In the Court of Appeal
Criminal Division

2011 / 2012

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Introduction by the Lord Chief Justice

This is the first review of work of the Court of Appeal Criminal Division since the retirement of Master Venne QC. Roger Venne was an outstanding Registrar of Criminal Appeals, and litigants, counsel and Judges are all hugely indebted to him for his contribution to the administration of justice throughout England and Wales. He left office with the warmest possible good wishes of us all based on the admiration, respect and affection in which he was held.

The new Registrar, Master Egan QC, has therefore been left with the difficult responsibility of following an individual who was irreplaceable. Nevertheless he has already demonstrated that the office is in the hands of an outstanding individual and the entire Court wishes him well as he takes up his new responsibilities.

This first report since he took office provides a comprehensive analysis of the work in the last year by the Court with the assistance of the Registrar and the Criminal Appeal Office.

The Court is continuing to maintain its accessibility outside London by sitting in Wales again in October 2012. It is not always possible to hear appeals from Welsh Courts in Wales, particularly if they need to be dealt with urgently, but wherever practicable the Court will sit in Wales to hear appeals from cases heard and decided in Wales. I am particularly pleased to have sat in Wales myself this October.

I am pleased to note the publication on 23 August 2012 of 'Court of Appeal Criminal Division – A Practitioner's Guide' by Susan Holdham and Alix Beldam, two of the Senior Legal Managers in the Criminal Appeal Office. This valuable guide has been well received by the legal profession and will provide an invaluable aid to all those who appear before the Criminal Division of the Court of Appeal and to the Judges who sit there.

The Court continues to be concerned by the long and short term issue of the way in which modern technology will impinge on trial by jury. There have been an increasing number of cases in which grounds of appeal against conviction have featured allegations of jury impropriety relating to the misuse of technology. This is a matter that will require close attention over the coming year to ensure the continuing integrity of the jury system.

As the report which follows shows, the Court is deeply indebted to the Criminal Cases Review Commission for all aspects of their assistance, not least the way in which they carry out investigations into allegations of jury misconduct.

Finally, no one knows better than I do of the quality of the work done with such energetic efficiency by those who work behind the scenes in the Court of Appeal Criminal Division Office. In difficult times they continue to provide the judiciary with the greatest possible assistance. We are indebted to them.

Lord Judge
Lord Chief Justice of England and Wales

Overview of the Year
Master Egan QC, Registrar of Criminal Appeals

"Stepping in"; my first 9 months

Both previous incumbents came to the post either through the Criminal Appeal Office (CAO) or the Court Service. Before Master Venne QC, Master McKenzie had been in post from 1988 to 2005. So it was the first time in recent years that a lawyer in private practice had assumed the role. I am grateful to Roger Venne, so generous with his time on the handover and my staff with their massive fund of experience for making my transition a comparatively comfortable one.

No one is free these days from budgetary considerations, all Government Departments are subject to pressure on funding. In this office there is an absolute determination to continue to provide a quality service to the Public and the Senior Judiciary and as numbers of applications increase this will require careful examination of our procedures.

That may show in a more rigorous look at the quality of applications. The provision of representation orders will never be regarded with equanimity by everyone. Recently coming from private practice I have an awareness of how the legal profession is being squeezed on legal aid. In granting representation orders we will adopt a high line; appellants who need representation must get it but it is unrealistic for there to be an expectation of paid funding for every application that the Court of Appeal receives. Unhappily there are very many unmeritorious applications and those could have the effect of clogging the arteries of the Court if they are not looked at and despatched critically and justly.

With the squeeze on all funding my office has to be careful to use representation orders properly and sensibly, for example:-

(i) When two appellants are arguing the same point it is not normally for public funds to pay for two counsel to appear and sometimes for one to do no more than adopt the arguments of the other.

(ii) Even if there have been two counsel at trial, it does not necessarily follow that representation by two counsel will be justified on appeal; the criteria for such representation have to be met.

There seems to have been an increase in counsel doing *pro bono* applications where leave to appeal is refused. The office admires the willingness of advocates to appear *pro bono*, especially since it may mean missing other work to present the case. But it is not the case that the Court will grant leave and a retrospective representation order merely because counsel is willing to argue the point. Practitioners should look carefully at the Single Judge's reasons on a refusal. These days they are inevitably comprehensive and I sometimes wonder whether they are examined as carefully as they should be.

Our office prides itself that we help, not just the senior judiciary, but the legal profession and the general public. I would be disappointed to hear that people with queries were not dealt with courteously and efficiently, our staff positively want to help members of the

profession to get it right, particularly as far as process is concerned. Process is not just the boring part; in handling appellate proceedings efficiently the system only works if due process is rigorously applied, the Rules are there to assist and not to impede. My Senior Legal Managers Alix Beldam and Susan Holdham have this year published "Court of Appeal Criminal Division, A Practitioner's Guide" and, while I am aware that I am inclined to be partial, it does provide in one volume all that the appeal practitioner will need to ensure compliance with our procedures and my legal staff will be using it.

Urgent Cases

Some cases have to come on urgently; applications to appeal terminating rulings where a jury is retained are classic examples where the Court must move to list in days rather than weeks. For example, a trial for manslaughter was being heard at Wolverhampton Crown Court and on Thursday 23 February 2012 the trial judge allowed a submission of no case to answer at the close of the prosecution case. The prosecution immediately indicated its intention to appeal against that ruling and notified the Criminal Appeal Office. The prosecution appeal (**Hamilton [2012] EWCA Crim 541**) was heard by the Court of Appeal Criminal Division (CACD) on Monday 27 February. The Court (Rafferty LJ, Foskett and Globe JJ) reversed the ruling and remitted the case back to the Crown Court which was able to resume the trial on Tuesday 28 February. Hamilton was convicted by the jury within one week of the Appeal.

Attorney General's References are always urgent but never more so than when the respondent has not been sent to custody. We have increased our administrative contact with the Attorney General's Office and the CPS appeals unit in dealing with these cases expeditiously. When cases like these have to be listed together with urgent sentence appeals because of short early release dates, it affects the general caseload.

Criminal Cases Review Commission

Our relationship with the Criminal Cases Review Commission (CCRC) is a strong one; it is important that it continues. Major miscarriage of justice cases such as **Sam Hallam [2012] EWCA Crim 1158** are a powerful illustration of the vital function that the CCRC exercises. We continue to be greatly assisted by the CCRC in the essential matter of directed investigations under section 23A Criminal Appeal Act 1968 into allegation of jury impropriety, it is no exaggeration to say that this function has never been more significant and the Court has never failed to be impressed by the thoroughness of their investigations.

The workload and throughput of cases

(See also the summary and statistics section at page 32 onwards)

The total number of cases received is up with a significant increase in conviction receipts from 1491 to 1731. The statistics appear to indicate that the proportion of conviction cases received that are successful has decreased (the average calculated over a three year period to 2012 is 11% compared to 12.8% for the three years to 2011). This statistic does not always give a true picture; nevertheless it does not refute the impression that there has been an increase in unmeritorious applications.

Bearing in mind the increase in receipts, the fact that we have no substantial increase in outstanding cases is encouraging. Likewise there has been a reduction in waiting times, particularly for conviction cases where leave is granted, from 9.3 months to 7.8 months. We must not be complacent but I do find this, again, encouraging and it says something for my office and the readiness which the senior judiciary show to deal with large volumes of cases efficiently.

Finally my office encourages contact from parties. Of course it may not always tell parties what they want to hear but that is because we attempt to advise parties on the actual position on any case. We do find interaction with legal professionals beneficial to the efficient management of cases. In my short time in post I have been impressed at how concerned the vast majority of practitioners are to get things right.

Master Egan QC
Registrar of Criminal Appeals

Looking to the Future

The delivering of a fair and just criminal justice system in a climate of reduced public spending will present many difficult challenges for the Court of Appeal and indeed the lower courts.

The increased use of technology is one of the ways that the courts and the bodies that use them have embraced these challenges.

Following implementation of a 'pilot' scheme in six Crown Court centres, the use of digital audio recording equipment, known as the 'DARTS' system, was extended to all branches of the Crown Court. The new system replaced the previous analogue recording equipment and the logging of stages and events in court by staff provided by firms contracted to provide transcription services. It is designed to provide an enhanced quality of recording and a faster transcription service for all court users at a reduced cost and trial judges are now able to access the recordings electronically during a trial, which is of great utility in complex cases.

The Crown Prosecution Service has also introduced measures for the electronic service of evidence, which will present additional challenges for practitioners whilst it is implemented and will revolutionise the criminal justice system and the way that evidence is presented in Court.

One of the ways the Court of Appeal is making itself more accessible and facing the challenges of reducing public spending is by the upgrading of its video link facilities over the summer vacation period. Looking ahead, four of the Courts now have the facility to use video links simultaneously, an increase of 50% from previous years. The use of video links enables appellants and witnesses to engage in hearings without the public cost of transporting them. There are also reduced security risks and reduced costs in transferring appellants between prisons. In the current reporting year the use of video links has increased again, there were:

- 128 successful video links to appellants in prison (a further 25 were cancelled due to cases being taken out of the list or appellants waiving their right to attend);
- four links for counsel to appear from a remote location; and
- two international links for witnesses to attend.

This trend is set to continue with over 30 video links to prison already booked for October 2012.

Following plans announced by the former Justice Secretary to overturn the ban on filming and broadcasting from law courts, as part of a Crime and Courts Bill, it is proposed to introduce filming at the Court of Appeal for legal submissions and judgments where there is no obstacle to doing this. The concept of open justice is very much behind the proposals and consultation for these proposals are ongoing, with the Criminal Appeal Office actively engaging in this process.

Practice guidance was issued by the Lord Chief Justice in December 2011 on the use of live text-based forms of communication (including twitter) from court for the purposes of fair and accurate reporting.

The new guidance makes clear that:

i) There is no longer any need for representatives of the media/legal commentators to make an application to use text-based devices to communicate from court.

ii) Members of the public should make a formal or informal application if they wish to use these devices.

iii) Use of devices should not cause a disturbance or distraction.

iv) The judge always retains full discretion to prohibit live, text-based communications from court, in the interests of justice. The 'paramount question' for the judge in deciding whether to allow live text-based communications is whether it may interfere with the administration of justice.

'The danger... is likely to be at its most acute in the context of criminal trials, e.g. where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence ...' or where legal discussions in the absence of the jury may appear on the Internet and be seen by jury members.

v) Anyone using electronic text is strictly bound by the existing restrictions on reporting court proceedings under the Contempt of Court Act 1981.

vi) Photography in court remains strictly forbidden under the Criminal Justice Act 1925.

Such communications will usually not be possible in the CACD where a re-trial is a possible outcome, and they must avoid committing the offence of identifying, whether directly or indirectly, a complainant with a statutory right to anonymity under the Sexual Offences (Amendment) Act 1992.

