THE LONDON ADVOCATE

THE NEWSLETTER OF THE LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION

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A belated Happy New Year to readers, and apologies for this edition being distributed a little later than originally intended. An eventful 3-4 months in the CJS has seen an end to the Bar's action, the Law Society launch a judicial review of the government's response to CLAIR and ongoing chaos in the courts. All against a backdrop of a government lurching from crisis to crisis with seemingly no interest in even starting to address the collapsing state of affairs.

With a general election still well over a year away, no one anticipates an imminent change of approach (and history has shown us not to expect too much from a Labour administration in any event), so the hopes for the urgent change that is so badly needed rest on the aforementioned judicial review (of which more below) and ongoing persuasion of the MoJ to permit incremental improvements. It's hard to be optimistic!

There are glimmers of hope, however. The ongoing commitment of so many of our members (and others who work in the CJS) is always inspiring and may finally – should the unionisation talks bear fruit – be harnessed into something more concrete and influential; a new Justice Minister, surely only a matter of time, may take a different, more conciliatory approach than the current incumbent; and even if not, the courts may force the government's hand as a result of the JR. So, all is not lost.

And on the lighter side, two significant events will take place in the coming year: the 75th anniversary of the LCCSA's founding, with an appropriate celebration to be announced in due course, and the return in the autumn of the much-loved European conference. May the anticipation of those help you through the winter weeks ahead.

This edition contains the addresses of the now-past President and incoming President to the AGM in November and lists the committee members for 2023. The articles take us through a successful challenge to the Met's approach to gang-related crime and an important, comprehensive update to the law on abuse of process. Finally, Bruce Reid tackles the crumbling court estate. See you in the spring!

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LCCSA NEWS

LAW SOCIETY JUDICIAL REVIEW

The Law Society has sent a pre-action letter to the Ministry of Justice challenging "the lord chancellor's decision not to remunerate solicitors by the bare minimum 15% recommended" by CLAIR and the decision to take no action to address the risk of local market failure. The pre-action letter describes both decisions as unlawful and irrational, and demands that the government withdraw and reconsider them. The letter goes on to invite the government to agree to mediation, conducted by an appropriately experienced senior lawyer or former judge.

On announcing this significant step, Law Society President Lubna Shuja explained that "The government is choosing to ignore the economic advice and analysis which Lord Bellamy's review team painstakingly produced, using data the government itself supplied. Instead, the government is implementing policies that run against the rationality of the review it commissioned and accepted…

…Criminal defence solicitors provide an essential service within that system but they simply won't be there if the profession is not economically viable – and the government's decisions mean it will not be…Solicitors are basically thinking this government is not taking this seriously. Why are we wasting our time?"

PRESIDENT'S ANNOUNCEMENT

You may have seen reports of meetings taking place between ourselves, the Criminal Law Solicitors Association (CLSA) and unions. We can confirm this is true. We take the view that the impasse with the Ministry of Justice has reached a point that unionisation may be the only way to secure a sustainable future, not just for legal aid solicitors working today in our courts and criminal justice system but for the solicitors of tomorrow.

Whilst the increase of 15% announced last year was broadly welcomed, we all know in truth it paid lip service to Lord Bellamy's recommendations and would make little difference. Lord Bellamy recognised of the two branches of the profession, solicitors in particular needed an immediate cash injection to stop the erosion of talent (and for all the other reasons he recognised in his report). Instead, the rates increase is derisory, limited to a few tens of pounds on litigator's fees, ignoring PPE (Pages of Prosecution Evidence) and prison law.

Solicitors will continue to suffer an exodus from the profession, operating as a cottage industry, with ever growing advice deserts. As professionals working in police stations, courts and advising people on remand in prisons (with shameful numbers waiting for trial) we are not fooled by false assurances that duty solicitor numbers are growing again. The Law Society has announced the reduction in duty solicitor numbers.

We have been willing to assist over the years, as an older cohort, tired, disheartened, disrespected, ignored, and marginalised, covering back-to-back duties, finishing an overnight police station duty at 4am back at court the next day, juggling a busy court list by co-opting help from colleagues, cobbling together a sticking plaster solution, to cover a gaping wound, to avoid delay and cost.

Can the Public Defender Service (PDS) offer a sustainable alternative? There are real doubts, and have been for some time. Once the profession is pushed into a new state, the costs of buyback by the government will be much greater. The government knows this to be true.

