In the Court of Appeal (Criminal Division)

2018 - 19

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Summary and Statistics

Introduction:

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

I write this piece as fourteen happy years as a Judge of the Court of Appeal draw to a close, some six of those as Vice President of the Criminal Division of the Court of Appeal. Reflecting upon my time on the Court, it is only right that I pay tribute to the Judges, and the staff of the Criminal Appeal Office. The workload of the Court is extremely heavy with over 4,000 applications or appeals received each year, including a large proportion submitted by litigants in person.

One development that will hopefully alleviate some of the pressures both in the Court and elsewhere within the system is the enactment of the Sentencing (Pre-consolidation Amendments) Bill, which is currently going through Parliament. This will pave the way for the enactment of the Sentencing Code, the culmination of several years of painstaking work by the Law Commission. The Code will provide clarity and structure to the corpus of sentencing law, which is currently labyrinthine and tends to cause significant difficulty for sentencing and appellate courts alike. I look forward to the progress of the relevant legislation through Parliament and anticipate with interest its undoubted positive effect.

I would also like to thank the Registrar, Alix Beldam, for her support and hard work in facilitating the work of the Court of Appeal (Criminal Division). It is through her skill and leadership that the Court continues to provide a high quality service for the public, whom we are here to serve.

I finally want to wish my successor, Lord Justice Fulford, the very best in his new role as Vice President of the Criminal Division of the Court of Appeal. His views on modernisation and digitisation will contribute enormously to the administration of justice. I am sure that he will take up the mantle with his customary panache, thoughtfulness, and focus, and will certainly have left a positive impression when his tenure comes to an end.

Lady Justice Hallett

Vice President of the Court of Appeal (Criminal Division)

Overview of the Year

Master Beldam, Registrar of Criminal Appeals

It has been a year of change at the Court of Appeal Criminal Division ("CACD"), in relation to personnel, development of the law, and technology.

The administrative processes employed by the Court must, as ever, adapt to meet modern requirements. Our IT department is to be congratulated on completing the monumental task of upgrading our in-house database and implementing the change to the new system smoothly with minimal disruption. Work has also been undertaken to develop digital case bundles for the judiciary, and it is anticipated that the judiciary will, in the near future, be able to directly access digital evidence files such as that captured by CCTV and body-worn police cameras.

As in previous years, over the previous 12 months the Criminal Appeal Office ("CAO") has received a large number of applications from litigants in person. Such applications often require additional preparation by the CAO to ensure that they can properly be considered by the single Judge and full Court.

Applications from litigants in person who have been deemed unfit to be tried at the Crown Court, pursuant to section 4 Criminal Procedure (Insanity) Act 1964, have caused particular difficulty. In July, the Court in **R v. Roberts [2019] EWCA Crim 1270** examined and provided guidance as to the practice and procedure to be adopted by the CAO when faced with such applications.

The Court continues to enjoy a strong relationship with the Criminal Cases Review Commission (CCRC). Working in conjunction with the Commission, the CAO has developed an appeal notice based upon the principles of "Easy Read", a method of presenting written information to make it easier to understand for people with difficulty reading. Directed investigations under section 23A Criminal Appeal Act 1968 into allegations of jury impropriety depend upon the CCRC and no one can ever fail to be impressed by the thoroughness and impartiality of their investigations.

In June 2019, Sir Brian Leveson retired as President of the Queen' Bench Division, a role that he had held with distinction since June 2013. He had served as Head of Criminal Justice since October 2017. In October 2019, Baroness Hallett (as she is

now) retired as Vice-President of the Criminal Division. She had served in that role since 2013. Each had played a towering role in the life of the Court, and it is not possible to summarise adequately their contribution to the administration of justice in England and Wales.

I look forward to continuing to work with Dame Victoria Sharp in her role as President of the Queen's Bench Division, and Lord Justice Fulford, appointed in October 2019 as the new Vice-President of the Criminal Division.

On a personal note, I am grateful, as ever, for the support of Judges who sit in CACD and the staff of the CAO and I would like to acknowledge the hard work and dedication of all who are involved in the work of the CACD. I look forward to working closely with the Senior Judiciary and the Senior Legal Managers to make sure that the CACD continues to be able to deal with its heavy workload both efficiently and justly.

Alix Beldam
Registrar of Criminal Appeals

Cases of Note – Criminal Law

Following guidance from the senior judges of the Court, 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 there follows a selection of cases of note.

Jury deliberations

R v. Woodward and Others [2019] EWCA Crim 1002

The Court (Simon LJ. Jay J. and HHJ Picton) considered some of the issues that might arise when a jury separates during the course of deliberating on their verdicts to allow jurors to take pre-booked holidays. The trial was initially estimated to last 8-10 weeks and jurors were selected on that basis. There were delays attributable to numerous causes, including illness and unavailability of parties. As a result of the delays the case overran into a period where some jurors had pre-booked holidays. The trial was, therefore, adjourned twice for three-week periods to allow jurors to take those holidays.

In dismissing the appeals the Court said:

"*There can be no general rule which determines that a particular length of time that a jury have been dispersed in the course of its deliberations necessarily renders a trial unfair or otherwise calls into question the safety of a conviction. The issue involves a fact sensitive analysis, as the court recognised in R v. A, Heppenstall and Potter* [2007] EWCA Crim 2485 at [32].

Nevertheless, the following matters may be material, and are material to the present appeal.

First, there is the quality of the summing-up. If there are deficiencies in the summing-up, then this may be material, see for example, A, Heppenstall and Potter [33]. Conversely, while there is a risk that the length of dispersal will deprive the jury of a fair opportunity to assess the evidence, that risk will be reduced by a careful and meticulous summing-up, see R v. Kellard, Dwyer and Wright [1995] 2 Cr App R. 134 at p.150A-C and A, Heppenstall and Potter [33] and [42]. In the present case, the summing up was clear and provided considerable assistance to the jury.

Second, it may be necessary to consider the extent and quality of the material that the jury has available on retirement, and the extent to which this will enable them to focus on the issues and the evidence in relation to those issues. As we have noted, in addition to the written directions and the routes to verdicts, the jury in the present case had a considerable amount of written and photographic material. We would note that the greater the quantity of documents available to a jury in retirement the longer the deliberations may take, as the jury works through the documentation.

Third, the gap in the jury's consideration between the summing up and the final verdicts will be relevant to the fairness of the process. The longer the period, the greater the risk that the jury will be unable to remember the evidence summarised in the summing up and the points made by the prosecution and defence. We recognise that the cumulative periods during which the jury was not considering the verdicts in the present case was considerable and unsatisfactory.

Fourth, it may be relevant that an application was made to discharge the jury on the basis of the time in retirement at the time. In the present case there was an application. This is not a case in which the grounds of appeal were not foreshadowed by arguments made and concerns expressed at the time. On the other hand, judges must be prepared to make robust case management decisions and expect such decisions to be upheld on any appeal.

Fifth, the existence of indications which tend to establish that, by reason of the length of the trial and the retirement, the jury were unable to discharge their functions. In other words, are there indications that the jury were alert and attentive to their task during the trial and (to the extent this can be discerned) during retirement on the one hand; or discontented and distracted on the other? Is there material which shows that the jury were in difficulties in discharging their task following retirement? In the present case there are no such indications. On the contrary it is clear that the jury were taking their time to work through the charges and the evidence in relation to ten defendants facing different charges before reaching their verdicts. The interruption to this process by discharging them while the defendants were in their charge might well have left them with a justifiable sense of grievance. This would be particularly so if they had

already reached verdicts in relation to some of the defendants or on some of the counts.

Sixth, the verdicts themselves will be relevant. Do they suggest, for example, that the jury were assessing the evidence in relation to each defendant or were unable to do so? Here, the different verdicts on different charges in relation to ten defendants suggest that the jury had focussed on their task despite the interruptions".

Abuse of process: fair trial

R v. PR [2019] EWCA Crim 1225

The Court (Fulford LJ. May and Swift JJ) considered whether the trial judge was right to allow the case to proceed when evidence gathered by the police in 2002, relevant to the appellant's defence, was destroyed by water damage and was unavailable for the trial in 2018. The appellant argued that the judge wrongly refused his application, which was renewed following the Prosecution's evidence, to stay the proceedings as an abuse of process.

In dismissing the appeal, the Court said:

"*It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the Prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the Prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but*

when this happens the effect may be to put the defendant closer to the position of many accused whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested.

In a case such as the present, the question of whether the defendant can receive a fair trial when relevant material has been accidentally destroyed will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to the defendant. A careful judicial direction, in many instances, will operate to ensure the integrity of the proceedings. This general statement is not meant to preclude the possibility that a fair trial may sometimes be unachievable when relevant material cannot be deployed (see, for instance, R v Anver Daud Sheikh [2006] EWCA Crim 2625). But we stress that the strength and the utility of the judge's direction is that it focuses the jury's attention on the critical issues that they need to have in mind.

The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the Prosecution had been able to prove, so that they are sure, that he or she is guilty. The judge gave an impeccable direction to this effect, of which there is no criticism by Mr Cotter"

Fresh evidence – long extension of time

R v. Jones [2018] EWCA Crim 2816

The appellant was convicted in 2008 of sexual activity by a care worker with a person with a mental disability contrary to s.38 of the Sexual Offences Act 2003. His out of time appeal against conviction relied upon fresh expert psychological evidence which provided information in relation to the appellant's learning difficulties. These issues were not known at the time of trial but had an impact on his presentation when giving evidence.

The Court (Simon LJ, Carr J and HHJ Picton), in allowing the appeal, concluded:

"*Taking all these matters into account, and in, what we would wish to emphasise are the highly unusual circumstances of this case, we have concluded that the appellant's conviction cannot be regarded as safe. However, we would add that the circumstances in which new medical and psychological evidence can be successfully deployed many years after a trial in order to challenge a conviction are likely to be very rare*".

Defences: the scope of the "householder defence" in section 76 of the Criminal Justice and Immigration Act 2008

R. v Cheeseman (Steven) [2019] EWCA Crim 149

The issue for the Court (LCJ, Cheema-Grubb and Martin Spencer JJ) was whether the judge was correct to rule that the householder defence is not available in cases where the injured person had entered a building lawfully but thereafter become a trespasser.

