COURT OF APPEAL
CRIMINAL DIVISION

In the Court of Appeal (Criminal Division)

2019 – 2020

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Introduction – The Vice President of the Court of Appeal (Criminal Division)

Borrowing from A Tale of Two Cities, the last year surely fits the immortal opening description, "It was the best of times, it was the worst of times". The worst of times as we watched a pandemic threaten the delivery of justice in every court, at every level (along with so much else); the best of times as everyone working in or with the Court of Appeal, Criminal Division (CACD) responded with enthusiasm, imagination, a cooperative spirit and a clear commitment to keep the court functioning at a highly effective level. It is true to report that the court barely missed a heartbeat when the first lockdown was announced 12 months ago, and within 24 hours we were sitting the first virtual courtrooms, keeping cases in the lists and dealing with appeals and applications in a fair and wholly appropriate way. The technology has had its good and bad days. CVP (the Cloud Video Platform), for much of the time, has enabled us to sit up to five constitutions a day, albeit the link occasionally fails and in recent weeks the volume can be inexplicably and unalterably loud. But it is critical that we do not lose sight of what has been achieved. We were fortunate that, starting in October 2019 when I took over as Vice President, we were able to move rapidly to furnishing the judges and the parties with digital files by building on the DCS system provided by Caselines in the Crown Court. This has proved to be highly successful, and although as individuals we have moved at different speeds in the bid to gain confidence at navigating our way around the system, it is intuitive and – dare I say – easy to operate. I have been heartened by the absence of any complaints as to the effectiveness of this changed method of working and by the frequent expressions of appreciation for all the benefits that well-ordered digital files bring. Many of us print out some documents, but I suspect the number of paper bundles in court decreases every week. Every judge now has the opportunity of working from two screens on the bench.

Whilst gently encouraging all those willing and able to come to the Royal Courts of Justice (RCJ) for conventional hearings in the CACD, we have had courts composed of every possible mix of judges and other participants either being in court or "beaming in" via CVP. The unvarying principle has been that no one is under any compulsion to attend court in person, and we have therefore provided remote access whenever this has been requested. I have been heartened by the number of advocates and others who have come to court. The courtrooms are large and lend themselves readily to "social distancing", and they are regularly and thoroughly cleaned.

Inevitably, with fewer cases being heard in the Crown Court, the receipts in the CACD have reduced over the last 12 months, and this has enabled us to clear some of the older cases and to prepare the court for the (hopefully) approaching moment when volumes will return to normal. I anticipate that the work of the court will revert very much to how it was before March 2020, but we will reflect carefully on any lessons that will help inform the ways in which we should operate in the future. For instance, it is not always easy for those participating or interested in our hearings to travel to the RCJ, and we will consider whether it is possible to give greater opportunities for remote attendance.

I want to pay particular tribute to the Registrar of Criminal Appeals, Alix Beldam, and all the staff and the lawyers within the CACD for the way in which they have so successfully kept the court operating in these difficult times. The cooperative spirit and the desire to find answers to seemingly intractable problems has been dauntingly impressive. Additionally, I want to express my thanks to my predecessor, Baroness Hallett, who guided the CACD with such a sure hand, leaving a truly worthy legacy. I inherited a very effective Division, and I owe Heather a considerable debt of gratitude.

I hope that the introduction to the next report will be far more conventional in content, and that Coronavirus will have become something of a distant memory.

Lord Justice Fulford
Vice-President of the Court of Appeal (Criminal Division)

Overview of the Year – Master Beldam, Registrar of Criminal Appeals

Last year I wrote about the need for processes to adapt to meet modern requirements and anticipated the introduction of working with digital bundles in the near future. Little did I know how soon digital working would become the norm for us all not only in terms of working with digital bundles, but also in terms of conducting remote hearings. At the start of this judicial year in October 2019 nobody could have foreseen the challenges that we have all had to face due to the Covid-19 pandemic. If ever there was a baptism of fire for a new Vice President of CACD, this has been it for Lord Justice Fulford, but I can think of no one better equipped to lead CACD through this crisis. Without his enthusiasm and support for all things IT related, combined with his positive outlook and good-humour, I have no doubt that we would not have made the progress we did as quickly as we did.

Contingency planning for CACD started in earnest in the second week of March: the effect of anticipated changes in legislation and the Criminal Procedure Rules were analysed, data was collected from CAO staff as to their personal circumstances, critical business functions were identified and plans made for these to be covered by a skeleton staff while reviewing gaps in IT capabilities and making plans to fill them. A snapshot of all listed cases was prepared with the Listing Officer, Lucy Underhill, and together we reviewed every case for urgency, security requirements and other relevant factors to enable us to prioritise them accordingly.

As the pandemic quickly developed, the information and guidance from the Government changed day by day, but it was clear that minimising contact between people was essential. We investigated ways to make use of video and telephone links to assist advocates attend CACD hearings remotely and made arrangements for critical functions to be maintained by staff working remotely where possible. Although there was little time to prepare for a full national lockdown, the CACD continued to sit and we ran our first test of a remote Cloud Video Platform (CVP) hearing just four days after lockdown was announced. At the same time, and crucial to the success of judges working remotely, the work on digital bundles gathered pace. The first digital s.31 bundle was sent to a single Judge a mere 7 days after lockdown was imposed. Just two weeks after lockdown, we had successfully run five lists using the new CVP technology and with digital bundles where possible.

It was impressive how quickly people adapted to new ways of working and within a matter of weeks CACD was leading the way with digital bundles and virtual courts. Inevitably problems arose but were solved with the customary innovation, resilience and hard work of CAO staff and the judiciary. During Trinity Term, work was undertaken to make the CACD courts and the CAO offices Covid-secure and the Court continued to sit with a mixture of in-person, remote or hybrid hearings. This meant that, notwithstanding the challenges, the Court has managed to sit throughout this crisis and deal with cases as efficiently as possible.

At the end of this extraordinary year, I would like to acknowledge the remarkable steps taken by HMCTS staff and the judiciary to meet our collective responsibility and ensure the continued operation of the CACD in the exceptional circumstances presented by the pandemic. Everyone played their part but particular mention should be made of those responsible for implementing the new technology and providing training and guidance for HMCTS staff and the judiciary as well as users such as advocates, victims and members of the public. Without their expertise, dedication and commitment our achievements would not have been possible. The operation of our courts also relies on those members of staff, particularly the Court Clerks, and the judiciary who have continued to attend the RCJ in person notwithstanding concerns about risks to their own health and that of their families: a special mention is also due to them.

This year in particular, I am personally very grateful for the unfailing support of the Judges who sit in CACD and the staff of the CAO, particularly the IT team and the List Office. We have not been left unscathed by the pandemic, which will be with us for some time, and we have some recovery still to do. Nevertheless, I am confident that I can rely as always on the hard work and dedication of the CAO staff and the judiciary so that the CACD is in a strong position to be able to deal with its workload when some sort of normal life returns.

Alix Beldam
Registrar of Criminal Appeals

Cases of Note

Following guidance from the senior judiciary, the Registrar and her staff look out for cases raising novel or important points of law or procedure for inclusion in special or guidance courts. Such cases may be listed individually or conjoined; where appropriate before a constitution of five judges. It is not possible to report here on every case heard, but the following are a selection of cases of note.

Criminal Law

When expert or opinion evidence from a counsellor is relevant or admissible.

R v. Jones and Miszczak [2019] EWCA Crim 1570

The appellants were convicted of a number of offences of cruelty, assault and rape of a child under 13. The victims were ST and CT. At trial there was agreed evidence from a counsellor, RP, who dealt with CT and who had been (wrongly) treated as an expert witness.

The Court (Coulson LJ. Cheema-Grubb J. and HHJ Chambers), whilst recognising that mistakes had been made in relation to RP's evidence, dismissed the appeal saying that when considered in the context of the evidence as a whole, and the judge's clear directions to the jury, the mistakes did not undermine the safety of the convictions.

The Court concluded:

> "Given that evidence from counsellors is not uncommon in criminal cases, three points of potentially wider application arise from our judgment. First, it will only be in the rarest cases that expert or opinion evidence from a counsellor will be relevant or admissible. The starting point must always be that a counsellor's evidence goes only to fact. Secondly, that factual evidence will be of limited compass, restricted to the timing and nature of any complaints made during the counselling sessions. Finally, when giving that evidence, a counsellor must take great care to use objective language, and to avoid saying anything which could be construed as subjective comment or statements of personal opinion".

Court Martial

Gunn v. Service Prosecuting Authority [2019] EWCA Crim 1470

The issue in this matter was: "Is a Court Martial trying a member of the Royal Air Force ("RAF") properly constituted if the Board of lay members comprises only Army personnel and no RAF personnel?

The Court (Gross LJ. McGowan and Butcher JJ.) held:

> "The primary legislation, contained in the Armed Forces Act 2006 ("AFA 2006"), is permissive and does not prohibit Court Martial boards being comprised of suitably qualified officers and warrant officers drawn from any Service. This is in keeping with the tri-service philosophy of the AFA 2006 (even if the word "jointery" is perhaps unfortunate) and the legislation which preceded it, notably the 1964 Defence Act. That approach carries with it inherent flexibility, which would be constrained by a same, single, Service requirement.
>
> That said, the usual practice, embodied in sentence [1] of para. (4) of the Queen's Regulations ("QR") is that a defendant will be tried by lay members of his own Service. That this should ordinarily be the mode of trial is eminently sensible; ordinarily, why should it be anything else? However, sentence [1] does not contain an invariable or mandatory rule, still less a rule with jurisdictional implications for the Court Martial, if breached.
>
> On this footing, ss.154-157 of the AFA 2006 and sentence [1] of para. (4) of the QR are not incompatible. The usual practice, set out in sentence [1] is comfortably accommodated within the broader ambit of the AFA 2006".

Disclosure of complainant's mobile phone

R v. McPartland and Grant [2019] EWCA Crim 1782

The appellants were convicted of rape. At trial the judge refused to adjourn to allow the complainant's mobile phone to be examined. Defence counsel argued that the judge should have adjourned the trial to allow analysis of the complainant's mobile phone to see whether and when she deleted messages about the events in question.

The Court (Thirlwall LJ. Fraser J. and Sir David Foskett) dismissing the appeal, said inter

alia:

> "It was suggested on behalf of the defence in the course of argument that it is now entirely usual practice in cases involving allegations of sexual assault, that the mobile phone of a complainant should be examined. This is not and should not be thought to be correct. What is a reasonable line of enquiry depends on the facts of each case".

Diminished responsibility

R v. Foy [2020] EWCA Crim 270

On the evening of 11 August 2017, the appellant fatally stabbed a man unknown to him. At the time he was experiencing a psychotic episode. On his own admission, he had been voluntarily ingesting huge quantities of alcohol and cocaine in the period before the killing. The sole defence advanced at trial to the charge of murder was lack of the necessary intent to kill or to cause really serious injury.

The appeal was founded solely on fresh evidence. That evidence - primarily in the form of expert psychiatric evidence - was to the effect that a defence of diminished responsibility was available. A defence of diminished responsibility had in fact been carefully considered in this case before the trial. But it had not been pursued at trial: because the report of the expert psychiatrist instructed on behalf of the appellant was adverse to such a defence.

The Court (Davis LJ. Spencer and Griffiths JJ.), in refusing the application, stated inter alia:

> "Where the killing occurs when the defendant is in a state of acute voluntary intoxication, even if that voluntary intoxication results in a psychotic episode, then there is no recognised medical condition available to found a defence of diminished responsibility: *see Dowds* [2012] EWCA Crim 281 [2012] 1 Cr. App. R 34; *Lindo* [2016] EWCA Crim 1940. This is so whether the intoxicant is alcohol or drugs or a combination of each.
>
> Where, however, the consumption of the intoxicant is as a result of an addiction such as alcohol dependency syndrome, then, depending on the circumstances, there may be a recognised medical condition giving rise to an abnormality of mental functioning which can found the defence of diminished responsibility: *Dowds* (cited above); *Stewart* [2009] EWCA Crim 593, [2009] 2 Cr. App. R 30.
>
> What is the position, however, where there is an abnormality of mental functioning arising from a combination of voluntary intoxication and of the existence of a recognised medical condition? What is the position, where the voluntary intoxication and the concurrent recognised medical condition are both substantially and causally operative in impairing the defendant's ability and explaining the defendant's act?
>
> One principled approach might have been to say that the defence is not then available. That, however, is not the course which the law has taken in cases of diminished responsibility. In *Dietschmann* [2003] UKHL 10, [2003] 2 Cr. App. R 4, the House of Lords considered this very issue, in the context of the defence being raised under the provisions of the Homicide Act 1957 in its original form. It was decided that, for the defence to be available, the abnormality of mind did not need to be the sole cause of the defendant's acts in doing the killing: even if the defendant, in that case, would not have killed had he not taken alcohol, the causative effect of the drink did not necessarily prevent an abnormality of mind from substantially impairing the mental responsibility for the fatal acts. A corresponding approach was subsequently taken by the Court of Appeal in cases such as *Stewart* (cited above).

Those were cases under the former legislation. But it has been decided that a corresponding approach is also to be taken under the current legislation. The relevant authority is that of a constitution of this court in *Kay and Joyce* [2017] EWCA Crim 647, [2017] 2 Cr. App. R 16.

Finally, for present purposes, we refer to the case of *Golds* [2016] UKSC 61, [2017] 1 Cr. App. R 18, albeit that was not a case involving intoxication. In that case it was confirmed that, notwithstanding the essentially psychiatric aspects of all elements of the defence, whether the impairment was sufficiently substantial remained a matter of fact and degree for the jury. The Supreme Court rejected the notion that any impairment beyond the trivial would suffice. Aside from that, it was to be left to the jury to decide whether in any given case the impairment was of sufficient substance or importance to meet the statutory test. Although this approach has been the subject of academic criticism to the effect that it leaves so important an issue as in effect undefined for the jury, and with consequential room for the approach to be adopted to vary from case to case, it is to be presumed that such an approach is based on pragmatic considerations in the context of jury trials.

Gross negligence manslaughter

R v Broughton [2020] EWCA Crim 1093

The appeal concerned causation in gross negligence manslaughter. At trial the prosecution's case was that the appellant supplied his girlfriend with drugs and, having done so and remained with her, owed her a duty of care to secure medical assistance as her condition deteriorated to the point where her life was obviously in danger. He failed to do so and as a result was grossly negligent in failing to obtain timely medical assistance, which failure was a substantial cause of her death.

The Court (LCJ. Sweeney and Murray JJ.), in allowing the appeal, said:

> "The ingredients of the offence were set out in *R v. Adomako* [1995] 1 AC 17. Gross negligence manslaughter had since been considered in this court on many occasions, particularly within the last four years. The context has frequently been the alleged gross negligence of medical professionals. The appeals include *R v. Rudling* [2016] EWCA Crim 741, *R v. Sellu* [2016] EWCA Crim 1716, [2017] 4 WLR 64, *R v. Bawa-Garba* [2016] EWCA Crim 1841, *R v. Rose* [2017] EWCA Crim 1168, [2018] QB 328, *R v. Zaman* [2017] EWCA Crim 1783, *R v. Winterton* [2018] EWCA Crim 2435, *R v. Pearson*
>
> [2019] EWCA Crim 455, *R v. Kuddus* [2019] EWCA Crim 837 and *R v. Broadhurst* [2019] EWCA Crim 2026. The result of this consideration is that six elements have been identified that the prosecution must prove before a defendant can be convicted of gross negligence manslaughter:
>
> i. The defendant owed an existing duty of care to the victim.
>
> ii. The defendant negligently breached that duty of care.
>
> iii. At the time of the breach there was a serious and obvious risk of death. Serious,

in this context, qualifies the nature of the risk of death as something much more than minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation.

iv. It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.

v. The breach of the duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim.

vi. In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

The elements found in (iii) and (iv) will not need separate consideration or articulation in many cases.