Meanwhile, the Law Society has issued its own challenge. Justice Secretary Dominic Raab is on notice that if he doesn't improve the government's latest legal aid offer and put the profession on a sustainable footing, the Law Society will take it to Judicial Review. On your behalf as members of the LCCSA, alongside the CLSA we support this action. We will also continue talks with unions about forming a union for legal aid lawyers. Unprecedented times call for unprecedented measures.

YOUR COMMITTEE FOR 2023

At the Association's AGM on 14 November 2022, the following were elected to serve on the committee for 2022-23:

Officers:

President	Fadi Daoud
Past President	Hesham Puri
Vice President	Ed Jones
Junior Vice President	to be filled
Secretary	Alison Marks
Treasurer	Rumit Shah
Law Reform	to be filled
Training	Diana Payne
Media/Advocate	Edmund Smyth

Other committee members:

Bianca St Prix	Bartholomew Dalton
Lara Ideo	Grace Loncraine
Rebecca Von Blumenthal	Casey Jenkins
Laura Cooper	Zachary Whyte
Joanna Schaefer	Claire Bostock
Piers Desser	

Co-opted members:

Jonathan Black	Mark Troman
Steve Bird	Malcolm Duxbury
Rhona Friedman	Kerry Hudson

COMMITTEE MEETINGS

The LCCSA committee meets on the second Monday of each month at 6:00pm. All members are welcome to attend (in person at the offices of Kingsley Napley, 20 Bonhill St, EC2A 4DN or remotely) and if you wish to participate please contact the editor or Sara Boxer (admin@lccsa.org.uk).

PAST PRESIDENT'S AND NEW PRESIDENT'S ADDRESSES TO THE LCCSA AGM

HESHAM PURI

I survived! Despite the views of some our members, the Jon Black committee of 1948 decided against a vote of no confidence in me and allowed me to complete my year! I'm sure some have thought it may have been the right thing to do.

I have thoroughly enjoyed the challenge of being the president of this association and it been a privilege to have been asked to do so.

I have been fortunate to have the support of an excellent committee whose guidance and words of wisdom has been invaluable in navigating the last year.

I want to give special thanks to our administrator Sara Boxer without whom the association wouldn't function and can I thank her for organizing this evening.

We have lost some excellent committee members: Adeela Khan, Danielle Reece-Greenhalgh and Claire Dissington, but we have several new members who are excellent. Much like the government we had to reshuffle the pack and make some early promotions and I was pleased that Fadi Daoud stepped up a year early to become president.

We have had a challenging year we find ourselves in depth of another criminal justice crisis! The patient is still in intensive care! A review of that last year:

On the 15th December 2021 Sir Christopher Bellamy KC published his excellent report on criminal legal aid, which set out in detail why we are in crisis and the remedy. It was simple: a minimum 15% increase immediately and then further funding to nurse the patient back to health.

The review was followed by several meetings with MoJ along with the Law Society and CLSA in which we put forward the case for the immediate injection of the 15% increase. You would think it was unarguable! The Review was clear and persuasive and had been conducted by the government's own man.

We also responded to the consultation setting out why the Government should follow the recommendations. Our aim was to persuade the government firstly that they should inject 15% immediately and any delay would result in more members leaving the profession. Sadly, in the last year we have lost even more firms (964 firms on the Oct 22 Rotas down from 1019 in April 22 Rota) and 400 duty solicitors have left (3,825 down from 4,222). It is unlikely they will ever return.

We then received the Gov response and the 15% was in reality 9%, and only 4% for Crown court fees. Sadly, the Gov is refusing to do right and are ignoring the facts. The ambition to get through the ever-growing back log is a fantasy unless you have a properly funded criminal justice system with lawyers being paid properly so we can retain and recruit for the future.

We now know that Judges are being called out of retirement to deal with backlog. As always, the government is looking for a short-term fix.

We have the PCS union members on strike because the common platform is not fit for purpose, and yet the roll out continues. Again, they are ignoring the evidence.

One of other the aims of this association is to unite both sides of the profession, and we agreed with our members that we would stay united with our colleagues in the CBA. We would not let the Government drive a wedge between us.

The CBA then undertook their action, and achieved some measure of success. However, that success came at a cost to individual barristers. But also to firms who had to manage their clients and deal with the courts, not to mention the real financial cost of Crown Court fees drying up.

And of course, the extra pressures on the Judiciary

We managed to get through this because we were all united, despite the Government's attempts to drive a wedge between us.

They wanted us to volunteer our HCAs or to refer cases to the Public defender service.