In allowing the appeal, the Court agreed with the appellant's submissions that s.76 (8A)(d) of the Criminal Justice and Immigration Act 2008 was not concerned only with cases in which a defendant believes that someone has entered as a trespasser (intruder cases). In a case where the injured person was in the building concerned at the time of the incident, the question was whether the defendant believed that he or she was in the building as a trespasser. In most cases where the householder defence is engaged the question whether the defendant believed the person concerned to be in the building as a trespasser will cause no difficulty. In other cases it would be unnecessary for a jury to wrestle with questions of property law and the niceties of whether someone who started as an invitee became a trespasser. The defence is not directly concerned with the question whether someone was or was not a trespasser but rather the defendant's belief. In the instant case, the question was whether the defendant believed that the person concerned had no right or business to be in the building, or was there without authority, at the time of the violent incident.

Gross negligence manslaughter

R v. Kuddus [2019] EWCA Crim 837

In this case, the appellant was the sole director and owner of a takeaway business which had provided food to a customer containing peanut proteins despite the fact that her allergies had been set out in the comments section when the order was placed via a third party website. The Court (PQBD, Stuart-Smith and Jeremy Baker JJ.) considered whether, antecedent to reasonable foreseeability of a serious and obvious risk of death, the Prosecution must prove, in relation to the particular victim concerned, that there was, in fact, a serious and obvious risk of death which itself would depend on the particular circumstances of the victim.

The Court summarised the principles of the offence of gross negligence manslaughter and referred to the cases of *R v Honey Rose* [2017] EWCA Crim 1168 and *R v Zaman* [2017] EWCA Crim 1783. The Court concluded that to focus on the particular circumstances of this specific victim is to misunderstand what has to be established to prove gross negligence manslaughter. There is no requirement that there had to be a serious and obvious risk of death for the specific victim who dies. If it is in issue, the question to be answered is whether the defendants' breach gave rise (as an objective fact) to a serious and obvious risk of death to the class of people to whom the defendant owed a duty. Thus, in the present case, where the duty was to take reasonable steps not to injure members of the class of nut allergy sufferers (of whom the deceased was one), the question to be answered would be whether any proved breach by the appellant would give rise to a serious and obvious risk of death for members of that class.

Extradition (failure to surrender to bail)

R. v Shepherd [2019] EWCA Crim 1062

The Court (PQBD, Jeremy Baker and Thornton JJ), having dismissed the appellant's conviction appeal considered his plea to the offence of failure to surrender to bail. The relevant provisions were set out in Section 151A of the Extradition Act 2003. As the extradition request made to the authorities in Georgia had not explicitly requested

extradition for the offence and the authorities in Georgia had therefore not consented to the UK authorities pursuing the appellant for the offence, his conviction was a nullity.

Diminished responsibility

R. v Hussain [2019] EWCA Crim 666

The Court (Hallett LJ, Russell and Goss JJ) said that neither *R v Brennan* [2014] EWCA Crim 2387 nor *R. v Golds* [2016] UKSC 61, changed the law in relation to diminished responsibility. In refusing the application, the Court confirmed that the decision as to whether a defendant falls within the provisions of section 2 of the Homicide Act 1957 is for the jury to determine, not the doctors. In this case, the trial judge had not erred in failing to withdraw the case from the jury where all of the doctors agreed that the appellant was suffering from diminished responsibility. The Court said that reliance should not be placed in the future on judgments predating *Golds* on this issue.

Cases of Note- Procedure

Contempt of Court

R.v.Yaxley-Lennon (aka. Tommy Robinson) [2018] EWCA Crim 1856

In quashing a finding of contempt due to the "*fundamentally flawed process*" undertaken by the judge at Leeds Crown Court, the Court (LCJ. Turner and McGowan JJ.), provided guidance on the law of contempt and the correct procedure to be followed by the courts when dealing with an alleged contempt of court.

The Court said that:

"*The law of contempt exists to protect the course of proceedings from interference, to safeguard the fairness and integrity of proceedings and to ensure that orders of the court are obeyed. It comes in many forms, both statutory and under the common law. Courts may themselves initiate proceedings for contempt in some circumstances when it is necessary to do so to protect the interests of justice in extant proceedings before that court. But the more general practice is for the Attorney General to be invited to initiate proceedings to safeguard the public course of justice. The enforcement of orders made in private proceedings is generally a matter for the parties*."

The Court set out the different ways in which contempt of court may be committed and the various ways the proceedings may be dealt with.

Contempt proceedings initiated by the court

A judge *may* deal with contempt in the face of the court and contempt which amounts to an interference with the proceedings that the judge is conducting. The Court observed that, "*Its purpose is to equip the court with the means to protect its processes and penalise those who seek to impede or subvert them… the court is empowered to act summarily and, if necessary, impose a term of immediate imprisonment*."

However, the Court observed that "*this jurisdiction should be exercised sparingly*."

Even if a court proceeds summarily, the Court observed that it may be wise, "*having sorted out the immediate concern, to adjourn the contempt hearing to a later date*

and sometimes before a different judge" and in most cases "*concerning an interference with the public course of justice, the judge will refer the matter to the Attorney General*."

Rule 48 of the Criminal Procedure Rules provides safeguards to ensure that procedural fairness is met in contempt proceedings. The Rule ensures, so far as possible, that the alleged contemnor is told what the conduct is alleged to be and has time to reflect and obtain advice before the court convenes to either enquire into the conduct or postpone it. Should the matter be postponed, the Rule provides further direction as to the management of postponement. Should the court deal with alleged contempt there and then, the Rule provides the procedure to be followed.

Contempt under section 1 and 2 of the Contempt of Court Act 1981

These sections set out the "strict liability" rule which, regardless of intent, means certain conduct may be treated as contempt. It applies only to publications addressed to the public, or sections thereof, which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. As per section 7 of the Act, proceedings in this regard can only be instituted with the consent of the Attorney General or by the court having jurisdiction.

The Court said that in these circumstances, "*the almost invariable course would be for the matter to be referred to the Attorney General*".

Section 41 of the Criminal Justice Act 1925

Section 41 Criminal Justice Act 1925 makes it a criminal offence punishable with a fine, to take or make any picture in court (whether criminal or civil).

Whilst this behaviour can be charged as a criminal offence, it can also be dealt with as a contempt, either by way of the summary procedure set out above and in accordance with Rule 48, or application can be made to the High Court by the Attorney General.

Postponement orders under section 4(2) of the Contempt of Court Act 1981

Section 4 of the 1981 Act permits a "*fair and accurate report of legal proceedings held in public, to be published contemporaneously and in good faith*."

However, the court may postpone the publication of any such report where it appears "*necessary for avoiding a substantial risk of prejudice to the administration of justice*", as per subsection (2).

Breach of a postponement order may be a contempt of court, which can be dealt with in one of the ways set out above.

Authorities

The Court provided a summary of the Court of Appeal authorities which provide guidance as to the balance to be struck where the rules (which existed in family and civil jurisdictions before being introduced into the Criminal Procedure Rules) in relation to contempt have not been strictly followed.

Citing with approval the case of *M. v. P. (Contempt of Court: Committal Order)* [1993] Fam. 167, Lord Woolf MR in *Nicholls v Nicholls* [1997] 1 W.L.R. 314 observed at page 327:

"*The guidance which can be provided for future cases is as follows.*

(1) As committal orders involve the liberty of the subject it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed.

(2) As long as the contemnor had a fair trial and the order has been made on valid grounds the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except in so far as the interests of justice require this to be done.

(3) Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended.

(4) When considering whether to set aside the order, the court should have regard to the interests of any other party and the need to uphold the reputation of the justice system.

(5) If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its power to order a new trial unless there are circumstances which indicate that it would not be just to do so."

The Court observed that, "*It is this guidance which has been adopted and applied by the courts consistently over the last twenty years and, most recently, in Fort Locks Self Storage Limited v William Deakin* [2017] EWCA Civ 404."

In *West* [2015] 1 WLR 109, Sir Brian Leveson P provided "*an emphatic reminder of the particular importance of following the correct procedure in cases of alleged contempt*".

However, the Court was "*satisfied that the court in West did not intend to herald a departure from the approach set out in Nicholls*."

In the instant case, the Court was persuaded by the argument that the judge at Leeds Crown Court was wrong to proceed to deal with the contempt as quickly as he did. The Court said that:

"*Such haste gave rise to a real risk that procedural safeguards would be overlooked, the nature of the contempt alleged would remain inadequately scrutinised and that points of significant mitigation would be missed. Those risks materialised*."

Ancillary matters

The formal record should record a finding of contempt not a conviction for a criminal offence. This error, whilst of itself not fatal to the finding, does have serious consequences of the contemnor.

The Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2016, is payable only in the event of the passing of a "sentence of imprisonment" and not upon a committal for contempt.

Before moving on to deal with sentence, the Court observed that "*there is much material readily to hand to enable all concerned to navigate these unfamiliar waters*

and whenever the circumstances allow the short amount of time needed for review of that material, should be taken"

Assessing the appropriate level of punishment

The maximum sentence available for the breach of a section 4(2) order is two years' imprisonment.

In *R v Montgomery* [1995] 2 Cr. App. R. 23, the Court of Appeal at paragraphs 28D to 29A, laid down guidance in respect of the matters likely to influence the level of punishment appropriate in cases of contempt of court.

The Court stated that:

"*More generally, although there are no authoritative statutory guidelines relating to punishment for contempt because such punishment does not relate to criminal proceedings, we would, by analogy, draw specific attention to the need to give consideration to the twin elements of culpability and harm as identified in the Sentencing Council Guideline of 2004 relating to "Overarching Principles: Seriousness*.""

Jurisdiction

R v. Ford [2018] EWCA Crim 1751

The Court, (PQBD. William Davis J. and Sir Wyn Williams), considered whether the Youth Court had jurisdiction to deal with the case of the applicant, who had been 17 years old when he first appeared before the Youth Court; but had turned 18 by the time of the adjourned hearing.

The Court said that the question as to whether the Youth Court had acted without jurisdiction entirely depended on the "*effect*" of the first appearance made at the Youth Court on 10 July 2017 when he was still aged 17.

By reference to section 24 of the Magistrates' Court Act 1980, somebody under the age of 18 who "*appears or is brought before a Magistrates' Court*" in relation to an indictable offence shall be tried summarily (subject to section 51A Crime and Disorder Act 1998).

The crucial words were "*appears or is brought before*". The Court cited *R v Islington Juvenile Court ex parte Daley* (1992) 75 Cr App R 280, as authority for the phrase "*appears or is brought before a Magistrates' Court*" as being a reference to the occasion on which the court makes its decision as to the mode of trial.

