So, let's look at how we might get fresh evidence in our appeals.

A review of any case should be focused on the overwhelming test to which the court applies itself namely is there material now before it which persuades it that the conviction is unsafe.

Section 2(1) criminal appeal act 1968 – the court shall allow the appeal against conviction if they consider it unsafe and shall dismiss any other appeal.

Whilst the court may so quash a conviction based on error (and often does) or for some other substantial reason inevitably the process is drawn to an examination of whether there is any fresh evidence.

As a result, this brings us to the thread of section 23 of the criminal appeal act, which we would be best placed to re-fresh our memories upon before getting down to the specifics.

Evidence.

(1) In section 23 of the 1968 act (evidence)—

"(2) The court of appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) Whether the evidence appears to the court to be capable of belief;

(b) Whether it appears to the court that the evidence may afford any ground for allowing the appeal;

(c) Whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings." and

So, the key issues for us to face are:

- ***Whether the evidence is capable of belief***
- ***Whether the evidence may afford a ground for allowing the appeal***
- ***Whether the evidence would have been admissible in the proceedings on an issue the subject of the appeal***
- ***Whether there is a reasonable explanation for the failure to adduce evidence***

This section is highly useful in focusing your mind in determining whether the evidence you are being offered by your appellant or his enthusiastic supporters will meet the courts requirements.

In general terms the key-determinating factor will be does the evidence if it is admitted go to the heart of the safety of the conviction?

Even if these criteria are met the Court will still be focussed on whether if admitted the material is capable of founding a ground of appeal. For example even if an appellant

produces a statement of the complainant which is inconsistent with that given at trial unless the inconsistency is of sufficient magnitude to be capable of disturbing the safety of the conviction it will not be admissible - R v Aslam [2014] EWCA Crim 1292 and R v Kingston [2014] EWCA Crim 1420 .

This should never be underestimated. Take for example the appellant who offers a great piece of evidence attacking the credibility of the complainant. But does it actually show the specific allegations to be unsafe?

or the appellant who can prove he could not have committed one particular offence or a series of offences relating to only one of his complainants this is unlikely to help him with the safety of the remaining convictions.

This also points us to another golden rule that in general terms one piece of fresh evidence is a start, two pieces are handy, and a clutch of fresh evidence might just get you where you want to go.

There are in fact as evidenced by the case illustrations I can give you a variety of types of fresh evidence and it's not just down to expert evidence.

my examples are drawn from some of our real examples of fresh evidence cases and they include:

1 – Documentary evidence contradicting the case at trial

2 – Expert opinion not available at trial

3 – Expert evidence that might have been available at trial

4 – nonspecific fresh evidence and linked material

Preparation and audit trail is everything – there are one or two points worth bearing in mind at the outset

1 – Fresh evidence is like any other form of evidence and brings with it a danger of being contaminated – tread with care

2 – From the moment it is raised, and you start to look into it record all of your actions

3 – Keep the appellant away from the fresh evidence at all costs – you do not want to face any allegation that he has contaminated the evidence.

4 – Remember someone is going to have to give a gogna statement about the actions you took.

[A gogna statement will be required by the court in all cases and records what the fresh evidence is and how it was obtained]

The legal principles the court applies

The court of appeal has wide powers in section 23 and exercises a very wide discretion in the way it approaches fresh evidence. It has the power to order disclosure under s. 23 (1) (a), can call any witness who could have given evidence at the original trial (s.23 (1) (b)), and hear any evidence which was not called at the trial (s.23 (1) (c)) such as an expert witness who was not called at the trial.

We will give you some and there are plenty more examples of expert evidence being called at an appeal which was not called at the trial for some reason, such as that the condition was not one that was recognised by experts at the time e.g. r.v.hobson [1998] 1 cr. app. r 31 re "battered women's syndrome" or that expert knowledge has changed – see the case of r v kf [2007] ewca crim 2787 on gynaecological evidence.

The provisions of sub-section 2 are important and in most cases the evidence will be expected to comply with all four paragraphs.