The formulation of a "serious and obvious risk of death" can be found in the judgment of this court in *R v. Gurphal Singh* 1999 Crim LR 582 approving the direction of the trial judge. It has been affirmed on many occasions (e.g. in *Rudling* at paragraph 18; *Rose* at paragraph 77(2)). In *R v. Evans* [2009] 1 WLR at paragraph 31, Lord Judge CJ used the term "life threatening" in this context but it does not suggest a different test. In *R v. Misra* [2004] EWCA Crim 2375 (a medical case) Judge LJ (as he then was) had considered the nature of the risk needed to engage the duty and, in particular, whether the risk should be of death rather than serious injury. At paragraphs 49 to 52 he cited the test in *Gurpal Singh*, the practice of the Director of Public Prosecutions to apply that test and the concurring views of the editor of Blackstone's Criminal Practice, all without adverse comment, before concluding that the risk must be to life.

Causation

…..

The test for causation in homicide cases has long been that it is sufficient for the prosecution to prove that the act (or omission) of the accused was a significant contributory cause of death, rather than the sole or principal cause of death. That reflects the obvious reality that there can be concurrent causes of death. In most cases the issue will not arise. Most homicides resulting from an assault provide no difficulty because the injury is the undoubted cause of death. That will be true also in gross negligence manslaughter cases where the deceased suffers a traumatic death. Nonetheless, even in cases of assault causing injury there may be examples of concurrent causes of death. They include an assault which provokes a fatal heart attack or an assault from which the victim dies in circumstances where medical treatment should have saved him but did not because it was negligently administered.

In cases of gross negligence manslaughter which arise in the context of medical treatment there will frequently be an underlying condition which causes death. The issue will be whether the breach of duty was also a substantial cause of the death. The same will apply when the allegation at the heart of the prosecution of manslaughter is that the health professional failed to provide treatment that should have been provided or a person who owed the deceased a duty of care failed to secure medical treatment.

The approach to causation in such cases was settled by Lord Coleridge CJ in *R v Morby* (1882) 8 QBD 571. The prosecution concerned a father who, in conformity with his religious views, did not employ a doctor to treat his son. The boy later died of smallpox. The medical evidence at trial had been that proper medical attention might have saved or prolonged the child's life, and would have increased his chance of recovery, but might have been of no avail.

Quashing the conviction Lord Coleridge explained in his two-paragraph judgment:

> "It is not enough to show neglect of reasonable means for preserving or prolonging the child's life, but to convict of manslaughter it must be shown that the neglect had the effect of shortening life. The medical witness called for the prosecution gave his evidence clearly and well, and under a high sense of his duty and responsibility, and what he stated was, that in his opinion the chances of life would have been increased by having medical advice, that life might possibly have been prolonged thereby, or, indeed, might probably have been, but that he could not say that it would, or indeed that it would probably, have been prolonged thereby. In order to sustain the conviction affirmative proof is required.
>
> This the skilled witness called, and upon whose evidence the matter rests, cannot, from the nature of the case, give and, indeed, properly declines to give. The direction of the learned judge, though right in point of law, is not applicable to the facts proved. The conviction cannot be sustained."

…

Sellu [2016] EWCA Crim 1716, [2017] 4 WLR 64 is not authority for the proposition advanced by the Crown that in cases of gross negligence manslaughter the limit of the obligation on the prosecution is to prove that the failing in question deprived the victim of a significant or substantial chance of survival that was otherwise available at the time of the defendant's negligence. The prosecution must prove to the criminal standard that the gross negligence was at least a substantial contributory cause of death. That means that the prosecution must prove that the deceased would have lived in the sense that life would have been significantly prolonged. It is well established that being "sure" is not the same as scientific certainty. See, for example, the discussion in *R v. Gian, Mohd-Yusoff* [2009] EWCA Crim 2553 at paragraphs 22 to 24. That case concerned a suggestion that there were theoretical or hypothetical possible causes of death which could not be excluded as a matter of theory but were entirely unrealistic. The jury must make judgements on "realistic not fanciful possibilities". To be sure that the gross negligence caused the death the prosecution must exclude realistic or plausible possibilities that the deceased would anyway have died".

Modern Slavery Act 2015: Abuse of process: Victim of trafficking

R v. DS [2020] EWCA Crim 285

This was an appeal by the prosecution under section 58 of the Criminal Justice Act 2003, the proceedings having been stayed as an abuse of the process of the court. The case concerned a victim of trafficking.

In allowing the appeal the Court (LCJ. Edis and Johnson JJ.) stated:

> "In our judgment, the result of the enactment of the 2015 Act and the section 45 statutory defence is that the responsibility for deciding the facts relevant to the status of DS as a Victim of Trafficking is unquestionably that of the jury. Formerly, there was a lacuna in that regard, which the courts sought to fill by expanding somewhat the notion of abuse of process, which required the Judge to make relevant decisions of fact. That is no longer necessary, and cases to which the 2015 Act applies should proceed on the basis that they will be stayed if, but only if, an abuse of process as conventionally defined is found. By way of summary only, this involves two categories of abuse, as is well known. The first is that a fair trial is not possible and the second is that it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution. Neither of these species of abuse affected this case, and it should not therefore have been stayed.

Section 74 Sexual Offences Act 2003: Sexual consent

R v. Lawrance [2020] EWCA Crim 971

The appeal raised a question about the meaning of consent for the purposes of section 74 of the Sexual Offences Act 2003, namely can a lie about fertility negate ostensible consent? The prosecution alleged that the appellant falsely represented to the complainant that he had had a vasectomy. On that basis she agreed to unprotected sexual intercourse when otherwise she would have insisted on his wearing a condom. The appellant was convicted of two counts of rape on that basis.

The Court (LCJ. Cutts and Tipples JJ.) in allowing the appeal stated:

> "The law concerning the impact of deception on the issue of consent to sexual intercourse was recently reviewed by the Divisional Court in *R (Monica) v. DPP [2019] QB 1019; [2018] EWHC 3508 (Admin)*. The facts were that a woman who was an environmental activist had an intimate relationship with a man she thought agreed with her ideological beliefs, but he was in fact an undercover police officer who had infiltrated her group. The claim was a challenge to the decision of the Director of Public Prosecutions not to prosecute the officer for a series of offences, including rape. Her case was that consent was obtained on the basis of deceit and that she would not have consented to an intimate relationship had she known what he was. The DPP's decision was upheld.
>
> The court (Lord Burnett CJ and Jay J) traced the evolution of the law of deception as it affects consent and noted that Section 76(2) of the 2003 Act put on a statutory

footing the two well-established common law bases upon which deceit or fraud will vitiate consent, but Parliament did not take the opportunity to go further. The facts of the instant appeal do not fall within either of the categories identified in section 76(2).

Returning to the facts of this case, the jury concluded that the complainant relied on the appellant's deception regarding a vasectomy and that she would not have consented to unprotected sexual intercourse had she thought him to be fertile. However, the "but for" test is insufficient of itself to vitiate consent. There may be many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse. *Monica* was an example, but they can be multiplied: lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth are such examples.

The question is whether a lie as to fertility is so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that it is capable of negating consent. Is it closely connected to the performance of the sexual act? In our opinion, a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender.

The complainant agreed to sexual intercourse with the appellant without imposing any physical restrictions. She agreed both to penetration of her vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it. We should add that the question of consent could not be affected by whether pregnancy followed or not; and neither could it be affected by the gender of the person who was guilty of deceit. On the prosecution case, a woman who lied about her fertility in circumstances where the man would not otherwise have consented to sexual intercourse would be in the same position, albeit guilty of a different sexual offence.

In terms of section 74 of the 2003 Act, the complainant was not deprived by the appellant's lie of the freedom to choose whether to have the sexual intercourse which occurred.

…..

In our view, in any event, it makes no difference to the issue of consent whether, as in this case, there was an express deception or a failure to disclose. The issue is whether the appellant's lie was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it. For the reasons we have given, in our view in the present case it was not".

Procedure and Evidence

Restraint Order

R v. S [2019] EWCA Crim 1728

In May 2016 West Yorkshire Police commenced an investigation into suspected offences of money laundering. One of those under suspicion and subject to the investigation was the respondent, S. In August 2018 the Crown Court made an all assets Restraint Order against S and certain companies and other persons connected with him. In July 2019 the Order was discharged pursuant to s.42(7) of the Proceeds of Crime Act 2002 ("2002 Act"), on the basis that proceedings for the alleged offence had not been started within a reasonable time. The Crown Prosecution Service appealed pursuant to s.43(2) of the 2002 Act.

The Court (Davis LJ. Edis and Andrew Baker JJ.) (17.10.19), allowing the appeal, said:

> "What, then, is the required approach to the evaluation of whether or not proceedings have been started within a reasonable time?
>
> In our judgment, the words of the sub-section are to be taken as they are found. They are not to be glossed. Nor is it helpful (indeed it is likely to be unhelpful) to seek to invoke allegedly comparable phrases in other statutes.
>
> At all events, no requirement of exceptionality, in our judgment, is to be written into s.42(7). The words are to be read as they stand. No doubt a court will think long and hard before it discharges a Restraint Order: just as it should think long and hard before it makes one in the first place.
>
> …..
>
> As to the required approach in assessing reasonableness, we consider that useful general assistance is afforded by some of the observations of Lord Bingham in the Privy Council case of *Dyer v Watson* [2002] UKPC 1, [2004] 1 AC 379. Overall, therefore, s.42(7) is to be read without any gloss. It is then for the court to decide, having regard to all the circumstances of the particular case, whether or not the proceedings have been started within a reasonable time.
>
> Just what those circumstances are, and the weight to be ascribed to them, will necessarily vary from case to case. It is not possible to identify by way of exhaustive list just what the relevant circumstances will be in every case. But in the ordinary way, we suggest, the following, in no particular order, at least will usually be likely to be relevant (there may of course, we stress, be others in any given case) where s.42(7) is under consideration:
>
> vii. The length of time that has elapsed since the Restraint Order was made;
>
> viii. The reasons and explanations advanced for such lapse of time;
>
> ix. The length (and depth) of the investigation before the Restraint Order was made;

x. The nature and extent of the Restraint Order made;

xi. The nature and complexity of the investigation and of the potential proceedings;

xii. The degree of assistance or of obstruction to the investigation.

It is the obligation of the judge to evaluate all the relevant circumstances of the particular case in reaching his or her judgment as to whether or not proceedings have been started within a reasonable time. If they are adjudged not to have been started within a reasonable time then the Restraint Order must be discharged; and accordingly the consequences flowing from such discharge are then irrelevant".

"Notification" *ex parte* of otherwise non-disclosable sensitive information to prevent the inadvertent mismanagement of the trial: *CPS Disclosure Manual*.

R v. Ali [2019] EWCA Crim 1527

The applicant was convicted of possession of an explosive substance with intent and one count of preparation for terrorist acts.

At trial the prosecution twice saw the judge on an ex parte basis. Neither of these hearings was concerned with Public Interest Immunity ("PII") matters. Their purpose instead concerned "notification" ex parte of otherwise non-disclosable sensitive information to prevent the inadvertent mismanagement of the trial. The basis upon which the prosecution relied for holding these ex parte hearings was the CPS Disclosure Manual.

On appeal the applicant argued that there was no proper basis in law for the prosecution seeing the judge ex parte for case management purposes outside a PII application; the CPS Manual did not make good the absence of any proper legal basis; accordingly, the ex parte hearings amounted to a material irregularity and the applicant's convictions were unsafe.

The Court (Gross LJ. McGowan and Butcher JJ.), in dismissing the appeal, said:

> "The centrality of public, open, justice to the common law requires no emphasis. It forms the starting point of this discussion and informs it throughout. A corollary is that a defendant in criminal proceedings is and must be entitled to be present and participate fully in his trial.
>
> A clear statement of the principle of public open justice is to be found in Attorney-*General v Leveller Magazine* [1979] AC 440, a decision of the highest authority, which also made it plain that exceptions were jealously guarded.
>
> …..
>
> It is, however, also clear from *Leveller* that as the purpose of the general rule is to serve the ends of justice, it may, exceptionally, be necessary to depart from it, where

the application of the general rule would otherwise frustrate or render impracticable the administration of justice. The basis of the departure from the general rule, statutory exceptions apart, is the Court's inherent power to control the conduct of proceedings before it.

…..

The problem to which notification hearings seek to provide an answer is necessarily rare. It concerns material which does not meet the disclosure test (undermining the prosecution case or assisting that of the defendant) - but is nonetheless of a public interest sensitivity so as to preclude disclosure by way of a pragmatic relaxation of the CPIA test. Crucially, if the Judge is not kept informed, there is a risk that the material in question will inadvertently impact on the fair management of the trial and thus run counter to the ends of justice.

Pulling the threads together, we are persuaded that *ex parte* notification hearings may be justified, where the following conditions are met:

- The need must be exceptional; such a hearing can never be routine or simply held by way of a course of least resistance.
- There must be no practicable *inter partes* alternative, so that even an in camera hearing cannot practicably be held.
- The *ex parte* notification hearing must be *necessary* in the interests of justice to avoid the risk of inadvertent mismanagement of the trial occasioning unfairness to the defendant.
- The material shown to the Judge and the discussion at the notification hearing must be kept to a minimum and confined to what is *necessary* to achieve the purpose of the notification hearing. It is only by such restraint on the part of counsel, subject to tight case management by the Judge, that the acute dangers inherent in any private exchange of material between prosecutor and Judge can be avoided or minimised".

The Court concluded by saying:

"We do not, however, leave the matter there. First, and especially as Ms Morgan told us that she has experience of notification hearings in other cases, we are deeply concerned that any practice has arisen, to date solely based on the CPS Manual. That cannot possibly be right. Valuable document though it is, it is of no legal authority. We think it essential if such hearings are to continue - and for the reasons given they may, exceptionally, be necessary to do justice - that the practice be placed on a sounder and more appropriate footing. We therefore draw this judgment to the attention of the Head of Criminal Justice and the Criminal Procedure Rules Committee. Having regard to the parameters we have outlined above, we would invite that Committee to consider and, if necessary, refine the procedure to govern notification hearings, including the circumstances in which such hearings can take place and the limits to be placed upon them".

Child Abduction, Section 2 Child Abduction Act 1984

Pringle [2019] EWCA Crim 1722

The appellant was convicted of two counts of abducting a child contrary to section 2(1)(b), Child Abduction Act 1984. There were two complainants. The brief circumstances were that the appellant together with a co-accused, both of whom had communication difficulties, accompanied two 13-year-old truanting girls to some woods.

On appeal the appellant argued inter alia that the evidence at trial was not capable of leading to the safe conclusion that he had "taken" either child, "so as to keep [her] out of the lawful control of any person entitled to lawful control of the child" under s.2 of the 1984 Act.

The Court (Hamblen LJ. Andrew Baker J. and Sir Roderick Evans, allowing the appeal, said:

> "The Indictment in the present case acknowledged that by playing truant, each of the complainants had moved outside of the lawful control of the school (which was in *loco parentis*) and accordingly, the charge involved "taking" a child "so as to keep" them from lawful custody.

Section 3 of the Act provides a definition of "taking":

> "For the purposes of this Part of this Act -
>
> a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken…"

The causal requirement of section 3 of the Act has been considered in various authorities, in particular *R v A* [2000] 1 WLR 1879 and *Shepherd v The Crown Court Sitting at Newcastle upon Tyne (ex p DPP)* [2017] EWHC 2566 (Admin).