In the instant case that decision was not made at the first hearing but rather was adjourned to the next date, by which time the applicant was an adult. As he was charged with an indictable only offence, the only route available to the court was to send him to the Crown Court. The Youth Court had no jurisdiction to take his plea.

Therefore, the Court said that, "*Proceedings which followed the purported plea were invalid. The sentence imposed by the Crown Court was invalid. It follows that it is not for this Court to consider the substance of the appeal against sentence because there is no valid sentence against which an appeal can be mounted*".

Indictment

R v. Johnson [2018] EWCA Crim 2485

The Court, (PQBD. Phillips and Edis JJ.), considered the unconnected cases of two applicants, in respect of whom guilty verdicts had been returned on indictments upon which they had not been arraigned. The issue for the Court was whether that procedural irregularity required the Court to quash the convictions on the basis that the indictments were a nullity.

Following a review of the strict approach to the validity of indictments taken in the House of Lords in *R v Clarke and McDaid* [2008] UKHL 8; [2008] 1 WLR 338 and followed by *R v Leeks* [2009] EWCA Crim 1612; [2010] 1 Cr. App. R. 5, in light of the revised section 2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the Court concluded:

"*In our judgment, in each of these cases, the indictment, the trial process and the convictions which resulted were all valid and the appeals are dismissed. The reasoning of this court in Leeks was firmly based upon the strict approach taken by the House of Lords in Clarke and McDaid to indictments and their validity, but that decision and its approach was fully reversed by revision of s. 2 of the 1933 Act in 2009. It is clear, therefore, that Leeks no longer represents the law*."

However, the Court emphasised that it remained the duty of both parties to ensure that the indictment was properly considered throughout the course of a case.

Acquittal agreement communicated electronically: Section 58 Criminal Justice Act 2003

R v. PY [2019] EWCA Crim 17

The Court, (LCJ. Cheema-Grubb and Goose JJ.), considered the question of whether the Prosecution had satisfied the obligation in section 58(8) of the Criminal Justice Act 2003 to inform the court that the respondent will be acquitted of the offence in the event that leave to appeal is not obtained or the appeal is abandoned. The Prosecution had notified the court of its intention to appeal and gave the acquittal agreement by email. The question arose whether that satisfied the statutory scheme, or whether the steps specified in the statutory scheme must take place in open court.

The Court said:

"*Section 58 of the 2003 Act does not explicitly specify any mechanism for informing the court (or requesting an adjournment). Does it implicitly require each of the steps we have identified to be taken orally in court? Our conclusion is that it does not.*"

The practice of the courts often involved judgments and rulings that were circulated in advance and handed down rather than read in open court. The statute was concerned with ensuring that the correct steps were taken and taken within the time limits, not how the steps were taken.

The Court said that the "*conclusion sits comfortably with the modern trend to use electronic means of communication in connection with proceedings when it is convenient to do so*."

To do so did not offend the principle of open justice.

In the substantive matter the Court was concerned with the defence within section 10(3) of the Dangerous Dogs Act 1991, which reads: "*For the purposes of this Act a dog shall be regarded as dangerously out of control on any occasion on which there are grounds for reasonable apprehension that it will injure any person or assistance*

dog, whether or not it actually does so, but references to a dog injuring a person or an assistance dog or there being grounds for reasonable apprehension that it will do so do not include references to any case in which the dog is being used for a lawful purpose by a constable or a person in the service of the Crown."

The question for the Court was whether, at the time of incident, the dog (a police dog being exercised by a police officer) was "*being used for a lawful purpose by a constable*" with the consequence that the incident fell outside the scope of section 3.

In allowing the Prosecution appeal, the Court held that the words "*being used*" should be given their ordinary meaning and the words "*by a constable or a person in the service of the Crown*" suggested a restriction on the purposes for which the dog is being used. The use must be as part of the activities of the police or other Crown body. In the context of a police constable, the use must be part of a policing activity.

Vulnerable defendants, Intermediaries and Service providers

R. v Biddle (Joseph) [2019] EWCA Crim 86

The Court, (Hallett LJ, Carr and Julian Knowles JJ), considered the issue of intermediaries for defendants and whether the trial judge could revisit the issue of whether an intermediary was required for the duration of the trial.

In dismissing the appeal, the Court held that the trial judge had been fully entitled to revisit the issue of whether an intermediary was required for the duration of the trial. He had given full reasons for the decision, which accorded with the principles of the Practice Direction. He had noted that the intermediary was unable to point to any part of the trial, apart from giving evidence, when it would be necessary to communicate with the appellant through an intermediary. The appellant had been represented throughout by a competent advocate, it had been a relatively short trial and the issue was straightforward. The evidence was given by the principal Prosecution witness with the assistance of an intermediary. It followed that the questions had been phrased so that they were easy for her to understand and for the appellant to understand. Breaks were taken as necessary, and there was no suggestion that the appellant had difficulty following and participating in the trial. Accordingly, the case did not come close to one of those very rare cases referred to

by Lord Thomas CJ in *R. v Rashid (Yahya)* [2017] EWCA Crim 2 and endorsed in the Criminal Practice Directions. The judge's change of order had not rendered the conviction unsafe

The case also highlighted the policy decision of the intermediary service provider, Communicourt, to only provide intermediaries in line with their own recommendations. The consequence of which in the instant case was to fail to provide an intermediary at all, once the trial judge had made an order contrary to the intermediary report recommendations that the defendant be assisted by an intermediary throughout.

By way of comment on this point, the Court noted that "*Communicourt's stated policy of only providing an intermediary for the giving of evidence alone if the assessing intermediary so recommends is wrong and should be revisited*."

Applicant in person: found unfit to be tried – section 4 Criminal Procedure (Insanity) Act 1964 – whether able to appeal to CACD

R v. Roberts [2019] EWCA Crim 1270

(Reporting restrictions apply)

The Court (Davis LJ. Warby and Julian Knowles JJ.) provided procedural guidance on how to manage applications to the Criminal Appeal Office by applicants who have been found to be unfit to be tried at the Crown Court.

Please see the Article in this review for full details of this case.

Cases of Note- Sentencing

Unlawfully and maliciously administering a noxious substance

R v Vesyey and Others [2019] EWCA Crim. 1332

These otherwise unconnected cases concerned 'potting', the form of assault that entails throwing urine or faeces, or a combination of the two at a prison officer. The defendant in such cases is often charged with an offence contrary to section 24 of the Offences Against the Person Act 1861 (the '1861 Act'), that is unlawfully and maliciously administering a noxious thing with intent to injure, aggrieve or annoy. One of the questions for the Court was whether urine is capable of being a noxious for the purposes of section 24 of the 1861 Act.

In dismissing the appeal, the Court (Holroyde LJ, Choudhury J and HHJ Field QC) ruled as follows (at 25 and 26):

> *"Skilfully though Mr Rule argued this ground, we are unable to accept his submissions. In each of the cases on which he relied, the relevant substance had in fact been harmful in the sense of being capable of causing injury to health. It is not possible to regard those cases as authority for the proposition that no substance can be considered noxious for this purpose unless it is capable of being injurious to health. In our view the matter is concluded by the decision of this court in Marcus. That decision makes clear that, where a substance is administered in a manner and a quantity which is in fact harmful, and the requisite intent is proved, then the offence will be made out even though the same substance in a less quantity, or administered in a different manner, may not have been harmful… In the passage which we have quoted from page 780G, the court plainly accepted the dictionary definition of 'noxious' which extends to a substance which is 'wholesome'.*
>
> *In our judgment, where an issue arises as to whether a substance is a noxious thing for the purpose of section 24 of the 1861 Act, it will be for the judge to rule as a matter of law whether the substance concerned, in the quantity and*

manner in which it is shown by the evidence to have been administered, could properly be found by the jury to be injurious, hurtful, harmful or unwholesome. If it can be properly so regarded, it will be a matter for the jury whether they are satisfied that it was a noxious thing within that definition."

The Court also made some general observations on offences of this nature (at 41), including that such offences will generally involve high levels of culpability for the following reasons: (i) committed by persons in custody against public servants, (ii) a necessary ingredient of the offence is that the offender intended to 'injure' aggrieve or annoy', (iii) there will in almost all cases be a significant element of planning, (iv) the use of urine or faeces are similar to the use of a weapon, and (v) the repellent and unhygienic nature of the offence shows a desire to humiliate, demean and distress the officer, to inhibit him or her in the proper performance of his or her public duties, and thus to undermine good order and discipline within the prison.

The Court then observed that the need to punish and deter makes it necessary to impose severe punishment. In the judgment of the Court, offences of this nature will generally attract a starting point after trial in the range of two to three years' imprisonment, with offences involving urine falling at the lower end of that range and offences involving faeces at the upper end.

Appropriateness of consecutive sentence - Causing more than one death by dangerous driving during the same incident

R v Chudasama [2018] EWCA Crim. 2867

The applicant pleaded guilty to three offences of causing death by dangerous driving at the Central Criminal Court. HHJ Joseph QC sentenced him to 13 years' imprisonment on each count to run concurrently. The application was referred to the Full Court by the Registrar.

The sentencing judge noted the following aggravating factors: (i) the substantial amount of alcohol consumed by the applicant, (ii) the extremely dangerous manoeuvre in attempting to overtake when he did, (iii) the applicant's excessive speed, (iv) the applicant's failures to give appropriate weight to the testing layout of the road, (v) the presence of vulnerable pedestrians, (vi) the eight lives the applicant put in danger, and

(vii) the applicant's attempt to flee. The judge noted that the authorities indicated that normally all offences arising out of the same facts should be sentenced concurrently, and also that both in the authorities and the guideline, when describing the principle requiring concurrent sentences, the word 'normally' or 'generally' was repeatedly used. The judge ruled that the case of *R v Mannan* [2016] EWCA Crim. 1082 demonstrated that there were circumstances beyond the 'normal' or 'general' in which if there were several victims it was possible for the judge to conclude that consecutive sentences were appropriate. The judge was of the view that the death of the three victims had to be reflected in consecutive sentences, imposing 82 months' on each Count consecutive, comprising a total sentence 20 ½ years' imprisonment. The judge then reduced the sentence by 1 year to reflect the applicant's personal mitigation, and by one third thereafter to reflect the applicant's plea of guilty. Having reached the figure of 13 years' imprisonment, the judge ordered that this should run on each count, concurrently.

