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7 Ways Justice System Favours Conviction of the Innocent Over Acquittal of the Guilty

Mark Alexander, A8819AL – HMP Coldingley: Tilting the Balance - The Law Commission's ongoing review of the criminal appeals system completed its pre-consultation phase last week, examining a raft of proposed reforms to the way our State institutions respond to potential miscarriages of justice. I was immediately struck by a well-intentioned but highly questionable passage in the Law Commission's Issues Paper (paragraph 2.8) which would have seemed unexceptional had I read it as a young law student 15 years ago, but which now stands out like a sore thumb:

"Criminal justice in England and Wales prioritises acquittal of the innocent over conviction of the guilty". This is a timely review, coinciding with the recent exoneration of Andy Malkinson, but it should not – indeed cannot – proceed on the assumption that the system is already weighted in favour of defendants. It is not. The Court of Appeal needs to adjust the way it approaches cases to reflect this fundamental and systemic imbalance. The thrust of my response to the Law Commission's Issues Paper is that this can only be achieved through legislative reform that dramatically broadens the scope of the Court of Appeal's powers. Whilst the review largely focuses on the post-conviction stage, it is important to recognise that the seeds of injustice are often sown long before a case ever reaches the Courts, falling from the moment of arrest itself. I have picked 7 examples that serve to demonstrate how the dice have been loaded to make it easier to secure convictions in England and Wales. These imbalances need to be rolled back if we don't want innocent people to be caught in the net.

1.Majority Verdicts - The introduction of majority verdicts in the late 60s has tilted the balance heavily towards the prosecution, making it easier to convict the innocent when the evidence leaves some jury members uneasy about weaknesses in the case. If two members of the panel do not believe the conviction can be proven, then that should amount to a reasonable doubt. As I argue in my response to the Law Commission, a requirement for unanimous verdicts should be reintroduced, if not in all cases, then certainly where the potential sentence could be greater than 10 years.

2. Circumstantial Convictions - It cannot be right in this day and age that a murder conviction can be sustained without forensic evidence. If we are sending someone to prison for life, then there should be absolutely no doubt in our minds that that person is in fact guilty. Given the risks and impact of wrongful conviction, the vast majority of jurisdictions set a much higher threshold for conviction in homicide cases than we do here in England and Wales. The Government should legislate to prevent convictions based upon circumstantial evidence alone, in indictments subject to mandatory minimum terms.

3. Custodial Remand - With year-on-year cuts to legal aid for the past 15 years, preparing a defence is hard enough as it is without having to do so from behind bars on remand. Courts currently place more weight upon predictions of perceived risk than they do upon equality of arms or due process. The psychological impact alone can be devastating, particularly for defendants like myself who have never been to a prison before. I vividly recall the fear and shock of the whole experience, which left me feeling disoriented and unable to function on a day-to-day basis. Cut off from the outside world, I had very little sense of what was going on, and the reality of my detention made effective communication with my legal team extremely difficult. The ordeal of being transported from the prison to the courtroom each day for 6

weeks was not only exhausting – emotionally and physically – but incredibly dehumanising.

For the vast majority of people, less restrictive and traumatising alternatives are available, such as HDC, electronic tagging, or – if custody is absolutely essential: remand to an open prison rather than a closed one. I propose introducing a presumption for bail in all cases unless there is clear evidence of risk, or the person has committed an offence whilst on bail. Whilst I was eligible for bail myself, I simply didn't have the financial means to meet the amount set by the judge. The Courts should avoid setting onerous bail figures that price defendants out of justice.

4. Courtroom Architecture - Jurors faced with a defendant flanked by guards and placed behind a glass screen cannot help but prejudge his or her culpability, undermining the presumption of innocence. I remember the judgmental looks of the jurors on the first day of my trial, which left me feeling deeply demoralised and with little confidence that the process about to unfold would be truly impartial. In a study by the University of Western Australia, "60% of jurors delivered a guilty verdict when the defendant was confined to a glass dock, 47% when located in an open dock, and 36% when they were placed next to their lawyer" (John O'Connor, 'Time to destroy courtroom cages?', Inside Time, August 2015). Most courtroom docks are now equipped with glass screens as standard, without much thought as to the effect that this very real separation of the defendant from the trial has not only on the jurors and witnesses, but on the defendant themselves. The actual experience of being sat behind a screen only adds to the sense of alienation one feels as the subject of proceedings. The design of our courtrooms is highly influential and should be reconfigured to reduce the potential for bias and trauma. It not only has an impact on the outcome of a trial, but heightens the adversarial nature of the process, making the trial more combative and psychologically damaging for participants.