As stated in *R v A* at p1884:

> "Section 3(a) does not expressly provide that the person concerned must solely cause the child to accompany him. As the judge observed, an event or state of affairs may have many causes. If an event or state of affairs A is caused by B, C and D, it can, in our judgment, fairly be said that each of B, C and D causes A. Section 3(a) does not provide that the person shall be regarded as taking a child if he is the sole cause of the child accompanying him. It simply provides that he shall be so regarded if he causes the child to do so. As in the above example, there may, as it appears to us, be other causes. In particular, one of those other causes may be and is often likely to be the child's own decision or state of mind."

…..

The state of the law as to the *mens rea* requirement in the light of *R (Owens) v Governor of Holloway Prison* [2000] 1 Cr App R 195. *Mousir* and *Leather Mousir* [1987] Crim LR 561 and *R v Leather* [1994] 98 Cr App 179 was addressed by the Divisional Court in *Foster* [2004] EWHC 2955 (Admin). The Court summarised the position as follows at [27]:

"What, then, is the state of the law as to the *mens rea* requirement? For my part, I would conclude that the *mens rea* of the offence of abduction under section 2 is an intentional or reckless taking or detention of a child under the age of sixteen, the effect or objective consequence of which is to remove or to keep that child within the meaning of section 2(1)(a) or (b). With great respect to the court in *Owens*, it does not seem to me that the applicant's argument upon the construction of section 2 could or should have survived the judgment of the Court of Appeal Criminal Division in *Mousir* and *Leather*. It does not appear to me to have been necessary to require an intention to remove the child from the lawful custody of another, or to keep the child against the entitlement of the grandmother, to arrive at the same result had a prosecution proceeded. The offence is not committed if the defendant has lawful authority or a reasonable excuse for taking or detaining the child."

Re-opening a final determination: Registrar's powers

R v. Cunningham and Di Stefano [2019] EWCA Crim 2101

The case involved consideration of two procedural issues, namely: (i) whether the Registrar of Criminal Appeals has the power, in certain circumstances, to determine the merits of an application to re-open a decision of the Court of Appeal (Criminal Division); and (ii) depending, in part, on the answer to i), the role of the single judge and the full court in determining such applications.

The Registrar was concerned that the full court may have to spend significant time considering meritless applications to re-open concluded appeals. In order to ease this potential burden, she asked the full court for guidance.

The Court (LCJ. VPCACD and Sir Henry Globe) concluded by saying that applications to re-open a decision of the Court of Appeal (Criminal Division) "should be sent by the Registrar straight to the full court (constituted of three judges), and they will be resolved on paper, without a hearing, unless the court orders otherwise. In those circumstances, there is no reason to amend the Criminal Procedure Rules". The Court also said:

"The court in *Gohil [2018] EWCA Crim 140* comprehensively summarised the ambit of this jurisdiction in the CACD (re-opening a final determination) (as follows):

"(viii) Pulling the threads together

129. We venture to pull the threads together as follows:

i. the CACD has jurisdiction to re-open concluded proceedings in two situations. First, in cases of *nullity*, strictly so-called and distinguished from "mere" irregularities. Secondly, where the principles of Taylor v Lawrence [2002] EWCA Civ. 90, as adopted in *Yasain* [2015] EWCA Crim 1277 are applicable, thus where the necessary conditions are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to re-open the appeal, and the absence of any alternative effective remedy. It is to be emphasised that these are almost invariably *cumulative* requirements - though not necessarily

sufficient for the exercise of the jurisdiction, in that the court retains a residual discretion to decline to re-open concluded proceedings even where the necessary conditions are satisfied;

ii. though the principles of *Taylor v Lawrence* apply in both the Court of Appeal (Civil Division) and the CACD, as underlined in *Yasain* the jurisdiction need not necessarily be exercised in the same way, bearing in mind both the triangulation of interests in criminal proceedings (the state, the defendant and the complainant/victim) and the general availability of the CCRC to remedy the injustice of wrongful convictions;

iii. in exercising the jurisdiction to re-open concluded proceedings, the test applied by the CACD will be the same, regardless of whether the application is made by the Crown or on behalf of the defendant;

iv. we respectfully agree with the observation of the court in *Yasain* that the jurisdiction of the CACD to re-open concluded proceedings is probably best confined to "procedural errors". Indeed, at least generally, we see the Yasain jurisdiction as directed towards exceptional circumstances involving (as submitted by the amicus) the correction of clear and undisputed procedural errors "where it is simpler and more expedient for the court itself to re-open the appeal and correct a manifest injustice without the need for further litigation". Such an approach is healthy as it does not altogether exclude room for pragmatism in practice, while confining its scope to appropriately very limited circumstances, where, even if recourse to the CCRC was otherwise available, it would be a wholly unnecessary exercise. As it seems to us, fashioning the jurisdiction in this manner accords with authority, principle, practicality and policy—not least the great importance of finality in criminal proceedings;

v. […]

vi. […]"

We entirely agree with the approach of this court in *Yasain* and *Gohil* that, save for decisions that are a nullity, the usual exercise of this jurisdiction is to be confined to correcting "procedural errors" that are clear and undisputed and when there is no alternative effective remedy (albeit we do not wish to close the door entirely on exceptional circumstances, when the lack of an alternative effective remedy, or some other reason, may lead the court to re-open a decision in order to avoid a manifest injustice). As Gross LJ observed in *Gohil*, although the jurisdiction to re-open concluded proceedings has not been removed by the availability of recourse to the CCRC, that will almost invariably be the proper route ([128])".

Defendant pleading guilty to three offences - appeal lodged against one of them - conviction quashed - further appeal lodged on a later date against the other two offences - whether the Court had jurisdiction to entertain a further appeal - factors to be considered

R v. Williamson [2019] EWCA Crim 2289

The appellant pleaded guilty to three counts: possession of ammunition without a firearms certificate (count 1); possession of prohibited ammunition (count 2); possession of a firearm without a certificate (count 4). He was sentenced to a total of 5 years imprisonment. An appeal against sentence was refused by the full court. Subsequently the appellant invited the Criminal Cases Review Commission to review his conviction on count 2 on the basis that the ammunition to which the count referred in fact was not prohibited. On the basis that there had been no appeal to the Court of Appeal (Criminal Division) ("CACD") against conviction the appellant was told to appeal to that Court first. He did and the conviction on count 2 was quashed. Nothing was said about counts 1 and 4. Subsequently the appellant applied for leave to appeal out of time against his convictions on counts 1 and 4. The CACD considered a jurisdictional point as a preliminary issue, namely whether the appellant, having already appealed against his conviction on count 2, was barred from any further appeal against his convictions on the other counts on the indictment.

The Court (VPCACD: William Davis and Johnson JJ.), stated:

> "On an ordinary reading of section 1(1) of the Criminal Appeal Act 1968, there was no basis for concluding that a defendant must appeal on a single occasion against all counts on an indictment in respect of which he had a complaint. The argument that the CACD had no jurisdiction to entertain an appeal against conviction on one count, when the court previously had determined on its merits an appeal on another count, was not supported by a proper reading of the statute. Nor did the principle of finality in legal proceedings assist. The issues in relation to one conviction could and often would be distinct from the issues in relation to another conviction, albeit on the same indictment. It followed that the CACD had jurisdiction to entertain an appeal against conviction on an offence on an indictment even though there had been a previous appeal in relation to another offence on that indictment. However, this jurisdiction should be exercised sparingly and with caution. By definition, an appeal against conviction in relation to a count on an indictment in respect of which the court already had considered such an appeal, albeit in relation to a different count, would require an extension of time. The usual principles in relation to granting an extension would apply. Thus, there must be good and exceptional reasons for the second appeal not having been brought at the point at which the first appeal was before the court. Further, there was a parallel to be drawn between the bringing of a second appeal in relation to a different count on an indictment and the addition of fresh grounds of appeal on a renewed application for leave to appeal, ie the position considered in *James and others* [2018] EWCA Crim 285. The factors set out at paragraph 38(v) of the judgment in *James* were applicable to a second appeal against conviction, albeit subject to adjustment. In any such case the CACD would consider the following matters: (i) The extent of the delay in advancing the second appeal.

(ii) The reasons for the delay and for not advancing the second appeal at the same time as the first appeal. (iii)Whether the facts and/or issues giving rise to the second appeal were or should have been known to the applicant at the time of the first appeal. (iv) The overriding objective in the Criminal Procedure Rules, in particular the requirement to deal with every case efficiently and expeditiously. (v) The interests of justice. This last factor enabled the court to consider in the round the propriety of a second appeal. The appropriate manner in which an application for leave to appeal in these circumstances should be dealt with was exactly the same manner in which any application for leave to appeal against conviction was dealt with, namely by reference of the papers to the single judge. It would be for the single judge to assess the factors in the light of which the single judge either would refuse the application outright or would refer the matter to the court for consideration or would give permission for the second appeal".

Jury: Amendment of verdicts

R. v RN [2020] EWCA Crim 937

The appellant was convicted of two counts of causing or allowing serious physical harm to a child contrary to section 5 of the Domestic Violence Crime and Victims Act 2004.

The appeal concerned inter alia whether the trial judge was wrong to exercise his discretion in allowing the jury to amend their verdicts.

The Court (VPCACD. Garnham and Farbey JJ.) allowed the appeal and stated *inter alia:*

"This court in *R v Paul Andrews* [1986] 82 Cr App R 148 and *Millward* [1999] 1 Cr App R 61 summarised the principles to be applied in this situation.

…..

For our part, we consider that it should be emphasised that although the judge has a discretion in these circumstances, if there has been a material opportunity for further discussion after the verdict in question was delivered, thereby potentially leading to a change of mind, no amendment to the conviction or acquittal should be permitted. In this context – although it is not necessarily determinative – of clear importance will be whether the jury promptly indicated that the verdict needed correcting, and whether the court thereafter dealt with the issue straightaway and before any significant further deliberations occurred, or might have occurred, thereby excluding the risk of a change of view on the part of one or more jurors.

…..

The determining factor, however, is that this was not a clear-cut instance of a jury indicating that there had been a mistake in the way the verdicts had been delivered, with that indication being provided promptly and the matter being resolved in circumstances which excluded the possibility of any further deliberations and a change of mind. The foreman had been isolated from the rest of the jury, rendering it unclear whether his short note of explanation reflected the views of the entire

jury or only some of them. Furthermore, the jury were expressly asked by the judge to reconsider their verdicts as regards the appellant. Following that direction, they deliberated for over 25 minutes before convicting the appellant on both counts, having previously returned verdicts of not guilty. In these circumstances, the court cannot exclude the real possibility that the jury's verdicts, as finally delivered, may have been influenced by things they heard or discussed after the original acquittals. Although the verdict on count 2 stood unaltered for a longer period of time than that on count 1, the underlying considerations are identical for both counts."

Hearsay evidence: Criminal Procedure Rules

R v. Smith [2020] EWCA Crim 777

The appellant was convicted of an indecent assault, which occurred in 1969. In the witness statements and record of interview served on behalf of the prosecution there was fairly extensive hearsay material. On appeal the appellant argued inter alia that the prosecution breached Crim PR 20.2(2) by failing to make a written notice of hearsay application.

In quashing the conviction, the Court (Irwin LJ. Holgate and Linden JJ.) said:

> "The Criminal Procedure Rules are not decorative. They are there for a reason. The structure and language of the rules, if complied with, should ensure that tricky questions of procedure or evidence are addressed by the parties in time, so that, where dispute arises, the parties have developed positions which can be laid clearly before the judge who must resolve the problem. That is the point of the Rules. This court is acutely aware of the pressures upon practitioners. But in our judgment this case represents a good example of the problems which can arise when the rules are not complied with.
>
> It is simply not sufficient, where complex hearsay evidence is sought to be introduced, for the Crown to remark that the evidence was in a record of an ABE interview or in a witness statement and that no explicit objection has been taken by the defence upon whom such evidence has been served. The notice requirement on the Crown is not implicitly waived by defence silence, or even where, as here, the defence have made suggestions for editing the ABE interview. The purpose of the rules is to ensure that both sides give their minds properly to what can be technical and difficult issues of admissibility. Here it is clear there was a procedural failure by the Crown, compounded by less than rigorous thinking by whichever defence representative considered the text of the ABE interview, left uncorrected by Mr Donegan.
>
> These failures left the judge in a difficult position. As he recognised, there were a number of knotty problems of admissibility. Had he been presented with clearly articulated argument, it is in our view are unlikely he would have admitted the confession evidence. He could not have done so in reliance on Crim PR 20.4. There had been no notice to introduce the evidence. Sensibly, he asked the defence advocate what the position was, but we are bound to say the response was less than clear".

Witness giving evidence – becomes distressed – refuses to continue – whether judge justified in allowing the trial to continue

R v. RT and Stuchfield [2020] EWCA Crim 155

The appeal raised an issue about whether the trial judge was entitled to continue a trial in circumstances where a prosecution witness, aged 16 years, diagnosed with ADHD, who had given evidence in chief and been cross-examined in part on behalf of one appellant, became distressed and refused to continue to give evidence.

The Court (Dingemans LJ. Elisabeth Laing J and HHJ Wall), in dismissing the appeal, said *inter alia*:

> "The defendant has a fundamental right under the criminal law to a fair trial. The right of a legal representative to ask questions of witnesses giving evidence against the defendant is one way in which a fair trial is delivered but limitations have long been recognised to the right to question, for example the hearsay statements of dying witnesses cannot, for obvious reasons, be questioned. The hearsay exceptions have been added to by the Criminal Justice Act 2003, but the proceedings must remain fair, see *R v Horncastle* [2009] EWCA Crim 964, and *Al-Khawaja v UK* (2012) 54 EHRR 23. The effect of not being able to cross examine because of the death, illness or refusal to continue for a witness is not a new problem for the law. In Blackstone's Criminal Practice at F7.7 there is reference to *Doolin* (1832) 1 Jebb CC 123 where the evidence of a witness who died before being cross examined was held to be admissible, even though little weight was attached to the evidence. In some cases the effect of not being able to cross examine a witness who has become ill and unable to continue has meant that a fair trial becomes impossible. In other cases it has proved possible to continue the trial and ensure that it is fair.
>
> When considering whether a fair trial is possible when a witness's evidence has been cut short a judge will have regard to the extent to which the defence has been put and explored with the witness, whether previous inconsistent statements can be put into agreed facts, and whether there is other relevant evidence, see *Pipe* [2014] EWCA Crim 2570.
>
> It is also right to record that fairness in court proceedings extends to complainants and witnesses. The law and practice in relation to the questioning of vulnerable witnesses has developed. Training in the cross examination of vulnerable witnesses is available to advocates. Practice and procedure is now governed by the Criminal Procedure Rules ("Crim PR"), see in particular Criminal Practice Direction: Division 1 (General Matters) at paragraph 3E.4 which provides that "all witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can." Thee toolkits published on the Advocates' Gateway are also available.

Guidance was given on the appropriate style of cross examination on vulnerable witnesses in *Wills (Practice Note)* [2011] EWCA Crim 1938. In *YGM* [2018] EWCA Crim 2458, Hallett LJ, VPCACD set out the need to sort out limitations on cross examination of vulnerable witnesses before cross examination started. For example where defence counsel have not already agreed a division of labour, it is permissible in multi-handed trials to divide up topics between counsel so that a witness is not asked repeated questions on the same topics by each counsel. Rule 3.11(d) of the Crim PR gives the power to the Court to "limit (i) the examination, cross-examination or re-examination of a witness …". The Court of Appeal Criminal Division will support the proper case management of the cross examination of a witness, see *E* [2011] EWCA Crim 3028 and *Lubemba* [2014] EWCA Crim 2064".

