstances if it considers it appropriate to do so.[432]

5.37 However, the Justice Committee also found "a broad agreement, or at least a perception, that something in the test or its application is not working properly", with the CCRC's referral rate being cited in support.[433] Since its inception in 1997 to May 2023 the CCRC has referred 814 cases out of the 30,239 applications it has received, around 3% of applications at the average rate of around 31 cases per year.[434]

5.38 In pre-consultation discussions with the CCRC, they pointed out that the low referral rate is partly attributable to the fact that the denominator, the large number of applications received, includes a large number of "no appeal" applications (around 40 per cent of all applications)[435] brought by people who have not tried to appeal directly through the court system, and which can therefore only be referred if there are exceptional circumstances. It also includes plainly inadmissible cases, including

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427 The Westminster Commission Report, p 36.

428 The Westminster Commission Report, p 34.

429 Justice Committee CCRC Report, p 8, para 9; Ministry of Justice, Triennial Review: Criminal Cases Review Commission (June 2013) ("CCRC Triennial Review"), p 9, available at https://consult.justice.gov.uk/digital-communications/ccrc-triennial-review/results/ccrc-triennial-review.pdf.

430 CCRC Triennial Review, p 9.

431 CCRC Triennial Review, p 9.

432 CCRC Triennial Review, pp 9 and 10.

433 Justice Committee CCRC Report, p 8, para 9.

434 CCRC, Facts and figures, available at https://ccrc.gov.uk/facts-figures/.

435 Annual Report and Accounts 2021/22, Report of the Criminal Cases Review Commission (2022-23) HC 634, p 10.

"appeals" by people who had been acquitted; victims and witnesses; and parties to civil proceedings.

5.39 The Justice Committee concluded that any changes to the "real possibility" test would need to be made in conjunction with changes to the test applied by the Court of Appeal.[436] It expressed concern that the Court of Appeal's approach to appeals may make it difficult for the CCRC to meet the "real possibility" test in some cases, leaving some miscarriages of justice uncorrected.[437] It also noted that whilst an alternative test may provide more scope for the CCRC to demonstrate its independence from the appellate courts, given the current formulation of the test the only additional referrals such a change would enable to be made are those where there is less than a "real possibility" of the appeal succeeding.[438] The Justice Committee recommended that the Law Commission review the Court of Appeal's approach to cases where, in the absence of any new evidence or argument, there remains "serious doubt" about the conviction and if any changes are made, review their effect on the CCRC and the continuing appropriateness of the "real possibility" test.[439]

Application of the test by the CCRC

5.40 The Home Affairs Committee indicated in its 1999 report on the CCRC that there may be some force in concerns that the CCRC is interpreting the test too strictly.[440] Similar concerns were raised by respondents to the triennial review and the Westminster Commission and the Justice Committee's inquiries, with the CCRC's low referral rate and high success rate for referrals being cited in support of the view that the CCRC takes an overly cautious approach.[441] Whilst the CCRC only refers around 3% of the applications that it receives, its referrals have a success rate of around 70%.[442]

5.41 The Westminster Commission recommended that the CCRC should be "bolder" in interpreting the test, "determining in each case whether there is more than a fanciful chance of the verdict being quashed, even if quashing is less likely than not".[443] The Justice Committee accepted the inherent difficulties in applying the "real possibility" test, but similarly recommended that the CCRC take a less cautious approach in applying the test, erring on the side of making a referral and not fearing disagreement with the Court of Appeal and reducing its target success rate.[444] The Justice

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436 Justice Committee CCRC Report, p 11, para 16.

437 Justice Committee CCRC Report, p 15, para 27.

438 Justice Committee CCRC Report, p 11, para 16.

439 Justice Committee CCRC Report, pp 15 and 16, para 28.

440 The Work of the Criminal Cases Review Commission, Report of the House of Commons Home Affairs Committee (1998-99) HC 106 at [30].

441 CCRC Triennial Review, p 9; The Westminster Commission Report, p 37; Justice Committee CCRC Report, pp 8 and 9.

442 Annual Report and Accounts 2021/22, Report of the Criminal Cases Review Commission (2022-23) HC 634, p 10.

443 The Westminster Commission Report, p 37.

444 Justice Committee CCRC Report, p 12, para 20.

Committee, however, found "no conclusive evidence" that the test is not applied correctly by the CCRC in the majority of cases.[445]

5.42 In response to the Westminster Commission's recommendation, the CCRC has expressed that in their view it is not possible to take a "bolder" approach, as the test focuses on the merits of the case and the "boldness" of the decision maker cannot compensate for meritless applications.[446] The CCRC indicated that in cases that appear to be "borderline" it always errs on the side of referral.[447]

The referral test in summary cases

5.43 Although the Criminal Appeal Act 1995 makes specific provision for appeals from summary cases,[448] and the CCRC regularly refers cases to the Crown Court for appeal, it has been suggested that the referral test as formulated in the 1995 Act does not make sense in the context of appeals against conviction in the magistrates' court. The Justice Committee noted:

> the Royal Commission predominantly looked at cases in the Crown Court and did not concern itself with the magistrates' court, largely because of the nature and seriousness of the high-profile miscarriages of justice which led to its formation.[449]

5.44 The test requires the CCRC to refer a case only if "there is a real possibility that the conviction … would not be upheld … because of an argument, or evidence, not raised in the proceedings which led to it". This test works where the case will be referred to the Court of Appeal, because the CACD will decide whether the conviction is "unsafe" on the basis of the new evidence or argument. Indeed, the appellant is precluded from raising grounds other than those forming the basis of the CCRC's referral unless leave is obtained from the CACD.[450]

5.45 However, where a case is referred to the Crown Court, the appeal is by way of rehearing. Since the Crown Court could decide any case differently from the bench of magistrates (or the single District Judge (Magistrates' Court)) who heard it at first instance, there is always the possibility that the Crown Court will not uphold the conviction: notwithstanding the fact that the appellant has been convicted at the magistrates' court, the Crown Court (unlike the CACD) starts with the presumption of innocence, and it is for the prosecution to prove the case to the criminal standard all

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445 Justice Committee CCRC Report, p 12, para 20.

446 Criminal Cases Review Commission, "CCRC releases official response to the Westminster Commission report", 2 June 2021, available at https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/.

447 Criminal Cases Review Commission, "CCRC releases official response to the Westminster Commission report", 2 June 2021, available at https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/.

448 Criminal Appeal Act 1995, s 11.

449 Justice Committee CCRC Report, para 36.

450 Criminal Appeal Act 1995, ss 14(4A) and (4B).

over again. Whereas the CACD is "constitutionally deferential"[451] to the jury, the same is not true of the Crown Court and magistrates. Professor Kevin Kerrigan notes that:

> [i]t follows that when the Commission is asked to determine whether there is a real possibility of a summary appeal against conviction succeeding it is extremely difficult to say with certainty that there is no real possibility.[452]

5.46 Equally, however, it will rarely be possible to know whether this would be "so … because of" the new evidence or argument.[453]

5.47 Professor Kerrigan concludes:

> The tension lies not with the real possibility test itself but due to the synthesis of this test with that applied at the Crown Court. There are two ways of dealing with this. The first would remove the requirement to refer the case back to the Crown Court for a re-hearing. This would establish a special procedure for cases referred by the Commission. Such cases would be heard by a different appeal tribunal which would not re-hear all the evidence but rather address whether there had been injustice meaning the conviction should not stand. This would require a new statutory basis for appeal in such cases. The obvious test would seem to be that currently applied in the Court of Appeal… An alternative approach would be to keep referred appeals in the Crown Court with the current re-hearing approach but to change the test to be applied by the Commission in respect of summary applications. In addition to measuring the prospects of success in the Crown Court the Commission would be tasked with assessing whether the applicant may have suffered an injustice.[454]

5.48 If the mode of appeal from magistrates' courts were amended, either by introducing a leave requirement or by replacing the existing rehearing with a review (following the granting of leave), then this might address the theoretical difficulties with the current test for summary offences.

5.49 There is a further issue with respect to appeals against conviction in summary cases. The 1995 Act provides that a referral of a person's conviction "shall be treated for all purposes as an appeal by the person under section 108(1) of the Magistrates' Courts Act 1980 against the conviction (whether or not he pleaded guilty)."

5.50 Section 108(1) does not ordinarily provide for an appeal against conviction where the appellant has pleaded guilty. In *R v F*,[455] HHJ Openshaw held that the Crown Court "should not embark on the process of an appeal by way of re-hearing the case unless and until the plea is set aside". He held that the "mere fact of referring the case by the

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451 K Kerrigan, "Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission" [2006] *Criminal Law Review* 124, 133.

452 Above, 134.

453 Criminal Appeal Act 1995, s 13(b). On one interpretation the test could be read as requiring the new evidence or argument to be the reason for the CCRC's conclusion that the conviction might not be upheld on an appeal rather than it being the reason why the conviction would not be upheld.

454 K Kerrigan, "Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission" [2006] *Criminal Law Review* 124, 139.

455 11 October 2002 (unreported).

Commission does not alter the important constitutional principle that it is for the court and not for the Commission to set aside convictions".[456] Accordingly, where there has been a guilty plea in summary proceedings, CCRC practice is to consider additionally whether there is a real possibility that the Crown Court will allow the appellant to vacate the guilty plea.

5.51 However, in a recent case[457] HHJ Altham ruled that it was not necessary to vacate a guilty plea upon a reference by the CCRC, and a case could proceed straight to rehearing. This decision is (as of July 2023) the subject of a judicial review brought by the Crown Prosecution Service.

The referral test in "change of law" cases

5.52 As discussed in the next chapter, where an appeal is based on a change in the law, the CACD has a discretion not to allow the appeal.[458] The test applied in these circumstances (reflecting the test used by the Court when considering whether to grant leave to apply out of time on such grounds) is one of "substantial injustice".

5.53 This means that in such cases (at least when tried on indictment), the CCRC, in judging whether the CACD would find the conviction unsafe, is required to assess whether the CACD would consider that the appellant had demonstrated substantial injustice (and potentially, given that is a discretionary power, whether it would allow the appeal nonetheless).

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456 It might be countered that an appeal against conviction does not in any case set aside the conviction unless it is successful. The Crown Court's powers on appeal include confirming, reversing or varying the decision appealed (Senior Courts Act 1981, s 48) which would not be possible if the conviction was automatically set aside once the appeal was commenced.

457 We have not identified the case as there are ongoing legal proceedings, and a possible retrial.

458 Criminal Appeal Act 1968, s 16C.

CCRC referrals: The Post Office 'Horizon' prosecutions[459]

In 1999, the Post Office introduced a new computer accounting system provided by the IT firm Fujitsu called "Horizon". Almost immediately, sub-postmasters began to report irregularities. The Post Office refused to acknowledge these discrepancies.

Between 2000 and 2014 the Post Office prosecuted at least 736 sub-postmasters based on data from Horizon. Some sub-postmasters were persuaded to plead guilty to false accounting charges.

None of these cases were successfully appealed in the criminal appeals system at the time. However, in 2019, in civil litigation in the High Court brought by postmasters who had been forced to repay money identified as a shortfall by the Post Office, Mr Justice Fraser found that it was possible for defects in the software to cause apparent or alleged discrepancies or shortfalls, and that this had happened on numerous occasions. He also found that Fujitsu had the ability to amend data in branch accounts without the knowledge or consent of the sub-postmasters, and that this would look as though the sub-postmaster had made the changes. Mr Justice Fraser found that the Post Office were aware of issues with Horizon. The Post Office agreed to settle with 555 claimants.

The Criminal Cases Review Commission referred the cases of, initially, forty-two applicants, who had been convicted on indictment, to the Court of Appeal.[460] Ordinarily, a conviction following a plea of guilty will rarely be found to be unsafe. However, a conviction can be quashed on grounds of abuse of process regardless of plea. The Post Office had brought the prosecutions itself, and as prosecutor was under a duty to disclose to defendants the problems that it knew Horizon had; instead, it had falsely presented Horizon as robust. Accordingly, where the reliability of Horizon data was essential to the prosecution and conviction of the applicant, the conviction could be held to be unsafe on grounds of abuse of process. Other than three cases where Horizon data had not been relevant to the person's conviction, the Court of Appeal quashed all the convictions.

The CCRC also referred to the Crown Court, several cases where the person had been convicted or pleaded guilty in summary proceedings.

As of July 2023, the CCRC has referred 68 cases, with convictions in 57 cases being overturned. Six cases are awaiting consideration. Four cases resulted in convictions being upheld and in one case, the appeal was abandoned between the reference and the substantive hearing.

Those who had had their convictions quashed would not ordinarily be entitled to compensation, as they would be unable to prove, beyond reasonable doubt, that they had not committed the offences in question. Indeed, in many cases the appellant would have been guilty of false accounting, albeit that they might only have altered records in order to address a shortfall generated by the Horizon system. However, the Government agreed to fund a compensation scheme for all postmasters affected; this included interim payments of £100,000 to those who were wrongly convicted.

A public inquiry into the failings of the Horizon system was established in September 2020 and remains ongoing.

Discussion

5.54 As acknowledged by the High Court in *Pearson*, the judgement the test requires the CCRC to make is a "very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take".[461] The unusual nature of the test is perhaps more acute in summary cases where the CCRC is required to predict the outcome of the rehearing and whether the applicant would be found guilty. As Professor Kevin Kerrigan highlights, this can put the CCRC in a difficult position as it does not know how each side will present their case and, given that in some cases the conviction may have taken place years ago, whether there is any remaining viable evidence for the prosecution to present.[462]

5.55 Much of the discourse in relation to the "real possibility" test has focused on indictable cases and there appears to be a widespread perception that the test is inhibiting the CCRC in such cases. However, the Westminster Commission noted that such criticisms may partly be reflective of the approach taken by the appellate courts:

> The evidence we heard suggests that the Court of Appeal's approach to cases may prevent some miscarriages of justice being corrected, and inhibit the CCRC's ability to raise alleged miscarriages of justice.[463]

5.56 The predictive nature of the test has been criticised on the basis that it undermines the CCRC's independence. The Westminster Commission argued that the test "encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice".[464] Such criticisms raise the possibility that the test may lead to cases where, "even if the CCRC thinks a conviction is unsafe, it is powerless [to make a referral] if the CACD has made its disagreement clear" through its case law.[465] Again, such concerns similarly point to the appellate courts perhaps setting the bar too high as potentially being at the root of the problem.

5.57 The CCRC's approach to referrals may also be affected by other factors. Whilst the CCRC cannot quash a conviction, its real power lies in its ability to direct a new appeal without needing to seek leave from the court. This may make the CCRC conscious of the way it uses limited court resources and inevitably creates an

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459 *Bates v Post Office Ltd (No.6: Horizon Issues)* [2019] EWHC 3408 (QB), [2019] 12 WLUK 208; CCRC, "Post Office Cases", at https://ccrc.gov.uk/postofficecases/; Post Office Horizon IT Inquiry, "About the Inquiry" at https://www.postofficehorizoninquiry.org.uk/about-inquiry.

460 *Hamilton v Post Office Ltd* [2021] EWCA Crim 577, [2021] Crim LR 684.

461 *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at [150].

462 K Kerrigan, "Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission" [2006] *Criminal Law Review* 124.

463 The Westminster Commission Report, p 42.

464 Above, p 36.

465 H Quirk and D Ormerod, "The Westminster Commission on the CCRC" [2021] *Criminal Law Review* 335, 336.

opportunity for some tension between the court and CCRC, as the court is unable to regulate its own caseload in the way that it normally would.

5.58 Additionally, the CCRC's role in the case ends when the referral is made; the CCRC provides the court with a statement of reasons for making the referral,[466] but there are no other opportunities for it to provide any further explanations or clarifications to the court, as the appeal is taken forward by the applicant. The lack of opportunity for a dialogue between the CCRC and the court in relation to referrals and the public criticisms the CCRC in some cases receives from the court,[467] may make the CCRC hesitant to refer cases that are seen as borderline. Professor Graham Zellick KC, former chairman of the CCRC, has suggested that prior to any criticism being made by the court the CCRC should be given the opportunity to defend, explain or comment on the matter.[468]

5.59 The other conditions that must be fulfilled in order to make a referral may further constrict the CCRC's power in this regard. The "real possibility" test needs to be met in light of new evidence or argument and the applicant must have exhausted their statutory right of appeal or there must be "exceptional circumstances". These requirements may unduly restrict the CCRC's ability to refer certain types of cases, such as lurking doubt cases. Professor Carolyn Hoyle and Dr Mai Sato note the difficulties the fresh evidence requirement may cause in some cases:

> in a few of our cases we have seen CRMs [Case Review Managers] and commissioners tie themselves up in knots trying to fit their case – which on the face of it seemed meritorious – into the dictates of the fresh evidence requirements.[469]

5.60 Given the statutory constraints within which the CCRC operates, it has been suggested that there may be a disconnect between the statutory functions of the CCRC and the wider perception of its role and what it should be. Some of the criticisms in respect of the real possibility test appear to be reflective of that. As Professor Carolyn Hoyle and Dr Mai Sato note, there are differing views on the role of the CCRC, which can cause confusion in discussions about whether the CCRC is fit for purpose and become apparent in examinations of the real possibility test.[470] For example, this can be seen in Dr Michael Naughton's criticisms of the real possibility test. In his view the statutory conditions for referral prevent the CCRC from referring cases where the applicant is believed to be factually innocent and, as such, he argues

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466 Criminal Appeal Act 1995, s 14(4).

