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Albion Chambers CRIME TEAM NEWSLETTER

The dilemma of addressing earlier acquittals in the re-trial

Addressing the admissibility of counts on which a defendant has been acquitted during a re-trial can be a knotty problem. For the Defence, it presents a dilemma. On the one hand, there is an advantage in having placed before the jury the acquittals because this may have a bearing on the honesty or reliability of a witness in a re-trial. However, on the other, it places before the jury allegations that might be best put quietly to one side. For the Crown, a previous acquittal can present similar conundrums. On the one hand, an acquittal that touches on the evidence of a witness who features in a re-trial is not going to be helpful, but on the other hand, the evidence to be presented at the re-trial might only make sense if the evidence leading to the acquittal is put before the jury.

How then to deal with firstly the presentation of the evidence on the re-trial, and how to deal with the fact of the acquittal? How also is one to address part acquittals and part convictions? Is it fair for the Crown to be allowed to adduce a conviction and at the same time exclude an acquittal?

The issues arising were considered by the Court of Appeal in *R v Robinson* [2011] EWCA Crim 917. In Robinson, the first trial concerned nine counts of sexual abuse where the defendant had been acquitted in respect of two comparatively trivial sexual assaults, but were hung on the remainder.

The defence argued at the re-trial that the acquittals should have been adduced in order to show that the previous jury could not have been sure either of the complainant's reliability or her credibility. The judge rejected this. He said that the acquittals demonstrated that the earlier jury had not been sure that these offences had been committed. That did not take matters any further and was of no assistance to the jury.

On appeal, the Court took as its starting point the cases of *Z* [2000] 2 AC 281 and *Terry* [2005] 2 Crim App R 7 (namely that the acquittals could not be adduced to show the acts had not occurred). The Court said there is "no doubt that the general principle is that evidence of acquittals is irrelevant, since it amounts to no more than evidence of what another jury thought on the facts presented to them: see the decision of the Privy Council in *Hui Chi-Ming v R* [1992] 1 AC 34."

However, there are, the Court noted exceptions to this principle; where, for example, an acquittal on the first trial necessarily involves a finding by the previous jury that they did not believe a particular witness. The Court cited the case of *Cooke* [1987] 84 Crim App R 286 (where the jury's acquittal clearly suggested a witness had lied, and where it was necessary to cross-examine that witness on the re-trial, that witness' credibility being a matter in issue in the re-trial).

In Robinson, the defence sought to make a distinction, in that the acquittals showed that the previous jury must have harboured doubt about the claimant's reliability or credibility. The defence argued that the sole issue was whether the acts had occurred and, this being so, the acquittals meant the jury must have doubted the witness' reliability. In support, the defence relied on *Joseph Robert H* [1990] 90 Crim App R 440 and *R v Y* [1992] CLR 436. The Court of Appeal, however, said these acquittals might have been simply due to the absence of corroboration, adding that in Joseph Robert H, the Lord Chief Justice noted that the fact of the acquittal could not demonstrate that the complainant was a liar; otherwise the jury would not have disagreed on the other Counts. The Lord Chief Justice had also identified a number of reasons why the acquittals could have occurred in circumstances which would not necessarily have cast any adverse reflection on the reliability of the witness at all, and said (page 445):

"It seems to us that, in a case such as this, the judge has a very difficult exercise to perform. He has to balance the interests of the defendant against the interests of the prosecution and he has to determine, in the light of those considerations, what, in his judgment, would be fair. Because, like so many problems in the criminal trial, it is fairness rather than any remote abstruse legal principle which must guide the judge. Coupled with that fairness, if indeed it is not part of it, is a necessity for the judge to ensure that the jury whom he is assisting do not have their minds clouded by issues which are not the true issues which they have to determine."