Cases of Note

Procedure

Disclosure

In **Sandhu [2012] EWCA Crim 1187** the appellant had been stopped by the police whilst driving his father's car and blocks of cocaine were found under the driver's seat. The appellant had been under observation prior to his arrest as part of a larger operation. The prosecution (having consulted the trial judge in chambers) had taken the decision not to disclose the observation evidence. In cross-examination Sandhu stated that he could not recall whether anybody else had been in his car and a document detailing his movements was then shown to him. He appealed against his conviction for possession with intent to supply class A drugs arguing that the failure to disclose the observation evidence made the conviction unsafe. The Court (Stanley Burnton LJ, Maddison J and The Recorder of Preston) found that there was no unfairness from the failure to disclose and dismissed the appeal. The appellant had made no comment in interview and had given an uninformative defence statement. The observation evidence did not weaken the case for the prosecution, nor could it have assisted the defence, other than by enabling the appellant to tailor his evidence to fit the observation evidence.

Retrial after conviction quashed

In **Blackwood [2012] EWCA Crim 390** at an appeal hearing on 8 February 2012 the appellant's conviction for rape was quashed. At the conclusion of the hearing the Court (Richards LJ, Kenneth Parker and Lindblom JJ) asked counsel whether there were any further applications. Prosecution counsel had no instructions to ask the court to order a retrial and no application was made. After the hearing counsel was instructed by the Crown Prosecution Service to apply for a retrial. Counsel telephoned and emailed the Criminal Appeal Office (CAO) to reconvene the Court in order to do so. The email was sent to a CAO lawyer who was not in the office until 10 February 2012. On 9 February 2012 the notifications clerk in the CAO sent out the order recording the decision of the Court to allow the appeal and quash the conviction with the request that the Crown Court update their system with the record that the appellant was acquitted. The lawyer on receipt of the email correspondence reconvened the Court to hear argument on 14 February 2012. The Court considered the legal framework and the reasoning in **Cross (Patrick) [1973] 1 QB 937** and held that the point at which an order on an appeal becomes final was when it was recorded by the proper officer of the court of trial. It was this point at which the appeal proceedings were concluded and the Court was *functus officio*, and no longer had jurisdiction to exercise the power to order a retrial. The Court emphasised that it was highly desirable that prosecuting counsel appearing at the hearing of a conviction appeal should have clear instructions as to whether to apply for a retrial in the event of the appeal being allowed and the conviction or convictions being quashed.

Technical issues

On 31 July 2012 the LCJ, Mackay and Sweeney JJ heard a number of cases where complaints made were in respect of technical issues.

Gul [2012] EWCA Crim 1761 This applicant had been sent for trial for a single indictable only offence. At the Plea and Case Management Hearing the indictment preferred contained only either-way offences, to which the applicant entered guilty pleas. The grounds complained that the proceedings were a nullity following the failure to conduct the mode of trial procedure required by paragraph 7 Schedule 3 Crime and Disorder Act 1998.

The Court reviewed the line of authorities and asked itself whether, when properly examined, there was non-compliance with paragraph 7 of Schedule 3 and if there was, the question to be addressed was whether Parliament intended the consequence of non-compliance with the provisions to render any subsequent proceedings a nullity.

The Court found that Gul was properly sent for trial; the indictment was prepared and signed; the counts identified the offences with which he was charged and which arose from the same facts and were based on the same evidence as the single indictable only charge which founded the committal; he was asked whether he would plead guilty or not guilty and indicated by his pleas that he would plead guilty to the three lesser counts which meant that the Court had to proceed in relation to those as if he had been arraigned and pleaded guilty to them in the Crown Court. Accordingly, non-compliance with the objective of paragraph 7 of Schedule 3 was not established. The omission of the procedural step did not vitiate the indictment or the process before the Crown Court and the appeal was dismissed.

In **Abdul [2012] EWCA Crim 1788** the indictment charged an offence contrary to a repealed statute. Following the trial but before sentence, the Crown Court judge identified that the indictment was defective and granted a certificate that the case was fit for appeal. The Court considered its powers under section 3 Criminal Appeal Act 1968 to substitute a conviction for an alternative offence and the authorities of **Shields [2011] EWCA Crim 2343** and **MC [2012] EWCA 213** which established a principle that section 3 could not be used in order to substitute a verdict of guilty to an offence for which a defendant could, if charged, have been convicted when the offence of which he was in fact convicted did not exist, and quashed the conviction.

In **Jones [2012] EWCA Crim 1789** the Registrar referred the applications for an extension of time of approximately six years for leave to appeal conviction following guilty pleas, under section 20 Criminal Appeal Act 1968 with a view to summary dismissal as it appeared to him to disclose no substantial ground of appeal.

Previous proceedings had been pursued at the Court of Appeal Criminal Division (CACD). In 2009 the applicant's appeal against a confiscation order had been dismissed; in 2010 the Court had refused an application against the decision to appoint a receiver; and in 2012 the Court had refused a renewed application for leave to appeal against the refusal of the Crown Court to vary the terms of the court order.

The grounds of appeal alleged that as the original draft indictment was not signed it was of no effect. This was despite the fact that a new bill of indictment had subsequently been preferred which was a properly signed and valid indictment and to which the applicant pleaded guilty. The Court agreed that the application could properly be treated as frivolous or vexatious, underlined by the fact that it had taken nearly six years for the point to be advanced, and dismissed the applications.

Abuse of process

In **Dwyer [2012] EWCA Crim 10** the Court (Pitchford LJ, Andrew Smith and Popplewell JJ) confirmed that the *autrefois* plea was available in very narrow circumstances. Where the appellant had pleaded guilty to substantive drug supply offences and had later been charged with a conspiracy which relied upon the same conduct, the judge had been right to reject a plea of *autrefois convict* in that it was a different offence. However, the proceedings should have been stayed as no different involvement than that already admitted had been relied upon and the Crown should not have been permitted to bring further proceedings from the same incident. Accordingly the conviction for conspiracy to supply class A drugs was quashed.

In **N and L [2012] EWCA Crim 189** the Court (LCJ, Royce and Globe JJ) considered the position of victims of trafficking where the Vietnamese appellants had been trafficked to staff cannabis factories. A series of conjoined appeals considered whether their convictions for cultivation of cannabis were safe and whether, having regard to the European Convention on Action against Trafficking in Human Beings 2005, their prosecution had been an abuse of process. After detailed consideration of the convention, protocols, reports and previous case law the Court found that their convictions were safe. The Lord Chief Justice restated that the Courts did not decide whether a person ought to be prosecuted, rather whether an offence had been committed. The Courts could decide whether a legal process to which a person was entitled had been neglected but this would be rare. The convention obliged a prosecution authority to apply its mind conscientiously to the question of public policy and to reach an informed decision.

In **A [2012] EWCA Crim 434** the Court (LCJ, Silber & Maddison JJ), expressed concern that a new form of satellite litigation was developing in which the decision of the prosecutor to prosecute formed the basis of an application for a stay. On the rare occasions where such matters arose the appropriate forum was the Crown Court. Only very exceptionally should an application to the Administrative Court for judicial review be granted where such an alternative remedy was available. It was not the function of the court to substitute its own view for that of the Crown about whether there should be a prosecution.

This was an appeal against conviction by A following her plea of guilty at the Crown Court, to doing acts tending and intended to pervert the course of public justice by making and pursuing false retractions of her complaints of rape against her husband. A was sentenced to 8 months' imprisonment. The sentence was quashed by the CACD in November 2010, and replaced with a non-custodial sentence. As a result of this case the Director of Public Prosecutions had issued new guidance on decisions to prosecute in such cases, but there had been no breach of the applicable guidance at the time of trial.

A prosecution which did not constitute an abuse at the date of conviction could not acquire that status later.

Submission of no case to answer

Christou [2012] EWCA Crim 450 concerned an appeal against conviction for assault occasioning actual bodily harm on a police officer who had been called to the appellant's home after the appellant had caused criminal damage and assaulted his mother. The police officer had used force on the appellant without having arrested him and had thus acted unlawfully. The issue for the jury was whether the appellant had used more force than was necessary to defend himself. Defence counsel made an unsuccessful submission of no case to answer at the close of the Crown's case relying on **Galbraith 73 CR App R 124** as interpreted by Turner J at first instance in **Shippey [1988] Crim LR 67**. The Court (Hallett LJ, McCombe and Singh JJ) dismissed the appeal and emphasised that reliance should not be placed on **Shippey**; **Galbraith** did not need interpreting.

The appellants in **Goddard & Fallick [2012] EWCA Crim 1756** had been convicted of attempted rape on the basis of evidence that showed that they had exchanged text messages in which they discussed raping an unnamed six year old boy. The exchange of messages took place in September 2006 and the appellants were arrested in March 2009. It was accepted that no steps had been taken to carry out the plan. A submission of no case to answer was made at the end of the prosecution case on the basis that there was no evidence on which a reasonable jury, properly directed, could be sure that each of the appellants intended that any apparent agreement to rape a child should be put into effect. The Court (Aikens LJ, Sweeney and Supperstone JJ) found: (1) in all cases where a judge was asked to consider a submission of no case to answer, the judge should apply the test set out by Lord Lane CJ in **Galbraith**. (2) Where a key issue was whether there was sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there was a case to answer involved the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question was whether a reasonable jury, not *all* reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concluded that a reasonable jury, properly directed, could, on the evidence and putting the prosecution case at its highest, reach that adverse inference then the case must continue; if not, the case had to be withdrawn from the jury. Quashing the convictions, the Court concluded that no reasonable jury, taking the prosecution evidence at its highest, could surely infer that the appellants intended to carry out the agreement.

Right of appeal to the Supreme Court

In **OB v SFO [2012] EWCA Crim 901** the Court (Gross LJ, Openshaw J and HHJ Milford QC) determined that a minor and consequential amendment contained in Schedule 16 Armed Forces Act 2006, had removed the pre-existing right of appeal to the Supreme Court from decisions of the CACD in appeals under section 13 Administration of Justice Act 1960 (appeals in cases of contempt).

The Court was abundantly sure that Parliament had not intended to remove that longstanding right of appeal and, exercising its powers of rectification, it reinserted necessary words in section 13(2)(c) to restore the right.

Having reached that determination, the Court certified two points of law in relation to the substantive matters considered in the appeal:

> "(1) Whether a contempt of court constituted by breach of a restraint order made under section 41 of the Proceeds of Crime Act 2002 constitutes a *civil* or *criminal* contempt?
>
> (2) If the answer to (1) is a *civil* contempt, whether section 151A of the Extradition Act 2003 and/or Article 18 of the United Kingdom - United States Extradition Treaty 2003 preclude/s a court from dealing with a person for such a contempt when that person has been extradited to the United Kingdom in respect of criminal offences but not the contempt in question?"

Committal for sentence

In **Ayhan [2011] EWCA Crim 3184** the Court (LCJ, Sweeney and Openshaw JJ) dealt with a misrecorded memorandum of conviction. The applicant pleaded guilty in the magistrates' court to two either way and two summary only offences and was committed for sentence. The memorandum of conviction incorrectly recorded that all offences were committed under section 3 Powers of Criminal Courts (Sentencing) Act 2000; the summary only matters should have been committed under section 6. The Court held that provided the power of the magistrates' court to commit for sentence was properly exercised in respect of one or more either way offence in accordance with section 3, a mistake in recording the statutory basis for a committal for summary only offences did not invalidate the committal.