467 For instance, in *R v Charlton and Ali* [2016] EWCA Crim 52, [2016] 3 WLUK 216, the CACD said (at [124]) "we agree with the CCRC that the circumstances of Charlton's conviction merited full and careful consideration and we are grateful to them for the extraordinarily thorough analysis they have put before the court. They have left no available stone of the investigation unturned." However, they went on to describe aspect's of the CCRC's submission as "a leap in the dark and one for which we can find no justification" ([126]), "pure speculation" ([142] and [180]) and "totally misconceived" ([205]),

468 G Zellick, "The Criminal Cases Review Commission and the Court of Appeal: the Commission's perspective" [2005] *Criminal Law Review* 937.

469 C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019) ("Hoyle and Sato"), p 337.

470 Hoyle and Sato, p 17.

that the CCRC is failing to fulfil the role that was envisaged by the Royal Commission.[471]

Alternative tests

5.61 The Westminster Commission recommended that referrals should be made by the CCRC where it determines:

(1) in relation to a conviction, that the conviction may be unsafe;

(2) in relation to a sentence, that the sentence may be manifestly excessive or wrong in law; or

(3) it is in the interests of justice to make a referral.[472]

5.62 In the Westminster Commission's view this would enable the CCRC to refer to the Court of Appeal all cases where a miscarriage of justice may have occurred, including lurking doubt cases.[473]

5.63 However, it is not clear whether the test proposed by the Westminster Commission would be appropriate for summary cases, for the reasons discussed in relation to the existing test at paragraphs 5.43 to 5.51 above. Whilst the nature of the test proposed by the Westminster Commission would not be predictive, given that in indictable cases it mirrors the test applied by the Court of Appeal, the CCRC may still draw on the court's case law and approach in its assessment of whether a conviction may be unsafe.

Other jurisdictions

5.64 There have also been suggestions that the referral test which the CCRC must use should be amended, including suggestions proposing the adoption of tests applied by equivalent bodies in other jurisdictions, where the predictive nature of the test is not replicated. Some of these bodies are required to determine whether a "miscarriage of justice" may have occurred or if it would be in the "interests of justice" to make a referral, or both.

5.65 It should be recognised, however, that these alternative tests operate within the context of their own appeal courts' systems and tests. For instance, the Scottish Criminal Cases Review Commission test is "that a miscarriage of justice may have occurred; and that it is in the interests of justice that a reference should be made".[474] This, however, reflects the fact that the sole ground of appeal in Scottish appellate courts is "miscarriage of justice".[475]

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471 For example, see M Naughton, "The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System" (2012) 58 *Criminal Law Quarterly* 207.

472 The Westminster Commission Report, p 37.

473 The Westminster Commission Report, p 37.

474 Criminal Procedure (Scotland) Act 1995, s 194C(1).

475 Criminal Procedure (Scotland) Act 1995, ss 106(3) and 175(5).

5.66 In relation to the suggestion that the "real possibility" test should be replaced with the "miscarriage of justice" test, there may be potential definitional difficulties and the adoption of such test may be less suited to indictable cases. Unless the test applied by the Court of Appeal is similarly changed or the CCRC is given the power to direct a retrial in such cases,[476] it may create a disconnect between how referrals are made and how the appeal is determined by the court. This could risk making the appeal process more complex by imposing an additional hurdle that applicants would have to meet to obtain an appeal. As the tests are currently linked, both the CCRC and the Court of Appeal consider whether the conviction is unsafe, or the sentence is manifestly excessive or wrong in principle. Such a change may lead to one test, unrelated to the test for quashing the conviction or sentence, being applied by the CCRC for the purposes of referral and then another test being applied by the court to the appeal.

5.67 Additionally, referrals currently proceed on the grounds put forward by the CCRC and leave from the Court of Appeal is required if the appellant wishes to argue additional grounds of appeal. If two different tests are being applied, grounds which may meet the referral test may not necessarily have a reasonable or real prospect of succeeding on appeal. As such, this raises a question about the grounds on which the appeal would proceed. Currently the "real possibility" test performs a similar function to the leave requirement in relation to the statutory right of appeal. If there is a possible disconnect between CCRC's test and the test applied by the court, it might be argued that a leave requirement may be needed to regulate the grounds on which the appeal proceeds to avoid the risk of hearing appeals on grounds that are unarguable in light of the test applied by the Court of Appeal. If a leave requirement were imposed in respect of referrals, it may complicate the process further and diminish the CCRC's power.

5.68 The "miscarriage of justice" test in Scotland avoids such potential difficulties as it is connected to the test applied by the appellate courts. Given the way appeals operate in summary cases, such a test may be more suited to this category of cases and it would help avoid the need for the CCRC to predict the outcome of the rehearing. However, as the CCRC deals with both summary and indictable cases, the test for referral would need to take into account fairness and make sure that it does not inadvertently make it harder to make referrals in one category than the other.

5.69 The "interests of justice" test perhaps avoids some of the potential difficulties of the "miscarriage of justice" test, as the nature of the test is different. For instance, the New Zealand Criminal Cases Review Commission is required to determine whether it would be in the "interests of justice" to make a referral and in making that determination it is required to take into account a number of factors, including the prospect of the appellate court allowing the appeal.[477] In the same way that it operates

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[476] In Canada alleged miscarriages of justice are currently reviewed by the Minister of Justice, who has the power to direct a new trial or refer the appeal to the appellate court if they are satisfied that there is a reasonable basis to conclude that a miscarriage of justice is likely to have occurred. The Canadian government has recently introduced a Bill, which seeks to establish an independent body (the Canadian Miscarriage of Justice Commission) to investigate alleged miscarriages of justice and replace the current Ministerial process. It is proposed that the new body would also have the power to direct a new trial or refer the appeal to the appellate court.

[477] Criminal Cases Review Commission Act 2019, ss 17(1) and (2).

in New Zealand, the CCRC could be required to take into consideration a number of factors when applying the test, including the prospects of the appeal succeeding. Therefore, it could maintain a connection with the test applied by the Court of Appeal in indictable cases and may also provide the CCRC with more latitude to refer the types of cases that it may find harder to refer at the moment, such as lurking doubt cases. However, similarly to the "miscarriage of justice" test, there could be potential definitional difficulties and a risk that the test could be interpreted too restrictively and become too focused on the prospects of the appeal succeeding.

Question 10.

5.70 Is there evidence that the referral test (a "real possibility" that the conviction, verdict, finding or sentence would not be upheld) used by the Criminal Cases Review Commission when considering whether to refer an appeal hinders the correction of miscarriages of justice?

5.71 If so, are there any alternative tests that would better enable the correction of miscarriages of justice?

Chapter 6: The "substantial injustice" test for appeals based on a change of law

Change of law cases

6.1 Change of law cases can arise in diverse situations. Professor John Spencer identifies three distinct types of appeal based on a change of law.[478] First, "where it is now clear that the conduct for which D was previously convicted was, under the law as now restated, no crime at all".[479]

6.2 Second, there are cases where "the law reveals that [the defendant] was not wholly innocent, but that he was merely convicted of the wrong offence".[480] The particular circumstances of a case might determine whether it falls into the first or second category.

6.3 Third, he identifies cases where "the later legal change affects not the conviction, but the sentence or order resulting from it".[481]

6.4 It is possible to conceive of at least two further categories. One is where the change in the law means that the defendant *might not* have been convicted under the corrected law. Cases involving joint enterprise such as *Jogee* and *Johnson*, discussed below, fall into this category. Here the situation is complicated for at least two reasons. First, it might be difficult for the court to judge whether the defendant would still have been convicted under the corrected understanding. Second, while in theory uncertain cases could be addressed by quashing the conviction and ordering a retrial which would test the case under the corrected law, practical considerations may mean that this is not a viable option.

6.5 A further category, identified by Professor David Ormerod,[482] is where there has been a "change in the law's attitude which has been prompted by purely legal developments,"[483] such as development of the law in relation to issues such as admissibility, disclosure or criminal procedure. Again, in such cases it will often be unclear whether, had the procedures under the "developed" law been applied at trial, the defendant would or would not have been convicted.

6.6 In general, where the criminal law changes as a result of statute, this does not affect the convictions of those who were properly convicted under the old law, nor does it

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478 J R Spencer, "Criminal appeals founded on a change of law" (2014) 73 *Cambridge Law Journal* 241, 242.

479 Above, 242.

480 Above, 243.

481 Above, 243.

482 D Ormerod, "Appeal: Leave to Appeal" [2000] *Criminal Law Review* 835.

483 Above, p 839.

prevent a person from being prosecuted and convicted under the old law for conduct prior to the change.[484]

6.7 However, the situation is complicated in the case of development of the common law. In such cases, the courts are not changing the law prospectively, but correcting a prior misunderstanding or misapplication. Indeed, in criminal law, it is usually only through decisions in appellate cases that the common law develops. In such cases, the law is changed retrospectively: for instance, the appellant's conviction is quashed because the court below, while applying what was believed to be the correct interpretation of the law, is held to have applied the wrong interpretation of the law.

6.8 As Murray CJ put it in the Irish case of *A v Governor of Arbour Hill Prison*:[485]

> Judicial decisions which set a precedent in law do have retrospective effect. First of all, the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought.

6.9 In *Preddy*,[486] the House of Lords held that obtaining a mortgage by deception did not amount to obtaining property by deception.[487] In *Gosney*,[488] the Court of Appeal Criminal Division ("CACD") held that dangerous driving was not a wholly strict liability offence; while there was no need to prove a particular mental element, it was still necessary to prove that the driver was "at fault".[489] In *Saik*,[490] the court held that the mental element required for offences of conspiracy to launder money was knowledge or intent that the money was, or would be, the proceeds of crime and not – as it was for the substantive offence – mere suspicion. Preddy, Gosney and Saik all therefore had their convictions quashed.

6.10 What, however, of others who have been convicted under that same misconception of the law? In theory, it would be possible to declare that any conviction based upon the misapplied law was unsafe. However, this raises several practical problems.

6.11 First, it will very often be impossible to say whether the change of law would have made a difference in a particular case. This is especially so where courts are found to have been providing a broader basis for a conviction than they should have done. For instance, before the ruling in *Jogee*[491] (see discussion at page 112 below), a person who was a party to an offence could be convicted as a party to a more serious offence

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484 Interpretation Act 1978, s 79.

485 [2006] 4 IR 88 at [36].

486 *R v Preddy* [1996] AC 815.

487 On the basis that the mortgage obtained was not property "belonging to another", and that when a balance is transferred this is not the transfer of property but the extinguishing of one liability and the creation of another.

488 *R v Gosney* [1971] 2 QB 674.

489 In this case deficient signage had led a perfectly competent driver onto the wrong carriageway of a dual carriageway road.

490 *R v Saik* [2006] UKHL 18, [2007] 1 AC 18.

491 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

committed by their co-party, if they intended or foresaw that their co-party might commit the more serious offence. *Jogee* established that intention was necessary – foresight was not sufficient, but could be evidence from which intention *might* be inferred. In *Saik*, the House of Lords ruled that conspiracy to commit money laundering requires knowledge or intention that the property is or will be the proceeds of crime – and not (as for the substantive offence) merely having reasonable grounds to suspect that the property represents the proceeds of crime. However, where a narrow interpretation of the law prevails, where previously a broader basis of liability had been possible, it will often be impossible to say whether or not the appellant would still have been convicted had the case been put on the narrower basis.

6.12 Second, had the mistake of law been identified at the time, the trial might have been conducted differently. For instance, if the error of law was to leave to the jury an impermissible basis for conviction, the prosecution might have focused its attention on proving what would have been necessary under the correct interpretation.

6.13 Third, had the mistake been identified at the time, the prosecution might have been able to charge different but related offences (particularly in the second category of cases identified by Professor Spencer described above at paragraph 6.2).

6.14 Fourth, commentators have identified a concern that if convictions can be appealed on the basis of a change of law, this will "open the floodgates", resulting in an unmanageable number of appeals and potentially retrials. Referring to the fifth category of case, Professor Ormerod warned, in 2000, that:

> If the Court of Appeal is prepared to quash convictions as "unsafe" because the law has changed its perception of what is "fair" to defendants, irrespective of whether that also undermines the reliability of the conviction, this really opens up the floodgates.[492]

6.15 It is perhaps notable that Professor Ormerod was writing in 2000, as the implementation of the Human Rights Act 1998 ("HRA"), which came into effect in 2000, heralded a potential expansion of this category of cases. Some academic commentators warned that the retrospective application of the HRA to criminal appeals created "a real risk of floods of applications".[493] The concern was particularly acute during a period between the HRA's commencement in July 2000 and the House of Lords ruling in *Lambert*,[494] in July 2001, that the HRA did not have retrospective effect.

The Court of Appeal's approach to change of law cases

6.16 Given that the vast majority of appeals based on a change in the common law will be brought out of time, the Court of Appeal has attempted to mitigate the issue of retrospectivity by distinguishing between in-time and out-of-time appeals. Where a person has brought their appeal within the statutory period of twenty-eight days, it will be dealt with according to the corrected interpretation of the law. Thus, for instance,

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492 D Ormerod, "Appeal: Leave to appeal" [2000] *Criminal Law Review* 835, 839.

493 K Kerrigan, "Unlocking the Human Rights Floodgates?" [2000] *Criminal Law Review* 71, 81.

494 *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577.

following the judgment in *Preddy*, in *Graham*,[495] the Court of Appeal quashed the convictions of seven appellants who had been recently convicted on similar basis.[496] That does not necessarily mean that an appeal will succeed in every such case – the court still has to establish whether the mistake of law rendered the conviction unsafe.

6.17 Where, however, the appellant seeks an extension of time to bring an appeal,[497] the court will only allow the appeal if the appellant can demonstrate "substantial injustice". In *Hawkins*,[498] the Court of Appeal held:

> It is plain, as we read the authorities, that there is no inflexible rule on this subject, but the general practice is plainly one which sets its face against the reopening of convictions recorded in such circumstances. Counsel submits—and in our judgment submits correctly—that the practice of the Court has in the past, in this and comparable situations, been to eschew undue technicality and ask whether any substantial injustice has been done.

6.18 In fact, as far as we can see, of the seven authorities cited for that proposition three – – *Lesser*,[499] *Ayres,*[500] *Pickford*,[501] – were not change of law cases. One of the others –

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495 *R v Graham* [1996] EWCA Crim 1211, [1997] 1 Cr App R 302.

496 Three of the appellants, whose cases were separate, were acquitted without a retrial being ordered. The remaining four appellants had been charged as co-conspirators in a single trial, and for some of their convictions the court substituted alternative convictions.

497 That is, for the Court of Appeal to extend the time for giving notice in accordance with s 18(3) of the Criminal Appeal Act 1968.

498 *R v Hawkins* [1997] 1 Cr App R 234 at [240]. Hawkins had been convicted of obtaining property by deception, before the House of Lords in *Preddy* ruled that the debiting of a bank's account and the crediting of the borrower's account could not amount to obtaining property. The CACD held that there was no injustice in Hawkins' conviction as alternative charges could have been laid. They did not, however, substitute an alternative conviction because those suggested by the prosecution were "by no means simple or free from controversy", perhaps acknowledging that while these alternative charges could have been laid, they might not necessarily have succeeded.

499 *R v Lesser* [1939] 3 WLUK 32, (1940) 27 Cr App R 69. This was not a change of law case. The appellant sought an appeal a month after his guilty plea (at the time, the time limit was ten days). A few days after his guilty plea, a similar case saw a person acquitted on the same ground that the judge had rejected in Lesser's case. The court did not apply a "substantial injustice" test – but just rigorously enforced the time limit.

500 *R v Ayres* [1984] AC 447. This was not a change of law case – rather this was a case which overturned the prevailing understanding of the law (the case established that where a statutory conspiracy could be charged under the Criminal Law Act 1977, common law conspiracy to defraud could not be charged; this was reversed in the Criminal Justice Act 1987). Nor does it appear to have been an appeal brought out of time. The proviso was applied on the basis that the appellant could have been convicted of statutory conspiracy.