In rejecting the appeal in Robinson, the Court said [i] there were other possible explanations as to why the jury acquitted [they may not have considered the acts indecent]. [ii] All that could be inferred from the acquittals was that the original jury did not find the evidence sufficiently reliable so that they were sure with respect to these particular incidents. [iii] The question of whether the acquittals should be allowed to go before the jury with respect to the question of reliability is a matter for the judge to determine, balancing the interests of the defendant against those of the prosecution and having regard to what is fair overall. [iv] The acquittals were in respect of relatively trivial matters, which would have little bearing on the substantial issues that the jury had to determine at the retrial. [v] The acquittals would necessarily distract the jury from its task and invite speculation as to why the earlier jury had reached the verdict that it had. [vi] The view of the original jury, if it be the view, that the complainant's evidence was such that they were not sure that these events had

occurred, would be of very limited relevance to their deliberations.

So, in conclusion, when considering how to present your argument surrounding acquittals in a re-trial, a helpful starting point is to remind the judge of the Lord Chief's fairness test in *Joseph Robert H.* Secondly, consider whether the acquittals really do have a bearing on the witness' credibility, and how much credibility is in issue. Thirdly, consider carefully whether there might be other explanations for an acquittal. An application to adduce acquittals on a re-trial will not succeed if it says no more than 'a previous jury had doubts'. Fourthly, consider whether the re-trial can be properly presented with or without the acquittals. If the facts surrounding the acquittals are so interlaced with the evidence at the re-trial, consider whether adducing the acquittal is nevertheless just an attempt to convey the irrelevant opinion of another jury. Finally, look ahead to how the acquittals are sought to be presented to the jury. On the one hand, seeking to adduce only the mere fact of an acquittal is suggestive of application that is without substance. On the other, seeking to re-litigate all the issues surrounding the acquittal might be seen as a distraction tactic from the issues in the re-trial. Ultimately, having worked it through, is the course you are asking the judge to adopt one that you can properly argue as fair?

Paul Cook

The wheels of justice

In 1989 a group chaired by Judge Pigot reported on the provision of video recorded evidence in criminal cases. Thereafter, the Criminal Justice Acts of 1988 and 1991 which in respect of one preceded and the latter followed quickly on the heels of that report, began the process of dismantling the hurdles preventing the giving of evidence by children by enabling their evidence to be given using live television links as well as recorded evidence in chief. After what had been a faltering start, the pace of change that has followed from those provisions makes it now almost impossible to recall a time when the almost universal video recording of evidence, whether in respect of adults or children, was not only non-existent, but there was an active presumption against the competence of children unless they were able to demonstrate a sufficient degree of understanding. But, back in 1989, Pigot didn't only advocate the recording of a child's evidence in chief. The committee, mooting that children should be as far removed from the Criminal Justice System as possible, went further and recommended that their cross-examination should also be pre-recorded. It is hard to believe, given the lack of action in respect of that particular recommendation, but it was in fact given statutory authority in the Youth Justice and Criminal Evidence Act 1999 (YJCEA), an Act which also extended the provision of special measures to witnesses other than children by virtue of their being vulnerable or intimidated.

S.28 of the YJCEA provided for the recorded cross-examination and re-examination of witnesses who were eligible by virtue of s.16 or 17 and where a video recording has been admitted under s.27.

Prior to the implementation of the YJCEA only child witnesses giving evidence in respect of sexual or violent offences, and then only in either the Crown or Youth Courts had been entitled to give that evidence by means of a pre-recorded video. That not only had the effect of severely restricting the ambit of those able to be assisted by such measures but also had little effect in minimising the distress of children during the court process because they still had to be cross-examined during the trial process, often many months after the incident complained of. However, despite the ambit of those afforded special measures was widened by the YJCEA, it was anticipated during the advisory stages of the Act that s.28 should be a uniquely special measure reserved only for those witnesses who require the additional protection of being kept completely out of a criminal trial. That of course meant children but, despite the aim being clearly set out in the early stages of the bill, that reservation was not eventually reflected in the drafting. In any event, despite both the strength of feeling in respect of children being kept away from the Criminal Justice System and the statutory provision enabling such a course, it took a further 25 years from the former and 15 from the latter for the provisions of s.28 to be implemented. Even then that is on a limited basis with three Crown Courts on the Northern Circuit piloting the provisions in 2014.