We stayed resolute and strong and supported the CBA as we all have a vested interest in a properly funded criminal justice system. We all want a criminal justice system that is fit for purpose and in the absence of new funding our already dwindling numbers will be wiped out. The evidence is clear.

We at the association had our own meetings with our members and what was clear to me that they care about the future of the profession and are prepared to act. Firms have started to refuse to take on poorly paid work and have had to make difficult choices. We have had a

London firm owners' meeting, at which again there was an appetite to escalate the action but there were concerns about our contractual obligations.

We joined the CBA outside the CCC. We made our case for why we are so important and why the public should care.

Over the following months we along with CBA set out our stall in the press and for once the public got the message that we are not fat cat lawyers and we provide a vital service.

Whilst the government has given us a small increase it may just have taken the patient off the ventilator for a short time; it won't save the patient from dying.

What next?

We will be having further meetings with the MoJ, and we are due to find out this month how much extra funding we will get. I'm afraid I don't have the figures yet.

We also had our first meeting of the Advisory Board. While only at the stage of agreeing our terms of reference it is nevertheless a positive step.

I attended a national meeting last week with national firm owners at which we agreed that we would call upon the Government to implement the 15% increase on all fees. It was agreed at that meeting that we would create a Criminal Legal Aid Contractors association which will seek to engage with the MoJ on behalf of contract holders so that we have one voice.

And even The Law Society has come out publicly making it clear that there is no viable future in criminal legal aid.

We have achieved some of our aims: we had a small increase in fees, but more importantly in my view we have maintained the unity of both sides of our profession and our members. This will give us a solid foundation for future battles. We will continue to fight for an increase in legal aid fees and to save our profession. As always: we fight for our clients.

<u>FADI DAOUD</u>

Good Evening, honoured guests, Judges, past presidents, members, colleagues, friends and the long-suffering Mrs Daoud. I won't take up much more than 30 min of your time to explain how a poor ignorant cave-dwelling immigrant from the Middle East crossed to modern civilised Europe riding a donkey looking for an inn – oh, wrong story – someone else beat me to it 2000 years ago. This speech should take 2 minutes and will steal unashamedly from writers who can write non-cliché filled prose.

Let us turn to my story – I, as many of you know, bored hearing the story many times probably, hail from Syria and Lebanon. My parents were in the airlines, a station manager and stewardess. We flew from Damascus back in the 1970s, on a direct flight, not in a dinghy.

Damascus is a rather long-lived capital city which was described by Mark Twain in his book Innocents Abroad, in 1867, Jonathan Black's year of birth, like this:

"She measures time not by days and months and years, but by the empires she has seen rise and prosper and crumble into ruin. she is a type of immortality…She saw Greece rise and flourish two thousand years and die. In her old age she saw Rome built… she saw it perish. The few hundreds of years of Genoese and Venetian might and splendour were, to grave old Damascus, only a trifling and scintillation hardly worth remembering. Damascus has seen all that has ever occurred on earth, and still she lives. She has looked upon the dry bones of a thousand empires, and will see the tombs of a thousand more before she dies."

Sound familiar? The LCCSA feels a bit like grave old Damascus: she has seen so many governments rise and perish, at ever increasing rates more recently, yet none seem to have gripped this thorn that we are all so familiar with. Funding for defence lawyers doing a critical professional, vocational job, protecting the innocents in this country and representing the guilty to secure the best possible outcome in both their interests and that of greater society, in the hope they might have the right sentence commensurate with their behaviour or ensure they have the professional help they require from probation, mental health and other professionals.

I am so proud to have been asked to be President of the LCCSA – a committee and President, Hesh, who worked so hard over so many years and in particular over the last few years, during Covid, meeting with Lord Bellamy and explaining our plight, securing a modest increase, but an increase nonetheless. I don't look at it as money in our pockets personally, but an opportunity once we return to 1990s rates of remuneration to allow an important branch of the constitution to survive, to train new blood into the profession so that it can continue to flourish. That can only be done through your hard work. The

committee is but a reflection of its members. Our goals as an organisation are simple and obvious to all, even more so during the next couple of difficult years we all expect to have – all the more important that our politicians understand we must be protected as an important branch of our unwritten constitution.