Section 66 Courts Act 2003

In **Iles [2012] EWCA Crim 1610**, the magistrates' court had declined jurisdiction in respect of an arson offence and matters had been committed for trial under section 6(2) Magistrates' Courts Act 1980. Separately the applicant pleaded guilty in the magistrates' court to other offences and these were adjourned for sentence. In the Crown Court the judge, sitting as a District Judge (Magistrates' Court) under section 66 Courts Act 2003, imposed concurrent custodial terms to that imposed for the arson. The Court (PQBD, Walker and Openshaw JJ) commented that this practice had advantages as well as dangers. A Crown Court Judge who was invited to deal with two sets of proceedings in this way had to decide whether it was appropriate in the light of submissions from both the prosecution and the defence. It had to be borne in mind that when sentencing as a District Judge the sentence was being imposed by the magistrates' court and this limited the powers of sentence to those of the magistrates' court, and also that sentences imposed would have a different route of appeal from that applicable to sentences imposed by the judge when sitting in the Crown Court.

Adding a summary only count in the Crown Court

In **Iqbal [2012] EWCA Crim 766** the Court (Gross LJ. Blake J and the Recorder of Redbridge) considered the relationship between section 40 Criminal Justice Act 1988 and section 127 Magistrates' Courts Act 1980. In the case the prosecution offered no evidence to the one indictable only count on the indictment. Leave was granted to add, outside of the six month time limit in section 127, a separate summary only offence under section 40. The Court held that provided the Crown Court and the jury were seized of an indictable offence there was nothing in section 40 that prevented the laying of a summary only offence outside the six month period. To invoke section 40 the summary only offence which was added had to be "founded on the same facts or evidence" as a count charging an indictable offence.

Bail

In **Evans [2011] EWCA Crim 2842** the Court (VPCACD, Owen and Lang JJ) considered the issue of surrendering to bail. The mere arrival at a court building did not constitute surrender to custody nor did reporting to an usher. Generally in Crown Courts surrender would mean a defendant entering a dock and placing himself in the custody of the dock officers. It might also be accomplished by the commencement of any hearing before the judge where a defendant was formally identified.

Evidence

Hearsay

Following the decision of the Grand Chamber of the ECHR in **Al-Khawaja & Tahery v UK [2011] ECHR 2127** the CACD has considered its effect on the hearsay code contained in sections 114-126 Criminal Justice Act 2003, in two significant decisions.

In **Ibrahim [2012] EWCA Crim 837** the Court (Aikens LJ, Field J and HHJ Cooke QC) considered the decision of the Grand Chamber in conjunction with the decisions of CACD and the Supreme Court in **Horncastle [2009] UKSC 14**. The Court concluded that there was a difference in approach between the Supreme Court's decision and that of the Grand Chamber, primarily in that the Supreme Court declined to apply the "sole or decisive" test which the Grand Chamber had confirmed remained part of Strasbourg jurisprudence. The Court viewed the difference as being more of form than substance.

In **Riat & Others [2012] EWCA Crim 1509** the Court (VPCACD, Dobbs and Globe JJ) stated that a Crown Court judge did not need ordinarily to concern himself with close analysis of the relationship between the judgment of the Supreme Court in **Horncastle** and that of the ECHR in **Al-Khawaja & Tahery** and need generally look no further than the Criminal Justice Act 2003 (CJA) and **Horncastle**. There was no overarching rule that hearsay evidence which was 'sole or decisive' was automatically inadmissible and nor was hearsay evidence to simply be treated as if it were first hand evidence and automatically admissible. The Court needed to work through a number of steps. The Court needed to consider whether there was a specific statutory gateway permitting the admission of hearsay evidence (sections 116-118 CJA); was there material which could help to test the hearsay evidence (section 124) and was there a specific 'interests of justice' test at the admissibility stage? If there was no other justification or gateway then the Court should consider whether the evidence should nevertheless be considered for admission on the grounds that it was in the interests of justice; or if the evidence was prima facie admissible should it be ruled inadmissible under section 78 of the Police and Criminal Evidence Act 1984 or section 126 CJA? If the evidence was admitted then should the case subsequently be stopped under section 125 CJA? The Court observed that whilst **Ibrahim** provided a good illustration of how the framework worked neither **Horncastle** nor **Ibrahim** added to the framework any requirement that the hearsay had to be independently verified either before it was admitted or before leaving the case to the jury.

In **Horsnell [2012] EWCA Crim 227** the Court (Davis LJ, Treacy and Blair JJ) considered the admission of a hearsay statement from the wife of the defendant (a competent but not compellable witness who was not willing to give evidence). The trial judge had admitted statements from the wife under section 114(1)(d) Criminal Justice Act 2003. The Court ruled that **L [2008] EWCA Crim 973** was binding. The provisions of section 80 Police and Criminal Evidence Act 1984, which set out the circumstances in which a spouse or civil partner might be compellable was not decisive. The Court agreed with **Y [2008] EWCA Crim 10** that a court had to be cautious in invoking s.114(1)(d) particularly where the evidence sought to be adduced was from a non-compellable spouse who had not been advised when making the statement that she was not compellable.

Compellable witness

In **BA [2012] EWCA Crim 1529** the Court (PQBD, Collins and Singh JJ) dismissed a prosecution appeal against a terminating ruling relating to the circumstances in which a wife may be compelled to give evidence against her husband. The Court held that the decision as to whether an offence was one in respect of which a spouse could be compelled to give evidence under section 80(3) Police and Criminal Evidence Act 1984, had to be taken by reference to the legal nature of the charged offence and not the factual circumstances surrounding the offence.

B and W had had an argument at their home. B had threatened to burn down the house with their three children in it and he had turned two gas hobs and the oven on. He was charged with threatening to destroy or damage property contrary to section 2(a) Criminal Damage Act 1971. W refused to give evidence voluntarily at the trial. The recorder ruled that the offence charged was not a specified offence within the meaning of section 80(3), and therefore that W was not a compellable witness. Section 80(3)(a) provided that a specified offence was one which involved an assault on, or injury or threat of injury to, the spouse or a person who was under the age of 16. The issue was whether the offence as charged involved an assault on, or an injury or threat of injury to, W or the children within the meaning of section 80(3)(a).

The Court held that Parliament had framed in narrow terms the circumstances in which one spouse was made a compellable witness against the other. The offence itself did not have to have as one of its ingredients an assault on or injury or threat of injury to the spouse or children; it was sufficient if the offence encompassed the real possibility of an assault or injury or threat of injury. The focus was on the legal nature of the offence and not the specific factual circumstances in which the offence was committed. There were practical considerations that supported that conclusion. It was essential to be able to determine at the outset of the trial whether the spouse was a compellable witness by reference to the nature of the offence, and not by reference to the evidence which the Crown intended to call. An offence under section 2(a) Criminal Damage Act 1971 was an offence directed at property, and did not give rise to the real possibility of an assault or injury or threat of injury.

Alibi direction

In **Pengelley [2012] EWCA Crim 1291** the Court (Stanley Burnton LJ, Maddison J and the Recorder of Preston) quashed a conviction for sexual assault in circumstances where the defence case was one of mistaken identity and alibi. In summing-up the judge had referred to the alibi put forward by the appellant but did not give the required alibi direction to the effect that if the jury rejected the alibi it did not follow that the appellant was guilty of the offence charged. The question of alibi and proof of his being the person who had assaulted the complainant were separate questions, although one could bear upon the other. There might be cases where the Court could overlook the absence of a clear alibi direction, but in this case the identification evidence was remarkably weak, in particular by reason of mistaken identifications made by the complainant after the incident and the weakness of that evidence made it all the more important that a clear alibi direction was given.

Bad character

McDonald [2011] EWCA Crim 2933 In 2010 McDonald was convicted of attempted murder and firearms offences that occurred in 2000. He had shot two men as they stood outside a nightclub. At trial he denied that he was the shooter. On appeal he argued that the Crown ought not to have been allowed to adduce evidence of his bad character since that amounted to bolstering a weak case. The Court (Stanley Burnton LJ, Stadlen J and HHJ Morris QC) disagreed and found that his earlier convictions for firearms offences were rightly admitted. The case was a strong one and McDonald gave a no comment interview and had not indicated any positive defence. In relation to the argument about bad character not being allowed if it would bolster a weak case (see **Hanson [2005] EWCA Crim 824**), Stanley Burnton LJ stated:

> Some care is required when considering whether bad character evidence is to be used 'simply to bolster a weak case'. Where the bad character consists of convictions, the degree of similarity between those convictions and the offences being tried will be a relevant consideration, as pointed out by Rose VP (in **Hanson** at [10]). The more specific the similarities between the previous convictions and the index offence, the more relevant are those convictions and the more substantial the argument for their admission in evidence. If, for example, the *modus operandi* in the previous offences was highly unusual, and the same *modus operandi* was followed in the index offence, that may of itself be evidence that the defendant committed the index offence.

In **Phillips [2011] EWCA Crim 2935** the Court (Pitchford LJ, Andrew Smith and Popplewell JJ) analysed the statutory provisions and reviewed previous cases relating to section 101(1)(e) Criminal Justice Act 2003:

"In criminal proceedings evidence of the defendant's bad character is admissible if, but only if: ... e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant"

Phillips had been convicted of conspiracy to cheat the Revenue. The Crown's case was that he and others conspired to cheat by failing to deduct tax and national insurance from payments to their workers and by failing to account for tax, VAT and national insurance. Phillips and a co-accused, Scraggs, accepted that a fraud had been in progress through a network of interrelated companies, but each denied responsibility. Phillips' application at trial to adduce evidence of Scraggs' bad character, was allowed in part only and he appealed against his conviction arguing that the judge had wrongly refused him leave to adduce evidence of the bad character of Scraggs. The Court upheld the conviction.

The Court held that "substantial probative value," meant that the evidence had an enhanced capability of proving or disproving a matter in issue. Whilst there was an overlap in the evaluation of whether evidence had substantial probative value and a consideration of the importance of the matter in issue, the questions had to be addressed in turn. The threshold for admissibility was high, to ensure that the probative strength of the evidence removed the risk of unfair prejudice. The important matter in issue in a 'cut-throat' case might, as in the present case, be whether either or both defendants committed the offence and, accordingly, whether one was falsely blaming

the other. The evidence which the defendant wished to use might be probative in that it tended to establish the co-accused's propensity for similar criminal conduct or for untruthfulness. The judge had to evaluate the capacity of the evidence to establish the relevant propensity. Where there was already evidence which had the same probative effect, the judge should assess whether further evidence had substantial probative value on that issue. The judge was not required to examine each piece of evidence in isolation of the rest of the evidence; what was of substantial probative value should be judged in a fact-sensitive manner in the context of the trial at the time of the application. Substantial probative value described the capacity of the evidence to prove or disprove a fact in issue. It was a relative, not an absolute term. The statutory criteria had to be fully met, but once they had been met, there was no discretion under section 101(3) or (4) or any other statutory provision, such as section 78 Police and Criminal Evidence Act 1984 (because the application was made by a defendant and not the prosecution), to exclude the evidence on "fairness" or "case management" grounds. If the statutory test of enhanced probative value upon a matter of substantial importance was met, the scope for unfairness was removed. The judge could take steps to minimise the risk that the focus of the trial would be lost by controlling the scope of the evidence, and the manner in which it was introduced; by imposing a timetable; and by explaining to the jury the issues to which the evidence was relevant.