The reports from the Northern Circuit piloting the provisions are that they are working well, albeit only by virtue of adherence to a strict timetable which includes not only a transcript of the ABE being available within two weeks of the case being sent to the Crown Court but the prosecution case being served, including third party disclosure within that same time frame. Defence advocates are also being obliged by the trial judges to write out every single question to be put to the child witness, much as is already done as part of a s.41 application. However, in the case of s.28, the judge vets the questions striking out any that he or she deems to be irrelevant, overly long or inappropriate. Despite what is clear to all of us struggling to work in these straitened times, is a system that, if applied universally would only work in an ideal world with sufficient funding and staff to enable the strict timetable to be adhered to, such is the perception of success that the pilot is set to be rolled out nationally in the near future.

So what then are the implications for those of us who practice in this field? The first and most obvious concern is that although the pilots have only included children under 16 that is not, as set out above, a limitation imposed by legislation. That means that the provision is, unless restricted by further legislation, available to any witness whose evidence is admitted via video recording under s.27. In any event, even in the pilots where that limitation was imposed difficulties remained in respect of multi-complainant cases involving a mixture of children older and younger than 16 or even of children and adult complainants. In those cases the obvious effect of the restriction was that those children eligible under s.28 were cross-examined and out of the trial process many months before those who were ineligible by virtue of their age but who may well have been given advance warning of what their cross-examination will involve (although given the consultation exercise launched this week by the DPP that may soon become the norm in every case). S.28 has particular implication for those of us practicing in the South West where it has become standard procedure in every case involving a witness in respect of a sexual or domestic violence offence to have their evidence recorded. That has had the effect of causing the system to

literally groan under the weight of the work required to transcribe, edit and check each and every one of those recordings. To triple that workload by having to do the same in respect of the cross-examination and re-examination would, I suspect to trespass into another metaphor, be the straw that breaks the already bowing camel's back. In addition, given the sheer volume of sexual complaints, both contemporary and historic, that the police are currently contending with, means there is at least a three month wait for the obligatory face-to-face charging meeting with a CPS rape specialist. For the scheme as piloted with its strict adherence to a tight timescale to be replicated nationally would only be feasible if disclosure requests are made, chased and answered to a degree that is impossible within the current system. That is particularly important because if there were to be a failure to disclose such that it deprived a defendant of a legitimate line of questioning during the pre-recorded cross-examination, it is not guaranteed that that defect would be rectified by a further recorded cross-examination. Although 28(5) and (6) provides for supplementary cross-examination it only applies to new matters which were not reasonably discoverable at the time, placing the onus on counsel to get it right the first time round. Given that trials are still being vacated as a result of the Crown's failure to meet its disclosure obligations it is difficult to see how matters would improve under a far tighter timescale. Indeed, given how slowly the wheels have turned thus far it seems unlikely that a new set, designed to get an already creaking Criminal Justice System working faster and more efficiently, will be found anytime soon.

Sarah Regan

Confessions and setting the record straight

Treatment for the irritating cough and Article 6?

We all want progress. But progress means getting nearer to the place where you want to be. And if you have taken a wrong turning, then to go forward does not get you any nearer. If you are on the wrong road, progress means doing an about-turn and walking back to the right road; and in that case the man who turns back soonest is the most progressive man." – C.S. Lewis

Ibrahim and others v United Kingdom, unreported, December 16, 2014, ECHR contains some interesting observations about confession evidence although most of the statements that the defence sought to exclude were essentially exculpatory lies told to the police in "safety interviews". The statements were obtained in the absence of a legal representative and it was held that there were compelling reasons to delay access to a solicitor. Three of the applicants had been convicted of conspiracy to murder by detonating bombs on 21 July 2005. Although the four bombs were detonated, in each case the main charge, liquid hydrogen peroxide, failed to explode. The fourth applicant had been convicted of assisting one Mr Osman in respect of the events of 21 July and also failing to disclose information after the bombings. A far greater tragedy occurred two weeks earlier.