501 [1994] 3 WLR 1022, [1995] QB 203. This was not a change of law case; nor does it appear to have been brought out of time: the appellant was convicted in January 1993 and the Court of Appeal ruled in February 1994 (although the offence was committed in around 1975). The appellant had pleaded guilty to inciting his stepson to have sexual intercourse with the appellant's wife, the boy's mother. The law at the time presumed that a boy aged under 14 was incapable of an offence involving sexual intercourse, and the dates in the indictment included a period in which the boy was under 14: if the boy could not be guilty of the offence, Pickford could not be guilty of inciting it. The court applied the proviso on the basis that the indictment could have been drafted in a way which would not have involved this problem: Pickford was guilty of inciting his wife to have sex with her son.

Mitchell[502] – had an in-time appeal against sentence pending (which meant that the court would have had to consider the appropriate sentence for an offence of which he should not have been found guilty). It is not clear that *McHugh*[503] was an out-of-time appeal – and leave had been granted for his appeal anyway, while *Ramsden*,[504] rather than laying down or applying a rule, stressed the court's discretion.

6.19 The authorities cited in *Hawkins* did not demonstrate that the CACD had routinely applied a substantial injustice test to appeals out of time in change of law cases – let alone as a reason for refusing leave to appeal.[505]

6.20 What those cases did show is that the court had regularly declined appeals where there was no substantial injustice. That, though, is hardly surprising – because until 1995 the proviso (see paragraph 4.46 above) had permitted the court to do just that; but the proviso had deliberately been abolished in the Criminal Appeal Act 1995.

6.21 As counsel in the case of *Kansal*[506] put it:

> All the authorities referred to by Lord Bingham CJ in *R v Hawkins* and in *R v Graham*, were decided at a time when the proviso still existed. They do not support the assertions as to the present practice of this court made by Lord Bingham CJ in *R v Campbell* or a similar assertion made by him in *R v Hawkins*.

6.22 However, the ruling in *Hawkins* effectively established the substantial injustice test as the CACD's practice, and it has been endorsed and applied by the CACD in several cases.[507] It was also endorsed by the Supreme Court (in comments which are strictly

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502 *R v Mitchell* [1977] 1 WLR 753. This was a change of law case, but as the court in *Hawkins* noted, although this was an out-of-time appeal, there was an in-time appeal against sentence pending. The court allowed the application not because the appellant had demonstrated "substantial injustice" but because it would otherwise have faced the artificial situation of having to consider the appropriate sentence for an offence of which he should not have been convicted.

503 *R v McHugh* [1976] 11 WLUK 118, [1977] 64 Cr App R 92. The judgment in *Edwards v Ddin* which formed the grounds of the appeal came less than four weeks after McHugh's conviction, and the single judge had, in any case, granted leave to appeal. The proviso was applied on the basis that if McHugh was not guilty of theft, he was guilty of deception, which had been charged as an alternative and carried the same penalty.

504 *R v Ramsden* [1972] 1 WLUK 405, [1972] Crim LR 547:

"Where a subsequent decision of a superior court has produced an apparent change in the law, that coupled with other circumstances may be a factor which will induce the court to grant leave to appeal out of time, nevertheless in the last analysis this must in every case be a matter of discretion. In the circumstances of the present case we are quite satisfied that the material before the court is not such as to move us to exercise our discretion in favour of granting the very long extension of time sought… ."

505 The remaining case cited was *R v Molyneaux* [1981] 72 Cr App R 111. This was a change of law case. *R v Duncalf* [1979] 1 WLR 918 – decided shortly after Molyneaux's conviction – held that conspiracy to steal is not an offence under common law but under the Criminal Law Act 1977. However, in *Molyneaux* the CACD held that this error only meant that the indictment was defective for citing the wrong basis of the offence, not a nullity, so it applied the proviso.

506 *R v Kansal (No 2)* [2001] EWCA Crim 1260, [2002] 2 AC 69 at [14].

507 Most importantly, *R v Johnson and others* [2016] EWCA Crim 1613, [2017] 4 WLR 104. In *R v Ramzan (Amer)* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10, the CACD stated, "[i]t is the very well established practice of this Court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice would

obiter) in *Jogee*.[508] It is now established law. That said, the Supreme Court has not, and probably cannot, assess the substantial injustice test itself. This is because, in *Garwood*,[509] the CACD ruled that it cannot certify a point of law of general public importance – which is required in order that leave can be obtained to appeal to the Supreme Court – where it has refused leave to hear the appeal: an appeal can only be taken to the Supreme Court against a decision on the substantive appeal, not a decision not to hear the appeal. Since the substantial injustice test operates at this stage, where a person cannot prove substantial injustice, there will be no decision on the appeal itself, and therefore no decision which can be appealed to the Supreme Court.

6.23 The court in *Hawkins*, however, gave no guidance as to how "substantial injustice" was to be assessed (in *Hawkins* itself, there was no substantial injustice because on the facts, he was clearly guilty of conduct which could have been prosecuted under alternative charges).

6.24 The issue has had a significant impact on appellants seeking to appeal convictions based on "joint enterprise" (or strictly, "parasitic accessory liability") following the ruling of the Supreme Court in *Jogee*.[510] This concerned the scope of liability when two or more people engage in a "joint criminal enterprise". The Supreme Court decided that in relation to a particular form of joint enterprise liability – referred to as "parasitic accessory liability" – the law had taken a "wrong turn".

6.25 The difficulty is that in many cases, where the judge directed a jury in accordance with the law as it stood pre-*Jogee*, it will not be clear whether the jury convicted on the basis of conventional joint enterprise liability or on the basis of parasitic accessory liability; that is, whether the defendant intended death or serious injury or merely foresaw it might happen. Even where the prosecution averred that the defendant fully intended the more serious crime, the jury, perhaps having heard the defendant's evidence, might have rejected the prosecution's case but convicted on the basis that while the defendant did not intend what transpired, they did foresee it as possible.

otherwise be done to the Defendant… We have no doubt that the practice is very fully established, endorsed by successive Lords Chief Justice, binding upon us and soundly based in justice."

508 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8 UKPC, [2017] AC 387.

509 *R v Garwood* [2017] EWCA Crim 59, [2017] 1 WLR 3182.

510 [2016] UKSC 8, [2017] AC 387.

Jogee: joint enterprise parasitic accessory liability

When two or more parties commit a crime together, they are all liable to be convicted of the offence. This includes those who encouraged, assisted, or procured commission of the offence.[511] For instance, three people rob a bank together: one threatens the staff with a gun; the second bags up the money; the third acts as a lookout, and drives the getaway vehicle. Although only one of the three has threatened violence, and only one has physically handled the cash, all are guilty of robbery.

This is the usual form of joint enterprise: it is not a form of "guilt by association". It requires that the defendant engaged in a course of criminal conduct (including by encouragement or assistance), and that they possessed any necessary mental element: for instance, in a murder case, that they *intended* to cause death or serious injury.

Where a person is a party to an offence as an accessory, they need not know precisely what offence is being committed: it is enough that the offence committed is within the range of offences that the defendant intended to assist or encourage. Conditional intent is also sufficient. For instance, if the bank robbers agree that they – specifically the conspirator with the gun – will shoot a member of staff if this is necessary to get compliance, then all can be convicted in relation to the shooting if it is carried out. Whether this is murder, or grievous bodily harm, or actual bodily harm, will depend on what actually transpires.

Parasitic accessory liability was a special form of joint enterprise liability, which would generally only arise in relation to violent offences. For instance, a gang attacks a rival gang member, beating him with sticks. During the attack, one of the gang pulls out a knife and fatally stabs the victim. All are jointly liable for the assault. But are the other members jointly liable for the murder of the victim?

Under the doctrine of parasitic accessory liability, it was held that it was sufficient if the defendant *foresaw* that the other party might intentionally kill or seriously harm the victim to fix a party to a joint enterprise[512] with liability for the more serious offence. (Though, again, this required more than mere association or presence. It required both foresight of serious harm, and an act of assistance or encouragement.)[513]

In *Jogee*, the Supreme Court held that the common law had taken a "wrong turn": it was not enough that the accessory might have *foreseen* the more serious offence, they must have *intended* it. Foresight was no more than evidence from which a jury might *infer* the requisite intention. If the jury is satisfied that there was a common purpose to commit an offence, and that the defendant must have foreseen that a co-accused might well commit a more serious offence, then it could in an appropriate case conclude that the defendant had the conditional intent that the more serious offence be committed, and accordingly convict; but that would be a question of fact for the jury.

6.32 A further complication is that where a person was convicted of murder in such circumstances, even if they were not guilty of murder, the facts which the jury must have been sure of in order to convict of murder (under parasitic accessory liability) would almost always be sufficient to sustain a conviction for manslaughter.[514]

6.33 In *Jogee*, the Supreme Court warned that:

> The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in *Chan Wing-Siu* and in *Powell and English*. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction.[515]

What does substantial injustice mean?

6.34 As already noted, although *Hawkins* established the "substantial injustice" test, it did not lay down what substantial injustice involved. Instead, what constitutes substantial injustice has to be inferred from how the test has been applied to subsequent applications. Indeed, in *Hawkins*, Lord Bingham spoke of "of eschewing undue technicality and asking whether any substantial injustice had been done".[516]

6.35 Professor Spencer suggested that for his first category of case – "where it is now clear that the conduct for which D was previously convicted was, under the law as now

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511 Accessories and Abettors Act 1861.

512 *Chan Wing-Siu v The Queen* [1985] AC 168. Note that the intended joint enterprise need not involve the actual infliction of violence. In the case of *Chan Wing-Siu* the conviction was for the use of knives to threaten. In *R v Daley (Kyrone)* [2015] EWCA Crim 1515, [2015] 7 WLUK 505, the defendant was convicted on the basis that he knew the killer had a gun and therefore was an accessory to an offence of possession of a firearm.

513 A further aspect of parasitic accessory liability was a focus on knowledge that the co-accused had a weapon (*Chan-Wing Siu v The Queen* [1985] AC 168); in *R v Powell, R v English* [1999] 1 AC 1, the House of Lords made clear that a defendant B would not be guilty under the doctrine if the co-accused A "suddenly produces and uses a weapon of which B knows nothing and which is more lethal than anything B contemplates A or any other participant may be carrying". As held in *R v Tas* [2018] EWCA Crim 2603, [2019] 4 WLR 14 at [37], "one of the effects of *Jogee* is to reduce the significance of knowledge of the weapon so that it impacts as evidence … going to proof of intention, rather than being a pre-requisite of liability".

514 This is because in order to convict under parasitic accessory liability, the jury would have to have been sure that the defendant (i) engaged in a course of criminal conduct, and (ii) foresaw that the victim might be killed. Unlawful act manslaughter requires that a person did an unlawful and dangerous act from which death resulted. The jury's verdict entails that the defendant did an unlawful act from which death resulted. Although the test of dangerousness for unlawful act manslaughter is objective, the fact that the defendant foresaw the possibility of death, coupled with the fact that death did, in fact, ensue, means that it will rarely be arguable that the course of conduct was not dangerous, fulfilling that part of the criteria. That said, it will not inevitably follow that the defendant was guilty of manslaughter: for instance, where the defendant claimed to have been acting under duress, the defence of duress would not be available in relation to a charge of murder, but would be available in relation to manslaughter.

515 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8 UKPC, [2017] AC 387 at [100].

516 *R v Hawkins* [1997] 1 Cr App R 234 at [240].

restated, no crime at all … the conviction surely should be set aside."[517] This was the conclusion in *Mitchell*.[518] However, in *Ordu*,[519] the court appeared to accept that had the law been correctly applied as subsequently case law established it should have been, the appellant would have been acquitted.[520] Nonetheless, it held that the substantial injustice test precluded his appeal as:

> he has now lived through all the adverse consequences and the conviction and emerged to a happier, more settled and safe life in the United Kingdom. The conviction and sentence is now a long time ago and quashing the conviction will not remedy the unpleasant memories which are now its only legacy.[521]

6.36 Against this, in some recent cases where it was contended that a conviction would have been stayed on grounds of abuse of process because the defendant was a victim of trafficking and had committed the offence due to compulsion, the CACD has accepted that the consequences of a conviction for a person's future employment[522] and/or immigration status[523] could amount to substantial injustice requiring the conviction to be quashed.

6.37 In relation to the second category of cases, where the defendant "was merely convicted of the wrong offence", Professor Spencer argues, "the current solution" – that is, the substantial injustice test – "is not wholly logical, but it is probably the best that can be done", noting the constraints on the CACD's ability to substitute a conviction for the correct offence (discussed at paragraphs 4.146 to 4.149 above).[524]

6.38 Third, where "the later legal change affects not the conviction, but the sentence or order resulting from it", he argues, "surely, the appeal should be entertained, and the sentence or order mitigated, at least in any case where the defendant is still in prison;

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517 J R Spencer, "Criminal appeals founded on a change in case-law" (2014) 73 *Cambridge Law Journal* 241, 243.

518 See fn 502 above.

519 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21.

520 Ordu was convicted in 2007 of possessing a false or improperly obtained identity document with intent: he had fled Turkey and attempted to enter the UK on a false passport. When he was detained at passport control, he disclosed his full name and made a (subsequently) successful claim for asylum. S 31 of the Immigration and Asylum Act 1999 provides a defence for a person who commits a relevant offence in coming to the UK "directly from a country where his life or freedom was threatened", but it was thought not to apply as Ordu had come via Germany – rather than directly from Turkey.

In *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, the House of Lords held that the defence was available to a person who was seeking asylum in another country and only transiting through the UK, and by analogy, *R v Mateta* [2013] EWCA Crim 1372, [2014] 1 WLR 1516 held it was available to a person who had arrived in the UK having transited a safe country.

521 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21 at [33].

522 *R v O* [2019] EWCA Crim 1389, [2019] 7 WLUK 537.

523 *R v GS* [2018] EWCA Crim 1824, [2018] 4 WLR 167. The CACD held that the appellant's precarious immigration status was capable of demonstrating substantial injustice. However, the CACD was not persuaded that her case would have been stayed on grounds of abuse of process had the law been correctly applied.

524 J R Spencer, "Criminal appeals founded on a change in case-law" (2014) 73 *Cambridge Law Journal* 241, 243.

or if money payments are involved, in any case where the money has not yet been paid."[525]

6.39 Skipping the fourth category for the moment, in the case of the fifth category, it will often be the case that while there is now recognised to have been an unfairness, the person would still have been convicted under a procedure which was fair according to contemporary standards. In *R v Ballinger*,[526] the Court of Appeal considered the position of judgments from courts martial following the European Court of Human Rights' judgment in *Grieves*.[527] There it been held that arrangements for naval courts martial denied the defendant a fair trial, chiefly because the role of Judge Advocate was performed by a serving officer rather than a civilian. In *Dundon*,[528] the Court of Appeal concluded that if there had been a breach of article 6 in relation to the independence and impartiality of the tribunal, no conviction could be safe. However, Ballinger's application to bring an appeal out of time was rejected:

> it is not enough for the applicant to show that there has been a breach of Art.6 and that the conviction is unsafe. Where, as here, the applicant is out of time for appealing … something more is required in the form of substantial injustice or injury to the applicant. That is clear from the judgment of this court in *Hawkins*. Mr Lewin for the applicant argues that he has suffered a substantial injustice; he has been wrongly convicted and the consequences for him are enormous both in terms of his sentence of detention, his dismissal from the service and the financial consequences. In our view, however this is not sufficient to bring him within the test envisaged by the Chief Justice in *Hawkins*.[529]

6.40 As to what the "something more" might be (if the consequences described afterwards are not sufficient), it might be that what was missing in *Dundon* was the proposition that the appellant would not have been convicted had the trial been conducted under procedures now recognised as fair.

6.41 It is the fourth category, where the change in the law means that the defendant *might not* have been convicted under the corrected law that creates perhaps the most difficulty. This is potentially a large class of cases, and allowing appeals on this point in the CACD, followed by retrials in the Crown Court to determine whether the appellant was guilty under the corrected law, might give rise to concerns about a "flood" of cases overwhelming the criminal justice system.

6.42 In the case of *Johnson*, which concerned a series of appeals in joint enterprise cases following *Jogee*, the Court of Appeal said:

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525 Above, 243.

526 [2005] EWCA Crim 1060, [2005] 2 Cr App R 29.

527 *Grieves v United Kingdom* [2004] 39 EHRR 2 (App No 57067/00), [2003] 12 WLUK 448.

528 [2004] EWCA Crim 621, [2004] 3 WLUK 504.

529 *R v Ballinger* [2005] EWCA Crim 1060, [2005] 2 Cr App R 29 at [21].