Sentencing

Relevance of consent to sentence

R v. Brendan McCarthy [2019] EWCA Crim 2202

The appeal involved consideration of the extent to which the consent of the victims of offences of causing grievous bodily harm with intent, which were committed by the appellant in the course of carrying out body modification procedures on customers of his then business, was relevant to sentence and, if so, to what extent.

The case had previously been the subject of an interlocutory appeal pursuant to section 58 of the Criminal Justice Act 2003.

The Court (LCJ. Sweeney J. and Sir Roderick Evans), in dismissing the appeal, stated:

> " It is unsurprising that the relevant Guideline makes no reference to consent. The cases in which it will arise on sentence for causing grievous harm with intent are likely to be extremely rare.
>
> All exercises in sentencing, amongst other things, import considerations of harm and culpability. There are two different ways in which consent may come into the picture for the purposes of arriving at a sentence for serious offences of violence (assault occasioning actual bodily harm; wounding or causing grievous bodily harm; or wounding or causing grievous bodily harm with intent).
>
> …..
>
> A serious injury which has been received freely following consent may well import fewer adverse consequences than usually associated with an injury of the same sort. It is at least possible that the injury brings positive feelings of wellbeing. In this way "harm" may fall to be assessed in a different way from that usually associated with sentencing serious assaults.
>
> Culpability is more obviously affected by genuine consent. An attack resulting in serious injury is more culpable than the infliction of the same injury with the genuine consent of the victim.
>
> Given the underlying policy imperative which dictates that consent does not provide a defence to serious assaults of this nature, genuine consent will have an impact on the appropriate sentence but not such as to lead to penalties entirely divorced from cases of the ordinary sort. It is possible that the category of "harm" will be reduced; but it is more likely that real consent will affect the evaluation of "culpability" and lead to a reduction in the sentence that would be appropriate in the ordinary course".

Section 14 Sexual Offences Act 2003: arranging or facilitating the commission of a child sex offence

R. v Privett and Others [2020] EWCA Crim 557

These four otherwise unrelated cases had been listed together in order to give the Court an opportunity to address sentencing practice for offences under section 14 Sexual Offences Act 2003 (arranging or facilitating the commission of a child sex offence), and in particular the correct approach to assessing harm. The common feature between these cases was that when the individual defendants arranged, via the internet, to commit a sexual offence with a child, they were unaware that they were in contact with a police officer.

The Court (VPCACD. Holroyde LJ and Sir Peter Openshaw) stated:

> "It is necessary, in our judgment, to keep in mind the terms of this offence. It is intentionally arranging or facilitating activity which would constitute a child sexual offence, intending that it will happen. This is a preparatory offence, albeit it could cover the case in which the offence was carried out. However, in that latter situation, the offender would ordinarily be charged as a participant in the full offence.
>
> The offence is complete when the arrangements for the offence are made or the intended offence has been facilitated and it is not, therefore, dependent on the completed offence happening or even being possible, and the absence of a real victim does not, therefore, reduce culpability.
>
> As a general proposition, the harm in a case will usually be greater when there is a real victim than when the victim is fictional. By way of analogy, the situation when an offender shoots and hits his victim is likely to be considered as involving greater harm than a case in which the offender shoots and misses. Nonetheless, as set out above, section 143(1) Criminal Justice Act 2003 requires the court to consider the intended harm.
>
> The Guideline for section 14 (arranging or facilitating the commission of a child sex offence) reflects these considerations: "the level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate" (see [46] above). The court will consider, therefore, the sentence that would be appropriate for the full offence and then impose a sentence for arranging or facilitating that is "commensurate" with (put otherwise, that is in proportion to) that sentence. The Guideline for sections 9 and 10 Sexual Offences Act 2003 (sexual activity with a child/ causing or inciting a child to engage in sexual activity) mirrors this approach:
>
> Focusing on the particular issue raised in these appeals, we consider that for a section 14 offence, the position under the Guideline is clear: the judge should, first, identify the category of harm on the basis of the sexual activity the defendant intended ("the level of harm should be determined by reference to the type of activity arranged or facilitated"), and, second, adjust the sentence in order to ensure it is "commensurate" with, or proportionate to, the applicable starting point and range if no sexual activity

had occurred (including because the victim was fictional) ("sentences commensurate with the applicable starting point and range will ordinarily be appropriate")".

Sentencers in future with section 14 offences in these circumstances should follow the Sentencing Guideline in the way we have described above at [67]. This may lead to the result that a defendant who arranges the rape of a fictional 6-year-old is punished more severely than a defendant who facilitates a comparatively minor sexual assault on a real 15-year-old. In our view, there is nothing necessarily wrong in principle with that result. The sentence should be commensurate with the applicable starting point and range, and in cases where the child is a fiction this will usually involve some reduction to reflect the lack of harm".

Restraining Order

R v. Richards [2019] EWCA Crim 2238

The appellant was sentenced inter alia to a Restraining Order prohibiting him from entering Stevenage. It was contended that the restriction was contrary to Article 8 of the European Convention on Human Rights ("Article 8") and the Human Rights Act 1998, it being unnecessary and disproportionate.

The Court (Green LJ. Nicol J. and Her Honour Judge Walden-Smith), dismissing the appeal said *inter alia*:

"In any case involving a restriction of the present sort a court must consider: (i) the purpose for which the order is being sought; (ii) its necessity; and (iii), its reasonableness in relation to the risk arising.

In our view the following matters are relevant.

First, orders of this breadth are rare. Restraining orders more usually focus upon specific roads or premises rather than whole towns. However, this does not mean that in an appropriate case a broader restriction may not be appropriate and might stretch to include an entire town or city. The evaluation is always fact and context specific.

Second, in this case the object or purpose behind the order was the protection of the complainant and other partners from violence and relevant children who might witness violence. This is a perfectly proper and legitimate reason justifying an interference with a person's Article 8 right.

Third, there was ample support for protection of this nature set out in the Pre-Sentence Report which assessed the appellant as "dangerous" and whose antecedents revealed a pattern of escalating violence.

Fourth, the next question concerns the reasonableness of the restriction itself. It was upon this component of the Article 8 test that the argument primarily centred. Is the restriction more than justified on the facts of the case? In our view it is not.

…

It is in our judgment also relevant that any hardship to the appellant is mitigated by two factors. First, for a substantial part of the ten-year period the appellant will be in custody. The operative part of the term is therefore substantially less than ten years. Second, if there is a change in circumstances, for example, because counselling or training whilst in custody alters the appellant's conduct and behaviour such that he no longer represents a risk to the complainant, then the order may be varied and the restrictions lifted or modified. The restriction upon entering Stevenage is not immutable".

Proper approach to sentencing offenders who suffer from autism or other mental health conditions or disorders

R v. PS and Others [2019] EWCA Crim 2286

The Court heard three otherwise unconnected cases which raised issues about the proper approach to sentencing offenders who suffer from autism or other mental health conditions or disorders.

The Court (LCJ. VPCACD and Holroyde LJ) made the following comments:

"Sentencing an offender who suffers from a mental disorder or learning disability necessarily requires a close focus on the mental health of the individual offender (both at the time of the offence and at the time of sentence) as well as on the facts and circumstances of the specific offence. In some cases, his mental health may not materially have reduced his culpability; in others, his culpability may have been significantly reduced. In some cases, he may be as capable as most other offenders of coping with the type of sentence which the court finds appropriate; in others, his mental health may mean that the impact of the sentence on him is far greater than it would be on most other offenders.

It follows that in some cases, the fact that the offender suffers from a mental health condition or disorder may have little or no effect on the sentencing outcome. In other cases, it may have a substantial impact. Where a custodial sentence is unavoidable, it may cause the sentencer to move substantially down within the appropriate guideline category range, or even into a lower category range, in order to reach a just and proportionate sentence. A sentence or two in explanation of those choices should be included in the remarks.

The court will be assisted by a pre-sentence report and by appropriate psychiatric or psychological reports. It is important, when such reports are commissioned, that the issues to which they are relevant should be clearly identified. For example, a report directed to the issue of dangerousness may provide only limited assistance on the issue of culpability; and vice versa. It follows that, as with all matters of case preparation, early identification of the real issues is important.

As one of the cases before us illustrates, difficulties may arise because there is nothing particular which prompts consideration of whether a mental health condition or disorder may be relevant to sentence. Both practitioners and judges should be

alive to that possibility in adult offenders. So far as children and young persons are concerned, in accordance with the applicable guideline, where a serious offence has been committed by a young offender, both the court and those representing him must be alert to the possibility that mental health may be a relevant feature of the case. The younger the offender, and the more serious the offence, the more likely it is that the court will need the assistance of expert reports.

One of the cases before us illustrates another situation which may arise, namely that reports obtained post-conviction reveal features of the offender's mental health which are relevant in the ways which we have identified, but which conflict with the case which the offender had advanced at trial. In such situations, in accordance with established principles, the sentencer must of course remain true to the jury's verdict; but within those confines form his or her own view as to the proper basis for sentence".

Slip Rule: section 155 Powers of Criminal Courts (Sentencing) Act 2000

R v. George and Ingram [2019] EWCA Crim 2177

This was a case in which the judge, having passed sentence, reflected and concluded that he had committed an error of principle. He immediately notified the parties of his change of view and permitted skeleton arguments to be submitted. He heard oral argument at a fresh sentencing hearing and in the light of this increased the sentences hitherto imposed.

This was not a case where it could be argued that the sentence initially imposed were at risk of a reference by the Attorney General to the Court of Appeal upon the basis that the sentence was "unduly lenient". Nor was this a case where the judge considered that he needed to address a statutory obligation or requirement that he had failed to address first time around. Here the Judge came to the conclusion that he had misapplied the Guidelines on Burglary and had therefore applied the wrong approach to the weight that he should attach to aggravating factors. There is a power to correct sentences conferred by section 155(1) Powers of Criminal Court (Sentencing) Act 2000. The question arising is whether the judge erred in his exercise of this "slip rule" power to increase the sentence.

The Court (Green LJ. Nicol J. and Her Honour Judge Walden-Smith), in dismissing the application, said *inter alia*:

> "First, we endorse the statement of earlier courts to the effect that in deciding whether to correct a previous error, the judge should apply a flexible test balancing the public with the private interest. The test is no longer the old affront to the appearance of justice test though, where such an affront exists, a Judge can still take this into account in deciding whether to use the slip rule. More broadly, there is a public interest in legal certainty and finality and a sentence should not be increased unless it would lead to a material change in the sentence. Otherwise, there will be a risk of a perception of needless tinkering for no discernible good reason. Equally, a defendant who has been sentenced might feel a sense of grievance if shortly thereafter he or she is brought back to court and handed a harsher sentence. On the other hand, there is a strong public interest in the imposition of appropriate sentences

since it is relevant and important to the confidence that the public repose in the courts that judges will act in a deliberate, conscientious and correct manner and if needs be repair significant errors.

Second, the exercise of the power is not confined to those case where there is a risk of a reference by the Attorney General to increase an unduly lenient sentence. Nor is the exercise confined to cases where the judge makes an clear legal error such as the misapplication of a statute. In our judgment it also applies where there is a misapplication of relevant Guidelines, not least because under the CJA 2003 judges are required to apply those Guidelines. Case law makes clear that errors of fact can also serve to trigger the exercise of power.

Third, we endorse the emphasis in case law upon materiality. In this context "material" takes into account both the nature and extent of the error of fact or law which has been made and the impact of that error upon the increase in the sentence. There is an obvious connection between the two since not every error of law or fact (even if it seems prima facie serious) will lead to a material increase in sentence. If the error would not lead to a material increase in sentence, then the power should not be exercised. What amounts to "material" will vary from case to case, but it can apply to any aspect of a sentence. The applicant places considerable weight upon Goss (ibid). That case does not assist. There the Court concluded that the initial sentence was the correct sentence i.e. there was no "slip" to correct. Another way of looking at the case would be to say that any error made was not material. Neither of those analyses applies to the present case.

Fourth, case law indicates the sorts of (non-exhaustive) factors that a judge might consider. These include whether the desire to change the sentence is simply a change of heart about leniency. If it is then it might be inappropriate to use the slip rule. But if the error goes to an "important" component of the law or Guidelines relating to sentencing then this will militate in favour of using the slip rule. We would add that we are concerned in this case only with an increase in sentence. The power applies to a reduction in sentence also (see the citation from Warren at paragraphs [22] above). This is not the case to express any view on how materiality applies to the different position of a judge who decides that the sentence imposed was, wrongly, too severe.

Fifth, in balancing the strong public interest in the imposition of correct and appropriate sentences against a justifiable sense of grievance on the part of a defendant who is brought back to court to be re-sentenced, a court can substantially address the interest of that defendant by the conferral of an appropriate level of discount to the new sentence that the judge considers should be imposed".

Victim Surcharge Order

Abbott [2020] EWCA Crim 516

The Court was invited to deal with issues of principle relating to the calculation of surcharge orders.

The Court (VPCACD. Cheema-Grubb J. DBE and Sir Nicholas Blake) gave the following guidance:

> **"The First Submission**
> *The amount of the surcharge should be calculated by reference to the total sentence imposed (i.e. the total period of imprisonment ordered, or the total amount of any fine).*
>
> This Court considered the issue in a largely overlooked decision, *R v Phelan-Sykes* [2015] EWCA Crim 1094. In that case the defendant was sentenced in the Crown Court for an offence of robbery and an offence of theft. He was sentenced to a total term of 2 years nine months' imprisonment (2 years' imprisonment for the robbery and a consecutive term of 9 months' imprisonment for the theft), and although it is not material to the present issue, a suspended sentence that had been breached was activated, to be served consecutively. Whilst permission to appeal his sentence was refused by the single judge, the calculation of the surcharge was referred to the full court. Because the sentence was in excess of 24 months, the judge ordered a surcharge of £120.
>
> The decision in *Phelan-Sykes* reflects the language in the statutory framework.
>
> Paragraph 3(1), 4(1) and 6(1) of the 2012 Order stipulates:
>
> > *"Where a court deals with [a person] for one or more offences by way of a single disposal described in column 1 of [the relevant table in the Order]…"*
>
> This language plainly contemplates that a court may deal with an offender for more than one offence by way of a single disposal.
>
> Furthermore, this approach will remove the self-evident anomalies that can arise depending on how the overall prison sentence imposed for a number of offences is structured (viz. whether the individual custodial sentences are to be served concurrently or consecutively).
>
> **The Second Submission**
> *If there is a mixed disposal (for example, a fine and a period of imprisonment), the surcharge which would be applicable to each (i.e. if the total fine or total period of imprisonment were the only order) should be calculated. The higher value is the amount of the surcharge.*
>
> The answer to this second question follows from the answer to the first. In a case involving a fine and a period of imprisonment, the surcharge is the higher of the amount corresponding to the aggregate fine and the amount corresponding to the aggregate period of imprisonment.

The same principles apply to any other available combination of orders, and the position is the same whether there is a mixed disposal in relation to a single offence, or different disposals in relation to different offences."

The Third Submission

Where a surcharge has already been imposed, no further surcharge should be imposed on any future occasion. Where the court makes orders activating any suspended sentence of imprisonment, or taking action upon breach of a community or other order, and at the same time sentences an offender for new offences, the victim surcharge should be calculated only by reference to the new offences.

The Court considered the cases of *R v George* [2015] EWCA Crim 1096 and *R v Bailey; R v Kirk* [2013] EWCA Crim 1551; [2014] 1 Cr App R (S) 59 and stated:

"To the extent that the reasoning in *Bailey* is inconsistent with *George*, we prefer the approach in *George*. Furthermore, the effect of the decision in *Bailey* in this context should be limited to the court's consideration of the position when the offence, or one of a number of offences, was committed before 1 October 2012. The court did not address the question of whether two surcharges may properly be imposed for the same offending.