Ibrahim and others v United Kingdom did involve some consideration of confessions [152] and acknowledged of course that statements which were "wholly or partly adverse to the person who made it" were classed as confessions, per s82 of PACE 1984. Regardless of whether a statement was a confession or not, the court had regard to a number of features in determining whether to exclude a statement obtained by the police in the absence of her/his legal representative. There was an acknowledgment that the court's primary concern under Article 6 of the ECHR was "to evaluate the overall fairness of the criminal proceedings" [191]. The factors in included: *"whether the statement was promptly retracted and the admissions made in it consistently denied, particularly once legal advice had been obtained"* – [196] (c) of the judgment.

It is perhaps worth analysing this passage of the judgment in some detail. The fourth applicant, Mr Abdurahman, was initially interviewed as a witness between 1.30 a.m. and 5 a.m. on 28 July. He gave an account in this witness statement in which he made some admissions to the effect that he had met Mr Osman but that he did not believe that he had been involved in bombings. It was regarded as "self-incriminatory" and classified as a "confession". The applicant was then interviewed in the presence of his legal representative from 30 July to 3 August. He submitted a prepared statement and, despite a few minor amendments, "freely adopted" the witness statement he had previously made to the police in the absence of his lawyer. His lawyer had arrived but there was no correction of the position. The statements were admissible and the Court could have regard to the fact that there had not been a prompt retraction when the solicitor arrived and there had been no consistent denial of the matters later sought to be excluded.

The judgment in *Ibrahim and others v United Kingdom* is extensive and covers a range of topics but this aspect is worth considering for a number of reasons. Any "confession" relied upon by the prosecution is used as a direct route to guilt and there is often little supporting evidence. Sometimes there is none. A previous inconsistent statement made in interview which is not a "confession" but can only be a proven lie at best only goes to the issue of credibility. The court will be more ready to admit a largely exculpatory statement which is an obvious lie (even if it was obtained in the absence of a solicitor who was requested) than a statement which can be classified as a confession.

Therefore it is perhaps unsurprising that there are safeguards which put the onus on the prosecution to prove that any "confession" obtained has not been obtained by oppression or "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made", per s76 (2) of PACE 1984. The defence simply have to raise these issues. The message is clear. The Court must be wary of questionable confessions. Questionable confessions are sometimes obtained and they are the simple route to a swift unsafe conviction.

The European Court also acknowledged that "where an accused denied prompt legal assistance alleges improper conduct, notably coercion or ill-treatment, by the police during interrogation, the most careful scrutiny by the domestic tribunals and by this Court is required" - [192].

If the suspect has been interviewed without her/his lawyer for a compelling reason or if (as I understand sometimes

occurs) the suspect decides to dispense with legal advice in interview because she/he is effectively told that it may take an eternity until the solicitor arrives, factors other than giving a reliable account may operate on the mind of the suspect. An unreliable "confession" might be made to the police. The legal representative arrives a little too late or is contacted by anxious parents after the interview process has started. The interview has already taken place and it seems that there is little that can be done. It is tempting to move on or walk away.

However, the principle in paragraph [196] (c) of *Ibrahim and others v United Kingdom* is encouraging. In a criminal justice system which compels us to act as quickly as possible and move onto the next case, it may be prudent to sometimes take time, care and correct a position which has resulted in an unreliable admission. A brief consultation could take place and a short post-charge prepared statement could be submitted if there is a true defence. The statement could even be lodged the following day after the suspect is released on bail. After consultation with his lawyer the suspect may genuinely raise "self-defence" although he simply admitted (in response to some leading questions) in interview that he hit the other man and he was sorry for causing the injuries.

