Evidence updater - Summer 2023

Khan [2023] 2023 EWCA Crim 347 – Voice identification

The defendant was alleged to be part of a conspiracy to supply class A drugs. Much of the case concerned telephone evidence. The prosecution served the raw data needed for analysis very shortly before the trial along with some voice messages they asserted were from Khan. The judge admitted the text messages as there was no evidence to suggest that anyone else could have interfered with the phone which Khan admitted possessing. The judge allowed the jury to compare the voicemail on the phones with the recordings of interview.

The defendant appealed on the basis that the text messages should not have been allowed in and that they should have been allowed to instruct an expert on the voice comparison and the jury should not have been allowed to make their own comparison.

The appeal was dismissed. The jury were given an adequate direction on the need to be sure that the voice on the messages with Khan. A direction in accordance with R v Flynn [2008] 2 CrAppR 20 had been given.

Comment: *Whatever the wealth of other evidence which existed against Mr Khan, allowing juries to act as their own expert in comparing voices is a highly dangerous approach (see Robson and Smith, 'Can we have faith juries listen without prejudice' (2019) Criminal Law Review 115 – 130). The fact that late service of the evidence meant the defence were precluded from getting their own expert assessment compounded the problem in this case. Voice identification is highly malleable and having been primed with the other evidence against Mr Khan the risk of the jury assuming it was him meant a positive identification was highly likely.*

Loader [2023] EWCA Crim 410 – Circumstantial evidence - Identification

Loader and two others were charged with attempted murder. The victims were attacked by a masked gang in Cambridge Market Place. There was evidence which put the defendants in the vicinity of the victims and the crime scene, evidence of Loader disposing of trainers and possession of a bottle of ammonia on his arrest that evening. There were also weapons found at his address. There was evidence that in 2019, L's brother had been injured in a vehicle struck by another car and this collision may have been deliberate. One of the victims of the attempted murder had been interviewed about being the driver of the car but had denied this and no further action was taken. This was relied on by the prosecution to show motive.

It was argued at trial there was no case to answer. This was rejected and the defendants convicted.

On appeal it was argued the judge had wrongly admitted the evidence of motive. The witness had denied being the driver of the car and the Crown were picking and choosing their evidence. This was rejected. The Court of Appeal concluded it was relevant to the question of identification (and not intent as suggested). Whether the victim had been the driver or not was immaterial – it went to what was on L's mind. The prosecution had been entitled to cross-examine L on the basis that L's

mother had fitted a panic alarm because she was in fear of another attack from the group who had attacked L's brother.

The Court of Appeal also concluded the judge had correctly admitted the bottle of ammonia as being evidence from which the jury could conclude that L was planning to commit an attack, notwithstanding the fact that the attack was carried out with a knife. They also agreed that the weapons and stab vest at L's house were evidence of a plan to commit violence which was properly admitted.

The Court of Appeal agreed with the judge's ruling that there was a case to answer. They noted that this ruling was based primarily on the behaviour of the defendants in the vicinity of the crime at the time of the offence.

Challenges were also made to the fact that an officer made reference in cross examination to other CCTV which had not been put before the jury, and that one of the victims had identified one of the defendants by name when the Crown accepted that this identification was too weak to be relied upon. The Court of Appeal accepted that these issues were cured by the directions given.

The Court also dismissed the argument that there was insufficient evidence of attempt to kill noting that a planned attack with lethal weapons would be enough for a jury to reach this conclusion.

Comment: *On the face of it, this looked a pretty thin case. 'Identification' is often a relatively complex way to adduce bad character. In R v Richardson [2014] EWCA Crim 1785 the Court of Appeal noted the difference between 'identification' and 'propensity' as a basis may not be obvious. Here the admission would seem to be predicated on the line of reasoning that the chance of the defendant (a person who had a motive) coincidentally being in the vicinity of the attack corroborated the identification rather than motive being a free-standing piece of evidence.*

McGowan [2023] EWCA Crim 247 s98 – Bad Character

The defendant was convicted of s18 and acquitted of Attempted Murder. The victim was attacked outside a house by a group of 4 males all of whom were armed. The victim had been with the defendants in the house a few minutes before the attack. Each defendant put their case on the basis of presence in the house but non-involvement in the stabbing. McGowan was arrested at his home shortly afterwards. Internet searches on his phone indicated that he had been searching for Rambo knives and zombie knives a few weeks earlier. There was no evidence to link the knives to the stabbing and no evidence that the searches had resulted in a purchase. At trial, the judge concluded this material fell under s98 as 'having to do with the facts of the offence' and so no bad character application was needed.