We consider, therefore, that the duty to impose a surcharge under section 161A of the 2003 Act is discharged when the court first sentences the offender. Section 161A contains no duty or power to order an offender to pay a second surcharge and, accordingly, the provision is not engaged for a second time when the court *"deals with"* an offender on a second or subsequent occasion. It follows that when the court makes an order activating a suspended sentence of imprisonment, or taking action upon breach of a community or other order, and at the same time sentences an offender for new offences, the surcharge should be calculated only by reference to the new offences.

It is important to note that in all cases, but particularly if the court is dealing with a number of offences (including an offence that resulted in a suspended sentence or other order that has been breached), the court must be careful to ensure that the correct charging regime applies. If any offence being dealt with by the court, including an offence the sentence for which has been breached, was committed before the coming into force of the current surcharge Order, the surcharge will need to be calculated by reference to the charging regime applicable on the date of the commission of the earliest offence (see *Bailey* [4] in this regard).

If a suspended sentence order or a community order is breached and the court amends the terms of the order so as to impose more onerous requirements (see paragraphs 9 and 10 Schedule 8 Criminal Justice Act 2003), this constitutes "dealing" with the offence for the purposes of determining the charging regime as regards the other offences dealt with at the same time. The court will need to identify the date of the offence for which the suspended sentence order or community order was originally imposed. In contrast, if, having been breached, a conditional discharge

is simply allowed to continue, this would not constitute "dealing" with the offence (section 13 of the Powers of Criminal Courts (Sentencing) Act 2000 is permissive in this regard (*e.g.* section 13 (7A) "the court may deal with him, for the offence for which the order was made").

Section 40A Prison Act 1952: Micro SD card smuggled into prison

R. v Salih (Amang Wahab) [2020] EWCA Crim 658

The point of principle in issue on this sentence application was whether a micro SD card smuggled into prison should be categorised as a class B or class C article when it met the definition for both categorisations. The difference between the two was of significance because for class B the maximum sentence is 24 months' imprisonment, whereas for class C the maximum sentence is a fine of Level 3.

The Court (VPCACD. McGowan and Cheema-Grubb JJ.) stated:

> "The judge came to the view that a micro SD card falls within List B and the fact that it also comes within the definition of List C did not operate to limit the maximum sentence available to the court. He particularly referred to the fact that the Act itself defines List B as including "any disk, film or other separate article on which images, sounds or information may be recorded".
>
> …..
>
> In our judgment, given the similarity in the formulation of these provisions and the complexity of modern technology, some List B items will inevitably also come within the definition of List C items. Mr Brook makes a telling point in this regard on the diverse and sophisticated nature of "smart" mobile telephones. They fall within List B as a mobile telephone and they fall within List C as an electronic device containing a computer processor which is capable of connecting to the internet. As Mr Brook correctly observes, the logic of Miss Trigilio's submission is that an offence involving a smart mobile telephone must come within List C, whereas a mobile telephone which is not "smart" would be within List B. Mr Brook contends that result cannot reflect the true legislative purpose and it would be perverse.
>
> The force of that submission is not substantively undermined by the fact that micro SD cards, as Miss Trigilio points out, are not specifically identified in the provisions in the way that applies to telephones. Instead, they can become a constituent part of a smart phone, and in the present case the judge found that the micro SD card was to be used in this way.
>
> We have no doubt that the court in these circumstances should inquire first whether the item comes within the ambit of the more serious category, thereafter considering the lesser category (List C) if it is not within the definition of the former. This is not a situation where there is uncertainty or confusion that should be resolved in favour of the accused. If the object comes within List B, absent good reason to conclude otherwise, it should be treated as a List B item. The use to which it is to be put will be relevant, as Mr Brook observed, to the level of sentence".

Sexual Harm Prevention Orders

R v. Ashford and Others [2020] EWCA Crim 673

At the start of its judgment, the Court said: "Breach of a sexual harm prevention order ("SHPO") or a sexual offences prevention order ("SOPO") is an offence punishable with imprisonment. It is not however an offence listed in either schedule 3 (sexual offences) or schedule 5 (other offences) to the Sexual Offences Act 2003. A court dealing with an offender for breach of an SHPO or SOPO therefore does not have the power to make a new SHPO. The consequences of that limitation upon the court's powers, and the scope of the court's power to vary an existing SHPO, arise for consideration in each of these three cases. It is for that reason that, although otherwise unconnected, they have been listed for hearing together".

The Court (Holroyde LJ. Andrews and Martin Spencer JJ.) gave the following guidance:

> "Provision is made in respect of SHPOs by sections 103A - 103K of the Sexual Offences Act 2003, which replaced (with effect from 8 March 2015) earlier provisions relating to SOPOs.
>
> Section 103A(1) and (2), so far as material for present purposes, give a court the power to make an SHPO where it "deals with" a defendant for an offence listed in schedule 3 or schedule 5 and is satisfied that it is necessary to make an SHPO for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant. As we have indicated, the offence of breach of an SHPO is not included in either schedule. That fact was overlooked in each of these three cases and, we understand, has been overlooked in other cases as well. Perhaps that is because many would assume that the offence of breach ought to be, and therefore is, included when in fact it is not. That, however, is a matter for Parliament.
>
> There is a separate power under subsections (3)-(7) for a magistrates' court, on application by a chief officer of police or by the Director General of the National Crime Agency, to make an SHPO against a "qualifying offender" who has "acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made". Where an application under subsection (4) has been made but has not yet been determined, section 103F gives the court a power to make an interim SHPO for a fixed period specified in the order.
>
> By section 103C, an SHPO prohibits the defendant from doing anything described in the order. It has effect for a fixed period specified in the order of at least five years, or until further order. Subsection (6) provides:

Having reviewed the authorities of *R v Hamer* [2017] EWCA Crim 192, [2017] 2 Cr App R 13 and *R v Ashton* [2006] EWCA Crim 794, [2007] 1 WLR 181 the Court considered whether the same prohibitions could have been imposed by amending the existing SOPO and stated that:

> "The Crown Court does not have power under section 103E to vary, renew or discharge an SHPO which was made by an adult magistrates' court or a youth court.

> It does not, however, follow that in such circumstances there must always be a separate hearing in the magistrates' court or youth court. By section 66 of the Courts Act 2003 a Circuit Judge or Recorder has the powers of a District Judge (Magistrates' Courts) in relation to criminal causes and matters. Provided that an application under section 103E has been made to the prescribed court by one of the persons who is permitted to make it, a judge or recorder dealing with the defendant in the Crown Court may be invited to exercise the power of a District Judge (Magistrates' Courts) sitting in that prescribed court to grant a variation pursuant to section 103E.

The final situation which fell to be considered was that of an offender who had previously been sentenced for an offence listed in schedule 3 or schedule 5 and was made subject to a suspended sentence of imprisonment and an SHPO. The Court stated that:

> "If he is subsequently convicted of a breach of that SHPO and consequently falls to be dealt with for breach of the suspended sentence order, but is not also before the court for any offence listed in schedules 3 and 5, can the Crown Court make a fresh SHPO? In our view, it cannot. Where an offender is convicted of an offence committed during the operational period of a suspended sentence, the court is required to deal with him in one of the four ways specified in paragraph 8 of schedule 12 to the Criminal Justice Act 2003. In doing so, the court is not "dealing with the defendant in respect of an offence listed in schedule 3 or 5" for the purposes of section 103A: it is imposing upon the defendant the consequences of his reoffending during the operational period of the suspended sentence. An SHPO made when the suspended sentence was imposed remains in force unless and until action is taken to revoke or vary it".

Variation of Sexual Harm Prevention Order

Inches [2020] EWCA Crim 373

The applicant was sentenced for sexual offences and made the subject of a Sexual Offences Prevention Order ("SOPO"). On appeal it was argued that the terms of the SOPO were wrong in principle and oppressive. The Court (Irwin LJ. Fraser J. and Sir Peter Openshaw) in refusing the application stated:

> " … we do emphasize that the variation sought and the terms of the SOPO must be pursued by means of a proper and structured application to vary its terms, supported by cogent evidence, and that must be made in the Crown Court. Notwithstanding the imposition of the SOPO, developments in computer technology alone mean more sophisticated means are available to prevent access to the internet. The Respondent's Notice submitted by the Crown demonstrates the constructive approach that is likely to be adopted by the Crown if such an application were to be made to the Crown Court. Nothing in this judgment on this application today should be taken as this court expressing a view on what the result of an application to vary the SOPO would be, were one to be made. We do however repeat, that a matter in a case such as this, namely seeking to vary the terms of an existing SOPO, is a matter for the Crown Court and not a matter for the Court of Appeal. Both applications are therefore refused".

Articles

Litigants in Person in CACD and the Introduction of Easy Read Forms

The number of Litigants in Person in the criminal courts has been growing substantially and this is also reflected in the Court of Appeal Criminal Division, where the number of litigants in person was growing year on year until 2017. Since 2019 this remained fairly constant at about 10% of all applications (just over 600 applicants).

Often litigants in person can struggle with the use of legal jargon and complicated forms can deter them from exercising their right of appeal at all.

In recognising the difficulties faced by litigants in person, the Criminal Appeal Office worked closely with the Criminal Cases Review Commission (CCRC) and the Criminal Procedure Rules Committee, to develop an Easy Read Form for CACD.

The aim of Easy Read is to increase accessibility to justice, by making it easier for people to complete the forms they need. A typical Easy Read form will have larger text and pictures to break down the text. Any legal jargon should be avoided and if legal jargon is used it should be clearly explained.

Examples of Easy Read forms which were already in use in the criminal justice system can be found in the Juror Notice and the Form for Appealing a Magistrates' Court Decision to the Crown Court.

Following a successful pilot of the Conviction Easy Read Form in November 2019, the Criminal Procedure Rules Committee approved a new Easy Read Form NG (Conviction) and Easy Read Form NG (Sentence), for litigants in person to use.

Those forms were designed to be used with the new "Help for applicants" booklet, which is a booklet that seeks to break down the appeal process, using flowcharts and by explaining what grounds of appeal might look like.

The forms and the booklet have been widely distributed throughout the prison estate and by the CCRC in hard copy. They are also available through the Criminal Procedure Rules Committee website (to those applicants not in custody) and Prison Governors have also been alerted to them.

We have seen that the introduction of the Easy Read Form in November 2019 has led to a substantial increase in the applications lodged by litigants in person and these now account for 20% of all applications (double the proportion of cases previously lodged before Easy Read was introduced).

Although the Easy Read Form is longer, it assists both applicants and the judiciary for the same reason. Applicants are forced to number their grounds and arrange them with reference to the boxes provided. This gives their grounds both clarity and structure.

Litigants in person previously struggled with how much to write and distinguishing between their grounds of appeal. As non-lawyers they also often had no idea what a ground of appeal might look like in any event and their grounds could run into multiple pages of voluminous documents.

We have seen that some applicants are clearly using the example grounds of appeal highlighted in the Easy Read Form (page 7) as a kind of "checklist" and then applying them to their own case and expanding on them in the boxes on the form.

Ensuring that litigants in person understand the appeal process and what is expected from them in order to properly participate in it, is of vital importance. Applicants without legal representation must still be able to access justice.

The presence of complicated legal forms can be a barrier to this. Whilst a form can clearly be no substitute for legal representation, the introduction of Easy Read Forms in CACD is a welcome step in the right direction in removing barriers to justice and helping litigants in person to better present their cases in writing to the single Judge in the first instance.

Should the Judge find merit in any of the grounds, public funding for legal representatives would then normally rightly follow; but an increase in the clarity and structure in the grounds of appeal presented by litigants in person can only aid a Judge in the decision whether to grant, refer or to refuse leave under Section 31.

Digital Bundles in the Court of Appeal (Criminal Division)

This year saw the introduction of digital bundles for the judiciary and advocates appearing before the Court of Appeal (Criminal Division). Many regular CACD advocates will have some experience of these digital bundles.

The CAO now provides an index to the judges' bundles in Word format. In a digital bundle, each item on the index is in fact then a hyperlink to the relevant document on DCS. Opening the hyperlink will take the user directly to the DCS platform and the document will appear.

Work had been underway, prior to COVID-19, to make changes to the Crown Court Digital Case System (DCS) so that appeal documents could be uploaded into two new areas – CACD1 and CACD2. Once uploaded the Criminal Appeal Office is then able to produce digital bundles by creating an index which has a hyperlink to each document stored on DCS. In December 2019 the VPCACD ran a concept court to test the use of digital bundles. The trial run was successful and established that DCS was viable option for the CACD and one which meant that a familiar interface would be used in the Crown Court and the Court of Appeal.

The national lockdown in March 2020 meant that the CAO had to bring forward the planned phased introduction of digital bundles. Many months of planning and preparation was carried out in a matter of days, and all staff and judiciary were trained (mostly remotely) on how to create, navigate and use the new digital bundles.

Within days, all bundles were converted into digital indexes. At the same time, remote hearings were organised using the Cloud Video Platform ("CVP"). The immediate move to digital working meant that the CACD was able to continue to hear applications and appeals throughout the lockdown with judiciary, advocates, and other court users remotely attending as much as possible.

The CACD has made full use of these bundles in all DCS cases. It is a system that appears to be working well and has been well received by the judiciary and court users. It has had a significant impact on the process of preparing bundles for the judiciary and has reduced the amount of paper used by the CAO.

Not all cases are uploaded onto the DCS – at present it only stores CPS prosecuted cases. As a temporary measure, the CAO made use of eJudiciary, and the Document Upload Centre, to create digital bundles in non-DCS cases.

The CAO and the VPCACD are now committed to improving the process. Amendments have been made to the Criminal Procedure Rules (effective from April 2021) which will encourage advocates to create hyperlinks to DCS in their Grounds of Appeal and Skeleton Arguments rather than producing annexes comprised of existing material. CAO staff continue to work closely with HMCTS to improve DCS, CVP and eJudiciary.

The Work of the Criminal Appeal Office

The Criminal Appeal Office (CAO) is located at the Royal Courts of Justice, in close proximity to the courts and Judges that it serves. Lawyers at the CAO work closely with the Registrar of Criminal Appeals to ensure that cases are guided through the appeal process efficiently and justly. The lawyers produce case summaries pursuant to the Criminal Practice Directions which are invaluable to the court and practitioners. The summaries are entirely objective and do not provide advice on the merits of the case, but they highlight and crystallise the salient issues in order to assist the court. In addition, lawyers give advice on procedural matters to practitioners, and also to litigants in person, which often involves the provisions of advice on how Grounds of Appeal can be formulated so that they comply with the Criminal Procedure rule and avoid being excessively prolix.

The CAO lawyers are supported by a dedicated team of administrative staff who obtain advice from CAO lawyers as necessary and exercise case management functions. In addition to the core functions such as the listing of cases there is a team of specialist administrative staff dedicated to writing case summaries on all but the most complex sentence cases Administrative staff also provide essential back office support and deal with some specialist matters such as the assessment of costs. Court clerks sit as the Registrar in Court.

Acting on behalf of the Registrar, CAO staff play a proactive role in preparing cases for the Single Judge and the Full Court. One clear example of this is in respect of unlawful sentences. In some instances, deficiencies in the information provided to the sentencing court coupled with misunderstandings of disparate and complex sentencing provisions have led to a number of unlawful sentences not being identified until grounds of appeal (sometimes against conviction only) have been lodged with the court. In such instances the staff of the CAO are often the first to identify that a sentence is in fact unlawful and draft that to the attention of the parties and the Court. It is however anticipated that the implementation of the Sentencing Act 2020 will soon eliminate such unlawful sentences.