Never be disheartened as we are recognised in those higher echelons of power, no other than our recently departed Queen Elizabeth II who, in her speech as far back as 1968 at the RCJ, reminded us of her support of *"the oldest and most honourable branch of the services of the Crown"*. She recognised the importance of an independent healthy cohort of dedicated professionals, going on to say that it *"is also one of the most vital, because the law is the highest inheritance of the King, for both he and all his subjects are ruled by it, and if there is no law there would be neither King nor inheritance. That is as true today as it was 5 centuries ago. The attachment of our people to law is the foundation of our constitution and of our civilization."*

We at the LCCSA are, with other professionals, *"independent custodians of the law…who bear a direct personal burden responsibility…"*

Her late Majesty went on to say, *"[a]s our world becomes more complex so the task of doing justice between man and man, and man and the state, becomes more difficult and even more important. Therefore, we must continue to be able to rely on the strong and fearless legal profession. [Whose] independence is as much a safeguard to our liberties today as it has been in the past."*

We would hope to be as valued by our politicians as we were by our late Monarch as the most honourable branches of services to the Crown, upholding the rule of law throughout this land, for law is the highest inheritance.

Let us come down to Earth now! The work the LCCSA does is in that tradition. I hope to serve you in the coming year to the best of my ability and thank you for honouring me with this most important and humbling responsibility.

I said I am going to bring you down to Earth – to one last quote from Groucho Marx: I refuse to join any club that would have me as a member. I am still asking myself "why me?"

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ARTICLES

ESCAPING THE MATRIX: MET ADMITS GANGS MATRIX UNLAWFUL

Rachel Pain of Mountford Chambers describes how the Metropolitan Police Service has agreed to redesign the Gangs Matrix following a legal challenge by the organisation Liberty.

What is the Gangs Matrix?

The Gangs Matrix is a database of suspected gang members and associates in London created by the Metropolitan Police. The database contains personal information which is shared with third parties such as the Home Office, local authorities, the DWP, housing providers, schools and the DVLA. An algorithm is used to provide a 'risk score,' which influences how the police and other agencies interact with individuals on the database.

There have historically been issues with the transparency of the contents of the database, including who is on it, what information is held, and who it is shared with. This has made it difficult for individuals to challenge their presence on the database or to correct inaccurate information about themselves. Identification on the Matrix is based on an assessment of the risk of committing violence or becoming a victim of violence. However, inclusion in the Matrix can often appear arbitrary, with some individuals being added a result of associations or the area in which they live.

A third of individuals on the Matrix have never committed a crime, and a 2018 review of the Matrix found that 38% of people listed were assessed as posing no risk of violence. The Matrix contains the information of children as young as 13 and has disproportionately targeted and impacted young black men in particular. 80% of people named on the Matrix are black and 86.5% are from BAME backgrounds.

What impact has it had?

Against a backdrop of the overrepresentation of black people in the criminal justice system, the disproportionality in the Gangs Matrix has likely been a contributing factor in the over-policing of the black community, particularly in relation to increased surveillance and stop and searches. In the current climate of expanding police powers, communities' concerns

about how the Matrix operates have in turn decreased public trust and confidence in the justice system.

The information shared by the Gangs Matrix also directly impacts lives beyond the justice system. Identification on the Matrix can jeopardise an individual's housing, education, healthcare, and employment. Information shared with schools may lead to expulsion of pupils and information shared with the Home Office can prevent individuals from obtaining British citizenship or lead to deportation. There have been anecdotal reports of inclusion on the Matrix leading to eviction threats when shared with housing associations. It can also become a barrier to opportunities, including employment, and can result in the removal of benefits.

Concerns have also been raised about possible data breaches in the operation of the Matrix. These include the sharing of data in unredacted forms and in disproportionate and unnecessary ways, storing data for longer than is necessary, and the inclusion of inaccurate data.

The Challenge

As a result of these concerns, a number of agencies have campaigned against the use of the Gangs Matrix. Following a recent judicial review claim brought by the organisation Liberty, on behalf of Awate Suleiman and UNJUST UK, the Met has now reached a settlement with the organisation.

The challenge was brought on the grounds that the Matrix is discriminatory in its disproportionate representation of black people, that it breaches human rights since it contravenes the Article 8 right to private and family life, and that it breaches data protection requirements.

The matter was due to be heard at the Royal Courts of Justice this week. However, the Met has now settled the claim, admitting that the operation of the database was unlawful both in being discriminatory and in breaching the right to a private and family life. It has acknowledged the importance of maintaining the trust of the communities it polices and has agreed to remove the majority of individuals – those assessed as low risk – from the database. Further, alongside a review of the current database, a stronger case will need to be made before individuals are added. The focus will now be upon reducing disproportionality and ensuring transparency. Those who request it will therefore now be entitled to be informed what data from the Matrix has been shared and with whom, with limited exceptions.