5.Pre-Charge Detention - When it comes to pre-charge detention, the police are empowered to hold individuals for up to 36 hours without a court order, (Police and Criminal Evidence Act 1984, s42; Serious Organised Crime and Police Act 2005, Schedule 7, s43(7)) "ample time for the suspect to be psychologically 'softened up'" as Professor Mike Maguire puts it ('The Oxford Handbook of Criminology', 5th Edition (2012), Ch. 28, p. 848). PACE guarantees those in custody certain rights, including free legal advice and basic standards of treatment (Police and Criminal Evidence Act 1984, Code of Practice C), but these do little to mitigate the coercive experience of detention and interrogation in an environment "deliberately denuded of psychological supports" (Maguire, op. cit. p. 848). The process induces varying degrees of trauma in detainees which the police often exploit to their advantage. Practices like selective disclosure or using closed and leading questions keep suspects off-balance. Vulnerable interviewees who resist the temptation to make deals with the police may be susceptible to suggestibility and difficulties with, or distortions in, memory according to David Hockey ('The problem with memory', Inside Time, March 2014) – which can then be used against them at trial. The abolition of the right to silence (Criminal Justice and Public Order Act 1994), once a cornerstone safeguard for suspects, has eroded civil liberties and increased the pressure on suspects to speak – without having any impact upon conviction rates. In practice, PACE has "shifted unwanted police behaviour" rather than reducing it, argues Professor Maguire (op. cit. p. 851) and has enhanced their structural advantage.

6. Police Performance Targets - As Professor Robert Reiner explains, the police have been subjected to 'market disciplines' ever since The Police and Magistrates Court Act 1994 ('The Policies of the Police', 3rd Edition, 2010). National Police and Crime Plans, issued at the start of each financial year (Police Act 1996, s.6ZB; Police Reform and Social Responsibility Act 2011, ss. 5 and 7), place pressure on the police to meet government targets which, as Mike

Maguire puts it, penetrate "the day-to-day operation of discretion". The politicisation of policing can be seen – for example – in the Secretary of State's power to direct the police, in consultation with elected Police and Crime Commissioners, to "take specified measures" where he or she feels "any part of a police force is failing to discharge any of its functions in an effective manner, whether generally or in particular respects" (s.40 Police Act 1996). While numerical targets, under the Policing Performance Assessment Framework, were scrapped by Theresa May in 2010 , Priti Patel reintroduced 'directional targets' through the National Crime and Policing Measures in 2021 ('Beating Crime Plan', pp. 46 – 47), assessing performance against police recorded crime. This sees police forces competing to beat the national average.

The problem with a police force reoriented towards performance measurement and motivated by competition is that officers can quickly lose sight of what justice actually requires. To meet targets and improve 'performance', it doesn't matter as much whether they have the right suspect, merely that they have a suspect. In their eagerness to charge someone within the detention time limit, evidence can be fitted to the individual by "selecting, interpreting, and sometimes even 'creating' facts which bear little relation to reality" (Maguire, op. cit. p.855).

Several witnesses at my own trial, for example, have since revealed that the police told them I was 'guilty', or 'definitely responsible' before taking their statements – in many cases before I was actually charged – thereby influencing the testimony they were supposed to be impartially collecting.

7. Police Impartiality - The police are expected to follow "all reasonable lines of enquiry, whether they point towards or away from the suspect" (Criminal Procedure and Investigations Act 1996, Code of Practice under Part II, s3.5), but interviewers are prone to avoid this, "frequently looking to interviews to confirm police suspicions" (Maguire, op. cit. p. 850). The police want to build their case, not demolish it – and are incentivised to do so as a result of National Policing Plan targets. Against the clock and with limited resources, they will be inexorably focused upon lines of enquiry that fit their own theories. There is, consequentially, an all too real danger that vital exculpatory evidence will be missed and a miscarriage of justice perpetrated. The fact that defendants must rely on the same police who arrested them to then pursue all lines of enquiry in what is fundamentally an adversarial process is less than satisfactory, and the most common cause of error. Defendants do not have the ability to send in their own scenes of crime team to hunt for evidence at the same time as the police. They must rely on the State to obtain that evidence for them. If the State misses that evidence, fails to store it correctly, or inadvertently destroys it, then the defendant has nowhere else to turn.

In my own case it became apparent some years after trial that Scenes of Crime Officers had incorrectly bagged key evidence from the burial site, which made it impossible to subject it to relative dating techniques – depriving me of a potential defence given the 6-month indictment window.

These problems extend to case-construction in which safeguards are often "ignored, subverted, or negotiated by the police… to secure… the creation of successful prosecution cases" – as Professor Tim Newburn identifies ('Criminology', 2nd Edition, p. 574). In theory, the CPS should be able to pick up on this when they assess the 'realistic prospect of conviction' in each case. The CPS are in a weak position however, because they can only go on what the police have picked up on, and how they then present the facts to them.

In a bid to prevent guilty people walking free, due process protections have been steadily eroded. The inevitable structural imbalances highlighted in this article have tilted the balance too far in the opposite direction, creating a disproportionate risk of convicting the innocent. This must be recognised and addressed not only by the Law Commission, but by our government when the opportunity comes for corrective legislation.