The importance of advising robustly and undoing a potential injustice caused to vulnerable or suggestible defendants has never been greater. I am referring to the suggestible defendant who has "coughed" unreliably to a crime during a police interview in what seemed like an interminable period of detention before his lawyer would arrive. Suspects say things for all sorts of reasons at the police station and these reasons include a misconceived belief that the acceptance of the offence will minimise inconvenience and also the chances of allegations being aired to loved ones.

It is, of course, a difficult judgement-call for any legal representative to make as to whether to submit that short post-charge statement/request further interview on one hand, or whether to simply let it lie on the other hand. If the defendant later admits the offence in court in due course wouldn't a prompt reversal of any admission undermine credit for a guilty plea? In the case of a young petrified defendant who had never been arrested before and gave his first interview in the absence of a solicitor I would imagine most judges would be sympathetic should the defendant give a couple of contradictory accounts.

The judgment suggests that if a prompt post-interview statement is submitted retracting any confession while setting out the essence of a defence it may do more than simply provide a powerful template for the defence at trial, which allows the defence advocate to deal with any inconsistent account in interview. This is of course extremely helpful at trial. It could lead to the previous prejudicial statement of the unrepresented defendant being excluded even if there was no trickery or oppressive conduct on the part of the police.

Factors to consider will obviously include the vulnerability of the defendant, whether an appropriate adult was needed or not. If a suspect has a learning disability which may have triggered investigation by an intermediary by the time case reaches trial that may be a powerful factor to consider. The criticism of the European Court's judgment in *Ibrahim and others v United Kingdom* includes the fact that although the "safety interview" of one applicant was obtained despite administering the wrong caution it was still deemed admissible and, keeping in step with domestic authorities, the strength of other evidence in the case was a powerful factor for the admission of the statements. The commentary from the learned editors of Criminal Law Week is that this is a decision where expediency has prevailed and that this decision marks a retreat from the previous position in *Salduz v Turkey*, 49 EHRR 421(19) where it had been acknowledged that "the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction".

However, the theme of ensuring a "fair" trial in accordance with Article 6 still pervades the judgment. Ultimately it will be a matter of whether it is fair to admit the statement.

Kannan Siva

Consent...

What's changed?

The Crown Prosecution Service has, through the campaign recently spearheaded by Alison Saunders, Director of Public Prosecutions, renewed battle with the public on the issue of myths and stereotypes. The directions now routinely given to juries by judges often in very powerful terms as to preconceptions about sexual allegations have not, it would seem from the Crown's perspective, done enough. There is a continuing need to challenge and educate, and to remove the blame attached to complainants.

Rape allegations are the most challenging for juries. In most cases they are concerned with the evidence of two people, the Complainant and the Defendant, who are more often than not known to each other, the issue usually being that of consent or belief in consent.

The new guidance, launched on 28 January 2015, places the emphasis on challenging the Defendant's knowledge and understanding of the Complainant's capacity to consent during the entirety of the sexual interaction, including what steps the Defendant took to obtain consent, enquiring how he knew or believed s/he continued to consent and checking whether consent was given for all sexual acts, not just some. Where there are obvious capacity issues, for example a Complainant under the influence of drink or drugs or with learning difficulties, this will be far more straight forward than for your 'average' sexual interaction. The account given by a suspect during police interview on these issues will be subject to greater scrutiny both in interview and at trial.

Aside from capacity and steps taken to obtain consent, renewed emphasis is placed upon prosecutors to explore the Complainant's freedom to consent, where, for example, there is a situation of domestic violence between the parties, or where there was a significant age disparity or dependency such as financial dependency by the Complainant upon the Defendant. Prosecutors will be exploring in evidence and commenting to juries about the context of the relationship between the parties, and inviting the jury to examine whether in reality there was freedom to consent or whether the complainant was taken advantage of because of her vulnerabilities.

Much of this of course is not new. What is new is the attempt to shift the focus on to the Defendant, his thinking and actions as opposed to that of the Complainant. We will have to see what juries make of it.

Virginia Cornwall

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