The Court (PQBD, Whipple and Cheema-Grubb JJ), in allowing the appeal, ruled that the answer to the question of whether sentences should be concurrent or consecutive was a clear one. Parliament prescribed that the maximum sentence for causing dangerous driving is 14 years' imprisonment and the authorities are clear that where the sentence is imposed for a single act of dangerous driving, concurrent terms should be imposed for each offence when more than one death results. To do otherwise would be to subvert the maximum term. In that regard the mechanism for change is not to subvert sentencing practice but to re-examine the maximum sentence for this offence: that was a job for Parliament (at 44).

Appropriateness of custodial sentence for non-violent protest

R v Roberts and Others [2018] EWCA Crim. 2739

On 22 August 2018, at Preston Crown Court, the applicants were convicted of public nuisance contrary to the common law. The convictions arose out of the applicants' conduct in protesting against the authorisation to Cuadrilla by the Oil and Gas Authority to begin hydraulic fracturing to explore for shale gas at a site just off the A583 near Blackpool. Roberts and Blevins were sentenced to 16 months' imprisonment, and Loizou to 15 months' imprisonment. The public nuisance in relation to which the

applicants were convicted comprised sitting on top of the cabs of lorries for between two and a half and three and a half days resulting in one carriageway being blocked, and substantial delay caused to thousands of people. The applications for leave to appeal against sentence were referred by the Registrar to the Full Court.

The applicants put forward four grounds of appeal, three of which were considered by the Court: (i) an immediate custodial sentence is never appropriate for a non-violent crime committed as part of peaceful protest as a matter of domestic law and would breach Article 10 of the European Convention on Human Rights ('ECHR'), (ii) even if the custodial threshold had been crossed on the facts, the judge should have suspended the sentences; and (iii) the disruption that followed the applicants' actions was largely the direct cause of the concurrent actions of others.

LCJ (sitting with Phillips and Cutts JJ) stated, in relation to the first ground of appeal that the Court was (at 32):

> … *"unable to accept that submission. There is a wide range of offences that may be committed in the course of peaceful protest of differing seriousness; and within the offending very different levels of harm may be suffered by individuals or groups of individuals."*

The Court went on to note the following on the issue of the ECHR (at 43):

> *"The Strasbourg jurisprudence does not support the proposition that detention is necessarily disproportionate for the conduct with which these appeals are concerned. On the contrary, the Strasbourg has accepted as proportionate both immediate sentences of imprisonment and suspended sentences in cases where the conduct in question caused less harm and was less culpable. In this way, the ECHR marches with the common law. The underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences."*

The Court were minded to substitute the immediate custodial sentences with community orders involving work or a curfew. However, in the final analysis, the Court imposed conditional discharges to reflect the time the appellants had spent in custody.

Preparation for acts of terrorism

R v Boular and Boular [2019] EWCA Crim. 798

The applicants, Rizlaine Boular, born on 6 January 1996 and at the time of sentence aged 23 years' of age, and her sister Safaa Boular, born 29 March 2000 and aged 19 at sentence, were charged on an indictment with offences of engaging in conduct in preparation for acts of terrorism, contrary to section 5 of the Terrorism Act 2006. Rizlaine Boular pleaded guilty to Count 4, and Safaa Boular was convicted after trial of Counts 1 and 2.

In 2016, Safaa Boular, then aged 16, began to communicate online and by social media with two persons seeking to recruit her to the cause of ISIS. The first was female. The second was Naweed Hussain, a UK national who at the time was fighting with ISIS in Syria. Safaa Boular and Naweed Hussain arranged that she would travel to Syria, marry Naweed Hussain, support ISIS and carry out a suicide bombing involving the two of them wearing and exploding suicide belts (Count 1). Naweed Hussain was killed in Syria on 4 April 2017. Safaa Boular continued her online planning to carry out an attack in this country. After initial discussion of other methods, the plan became a plan for her and her supposed accomplices to carry out an attack using semi-automatic firearms and/or grenades at the British Museum (Count 2). She was arrested on 19 April 2017.

Rizlaine Boular had also been in contact with Naweed Hussain in 2016. Following his death and the arrest of her sister, she resolved to carry out an attack in the United Kingdom. She discussed this on the telephone with her sister, using coded language. On 24 April 2017, they agreed that the attack, in which Rizlaine Boular was to use a knife or knives on innocent members of the public, would take place in the area around Parliament on 27 April 2017 (Count 4).

In relation to Rizlaine Boular, the judge categorised her offending as A2 under the Definitive Guideline for Terrorism Offences, that is to say she had played a leading role in terrorist activities, where the preparations were complete or so close to completion that, but for apprehension, the activity was very likely to have been carried out, and that multiple deaths were risked but not very likely to be caused. She was sentenced to life imprisonment with a minimum term of 16 years.

As far as Safaa Boular was concerned, the judge placed her offending in category B2 under the Definitive Guideline for Terrorism Offences, that is to say she played a leading role in terrorist activity, where preparations were advanced and, but for apprehension, the activity was likely to have been carried out, and that multiple deaths were risked but not very likely to be caused. She was sentenced to life imprisonment with a minimum term of 16 years.

The Court (Holroyde LJ, Farbey J and HHJ Picken) did not agree with the applicants' submissions that the judge had mischaracterised culpability and harm under the Definitive Guideline. Both applicants submitted that they did not play a leading role in the offence. Rizlaine Boular submitted that she neither acted alone nor in a leading role. She did not act alone because of the involvement of her mother and another woman who had supported and assisted her. She had not had a leading role because the planning of the attack had been handed over to her by her younger sister when Safaa Boular was arrested. It was further submitted that, although the judge could properly have found that the relevant activity was likely to have been carried out but for apprehension, he could not properly find that it was very likely to be carried out, because that category requires that an offender be in or very near the vicinity of the intended scene of the attack. As far as Safaa Boular was concerned, it was submitted that she did not play a leading role, contrary to the judge's finding, because she was subordinate at all times to Naweed Hussain's influence. A "leading role", which is above a "significant role" in the guideline categorisation, implies, it is submitted, some sort of leadership. It is further submitted that the offence was not at all likely to be carried out.

As far as categorising Rizlaine Boular's offending was concerned, the Court ruled as follows (at 35):

> *"Although Rizlaine Boular became involved in planning her attack after Safaa Boular had been arrested, it does not follow that she could not thereafter play a leading role. It is fallacious to assume that there can be only one leading role per offence. We have no doubt that the judge was entitled to find that by late April 2017 Rizlaine Boular, who had purchased her weapon, had practised using it and was planning to carry out the offence later on the day of her arrest, was playing a leading role. He was entitled also to say that the activity was*

very likely to be carried out but for her arrest. We reject the submission based on geographical proximity, which in our view would lead to very surprising results: for example, if a heavily-armed terrorist was speeding along a deserted road towards his target but was intercepted when still some distance away. We decline Mr Khan's invitation to provide some general guidance as to the phraseology of the culpability factors in the sentence guideline. We do not consider further guidance to be either necessary or, indeed, possible. The guideline is, in our view, clear in its terms. The sentencing judge will in each case have to make an assessment of all the facts and circumstances in order to decide whether, for example, the relevant activity was very likely, or likely, to have been carried out but for apprehension."

As far as categorising Safaa Boular's offending was concerned, the Court rejected the submission that less harm or culpability should have been found by the judge, inter alia, as follows (at 45-52):

"We are not able to accept the submission that Safaa Boular was not playing a leading role in the proposed activity. If the plan had been performed, she was to wear and detonate a suicide belt or vest in order to murder others. We have no doubt that the judge was entitled to regard that as a leading role. That is so whether or not Naweed Hussain was also to play a leading role in the commission of the planned offence.

We also reject the challenge to the finding in relation to count 1 that the applicant was likely to carry out the planned activity if not apprehended. We accept that there would be difficulties in her travelling to Syria, and the judge had to take those into account. But the applicant had shown herself to be very determined, and in our view the judge was entitled to conclude that she was likely to succeed.

As to harm, the use of a suicide belt or vest plainly risks multiple deaths. But the judge rightly concluded that it could not be said that that was the very likely outcome. We therefore reject the challenge to the categorisation of that offence.

It is next submitted that count 2 should have been categorised as a D3 offence. It is submitted that, in relation to culpability, the reference in the guideline to the

activity being "likely to have been carried out" has an objective element. Given that Safaa Boular was communicating with members of the Security Services, the attack which she was planning would never, in fact, be carried out. It is further submitted that the applicant could not be described as having played a "leading role".

As to culpability, the sentencing judge must, in our view, consider the culpability factors on the basis of what the offender was planning to do. The offence consists of engaging in conduct in preparation for intended acts of terrorism. The culpability factors reflect how determined the offender was to carry out that intention and how close the offender came to doing so. The inclusion in the guideline of the phrase "but for apprehension" confirms that approach. The fact that Security Services were monitoring the activities of the offender and aimed to prevent the commission of the offence does not reduce the culpability of the offender.

The involvement of the Security Services may, however, be relevant to harm. We do not accept the submission of Mr Atkinson QC and Miss Morgan QC, who appear on behalf of the prosecution, that in circumstances such as the present case, the participation of the Security Service in planning the attack comes within the phrase "but for apprehension". We do, however, accept the submission as to the proper approach to the harm factors which, we observe, are preceded in the guideline by the words: "When considering the likelihood of harm, the court should consider the viability of any plan". In our view, the reference to "risk" focuses on what was intended: that is, the consequences if the plan had succeeded. The reference to "likelihood of occurrence" requires the court to consider how likely it was that the plan would actually succeed. The answer to that question will depend, of course, on all the facts and circumstances of the case.

Here, the judge was entitled to find that multiple deaths were risked. That, after all, is what the applicant planned and intended. But, as the judge found, it was not a plan which was very likely to succeed. The judge, therefore, rightly assessed the harm as falling within category 2. We do not accept Mr Bennathan's submission that, in the circumstances of this case, the involvement of the Security Services made it necessary for the sentencing

judge to put the offence into category 3. That would equate a plan to cause multiple deaths (properly falling within category 2 in the circumstances of this case) with a plan to cause a single death, for which (amongst other things) category 3 provides."