Inquest Resumes Eleven Years After His Death Following Police Restraint

Thomas Orchard, 32, died following police restraint in October 2012. Eleven years on the inquest into his death will resume. On the morning of 3 October 2012, Thomas was detained in Exeter City Centre by Devon and Cornwall police officers and transported to Heavitree Road police station where an Emergency Restraint Belt, which had been authorised by Devon and Cornwall police as a bite and spit hood, was placed around his face. Shortly after midday Thomas was taken by ambulance to hospital where he was subsequently pronounced dead on 10 October 2012. Thomas had a history of serious mental illness. Following Thomas' death an independent investigation by the Independent Police Complaints Commission (IPCC, predecessor to the Independent Office for Police Conduct) was begun. Thomas' inquest was subsequently suspended by Elizabeth Earland, then HM Senior Coroner for Exeter and Greater Devon to allow for criminal proceedings related to Thomas' death to take place. Following the conclusion of previous proceedings, Thomas' family requested that the inquest be resumed and, in May 2022, Philip Spinney, HM Senior Coroner for Exeter and Greater Devon, determined that Thomas' inquest should be resumed. The inquest will now examine the circumstances of Thomas' death.

The family of Thomas Orchard said: "It has been over 11 - tortuous - years since Thomas' tragic death and we welcome his inquest as our first opportunity to play a more active role in the proceedings and to finally get some answers. We hope that the inquest process will be robust, with all those involved being open and honest, so that, as a family, we can, not only have our questions answered, but also ensure that Thomas' death can play its part in improving the treatment of those in mental health crisis and in preventing further deaths in police custody."

Criminals and Sanctions-Busters Exploiting UK Secrecy Loophole

BBC News: An offshore firm helped create companies used by members of Vladimir Putin's inner circle, including one hiding the late mercenary boss Yevgeny Prigozhin's yacht, the BBC can reveal. Seychelles-based Alpha Consulting also helped to form more than 900 UK partnerships which used a secrecy loophole to conceal their true owners. One partnership was involved in running a sanctions-busting oil tanker, while others committed crimes. Alpha said it always followed the law.

The investigation by the BBC, Finance Uncovered and the Seychelles Broadcasting Corporation has analysed internal Alpha documents and thousands of company records to identify some of the people who secretly benefitted from the work of the offshore firm, based in the island nation in the Indian Ocean. As well as catering to members of Russian President Vladimir Putin's inner circle, Alpha Consulting was a secrecy factory - one of the most prolific companies helping to exploit a gaping loophole in UK law. Some of the partnerships it helped create have been involved in alleged fraud and running an illegal essay mill. One has been accused of interfering in a foreign election. Limited partnerships, a type of firm usually created by two or more people to own and run a business together, can also be used to sidestep transparency regulations. After a law was introduced in 2016 requiring UK companies to declare who owns them or is really in control, there was a surge in the registration of limited partnerships, which were exempt. This requirement was extended to Scottish limited partnerships a year later after it was revealed that they were being increasingly used for money laundering and other crimes. But last year, the BBC and Finance Uncovered revealed the increasing use of English limited partnerships and evidence linking a number of them to fraud, terrorism and money laundering. Despite this, the government has failed to extend laws requiring companies to identify the people really in control - known as "persons of significant control" - to all limited partnerships.

Jail Sentences to End For Thousands of Abusive Men

Maya Oppenheim, Indepemndent: Thousands of abusive men could walk free from court under the government's plans to scrap some shorter sentences as it scrambles to tackle the overcrowding crisis gripping prisons – putting women's safety at risk. Some 11,040 men were jailed for around 12 months or less for harassment, stalking and revenge porn last year – all sentences that could now be served in the community to free up space in jails. Justice secretary Alex Chalk's proposals, announced earlier this month, would see prison terms of under 12 months axed for most offenders. Critics say the move will affect criminals who target women and girls who typically get low sentences – despite Rishi Sunak repeatedly pledging to do more to protect these victims.

Politicians, campaigners and the government's own domestic violence watchdog have raised concerns over the measures amid fears domestic abusers and stalkers could "slip through the net", with Labour saying the plans had been "rushed out with no consideration for victims". Latest available figures from the Ministry of Justice for 2022 show: 8,996 men were sentenced on average to less than five months for harassment - 1,809 men were sentenced on average to around 12 months behind bars for stalking offences - 235 men were sentenced for an average of just over seven months in prison for revenge porn offences. The number of men sentenced for stalking and revenge porn offences has also increased substantially – from 1,384 in 2021 to 2,044 last year.