The leading case on the approach to be taken is r. v. Pendleton (Donald) [2002] 1 w.l.r. 72, hl, in which it was held that, where fresh evidence is admitted, the decision for the court of appeal is the same as in any other appeal; it has to make a judgment whether the conviction is unsafe;

It is not incumbent on the court to ask itself what effect the evidence would have had on the jury; but the court of appeal should bear in mind, first, that it is a court of review and that it is not and should never become the primary decision-maker, and,

Secondly, that it can only ever have an imperfect and incomplete understanding of the processes, which led the jury to convict;

Whilst the court of appeal can make its own assessment of the evidence that it has heard, it is, clear cases apart, at a disadvantage in seeking to relate that evidence to the rest of the evidence that was before the jury; accordingly, it will usually be wise for the court of appeal to test their own provisional view by asking whether the evidence, if given at trial, might reasonably have affected the decision of the jury to convict; if it might have done, then the conviction must be thought to be unsafe. This is the jury impact test

The Court has stressed that it is for the court to assess safety and it is not a simple matter of testing that by reference to the jury – that is to say the jury impact test is a backup to the key decision – see dial v. state of Trinidad and Tobago [2005] 1 w.l.r. 1660, pc; and again in r. v. noye [2011] 5 archbold review 1, ca, in the latter case the court of appeal the court roundly rejected an argument, based on the law in Australia (r. v. weiss 223 a.l.r. 662, high court of australia) and new zealand (r. v. matenga [2009] 3 n.z.l.r. 145, supreme court of new zealand), that the question should be as to the impact that the evidence might have had on the verdict of the jury. Very recently reaffirmed in r v Wilkinson [2011] ewca crim 2289

Also note that where by its nature, the fresh evidence could not have been given at trial (e.g. a post-trial retraction by a prosecution witness), the court will have no alternative to making its own assessment of the evidence, and then deciding, in the light of that assessment, what effect it has on the safety of the conviction. In such a case, to ask what effect the evidence would have had on the jury's verdict would be meaningless: see r. v. ahmed (ishtiaq), unreported, december 6, 2002, ca ([2002] ewca crim. 2781).

However recent cases do seem to suggest that the Jury impact test is the one which the Court places considerable weight by see:

- *R. v Nealon (Victor) [2014] EWCA Crim 574*
- *R. v Thompson (Andrew) [2014] EWCA Crim 836*
- *R. v A [2014] EWCA Crim 1292*
- *R. v George (Dwaine Simeon) [2014] EWCA Crim 2507; [2015] 1 Cr. App. R. 15*
- *R. v Foran (Martin Patrick) [2014] EWCA Crim 2047*
- R. v Darroux (Pamela) [2018] EWCA Crim 1009; [2019] Q.B. 33
- R v L [2019] EWCA Crim 1326

Admitting the evidence

In r.v. Erskine; r.v. Williams [2009] 2 cr. app. r. 461, ca, the court said that the decision whether to admit fresh evidence is case and fact specific; the discretion to receive such evidence is a wide one focusing on the interests of justice, with the considerations listed in section 23 (2) (a) to (d) being matters that require specific attention, but being neither exhaustive nor conclusive; the fact that the issue to which the fresh evidence relates was not raised at trial does not automatically stop its reception; but unless a reasonable and persuasive explanation for the omission is offered, it is highly unlikely that the “interests of justice” test will be satisfied.

It was held in r. v. Beresford, 56 cr.app.r. 143, ca, that there is a "reasonable explanation" for a failure to adduce evidence at trial if the evidence could not with reasonable diligence have been obtained for use at the trial.

To admit or not to admit

The existence or otherwise of a reasonable explanation for not calling the evidence at trial is, however, but one factor to be taken account of in deciding whether it is necessary or expedient in the interests of justice to receive the evidence: r. v. cairns (Robert Emmett) [2000] crim.l.r. 473, ca. evidence may be received even though none of the conditions in subsection (2) are satisfied: r. v. sale, the times, June 16, 2000, ca.

The court of appeal may examine such material as it thinks fit in deciding whether to order production of documents at the hearing of the appeal; it will not in principle restrict itself to reading material relating to the trial and such documents as the parties place before it: r. v. Callaghan, 86 cr.app.r. 181, ca.

In r. v. boal and cordrey [1965] 1 q.b. 402, 48 cr.app.r. 342, ca, where a co-defendant who had pleaded guilty was willing to give evidence on appeal, having been unwilling to do so at trial, it was held that since he had been compellable, the evidence could not be regarded as "fresh", it being the practice of the court of criminal appeal at that time to insist on this requirement. This is no longer a requirement, the current provision allowing of considerable flexibility; nevertheless, it seems highly unlikely that the court of appeal would allow any application to call a co-defendant who could have been called at trial (see r. v. stokes [1997] 6 archbold news 1, ca and r.v. Simpson [2010] ewca crim 1528, where the ca held that an

omission to enquire of a co-defendant whether he was willing to give evidence could not amount to a "reasonable explanation" for failure to call him).