What Lies Ahead?

The Met has maintained that the Matrix remains a necessary enforcement tool, and thus there will therefore almost certainly be challenges ahead for the redesigned Matrix (and any additional tools introduced) to balance this with improving public trust and the commitment to increased transparency and scrutiny. Although the Met has committed to working with community groups and engaging with academic research, eliminating public concerns whilst the database is still in existence may prove difficult.

Those who are concerned they might have been included on the Matrix and wish to obtain information can make a Subject Access Request to the Met. Further details on how to make a Subject Access Request and a Subject Access Request form can be found on the Stopwatch website: https://www.stop-watch.org/what-we-do/projects/the-gangs-matrix/

The Met's promised overhaul of the Gangs Matrix is undoubtedly a step forward, but this needs to be the start of a wider look at the policies and systems that are disproportionately affecting minorities within our criminal justice system.

Rachel Pain is a pupil at Mountford Chambers, having previously worked as a paralegal at GT Stewart Solicitors in their specialist criminal appeals team. She has experience in a wide variety of criminal matters and considerable experience in working with vulnerable people.

Rachel previously volunteered with Hammersmith & Fulham Youth Offending Team, sitting on restorative justice panels, and is a former director of Vocalise, a student led initiative teaching debating in prisons. Rachel continues to have a keen interest in appellate work and is currently a committee member of the Criminal Appeals Lawyer's Association.

https://www.mountfordchambers.com/profile/rachel-pain/

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ABUSE OF PROCESS FOR LOST EVIDENCE: ALIVE AND KICKING

Colin Wells of 25 Bedford Row discusses the recent case of ANP [2022] EWCA Crim 1111 in which the Court of Appeal (Criminal Division) considered the circumstances of when a case might be stayed as an abuse of process when important evidence has been lost or destroyed.

Introduction

The remedy to stay proceedings as an abuse of process is alive and kicking as illustrated by the Court of Appeal Criminal Division decision in *ANP* [2022] EWCA Crim 1111, which raised issues of general importance as to the

approach to be taken to an application to stay a prosecution as an abuse of the process on the basis that evidence or exhibits seized by the police have been lost.

Where evidence has been lost or destroyed and the defence has been deprived of a potential opportunity to advance its case, the court has a discretion to stay proceedings.[1] The court, when considering an abuse application based on the non-availability of evidence, has to consider the relevance of the material, whether it should have been preserved, why it was destroyed (in terms of bad faith, serious fault or incompetence), and alternative trial remedies. All these issues are dealt with, and guidance given, in *R v Feltham*[2]

R v ANP

The Vice President of the Court of Appeal Criminal Division, Lord Justice Holroyde, gave the lead judgment in *R v ANP* examining an application by the prosecution for leave to appeal, pursuant to section 58 of the Criminal Justice 2003, against a terminating ruling by a judge in a rape and sexual assault trial

The prosecution case alleged that the defendant ('D') took advantage of the complainant ('C'), who was highly intoxicated, by first kissing and touching her, and then vaginally raping her. CCTV footage was available covering the former incident, but not the latter. C herself gave an account in a video recorded interview alleging rape. The defence case was that C consented, or was honestly believed by D to be consenting, to such activity as took place, which comprised only kissing and cuddling and brief oral sex by D on C, with no vaginal penetration.

The prosecution relied upon CCTV footage showing that C was plainly so intoxicated that she was not capable of consenting, and could not honestly be thought to be consenting, to any sexual activity. Evidence was available as to the dishevelled and distressed state in which C left the premises and as to the manner of her speech shortly after the relevant events. The defence rely on that combination of evidence as rebutting the prosecution case as to C's level of intoxication.

D further relied on evidence that analysis of penile swabs taken from him revealed no cellular material matching C; and on entries in C's medical records, which may be relevant to her reliability and credibility as a witness.

C was seen by the police shortly after the events. Samples of her blood and urine were taken, as were vaginal swabs. Her underwear was kept for examination. These items were packaged and refrigerated as necessary. A month or so later, there was an internal re-organisation which should have involved the items being moved to new places of storage. Somewhere in that process, they were all lost. The fact that they have been lost was made known to the defence soon after the case had been sent to the Crown Court for trial. In addition, body-worn camera footage was not retained, so that there were no contemporaneous images of the premises in which the events occurred, and no video recording of C's first complaint.