In **Gillespie [2011] EWCA Crim 3152** the Court (Elias LJ, Royce and Haddon-Cave JJ) found that the trial judge had been entitled to admit, under sections 101(1)(d) and 101(1)(f) Criminal Justice Act 2003, bad character evidence relating to a defendant's previous fraudulent conduct even though no prosecution had arisen from it.

Gillespie appealed against his conviction for offences including conspiracy to defraud arising out of the supply of counterfeit prescription drugs. The Crown's case was that he had imported the drugs from China, altering the packaging to make it appear that they had originated from France. Gillespie's case was that he did not know that the drugs were counterfeit and that he had been duped by a business associate. The essential issue for the jury was whether he had acted dishonestly. The judge allowed the Crown to adduce bad character evidence relating to the collapse of his previous business, consisting of his admissions to falsifying invoices and misleading his bankers, and his conviction for a pharmaceutical labelling offence. The judge allowed the evidence under sections 101(1)(c) and 101(1)(d) Criminal Justice Act 2003 on the basis that it was relevant to a matter in issue and was important explanatory evidence, and also under Criminal Justice Act 2003 s.101(1)(f) to correct the impression given to the jury by Gillespie that he was a man of good character whose difficulties had been the sad result of ill fate. Gillespie submitted that the bad character evidence should not have been admitted because it was not sufficiently similar to the offences charged, had not been the subject of any prosecution, was not important explanatory evidence, and did not show a propensity to commit offences of the kind charged. The Court held that under s.101(1)(d), whether the evidence was sufficiently similar to be admitted was a matter for the discretion of the judge, and in the instant case he had been entitled to conclude as he did. The trial judge was in the best position to assess whether the appellant had given a false impression as far as s.101(1)(f) was concerned. Had s.101(1)(c) been the only ground on which the application had been based, the court would have considered that it was not necessary to admit the evidence in order to understand the issues at trial.

Admissibility of interview/fitness to plead

In **Blundell [2012] EWCA Crim 1799** the appellant had been found unfit to plead. The jury later found that he had committed the act of sexual assault on a female child under the age of 13. There was no evidence against the appellant save for his admissions in interview. The Judge had allowed the prosecution to adduce the applicant's record of interview. The Court (PQBD, Collins and Calvert-Smith JJ) directed an acquittal and ruled that it was impossible to understand how the interview could have been admitted in light of the Judge's earlier findings regarding the appellant's unfitness to plead. Cases of unfitness to plead were very difficult ones and it was extremely important for the public interest to ensure that time was taken to ensure that an enquiry was handled fairly. As the court observed in **Norman [2008] EWCA Crim 1810**, unfitness to plead cases required very careful case management. A judge had to be directed to the relevant passages in Archbold or Blackstones which set out the way in which the proceedings should be conducted and take the utmost care to ensure that the rights of the defendant before him and the public interest were properly taken into account. Sufficient time had to be given to prepare the cases as they were quite different from the ordinary cases before the Crown Court. In the instant case the Court had no power to order a retrial, but would have done in the public interest if it could. Parliament should remedy this most unfortunate error in the law.

Admissibility of PCMH form

In **Newell [2012] EWCA Crim 650** the Court (PQBD, Dobbs and Underhill JJ) gave guidance as to the admission of the contents of a PCMH (plea and case management hearing) form as a previous inconsistent statement.

The appellant had sole use of a flat from which a quantity of cocaine was seized. He made no comment in interview. His then counsel responded "No possession" to a question seeking identification of the real issues on the PCMH form. At trial, a new defence statement was lodged in which possession was admitted but intent to supply denied. The Judge permitted the Crown to cross-examine the appellant on the inconsistent statement. The Court concluded that the PCMH form was admissible, in principle. An advocate had implied actual authority to do what was normally incidental to the execution of what he was expressly authorised to do, ie conduct the defence, and recording a matter on a PCMH form fell within that. Even if he had no implied authority, he had ostensible authority.

The Court reviewed the decision of the Administrative Court in **R (Firth) v Epping Magistrates Court [2011] EWHC 388**. The CPS had issued guidance to the effect that applications to make use of what was recorded on a PCMH form should be the exception rather than the rule. One of the effects of **Firth** had been to render defence advocates much more cautious in providing information. Given the statutory background and the provisions of the Criminal Procedure Rules, the requirements of a PCMH form in the Crown Court should be seen primarily as a means of providing information to the judge to enable active case management. The nature of the defence should appear from the defence statement which had to be provided before PCMH. The trial advocate at the

PCMH should view the provision of information on the PCMH form as part of his duty to help the court with case management without the risk of it being used against the defendant's interests, provided he complied with the letter and the spirit of the Criminal Procedure Rules.

If there was such compliance, the court's discretion under section 78 Police and Criminal Act 1984, should ordinarily be exercised to exclude the contents of a PCMH form. In rare cases, for example where there was no defence statement and an ambush was attempted, it might be right to admit it.

Criminal Law

Corporate liability

In **St. Regis Paper Company Ltd [2011] EWCA Crim 2527** the Court (Moses, LJ, Nicola Davies J & HHJ Gilbert QC) considered the extent to which the company could be criminally liable in respect of an employee (who was not the directing mind and will of the company) intentionally making false entries in pollution control records submitted to the Environment Agency on its behalf. The Court found that there was no basis in law for attributing the employee's dishonest intention to the company. The offence required proof of mens rea and whether the employee's intent could be attributed to the company was a matter of statutory construction. The company had also not delegated its responsibilities under the relevant Regulations to the employee and therefore as a matter of construction, it could also not be vicariously criminally liable for his actions.

Corruption/match fixing

In **Majeed & Westfield [2012] EWCA Crim 1186** Majeed acted as an agent for a number of cricket players representing Pakistan in the Test Match against England in the Summer of 2010. Westfield was a cricketer, contracted to Essex County Cricket Club. The appeals were conjoined because the Court (LCJ, Openshaw & Irwin, JJ.) considered the ambit of offences of cheating at gambling pursuant to s. 42 of the Gambling Act 2005, conspiring to give corrupt payments contrary to s.1(1) of the Criminal Law Act 1977, and conspiracy to cheat. In the context of 'spot fixing' in cricket matches, the Court considered that the prizes for successful gambling could be great and the scope for corruption was therefore considerable; but these practices must be eradicated to ensure the survival of the game as a truly competitive sport.

Self defence

In **Yaman & Yaman [2012] EWCA Crim 1075** the appellant believed that three males who had forced entry into his family's kebab shop were burglars and that he was outnumbered and had to defend himself and his mother. The Court (Hooper LJ, Cooke and Beatson JJ) considered the defence of self-defence as set out in section 76 Criminal Justice and Immigration Act 2008 which concerned the defence of persons and property as well as the defence of arrest and prevention of crime. The trigger for the use of force under the section was to be assessed subjectively but a person's response to that trigger must be assessed objectively in light of that subjective belief. The Court found that the use of a hammer in the circumstances where the three males were not aggressive and were executing a distress warrant to disconnect the gas meter was not reasonable.

Partial defences to murder

In **Clinton & Others [2012] EWCA Crim 2** the Court (LCJ, Henriques and Gloster JJ) considered three appeals which followed the new 'loss of control' defence created by the Coroners & Justice Act 2009, and which replaced the common law defence of 'provocation' in relation to offences committed on or after 4 October 2010, with

particular regard to the prohibition of sexual infidelity alone constituting a qualifying trigger. The new partial defence was self-contained and set out three integral components all of which had to be present for the defence to apply. The killing must (1) result from a loss of control (which did not have to be sudden) and not a considered desire for revenge; (2) there must be a qualifying trigger which resulted in the defendant fearing serious violence (an objective test) and (3) the defendant, even when faced with a situation amounting to a qualifying trigger, must exercise a degree of self control. The Judge had a responsibility at the conclusion of the evidence to determine whether there was evidence sufficient to raise the defence. If there was not, it should be withdrawn from the jury. If there was, it was for the Crown to disprove.

In **Dowds [2012] EWCA Crim 281** the Court (VPCACD, Simon and Lang JJ) was asked to consider whether acute voluntary intoxication was now capable of giving rise to the partial defence of diminished responsibility following the amendment of section 2 Homicide Act 1957, by section 52 Coroners and Justice Act 2009. The appellant contended that acute intoxication was a "recognised medical condition" within section 2(1)(a) as amended. The Court concluded that voluntary intoxication which did not result from alcoholism or dependence was not capable of founding a defence of diminished responsibility. Had Parliament intended to modify the well entrenched rule it would have done so explicitly.

Status of acquitted defendants

Sam Cook [2012] EWCA Crim 6 involved a conspiracy to import cannabis. One of the accused, Matthews, pleaded guilty to the offence (as the principal conspirator) but the jury acquitted three of the co-accused and could not decide on the case against a fourth accused, Cook. The Court (Hooper LJ, Hickinbottom J and HHJ McKinnon) was asked to consider whether the prosecution could then rely on the three acquitted defendants still being co-conspirators in the re-trial of Cook, given the fact that they had been acquitted by the jury of the conspiracy charge. The Court found that the jury could find on the facts that Cook conspired with Matthews and others unnamed, and that the acquitted co-accused were probably also involved in the conspiracy but they should not be named on the indictment at the re-trial.

Disclosure

In **Joof & Others [2012] EWCA Crim 1475** the appellants had been convicted of murder. The prosecution case at trial had been dependent upon an eyewitness who purported to have been present when the deceased was shot. Following a lengthy investigation by the Criminal Cases Review Commission, it was found that the prosecution had withheld material regarding police misconduct in the witness handling arrangements for the protected witness. If the material had been available to the defence then the prosecution might not have proceeded with the trial or the judge may have stopped the proceedings on the grounds that there had been gross prosecutorial misbehaviour. The prosecution did not seek to uphold the convictions and the full Court (Hooper LJ, Simon and Stadlen JJ) allowed the appeals. The prosecution did not seek a retrial. The Court observed that this was a very bad case of non-disclosure which bore similarities to **Maxwell [2010] UKSC 48**.

Sentencing

Riots

In **Blackshaw and Others [2011] EWCA Crim 2312** the Court (LCJ, PQBD and Leveson LJ) dealt with a number of appeals against sentence arising from the riots in London and other major British cities in August 2011. The Court observed that fundamental sentencing policy dictated that there was an overwhelming obligation on sentencing courts to do what they could to ensure the protection of the public in their homes and businesses or in the street. Severe sentences, intended to provide both punishment and deterrence had to follow for those who deliberately participated in disturbances of this magnitude, causing injury, damage and fear. Those who individually committed further offences during the course of the riots were committing aggravated offences and had to be punished accordingly. The sentences should be designed to deter others from similar criminal activity. Sentencing courts could not ignore the context in which the offences had been committed as it was an essential feature in the assessment of culpability. The Court should approach the sentencing decision by reference to any relevant guidelines as the starting point without sacrificing the obligation to do justice in the individual and specific case. However, the Sentencing Council guidelines had not contemplated the offences with which they were concerned would take place within the context of nationwide public disorder. Therefore sentences beyond the range in the guidelines for conventional offending (i.e. offending which lacked the aggravating features of widespread public disorder common to these appeals) were not only appropriate but inevitable. **Gilmour [2011] EWCA Crim 2458** (VPCACD, Cranston and Hickinbottom JJ) approved the approach set out in Blackshaw.