First Arrests Under New Public Order Act Offences

*Thomas Gulian, Justice Gap:*Police powers under the Public Order Act 2023 have been exercised for the first time against protesters. 61 Just Stop Oil protestors were arrested on Monday 30th October on a road outside parliament for the new offence of 'interference with national infrastructure. On Tuesday1st November, protestors chained to the drone manufacturer Elbit Systems were arrested under the offence of 'locking on'. Additional arrests were made later in the week after further protest action by Just Stop Oil, bringing the total arrests under the new interference with infrastructure provision to 112 as of Friday evening 3rd of November.

Amnesty International have similarly warned that these new offences could have a 'chilling effect' on protest. Netpol, who monitor policing, have said these new powers let police "immediately shut down a protest and criminalise everyone involved. That is what makes these new offences so repressive." Similarly, the human rights group Liberty has expressed concern about the broad scope of these powers. The 'locking on' offence in for example, includes a provision which criminalises 'being equipped for locking on', which was used against Republic protesters during the King's coronation. Liberty has also noted that the new offence against infrastructure interference could have an impact on industrial action in certain industries, as well as protests in the vicinity of power stations.

Extradition: An Introduction

5SAH Chambers: This is where politics and law collide – it is the coming together of law, human rights, and international relations. It has political ramifications far beyond individual cases and is an area where authoritarian regimes can try to influence the outcomes of UK legal proceedings. Prison Conditions and Torture: Human rights remain at the forefront of the issues raised in extradition cases. In particular, the state of foreign and UK prisons and the use of torture against suspects. This year has also seen particular emphasis by the European Court of Human Rights on USA extradition cases involving the UK, Italy and Sweden and the question of whether a sentence of life without parole is a breach of International Human Rights Standards. The Grand Chamber of the European Court of Human Rights gave judgment in Sanchez-Sanchez v the United Kingdom. The court changed the law on extradition and life without parole, instituting a new, two-stage test. Firstly, whether an individual could show they were likely to receive a sentence of life without parole and secondly whether there was a mechanism available for release, even if it was unlikely. The Strasbourg Court also heard the case of Balahan v Sweden dealing with a minimum sentence of 61 years under the "three strikes" rule in California and is shortly due to hear Horne v the United Kingdom on life without parole in Florida. The UK courts then examined Rae v USA dealing with Texas prison conditions and the applicability of the test in Sanchez-Sanchez to prison conditions.

Prison conditions in Europe and the UK remain a real problem. This year, a German court refused extradition to the UK on the basis of poor prison conditions. The UK has examined the issue in many jurisdictions. Many cases are dealt with by the provision of assurances from the foreign state giving undertakings to the UK about conditions but, in spite of assurances on issues of overcrowding, inter-prisoner violence and dreadful facilities make this an important area of jurisprudence.

Forum and the Rule of Law: There has also been a string of US cases that relate to American prosecutions of extra-territorial offences. These arguments are being run on the basis of forum, given that the most appropriate location for trial is arguably not the United States. In the Autonomy case of Lynch v United States, it was argued that Dr Lynch should be tried in the UK for the fraud allegedly committed during the sale of the company Autonomy to HP, of which he was the CEO. There continues to be ongoing issues with the rule of law in Poland, Romania and Hungary, as changes to the law have substantially undermined the independence of the judiciary and thus the potential fairness of trials and the extradition process itself. These attacks on the rule of law are being closely monitored by the Council of Europe and that monitoring could lead to sanctions being imposed, which could include cessation of the use of the European arrest warrant system. In addition, the UK Supreme Court will shortly consider various issues in the cases of Bertino and Merticariu relating to the right to a retrial for individuals who were absent from their original trial in EU states. The first Ukraine case to examine the issue of the impact of the war is also to be litigated in December, examining whether extradition to a war zone is permissible.

Other Jurisdictions: 'The last 12 months have marked a number of high-profile extradition requests in the field of cryptocurrency. Both the United States and South Korea are currently seeking the extradition of Terraform Labs CEO, Do Kwon, and others from Montenegro accused of misleading investors about the stability of the firm's crypto tokens "TerraUSD". Crypto billionaire, Sam Bankman-Fried, has also been extradited from the Bahamas on charges of fraud and money laundering following the collapse of his cryptocurrency exchange, FTX. It is claimed the exchange allowed individuals to avoid restrictions on political contributions, which Bankman-Fried then used as leverage with politicians to support his own ends. He has pleaded not guilty to eight offences and is currently awaiting trial in federal custody. Interpol continues to face criticism for the misuse of its Red Notices as a political tool, most notably by Russia and China. By issuing Red Notices on false pretences, a country can effectively mobilise police outside of their jurisdiction to search for anyone considered an enemy of the state. China is accused of transnational repression of the Uyghurs by using such means to reach them even in otherwise "safe" democratic states.