It was submitted on behalf of D that the prosecution should be stayed as an abuse of the process on the ground that he could not receive a fair trial. The lost samples and underwear were highly relevant to the central issues of C's level of intoxication, credibility, consent or belief in consent, and vaginal penetration. Reliance was placed on the decision of the Court of Appeal in *R v Ali* [2007] EWCA Crim 691.

The judge ruled that D could not have a fair trial and accordingly directed that the indictment should be stayed. He regarded the circumstances as being similar to those in *R v Ali*, with no significant evidence to support C's own "confused and limited recollection". The judge concluded that he could not give directions which would mitigate the prejudice suffered by D as a result of the loss of the various items.

In the Court of Appeal, the prosecution argued that the judge's ruling was wrong in law and that his decision should be reversed so that the trial may proceed. Reliance was placed on the decision of the Court of Appeal in *R v PR* [2019] 2 Cr App R 22. It was submitted that the judge had fallen into error in particular because, having considered what had been lost evidentially, he did not sufficiently go on to consider whether what still remained was evidentially sufficient for there to be a fair trial.

The Court emphasised that the burden is on an accused to show on the balance of probabilities that he is entitled to a stay on grounds of abuse of process, that it was impossible for him to have a fair trial. It also restated the principle that a stay of criminal proceedings is always an exceptional remedy: see *Hamilton v The Post Office* [2021] EWCA Crim 577. As Gross LJ put it in *DPP v Fell* [2013] EWHC 562 (Admin) at [15], the grant of a stay "*is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process*".

The Court observed as follows:

> *[16] The police were plainly under a duty to preserve the samples and underwear which they had taken. A stay of proceedings is not, however, to be granted as a means of punishing failure to comply with that duty.*

[17] Where a stay is sought on grounds arising from the loss of evidence or exhibits, the starting point for consideration has long been R (on the application of Ebrahim) v Feltham Magistrates' Court in which Brooke LJ stated the applicable principles. First, at [25] he said:

"Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:

(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.

At [27] he said:

(ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded."

"It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

In R v Ali, the facts were that the accused had been charged with sexual offences alleged to have been committed more than a decade earlier against two girls then aged 13. There had been a long delay in prosecution, in the course of which a number of relevant documents had been destroyed or lost. In particular, each of the complainants had made a claim for compensation from the Criminal Injuries Compensation Authority. Only one of the claim forms was available by the time of trial. It contained what the girl in question admitted to be a number of lies. The claim form of the other girl had been lost. The judge refused an application for a stay.

In that case the Court of Appeal had quashed the convictions. Moses LJ stated at [30]:

"*But in considering such powers to alleviate prejudice, Brooke LJ (at para 27) emphasised the need for sufficiently credible evidence, apart from the missing evidence, leaving the defence to exploit the gaps left by the missing evidence. The rationale for refusing a stay is the existence of credible evidence, itself untainted by what has gone missing."*

The court has also referred to what it described as a "significant difficulty" in respect of the trial judge's directions on speculation. The Court quashed the convictions due to the combination of the loss of material evidence, the unsatisfactory evidence as to how the complaints were first made, and the terms of the directions to the jury which collectively caused doubt as to the safety of the convictions.

More recently, in R v D [2013] EWCA Crim 1592, Treacy LJ, giving the judgment of the court, stated the relevant principles as follows at [15]:

"*In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."*

The principles have most recently been reiterated by the Court of Appeal in R v PR. Fulford LJ, giving the judgment of the court, stated at [65]:

"*It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses.*

In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused, whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested."

The Court added that the question of whether the accused can have a fair trial will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to him. A careful judicial direction will in many instances ensure the integrity of the proceedings:

"*The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty. ..."*

Having reviewed those authorities, the court allowed the Prosecutor's appeal, reversed the terminatory ruling, and observed that the Judge in staying proceedings had fallen into error:

[24]. "*First, we cannot agree that the loss of the samples and the underwear left "an evidential vacuum". The judge was wrong to make his decision on the basis that there was such a vacuum. There was certainly an absence of some evidence, which should have been available. We can well understand why the judge referred more than once to potential weaknesses in the evidence which remained available to the prosecution. But those possible weaknesses would primarily affect the prosecution as the party which bears the burden of proof. The burden of proof at trial is, in our view, always an important factor to keep in mind when considering an application to stay in circumstances such as these.*

[25]. In any event, the simple fact is that there remains the evidence of C, the CCTV footage, the evidence of those who saw and spoke to C very soon after the events, and the potential for D himself to give and/or to call evidence if he chooses. It is not a case in which there has been any culpable delay by the prosecution. Nor is it a case in which D was first questioned long after the material time. In those circumstances, it cannot be said that there is such an evidential vacuum as to make a fair trial impossible. Once one eliminates any question of using the application to stay as an inappropriate means of registering disapproval of police negligence, it seems to us that the overall position is broadly the same as it would have been if, for example, C had not made her allegations until some considerable time after the events, having in the interim washed both herself and her clothing.