Credit for guilty plea

In **Whelan [2012]** the appellant entered a late guilty plea but at the first reasonable opportunity following receipt of a psychiatric report that said he was fit to plead. The Court (Gross LJ. Griffith Williams and Sweeney JJ.) found that the sentencing judge had erred in not giving maximum credit for the plea.

In **Chaytors [2012] EWCA Crim 1810** the Court (Hallett LJ, Royce and Haddon-Cave JJ) commented that in an increasing number of court centres there was an early guilty plea scheme where early guilty plea hearings took place. In those centres there were practice guidance notes making it clear that there was a presumption that only a 25% discount would be given if a guilty plea was entered at the plea and case management hearing (PCMH) rather than earlier. It was likely to be increasingly difficult to maintain that a plea at the PCMH would be the first reasonable opportunity.

Child abduction

K and S [2011] EWCA Crim 2871 (LCJ, McFarlane LJ and Royce J) concerned appeals against sentence involving fathers who had abducted their children and taken them overseas for many years. Both matters raised common questions relating to sentencing considerations in the context of the Child Abduction Act 1984. The Court observed

that such offences were of great seriousness, with the additional complexity that the abducting parent was the person best able to provide the children with a home. Where the only person available to care for children committed serious offences, even allowing fully for the interests of the children, it did not follow that a custodial sentence of appropriate length to reflect the culpability of the offender and the harm consequent on the offence was inappropriate. There was no reason why the offence of child abduction should be placed in a special category of its own when the interests of the children of the offender fell to be considered. In the instant cases making every allowance for the impact on maturing teenage children of the imprisonment of their fathers, any damage to their welfare was a direct consequence of their fathers' actions and did not justify a reduction in what would otherwise be entirely appropriate sentences.

Reducing minimum term

In **Gill; Eccles; Abu-Neigh (Formerly Wallace) [2011] EWCA Crim 2795** the Court (LCJ, Henriques and Irwin JJ) considered three applications for leave to appeal out of time by applicants who had been convicted of murder prior to 2003 (when the setting of the minimum term was the responsibility of the Secretary of State). In each case a minimum term had been set by a High Court Judge under the provisions of Schedule 22 Criminal Justice Act 2003 and the applicants sought a review of their terms on the basis of the exceptional progress they had made while serving their sentences. The authorities established that for cases falling within Schedule 22, the High Court, or the Court of Appeal, should consider and reflect on evidence of exceptional progress in prison and, where it was established, make due but modest allowance for it against the minimum term. The Court observed that a reduction in the minimum term to reflect exceptional progress should not realistically be considered until towards the end of the minimum period and an application made more than three years before the end of the determinate period would be premature. Such an application would inevitably require an extraordinary extension of time when in any other circumstances this would be bound to fail. However, it remained open to the applicant to refer the case for the consideration of the Criminal Cases Review Commission. Any reference by that body would by statute be treated as an appeal which did not require any extension of time. In any event the Court had to face up to the practical realities and in an appropriate case, when the minimum term had been assessed in accordance with either paragraph 3 or paragraph 6 of Schedule 22, to conduct the necessary review.

Sexual Offences Prevention Orders

The appellants in **Aldridge & Eaton [2012] EWCA Crim 1456** were each sentenced to Sexual Offences Prevention Orders. The orders were subsequently varied and each appellant appealed against the variation under section 110(3)(a) Sexual Offences Act 2003. The question for the Court was whether it was the Criminal or Civil Division of the Court of Appeal which was vested with jurisdiction to hear the appeals. The Court (LCJ, Openshaw and Irwin JJ), following **Hoath & Standage [2011] EWCA Crim 1656**, found that the appropriate forum to consider any appeal was the Criminal Division.

The appellant in **Pelletier [2012] EWCA Crim 1060** was made the subject of a Sexual Offences Prevention Order. The order as drawn and served on him did not accord with the terms of the order made by the judge. His appeal for breaching the order was allowed. The Court (VPCACD, Macur and Maddison JJ) said that ancillary orders should be placed before the Judge in draft in writing. The judge should then either make them in the form tendered in draft or, if appropriate, amend them. The document bearing either the judge's approved initial or the amended terms of the order together with such initial should then be placed with the papers by the court associate. The order would then be translated into proper form in the office afterwards.

Drugs

Over the year the Court considered several groups of cases relating to sentencing for drug offences. In **Boakye [2012] EWCA Crim 838** the Court (VPCACD, Treacy and Globe JJ) considered the cases of six applicants who were sentenced for bringing sizeable quantities of Class A drugs (in each case cocaine) into the UK. Each fell to be dealt with for a single transaction, having been caught bringing the drug through customs control. They had all been sentenced before the coming into force of the Sentencing Council Guidelines on drug offences on 27 February 2012, but contended that their sentences should be reduced in line with the sentence they would have been likely to receive had the guideline been in force. The common point of principle was whether the new guideline operated retrospectively to render manifestly excessive sentences which when passed were in accordance with prevailing practice. In refusing the applications the Court noted that there had been many changes in sentencing practice in the previous 20 years and if changes in sentencing practice were generally regarded as retrospective in operation, not only would the courts be deluged with the need to re-sentence those whose cases had long been closed, but also great injustice would be likely to be done as between offenders. The Sentencing Council's guideline was deliberately expressed by the Council to be prospective and not retrospective. The Court also gave guidance as the applicable culpability to be assigned to offenders in drugs courier cases.

In **Healy [2012] EWCA Crim 1005** the Court (VPCACD, Cooke and Burnett JJ) considered five appeals against sentence for the cultivation of cannabis in which the main issue was the proper application of the Sentencing Council's guideline on drug offences. The Court stated that it was not open to a sentencing judge to disregard the guidelines because he or she preferred the earlier decision of the Court in **Auton [2011] EWCA Crim 76**. The Court explained that the proper approach to the drug guideline was to recognise that broad categories of offence were presented in boxes but that there was an inevitable overlap between the scenarios described in adjacent boxes. In real life offending was found on a sliding scale of gravity with few hard lines. The guidelines recognised that the two principal factors which affected sentencing were the harm the offence did and the culpability of the offender. The quantity of the drug was a broad indicator of harm but that might be qualified by the level of participation which was a broad indicator of culpability, and vice versa. The quantities of drugs which appeared in the guideline were indicative quantities designed to enable the experienced judge to put the case into the right context on the sliding scale. In production cases it was the output or the potential output which counted, and a judge could take into account the higher productivity of

the plants (as in the present cases) in determining the potential output. Assessing the culpability of an offender was a matter for the experience of the judge. The Court noted that the lists in the guidelines were not exhaustive and that one or more of the listed characteristics may demonstrate the category into which the offender fell.

In applications by the Attorney General for leave to refer as unduly lenient three sentences imposed for drug offences, **A-G's Refs (15, 16 and 17 of 2012) [2012] EWCA Crim 1414**, the Court (Hallett LJ, Calvert-Smith and Maddison JJ) confirmed with reference to the judgments in **Boakye** and **Healey** (above) that the new guideline would not, in most cases, result in a departure from previous sentencing practice. No reduction of sentence levels for drug offences was intended by the Sentencing Council, save for the special category of drug mule, and that only in limited circumstances. That special case apart, courts should continue to allocate offender(s) into the appropriate role which they have played in the commission of the offence, in much the same way as before.

Historic sexual offences

In **H and Ors [2011] EWCA Crim 2753** the Court (LCJ, Royce and Macur JJ) considered eight sentence appeals where the appellants had all committed offences between 25 and 40 years ago. The Court held that there were no special sentencing provisions for historic cases. In principle, the defendant had to be sentenced in accordance with the sentencing regime applicable at the date of sentence and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts. It was wholly unrealistic to attempt an assessment of sentence by seeking to identify what the sentence would have been had the offence come to light shortly after it was committed. However, the sentence was limited to the maximum sentence then available for that offence. Changes in the law which created new offences or increased the maximum penalties for existing offences did not apply retrospectively to crimes committed before the change in the law. The focus should be on the particular circumstances in which the offence was committed and its seriousness. Due allowance for the passage of time might be appropriate if, for example, the offender was very young and immature at the time when the offence was committed. Careful judgment of the harm done to the victim and the extent of the defendant's criminality was a critical feature of a sentencing decision. The circumstances in which the offence came to light would be relevant; and events since commission of the offence could constitute aggravating or mitigating factors depending on the kind of life the defendant had since led. Early admissions and a guilty plea were of particular importance in historic cases. Even more powerful mitigation was available to the offender who out of a sense of guilt and remorse reported himself to the authorities.

Case Study

The Court of Appeal Criminal Division deals with many different types of cases involving various procedural stages. What follows is by no means a typical case, but it serves to illustrate some of the stages that a case may go through before it is concluded, and the role that the Criminal Appeal Office can play in the process.

R v Thackaberry

On 21 August 2009 the appellant was convicted (in his absence) of three counts of theft. On 26 February 2010 he was sentenced (in his absence) to four years' imprisonment. The sentence was ordered to run **consecutively** to a sentence the appellant was serving for a drugs offence in Sweden.

The offending

In the evening of 30 July 2008 the appellant stole five horses valued at £23,500 and 15 chickens from a stable yard in West Sussex. The lock on the gate to the yard had been broken, two guard dogs had been beaten and the horses and chickens had been loaded onto a horsebox, which itself had been stolen. The horsebox was later found burnt out in a lane in Surrey. The horses and chickens were not recovered. With the assistance of DNA the offence was traced to the appellant. He was arrested but later absconded and failed to attend his trial. He had gone to Sweden where in 2009 he was convicted of possession of cannabis with intent to supply and sentenced to three years and nine months' imprisonment.

Application for leave

Applications for leave to appeal against conviction and sentence drafted by counsel were received and processed by the CAO. The applications were put before the single Judge for consideration and were refused. The applications were renewed by counsel and a summary for the Court was written. Prior to the hearing date, a potential error in sentence was identified by a CAO lawyer and the prison service was contacted to clarify on what basis the appellant had been repatriated.

The error in sentence

It was unclear whether it had been lawful to order the sentence to run consecutively to the Swedish one. The appellant had been returned to the United Kingdom on 21 July 2010 to serve his sentence. The United Kingdom had derogated from Articles 3(3) and 9(1)(b) of the Convention on the Transfer of Sentenced Persons. Consequently the penal authorities could only continue to enforce the foreign sentence; they could not convert it into a United Kingdom imposed sentence. Section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 provided for a sentence to start on a day other

than the day of imposition. However, it had never been construed so as to permit a sentence to be imposed to start on some future date except where the defendant was in custody serving another sentence.

The Court of Appeal

There were a number of hearings. Leave to appeal against conviction and sentence was granted on the renewed grounds. A sentence ground was then added submitting that it was unlawful to make the sentence consecutive. The conviction appeal was subsequently abandoned.

At the final hearing the Court observed that the repatriation occurred under the Repatriation of Prisoners Act 1984 by reason of a warrant for transfer to, and detention in, the United Kingdom, signed on behalf of the Minister of Justice on 1 July 2010. The sentence could not be made consecutive; while there was power to make sentences consecutive to sentences imposed in other parts of the United Kingdom that power did not extend to foreign sentences. The sentence, reduced to three years, was ordered to run concurrently.