Requests From New Jurisdictions: In October 2022, judgment was handed down at Westminster Magistrates' Court in the first South Korean extradition request, for allegations of trading fraud by a Deutsche Bank Employee. The court discharged the Requested Person on the basis that the

extradition request was politically motivated as the stock market crash caused by the alleged offender had led to the prosecutors pursuing the case on a political basis. The court also found that extradition would be oppressive due to a ten-year delay and would violate the Article 3 rights of the Requested Person, due to chronic overcrowding in Korean prisons. In November 2022, an extradition request from Mexico was discharged. The court found a real risk that extradition would breach the Requested Person's rights under Article 3 on the basis of prison conditions, and that extradition would amount to a disproportionate interference with the requested person's right to a private and family life under Article 8 ECHR and on the basis of ill health.

The first extradition request from Japan was also dealt with this year. The request is particularly unusual in that it is an ad hoc request, based on a Memorandum of Co-operation between the two countries rather than a pre-existing extradition treaty. The requested persons are UK nationals who are sought to stand trial for the robbery of a Tokyo jewellery store. In its judgment, the Magistrates' Court found that Japan had failed to establish a prima facie case and also found a real risk of a breach of the Requested Persons' rights under Articles 3, 4, 5 and 6 of the ECHR. Appeal proceedings are now pending. This year, extradition proceedings commenced in relation to two extradition requests from Nigeria. These cases will be heard by Westminster Magistrates' Court in the coming months. There has only been one previous contested request from Nigeria which resulted in the discharge of the Requested Person on several grounds, including lack of adequate particularisation, absence of an extradition offence, failure to establish a prima facie case and incompatibility with the Requested Persons Article 3 and Article 8 rights. The first contested Kuwaiti requests are presently being heard before Westminster Magistrates' Court. These cases raise a number of contested issues including the impact of torture, retrial rights and prison conditions.

Conclusion: Extradition therefore remains at the forefront of law, politics and human rights, and the examination of international and foreign law is still an exceptionally interesting and fertile area for jurisprudence and political intrigue.

Bookkeeper Accused of Fraud Acquitted at Close of Prosecution Case

A bookkeeper accused of being complicit in a fraud valued at £1.8 million was acquitted on direction of the trial judge at Basildon Crown Court. LR stood trial along with three co-defendants, all three partners of an Essex-based conveyancing firm. It was alleged that between 2011 and 2013, they took part in a fraud involving the late or non-payment of Stamp Duty Land Tax. Following extensive cross-examination of prosecution witnesses, the trial judge allowed a submission of no case to answer. He directed the jury to return not guilty verdicts in the case of LR and the fourth defendant. Two defendants remain in the trial.

Conviction for Handling Stolen Goods Referred to the Crown Court

A woman's conviction for handling stolen goods has been referred to the Crown Court by the Criminal Cases Review Commission (CCRC). Magda Krol was convicted of handling stolen goods and six other offences at Uxbridge Magistrates' Court in August 2017. In July 2018, Ms Krol was convicted of a further five offences. In light of new evidence, a judge quashed 11 of Ms Krol's convictions in February last year but was unable to consider the single remaining conviction of handling stolen goods as this had been the subject of an earlier appeal. It was suggested that an application be made to the CCRC. The judge confirmed that should the CCRC refer the single conviction, the Crown Court would quash it. Following a thorough case review, the CCRC has decided to refer the conviction to the Crown Court.

Durdaj and Ors v. Albania - Delays in Prosecution of Minister Violation of Article 2

In Chamber judgment1 in the case of Durdaj and Others v. Albania (applications nos. 63543/09, 46707/13, 46714/13 and 12720/14) the European Court of Human Rights held, unanimously, that there had been: a violation of the procedural aspect of Article 2 (right to life) of the European Convention on Human Rights. The case concerned an explosion, on 15 March 2008, at a facility in Gërdec set up by the State authorities for dismantling decommissioned and obsolete weapons, machinery and equipment of the armed forces. In total, 26 people died (including the seven-year-old son of two of the applicants in this case) and over 300 were injured (including 15 applicants).

The Court found that the applicants had been deprived of the possibility to participate effectively in the criminal trial. Moreover, the criminal proceedings against the former Minister of Defence, F.M., for abuse of office are still pending, thus leaving the applicants without a final conclusion as to his responsibility more than 14 years after the explosion. The national prosecuting authorities had provided no convincing explanations for their failure to resume the investigation immediately after F.M.'s re-election as MP, thus raising serious questions as to their willingness and diligence to pursue the matter and creating a potential for impunity. While the Court was not taking a stance as to his criminal responsibility, it considered that the applicants as well as the general public had the right to know not only the circumstances in which the Gerdec tragedy had taken place, but also the exact role the former Minister of Defence had played in it.

Shamina Begum Lawyer Withdraws Due to Unfair Process

Venita Yeung, Justice Gap: Begum has been engaged in a legal battle to regain her citizenship and return to the UK, claiming that she was a victim of human trafficking and radicalisation as a minor. Her lawyer, Angus McCullough KC, has publically withdrawn from his work as a special advocate, with detailed criticism of the government's lack of support for this system.