[26]. Secondly, it seems to us that the rhetorical question posed by the judge at page 6E of his ruling reveals an error of principle in his approach. The answer to the dilemma which the judge felt is that the jury can and should be directed in conventional terms to try the case on the basis of the evidence, and not to speculate or guess about anything not shown by that evidence. In addition, as the court said in R v PR (and as the trial judge had done in that case) the jury can and should be directed that the loss of relevant material may have put D at a disadvantage, and that they should take that into account in deciding whether the prosecution had made them sure of guilt. The precise terms of that direction will depend on the evidence and issues at trial, and the judge will no doubt wish to discuss them with counsel.

[27]. Thirdly, in his conscientious efforts to formulate the test he should apply, the judge, fell into error when he said that if evidence has "the real potential to go to the very issues which the jury must resolve", its loss "must inevitably cause" a level of unfairness that the trial process cannot remedy. As the case law to which we have referred shows, there must be a case-specific assessment which focuses on the importance of the missing evidence in the context of the case, and the nature and extent of any prejudice caused to the accused by its loss. We bear very much in mind the submission on behalf of D that the judge's use of language may have been slightly loose, and that he was not purporting to lay down any principle applicable to all cases. Nonetheless, considering that passage from his ruling in conjunction with the earlier passage we have cited, it seems to us that the judge did fall into error.

[28]. In the present case, the relevant material was lost before it had been sent for analysis. It is therefore unknown what investigation of it would have revealed. It is unknown whether meaningful results would have been recoverable from all or any of the analysis. If they had been, it is not known whether those results may have been helpful to D, may have been helpful to the prosecution, or may simply have been neutral. But what remains available is a body of evidence and material which can be deployed by D in cross-examination of C. D also remains able, if he wishes, to give his own account of events, with the advantage that the one piece of scientific evidence which was obtained is favourable to him, and without any risk of other scientific evidence supporting the prosecution case. In addition, D is able, if he wishes, to adduce other evidence, including expert evidence."

[11] See 'Lost and Destroyed Evidence: The Search for a Principled Approach to Abuse of Process'—S Martin (2005) 9 E&P 158; Victor Smith, 'Lost, Altered or Destroyed Evidence' (2007) 171 JPN 556. In relation to destruction of evidence by state agencies and any breach of Article 6, see *Sofri v Italy* [2004]

Crim LR 846 (a murder trial in which the deceased's clothing, bullets from the deceased's body and the getaway car were all missing) and *Papageorgiou v Greece* (2004) 38 EHRR 30 (destruction of forged cheques).

[12] [2001] 1 All ER 831, [2001] 2 Cr App R 23.

Colin Wells has written and lectured extensively on abuse of process. A fourth edition of his book, Abuse of Process, is to be published by Oxford University Press in May 2023.

https://www.25bedfordrow.com/site/people/profile/colin.wells

♦ ♦ ♦ ♦

BRUCE REID

A NEW BEGINNING

[Felix Mansfield and Squirrel Nutkin are both on Duty at Camberwell.]

Squirrel Nutkin: "Any New Years Resolutions, Felix?"

Felix Mansfield: "As I approach retirement, Squirrel, I am starting to contemplate my Eternal Soul. Accordingly, I am increasingly devoting my time to Prayer as opposed to Negronis."

SN: "Indeed, Old Friend, and what is the subject to your benedictions? World peace? The war in Ukraine? An increase in the rate of Universal Credit for our suffering clientele?"

FM: "Dominic Raab."

SN: "Few would argue that he doesn't need them, we would all wish him Enlightenment."

FM: "I don't. Start small, I always say: I was wishing him boils on his backside, I have bruises on my knees from my dawn session."

SN: "Felix you are forgetting the need to Be Kind. May All Sentient Beings Be Happy……"

FM: "Stuff that! Although to be honest, my approach doesn't seem to have worked so far – he was able to sit down on the Front Bench in yesterday's Prime Minister's Questions."