The work of the Criminal Appeal Office

The Court is supported by the Registrar and the staff of the Criminal Appeal Office (CAO), currently comprising 25 lawyers and 84 administrative staff, some of whom work part-time. The office forms part of Her Majesty's Courts and Tribunal Service (HMCTS) which in turn is an agency of the Ministry of Justice.

The structure of the office is intended to provide maximum support to the judiciary in all aspects of the appeal process and to provide value for money as a publicly funded service. The budgetary constraints which have affected all government departments have led to restrictions on recruitment and the CAO has been operating with reduced staff numbers throughout the 2011/2012 legal year. The on-going re-structuring of HMCTS has also meant that many posts have been the subject of review and some staff have had to re-apply for their own jobs.

The Registrar and Judiciary remain of the view that it is vital to the Court's ability to function effectively and efficiently that the CAO is fully staffed by high quality and suitably qualified personnel.

Conviction applications and appeals are managed by teams comprising of administrative staff, casework lawyers and complex casework lawyers who are assigned cases according to complexity and who ensure that they are guided through the appeal process efficiently and justly. The lawyers provide case summaries to the Court, saving valuable judicial time. The lawyers also provide advice on procedural matters to practitioners and to applicants in person. Complex casework lawyers deal with the more difficult cases, prosecution appeals against terminating rulings, interlocutory applications and other more unusual applications.

Sentence appeals and applications are managed by administrative staff with access to legal advice as required. Administrative staff are responsible for the preparation and progression of the majority of sentence only cases and write the case summaries on all but the most complex sentence cases. This work is similarly essential to the volume of cases dealt with.

The administrative staff is led by the Senior Operational Manager, Criminal Appeal Office and Support Services, and her Deputy. Small teams of administrative staff within the CAO also deal with specialist matters such as the assessment of costs, listing of cases, and the maintenance and development of electronic case management systems and IT. Court clerks sit as the Registrar in Court.

The legal team at the CAO is led by three Senior Legal Managers. Their responsibilities include line management of the legal and secretarial staff, the development and maintenance of best practice and procedure and the maintenance of specialist legal skills for CAO lawyers.

The Registrar and judiciary are also assisted by the Legal Information and Dissemination Lawyer who provides regular legal bulletins to the Registrar and members of the judiciary, ensures that recent unreported judgments are drawn to the Court's attention and assists the Registrar in keeping relevant primary and secondary legislation under review.

The staff of the CAO continues to play a proactive role in preparing cases for the single Judge and the full Court. The work of the team has been recognised by the Court in a number of cases this year.

For example in **OB v Serious Fraud Office [2012] EWCA Crim 901** the appellant applied to the Court to certify that a point of law of general public importance was involved in the decision to dismiss the appeal against a finding of contempt. Staff at the Criminal Appeal Office drew a potential difficulty to the attention of the Court and the parties. In his judgment (at paragraph 4) Lord Justice Gross stated:

> [T]he Registrar raised a concern that s.13 of the Administration of Justice Act 1960, as amended does not provide a right of appeal to the Supreme Court from a decision of the Court of Appeal Criminal Division in cases of contempt of court. We pay tribute to the diligence of the Registrar and his office for bringing this concern to our attention.

CAO lawyers are alert to the ever present danger of unlawful sentences and frequently draw these to the attention of counsel and the Court. In **Bradley [2012] EWCA Crim 202** the Court stated:

> This is another case in which those responsible for preparing the summary for this court realised that there had been three unlawful sentences passed. That had not been noticed by either counsel or the judge. This is an opportunity to thank the Criminal Appeal Office for the work that they do in spotting unlawful sentences.

Contacts

Over the reporting year the Registrar and/or the Senior Legal Managers (in the Registrar's absence) welcomed a number of judicial and academic visitors from overseas as well as from this country. The visits help to build and strengthen global relations and international understanding of our legal system.

The Registrar/Senior Legal Managers met with and hosted visits from:

- Judges from the High Specialised Court of Ukraine
- Justice of the Supreme Court, the Attorney General and Minsters of Justice and Interior from Somaliland
- The DPP of Victoria, Australia, John Champion
- A delegation from Ethiopia led by the State Supreme Court President
- Law Students from Syracuse University, New York
- A delegation from Kenya led by the Registrar of Subordinate Courts
- The Deputy Chief Justice, Uganda, Alice Mpgi Bahigeine
- Judges from the Taiwan High Court
- Chief Prosecutors from Qatar
- The Registrar of the Irish Supreme Court, John Mahon

During the year Susan Holdham, a Senior Legal Manager in the Criminal Appeal Office (CAO), accepted a kind invitation to spend some time in Melbourne looking at the Criminal Appeals systems in the state of Victoria. The structure is quite similar to that of the CAO although the culture is different with more emphasis on oral hearings. The Victoria Appeal System, faced with a large backlog of cases, has introduced reforms which have successfully halved the number of outstanding appeals. These reforms have included the introduction of strict rules concerning the length of counsel's grounds, the dismissal of appeals where no grounds are shown, the encouragement of trial counsel to attend hearings and the introduction of lawyers into the Registrar's Office to case manage and write summaries. Interestingly all matters are dealt with electronically: there are no paper files.

As a result of the visit the CAO has adopted the sentence grid which allows the reader to see very quickly what the sentence was and how it was comprised. It also allows for unlawful sentences to be identified and rectified quickly and sometimes more cheaply under the slip rule. Susan would like to express her sincere thanks to her very welcoming and generous hosts. The exchange of ideas can only be to the benefit of both offices.

Summary and Statistics

1 October 2011 to 30 September 2012

Overall number of cases received

The number of conviction and sentence applications received by the Court this year has increased significantly in comparison with recent years and is the highest number received for nine years.

In summary:

- 7442 applications were received in total, an increase of 470 cases on last year.
- 5711 sentence applications were received, 230 more than last year.
- 1731 conviction applications were received, 240 more than last year.

Unsurprisingly there has been a slight increase in the number of applications outstanding at the end of the year. There were 3185 cases outstanding at 30 September 2012, an increase of 72 cases compared with September 2011.
(See **Annex A**)

Applications for leave to appeal

Applications for leave to appeal are generally considered by a single Judge, though some are referred directly to the full Court by the Registrar.

Conviction applications:

- In total 1341 conviction applications were considered in the reporting year (90 more than the preceding year);
- 245 (18%) were granted leave to appeal by a single Judge;
- 121 (9%) had their applications referred to the full Court by a single Judge or by the Registrar;
- 975 (73%) were refused by a single Judge.

(See **Annex C**)

Sentence applications:

- A total of 4469 sentence applications were considered in the reporting year (430 more than the preceding year);
- Of those,1199 (27%) were granted leave to appeal by a single Judge;
- 349 (8%) had their applications referred to the full Court by a single Judge or by the Registrar;
- 2921 (65%) were refused by a single Judge.

(See **Annex C**)

Average waiting times

The average waiting time of cases disposed of by the Court over the reporting period was:

- 7.8 months for conviction cases where leave to appeal was granted or the case referred to the full Court;
- 4.5 months for sentence cases.

In terms of conviction cases, this represents an impressive decrease of 1.5 months in the average waiting time compared with that of the preceding year. In sentence cases the average waiting time has also decreased but by a more modest 0.1 of a month.
(See **Annex B**)

Conviction and Sentence cases heard by the full Court

In total 161 fewer appeals (i.e. where leave was granted) have been heard by the full Court over the reporting year compared with the previous year.

- A total of 377 conviction appeals were heard (158 fewer than last year);
- A total of 2001 sentence appeals heard (3 fewer than last year).

(See **Annex D**)

Taking applications and appeals together 243 fewer cases were heard by the full Court compared to last year:

- A total of 942 conviction cases were heard (183 fewer than last year);
- A total of 3163 sentence cases were heard (60 more than last year).

(See **Annex E**)

Success rate of appeals

- Of the 377 appeals against conviction (i.e. where leave to appeal had been granted) which were heard by the Court this year, 146 (39%) were allowed and 231 (61%) dismissed.
- Of the 2001 appeals against sentence which were heard by the Court this year, 1328 (66%) were allowed and 673 (34%) were dismissed.

(See **Annex D**)

It is difficult to quantify the success rate of appeals in terms of the number of cases received by the Court, as those received in a given year far outnumber those dealt with by the full Court because not all cases will proceed that far. Analysing the results of the Court compared to its intake of cases over a three year period gives a clearer idea of the success rate.

- On this basis an average of just over 11% of conviction applications received and 25% of sentence applications received are successful.

(See **Annex F**)

Other types of appeal

The Attorney-General referred 98 potentially unduly lenient sentences for the Court's consideration pursuant to section 36 of the Criminal Justice Act 1988 this year (three fewer cases than last year). Of those 73 resulted in an increase in sentence.

There was a slight decrease in the number of confiscation cases received (97 cases compared to 102 last year).

There was also a decrease in the number of 'ad hoc' applications received; in total 67 such applications were received compared to 81 last year. Of these:

- 33 were prosecution appeals under section 58 Criminal Justice Act 2003 (compared to 28 last year).
- One was an application under part 10 Criminal Justice Act 2003 for retrial for serious offences ('double jeopardy').
- Nine were interlocutory applications (compared to 16 last year).

These applications represent a comparatively small number of cases compared with the bulk of the Court's business, but often require listing at very short notice, which can mean that the Court's lists have to be completely re-organised to accommodate them.

Listing

There has been a steady increase in the average number of cases disposed of per court per day over this and previous reporting years (5.8 in this reporting year as compared with 5.4 in 2011 and 4.6 in 2009).

This demonstrates the increasing value added by the involvement of the CAO lawyers in the preparation of cases and the giving of accurate time estimates for hearings leading to a more efficient use of judicial time. It is very striking that the occasion for adjournment of a case in the CACD on the grounds that it is not ready is extremely rare.