The so called 'secret hearings', also known as closed materials proceedings (CMPs), have long been a subject of controversy in terms of basic principles of fairness and open justice in the UK's legal landscape. Parties can be denied access to evidence used against them by the State, but that evidence can nonetheless be considered by the judge or tribunal deciding the case. Their lawyer can see this evidence, but not communicate with their client directly.

McCullough explained that his departure was fuelled by the belief that the system's imbalances against defendants have been exacerbated by the government's lack of support for special advocates. The 'silence barrier' between lawyer and client impedes effective legal representation and the right to a fair trial, putting individuals at a disadvantage. Special advocates are also hamstrung by under-resourcing, which directly affects their ability to navigate complex cases effectively. Stagnant pay rates for special advocates for over two decades also raise concerns about the system's sustainability. McCullough, who has appeared in more than 50 closed material cases in the last 20 years, stated that he had requested a meeting with Ministry of Justice officials to explain his concerns but had received no answer.

An independent review made numerous recommendations for improving the CMP system, however, McCullough claims that the government has not acted promptly to implement them. The government is aiming to publish a public response by early 2024 at the earliest. Urgent reforms are needed to address the issues plaguing CMPs and ensure that justice is served. This includes addressing budgetary constraints for special advocates, which are vital for the system's proper functioning and facilitating open justice. There are concerns that the delayed response to the identified unfairness in the CMP system is undermining the fair administration of justice.

Between : ADG BIJ Appellants - and - Rex Respondent - Convictions Quashed

This appeal against conviction raises an important issue about the elements of the defence for those aged under 18 years, pursuant to section 45 of the Modern Slavery Act 2015 (the 2015 Act). The first appellant ADG and the second appellant BIJ are 17 year old men. They have the benefit of anonymity pursuant to the provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999, which anonymity expires on their 18th birthday. The events which formed the basis of the indictment against them took place when ADG and BIJ were aged 14 to 16 years and because of their age at the time at which these events occurred, we have decided that it is not necessary in the interests of justice to remove the statutory anonymity before their 18th birthday. On 16 November 2022, following a trial before the late His Honour Judge Rose and a jury, the appellants were convicted of two counts of conspiracy to supply class A drugs (one conspiracy related to cocaine and the other to diamorphine). On 23 February 2023 the appellants were sentenced to a Youth Rehabilitation Order (YRO) for a period of 3 years. ADG had also been convicted on his own plea of guilty of two counts of being concerned in the supply of class A drugs, and BIJ had been convicted on his own plea of guilty of 3 counts of being concerned in the supply of class A drugs and 2 counts of possession with intent to supply class A drugs, and they were both sentenced to a YRO for a period of 3 years for those offences. This means that, whatever the result of this appeal, both ADG and BIJ will remain subject to concurrent YROs imposed for other offences.

Relevant Factual background: The charges against ADG and BIJ arose out of a police investigation carried out by the Serious and Organized Crime Team of Devon and Cornwall Constabulary into street dealing of both crack cocaine and heroin. The investigation revealed a drug supply network that involved at least 16 people. 10 of those individuals pleaded guilty. The network was involved in wide scale drug dealing. The network had its origins in Liverpool, and was supplying cocaine and heroin to drug users in Devon, principally in Exeter and Torbay. It operated during a 16-month period between October 2020 and February 2022. The network utilised mobile telephones to facilitate the supply of drugs, in what is commonly referred to as a "County Line" operation. This involved broadcast messages advertising the sale of cocaine and heroin being sent to drug users. Over the indictment period there were a number of drugs lines, with various names and numbers, but the first iteration was on 5 October 2020 when the "Sonny Line" was activated by a co- accused Robert Hadwin.

The prosecution case was that ADG and BIJ were involved in the conspiracy to supply both cocaine and heroin in Devon, between October 2020 and February 2022. ADG was aged 14 at the start of the conspiracy period and aged 16 at its end. BIJ was also 14 at the start and 16 at its end. The prosecution case was broadly agreed, with a 50 page document setting out a substantial number of agreed facts. As the judge said in the summing up to the jury about 98.5 per cent of the prosecution case was simply written down in front of them. ADG accepted involvement in the conspiracy to supply class A drugs. He accepted that his role included manning a phone used for the supply of drugs, sending messages advertising drugs for sale, and collecting and delivering drugs. BIJ also accepted his involvement in the conspiracy to supply class A drugs, however he said he was only involved from October 2020 until about April 2021. After that date he said he was still involved in the supply of drugs, however it was a different conspiracy that he was part of. In his defence case statement ADG set out that the "general nature of the defence is section 45 of Modern Slavery Act 2015". It was said that ADG was "targeted, utilised and exploited by others". In his defence statement BIJ stated that "the defendant avails himself of a defence pursuant to s.45 of the Modern Slavery Act 2015". BIJ referred to pressure to pay off drugs and cash that had been seized from him when arrested by the police.