The Court of Appeal was not satisfied that the Crown had established there was nexus between the knives and the search history. They did however accept that it established propensity to carry knives under Criminal s101 (d) Criminal Justice Act 2003- and if admitted on that basis there would be no basis to exclude it. The conviction was therefore safe.

An additional submission that a Turnbull direction was needed was rejected as the issue was credibility not identification.

Comment: *Another attempt by the Court of Appeal to clarify where s98 stops. In this case the Court of Appeal are clear in identifying that there needs to be a nexus between the act of looking at knives and the use of a knife in an incident and the judge erred in their approach. However as is often the case, the remedy is to say that the evidence would have been inevitably allowed under another gateway, in this case 101 (d). This leaves the question of whether the trial judge would have applied the exclusionary test unresolved.*

Director of Public Prosecutions v Eastburn [2023] EWHC 1063 (Admin) Article 10 and 11

The DPP appealed against a decision of the City of London Magistrates Court to acquit the respondent of an offence of s14 of the Public Order Act 1986 (refusing to comply with a direction from a senior police officer).

Acting Commissioner Rolfe of the Metropolitan Police issued a direction in respect of protest by Extinction Rebellion scheduled for 2 September 2020. The appellant attended on that date and joined the protest by sitting in the road. In all other respects her actions were found to be peaceful. The respondent was notified of the direction and given the opportunity to leave the area which she did not. She was charged with the offence.

It was accepted the direction was lawfully made. It was also accepted that the respondents Article 10 and 11 rights were engaged. The Deputy District Judge concluded the elements of the offence were established but that following the Supreme Court decision in *Ziegler* he had to consider the proportionality of the prosecution. He was not satisfied given the limited involvement of the respondent and the limited obstruction that this was satisfied.

The Divisional Court quashed the decision- and remitted the case with a direction to convict. Subsequent case law had clarified the position of Ziegler. This was not a case where the elements of the offence were subject to an assessment of proportionality. Proportionality might become an issue in considering the lawfulness of the direction given, but that was not in issue in this case. Having found the elements of the offence proven the judge had no choice but to convict.

Comment: *This is one of a line of cases including DPP v Cuciurean [2022] EWHC 736 (Admin), [2022] QB 888 and Attorney General's Reference No.1 of 2022, better known as the Colston case [2022] EWCA Crim 1259, [2023] 2 WLR 651 which have tried to circumscribe the impact of DPP v Ziegler [2021] UKSC 23. It seems clear that the proportionality test required by Ziegler is limited to cases where an element of lawful excuse is part of the assessment and even then in limited circumstances.*

Molliere [2023] EWCA Crim 228 s34 Inferences/Bad Character

The applicant was convicted of three counts of sexual assault. The incident took place in 2010 when he was working as a fashion photographer. The Crown's cases was that the victim had engaged his services to produce a portfolio of photographs. During the photo shoot he had committed a number of sexual assaults. The matter was not reported until 2019. Prior to the interview, the defendant had been provided with details of the allegation. He put forward a prepared statement saying he could not remember the precise shoot and then replied 'no comment ' to all matters put to him. In

evidence he put forward a more detailed denial of the offence. The judge directed the jury inferences could be drawn under s34 of the Criminal Justice and Public Order Act of 1994.

At trial, the applicant stated in evidence in chief that the complainant had a profile on a website which said she was available for 'adult' photos (the complainant having stated that she was not happy to do a naked photo shoot). The trial judge treated this as an attack on character and allowed the defendant's character to be admitted.

The applicant argued that the judge was wrong to direct the jury they could draw inferences given the age of the offence and the lack of disclosure. The Court of Appeal refused leave on this ground noting that the defence put forward at trial was not simply an 'amplification' of the prepared statement but was a detailed narrative and the jury were properly entitled to draw inferences.