> In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference.[530]

6.43 *Johnson* has been interpreted as requiring the appellant to show that they would not have been convicted had the jury been directed properly; that they might not have been convicted would not be enough.[531] This may overstate matters. In theory, it is hard to see that such a requirement could ever be met. In every case in which a person was convicted under parasitic accessory liability, they *might* have been convicted under the post-*Jogee* test, since the jury must have found at least that the accessory foresaw that the principal offender might commit the more serious offence. From this it would have been open to the jury to have inferred that the accessory intended – or conditionally intended – that they should commit it.[532]

6.44 However, insofar as the test articulated in *Johnson* does not go so far as requiring *proof* that the change in the law would, in fact, have made a difference, and only requires the Court of Appeal to "have regard to the strength of the case that" it would, it is not clear how strong that case must be. It can be said that in practice the Court of Appeal requires a very strong case that the change would have made a difference. *Crilly*[533] is an unusual example of a conviction being successfully challenged on *Jogee* grounds, the CACD concluding:

> The case against the applicant was to all intents and purposes a case about his foresight. Foresight may be evidence of intent but it does not equate to intent. The evidence against him was not so strong that we can safely and fairly infer the jury would have found the requisite intent to cause really serious bodily harm had the issue been left to them by the judge.

6.45 The case was highly fact specific: the planned enterprise was burglary of an unoccupied property; the appellant was not a party to the violence by his co-accused, which may have been solely a push and a punch; and while the jury must have concluded that Crilly continued to participate in the robbery once he foresaw that one of the others might cause serious harm, in the context of a very short incident, this could not, or might not, have led to the inference that he *intended* that violence.[534]

6.46 However, the focus in *Johnson* on whether the change in law would have made a difference arguably fails to reflect some of the considerations which had previously been suggested as being of relevance in deciding whether an appellant had

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530 *R v Johnson* [2016] EWCA Crim 1613 at [21].

531 See, for instance, F Gerry, "Why race is an issue in joint enterprise murder – and what are the solutions?", *The Justice Gap*, https://www.thejusticegap.com/why-race-is-an-issue-in-joint-enterprise-murder-and-what-are-the-solutions/; P Taylor, "The Jogee Effect", Counsel Magazine, September 2018.

532 B Krebs, "For want of a shoe her freedom was lost: judicial law reform and dashed hopes in *R v Mitchell*" (2019) 83 *Journal of Criminal Law* 20, 22.

533 *R v Crilly* [2018] EWCA Crim 168, [2018] 4 WLR 114 at [40].

534 It can be seen that in *Crilly* the CACD asked whether the evidence was or "was not so strong that we can safely and fairly infer the jury *would have* found the requisite intent". In *Hall*, one of the cases in *Johnson*, they framed the question whether "there is a sufficiently strong case that the defendant *would not have* been convicted". It can be seen that the former formulation is more generous to the appellant that the latter.

demonstrated substantial injustice, such as whether the defendant was still serving a prison sentence and whether the appellant might have been convicted of an alternative offence. (The CACD has also been reluctant to consider that a conviction for murder – and the consequent mandatory life sentence – amounts to substantial injustice if the person would otherwise have been guilty of manslaughter.)[535] It is also hard to reconcile this primary focus on whether the change of law would have made a difference with *Ordu*, where there is no question that had the law been applied as it is now accepted it should have been, Ordu would have been acquitted. This suggests that *Johnson* should not be seen as laying down a general rule, but as applying primarily to cases where the change of law might have affected the *likelihood* of the appellant being convicted. In other categories of cases, this factor will not be relevant, but other factors might be.

6.47 Drawing this case law together, it would appear that:

(1) an appellant is unlikely to be able to demonstrate substantial injustice unless they can demonstrate that they were unlikely to have been convicted, or would not have been prosecuted, had the law been applied correctly;

(2) an appellant is unlikely to be able to demonstrate substantial injustice if, had the law been applied correctly, they would have been convicted of another serious offence;

(3) an appellant is unlikely to be able to demonstrate substantial injustice if they are no longer serving a sentence for the offence. However, substantial injustice may be demonstrated if the conviction has enduring consequences such as causing difficulty in obtaining employment or leading to precarious immigration status.

Appeals in time and analogous situations

6.48 While the use of time limits may seek to create a "bright line" rule, the line may, in practice, be blurred. For instance, in *Johnson*, the CACD had to consider in which cases (of those it was considering following *Jogee*) the applicant would be required to demonstrate substantial injustice.

> One type of case is where an application for leave to appeal was made within 28 days on non-*Jogee* grounds and either granted (as in the appeal of Lewis and Asher Johnson) or refused, but renewed to the Full Court, as in the appeal of Garwood. Subsequently, an application was made to add grounds based on the decision in *Jogee*.
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> A second type of case is where the application was made within 28 days on non-*Jogee* grounds, but the issue of leave to appeal [was] not determined by either the Single Judge or the Full Court, as progress in the case was adjourned by the Registrar pending the decision in *Jogee*. An application was then made on *Jogee* grounds…

[535] P Taylor, "The Jogee Effect", Counsel Magazine, September 2018.

The final scenario is one in which one appellant appealed on *Jogee* grounds in time and a co-defendant (who did not) then seeks to appeal on similar grounds out of time.[536]

6.49 The CACD ruled that for the first of these, while the case could be considered on the basis for which leave had already been granted, the application to amend the grounds to include the change of law would be subject to the substantial injustice test. In the second category, the appeal of two appellants was allowed; however, the court held it relevant that here "counsel … drew the attention of the trial judge to the fact that the Court of Appeal had certified a question for the Supreme Court in the appeal of *Jogee* … Counsel was therefore, in effect, asking the trial judge to reserve the question" of parasitic accessory liability. In respect of the final category, they held that the potential substantial injustice between co-defendants who had and who had not brought their appeals in time is likely to require leave to be permitted.[537]

6.50 Even where *Jogee* grounds have been brought in time, the CACD has required appellants to demonstrate substantial injustice. In *Daley*,[538] the appellant brought an in-time appeal, arguing that parasitic accessory liability should not have been applied when the offence which formed the basis of his parasitic accessory liability for murder was not – as in the cases establishing parasitic accessory liability – participation in a violent assault, but rather possession of a weapon. The CACD refused his appeal saying that it was "in truth … not so much about the judge's directions but about the very existence of parasitic joint accessory liability". Counsel for the appellant at this appeal explicitly sought to "to preserve the position of the appellant while awaiting the decision of the Supreme Court in *Jogee*". The CACD rejected this appeal on the basis of the existing law. It seems clear that had Daley appealed (or been given leave to appeal) to the Supreme Court, he would have been successful on this point, as per *Jogee*.[539]

6.51 However, when the Criminal Cases Review Commission ("CCRC") then referred Daley's case back to the CACD on the basis of *Jogee*, the CACD rejected it on the

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536 *R v Johnson and others* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [25]-[28].

537 The position of co-defendants had previously been considered in *R v R (Amer)* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10, but an argument along the lines of that accepted in *Johnson* was rejected: "It is submitted for M that leave should be granted because (a) he would otherwise be treated differently to his co-accused R... We do not consider that the fact that R is by chance here on referral by the CCRC, because of his previous application for leave, should cause us to decide M's application otherwise than we would have done if R had been in the same position as M." R was not required to demonstrate substantial injustice (under the law as it stood pre-2008, since it was a CCRC referral); M was; the fact that the co-defendants were treated differently did not amount to substantial injustice in itself.

538 *R v Daley (Kyrone)* [2015] EWCA Crim 1515, [2015] 7 WLUK 505. The appellant presumably framed the appeal on these narrow grounds correctly judging that the Court of Appeal would not rule out parasitic joint accessory liability wholesale.

539 However, had he been successful on the *Jogee* point, the CACD would still have had to consider whether this defect made the conviction unsafe.

basis that he was required to demonstrate substantial injustice and had not done so.[540]

The Criminal Cases Review Commission and change of law cases

6.52 After *Hawkins*, and up to 2008, the Court of Appeal's use of time limits as a mechanism for filtering out change of law cases led to an anomaly – the substantial injustice test would not apply to cases brought on a reference by the CCRC.

6.53 Formally, the effect of the Criminal Appeal Act 1995 is that a case referred to the Court of Appeal by the CCRC is not subject to the need to obtain leave, nor the application of a time limit. As stated in *R*, "one effect of making such a reference [was] to pre-empt the decision which might otherwise be made on the merits of the case as to whether substantial injustice is established, so that leave should be granted".[541]

6.54 CCRC references brought on the basis of a change of law would bypass the substantial injustice filter, and – because of the abolition of the proviso[542] – the CACD would have to quash the conviction as unsafe even if no substantial injustice had been done.

6.55 Following *Saik*, the CCRC sought to refer four cases to the CACD. The CCRC applied the usual referral test – was there a real possibility that the CACD would find the convictions unsafe? The decision by the CCRC to refer these cases was the subject of a judicial review brought by the Director of Revenue and Customs Prosecutions. The Administrative Court found that the CCRC was under no obligation to have regard to a practice of the CACD "which operates at a stage with which the CCRC is not concerned".[543] It also questioned *Hawkins* itself (for similar reasons to those outlined at paragraphs 6.18 and 6.19 above), concluding that it could not:

> be said that the courts had consistently applied the substantial injustice test … for example, in *Ramsden*, the approach of the CACD seems to have been more in the form of a general interests of justice test.[544]

6.56 However, in the subsequent cases of *Cottrell and Fletcher*[545] and *R*, the CACD was critical of the CCRC's refusal to apply the substantial injustice test. In *Cottrell and Fletcher*, it questioned the outcome of the judicial review proceedings:

> …we must identify our concerns about the decision in *R (DRCP) v Criminal Cases Review Commission* [2007] 1 CAR 395… In our judgment, in these cases, it is not open to the Commission lawfully to apply a policy based on the conclusion of the

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540 *R v Daley (Kyrone)* [2019] EWCA Crim 627, [2019] 4 WLUK 179. (As explained in the next section, where the appeal is by way of a reference by the CCRC, the substantial injustice test is applied at the decision stage, rather than the leave stage.)

541 *R v R (Amer)* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10.

542 See discussion of the "proviso" at paragraphs 4.46-4.47 and its abolition at paragraph 4.55 above.

543 *R (on the application of Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission* [2006] EWHC 3064 (Admin), [2008] 1 All ER 383.

544 Above at [32].

545 *R v Cottrell and Fletcher* [2007] EWCA Crim 2016, [2007] 1 WLR 3262.

Divisional Court that it was "under no obligation to have regard to, still less to implement" the practice of the court.

6.57 In *R,* the CACD said, "we do not know whether the Commission, before deciding to refer his case, took into account the very clear practice to which we have referred" but drew attention to its previous comments in *Kansal* where it said, "we express the very firm hope that … the CCRC may think it right to take into account this court's practice in refusing leave because of a change in the law".[546]

6.58 This led in turn to amendments being brought forward in the Criminal Justice and Immigration Act 2008 at the request of the senior judiciary.[547] The Criminal Appeal Act 1968 was amended to give the CACD the power to reject an appeal referred by the CCRC where the only ground for allowing it would be that there has been a development in the law since the date of the conviction, where the court would have declined to allow an out-of-time appeal (ie where the substantial injustice test was not met). This change also feeds through to the referral test since, in considering whether there is a real possibility that the verdict would not be upheld, the CCRC is now obliged to consider whether the CACD would apply the substantial injustice test. If the CCRC is confident that the court would conclude that a case does not satisfy the substantial injustice test, then the CCRC should not refer it under the real possibility test.

6.59 Although the statutory amendment only applied to appeals against conviction, in *Neuberg*,[548] Thomas LCJ ruled that the CCRC should adopt a similar approach to sentencing appeals, despite the fact that Parliament had not included such appeals when legislating on the matter in 2008:

> In the case of a conviction appeal, the amendment to the Criminal Appeal Act 1968 by the insertion of s.16C(1) enables this court to refuse to allow an appeal against conviction on a reference by the CCRC where, in the court's view, it would not consider it appropriate to extend time in a change of law case.
>
> However, there is no corresponding power in a CCRC reference on a sentence. In such a case, it is the essential duty of the CCRC to consider the law in relation to substantial injustice as set out in the decisions to which we have referred and to apply that law when considering whether to refer the case to the court.[549]

6.60 Since the power for the CACD to apply the substantial injustice test in CCRC cases is a discretionary one,[550] this requires the CCRC to consider how the CACD would

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546 *R v Kansal* [2001] EWCA Crim 1260, [2001] 3 WLR 1562 at [22].

547 *Hansard* (HL), 21 April 2008, vol 700, col 1284.

548 *R v Neuberg* [2016] EWCA Crim 1927, [2017] 4 WLR 58.

549 Above at [50].

550 The statutory provision says only that the CACD "*may* dismiss the appeal if the only ground for allowing it would be that there has been a development in the law [and] if the reference had not been made, but the appellant had made … an application for an extension of time within which to seek leave to appeal … the Court would not think it appropriate to grant the application" (Criminal Appeal Act 1968, s 16C(2)).

exercise its discretion. In *Cottrell and Fletcher*,[551] the CACD said of the "substantial injustice" test:

> We do not doubt that there have been occasions when the practice has not been followed, but they do not undermine the essential policy reasons on which the principle is based. As applied in this Court, it is inherent that the policy permits of exceptions.

6.61 If the power is discretionary and its application permits of exceptions, the CCRC may find it difficult to apply the "real possibility" test (indeed, it could reasonably conclude that there is always a *possibility* that the CACD will make an exception). The CCRC has itself questioned how it can apply that part of the test relating to whether the change of law would have made a difference to the verdict:

> As juries are only required to deliver a simple verdict (ie "guilty" or "not guilty") it is very difficult to say with any degree of certainty whether or not the defendant's conviction was a result of the law being applied incorrectly and was therefore, arguably, unsafe.
>
> The CCRC considers that it is extremely challenging to demonstrate that the correct legal direction "would, in fact, have made a difference" without first knowing on which basis the jury reached their original decision.[552]

The "substantial injustice" test and summary cases

6.62 The substantial injustice test was developed by the Court of Appeal, based on its use of the proviso, initially in relation to its own practice in permitting an appeal to be brought out of time. To the extent that legislation provides for the use of the test, in section 16C of the Criminal Appeal Act 1968, that refers only to the Court of Appeal. There is no similar provision for magistrates' court appeals.

6.63 *Khalif*[553] establishes that "substantial injustice" is one of the factors that the Crown Court must take into account when deciding whether to allow leave to bring an appeal out of time, but does not present it as a test in the same way that it is applied in the CACD.

6.64 The position of the CCRC is also uncertain. When deciding whether to refer a summary case for appeal, the CCRC is not generally obliged to consider whether the Crown Court would itself grant permission for an out-of-time appeal.

6.65 The obligation for the CCRC to have regard to the Court of Appeal's own practice was one developed by that court itself prior to the legislative change, and as discussed in relation to sentence, it has developed that obligation beyond what is required by

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551 [2007] EWCA Crim 2016, [2007] 1 WLR 3262 at [47].

552 CCRC, Written evidence submitted to the House of Lords Constitution Committee, 26 November 2020, paras 10 and 11, available at https://committees.parliament.uk/writtenevidence/14816/pdf/.

553 *R (Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin), [2015] 3 WLUK 889.

statute. Accordingly, there is no guarantee that the courts[554] would hold that the CCRC is obliged to do the same in summary cases.

6.66 In the case of *RC*, whose conviction for failing to provide a valid immigration document was referred by the CCRC to the Crown Court in 2019, the CCRC noted that the court might find that the defence advice "was wrong only because of a subsequent change in the law". It therefore made clear that it had taken the view that even if this was correct, "substantial injustice may still be considered [because the conviction's] longer term implications for the appellant are arguably significant".[555] The applicant had been granted asylum but was unable to obtain indefinite leave to remain on account of his conviction.

Discussion

6.67 Application of the "substantial injustice" test to post-*Jogee* appeals has received a significant degree of criticism.

6.68 First, it is suggested that the Court of Appeal has been inconsistent in its application of the test. Dr Elaine Freer, for instance, notes that the fact that a person would inevitably have been convicted of other offences was taken as highly material as demonstrating no substantial injustice in post-*Jogee* cases.[556] Conversely, in the 1977 case of *Mitchell*,[557] one of those cited as authority for the "substantial injustice" practice in *Hawkins*, "it was expressly contemplated by that court that, where there had been no criminality under the law as interpreted … that should lead to an appeal being allowed".[558]

6.69 Yet Dr Freer points out that this is inconsistent with *Ordu*,[559] whose conviction was upheld on the grounds that he had suffered no substantial injustice, even though he would have had a full defence to the charge.

6.70 She says:

> Whilst commentators have pointed to *Ordu* as an aberration that stands alone, I argue that the fact it exists serves to illustrate the arbitrariness and inconsistency caused by the application of "glosses" by the court when considering reinterpretation-based appeals.[560]

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554 That is, the Crown Court which would hear the appeal, or the High Court to which a point of law would be taken by way of case stated or judicial review.