Approach to be taken when assessing harm

R v Chall and others [2019] EWCA Crim 865

In this case the Court (Holroyde LJ, Popplewell J and HHJ Rees) considered the approach that a sentencing judge should take when assessing for the purposes of a relevant sentencing guideline whether a victim of crime has suffered severe psychological harm. In each case before the Court, the sentencing judge had, on the basis of a victim personal statement ('VPS'), found that the victim in question had suffered severe psychological harm, and placed the appellant in question into a higher category of harm for the purpose of the relevant Definitive Guideline. Each appellant complained that this approach, in the absence of other evidence such as an expert report, rendered their sentence manifestly excessive. The questions for the Court were, therefore: (i) Must the court obtain expert evidence before making a finding of severe psychological harm? (ii) If not, on what evidence can it act? (iii) In particular, can the court make such a finding on the basis only of the contents of a VPS?

The initial written submissions on behalf of the appellants were modified in the oral submissions presented to the Court. It was submitted that in the absence of expert evidence a judge has no benchmark against which to assess whether psychological harm is severe. No guidance was given as to whether, for example, such an assessment could be made on the basis of a single adverse psychological impact or whether a combination of psychological impacts is necessary: guidance could be provided by reference to, for example, a list of the common signs and symptoms of PTSD or of depression.

The Court ruled, inter alia, as follows (at 15- 17, and 21-23):

"When a sentencing guideline directs a sentencer to assess whether the victim of an offence has suffered severe psychological harm or to make any other assessment of the degree of psychological harm, a judge is not thereby being

called upon to make a medical judgment. The judge is, rather, making a judicial assessment of the factual impact of the offence upon the victim. Thus, submissions to the effect that a judge who makes a finding of severe psychological harm is wrongly making an expert assessment without having the necessary expertise are misconceived. The judge is not seeking to make a medical decision as to where the victim sits in the range of clinical assessments of psychological harm, but rather is making a factual assessment as to whether the victim has suffered psychological harm and, if so, whether it is severe.

The assessment of whether the level of psychological harm can properly be regarded as severe may be a difficult one. The judge will, of course, approach the assessment with appropriate care, in the knowledge that the level of sentence will be significantly affected by it, and will not reach such an assessment unless satisfied that it is correct. But it is an assessment which the judge alone must make, even if there be expert evidence. It is the sort of assessment which judges are accustomed to making. An analogy might be drawn with the assessment which a judge has to make when considering under the Criminal Justice Act 2003 whether an offender is dangerous. In that context, the judge may have to assess whether there is a significant risk of serious psychological injury being caused by the commission of further specified offences.

The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence.

As to the revised argument advanced today, we are not persuaded that any such checklist as is suggested is necessary or appropriate, or indeed that it would be workable. We note the concern expressed on behalf of the defendants that a judge is left to make a subjective assessment. However, in making the assessment of whether the psychological harm in a particular case can properly be described as severe, or serious (if a different guideline is being considered),

the judge will act on the basis of evidence and will be required in the usual way to give reasons for his or her decision in the sentencing remarks. If the evidence was not such as could provide a sufficient foundation for the judge's assessment, the point can be raised on appeal.

Save where there is an obvious inference to be drawn from the nature and circumstances of the offence, a judge should not make assumptions as to the effect of the offence on the victim. The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanour of the victim when giving evidence may be an important factor in the judge's assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because it comes from a VPS.

Whether in a given case the VPS does provide a sufficient basis for the judge to make a finding of severe psychological harm will depend on the circumstances of the case and the contents of the VPS. To take an obvious example, a VPS written by a mature adult setting out the effects of historic sexual abuse in his or her childhood may provide very clear evidence of the long-term and severe psychological harm which has been suffered; whereas a VPS written only a few weeks after the offence may provide clear evidence only as to the immediate consequences of it and be insufficient to enable the judge to make any safe finding as to the severity and likely duration of any psychological harm."

Length of sentencing remarks

R v Chin-Charles and another [2019] EWCA Crim. 1140

In this case, the Court (LCJ, VP and Rafferty LJ) considered the length, nature and structure of sentencing remarks. As noted by the LCJ (at 2):

> *"In both cases sentencing remarks were comprehensive. They set out in considerable detail the judge's reasons. In Chin-Charles the remarks for one defendant in a factually and legally simple drugs and causing grievous bodily harm with intent case ran to 17 pages of transcript. We attach them at annex A. At annex B we attach remarks that capture all that is necessary in a fraction over two pages. In the case of Cullen (sentenced with 19 co-accused in a complex drugs and weapons conspiracy) the remarks extended over 76 pages."*

The Court went on to consider various statutory and Criminal Procedure Rule provisions that dictate the nature and content of sentencing remarks, noting that there had been an increasing tendency in recent years to draft sentencing remarks with 'the eye to the Court of Appeal rather than the primary audience identified by Parliament' (at 7). The Court then noted that this has led to longer and longer sentencing remarks. The LCJ expounded the following principles (at 8-13):

> *"The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would a public law decision. Its task is to determine whether the sentence imposed was manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored it, rarely prosper. Judges take into account all that has been placed before them and advanced in open court and in many instances, have presided over a trial. The Court of Appeal is well aware of that.*
>
> *On occasion authority is cited by parties. Save in exceptional circumstances sentencing remarks need not refer to it.*
>
> *The sentence must be located in the guidelines. In general, the court need only identify the category in which a count sits by reference to harm and culpability, the consequent starting point and range, the fact that adjustments have been made to reflect aggravating and mitigating factors, where appropriate credit for plea (and amount of credit) and the conclusion. It may be necessary briefly to set out what prompts the court to settle on culpability and harm, but only where the conclusion is not obvious or was in issue, and also to explain why the court moved from the starting point.*

Findings of fact should be announced without, in most cases, supporting narrative.

If in play, a finding of dangerousness contrary to statute must be recorded. Supporting facts should be set out only when essential to an understanding of the finding, not as a matter of course.

Victim personal statements might merit brief reference (Criminal Practice Direction VII Sentencing F3d). Limited brief reference to the contents of reports will be apt only if essential to an understanding of the court's decision."

Litigants in Person and the Easy-Read pilot

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, but since then has remained fairly constant. Litigants in person account for about 10% of all applications (just over 600).

It is of vital importance in upholding the rule of law that applicants without legal representation are still able to access justice. The presence of complicated legal forms can be a barrier to this. Feedback from the Criminal Cases Review Commission ("the CCRC") suggested that many potential applicants were trying to bypass the Court of Appeal, because they felt that the process of appealing was too complicated or that it could not be done without a lawyer.

The Criminal Appeal Office subsequently worked with the CCRC and the Criminal Procedure Rules Committee, to develop a new Easy Read Form NG (Conviction), for litigants in person to use.

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 currently being used 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.

The Pilot

From the start of mid-January 2019, when the CCRC received a conviction application from an applicant who had not appealed in CACD (often called a "no appeal" case), the CCRC has sent the applicant the pilot Easy Read Form NG (Conviction), a customer feedback form and 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 aim of the pilot was to see if the new Easy Read Form and booklet motivated these applicants to apply directly to the Court of Appeal, when they previously had not; and to identify any improvement that could be made to the form for general use for litigants in person.

The results of the pilot were very positive.

Although the Easy Read Form was longer, applicants were forced to number their grounds and complete the boxes provided, which limited the amount they could write and gave greater clarity and structure to their grounds.

Some applicants were also clearly using the example grounds of appeal highlighted in the Easy Read Form (page 7) as a kind of “checklist” and were marking examples which they thought were relevant to them and expanding on them in the boxes.

Generally the grounds of appeal were all effective, with only two applications being deemed ineffective by the Registrar.

The Criminal Appeal Office received five completed feedback forms (also in Easy Read).

All of the feedback was that the applicants did not previously know how to appeal to the Court of Appeal and/or that Form NG (non-Easy Read) was too complicated for them.

All applicants said that the new Easy Read Form helped them in deciding whether to apply to the Court of Appeal.

The success of the pilot has lead the Criminal Appeal Office to develop an Easy Read Form NG (Sentence) and it is hoped that these Easy Read Forms will be formally approved by the Rules Committee by the end of October 2019 and that they can then be made available to potential applicants.

Notification Hearings

R v Ali [2019] EWCA Crim. 1527

Ex parte notification hearings are described in the CPS Disclosure Manual (the "CPS Manual") as hearings that may occur in exceptional circumstances whereby the judge should be notified of otherwise

> … *"non-disclosable sensitive material such as where not to reveal non-disclosable sensitive information to the Judge would create a risk that the Judge's fair management of the trial or a wider public interest would be prejudiced."*

The CPS Manual gives certain examples in which an ex parte notification hearing may be held, largely situations in which covert human intelligence sources are involved.

Background

On 26 June 2018, at the Central Criminal Court before the Recorder of London and a jury, the appellant was convicted on indictment of two counts of possessing an explosive substance with intent, contrary to section 3(1)(b) of the Explosive Substances Act 1883. On 20 July 2018, the Recorder of London sentenced him to a total of life imprisonment with a minimum term of 40 years.

The appellant's fingerprints were matched by the Federal Bureau of Investigation to those lifted from two caches of components of improvised explosive devices ("IEDs") recovered in Afghanistan in 2012. The Crown's case was that whilst abroad, in around 2012, the appellant became involved in the manufacture of IEDs, intending that they be used against Coalition and local forces in Afghanistan. The appellant's defence was that he had been acting under duress having been kidnapped in Pakistan during a trip in 2012. He had been forced to make IED components under threats of death.

As to the grounds of appeal, the Court stated as follows (per Gross LJ at para. 5):

> *"In the course of the appellant's trial, the prosecution ("the Respondent") twice saw the Judge on an ex parte basis. Neither of these hearings was*

connected 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 Respondent relied for holding these ex parte hearings was the CPS Disclosure Manual..."

The Notification Hearings

At 09.23 on 15 June 2018, the Crown notified the appellant's counsel that they, the Crown, had asked to see the judge on an ex parte basis at 10.00 that day. On 19 June 2018, the Crown notified the appellant's counsel that there had been a further ex parte notification hearing with the judge.

The appeal

On appeal the Crown relied upon the CPR (Rule 1(1)) and the guidance in the CPS Manual as authority for the proposition that ex parte notification hearings are lawful in order to prevent the inadvertent mismanagement of the trial. The appellant submitted that no such authority existed and that therefore a material irregularity had occurred, requiring that the appellant's convictions be quashed.