The legal team is headed by three Senior Legal Managers, who are responsible for the throughput of all work in the CACD. Their work however is not confined to the management of staff and work, but also encompasses specialist internal and external training. In addition to being responsible for the promotion of best practice within the CAO, the Senior Legal Managers have an important role in assisting the Registrar in carrying out her statutory functions.

Contacts

Over the reporting year the Registrar of Criminal Appeals was delighted to welcome the following visitors:

- 5 February 2020 – a delegation of legal and administrative staff from Oman
- 24th February 2020 – two Supreme Court Judges from Sri Lanka – Honourable Justice Buwanaeka Aluwihare P.C and Honourable Justice Priyantha Jayawardena P.C
- 14th July 2020 - a virtual meeting with the Chief Justice of the Bahamas, Mr Brian Moree and a judicial delegation.

Summary and Statistics – 1st October 2019 to 30th September 2020

The Annexes attached to this Review provide details of the number of applications considered by the Court, the average waiting times and the general success rates.

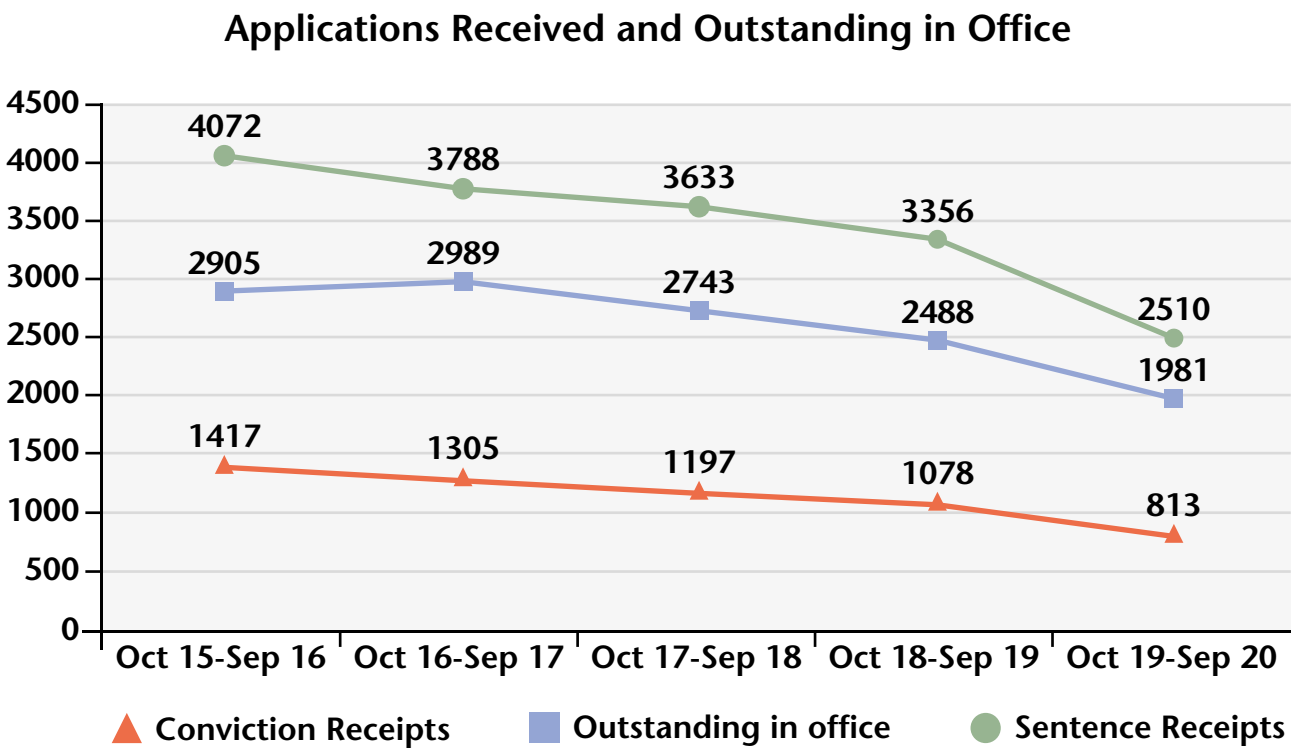
The reduction in the number of cases received by the court on an annual basis has continued with a total of 3,323 applications received. The overall conviction waiting times have remained fairly consistent. However in respect of conviction renewals and sentence applications there has been a slight increase (see Annex A and B). There are several reasons for this: the Covid – 19 pandemic and the CAO having to adopt new methods of digital working, the increasing complexity of the cases which are lodged, staff shortages, an increase in Special Court sittings (which has meant that some cases have been held back for inclusion in a specific court or to await the outcome of a Special Court) and an increase in applications from litigants in person (as these cases require more case officer resources to ensure that they are properly prepared for hearing).

The majority of the applications for leave to appeal are determined by a Single Judge, though some are referred directly to the Full Court by the Registrar. In the reporting year, out of a total of 510 conviction applications considered, leave was granted for 44 applications, with 53 referred and 413 refused. Out of a total of 1941 sentence applications considered, leave was granted for 429 applications, with 127 referred and 1385 refused (Annex C).

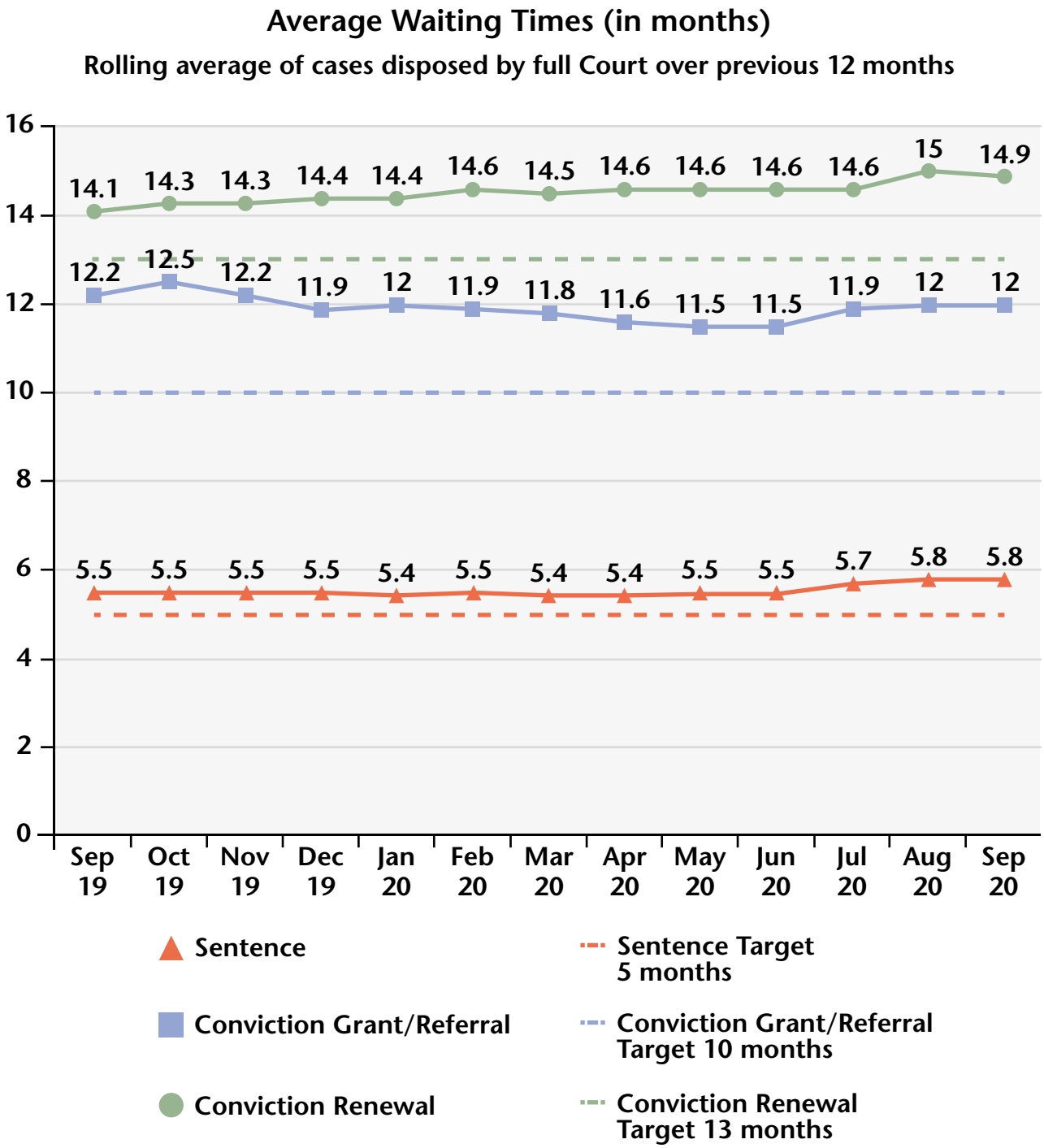
Of the 171 conviction appeals heard by the Full Court, 67 were allowed. This represents an increase of 3 cases from the preceding year. Of the 873 sentence appeals heard by the Full court, 529 were allowed. This represents a decrease of 143 cases from the preceding year (Annex D).

Renewed applications for leave to appeal against both conviction and sentence accounted for 1,042 of the hearings in the reporting year. Of these, the Full Court granted leave to appeal in 60 conviction applications, representing 3% of those renewed applications. The Court granted leave in 176 renewed applications for leave to appeal against sentence, representing 8% of those renewals (see Annex E).

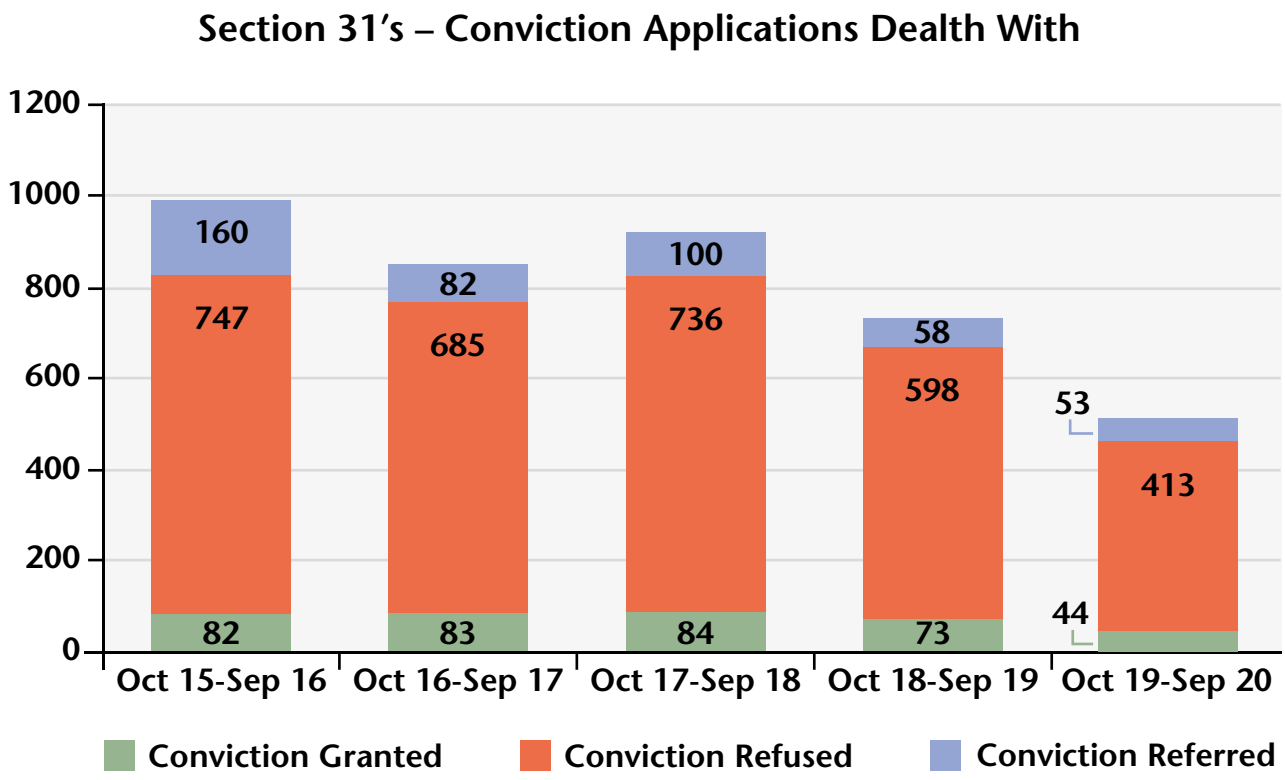
Annex A


Applications Received and Outstanding in Office
4500
4000
3500
3000
2500
2000
1500
1000
500
0
4072
3788
3633
3356
2510
2905
2989
2743
2488
1981
1417
1305
1197
1078
813
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Conviction Receipts
Outstanding in office
Sentence Receipts

Annex B


Average Waiting Times (in months)
Rolling average of cases disposed by full Court over previous 12 months
16
14
12
10
8
6
4
2
0
14.1 14.3 14.3 14.4 14.4 14.6 14.5 14.6 14.6 14.6 14.6 15 14.9
12.2 12.5 12.2 11.9 12 11.9 11.8 11.6 11.5 11.5 11.9 12 12
5.5 5.5 5.5 5.5 5.4 5.5 5.4 5.4 5.5 5.5 5.7 5.8 5.8
Sep 19
Oct 19
Nov 19
Dec 19
Jan 20
Feb 20
Mar 20
Apr 20
May 20
Jun 20
Jul 20
Aug 20
Sep 20
Sentence
Conviction Grant/Referral
Conviction Renewal
Sentence Target 5 months
Conviction Grant/Referral Target 10 months
Conviction Renewal Target 13 months