555 CCRC, "Commission refers conviction of Mr C for appeal", 30 July 2019, available at https://ccrc.gov.uk/news/commission-refers-conviction-of-mr-c-for-appeal/.

556 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 244.

557 *R v Mitchell* [1977] 1 WLR 753.

558 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 244.

559 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21.

560 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 245.

6.71 The decision in *Ordu* has also attracted criticism for the suggestion that the conviction of someone provably innocent might not amount to a "substantial injustice". Professor John Spencer has described the decision in *Ordu* as "demonstrably unjust and, unlike some harsh outcomes, … not one forced upon [the CACD] whether by binding precedent, or compelling practical considerations".[561]

> It is completely unrealistic to say that a criminal conviction loses its potency to harm the convicted person as soon as it is spent… In truth, a conviction is a stain upon on the convicted person's character which only completely disappears if it is quashed.

6.72 Other commentators have argued that the substantial injustice test places an undue burden on appellants to prove their innocence. Dr Beatrice Krebs notes that in *Mitchell* (*Laura)* [2018],[562] the CACD held that *Jogee*-compliant instructions would not have made a difference as "it would have been open" to the jury to infer from her foresight that someone would cause the victim serious injury (which the jury must at a minimum have found the defendant had) that the defendant had had the necessary conditional intent that the victim be caused serious harm. In doing so, she says:

> The court raises the bar for substantial injustice. That test is almost impossible to meet if it suffices for a conditional intent that the jury *could have,* rather than *must have*, so inferred. There is all the difference between an *entitlement to infer* and a finding that the jury *must have inferred*.[563]

6.73 This criticism is echoed by Sir Richard Buxton, a former Court of Appeal judge, who notes that "in the case of *Hall,* one of the applicants in *Johnson* … the court, at [91], considered that there was not a "sufficiently strong" case that the defendant would not have been convicted if the law in *Jogee* has been applied".[564]

6.74 A further criticism has been made that the CACD is wrong to treat there as being no substantial injustice where a person is convicted of murder, where they would otherwise fall to be convicted of manslaughter. Dr Freer has criticised the CACD's:

> refusal to recognise the substantial injustice caused in refusing to allow an appeal against an unsafe conviction for murder on the basis that there could be a safe conviction for manslaughter. This neglects the most crucial difference: imposition of the life sentence. Even where someone convicted of murder is given a comparatively short tariff, they will remain on life licence, liable to recall for any further offences, however minor, or other transgressions of their licence terms. Meanwhile, an offender convicted of manslaughter would likely receive a

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561 J R Spencer, "Upholding the Conviction of the Innocent" [2017] 3 *Archbold Review* 8, 9.

562 *R v Mitchell (Laura)* [2018] EWCA Crim 2687, [2018] 11 WLUK 537.

563 B Krebs, "For want of a shoe her freedom was lost: judicial law reform and dashed hopes in *R v Mitchell*" (2019) 83 *Journal of Criminal Law* 20, 22.

564 R Buxton, "Joint Enterprise: *Jogee*, substantial injustice and the Court of Appeal" [2017] *Criminal Law Review* 123, 124.

determinate sentence, of which they will serve either half, or two-thirds, before release on licence.[565]

6.75 Sir Richard Buxton has argued:

> It is … difficult to see how considerations of legal policy could ever prevent it being a substantial injustice for a prisoner to be serving a life sentence with a very long minimum term, imposed after a trial that applied a law that the Supreme Court has condemned after an exhaustive review specifically directed at cases of his type.[566]

6.76 Against this, Nathan Rasiah has argued that:

> The prospect of potentially reopening every case that featured a direction on accessorial liability in accordance with the law prevailing at the time would be unthinkable, particularly given that, in many cases, evidence of foresight of really serious harm would have supported a conviction based on an inference of conditional intention.[567]

6.77 Karl Laird has argued that "the relationship between substantial injustice, a test of the Court of Appeal's own devising, and safety, the test that Parliament has mandated, must be evaluated through a constitutional lens":

> Is it right that the test that Parliament has devised to determine whether an appeal against conviction succeeds is now out of reach for a significant number of appellants as a result of a common law test devised and defined exclusively by the Court of Appeal?[568]

6.78 It is worth noting, however, that Parliament expressly gave its imprimatur to the CACD's approach in allowing the CACD to apply the same test to cases referred by the CCRC (see paragraph 6.58 above).

6.79 Barry Sheerman MP, Chair of the All-Party Parliamentary Group on Miscarriages of Justice, has recently tabled legislation in Parliament[569] which would "give leave to appeal against a criminal conviction for an offence that no longer exists, or if the offence has changed in a way that is material to the applicant's conviction. That includes the availability of a defence that did not previously exist."

6.80 This would be subject to a requirement that "(i) the application for leave to appeal was served before the conviction is spent or (ii) that there is some other compelling reason that the Court of Appeal finds it is in the interests of justice to do so".[570] The first condition might be to allay fears that the Court of Appeal would be swamped by

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565 E Freer, "The "substantial injustice" test for reinterpretation of law appeals: a substantial injustice of its own?" (2022) 7 *Archbold Review* 7, 8.

566 R Buxton, "Joint Enterprise: *Jogee*, substantial injustice and the Court of Appeal" [2017] *Criminal Law Review* 123, 124.

567 N Rasiah, "New Cases: Substantive Law, Murder (joint enterprise)" (2021) 32 *Criminal Law Week* 1.

568 K Laird, "Homicide: *R v Towers*" [2019] *Criminal Law Review* 791, 795.

569 Criminal Appeals (Amendment) Bill, available at https://bills.parliament.uk/bills/3334.

570 See https://jeb.jointenterprise.co/.

appeals against convictions for minor offences which have long become spent. In contrast, murder convictions, or convictions resulting in a long prison sentence, would never be spent.

6.81 There is a danger that if development of the common law by superior courts would lead to a large, perhaps unmanageable workload for the appellate courts, superior courts might be reluctant to develop the common law. Leaving reform of the law to Parliament might be seen as preferable, not least because statutory reform tends only to apply prospectively. Apart from the broad impact of hampering development of the law, this might hinder the ability of the courts to deliver justice in individual cases.

6.82 There are, however, legitimate questions about the consistency of the CACD's practice, the arbitrary way in which it operates, and whether it enables legal advisers and the CCRC to predict how an appeal is likely to be received.

Question 11.

6.83 Is there evidence that the application of the "substantial injustice" test to appeals brought out of time on the basis of a change in the law is hindering the correction of miscarriages of justice?

Chapter 7: Appeals by the prosecution, third parties and the state

7.1 Although the main focus of the appellate system is on the ability of defendants to appeal their conviction and/or sentence, this is not the only context in which appeals can arise: appeals in criminal cases may also be brought by the prosecution and/or the state, or in some cases by third parties.

7.2 Most prosecutions are brought by an emanation of the state, whether a prosecutorial body like the Crown Prosecution Service ("CPS") or Serious Fraud Office, or a regulatory authority, such as the Environment Agency or local government trading standards or environmental health departments. Some public bodies may also bring private prosecutions.[571] Consequently, prosecution appeals will usually be brought on behalf of a public authority.

7.3 However, prosecutions may also be brought by private citizens or their representatives and in some areas of law – such as intellectual property offences and fraud – this is relatively common.[572] Accordingly, many appeal rights apply to both public and private prosecutors.

7.4 There are a variety of circumstances in which the prosecution may appeal findings of a court in a criminal case. The prosecution may challenge an acquittal, sentence or other ruling in summary proceedings court through an appeal by way of case stated or by judicial review.

7.5 In proceedings on indictment, prosecution rights of appeal are limited to those provided by statute, and there is no mechanism to appeal an acquittal. However, the prosecution may appeal rulings made at a preparatory hearing and "terminating" rulings. This latter provision is not limited to rulings which would have the effect of ending the prosecution. It can apply to certain other rulings provided that the prosecution agrees that if leave to appeal to the Court of Appeal Criminal Division ("CACD") is not obtained, or the appeal is abandoned before it is determined by the CACD, it will drop the prosecution).

7.6 Independently of prosecution rights of appeal, there are certain appeal mechanisms which are available to the state, reflecting the public interest in outcomes of criminal trials, in particular for legal certainty and public safety. One is the ability of the Attorney General to refer a question of law to the CACD when a person is acquitted at trial on indictment. Although this is not strictly an appeal, since it will not affect the

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571 For instance, the Post Office "Horizon" prosecutions that have been the subject of a large number of successful criminal appeals were mostly pursued in England and Wales as private prosecutions by the Post Office (which, while formally a limited company, is wholly owned by the UK Government) as the purported victim of the supposed frauds. Prosecutions for TV licence offences are brought in England and Wales by Capita on behalf of the BBC.

572 See for instance *R (Gladstone Plc) v Manchester City Magistrates' Court* [2004] EWHC 2806 (Admin), [2005] 1 WLR 1987; *R (TM Eye Ltd) v Southampton Crown Court* [2021] EWHC 2624 (Admin), [2022] 1 WLR 1114.

acquittal, it can have the effect of correcting a ruling of law made by the judge during the trial and preventing the ruling from becoming authority in subsequent cases.

7.7 A second is the power of the Attorney General to refer certain sentences to the Court of Appeal on the grounds that the sentence was "unduly lenient".

7.8 In very limited circumstances, an acquittal may be quashed where it is "tainted" by intimidation or interference, or there is compelling new evidence of guilt.

7.9 Finally, as is discussed towards the end of this chapter, in certain circumstances a third party who is not a party to proceedings may be able to appeal an order made in criminal proceedings where they are affected by it.

Prosecution appeals

Prosecution appeals in summary cases

7.10 The statutory appeal from a magistrates' court to the Crown Court is available only to the defendant.[573] However, the prosecution can challenge both an acquittal and sentence by way of case stated to the High Court.[574] The magistrates' court may only refuse to state a case if they are satisfied that it is "frivolous".[575]

7.11 Where a defendant has successfully appealed to the Crown Court in summary proceedings, the prosecution may appeal against acquittal in the Crown Court by way of case stated to the Divisional Court,[576] but only on grounds that the decision was wrong on a point of law or in excess of jurisdiction.

7.12 An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court for the superior court to make a decision on the application of the law to those facts. However, the line between decisions of law and decisions of fact may become blurred. In a different context, Baroness Hale said, "it is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon the factual conclusions of the first instance judge".[577]

7.13 The prosecution may also challenge decisions in summary proceedings by way of judicial review (judicial review is not available in relation to trials on indictment).[578] This

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573 Magistrates' Court Act 1980, s 108.

574 Magistrates' Court Act 1980, s 11.

575 "Frivolous" means "futile, misconceived, hopeless or academic": *R v North West Suffolk (Mildenhall) Magistrates' Court ex p Forest Heath District Council* [1997] EWCA Civ 1575, [1997] 4 WLUK 476. The Court cannot refuse a request to state a case on this ground if it is made by or on behalf of the Attorney General.

576 Senior Courts Act 1981, s 28(1).

577 *R (Cart) v The Upper Tribunal*; *R (MR (Pakistan)) v The Upper Tribunal (IAC)* [2011] UKSC 28, [2012] 1 AC 663.

578 Senior Courts Act 1981, s 29(3).

includes a refusal by a magistrates' court or Crown Court (in summary proceedings) to state a case.[579]

7.14 In general, the prosecution cannot obtain the quashing of an acquittal by judicial review merely on the grounds that the prosecution was prejudiced by a decision of the court – even if the defendant, if similarly prejudiced, would have been able to secure the quashing of a conviction. However, an order quashing an acquittal is available where the magistrates had no jurisdiction to acquit.[580]

7.15 On the basis of *Rowlands*[581] – albeit that this concerned defence appeals – the general rule can be inferred that where the prosecution alleges that the magistrates made an error of law or acted in excess of jurisdiction, the appeal should be by way of case stated. However, where the allegation is one of unfairness, bias or procedural irregularity, the challenge should be by way of judicial review. As with defence appeals, there will be cases in which there is sufficient overlap that the prosecution has a choice as to which route to take.

Appeals from preparatory hearings

7.16 Preparatory hearings for case management, unlike other pre-trial hearings, can only be ordered by a judge in certain cases (either serious fraud cases or where the case is complex, lengthy or serious[582]). They can only be ordered where "substantial benefits" arise from ordering the hearing, such as identifying material issues, assisting juror comprehension or managing the trial.[583] Under section 35 of the Criminal Procedure and Investigations Act ("CPIA") 1996, there is a right to appeal, with leave of the court, a decision made at a preparatory hearing. The preparatory hearing cannot be concluded until the outcome of the appeal, or if the appeal is abandoned.[584]

7.17 When ordered, preparatory hearings are held before the jury is sworn in. Under section 31(3) of the CPIA 1996, the judge at the hearing can make rulings as to:

(a) any question as to the admissibility of evidence;

(b) any other question of law relating to the case; and

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579 Magistrates' Court Act 1980, s 11(6); Senior Courts Act 1981, s 28(1). See for example *DPP v Stratford Magistrates' Court* [2017] EWHC 1794 (Admin), [2018] 4 WLR 47; *DPP v Highbury Corner Magistrates' Court* [2022] EWHC 3207 (Admin), [2023] 4 WLR 22.

580 *R v West* [1964] 1 QB 15 (the defendant was acquitted by magistrates on a charge of being an accessory after the fact, an offence which was not triable summarily); *Cardiff Magistrates' Court ex parte Cardiff City Council* [1987] 1 WLUK 370 (the offence was triable either-way and the acquitted defendant had not elected summary trial); *R v Hendon Justices ex parte DPP* [1994] QB 167 (the court had acquitted the defendant without hearing the prosecution witnesses, the High Court finding that this was an improper exercise of its powers being used to punish the prosecution).

581 [1998] QB 110.

582 Criminal Procedure and Investigations Act 1996 ("CPIA 1996"), s 29(1); Criminal Justice Act 1987, s 9.

583 CPIA 1996, ss 29(1) and (2); Criminal Justice Act 1987, s 7(1).

584 CPIA 1996, s 35(2).

(c) any question as to the severance or joinder of charges.[585]

7.18 Either the prosecution or the defence may appeal against such a ruling,[586] with leave from the judge or the CACD.[587]

7.19 This also extends to the decision of a judge under sections 44 and 45 of the Criminal Justice Act 2003 to order, or to refuse to order, a trial without a jury on the grounds that there is a danger of jury tampering.[588]

7.20 Where the appeal is brought by the prosecution there is no requirement to give the "acquittal guarantee" required once the trial is under way (see following section).

7.21 Additionally, while rulings at preparatory hearings can relate to the admissibility of evidence, not all evidential rulings can, or must, be made at a preparatory hearing. Usually other preliminary hearings (which do not attract rights of appeal) are used to make such rulings.

Appeals from "terminating" rulings

7.22 The ability of the prosecution to bring appeals in relation to trials on indictment was extended following recommendations of the Law Commission in 2001. In our report on Double Jeopardy and Prosecution Appeals we recommended:[589]

(1) That the prosecution should have a right of appeal against a direction to acquit arising from a ruling made up to the conclusion of the prosecution evidence.

(2) That the prosecution should have a right of appeal against a direction to acquit arising from a ruling of no case to answer made at the conclusion of the prosecution evidence. This would only be possible where that ruling is made on a point of law that there is no evidence that the accused committed the offence.[590]

7.23 We recommended that there should be no right of appeal against a jury's not guilty verdict, even where there has been a misdirection by the judge which may have favoured the defence.

7.24 Our recommendations were implemented with modification in Part 9 of the Criminal Justice Act 2003. In particular, the Act went further in allowing appeals against rulings relating to disclosure where this could lead to a prosecution being abandoned. Under

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585 CPIA 1996, s 31(3).

586 CPIA 1996, s 35(1); Criminal Justice Act 1987, ss 9(11) to (14); Criminal Procedure Rules 2020, Part 37.

587 CPIA 1996, s 35(1); Criminal Justice Act 1987, s 9(11).

588 CPIA 1996, s 35(1).

589 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267.

590 That is, the first limb of the *Galbraith* test. We concluded that in respect of the second limb, where a submission is that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, the judge is required to perform a quasi-jury role, and there was "no more reason to give the prosecution a right of appeal against such a decision than there is to give it a right of appeal against an acquittal by the jury" (Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 7.69).

section 58 of the 2003 Act, where a judge makes a ruling in relation to a trial on indictment that would have the effect of terminating the proceedings, the prosecution may appeal the ruling to the CACD. The prosecution can only do so if it first informs the trial court that, if leave to appeal is not obtained or the prosecution appeal is abandoned, the defendant should be acquitted – referred to as the "acquittal guarantee".