In refusing the appeal against conviction, the Court ruled that ex parte notification hearings may be justified where the following conditions are met (per Gross LJ at para. 50):

"i) The need must be exceptional; such a hearing can never be routine or simply held by way of a course of least resistance.

ii) There must be no practicable inter partes alternative, so that even an in camera hearing cannot practicably be held.

iii) 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.

iv) 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 held that the power to hold ex parte notification hearings emanates from the inherent jurisdiction of the court to regulate its own procedure (see para. 39). The Court used the speech of Lord Diplock in *Attorney-General v Leveller Magazine* [1979] AC 440 for authority for that proposition (at para. 38):

> *"However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. A familiar instance of this is provided by the 'trial within a trial' as to the admissibility of a confession in a criminal prosecution. The due administration of justice requires that the jury should be unaware of what was the evidence adduced at the 'trial within a trial' until after they have reached their verdict; but no greater derogation from the general rule as to the public nature of all proceedings at a criminal trial is justified than is necessary to ensure this. So far as proceedings in the courtroom are concerned the trial within a trial is held in open court in the presence of the press and public but in the absence of the jury…"*

Discussion

As pointed out by the appellant's counsel, and as noted by the Court, the CPS Manual, whilst providing useful guidance on ex parte notification hearings, has no legal standing. The Criminal Procedure Rules (in particular Rules 1(1) and 3.2(1)) do provide a framework within which the court may exercise its inherent jurisdiction, but this is a somewhat grey area.

To that end, the Court in *Ali* drew the attention of its judgment to the Criminal Procedure Rules Committee (the 'CPR Committee') along with the Head of Criminal Justice. The Court invited the CPR Committee (at para. 52):

> … *"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."*

It will be interesting to see what the CPR Committee decides if it takes up the invitation of the Court. This is a somewhat opaque area of procedure, with any CPR Committee Rules breaking new ground by codifying a little-understood are of criminal practice.

Litigants in Person who are unfit to be tried and the appeal process

R v. Roberts [2019] EWCA Crim 1270

Individuals who have been deemed unfit to be tried have a right to appeal by virtue of section 15 of the Criminal Appeal Act 1968. The concern for the Court was how that right of appeal could be exercised by an applicant in person, given that the Crown Court, based on expert psychiatric evidence, had determined that they were unfit to take part in those proceedings.

The Court determined that such an individual would not be competent to appeal in person against the finding of unfitness or any subsequent finding because if a person is unfit to plead or stand trial, that "*necessarily connotes that a person cannot be considered fit to appeal either*" (para. 34).

However, the Court recognised that to prevent any application from an applicant in person who had been deemed unfit would deprive them of their very right to appeal.

The answer, whilst not covered in the current form of the Criminal Procedure Rules, was to be found in section D9 of the Guide to Commencing Proceedings in the Court of Appeal Criminal Division (as issued in August 2018), which states that the accused can seek to appeal against a finding of unfitness to plead or that he did the act or made the omission charged *by the person appointed to represent the accused*. The same approach is taken in the Practitioner's Guide to the Court of Appeal Criminal Division 2nd ed. (edited by Alix Beldam and Susan Holdham) at paragraph 9 – 004.

The Court said that, "*Accordingly, once a finding of unfitness has been made and where there is a subsequent determination by the jury that the accused did the act or omission charged, it is the duty of the person appointed by the court to present the defence case to consider, as a matter of professional obligation, whether an appeal might properly lie against either determination or, indeed, against the ultimate disposal…..*

…….If the appointed person considers that there is no arguable ground of appeal and declines to settle a Notice of Appeal, it follows that there can be no valid appeal. The accused will not be competent (in terms of mental fitness) to pursue an appeal in person: nor will the accused be competent (in terms of mental fitness) to instruct fresh counsel or solicitors to pursue an appeal on his or her behalf." (paras. 38 and 39).

The Court recognised however, that to administratively reject any application from an applicant in person who had been deemed unfit at the Crown Court, would not be appropriate without some form of judicial consideration.

In such circumstances, the Court set out the detailed procedure that should be adopted going forward.

1. The CAO should check with the Crown Court representative as to whether they considered if there were arguable grounds of appeal.
2. If the representative confirms that to be the position, the application should be sent to the single Judge to consider whether a direction should be given to appoint a representative to act for the applicant going forward.
3. If the Single Judge can find no potentially arguable grounds, no such direction will be given and the application can go no further. The applicant will not be fit to renew their application before the full Court.
4. If the Single Judge finds potentially arguable grounds they can direct that fresh counsel be appointed to settle grounds, which will again be considered by the Single Judge on the papers and then (if, and only if, leave to appeal is granted or the application is referred) present the appeal before the Full Court.
5. If fresh counsel, on the other hand, concludes that there are no viable grounds to be advanced, then the matter is again to be referred back to the Single Judge, who will then doubtless reject the application, which again will not be able to advance any further.

The Court considered those applications from applicants in person based on the assertion that they had recovered mental capacity. Such cases would require fresh evidence and would still adopt the above procedure.

Waiver of privilege was also a potential issue for these types of cases. The Court said that in the instant case, it had been wrong to invite the applicant in person (who had criticised his trial Counsel) to waive privilege, because having been adjudged unfit to plead and stand trial, he would also be unfit to meaningfully waive privilege. In those cases, where the applicant was represented, the Court said that "*The matter therefore will be one for the appointed representative or fresh counsel to decide in each case, acting in what are considered to be the best interests of the accused and having regard to the normal obligations to the court*" (para. 43).

Two important points were noted post script by the Court;

Firstly, that it may be appropriate to review the current Form NG to be used in cases such as these.

Secondly, since a number of the matters discussed were not currently the subject of the Criminal Procedure Rules, it may be that the Criminal Procedure Rules Committee would wish to consider whether to introduce any new rules to cover the position.

The Criminal Appeal Office and Criminal Procedure Rules Committee are currently undertaking a review in this regard.

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 provide case summaries pursuant to the Practice Direction, which are invaluable to the Court and practitioners. The summaries are entirely objective and do not provide advice on the merits of a case, but they highlight and crystallise the salient issues in order to assist the Court. In addition, the lawyers give advice on procedural matters to practitioners, and also to litigants in person, which often involve the provision of advice on how Grounds of Appeal can comply with the relevant Rules and avoid being excessively prolix.

The CAO lawyers are supported by dedicated teams of administrative staff who obtain advice from CAO lawyers as necessary and exercise case management functions. In addition to 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 information given 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 draw that to the attention of the parties and the Court.

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:

October 2018 – Judicial delegation from Taiwan

October 2018 – Judicial delegation from the Supreme Court, Ukraine

October 2018 – 3 Judges on the EJTN Exchange Programme from Bulgaria, Sweden and Germany

November 2018 – Group from the Krygyz Republic

December 2018 – Mr A Macrae (VP Court of Appeal Criminal Division – Hong Kong), the Registrar (June Cheung) and Judicial Associate (Laurence Chan)

March 2019 – Mr Justice Chris Maxwell, President of the Supreme Court of Victoria

June 2019 – Judge Ho from the Taiwan District Court

September 2019 – Judicial Administration visit – Judicial Registrar from Malawi

Summary and Statistics

1 October 2018 to 30 September 2019

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 4,434 applications received. This has allowed the office to make a significant decrease in the number of cases outstanding, although this does not seem to have had the expected impact upon average waiting times (See Annex A & B), this reflects the increased complexity of the cases which are lodged.

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 729 conviction applications considered, leave was granted for 73 applications (%), with 58 referred (%) and 598 (%) refused (Annex C).

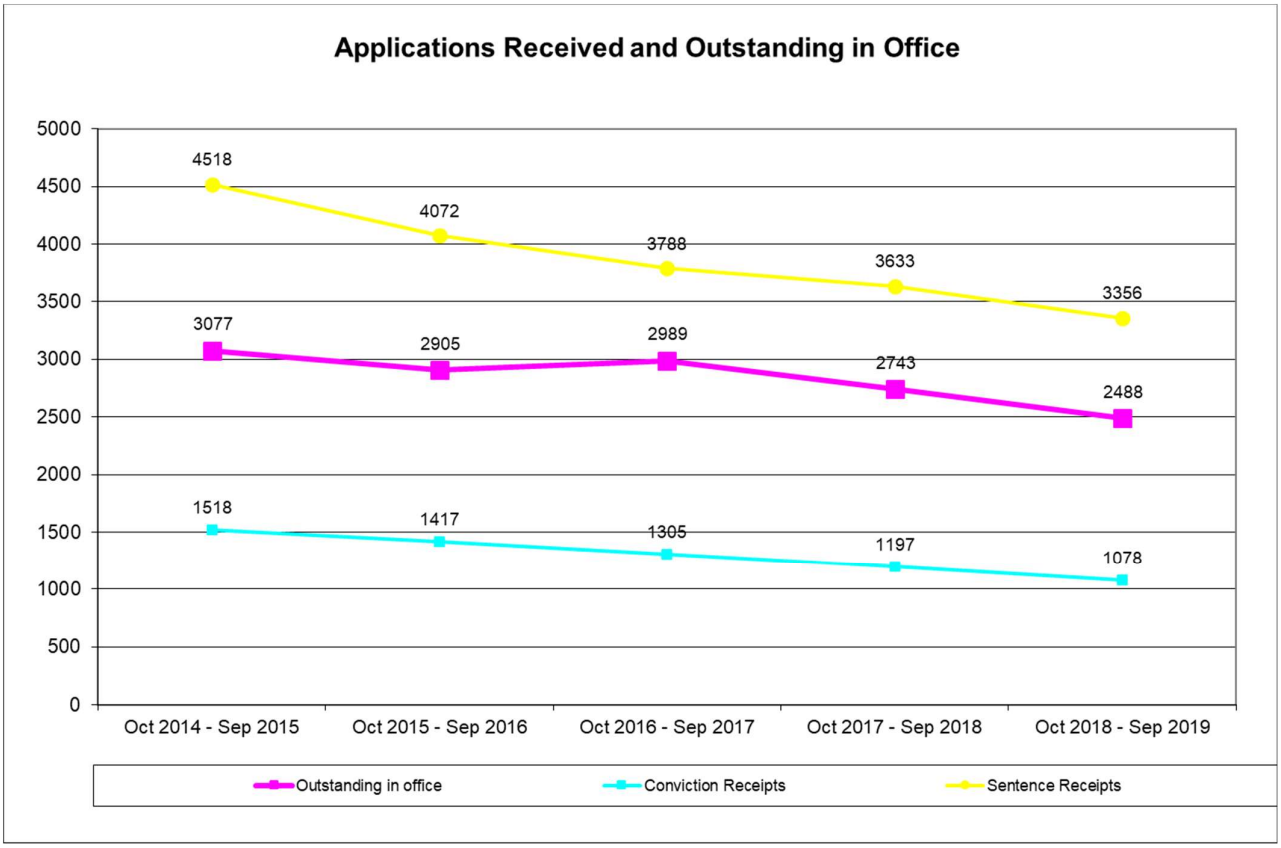
Of the 195 conviction appeals heard by the full Court, 64 (%) were allowed. This represents a decrease of 15 cases from the preceding year.

