

Appealing to the Court of Appeal Criminal Division

The Appeal Solicitors Perspective

The Current Challenges

- The ever increasing weight of applicants
- The diminishing resources available to review often very complex cases
- The constraints of time
- The increased burden which the Court has to impose upon us
- The “brick wall “ in seeking to access original case material and exhibits – Nunn
- Getting effective cooperation out of original trial solicitors and counsel
- Managing expectations

The Overall Test

- It is important not to lose sight of what we are seeking to achieve – identifying the wrongfully convicted and **getting them out**
- But the inevitable tension is that is not the overall aim of the system which is to identify if a conviction is “unsafe “ or in the case of the CCRC “whether there is a reasonable possibility the CACD will not uphold the conviction “
- As a result the fact that there is a need for a wider and more far reaching debate on our Criminal Appeal System is **not in question** and has been recognised by the Justice Committee

The Status Quo

- However until there is time or a greater impetus for the Law Commission to act on the Justice Committees call for a review – we will all have to make the best of the system we have .
- This leaves us in a place with considerable pressure on the CACD
- The consequent pressure on the CCRC is equally clear to see which is heightened by decisions such as **Nunn** and **James**
- Lets start by considering the current changes and what it means for those representing applicants

CACD Direct Lodgment

- From 1st October the CACD has implemented direct lodgment
- This is covered by Part 39 of the Criminal Procedure Rules as amended
- You will lodge directly at : **Registrar of Criminal Appeals** at the Criminal Appeal Office, Royal Courts of Justice, Strand, London, WC2A 2LL, **Email:** criminalappealoffice.applications@hmcts.x.gsi.gov.uk **Tel:** 020 7947 6011/6014 **DX:** RCJ 44451 Strand
- This handy document explains the basic requirements and importantly what limited cases the new lodgment rules do not apply to
<https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/2018-appeal-forms/guidance-lodging-appeals-september-2018.pdf>

Application Guidance – ignore at your peril

- The Court provides in addition detailed guidance on completing the new appeal forms [8 pages] to be accessed here :
<http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/2018-appeal-forms/ng-guidance.pdf>
- Whilst all are important pay particular attention to
 - D2 – Extension of Time
 - G2 – McCook Enquiries
 - H – Grounds of Appeal
 - H2 – Section 39 Criminal Procedure Rules Compliance

What else do I need to know ?

- It is assumed you will be familiar with “A guide to commencing Proceedings in the Court of Appeal Criminal Division “
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727918/Guide-to-proceedings-in-Court-of-Appeal-Criminal-Division-0818.pdf
- Remember to keep up to date with all the Courts decisions you are assumed to know them the best resources are :
 - Westlaw
 - Lawtel
 - Bailii Reports [Free]
 - Crimeline + the best text remains Taylor on Criminal Appeals

So lets talk about some of the
Current issues of importance

Prolix Grounds

- Prolix – by which we mean far too long
- Ever heard an advocate go on and on in Court ? It can be nothing compared to the “war and peace” some want to write for the CACD / CCRC
- These Advices and Grounds have to be quickly distilled by a Court under pressure , they invariably add little to the merits of a case .
- **R v James and Selby [2016] EWCA Crim 1639** - CPR Rule 39.2
Summary of facts 2 pages and a concise argument in support of each ground

Prolix Grounds Continued

- It should be in A4 format using 12 point Font and 1.5 line spacing
- If grounds are prolix then they may be returned by the Registrar
- The Court may refuse leave if the ground is so poorly presented that it is rendered unarguable
- Your approach to the CCRC should be no different distill the grounds and facts . Tell the CCRC what enquiries you want them to make and why .

Variation of Grounds - Post Single Judge

- The Court has made clear that grounds refused by a Single Judge should not be renewed by adding a plethora of new grounds as this then defeats the purpose of the permission stage – **R v James and Others [2018] EWCA Crim 285**
- Any new grounds should not simply be bolted on and an application should be made to vary the the appeal notice .
- Such an application would need to address the grounds identified in Paragraph 38 of the Judgment .
- Inevitably this will lead to more traffic to the CCRC

The High Hurdle to be met

- The application to vary would not require “exceptional leave” (by demonstrating substantial injustice) but the hurdle for the applicant is a high one.
- So the sort of test deployed in [R v Jogee; Ruddock v The Queen \[2016\] UKSC 8](#) , [2016] UKPC 7, and *R v Johnson & Others [2016] EWCA Crim 1613 para 24 -28*) **does not apply**
- But in balancing the interest of justice decision all criteria must be carefully considered and it should not be assumed even if a ground has merit it would automatically be given leave particularly where there was no justification for the delay [R v Wilson \[2016\] EWCA Crim 65](#)