7.25 Although these are often described as "terminating rulings", the right of the prosecution to appeal is not limited to those rulings which formally curtail the proceedings, such as a ruling of no case to answer, or a stay of proceedings on the grounds of abuse of process. The prosecution's right to appeal also covers rulings in other circumstances which will have the practical effect of leading to the abandonment of the prosecution, for instance where a judge orders the disclosure of sensitive evidence which the prosecution is not prepared to disclose. It is the "acquittal guarantee" which makes them terminating rulings.

7.26 The prosecution's right to appeal does not apply to a ruling to discharge a jury, nor to any ruling which could be appealed to the CACD by other means.[591]

7.27 The prosecution is required to inform the court immediately following the ruling of its intention to appeal, or – if time is needed to consider whether to appeal – must immediately request an adjournment to consider appealing the ruling.

7.28 When the prosecution appeals against a ruling of no case to answer it may also nominate one or more other rulings in the proceedings to be considered in the appeal. This is so that the CACD can consider the cumulative effect of the rulings. The reason for this is that the ruling of no case to answer will often follow a series of prior rulings – for instance relating to admissibility of evidence – which cumulatively led to the result that there is, on the evidence adduced or on the basis of rulings of law previously made, no case to answer.

7.29 An appeal cannot be made once the judge has started summing-up. Consequently, there is no means of appealing a misdirection to the jury in the judge's summing up. Nor is there any means of appealing a misdirection in response to a question from the jury once it has started deliberation.

7.30 Where appeals are brought against rulings during a trial, the process may or may not be expedited. If it is not, the jury may be discharged while the appeal is heard but a fresh trial may be ordered.

7.31 There is a high threshold for the CACD to grant the prosecution leave to appeal: it must be seriously arguable that it was unreasonable for the judge's discretion to be exercised as it was.[592]

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591 Criminal Justice Act 2003, s 61.

592 *R v B* [2008] EWCA Crim 1144, [2008] 5 WLUK 22.

7.32 On the substantive hearing, the CACD may not reverse a ruling unless satisfied it was wrong in law, involved an error of law or principle, or was not a ruling it was reasonable for a judge to have made.[593]

7.33 It is worth noting that there is no corresponding right for the defendant, though the positions of the defence and the prosecution are not directly comparable as the defendant, unlike the prosecution, would be able to appeal if convicted. However, the defendant would be doing so as a convicted person – they would have to show that the ruling made the conviction unsafe.

7.34 Section 62 of the Criminal Justice Act 2003 also introduced a power for the prosecution to appeal against evidentiary rulings. However, this has not been brought into force. The provision would enable the prosecution to appeal to the Court of Appeal against a ruling which significantly weakens the prosecution's case. It would apply only to a narrow range of very serious offences. There would be no requirement to give the "acquittal guarantee".

7.35 In pre-consultation engagement with stakeholders, some concerns were expressed that the restrictions on prosecution appeals in relation to terminating rulings can lead to injustice. For instance, where a judge makes a misdirection in the summing-up, or in response to jury questions, there is no ability for the prosecution to appeal the ruling – even where it would be prepared to offer the "acquittal guarantee". If the defendant is then acquitted on the basis of those directions (although, because of the secrecy of jury deliberations, it would be impossible to be sure that this had occurred) there would be no way of appealing the acquittal.

7.36 A second scenario that was suggested to us was where the judge makes a misdirection, but the error is not so serious that the prosecution would want to jeopardise the prosecution by offering the "acquittal guarantee". For instance, the judge might wrongly leave a partial defence available in a murder case. The prosecution would not want to risk losing the case altogether by offering the guarantee (since the evidence might well be strong enough to secure a conviction on the murder charge). However, the jury might, in consequence, acquit the defendant of murder and instead convict them of manslaughter on the basis of the partial defence wrongly left available to them.

Question 12.

7.37 Are the powers available to prosecutors to appeal decisions made during criminal proceedings adequate and appropriate?

[593] Criminal Justice Act 2003, s 67.

Attorney General's references

Attorney General's references following acquittal

7.38 Under the Criminal Justice Act 1972, where a defendant has been acquitted on all or part of the indictment, the Attorney General may seek a ruling from the CACD on a point of law which has arisen in the case.

7.39 Such references are less common since the introduction of prosecution appeals under section 58 of the Criminal Justice Act 2003. However, there remain circumstances where a reference after appeal will be the appropriate mechanism:

(1) Where the ruling is not so adverse as to merit giving the "acquittal guarantee".

(2) Where the state is not a party to the proceedings so only becomes aware of the issue following the acquittal.

(3) Where the alleged mistake of law was a direction made during, or after the judge's summing up.

7.40 There is no power to refer theoretical questions of law.[594] However, nor is the Attorney General prevented from advancing an argument different to or developed from that advanced by the prosecution at trial in relation to a point that *was* in issue.[595]

7.41 It is worth noting here that where the Attorney General seeks to clarify a point of law following acquittal, the case goes to the CACD.[596] However, where a point of law is appealed in summary proceedings, the case goes to the Administrative Court, part of the High Court. An appeal from the Administrative Court lies direct to the Supreme Court.[597]

7.42 The inconsistency is particularly stark in relation to either-way offences in the Crown Court, because the Crown Court could try an either-way offence either on appeal from the magistrates' court or on indictment. On appeal from the magistrates' courts, the finder of fact would be the judge and magistrates, while on indictment the finder of fact

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594 *Attorney General's Reference (No.2 of 1975)* [1976] 1 WLR 710 at 714E; *Attorney General's Reference (No.4 of 1979)* [1981] 1 WLR 667 at 672 G-H.

595 *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, [2023] 2 WLR 651. This concerned the trial of four protestors accused of damaging a statue of Edward Colston, and acquitted on a charge of criminal damage. The judge had provided a 'route to verdict' which asked, "Are you sure that convicting [the defendants] of criminal damage would be a proportionate interference with their rights to freedom of thought and conscience, and to freedom of expression?" This was intended to reflect the decision of the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408. However, shortly after the acquittal, in *DPP v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888, the High Court ruled that *Ziegler* did not lay down any principle that for all offences arising out of "non-violent" protest, the prosecution has to prove that a conviction would be proportionate to the defendant's rights; rather, this was required in *Ziegler* because the specific offence was subject to a defence of "lawful excuse". In *Attorney General's Reference (No 1 of 2022)*, the Court of Appeal held that criminal damage did not fall into the *Cuciurean* class of offence for which no assessment would ever be necessary, because the offence could be committed by minor or trivial damage in relation to which conviction would amount to an unlawful interference. However, in this case, the damage was "clearly significant" and "did not involve peaceful protest" and therefore the proportionality of conviction should not have been left to the jury.

596 Criminal Justice Act 1972, s 36.

597 Administration of Justice Act 1960, s 1(1)(a).

would be the jury. But in either case, questions of law would be a matter for the judge. Yet the point of law would be appealed to different courts.

Unduly lenient sentences

7.43 Under the Criminal Justice Act 1988, a sentence may be referred to the CACD where it appears to the Attorney General that the sentence was "unduly lenient". This includes cases where the judge erred in law as to the sentencing options available or failed to comply with a mandatory sentencing provision. Requests for the Attorney General to consider referring a sentence CACD may come from the prosecution itself, members of the public or member of Parliament, victims or the bereaved. Media coverage may also prompt the CPS to consider the case.[598]

7.44 The power to refer is limited to offences triable only on indictment and certain other offences specified by order. The current list of offences is contained in the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006 (though that order has been amended on several occasions since 2006).

7.45 The referral must be made within 28 days of the sentence;[599] this limit is absolute. One issue with this time limit is that there is a power to alter a sentence made by the Crown Court under the "slip rule" within 56 days. Where the sentence is legally deficient – for instance where a mandatory minimum sentence is not imposed, it is preferable for this to be addressed under the "slip rule". However, if the CPS seeks to have a sentence corrected under the "slip rule", it risks losing the ability to refer it to the Court of Appeal if the sentence is not corrected.

7.46 A further issue is where there are reporting restrictions in respect of a trial: members of the public may not be aware of the sentence within the time for bringing a reference. Accordingly, CPS practice is that in such circumstances the prosecutor must consider whether the sentence should be referred to the Attorney General's Office so a decision can be made as to whether to refer the sentence to the CACD.

7.47 A sentence will be unduly lenient "where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate".[600]

7.48 Where the sentence was passed following a retrial, the Court of Appeal cannot impose a sentence more severe than that passed at the original trial (reflecting the general rule applying to sentencing on retrials in section 8(4) of the Criminal Appeal Act 1968).[601] This applies even if the judge at the original trial failed to impose a mandatory minimum sentence: the court at the retrial and the CACD are required to repeat the error.[602]

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598 Crown Prosecution Service, *Unduly Lenient Sentences* (9 March 2021), available at https://www.cps.gov.uk/legal-guidance/unduly-lenient-sentences.

599 Criminal Justice Act 1988, sch 3, para 1.

600 *Attorney General's Reference (No 4 of 1989*) [1990] 1 WLR 41, [1990] 11 Cr App R (S) 517.

601 *Attorney General's Reference (No 82a of 2000)* [2002] EWCA Crim 215, [2002] 1 WLUK 563.

602 *R v Reynolds and others* [2007] EWCA Crim 538, [2008] 1 WLR 1075.

7.49 The sentence must be unduly lenient by reference to the facts as found or admitted at trial. In *R v Pybus*,[603] the CACD said:

> It is not the function of this Court to substitute its own view as to what the sentence should be in the light of new material, which was not before the sentencing judge… It is not open to Her Majesty's Attorney General to rely upon further evidence to justify the application to make a reference, nor lest it be satisfactorily explained in detail why, to advance the case in a different way, or to seek to depart from concessions made by the prosecution in the court below.

7.50 However, where the Court of Appeal finds that the sentence *was* unduly lenient, it has the discretion whether to increase the sentence, and if so by how much:

> It will be at liberty to look at any fresh material that is supplied, or to consider arguments as to the sentencing exercise that were not made below but will only do so far as that material is relevant to the facts or circumstances of the case.[604]

7.51 Conversely, it may choose to increase the sentence to a level which was still more lenient than would have been warranted at the original sentencing. Indeed, the Court of Appeal traditionally applied a "double jeopardy" discount. As a result of statutory changes in 2003 and 2008, this does not apply when the Court of Appeal is determining the minimum term for a life sentence, where the original term was considered unduly lenient,[605] and the practice of discounting the replacement sentence is increasingly rare.

7.52 There is no power in relation to sentences passed in other courts. A possible anomaly here is that the Youth Court can hear trials relating to indictable-only offences. Because the Youth Court is a magistrates' court, a sentence cannot be appealed under the unduly lenient sentence scheme even if it is for an indictable-only offence such as rape.

Question 13.

7.53 Are the powers of the Attorney General to refer a matter to the Court of Appeal adequate and appropriate?

Appeals following acquittal

Tainted acquittals

7.54 Section 54 of the Criminal Procedure and Investigations Act 1996 provides for an acquittal to be quashed where it is "tainted" by interference with or intimidation of a juror or witness. The legislation provides that where a person has been acquitted of an

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603 *R v Pybus* [2021] EWCA Crim 1787, [2021] WLUK 430 at [9].

604 Above at [10].

605 Criminal Justice Act 2003, s 617; Criminal Justice Act 1988, s 36(3A). The rationale was that a prisoner serving a life or other indeterminate sentence has no expectation of release at the completion of the minimum term.

offence, and that person or another person has been convicted of an "administration of justice offence" in relation to proceedings leading to the acquittal, an application may be made to the High Court for the acquittal to be quashed. The High Court may only quash the acquittal if:

(1) it appears likely that, but for the interference or intimidation, the acquitted person would not have been acquitted;

(2) it does not appear that, because of lapse of time or for any other reason, a retrial would be contrary to the interests of justice;

(3) the acquitted person has been given a reasonable opportunity to make representations to the Court; and

(4) it appears to the Court that the conviction for the administration of justice offence "will stand".[606]

7.55 In our report on Double Jeopardy and Prosecution Appeals,[607] we recommended this provision should be extended to cover situations in which the court is satisfied that an administration of justice offence had been committed but it is not possible to bring a prosecution because:

(1) the person responsible is dead;

(2) it is not reasonably practicable to apprehend the person responsible;

(3) the person responsible is overseas and it is not reasonably practicable to bring the person within the jurisdiction within a reasonable time; or

(4) it is not reasonably practicable to identify the person responsible.[608]

7.56 These recommendations have not been implemented.

"Double jeopardy" retrials

7.57 Under a reform introduced in the Criminal Justice Act 2003, a person may face retrial for certain serious offences following acquittal where there is new and compelling evidence against the person in relation to the offence. "New" means that the evidence was not adduced in the proceedings in which the person was acquitted (or, where the

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606 The fourth condition means that the Court, taking into account all the information before it, but ignoring the possibility of new information coming to light, must be satisfied that the conviction for the administration of justice offence will not be quashed. S 55(6) gives the example that the Court should not therefore make an order if the time for bringing an appeal against the conviction for the administration of justice offence has not expired, or there is an appeal pending.

607 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267.

608 These conditions were intended to avoid the possibility that an acquittal might be quashed in circumstances where the alleged "interferer" could still be brought to justice. This was because in this scenario, perverse outcomes could occur such as someone being retried for the original offence, but the alleged interferer being acquitted (in which case the original defendant would have been retried in proceedings only brought because of alleged interference later held not to have happened). It might also incentivise the prosecution not to bring criminal proceedings against the alleged interferer (for fear that they would be acquitted) and instead seek to quash the acquittal without bringing a prosecution for interference.

person was acquitted in appeal proceedings, in the proceedings to which the appeal related). “Compelling” means that the evidence is reliable, substantial, and in the context of the outstanding issues, it appears highly probative of the case against the acquitted person. The court must be satisfied that it is in the interests of justice to quash the acquittal, having regard to:

(1) whether existing circumstances make a fair trial unlikely;

(2) the length of time since the offence was allegedly committed;

(3) whether it is likely that the new evidence would have been adduced in the earlier proceedings but for a failure by an officer or prosecutor to act with due diligence or expedition; and

(4) whether, since those proceedings,[609] any officer or prosecutor has failed to act with due diligence or expedition.

7.58 An application may only be brought with the written consent of the Director of Public Prosecutions (“DPP”), or a person authorised by them, and no more than one application may be brought in relation to an acquittal. If successful, the Court of Appeal makes an order quashing the acquittal and ordering a retrial.

7.59 Accordingly, it is easier to retry a person who was properly acquitted because of a lack of evidence at the first trial, than where there is evidence that the acquittal was secured by intimidation or interference. In the former, it is only necessary to show that the evidence is highly probative. In the latter case, the intimidation or interference must be proved in separate proceedings to the criminal standard, then it must be shown that the acquitted person would not have been acquitted absent the intimidation or interference.

Question 14.

7.60 Do you have any views on the circumstances in which an acquittal might be quashed, including the law relating to acquittals tainted by interference with the course of justice?

Appeals to the Supreme Court

7.61 The process of appeals from the CACD to the Supreme Court is discussed in detail at paragraph 4.182 above. However, it is worth noting at this point that section 33 of the Criminal Appeal Act 1968 allows both the defendant and the prosecution to appeal a decision of the Court of Appeal to the Supreme Court. This includes the following decisions which may be challenged by the prosecution:

[609] Or, if later, since commencement of the provision – this presumably is intended to reflect the fact that prior to its commencement, there would have been no prospect of a retrial, so inaction by police and prosecutors following the acquittal would be understandable and justified.

(1) a decision of the CACD to quash a conviction;

(2) a refusal to allow an acquittal to be quashed in order to enable a "double jeopardy" retrial for a serious offence;

(3) a decision not to order a retrial following the quashing of a conviction.

7.62 Accordingly, while there is no prosecution appeal against acquittal in the Crown Court, there is an ability for the prosecution to appeal an acquittal by the Court of Appeal (that is, where the CACD quashes a conviction and refuses to order a retrial). Leave is required, and can be granted either by the CACD or by the Supreme Court. However, leave to appeal can only be granted if the CACD itself certifies that the decision involves a point of law of general public importance.

7.63 As discussed at 4.183 above, an application for leave must be made to the CACD within 28 days of the decision (or, if later, of the date it gives reasons for that decision). If the CACD refuses leave to appeal to the Supreme Court, an application must be made to the Supreme Court within 28 days of that refusal. Unlike an appeal by a defendant, where there is discretion to extend this period, the limit is strict in relation to prosecution appeals (other than "double jeopardy" appeals under section 76 of the Criminal Justice Act 2003).

Prosecution appeals, Attorney General's references, and double jeopardy retrials: the case of Michael Weir[610]

In 1999, Michael Weir was convicted of the murder of 78-year-old Leonard Harris during a burglary in North London in 1998, along with charges of burglary and assault occasioning actual bodily harm. A bloodied glove found at the crime scene matched a sample on the DNA database, which had been taken in 1997 when Weir was arrested for drugs offences.