The following table shows the number of days sat in court together with the number of reading days, reflecting the different types of constitution:

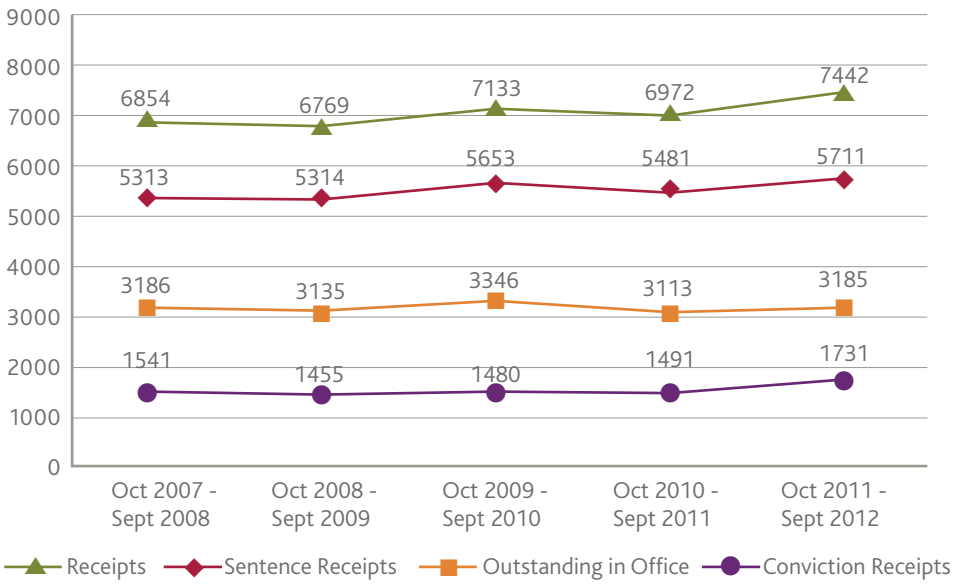
	Lord Justice		**High Court Judge**		**Deputy High Court Judge**		**Circuit Judge**	
	CT	**RD**	**CT**	**RD**	**CT**	**RD**	**CT**	**RD**
2011-2012	651	409	1095	684	20	15	259	135

(**CT** = Court sittings, **RD** = reading days, including judgment writing)

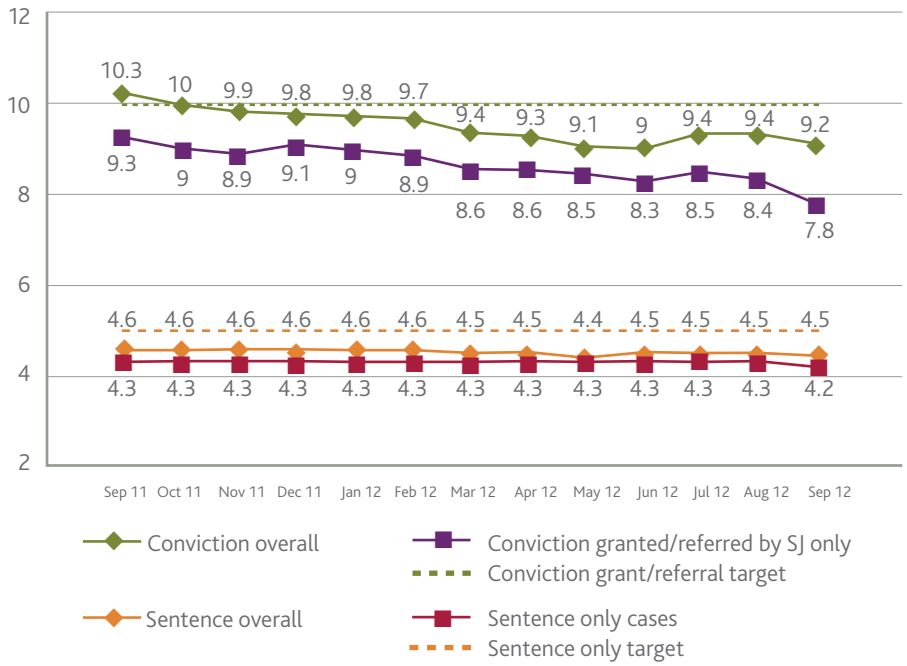
Costs

This year saw a small (1%) increase in claims for public funding. 5887 bills of costs were received compared with 5827 in the previous year. £12.17m was claimed compared with £11.46m. However, in total £5.68m was paid out compared with £6.99m last year. A lower percentage of the total bills received (6.8% compared to 8.6% last year) were in excess of £4,000 and there was also a reduction in the number of bills received which were in excess of £50,000, 13 (0.22%) of the total number received this year compared with 30 (0.51%) last year.

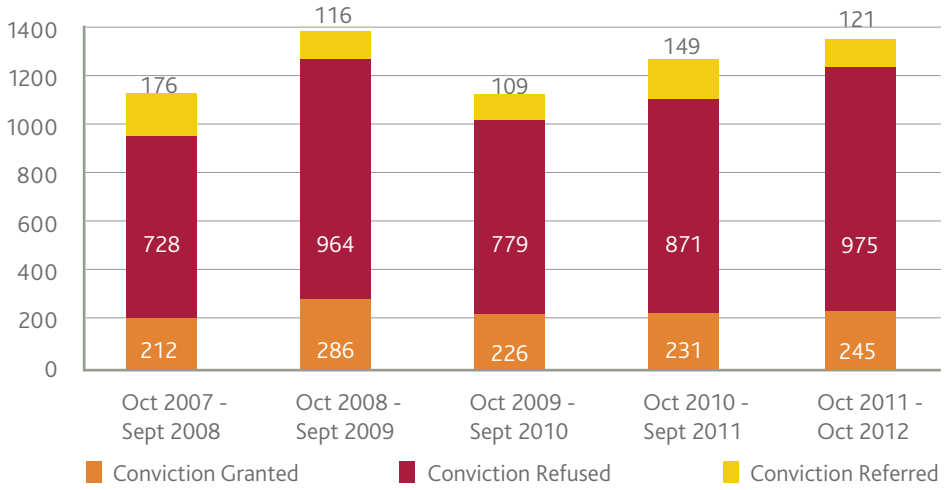
Applications Received and Outstanding in Office



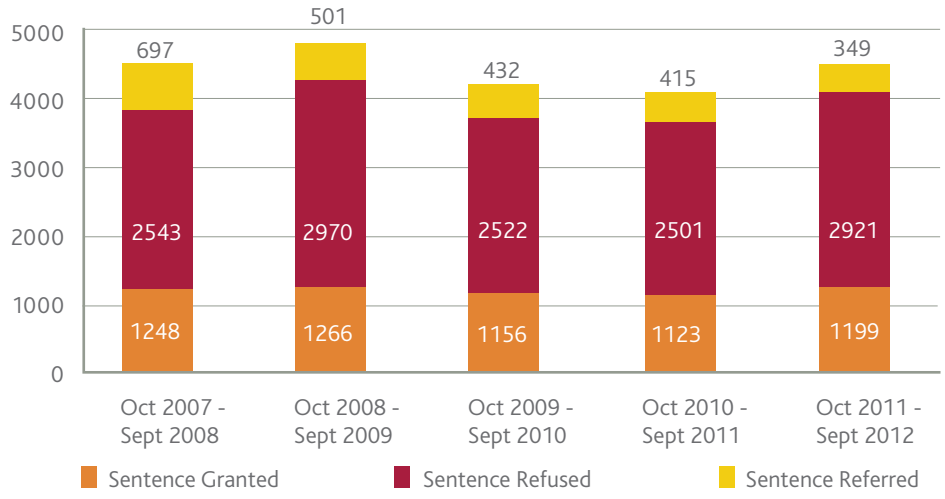
Average Waiting Times (in months)
Rolling average of cases disposed by full court over previous 12 months

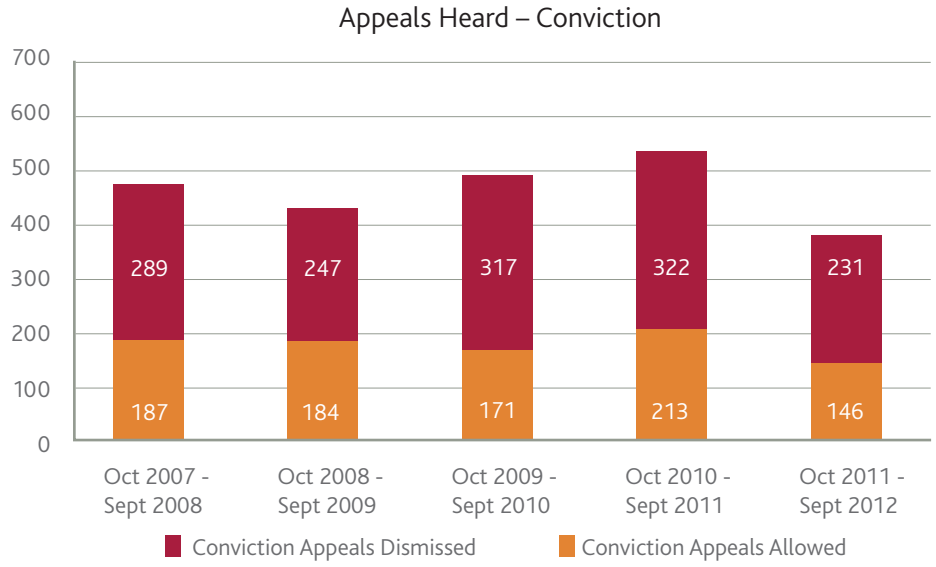


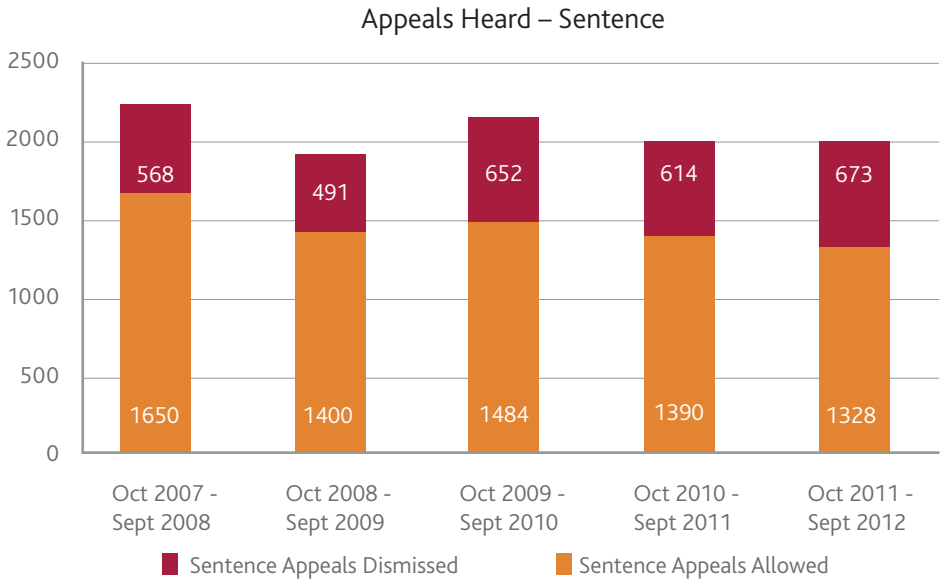
Section 31s – Conviction Applications dealt with



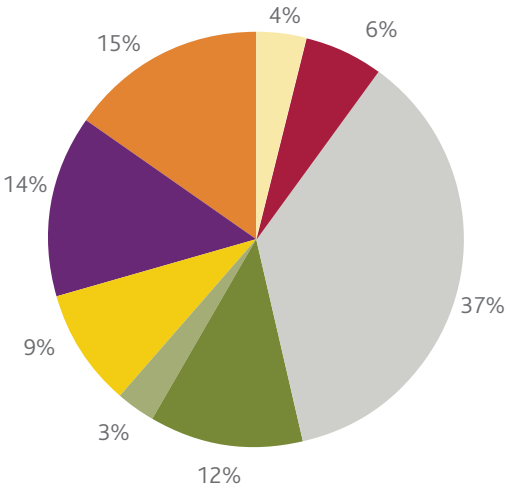
Section 31s – Sentence Applications dealt with