The Summing Up: It appears that the judge provided counsel with a draft of his proposed directions. At that stage the judge proposed to direct the jury that this was a case where trafficking, as opposed to slavery, did not arise. Representations were made about relevant journeys, including the journeys from care homes arranged by others, and the judge agreed to remove his proposed direction that trafficking did not arise. On behalf of ADG a legal direction on the meaning of exploitation and human trafficking was sought, but the judge made no further alteration to the draft directions. It appears that no one on behalf of either the prosecution or defence identified that the draft directions included "compulsion" as an element of the defence, when it was not part of the section 45 defence so far as it related to persons under the age of 18 years. The judge then gave his legal directions and a route to verdict. So far as is material the judge directed the jury under the question "what is modern slavery" as follows: "ADG and BIJ have both said in evidence that they only participated in their actions within the conspiracies because they were compelled to do so. The defence case is that the compulsion in question overpowered any capacity to resist taking part and that this applied at all stages throughout the period in question. There was never an occasion throughout the Judgment Approved by the court for handing down. ADG & BIJ v Rex period when they were not operating under these circumstances of compulsion.

The first question for you to decide is whether you conclude on the evidence, as you find it to be, that ADG and BIJ (considered separately) were engaged in the conspiracies, i.e. engaged in the drug supply activities, only by reason of compulsion – or that this may have been the position. If this is your decision, you will proceed to consider a second question, appearing shortly below. However, if you are sure that this was not the position, sure on the evidence that the defendant whose case you are considering was not operating only by reason of the compulsion asserted, you will not proceed to the second question because you would then have rejected the existence of "modern slavery" compulsion arising in the first place and your verdicts will be "guilty". If you decide that they either were, or may have been, compelled as they have asserted in evidence then you must move on to the second question, which is this: has the prosecution made you sure that a reasonable person in the same situation as ADG and BIJ (considered separately), of his age (in both cases through the period in question 14, 15 and 16) and male sex, sharing any of his physical characteristics and/or features of mental illness or psychological limitations and/or physical disabilities would not have engaged in the conspiracies as each of them admits that they did? There is no evidence in this trial of physical disability or mental illness. You have received evidence by way of "agreed facts" as to the opinion of a consultant psychologist as to ADG's IQ and dyslexia. As to that second question, if the prosecution have made you sure that a reasonable young male person with similar characteristics to the defendant whose case you are considering would not have been involved in the conspiracies to commit serious class A drug supply offences, your verdict for that defendant will be "guilty". If the prosecution have not made you sure of this then your verdict will be "not guilty" for the defendant in question. I summarise all of the above in the following "route to verdicts" in relation to ADG and BIJ."

The judge then set out the routes to verdict for ADG and BIJ in the following terms: "1. Are you sure that the defendant whose case you are considering was not operating within the conspiracies during the period of time in question only by reason of the compulsion asserted on his behalf? Judgment Approved by the court for handing down. ADG & BIJ v Rex If, "yes, we are sure of this, he was not operating only by reason of compulsion", your verdicts are "guilty" and you go no further. If, "no, we are not sure of this – we have decided that he was operating under that compulsion, or that he may have been", then proceed to question 2. 2. Are you sure that a reasonable young male person with similar characteristics to the defendant whose case you are considering would not have been involved in the conspiracies? If, "yes, we are sure of this, a reasonable similar young male would not have been involved", your verdicts are "guilty". If, "no,

we are not sure of this, we have decided that such a reasonable other young male would have been involved, or may have been involved", your verdict is "not guilty". (underlining added to identify passages relating to compulsion) Other appropriate legal directions were given. As was to be expected of HHJ Rose, the rest of the summing up was conspicuously fair and accurate.

Unsafe Convictions: It is apparent from the directions on law and the routes to verdict provided to the jury and set out in paragraphs 22 and 23 above that the judge did direct the jury that ADG and BIJ would have to show either that they became engaged in the conspiracies, or might have become engaged in the conspiracies, because of compulsion. This would have been a proper direction for a defendant who was over 18 years because of the terms of section 45(1), (2) and (3). Section 45(1)(b) and (c) requires that the defendant commits an offence "because the person is compelled to do it" and that "the compulsion is attributable to slavery or to relevant exploitation". Although the objective test for both over and under 18 year old defendants is in similar terms, see paragraph 45(1)(d) and 45(4)(c), the defence for those under 18 years does not include the requirement to show compulsion. What is required by section 45(4) is for the person under 18 to have committed the offence as a "direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation". It is apparent that a requirement to show compulsion is more onerous than a requirement to show that the relevant act was committed as a direct consequence of the person being, or having been a victim of slavery or a victim of relevant exploitation.