The drugs charges had been discontinued in October 1997, and accordingly the sample should have been destroyed and the record removed from the database before the match was made. The record itself was not used in evidence at the trial. Instead, the prosecution relied on a match between the glove and a new DNA sample taken following Weir's arrest for burglary (Mr Harris had not, at this point, died). The trial judge ruled that this evidence was admissible. Weir appealed his conviction, arguing that this ruling was incorrect.

By chance, the same issue had arisen in another case, where the judge had ruled that similar evidence was inadmissible. Because the defendant in that case had been acquitted, it reached the Court of Appeal by way of an Attorney General's reference on a point of law. The Court of Appeal ruled that the evidence in both cases was inadmissible and quashed Weir's convictions. The Court certified a question of law, and granted leave to appeal to the House of Lords in respect of the Attorney General's referral, but refused leave in respect of Weir's acquittal.

The House of Lords then ruled that evidence found as a result of the use of the unlawfully obtained or retained evidence was not inadmissible; rather its admissibility would be a matter for the trial judge.

It followed that the decision to quash Weir's conviction was wrong. However, the House of Lords was unable to reinstate Weir's conviction, as the prosecution had notified its intention to appeal the Court of Appeal's ruling one day outside the time limit (then fourteen days).

At this point, the strict double jeopardy rule meant that no retrial of Weir was possible. Even when the Criminal Justice Act 2003 was passed permitting retrial in certain circumstances, a retrial would require compelling *new* evidence not adduced at trial: the DNA evidence had been adduced at trial.

However, a palmprint subsequently found at the scene was matched to Weir. The print also matched one found at the scene of a similar murder in Kensington five weeks later. In 2018, the Court of Appeal quashed its earlier acquittal of Weir, and he was tried for, and convicted of, both murders.

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610 *R v Weir* [2000] 5 WLUK 751; *R v Weir* [2001] 1 WLR 421; *Attorney General's Reference No 3 of 1999* [2001] 2 AC 91. *R v Weir*: Sentencing Remarks, 16 December 2019, https://www.judiciary.uk/wp-content/uploads/2022/07/Sentencing-Remarks-Weir-16.12.19-1.pdf.

Third party appeals

7.64 The right to seek to bring an appeal by way of case stated from a magistrates' court is not limited to parties but extends to "any person … aggrieved by the conviction, order, determination or other proceeding".[611] In *Smith v DPP*,[612] the parents of a motorcyclist killed[613] in a road traffic collision were permitted to bring an appeal by way of case stated against the decision of the magistrates not to adjourn the prosecution of the driver of the other vehicle until after the inquest into the motorcyclist's death (the appeal was unsuccessful, so it was not necessary to consider whether the acquittal of the driver could be quashed). Judicial review of magistrates' court decisions is also available where the third party can demonstrate standing.[614]

7.65 The right to bring an appeal by way of case stated against a decision of the Crown Court in summary proceedings is limited to parties to the proceedings.[615] There is no comparable right in trials on indictment. There are, however, various statutory provisions allowing a person who is not a party to the criminal proceedings to appeal against an order made in those proceedings. These include:

(1) a wasted costs order made against a legal or other representative of one of the parties, as a result of improper, unreasonable or negligent acts or omissions;[616]

(2) a third-party costs order made by the Crown Court or Court of Appeal;[617]

(3) a parenting order made where a child or young person aged under 18 is convicted of an offence;[618]

(4) reporting restrictions in the Crown Court and other proceedings relating to a trial on indictment.[619]

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611 Magistrates' Court Act 1980, s 111.

612 [1999] 7 WLUK 377.

613 The collision would not ordinarily have been fatal, but the victim's religious beliefs precluded a blood transfusion.

614 In order to bring judicial review, a party must have "sufficient standing in the matter to which the application relates" (Senior Courts Act 1981, s 31(3)). In our Report on the High Court's jurisdiction in relation to criminal proceedings we noted "Whether a victim of a crime has sufficient interest to bring judicial review proceedings is not a settled point", High Court's Jurisdiction in Criminal Proceedings (2010) Law Com No 324.

615 Senior Courts Act 1981, s 28.

616 Prosecution of Offenders Act 1985, s 19A.

617 Senior Courts Act 1981, s 51. For instance, a director of a company might be subject to an order if they were considered the "real party to the litigation" in a private prosecution brought by the company.

618 Sentencing Code, s 366(9). A person subject to a parenting order has the same rights of appeal as if they had committed the offence themselves and the order were a sentence passed for the offence.

619 Criminal Justice Act 1988, s 159. The appeal may be brought by any "person aggrieved" by the restrictions.

7.66 In our recent consultation paper on Evidence in Sexual Offences Prosecutions,[620] we noted that the Dorrian Review on the management of sexual offence cases in Scotland[621] had recommended that complainants in sexual offences prosecutions should be able to appeal decisions to admit sexual behaviour evidence and evidence relating to their character or personal records.

7.67 We provisionally concluded that it would be appropriate to grant to complainants a limited right to appeal decisions made at preparatory hearings concerning the admissibility of evidence of their sexual behaviour or access to, disclosure or admissibility of their personal records. We also invited views on whether complainants should have further rights to appeal decisions regarding evidence relating to their sexual behaviour or personal records, and, if so, whether this should be limited to decisions made before the trial commences or extend to judicial rulings made during the trial.

Question 15.

7.68 Do you have any views on the circumstances in which a third party might appeal a decision made in criminal proceedings?

620 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259, p 519.

621 "Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group" (March 2021).

Chapter 8: Retention and disclosure of evidence and records of proceedings

8.1 Our terms of reference require us to consider whether appeals are hampered by laws governing the retention and disclosure of evidence and retention and access to records of proceedings.

8.2 In contrast with other areas of the appeal process that will be examined as part of the review, this area is not entirely governed by a statutory framework. Police records are generally covered by the Code of Practice on the Management of Police Information ("MPI"). However, evidence obtained during an investigation is governed by the Criminal Procedure and Investigations Act 1996 ("CPIA 1996"), and a Code of Practice issued under section 23 of the Act. Court records are kept subject to policies of HM Courts and Tribunals Service ("HMCTS") which are intended to ensure compliance with statutory obligations in the Public Records Act 1958, the Data Protection Act 2018, the UK General Data Protection Regulation, and the Inquiries Act 2005.[622]

Retention and disclosure of evidence post-conviction

Retention of evidence

8.3 Minimum retention periods in respect of material gathered during the course of a criminal investigation are set out in the Code of Practice issued under section 23(1) of the Criminal Procedure and Investigations Act 1996 ("CPIA Code of Practice").[623] The Code of Practice provides that following a conviction "all material[624] which may be relevant" must be retained at least:

(1) where a custodial sentence or a hospital order is imposed, until the person is released from custody or discharged from hospital;[625] and

(2) in all other cases, for six months from the date of conviction.[626]

8.4 Where at the end of the minimum period specified in paragraph 8.3 above an appeal is pending or the Criminal Cases Review Commission ("CCRC") is considering an application for a referral, the Code of Practice requires "all material which may be

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622 The Inquiries Act 2005 enables a statutory inquiry to impose a suspension on the destruction of records.

623 The Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice (September 2020) ("CPIA Code of Practice").

624 The term "material" is defined as "material of any kind, including information and objects, which is obtained or inspected in the course of a criminal investigation, and which may be relevant to the investigation", including material generated by the investigator, such as interview records (Above, para 2.1(7)).

625 Where the person is released from custody or discharged from hospital earlier than six months from the date of conviction, "all material which may be relevant" must be retained at least for six months from the date of conviction (Above, para 5.9).

626 Above, para 5.9.

relevant" to be retained until the determination of the appeal or the decision of the CCRC not to make a referral to the appellate court.[627]

8.5 A possible difficulty here is that most prisoners are routinely released at the halfway or two-thirds point of their sentence (depending on the particular offence), or may be released on parole having completed the minimum term of a life or indeterminate sentence. However, they remain liable to be recalled during this period. If evidence is destroyed because the convicted person has been released on licence, it may be unavailable for an appeal if they are subsequently recalled.

8.6 The National Police Chiefs' Council ("NPCC") has issued specific guidance in relation to the retention of materials by "forensic units"[628], which includes private forensic service providers and any part of a police force that provides forensic science services.[629] The NPCC's guidance specifies default retention periods in respect of case materials[630] held by the forensic units, which vary depending on the nature of the offence from 30 years in respect of the most serious offences to three years in relation to alcohol and drug driving offences.[631]

Case law on lost or destroyed evidence

8.7 In *R (Ebrahim) v Feltham Magistrates' Court*[632] the court ruled that when considering an application that a case should be stayed on the grounds of abuse of process, on the basis that evidence had been lost or destroyed, the trial court should apply the following considerations:

(1) in the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the … evidence in question? Recourse should be had in this context to the contents of the CPIA Code of Practice and the Attorney-General's Guidelines on Disclosure;

(2) if in all the circumstances there was no duty to obtain and/or retain the evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground;

(3) if such evidence is not obtained and/or retained in breach of the obligations set out in the Code and/or the Guidelines, then the following principles should be applied:

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627 CPIA Code of Practice, para 5.10.

628 The term "forensic unit" is defined as "any organisation or part of an organisation which provides forensic science services to the criminal justice system". NPCC, *Retention, Storage and Destruction of Materials and Records relating to Forensic Examination* (version 1.0, 2021) (NPCC's guidance), p 19.

629 Above, p 3, para 1.3.

630 This includes items submitted to, or collected or seized by, a forensic unit for examination, materials that are physically recovered or sampled from an item or person and materials prepared or created by the forensic unit during the examination of an item or scene (above, para 9.2 and p 20).

631 Above, p 10, para 11.1.4. The specified retention periods commence on 31 December of the year in which the case was first received by the forensic unit (see para 11.1.6).

632 [2001] EWHC Admin 130, [2001] 1 WLR 1293 at [23], [25] and [74].

(a) the ultimate objective of the discretionary power to stay proceedings as an abuse of process is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted;

(b) the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded;

(4) If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. There would need to be either an element of bad faith or at the very least some serious fault on the part of the police or prosecution authorities for this ground of challenge to succeed.

8.8 When considering whether to order a retrial following a successful appeal against conviction, the Court of Appeal Criminal Division ("CACD") has a wide discretion to consider whether the non-availability of evidence would mean that it is not "in the interests of justice" to order a retrial.[633]

Westminster Commission report

8.9 In their submission to the Westminster Commission on Miscarriages of Justice ("Westminster Commission"),[634] Inside Justice said:

> the post-conviction retention landscape within police forces is chaotic: material which could exonerate an innocent individual is routinely lost, contaminated or destroyed.[635]

8.10 The Commission noted in its report in 2021 that "non-disclosure or destruction of exculpatory material has been a factor in a number of miscarriages of justice".[636] The Commission was "concerned to hear that current retention processes may not be being complied with, and that such material may be destroyed while someone is in custody".[637] It recommended that:

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633 See, for instance, the Privy Council case of *DPP v Lagesse (Mauritius)* [2020] UKPC 16, [2023] 4 WLUK 324 at [53], where the Judicial Committee said "a retrial is the fair and appropriate way forward and the decision of the Supreme Court should be upheld. Most of the relevant evidence is derived from contemporaneous documentation and there are extensive written records of the accounts given by the accused to the police prior to being charged and affidavit evidence prepared by them prior to the trial in the Intermediate Court. It is not unreasonable to expect the accused to face a retrial with the benefit of this extensive material to hand."

634 See para 1.5. The Westminster Commission was established by the All-Party Parliamentary Group on Miscarriages of Justice, and chaired by Baroness Stern and Lord Garnier.

635 The Westminster Commission Report, p 51.

636 The Westminster Commission Report, p 51.

637 The Westminster Commission Report, pp 51 and 52.

(1) The Home Office contacts police forces to remind them of their legal obligation to retain all material in cases resulting in conviction and to ask them what measures they have in place to ensure compliance.

(2) HM Inspectorate of Constabulary and Fire and Rescue Services conducts a thematic inspection into police forces' current retention practices.

(3) The Crown Court Retention and Disposition Schedule is amended to provide for audio recordings of Crown Court trials to be retained for as long as a convicted person is in custody, or for five or seven years (as at the time), whichever is longer.[638]

8.11 The Westminster Commission also invited the Law Commission to consider whether premature destruction of crucial evidence which could have undermined the safety of a conviction should be a standalone ground of appeal.[639]

Disclosure of evidence post-conviction

8.12 The Criminal Procedure and Investigations Act 1996 places a duty on the prosecution in criminal proceedings to disclose material in its possession, or which it has inspected, that might reasonably be considered capable of undermining the prosecution's case or assisting the defendant's case.[640] The prosecution has a continuing duty to keep their disclosure obligations under review. [641] However this duty comes to an end when the defendant is acquitted or convicted. As such, disclosure post-conviction is governed by the common law.[642]

8.13 The common law disclosure obligations of the police and the prosecution post-conviction were considered by the Supreme Court in the case of *Nunn*.[643] The Supreme Court held that whilst the duty of disclosure is informed by the principle of fairness at all stages of the criminal process, fairness does not require the same level of disclosure at every stage of the criminal process.[644] The court noted that the position of the defendant and the public interest will be different post-conviction, as the defendant would have had an opportunity to defend themselves against the charge and there is a public interest in finality of proceedings and, in the absence of a good reason, in prioritising current police investigations, given finite resources.[645] As such, the court rejected the argument that the duty of disclosure post-conviction is the same as the duty of disclosure pre-conviction.

8.14 The Supreme Court held that while an appeal is pending, the duty of disclosure extends to "any material which is relevant to an identified ground of appeal and which

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638 The Westminster Commission Report, p 52.

639 The Westminster Commission Report, p 43.

640 CPIA 1996, s 3.

641 CPIA 1996, ss 7A(1)(b) and (2).

642 CPIA 1996, s 21(1).

643 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225.

644 Above, [22].

645 Above, [32] and [33].

might assist the appellant".[646] In relation to the duty of disclosure in other circumstances post-conviction, the court confirmed that where the prosecution or the police come into possession of material "which might afford arguable grounds for contending that the conviction was unsafe", they have a duty to disclose such material to the person convicted of the offence.[647] The court added that "if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made".[648]

8.15 The court noted that the CCRC provides a safety net in cases where a request for the review of case materials is disputed, given that it can make enquiries to determine whether there is a real prospect that material which affects the safety of the conviction could emerge.[649] The court also confirmed that this did not mean that others, such as legal representatives, may not make a request for post-conviction disclosure to the police or the prosecution.[650] It went on to say that "[p]olice and prosecutors should exercise sensible judgment when such representations are made and, if there appears to be a real prospect that further enquiry will uncover something of real value, there should be co-operation in making those further enquiries".[651]

8.16 However, in pre-consultation discussions, several stakeholders have told us that police forces are misapplying *Nunn*, essentially concentrating on the first of these "safety nets" at the expense of the second – applicants who request disclosure of evidence or access to evidence for testing are being (wrongly) informed that they must go through the CCRC.

Use of disclosed material by appellants

8.17 The use by defendants and their representatives of material disclosed is governed by sections 17 and 18 of the CPIA 1996. This limits the use and disclosure by the defendant of material disclosed to them. The defendant may use or disclose the object or information in connection with the proceedings for whose purposes they were given the object or allowed to inspect it; with a view to the taking of further criminal proceedings (for instance, by way of appeal) with regard to the matter giving rise to the previously mentioned proceedings; or in connection with those further proceedings. The defendant may also use or disclose the object to the extent that it has been displayed to the public in open court, or the information to the extent that it has been communicated to the public in open court. The defendant may also apply to

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646 Above, [25]. The court noted that, given the prosecution's statutory disclosure obligations during the criminal proceedings, such disclosure is only likely to arise in circumstances where material comes into the prosecution's possession after the trial or there has been a failure to disclose the material during the proceedings.

647 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225 at [35]. For example, if someone else has confessed in relation to the offence or evidence has been discovered which creates doubt regarding the original conviction. This duty is reaffirmed in para 140 of the Attorney General's Guidelines on Disclosure (May 2022) and in chapter two of the Crown Prosecution Service's Disclosure Manual (October 2021).

648 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225 at [42].

649 Above, [39].

650 Above, [41].

651 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225 at [41].

the court for an order granting permission to use or disclose the object or information for another purpose.

8.18 Disclosure can be dealt with as contempt of court, punishable by up to two years' imprisonment.

8.19 In pre-consultation discussions, some stakeholders argued that these provisions can prevent convicted persons and their legal representatives from disclosing to journalists material which might disclose a miscarriage of justice. They argued that disclosure to journalists can be an important way of securing an appeal, or obtaining the fresh evidence necessary for a successful appeal (see the discussion of the role played by the BBC's programme Rough Justice in obtaining the evidence that cleared Barri White and Keith Hyatt – and secured the conviction of Shahidul Ahmed – at page 70 above).