Renewed applications for leave to appeal against both conviction and sentence, accounted for 50% of the hearings in the reporting year. Of these, the full Court granted leave to appeal in 131 conviction applications, representing 26% of those renewed applications. The Court granted leave in 240 renewed applications for leave to appeal against sentence, representing 33% of those renewals (See Annex E).

It is difficult to quantify the success rate of appeals, because those received in each reporting period are not necessarily concluded with in the same reporting period. However, it can be seen that over the last five years the number of successful conviction appeals has been 6.7% when considered as a percentage of the applications received. For sentence appeals it is 21.5% (See Annex F).

Annex A

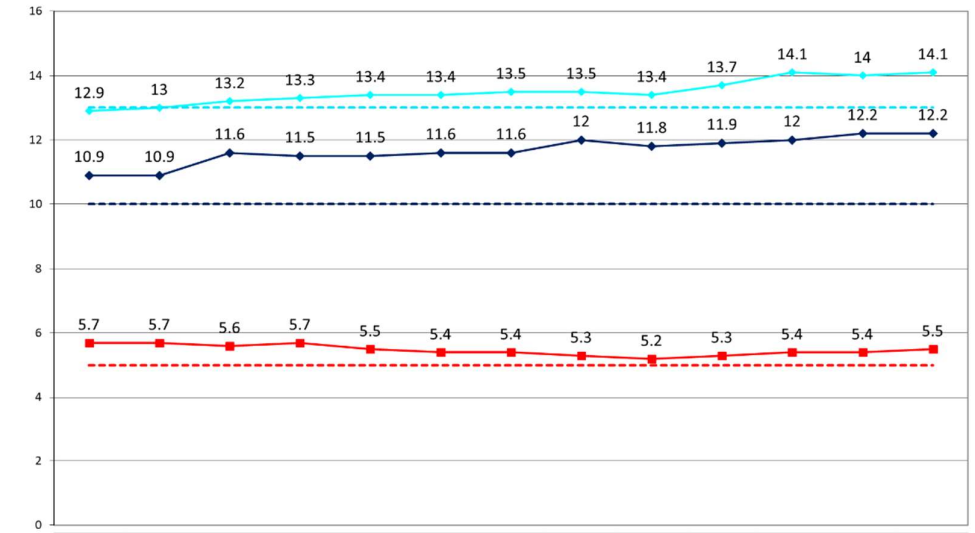
Annex A



Annex B

Annex B

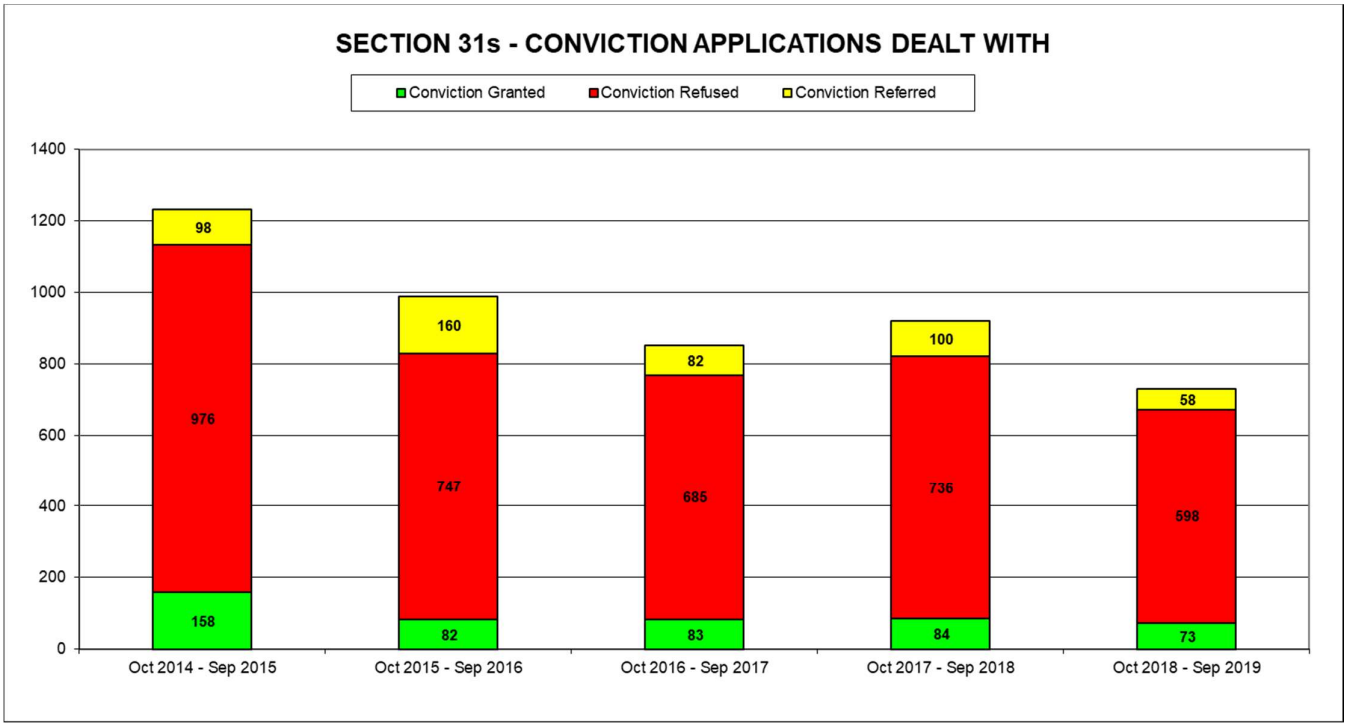
Average Waiting Times (in months)
Rolling average of cases disposed by full Court over previous 12 months



	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19
Conviction Grant/Referral	10.9	10.9	11.6	11.5	11.5	11.6	11.6	12	11.8	11.9	12	12.2	12.2
Conviction Renewal	12.9	13	13.2	13.3	13.4	13.4	13.5	13.5	13.4	13.7	14.1	14	14.1
Sentence	5.7	5.7	5.6	5.7	5.5	5.4	5.4	5.3	5.2	5.3	5.4	5.4	5.5
Conviction Grant/Referral Target 10 months	10	10	10	10	10	10	10	10	10	10	10	10	10
Conviction Renewal Target 13 months	13	13	13	13	13	13	13	13	13	13	13	13	13
Sentence Target 5 months	5	5	5	5	5	5	5	5	5	5	5	5	5