Annex C


Section 31's – Conviction Applications Dealth With
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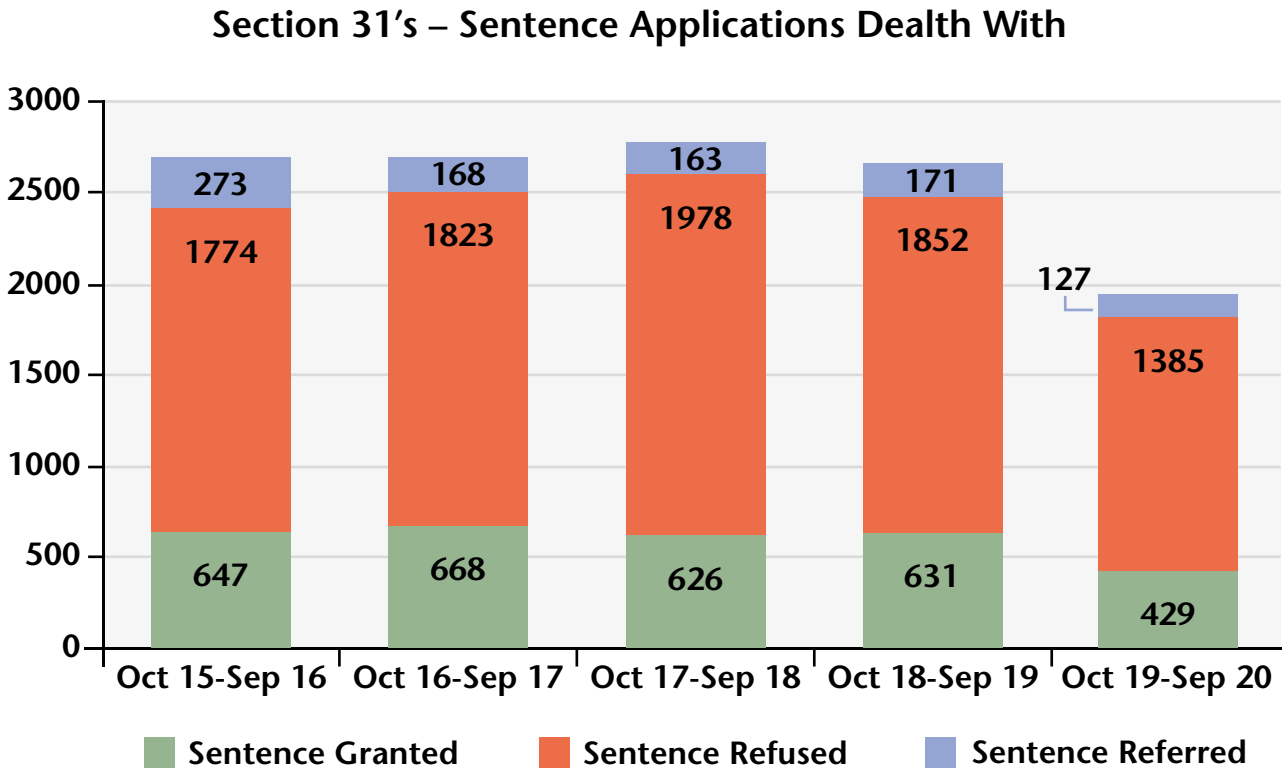
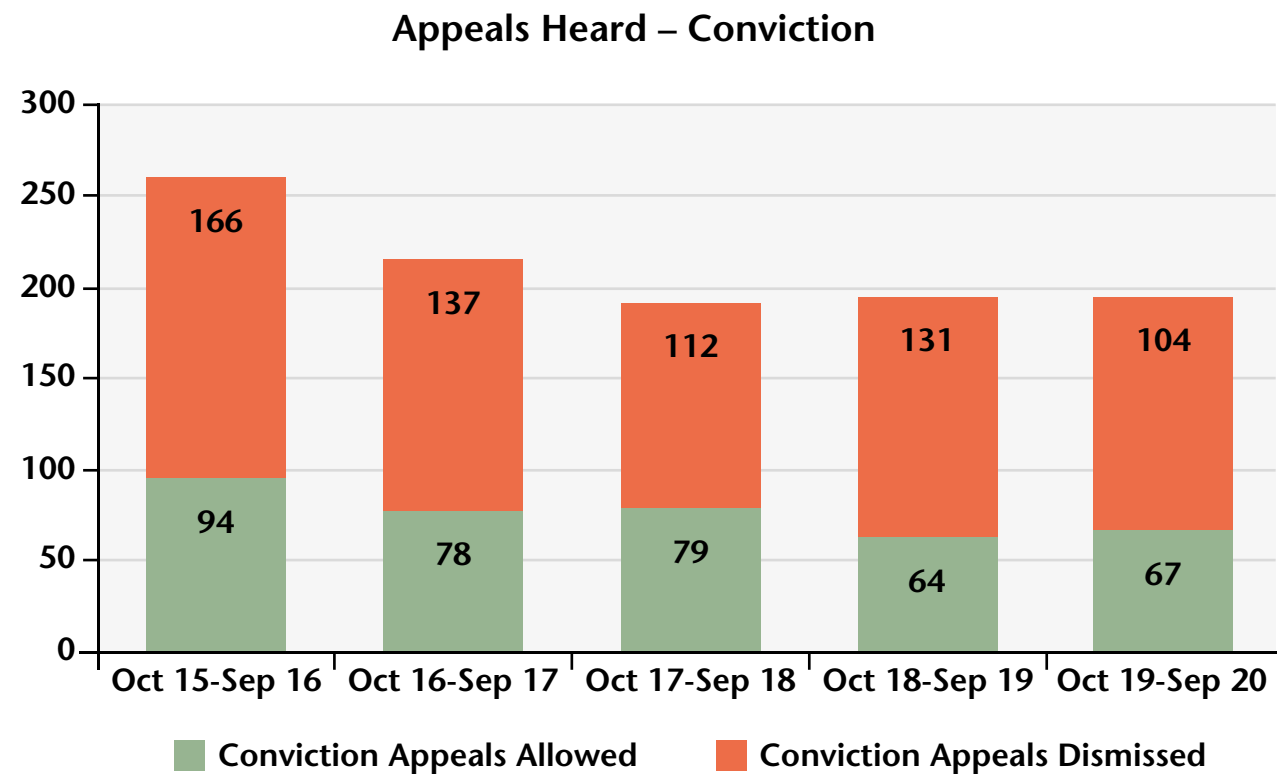
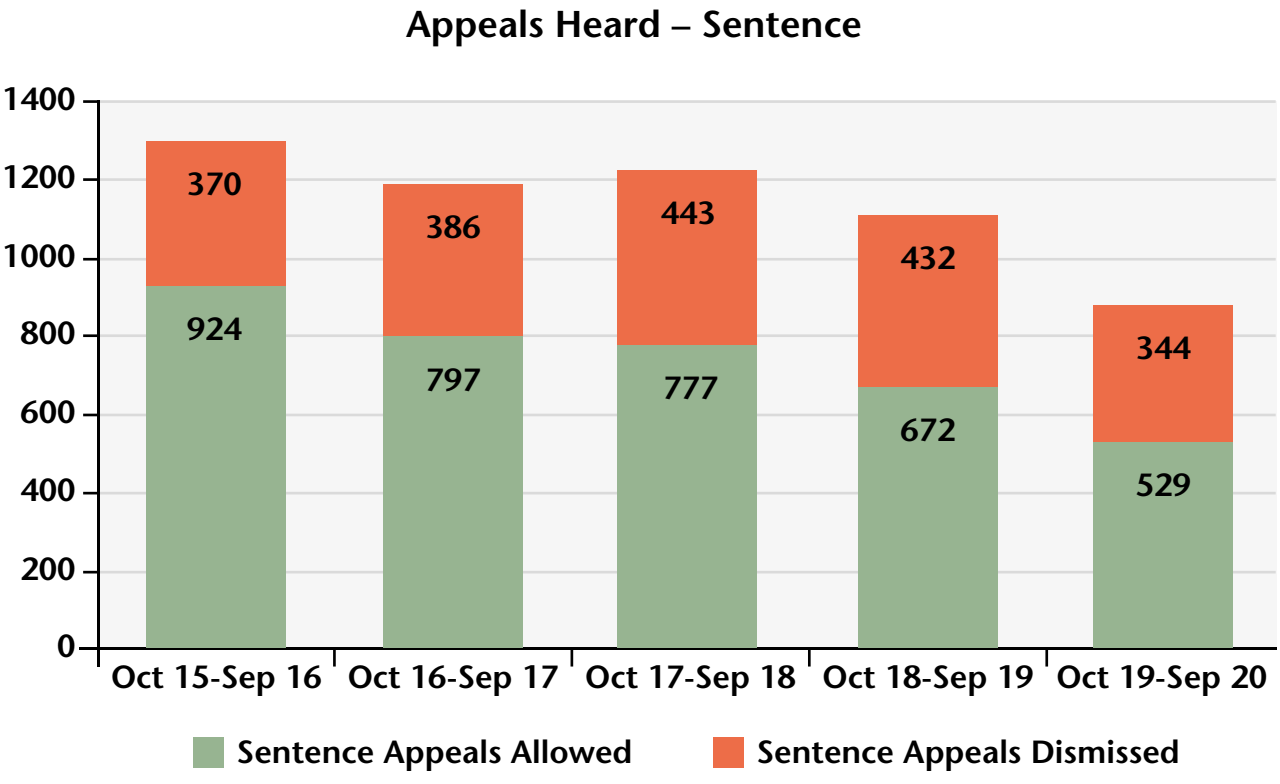
1000
800
600
400
200
0
160
747
82
685
83
100
736
84
58
598
73
53
413
44
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Conviction Granted
Conviction Refused
Conviction Referred

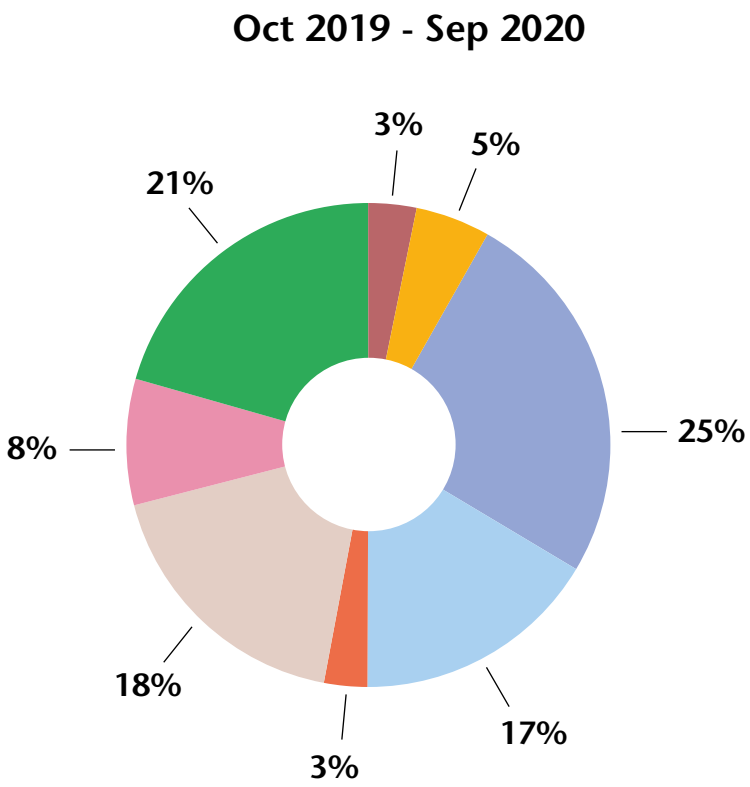

Section 31's – Sentence Applications Dealth With
3000
2500
2000
1500
1000
500
0
273
1774
647
168
1823
668
163
1978
626
171
1852
631
127
1385
429
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Sentence Granted
Sentence Refused
Sentence Referred

Annex D


Appeals Heard – Conviction
300
250
200
150
100
50
0
166
137
112
131
104
94
78
79
64
67
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Conviction Appeals Allowed
Conviction Appeals Dismissed

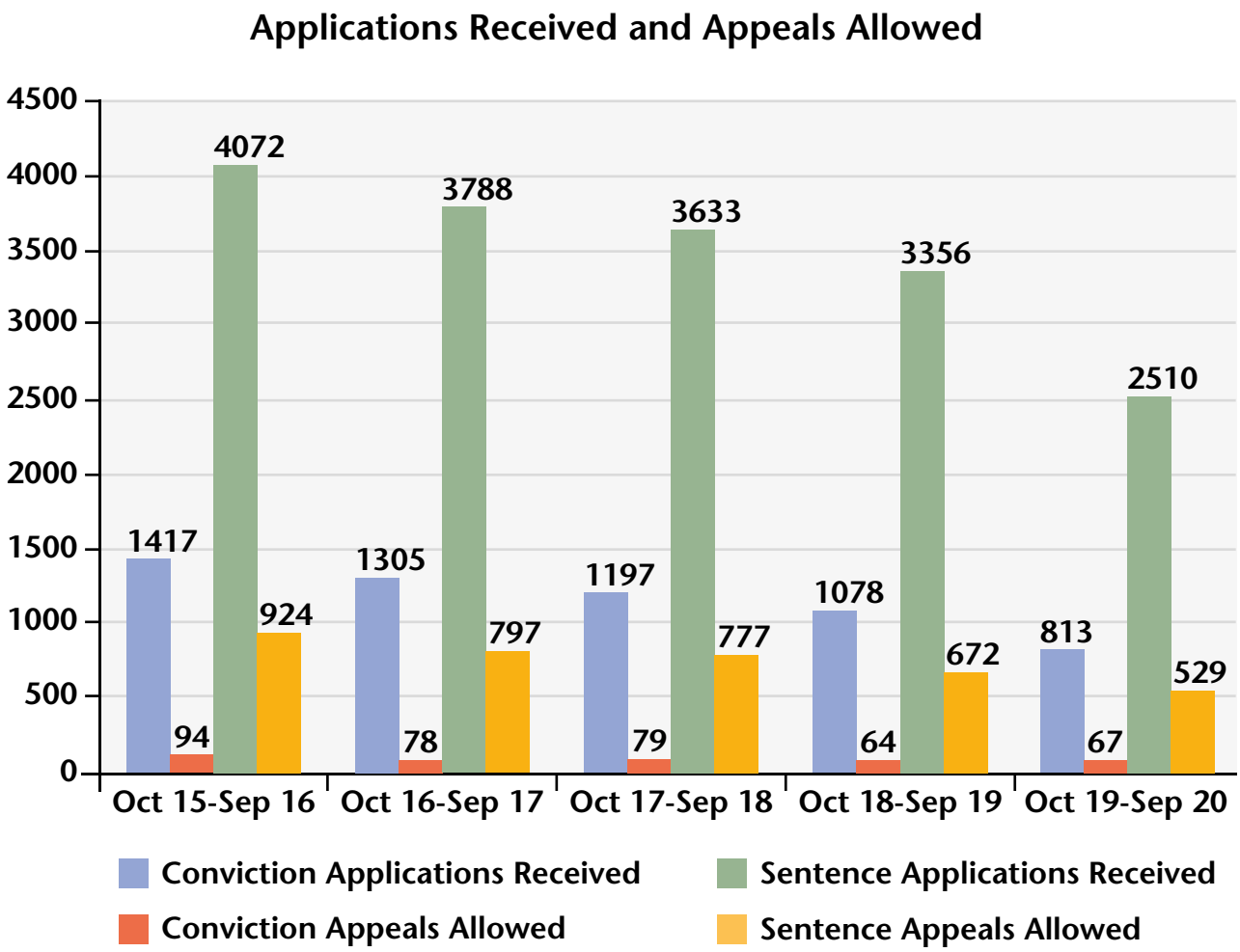

Appeals Heard – Sentence
1400
1200
1000
800
600
400
200
0
370
386
443
432
344
924
797
777
672
529
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Sentence Appeals Allowed
Sentence Appeals Dismissed