When fresh evidence may be received

Evidence may be received of matters which have arisen only after conviction, which, of course, is itself the explanation for the failure to adduce it at the trial: r. v. ditch, 53 cr.app.r. 627; r. v. Conway, 70 cr.app.r. 4; r. v. Williams and smith [1995] 1 cr.app.r. 74; r. v. twitchell (keith) [2000] 1 cr.app.r. 373. In ditch, evidence was admitted of a confession of a convicted co-defendant of the applicant made after conviction, which exculpated the applicant. Although the court would be careful in acting on such evidence, it will nevertheless in a proper case, where it accepts the co-defendant's evidence as genuine, quash the conviction.

In Conway, the evidence, which it was sought to adduce, was of statements made by prosecution witnesses after the conclusion of the trial, which, it was said, were inconsistent with their evidence at the trial. It was held that the proper procedure in such circumstances, in accordance with section 4 of the criminal procedure act 1865, was for the witnesses themselves to be called so that the alleged statements could be put to them and, thereafter, if they denied making them, the court could hear the evidence of the witnesses that the applicant sought to call.

In r. v. Williams and smith, evidence of discreditable conduct of police officers subsequent to the trial of the appellants was admitted. Their integrity had been in issue; the court held that the evidence discredited their earlier testimony. See also r. v. Edwards (Maxine) [1996] 2 cr.app.r. 345, ca (refusal of juries to accept evidence of key police witnesses in respect of like allegations in subsequent cases); and r. v. twitchell (keith), above.

See also: r v Blackwell [2006] ewca crim 2185 the conviction was quashed on the basis that:

'There is new evidence available which gives rise to a very real doubt that [the complainant] was the victim of an assault by another person. [The complainant] had previous convictions for dishonesty. She has made other allegations, including allegations of sexual assault, to the police which, when investigated, were considered to be false. [The complainant] has a demonstrable propensity and ability to lie. There is material contained in her medical and psychiatric history which indicates that her evidence might not be credible or reliable...'

And

'Following the appellant's conviction, the complainant made a number of allegations of sexual assaults in other circumstances on other occasions, some of which include allegations strikingly similar to those made by her in the present case.' (Emphasis added)

Remember also that the court of appeal has power to hear evidence "de benese "which means it can hear the evidence provisionally prior to making any determination that it will admit the evidence. There are advantages to inviting the court to adopt this approach in a case which technically might fail on one or more elements of the test on a strict interpretation.

And when it may not be!

Where it is sought to call a witness who was not called at trial as a result of the advice or decision of the appellant's counsel and it is alleged that that advice or decision was mistaken, the court of appeal will not admit the evidence even if it disagreed with counsel's decision, unless the court was left with a lurking doubt that injustice had been caused by flagrantly incompetent advocacy: r. v. roberts [1990] crim.l.r. 122, ca.

The Court is unlikely to receive evidence which advances a different defence to that which was run at Trial R v Brown [2016] UKPC 6

You cannot simply hunt out a new Expert different to that at the trial for example a DNA expert, the Court may only be receptive if there have been genuine advances in DNA testing or serious errors undermined the original report R v Cleobury [2012] EWCA Crim 17. For a guide of the principles to be applied see R v Chatoo [2012] EWCA Crim 190.

Where such evidence might be admitted is demonstrated in the case of R v George [2014] EWCA Crim 2507 - gun shot residue evidence and Choudhry [2017] EWCA Crim 1325 on fresh medical evidence.

Bringing this all together

Where does this leave us with some clear principles to approach fresh evidence and getting it in to your appeal?

1 – make sure the evidence is evidence, which could potentially go to the heart of the safety of the conviction.

2 – remember it's the courts assessment that counts and the jury impact test is only a backup to the overriding test

3 – keep a full audit trail of all your investigations

4 – keep the defendant and supporters away from the fresh evidence

5 – prepare a gogna statement detailing how you got the evidence

6 – remember that fresh evidence is documentary, it is expert evidence, it is non-disclosed material, and it is ultimately anything that can suggest to the court the original verdicts are unsafe

7 – look for any other evidence that might contradict the fresh evidence

8 – try to get more than one piece of fresh evidence if you can

9 – focus your argument on the courts criteria

10 – get your appeal in and hope for the best

I hope what I have said helps focus your efforts to get evidence of innocence into the court it's a difficult road but one ultimately that the court prefers more than any other ground