Extension of time

- Applies equally to Conviction and Sentence Appeals
- Never enough to simply invite the extension be granted if the ground has merit
- If you are engaged in investigating a substantial case keep a clear log of all your actions so you can demonstrate they were justified and timely .
- In brief but cogent terms set out to the Court why the case took the time it did

Fresh Evidence Cases

- Starting point remains Section 23 of the Criminal Appeal Act 1968
 - Capable of Belief
 - Admissible
 - Relevant
 - Explanation for not being produced at Trial
- A Waiver of Privilege will always be required (in fact arguably you need that in all instances for the McCook Enquiries)
- You need to know if it was raised with the original team and you can't take the applicants word for it . Also seek independent evidence for any fact asserted **R v Singh [2017] EWCA Crim 466**

Fresh Evidence Continued

- If genuine Fresh evidence the Court will need to know what led to the evidence being obtained – **Gogna Statements**
- You will need to apply to call the Witness Evidence in Support
- Don't lose sight of the fact that one or several pieces of evidence might not make the conviction unsafe **you need to keep your eye on the ball**
- Remember you have no discretion in fresh evidence of the strict requirements to be met , as compared to the Court which has a wide discretion to admit , not admit or to hear the evidence de benese

Tricky Sentencing Issues

- Note the Court cannot under 11 (3) impose a sentence which when considering the case as a whole would mean the appellant is treated more severely than dealt with the Court below - See **R v Thompson and others [2018] EWCA Crim 639**
- For example there can be particular difficulties with a Section 236A Sentence for offenders of particular concern . If the additional one year licence period has been missed the Court can still impose it provided the offender is not treated more harshly overall .
- Remember also the Slip rule is now 56 days so make use of it .

Other Matters

- **Digital Case System** – There are no plans to extend to CACD Hearings but the CAO can access the Digital system in preparing the papers so make reference to them wherever appropriate
- Time Limits for Gross Indecency Offences – **R v Coatman and Walker [2017] EWCA Crim 392** . This is still an issue. In the vast weight of historic cases facing practitioners week in and week out it is essential we spend time carefully assessing the indictment and any drafting errors before it is too late
- Note also **LDG [2018] EWCA Crim 2264** a S14 SOA 1956 case where appellant was under 14 at the time and so could not be sent to custody – missed by all apart from the Court of Appeal Lawyer

Non Disclosure the latest

- This remains a live issue
- CCRC is currently undertaking a review of a sample of 100 past cases
- Non Disclosure isn't simply just about large quantities of electronic material or social media , this can also involve third party records , medical records , social services and educational material
- Its important to identify what the non disclosure is and how it affects the safety of the conviction

Non Disclosure The Courts Latest View

- As yet unreported – Last week there was an unsuccessful referral in a case called **Simmons**
- Large amount of material was undisclosed by the CPS which touched on the complainants reliability , potential for making complaints and first disclosure
- The formula adopted by the Court to assess the non disclosure is worth remembering

Disclosure – a Useful Approach

- *Should the material have been disclosed*
- *If it had been disclosed would the Defence sought to have deployed it*
- *Would the Court have admitted it*
- *If admitted would it have made an impact upon the jury thereby rendering the conviction unsafe*

In **Simmons** – It should have been disclosed and would have been deployed by the defence . There were questions over whether all of the material might have been admitted but overall the Court were not persuaded the material itself would have had the desired impact upon the jury and some of it may have arguably weakened or assisted the Crown

Other Miscellany

- Judicial Conduct - **Myers [2018] EWCA Crim 2191**
- *Right to give evidence (ill health)* – **Welland [2018] EWCA Crim 2036**
- *Sentencing those with mental disorders* to indeterminate sentences note the guidance in ***Edwards and others [2018] EWCA Crim 595***
- *Guidance to Juries*– *Written Routes to verdicts are recommended in what may appear to be the most straight forward cases* ***R v Atta-Dankwa [2018] EWCA Crim 320***
- *More Terminating Ruling Requirements* – *the undertaking* ***R v C and D [2017] EWCA Crim 2257***

Final Case - Back to where we began

- *Appeal Delay* – Defences Duty to bring to Registrars attention **Ward [2017] EWCA Crim 1642**
- *Demonstrating the nature of the continuing onus on all Criminal Appeal Practitioners*

Justice Week – Final Thoughts

- There remains a difficult path for those seeking Justice from the Criminal Justice system
- This will only change when we finally have the formal debate we require and Government finally gets the need to invest in a Justice System which isn't just "creaking a bit " as the outgoing DPP described this week .
- In the meantime those of us who represent the wrongfully convicted need to do our best by those we represent and by the institutions we must work with to strive to deliver justice .