Annex E

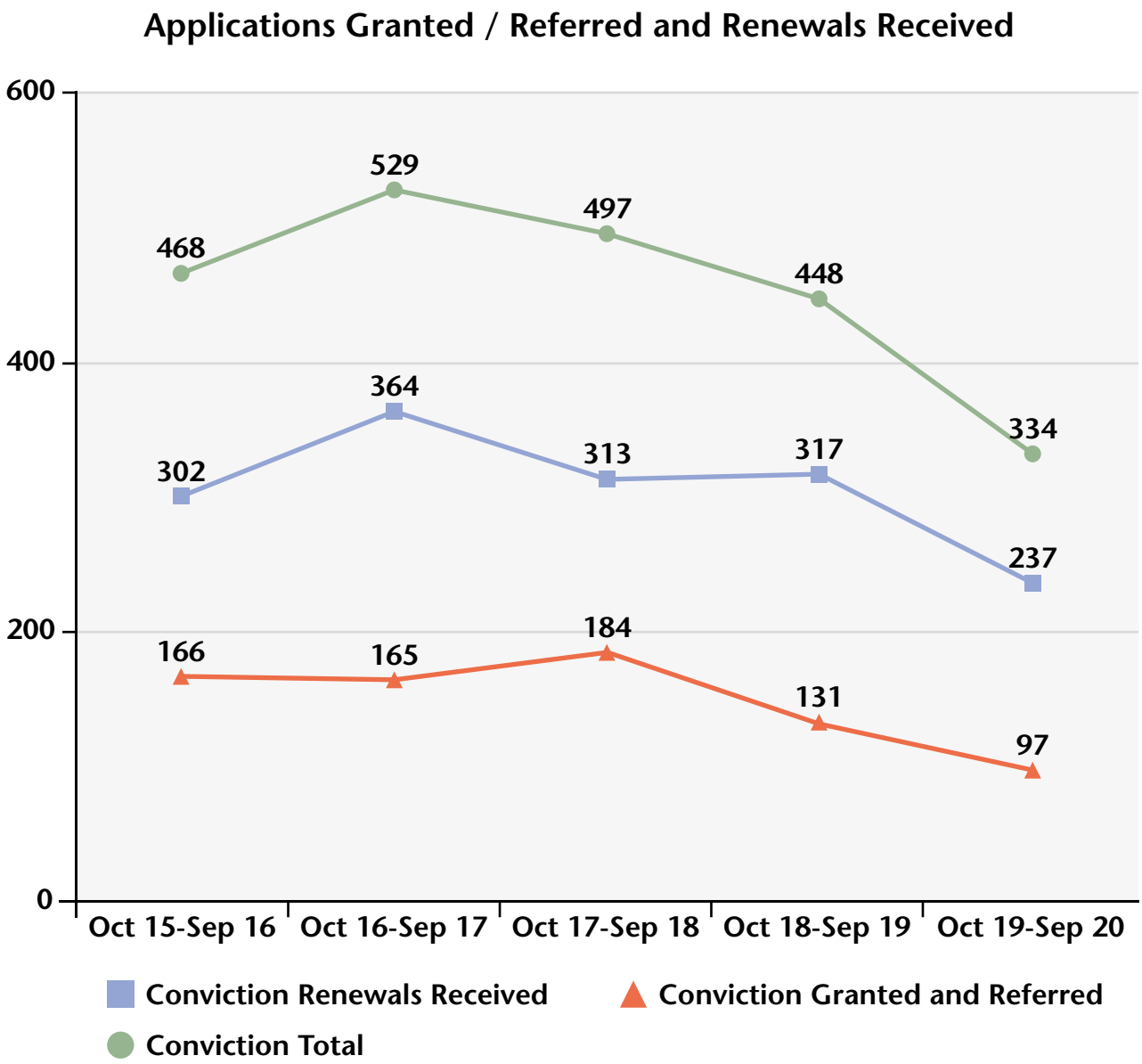


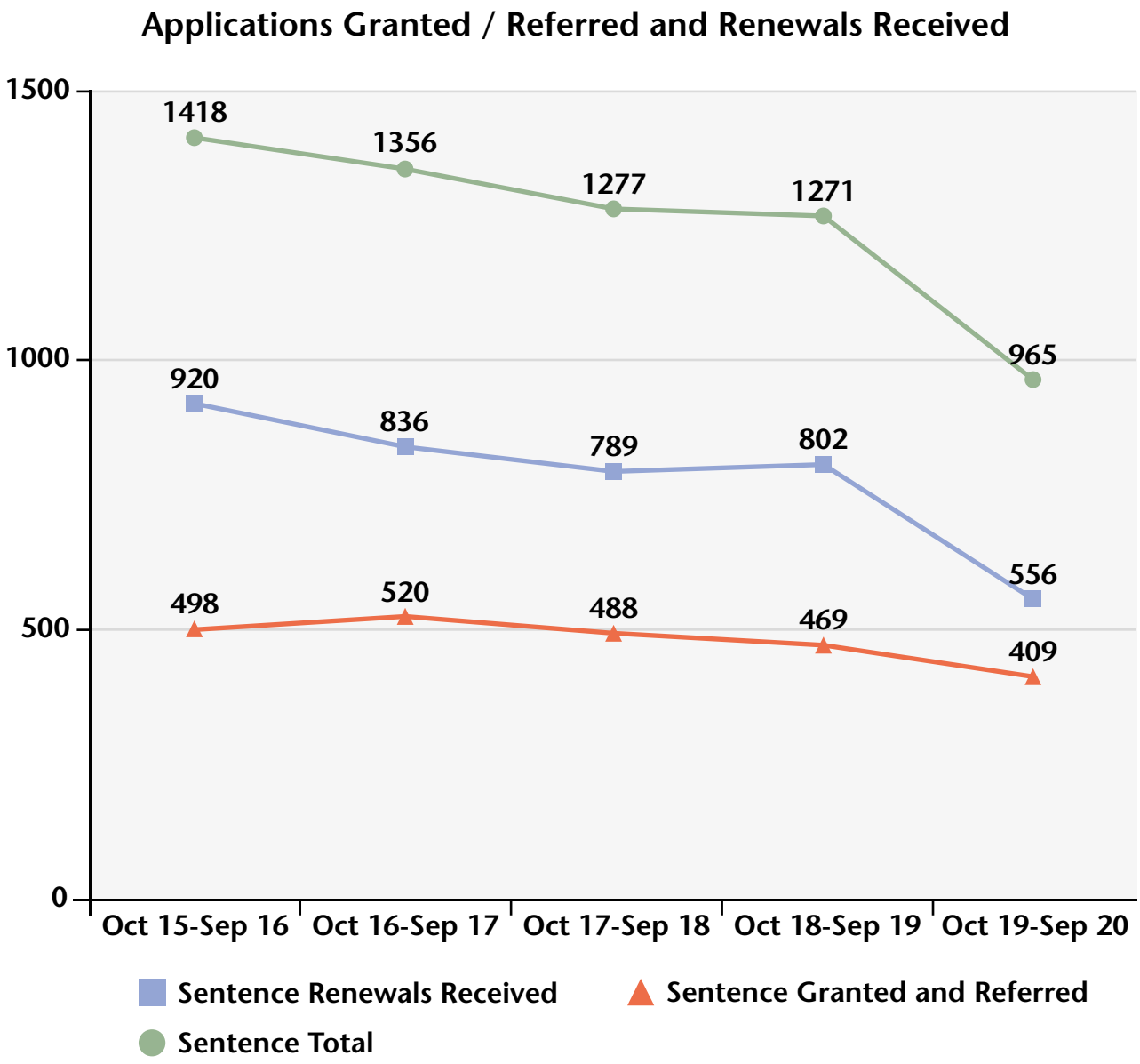
- Conviction Appeals Allowed - 67
- Conviction Renewals Granted - 60
- Conviction Appeals Dismissed - 104
- Conviction Renewals Refused - 377
- Sentence Appeals Allowed - 529
- Sentence Renewals Granted - 176
- Sentence Appeals Dismissed - 344
- Sentence Renewals Refused - 429

Annex F

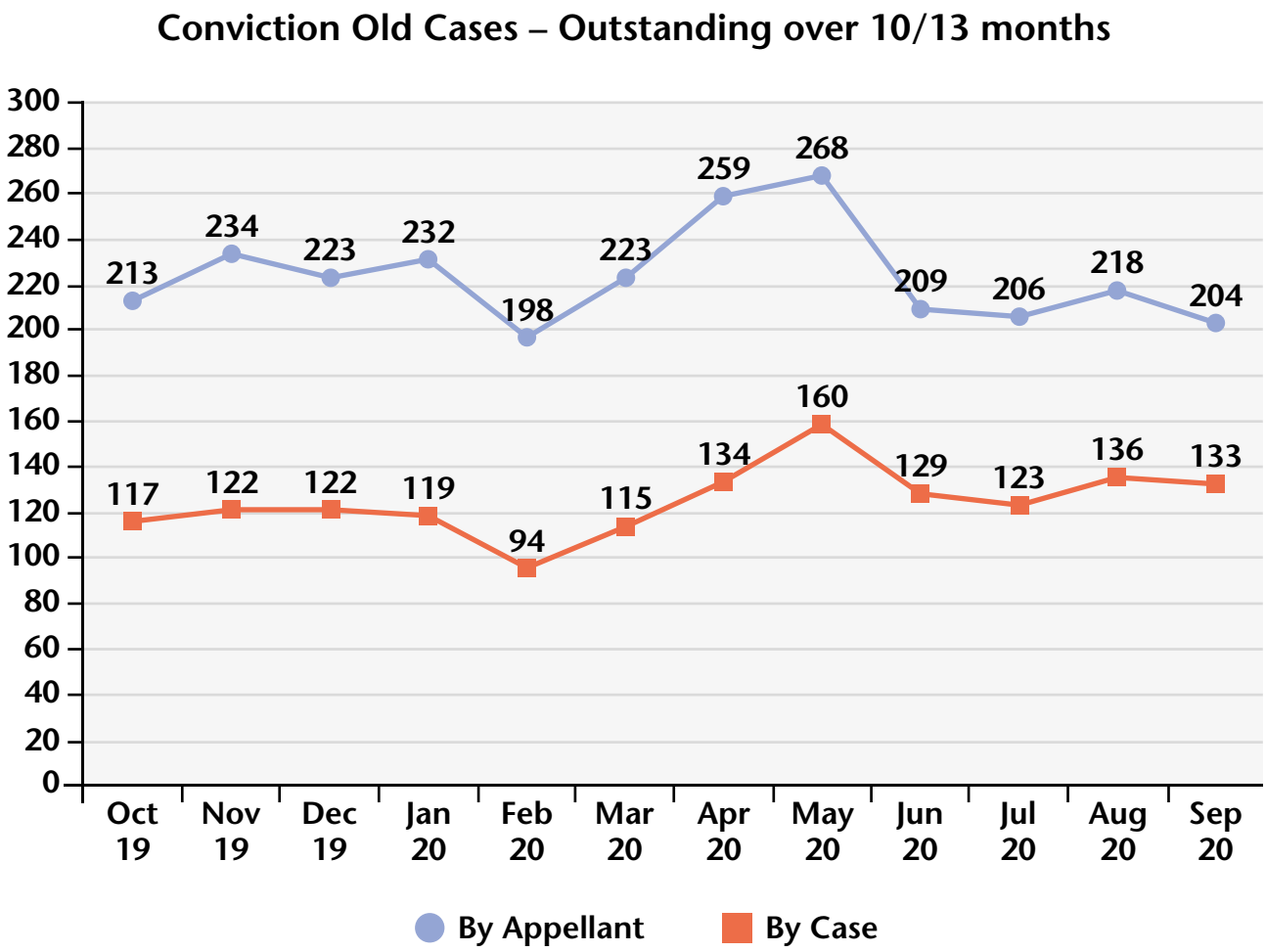

Applications Received and Appeals Allowed
4500
4000
3500
3000
2500
2000
1500
1000
500
0
1417
94
4072
924
1305
78
3788
797
1197
79
3633
777
1078
64
3356
672
813
67
2510
529
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Conviction Applications Received
Sentence Applications Received
Conviction Appeals Allowed
Sentence Appeals Allowed

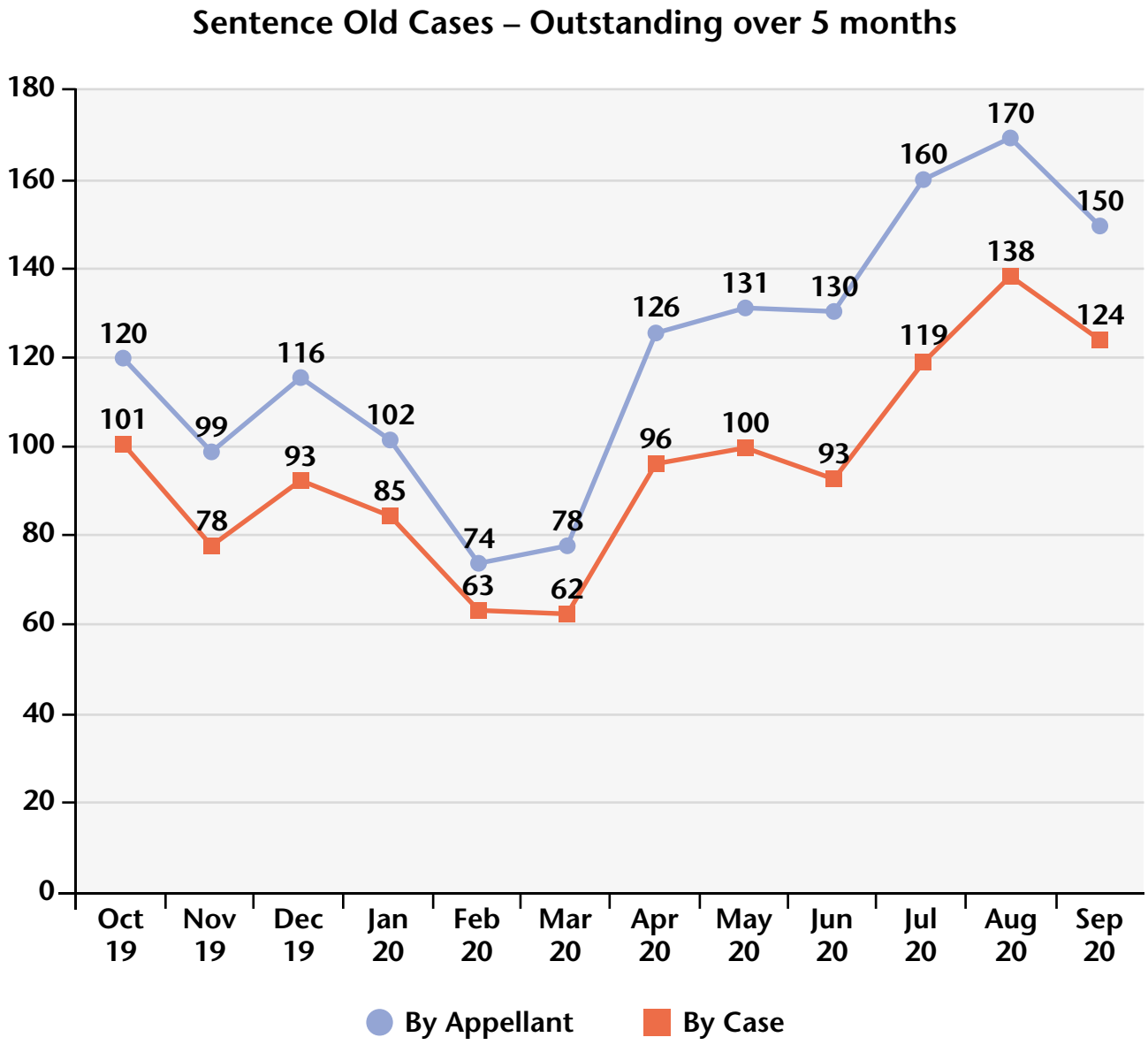
Annex G


Applications Granted / Referred and Renewals Received
600
400
200
0
529
497
468
448
334
364
313
317
302
237
184
166
165
131
97
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Conviction Renewals Received
Conviction Granted and Referred
Conviction Total


Applications Granted / Referred and Renewals Received
1500
1000
500
0
1418
1356
1277
1271
965
920
836
789
802
556
498
520
488
469
409
Oct 15-Sep 16
Oct 16-Sep 17
Oct 17-Sep 18
Oct 18-Sep 19
Oct 19-Sep 20
Sentence Renewals Received
Sentence Granted and Referred
Sentence Total

Annex H


Conviction Old Cases – Outstanding over 10/13 months
300
280
260
240
220
200
180
160
140
120
100
80
60
40
20
0
213
234
223
232
198
223
259
268
209
206
218
204
117
122
122
119
94
115
134
160
129
123
136
133
Oct 19
Nov 19
Dec 19
Jan 20
Feb 20
Mar 20
Apr 20
May 20
Jun 20
Jul 20
Aug 20
Sep 20
By Appellant
By Case


Sentence Old Cases – Outstanding over 5 months
180
160
140
120
100
80
60
40
20
0
120
99
116
102
74
78
126
131
130
160
170
150
101
78
93
85
63
62
96
100
93
119
138
124
Oct 19
Nov 19
Dec 19
Jan 20
Feb 20
Mar 20
Apr 20
May 20
Jun 20
Jul 20
Aug 20
Sep 20
By Appellant
By Case