8.20 In *ex parte Simms*,[652] the House of Lords noted the important role that journalism had to play in revealing miscarriages of justice. That case concerned a Home Office policy requiring journalists to sign an undertaking before meeting with a serving prisoner agreeing that the journalist would not publish anything that passed between them during the visit. The House of Lords declared that the policy was an unlawful interference with the right to freedom of expression. While certain limitations on prisoners' freedom of expression were justified, Lord Steyn noted:

> there is at stake a fundamental or basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner.

8.21 Similar considerations arguably apply to the use of disclosed material for the purposes of exposing a miscarriage of justice.

Question 16.

8.22 Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory?

652 *R v Secretary of State for the Home Department ex parte Simms, R v Secretary of State for the Home Department ex parte O'Brien* [1999] UKHL 33, [2000] 2 AC 115 at 130.

Retention of evidence: the case of Sean Hodgson[653]

In December 1979, Theresa De Simone was murdered outside the pub in Southampton where she worked. There was evidence that she had been raped, including a semen sample.

Sean Hodgson was arrested in relation to an unrelated matter two days later. He had numerous previous arrests, including one for unlawful sexual intercourse, although none for "offences of violence". He was also a pathological liar. While in custody, he named another man as being responsible for Theresa's murder – that man could be quickly eliminated as his blood group did not match the blood type found in the semen sample.

In 1980 Hodgson was sentenced to three years' imprisonment for theft, admitting to a large number of minor offences: he could not have committed them all, some of which occurred while he was in custody.

In December 1980, Hodgson told a prison chaplain that he was having visions of a woman he had killed in Southampton a year earlier. The next day he gave an account of killing Theresa to a prison officer. Shortly afterwards he confessed to two other murders in London; police inquiries established that neither had happened.

Hodgson was charged with Theresa's murder. He pleaded not guilty. He did not give evidence, but made an unsworn statement explaining that he was unable to go into the witness box because "I am a pathological liar… every time I have been nicked by the police, which is on many occasions, I have made false confessions to crimes I have not committed".

He was found guilty and sentenced to life imprisonment with a minimum term of seventeen years. He applied for leave to appeal in 1983, but this was refused.

In 1989, enquiries were made of the Forensic Science Service, who said that none of the evidence had been retained. That was incorrect.

In 2008, with the assistance of Hampshire Police and the Director of Public Prosecutions, the evidence was located. DNA testing confirmed that the semen could not have come from Hodgson. Hodgson applied to the CCRC, and the Crown Prosecution Service informed the CCRC that if the case were referred to the Court of Appeal, it would not contest the appeal. The reference was made within weeks, and Hodgson's conviction was quashed two weeks later.

He had by this point served twenty-seven years in prison.

The semen was subsequently matched to a man called David Lace, who had committed suicide in 1988. Lace had confessed to Theresa's murder to police in 1983. The police had dismissed this as a false confession and did not inform Hodgson's legal team.

653 *R v Hodgson (Robert Graham)* [2009] EWCA Crim 320, [2009] 3 WLUK 472.

Retention of and access to records of proceedings

8.23 Records of court proceedings are governed by the Magistrates' Court and Crown Court Records Retention and Disposition Schedules issued by the Ministry of Justice.[654] The "case file" (case documents, evidence and data) for a trial on indictment is kept for seven years. Case files relating to appeals from magistrates' courts are kept for five years. Where the offence alleged is one of terrorism, homicide, sexual offences, or results in a life sentence or a sentence of longer than seven years, and cases which have been appealed to the Court of Appeal, the file should be kept for permanent preservation.

8.24 Criminal proceedings are recorded in the Crown Court. Retention of audio recordings is governed by the Crown Court Record and Disposition Schedule, under which analogue audio recordings of trials are routinely destroyed after five years, while digital recordings are kept for seven years.[655] An application can be made for a transcript of the proceedings; however, the provision of the transcript will be subject to a fee, which may vary depending on the length of the proceedings that require transcription, the timescale for completion of the transcript and the prices of the transcription company.

8.25 In the "Shrewsbury 24" case,[656] the Court of Appeal indicated that existing rules on retention and destruction of records of proceedings were no longer appropriate:

> This case provides the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal etc.), particularly if they resulted in a conviction. At the point when the record is extinguished by way of destruction of the paper file (as hitherto) or digital deletion (as now), there is no way of predicting whether something may later emerge that casts material doubt over the result of the case.
>
> Given most, if not all, of the materials in criminal cases are now presented in digital format, with the ability to store them in a compressed format, we suggest that there should be consideration as to whether the present regimen for retaining and deleting digital files is appropriate, given that the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether an historical conviction is safe.

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654 Ministry of Justice, Magistrates' Courts Records Retention and Disposition Schedule (July 2020) and The Crown Court Records Retention and Disposition Schedule (August 2020).

655 Ministry of Justice, The Crown Court Records Retention and Disposition Schedule (August 2020), p 5, row 13 of the table.

656 *R v Warren and others* [2021] EWCA Crim 413, [2021] 3 WLUK 373 at [101] and [102]. The CACD quashed the convictions of several pickets who had been convicted of public order offences in relation to a construction workers' strike in 1972. In the proceedings, handwritten witness statements had been replaced with substituted statements (and the originals destroyed). A note revealed that the substitute statements had been taken once the police were able to show press photographs to the witnesses and once officers responsible for taking the statements knew what prosecutors were seeking to prove. The defence were not alerted to this fact, and consequently were unable to challenge witnesses on any discrepancies between their initial account and that given at trial. There was also evidence that additional allegations had been added to witnesses' statements without their knowledge or permission.

Retention of evidence and court records: the case of Ahmed Mohammed[657]

In July and August 2001, six women were sexually assaulted in Tooting, London. The assaults had involved an assailant on a mountain bike; he was variously described as being in his early 20s, and "olive skinned", "Mediterranean", or "dark skinned or Arabic". At one of the assaults, a mobile phone was found nearby – it was fully charged and undamaged. Text on the phone was found to be in Turkish.

In early September 2001, Police arrested Ahmed Mohammed, a black Somali teenager who had arrived in the UK as a refugee a few weeks earlier. Police believed that he matched a description of the man involved in one of the assaults, although a later court judgment found he could not "reasonably be described as having either "dark olive skin" or a "Mediterranean appearance"". He did not have a mobile phone or a bike.

Despite this, at an identification parade, two of the victims identified Mohammed as their attacker, and he was prosecuted for their assaults. He was found unfit to plead, and a "findings of fact" hearing was held. The jury was not told that three victims of linked offences had failed to identify him – his solicitors not wanting the jury to know that he was suspected of other offences. The jury found that Ahmed had carried out the attacks and he received a hospital order. Leave to appeal on the basis that the case was not strong enough to go to the jury was refused.

In 2004, Mohammed's health had recovered, and he was ordered to stand trial. He was convicted, again sentenced to a hospital order, and required to comply with the notification requirements under the Sex Offenders Act 1997 indefinitely.

In 2017, Mohammed applied to the CCRC. No records of the 2004 trial remained. The Crown Prosecution Service no longer had any papers. The defence solicitors had gone out of business and their files had been destroyed. The Court of Appeal had to proceed on the basis that the trial would have been conducted along the lines of the earlier "findings of fact" proceedings.

Neither the police nor the Forensic Archive had retained any objects from the case, including the mobile phone. However, the Forensic Archive identified that swabs extracted from the phone had been retained. They submitted these to DNA testing which identified a male DNA profile.

When this profile was cross-referenced against the national DNA database, it returned a match. The man was Turkish, lived in Tooting, and a custody photograph confirmed that he was a better match for the physical description of the suspect than Mohammed. He had previously been arrested and cautioned for a sexual offence on Tooting Common, and while this was not a sexual assault, police records showed that at the time of the offence he was on a mountain bike.

The Court of Appeal found Mohammed's conviction unsafe, and ordered no retrial.

657 *R v Mohammed (Ahmed)* [2021] EWCA Crim 201, [2021] 2 WLUK 323.

8.26 While digitisation does make longer-term storage of court records more affordable (although it is not without cost), it should also be recognised that digitisation is not always an acceptable substitute for retention of physical items. For instance, a number of miscarriages of justice have been exposed because analysis of police notebooks using electrostatic detection apparatus ("ESDA" testing) revealed that police had amended or even fabricated statements. This was only possible because the actual notebooks had been retained; the analysis would not be possible with digital records.

Question 17.

8.27 Is the law governing retention of, and access to, records of proceedings following a trial satisfactory?

Chapter 9: Further matters

9.1 We are conscious that this issues paper has been structured in a way which reflects the existing processes and institutions for dealing with criminal appeals in England and Wales. However, we do not want this to restrict consideration of possible reform options. We would welcome representations on any aspects of the law relating to criminal appeals which respondents think ought to be reviewed.

9.2 We are also conscious that although this project is concerned with criminal appeals, and with the appeals process as a mechanism for *correcting* miscarriages of justice, from a wider perspective, it might be considered at least as important to *prevent* miscarriages of justice.

9.3 Indeed, in chapter 4, we discussed the relationship between the test for putting a case to a jury, and the safety test – noting that prior to *Galbraith*, the test for allowing a case to proceed to be considered by a jury had become aligned with the "unsafe" limb of the test applied in the Court of Appeal Criminal Division ("CACD") – and suggested that reform to the *Galbraith* test might be preferable to relying on the possibility of the CACD quashing an unsafe conviction arrived at by a properly directed jury.

9.4 We also noted previous recommendations that juries should provide "reasoned verdicts" – or at least should answer the questions underpinning their route to verdict – could assist consideration of appeals. Arguably, by ensuring that juries have at least followed an acceptable route to verdict, they may also prevent miscarriages of justice.

9.5 It is recognised that many potential reforms to prevent miscarriages of justice would not be within the terms of reference of this project. For instance, while reform of the law governing disclosure of jury deliberations insofar as it relates to disclosure for the purposes of an appeal would be in scope, the general prohibition on disclosure of jury deliberations would not.

9.6 Similar considerations apply to the law of criminal evidence. The law of criminal evidence recognises certain types of evidence as potentially suspect, where special caution is required. For instance, special directions are required in the cases of eyewitness identification evidence[658] and may be required in respect of purported confessions to a fellow prisoner;[659] if the jury is not properly directed, this may be enough to render a conviction unsafe. How particular forms of evidence should be treated at trial (and whether they should be admissible at all) is not within the scope of this review. How the appeals system deals with the challenges that these forms of evidence can pose when the safety of a conviction is challenged, however, could be within its scope.

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658 *R v Turnbull* [1977] QB 224.

659 *R v Pringle* [2003] UKPC 9, [2003] 3 LRC 658; *R v Stone* [2005] EWCA Crim 105, [2005] Crim LR 569. *Roberts and Zuckerman's Criminal Evidence* (3rd ed 2022) p 2, notes that "'gaol cell confessions' to fellow inmates … are notoriously suspect".

9.7 We would welcome suggestions from respondents as to other issues which should be considered in our consultation paper. We would be grateful for a summary of the problem, and suggestions as to what could be done to address the issue.

Question 18.

9.8 Do consultees have any further comments or proposals for reform not dealt with in answers to previous questions?

Chapter 10: Questions

Question 1.

10.1 What principles should govern the system for appealing decisions, convictions and sentences in criminal proceedings?

Paragraph 2.65

Question 2.

10.2 Is there a need to reform the processes by which decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed?

10.3 In particular:

(1) Should the ability to challenge decisions of a magistrates' court through appeal by way of case stated or judicial review, be retained, abolished or reformed (and if reformed, how)?

(2) Should a leave requirement be introduced in respect of appeals from the magistrates' court to the Crown Court? If so, should the grant of leave to appeal be followed by a rehearing or a review of the magistrates' court's decision by the Crown Court?

Paragraphs 3.59 and 3.60

Question 3.

10.4 Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction?

10.5 In particular, under what circumstances, if any, should a conviction be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant?

Paragraphs 4.92 and 4.93

Question 4.

10.6 Is there evidence that the Court of Appeal's approach to the admission of fresh evidence hinders the correction of miscarriages of justice?

Paragraph 4.111

Question 5.

10.7 Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice?

Paragraph 4.126

Question 6.

10.8 Is there evidence that the Court of Appeal's approach to "lurking doubt" cases (not attributable to fresh evidence or material irregularity at trial) hinders the correction of miscarriages of justice?

Paragraph 4.145

Question 7.

10.9 Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and appropriate?

Paragraph 4.168

Question 8.

10.10 Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate?

Paragraph 4.181

Question 9.

10.11 Does the law satisfactorily enable appropriate criminal cases to be considered by the Supreme Court?

Paragraph 4.192

Question 10.

10.12 Is there evidence that the referral test (a "real possibility" that the conviction, verdict, finding or sentence would not be upheld) used by the Criminal Cases Review Commission when considering whether to refer an appeal hinders the correction of miscarriages of justice?

10.13 If so, are there any alternative tests that would better enable the correction of miscarriages of justice?

Paragraphs 5.70 and 5.71

Question 11.

10.14 Is there evidence that the application of the "substantial injustice" test to appeals brought out of time on the basis of a change in the law is hindering the correction of miscarriages of justice?

Paragraph 6.83

Question 12.

10.15 Are the powers available to prosecutors to appeal decisions made during criminal proceedings adequate and appropriate?

Paragraph 7.37

Question 13.

10.16 Are the powers of the Attorney General to refer a matter to the Court of Appeal adequate and appropriate?

Paragraph 7.53

Question 14.

10.17 Do you have any views on the circumstances in which an acquittal might be quashed, including the law relating to acquittals tainted by interference with the course of justice?

Paragraph 7.60

Question 15.

10.18 Do you have any views on the circumstances in which a third party might appeal a decision made in criminal proceedings?

Paragraph 7.68

Question 16.

10.19 Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory?

Paragraph 8.22

Question 17.

10.20 Is the law governing retention of, and access to, records of proceedings following a trial satisfactory?

Paragraph 8.27

Question 18.

10.21 Do consultees have any further comments or proposals for reform not dealt with in answers to previous questions?

Paragraph 9.8

Appendix 1: Terms of reference

1.1 The Law Commission will conduct a review of the law governing appeals in criminal cases and consider the need for reform with a view to ensuring that the courts have powers that enable the effective, efficient and appropriate resolution of appeals. The review will be particularly concerned with inconsistencies, uncertainties and gaps in the law. It will consider, but is not limited to, the following:

Appeals against conviction and sentence in the Court of Appeal (Criminal Division) ('CACD')

(1) Whether the CACD has adequate and appropriate powers to:

(a) order a re-trial, substitute a conviction, or substitute a sentence; and

(b) make directions regarding time spent in custody pending appeal.

(2) Whether there is evidence which suggests that the test for allowing an appeal on the grounds that a conviction is unsafe may hinder the correction of miscarriages of justice, including with regard to:

(a) the approach to fresh evidence;

(b) the approach to "lurking doubt" or grounds not attributable to fresh evidence or a material irregularity; and

(c) the test of "substantial injustice", which applies in cases where there is an appeal on the basis of a subsequent change in the common law.

(3) Whether the law in relation to grounds of appeal provides sufficient certainty to allow a convicted person to receive clear advice about the prospects of an appeal.

(4) Whether the Attorney-General's powers to refer a matter to the CACD are adequate and appropriate.

(5) Whether codification of common law tests in relation to grounds for appeal against conviction and sentence may be warranted.

(6) Whether the composition of judicial panels in the CACD is an efficient and effective use of court resources and judicial time, while serving the interests of justice.

Appeals against matters other than conviction and sentence in the CACD

(7) Whether the CACD has adequate and appropriate powers to deal with appeals relating to findings on fitness to plead.

Appeals against conviction and sentence in the Magistrates' Court and Crown Court

(8) Whether the rights to appeal and processes for appeals in summary matters are an efficient and effective use of court resources and judicial time, while serving the interests of justice.

(9) Whether the Crown Court has adequate and appropriate sentencing powers in a new trial that is a result of an appeal.

Referral of matters from the Criminal Cases Review Commission

(10) Whether the conditions for referring cases to the CACD under the Criminal Appeal Act 1995 allow the CCRC to fulfil its functions.

Evidence and records of proceedings

(11) Whether appeals (both from CCRC referrals and generally) are hampered by inadequate laws governing the retention and disclosure of evidence, including post-conviction, and retention and access to records of proceedings.

Consolidation of statutory provisions

(12) Whether consolidation of rights to appeal, which are currently spread across a number of statutes, may make the law clearer and more consistent.