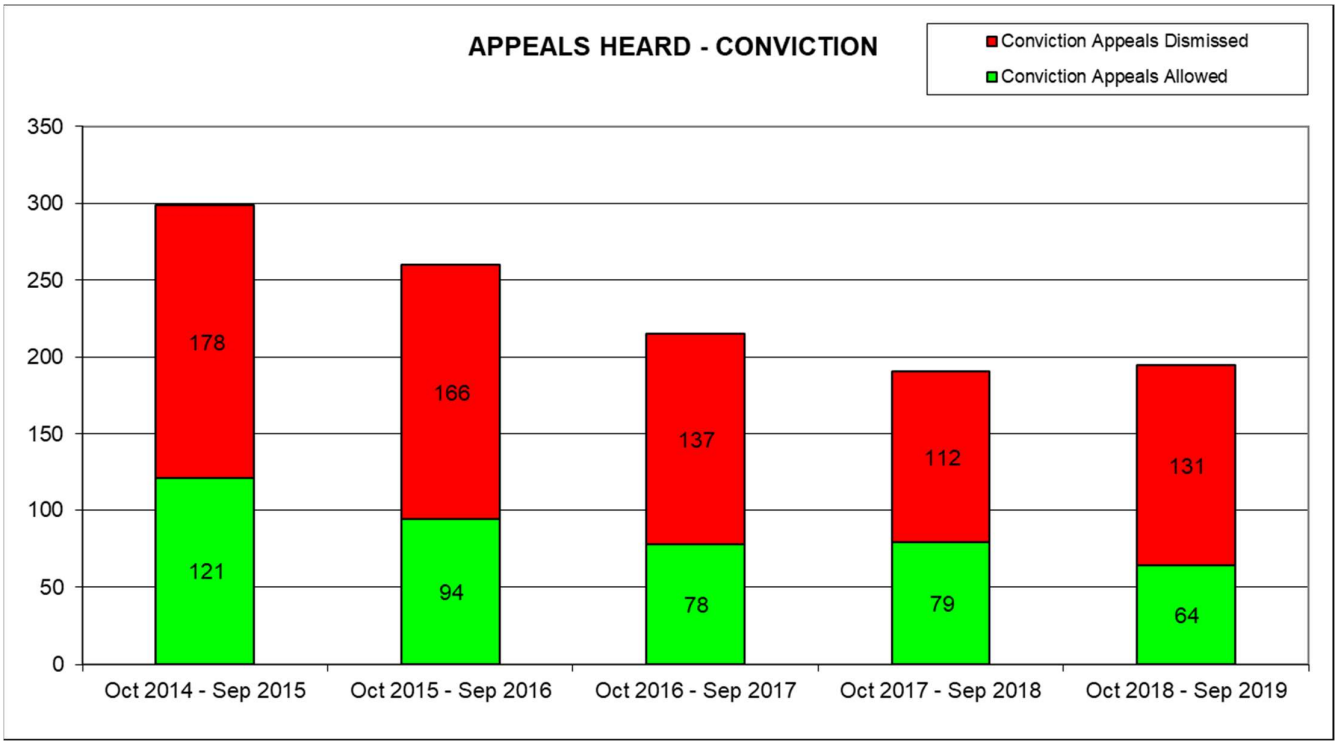
Annex C

Annex C



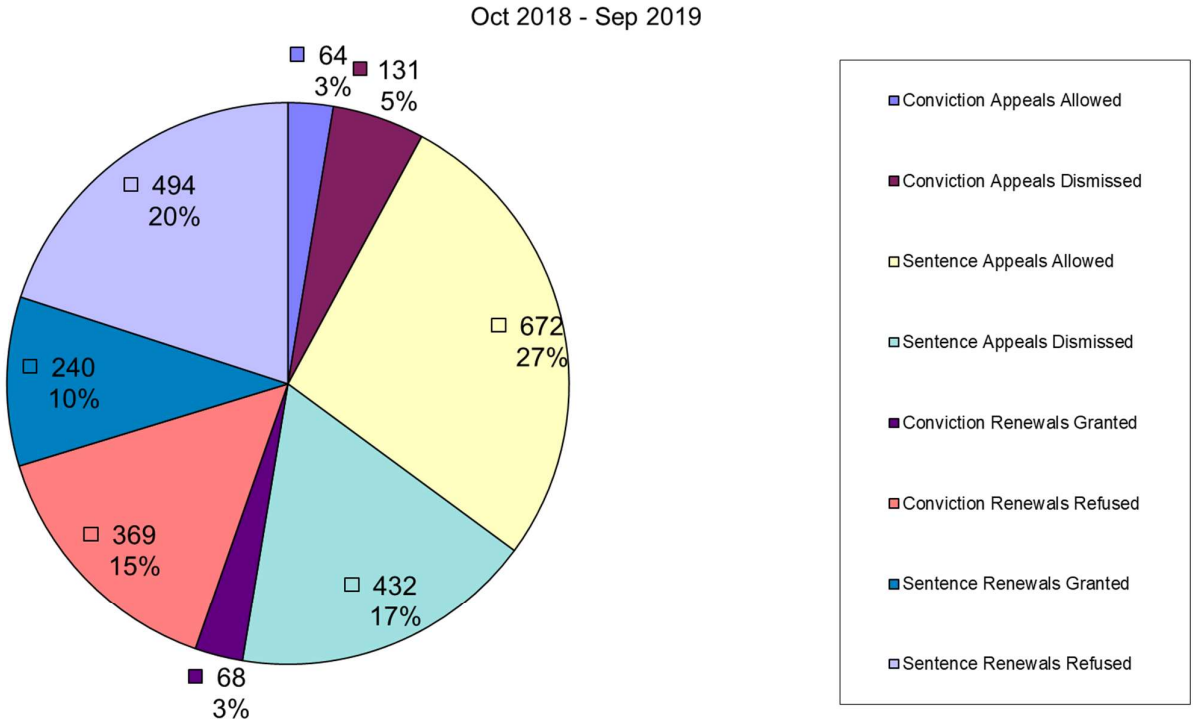
Annex D

Annex D



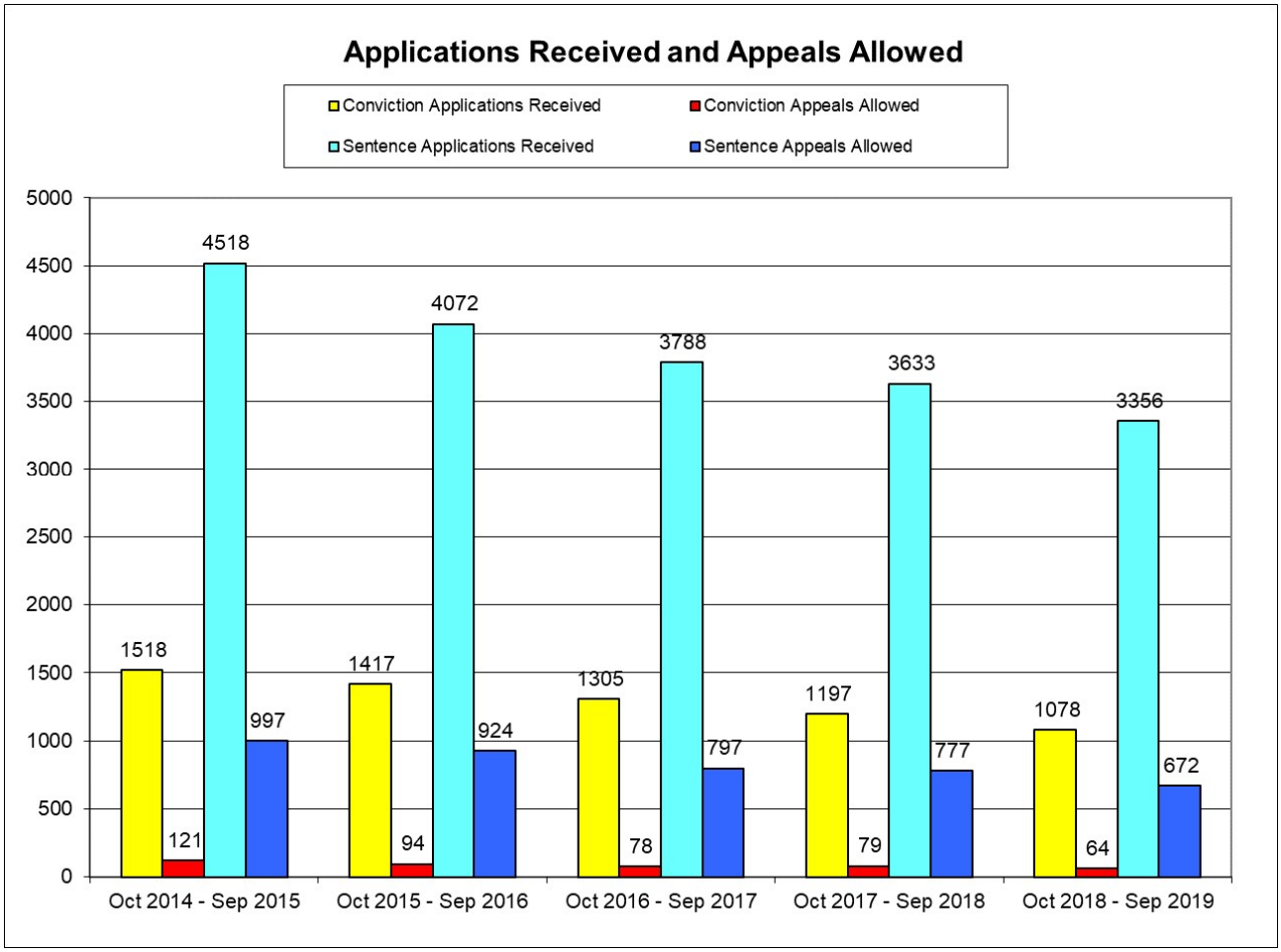
Annex E

Annex E



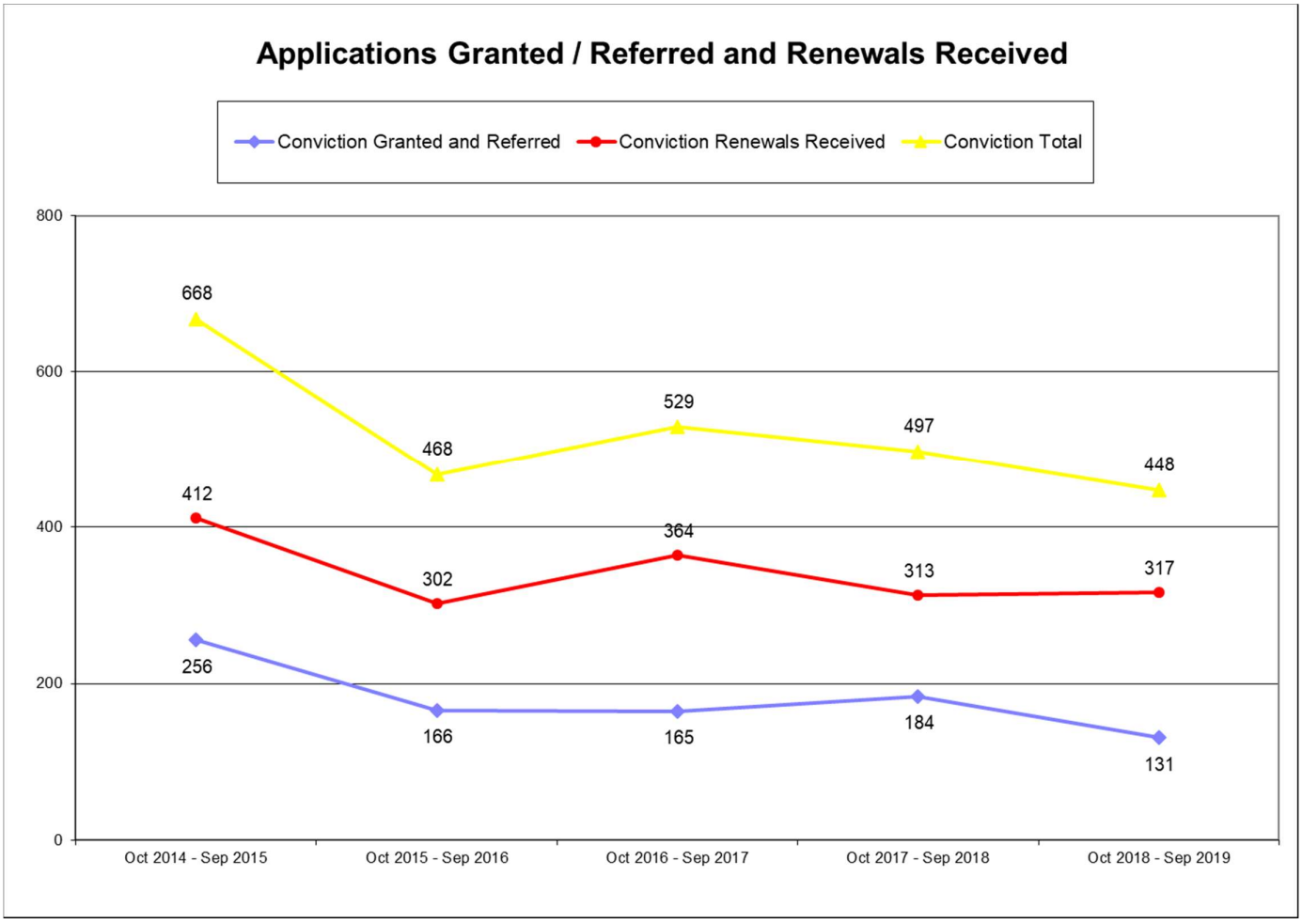
Annex F

Annex F



Annex G

Annex G



Annex H

Annex H