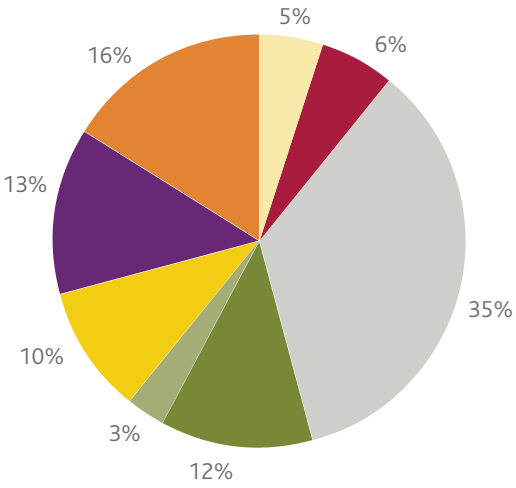

Appeals Heard – Conviction
700
600
500
400
300
200
100
0
289
247
317
322
231
187
184
171
213
146
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Oct 2011 - Sept 2012
Conviction Appeals Dismissed
Conviction Appeals Allowed


Appeals Heard – Sentence
2500
2000
1500
1000
500
0
568
491
652
614
673
1650
1400
1484
1390
1328
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Oct 2011 - Sept 2012
Sentence Appeals Dismissed
Sentence Appeals Allowed

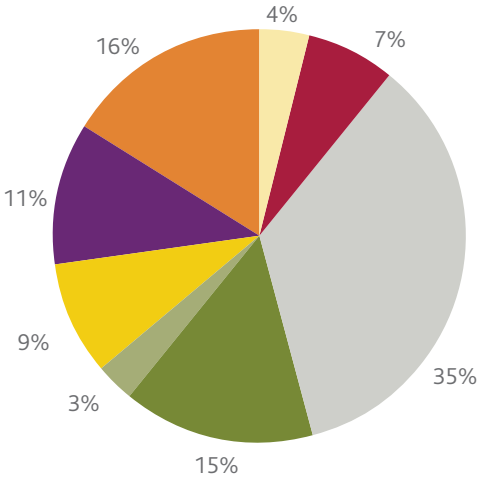
October 2007 - September 2008



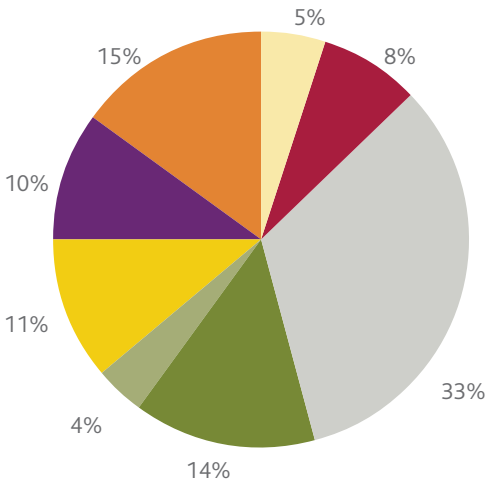
October 2008 - September 2009



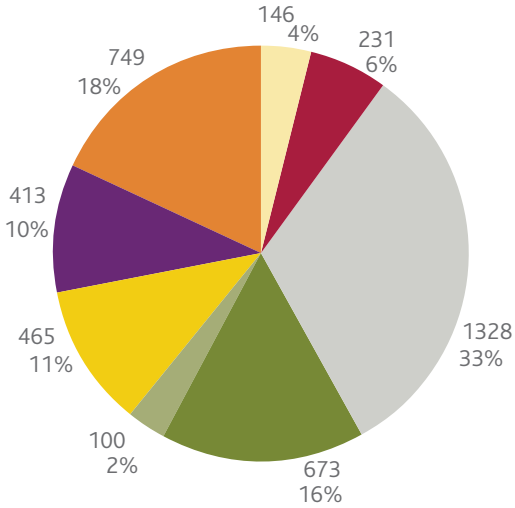
October 2009 - September 2010

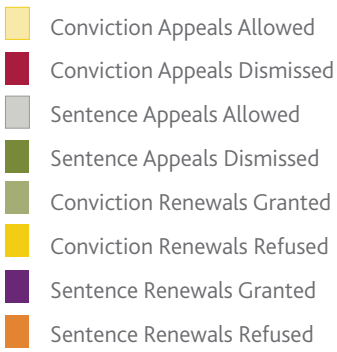


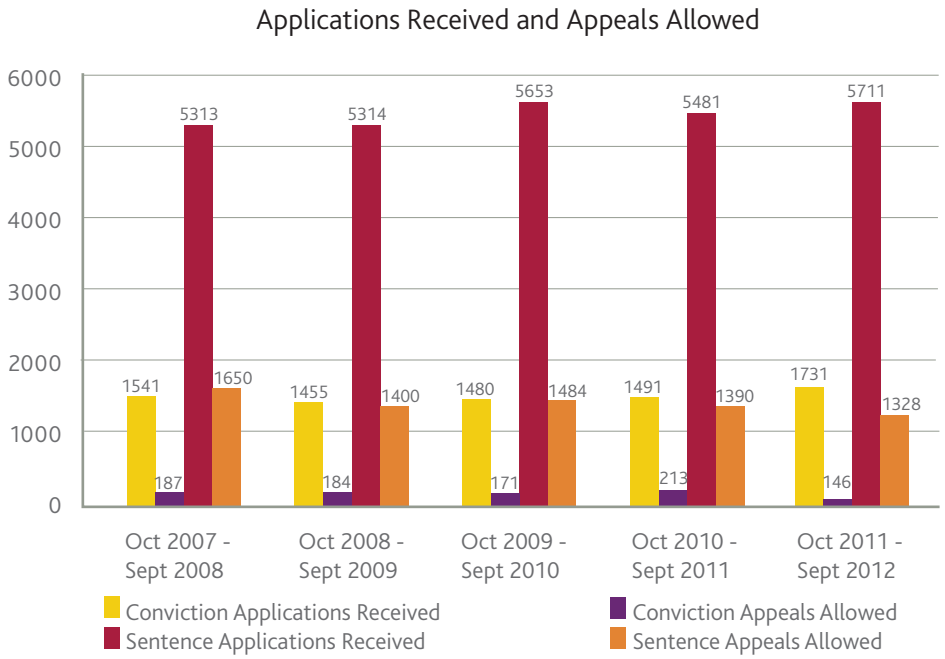
October 2010 - September 2011



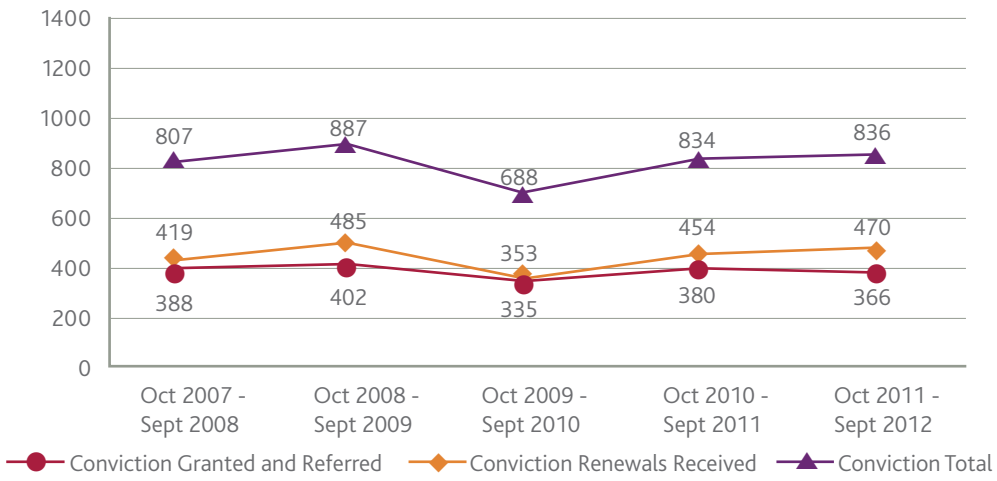
October 2011 - September 2012



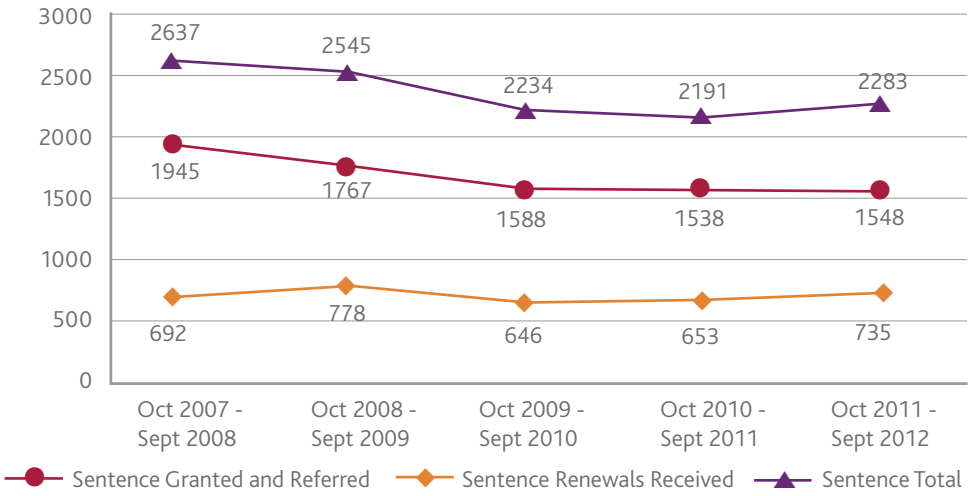



Applications Received and Appeals Allowed
6000
5000
4000
3000
2000
1000
0
1541
187
5313
1650
1455
184
5314
1400
1480
171
5653
1484
1491
213
5481
1390
1731
146
5711
1328
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Oct 2011 - Sept 2012
Conviction Applications Received
Sentence Applications Received
Conviction Appeals Allowed
Sentence Appeals Allowed

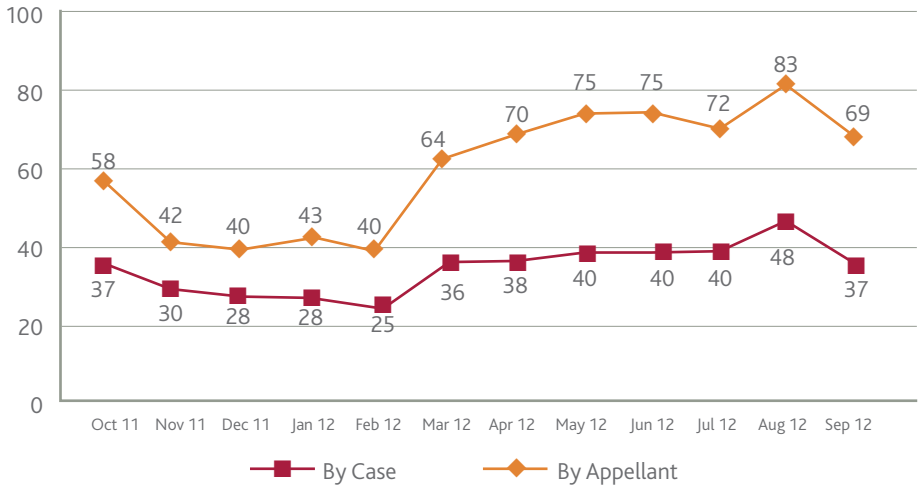
Applications Granted / Referred and Renewals Received (Conviction)



Applications Granted / Referred and Renewals Received (Sentence)



Conviction Old Cases – Outstanding over 10/13 months



Sentence Old Cases – Outstanding over 5 months