In relation to the Bad Character, the defendant argued that he was doing more than challenging the credibility of the complainant, that it did not amount to an attack on character as there was no imputation of illegality and that even if this was the case the judge should not have admitted it taking into account the exclusionary discretion.

The Court of Appeal rejected these arguments. They concluded the inference was that 'adult' meant pornographic and that this assertion was an act of 'mudslinging' designed to lower the complainant in the eyes of the jury. They also accepted that it was designed to deliberately undermine her credibility and went beyond the assertion of a defence. There was no basis to interfere with the judge's exercise of discretion.

***Comment**: Cases where allegations are made of behaviour which is not illegal resulting in gateway 101(g) of the Criminal Justice Act 2003 being opened are not common in Court of Appeal judgments. Here the Court looked at what their purpose was (rather than making a moral judgment) which was to suggest the complainant was a hypocrite. This fairly brought character into play.*

Lake [2023] EWCA Crim 710 Previous consistent statements/ evidence of distress/s34/ judicial intervention

Appeal allowed in a rape case. The prosecution case was that the victim was asleep. The defence case she was awake and consenting.

The Court of Appeal identified a number of errors in the trial, each one was not enough to allow the appeal but in combination were fatal to the safety of the conviction.

1) The prosecution relied upon previous consistent statements made by the victim. The recorder gave a warning 'Simply because the allegations were repeated to others, does not make for more evidence.' He also failed to warn the jury about some inconsistencies. The Court of Appeal concluded this was not a suitable direction and the Recorder should have followed the specimen direction.
2) Throughout her ABE and evidence the complainant appeared to be in considerable distress (described by the recorder as 'hyperventilating'). The Crown had placed considerable weight on the demeanour of the witness and the jury should have been directed to consider other explanations for the distress.

3) The recorder allowed a s34 inference to be drawn from the change of account of the defendant as to when the complainant woke up. The Court of Appeal described it as unfortunate that this was treated as an omission rather than an inconsistency. However in any event the direction given was inadequate and did not address the fact it could not form the sole basis for the conviction. This was material misdirection.
4) The recorder asked a series of short questions leading to the final question;
"So you tell this jury you believe she was consenting to unprotected sex with somebody she had known for less than half an hour?"
The issue of unprotected sex had not been taken by the prosecution and the recorder was unwise to have adopted it. In particular the Court of Appeal noted it should not of been done in the style of a skilful cross-examination with a rhetorical flourish.

The Court of Appeal also issued a reminder on the importance of access being given to trial recordings as well as transcripts.

***Comment**: Cases where allegations of judicial intervention form the basis of an appeal are frequent. Cases where they succeed are not. Here this was part of a trial with so many other errors the conviction could not stand. What is perhaps of most use for those who encounter judicial intervention was the way that the defence were able to use the transcript to establish how the style of the interventions closely mirrored the structure of a prosecution cross-examination.*

Jackson[2023] EWCA Crim 735 Loss of control – tendering witnesses

This was a widely publicised case in which the accused stabbed her husband. The defence put forward was loss of control on the basis of sustained coercive control. The jury convicted.

The appellant appealed on a number of grounds including two relating to the nature of the summing up which were rejected by the court on the basis the summing up had clearly identified the importance of examining the cumulative nature of the controlling behaviour and the nature of the prosecution case.

A third point concerned the prosecution duty to call witnesses. The prosecution had served a number of witnesses as unused material. The defence argued that they should be called by the prosecution and tendered for cross-examination. It was argued that the principles established in *Russell-Jones [1995] 1 Cr App R 538* extended to material served as unused material as well as witnesses served on the 'back of the indictment' (as part of the prosecution case) and that the common law principles had been overtaken by the duty in the overriding objective to ensure a fair trial. The trial judge rejected this argument. The Court of Appeal agreed, noting that the principles in Russell-Jones were sufficient to meet the obligations in the overriding objectives.

***Comment:** In terms of the difficult area of victims of coercive control killing their abusers, this case does not take the law any further. The judge addressed all the issues in respect of loss of control in the summing up and the jury rejected them. The question of an obligation to call witnesses served as part of the unused is novel and had it been allowed, would have caused significant difficulties in practice.*