It is unfortunate that when the judge circulated his draft directions this point was not picked up by either prosecution or defence. It might be noted that it does not seem that either the prosecution or defence had focussed on the critical difference between the elements of the section 45 defence for those over 18 years and those under 18 years. Be that as it may, in circumstances where the judge has added in another element to the defence which the law does not require, and in circumstances where it is not possible to say that the jury were not influenced by that additional step on the routes to verdict, in our judgment the convictions of both ADG and BIJ are unsafe. We therefore quash their convictions for conspiracy to supply class A drugs. It might be noted that with R v NHF, this is the second case in which it is apparent that the critical difference between the section 45 defence for those aged 18 years and over, and those aged under 18 years, has been missed. This may have something to do with the fact that sections 45(1), (2) and (3) relate to the defence for those aged 18 years and over, and it is only section 45(4) that relates to those aged under 18 years. It highlights the importance of reading carefully the relevant statutory provisions.

No Retrial - As noted above both ADG and BIJ had been convicted on their own pleas of separate drug offending, and both had been sentenced to concurrent YROs. In these circumstances the quashing of these convictions will not make any practical difference to the sentence which they are serving. Mr Tully on behalf of the prosecution submitted that there should be a retrial because it appears that ADG and BIJ are facing proceedings for breaching their YROs and there are proceedings relating to other offences. This application was resisted on behalf of ADG and BIJ. These events occurred when ADG and BIJ were aged 14 to 16 years, and they are nearly aged 18 years. They were convicted on their own pleas of guilty to other and separate drug dealing. If ADG and BIJ have been foolish enough not to take advantage of the opportunities offered to them by the YRO imposed by the judge (and we are not in a position to say if that is the case), they can be dealt with for those breaches, and if necessary for the original offences to which they had pleaded guilty, and any other offending for which they are convicted. In these circumstances it is not in the interests of justice to order a retrial.

Conclusion: For the detailed reasons set out above these appeals against conviction are allowed and the convictions are quashed. We do not order a retrial.

Two More Convictions Based on Evidence of Corrupt Officer to be Reviewed

Samantha Dulieu, Justice Gap: The wrongful convictions of two men who died in custody will be reviewed by the courts as part of a wider examination into cases that relied on evidence from a corrupt British Transport Police Officer. Basil Peterkin and Saliah Mehmet were British Rail workers, convicted in 1977 after thefts from the goods depot where they worked. DS Derek Ridgewell provided evidence in their prosecution but later plead guilty to stealing from the same depot. The CCRC have previously referred 9 such cases that relied on Ridgewell's evidence back to the courts, all of which were quashed. They announced their review of the Peterkin and Mehmet cases after tracking down surviving family members, who have welcomed the re-examination of their convictions. The head of the CCRC, Helen Pitcher, said they are still working to identify other people who may have been unjustly convicted, and urged people to contact the commission if they believe this may be them or one of their family members 'particularly if DS Derek Ridgewell was involved'. In 2021, the British Transport Police apologised for the trauma caused by Ridgewell's actions and 'systemic racism' in light of miscarriages of justice involving the Stockwell Six, who were accused of attempting to rob the corrupt officer, and the Oval Four, who were accused of 'nicking handbags' on the tube.

Magistrates in England Not Following Law On Remand Decisions

Haroon Siddique , Guardian:Magistrates are not following the law when sending thousands of people to jail on remand, exacerbating the prison overcrowding crisis in England, a report suggests. The remand population is at a record high, with one in five people who are in jail awaiting trial or sentencing, up from one in nine in 2019. Police cells are being used to hold prisoners, and the government plans to rent cells overseas because of the lack of capacity.

A report by the legal reform charity Justice says "poor quality decision-making" by magistrates – including in two-minute hearings – may be playing a part. It sent observers to 742 magistrates court hearings in England and found that four out of five decisions to remand in custody or impose bail conditions did not reference the relevant law and give full reasons with reference to the facts of the case, as is required under the Bail Act 1976. Justice said this undermined fairness and increased the likelihood of custodial remand being imposed unnecessarily. In two cases, the decision to impose custodial remand took just two minutes.

Fiona Rutherford, the chief executive of Justice, said: "We should all be able to trust that courts follow basic legal steps when making life-changing decisions. The choice to imprison someone not yet tried or convicted can shatter lives, leading to job loss, homelessness and severed connections to family and support services. "Many of these individuals will have spent months if not years in an unsuitable cell whilst their lives fall apart. All too often, magistrates courts are not taking the proper legal steps when making these important decisions." The report says that despite the stringent test for custodial remand or imposing conditions on bail under the Bail Act, unconditional bail was the outcome just 21% of the time. Justice says people jailed while awaiting trial often experience some of the worst conditions in the prison estate, are denied access to rehabilitative programmes and are frequently held in increasingly overcrowded local prisons. They are more likely than other prisoners to have problems accessing mental health care, are at an increased suicide risk and can spend months or even years awaiting trial. The report also suggests that biases around race, nationality and the use of video link or a secure dock – which can be random and unrelated to the risk posed by the defendant – may significantly affect decisions not to grant bail.