SN: "I saw that, Keir 'Sword of Socialism' Starmer failed as usual to land a custard pie on a sitting duck. I swear that crib sheet in front of him starts with the words 'Don't Upset Godalming'. How can a leading Silk cross-examine so feebly?"

FM: "And how many Silks have you instructed, Squirrel?"

SN: "Oh, at least…(he tails off)…oh…See what you mean…A Human Rights Bookworm is not the man to crack a lying Detective Inspector on a multi-hander is he? I suppose we should be grateful he's facing in the right direction. But anyway, the allegations against Raab are deeply disturbing. He seems to bully every Civil Servant he comes across."

[He huddles the overcoat a bit more snugly as they glumly contemplate the trainee stalactites on the aircon.]

FM: "Pity he doesn't bully the HMCTS higher ups, he could at least employ his limited talents in the right direction: we abandon Court in the summer when it hits the 30's but don't do anything when the Probation Service strikes for a Winter Fuel Allowance. Court 10 doesn't have WiFi whatever the Senior Nerd says; Court 6 is like Boxing Day on the terraces in Glasgow and the toilets have a cocoon of black and yellow tape shifted on an hourly basis from one cubicle to another."

SN: "That's the job lot left over from the last COVID session. Who knows how many more dead we'd have had if the Senior Nerd hadn't Christmas Tree'd every second seat with that bunting and made us all walk widdershins in a clockwise direction?"

FM: "True, we all caught it at least a week behind France. It was well worth keeping the Courts open wasn't it?"

SN: "What would the Tory Front Bench do if Parliament's toilets backed up and the place stank?"

[They look at one another and smile and then chorus]

"Nothing ! They'd assume it was the Back Benches!"

SN: "That's made us feel better then hasn't it? If they've defrosted the cells I will go and see my Bladed Article Du Jour."

[Meanwhile in a parallel universe – The Corridors Of Power – the Minister and his Minions are in a huddle – metaphorical as opposed to keeping warm.]

Minion 1: "You are due to answer a question on the Court Estate, Minister."

Dominic Raab (Shouting): "Where's that? Buckinghamshire? Are we missing a few tithes? Deal with it!"

Minion 1: "No Minister, it's the Court Buildings etc. Although as you mention Buckinghamshire, that Magistrates Court is no more. My colleagues in Health and Safety were JR'd into closing it on account of the rat infestation."

Dominic Raab: "So what? Every public building has a rodent problem."

Minion 2: "Not with rats that can down a Doberman, Minister. There's three ongoing law suits from Newcastle for the falling plaster headwounds and we have had to issue life-jackets and a dinghy to get from one court to another in Doncaster."

Dominic Raab: "No votes in it, work out an answer dammit, what are you paid for?"

Minion 1: "Kier Starmer will have a point, Minister, the whole system is falling to bits."

Dominic Raab: "Find some figures!"

Minion 2: "We have Minister; it's called several gazillion on IT consultants to screw up the Common Platform."

Dominic Raab: "What's that?"

Minion 1: "Er, best not to bother yourself with it, Minister. Those reports of suicide by Legal Advisors are not borne out by our statistics… [sotto voce] but then nothing ever is……."

Dominic Raab: "OK, just sort it, use distraction. Give me a script talking about something else, a new initiative we can shuffle from an existing budget. Something that appeals to our core vote. Patriotism, Religion. Like I said: 'Sort it, you bumpkins!'"

Minion 2: "I have it Minister! We can have an All Faith Prayer Session to start the courtroom day and provide focus for the deliberations!"

A day later:

[A succession of custard pies limp feebly in the direction of Dominic Raab from the Labour Bench.]

To the reply:

"…And that is why we are enhancing the courtroom experience with a morning Prayer session; ecumenical and Multi Faith of course, where all Faiths can pray for the speedy administration of justice that day."

COURT 1 CAMBERWELL

Christians remove their hats, Muslims and Rastafarians ensure theirs are on. Hindus look bemused by the whole script and a number of Legal Aid lawyers are strategically late.

As the Senior Defence Advocate, Felix is honoured to lead the opening invocation.

"…So we humbly pray to each of our respective Deities, may our efforts today lead to boils on the backside of Dominic Raab…"

"Inshallah!"

"Amen!"

"Ram Ram!"

"Aum!"

"Praise Jah! He who feels it knows it.!"

♦ ♦ ♦ ♦

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