In the Court of Appeal

Criminal Division

2012 / 2013

Contents

Introduction by the Lord Chief Justice

The publication of this Report marks not only a year in the life of the Court of Appeal, Criminal Division, but also my final year as Lord Chief Justice. It has been an interesting and active year for both of us.

The efficient disposal of the work of the Court depends on the lawyers and staff working in the office, presided over with his cheerful efficiency by Michael Egan QC, and by the commitment and dedication of the judges sitting in the Court, who cope with its burdens by working late into the night and at the weekends, so that they are fully prepared for the hearings. The pressures are unrelenting. I pass on my grateful thanks to them all. This year also saw the promotion to the Supreme Court of Lord Justice Hughes, who for four years presided over the Court as Vice President. His active but calm leadership, in what has become an increasingly difficult and complex area of judicial responsibility will be greatly missed.

Some of the problems both of substantive and procedural law addressed by the Court this year are discussed in the text of the Review. They provide a thumbnail sketch of its work. Over the course of the year the Court has considered the issue of people trafficking, given guidance on the use of victim personal statements and, before a specially constituted five judge court, considered the jurisprudence of the European Court of Human Rights in relation to whole life orders.

There are two issues that call for specific mention: the government's plans for legal aid and filming in court. In response to the Justice Secretary's "transforming legal aid" consultation the Judicial Executive Board expressed its concern about an increase in unrepresented people which would add to the length and costs of cases. The recent announcement that the plans for price-competitive tendering are to be withdrawn is welcomed. Further, although I am broadly supportive of allowing cameras into court, the process must not be allowed to result in any diminution in the achievement of justice. Fundamental changes always require thought and appropriate consultation. Where fundamental changes affecting the administration of justice are proposed, there must always be an appropriate degree of dialogue between the government and the judiciary. These will be matters for my successor, Lord Thomas, and I wish him well.

Lord Judge
Lord Chief Justice of England and Wales

A reflection: Lord Hughes

A few months' absence from the CACD provides the opportunity for a brief retrospective.

From the point of view of the working judge, the principal feature of the court is the volume and speed of work – not only or even mainly in the hearings, but in the preparation. Hindsight confirms that this is manageable only through the partnership which has grown up between the judges and the sophisticated support systems provided by the Criminal Appeal Office. Under the Registrar, the lawyers and the administrative teams work as a unit. They have multiple functions. They analyse the case. They liaise with the advocates. They act as case managers where necessary. They spot purely technical faults in the sentencing process, for which the complexity of current legislation gives increasing scope. They connect up cases raising similar points. They convert *ex tempore* judgments into formal written orders, not a task for the inexperienced. They make the video links work, sometimes against all odds. They maintain a usually iron but just occasionally velvet-clad grip on the listing. And they physically handle the enormous quantity of paperwork and somehow distribute it to the correct three judges for each case. They even manage quite often to marry up the sometimes unavoidable last-minute additions, bearing as best they can the judges' exasperation with the messenger when the "Late Papers" arrive after the rest has been read. All of this vastly increases the productivity of the judges. Without it, the court would certainly need far more judges than it has. But judges are in short supply, especially the key front-line trial judges of the Queen's Bench Division, whose membership of the court is absolutely vital to maintain the connection between the realities of the trial process and the review of it which it needs if it is to work properly. Meanwhile the link between the Vice President and the Registrar is equally critical to the business of juxtaposing an essentially random distribution of work with the identification of those cases which need particular attention. It is no accident that the definitive book on the criminal appeal process has been written by the two most senior, after the Registrar, of the office's lawyers. This office system for supporting judges has been copied in other jurisdictions and it might with advantage be adopted in other courts much nearer home.

The practicalities of case handling are ever developing. Video links are increasingly saving the costs of transporting prisoners and allowing them to hear their appeals without losing their cell places. Electronic documents are increasingly used. This process will of course continue. Some modest possible adjustments which, with hindsight, I should have liked to find time to explore with all the court's judges and users, include these. Would it enhance or reduce the value of the estimable summaries if the grounds of appeal, and thus the point at issue, were to appear right at the front, immediately after the statement of the offence and sentence? Could the recital of the evidence in the summaries sometimes be less exhaustive, and more concentrated on the grounds/issue, or would that risk omission of something essential? How can the inevitable advocate's tendency to re-work the case at the last minute be reconciled with the need of the judges to pre-read, often several days before the hearing? Despite the chronic shortage of money both for legal aid and for office staff, is there nothing which can be done to escape from the paper management system which generates multiple separate clips of documents? If the case

has more than x number of pages, is there a way in which the papers can be filed in a folder with identifying tags, and paginated and indexed? When will it be economic for all the papers to be supplied electronically, on a CD or memory stick, at least where they are voluminous? How can we better organise the reporting of cases, so that there is a distinction made between those which are potentially of some general application and the vast majority which are not, so that advocates are not tempted to cite single instance sentencing decisions, some of which do no more than say that the sentence passed below was not too long, and the searching of previous decisions becomes more focussed and thus more manageable? What is a principled and proper way to discourage hopeless appeals, which take up time and effort which ought to be devoted to ones with prospects, whilst preserving the rights of individuals? And in the great majority of cases where the decision is limited to the single instance, could the outcome properly be communicated, still fairly to the parties, by way of shorter *ex tempore* judgments nearer to the kind which we can all find in the first few volumes of the *Criminal Appeal Reports*?

These are but possible developments of present trends. Whether they are worth pursuing is for those presently responsible, not for a distant alumnus. What hindsight amply confirms, however, is the view formed in the heat of the forge that the office support system is sophisticated, founded on remarkable loyalty of its members, and one we simply cannot do without.

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

There have been some great changes in the life of the Court of Appeal (Criminal Division) this year. We have said farewell to one of the truly significant Lord Chief Justices in recent years. Lord Judge will be missed not just for his great legal acumen but as a leader who was hugely respected by all. Lord Hughes has moved from the post of Vice President of the CACD (VP) to the Supreme Court. We will all miss his powerful input and advice and it is entirely in keeping that his kind note in this issue includes matters that look forward and give us much to consider. The presence of Lord Hughes in the Supreme Court is an important development for the future of criminal justice.

The new Lord Chief Justice is, of course, well known to this office in his former role of President of the Queen's Bench Division. As Master of the Crown Office I have been lucky enough to work with Lord Thomas and look forward to doing so in his new position. The appointment of Lady Justice Hallett to replace Lord Hughes as VP is hugely significant for us. The new VP has unparalleled experience of criminal procedure and we are all looking forward to working together with her at a time when our office has so many challenges to meet.

It is inevitable that another year sees the judges grappling with changes brought in by new legislation. Amongst others, this year the Court has had to address issues raised:-

(i) By changes to the victim surcharge provisions. These came into effect on 1st October 2012 and extended the number of offenders caught by the provisions. They have produced a number of problems which the Court in three separate cases, *Stone, Hemsworth* and *Bailey*, has considered. These cases are discussed in the text of the Review.

(ii) The Criminal Justice Act 2003 saw the introduction of IPPs and Extended Sentences for Public Protection. The changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 saw their demise[1]. The new Act introduces an Extended Determinate Sentence for offenders convicted after 3rd December 2012 regardless of the date of offence and a mandatory life sentence for a second offence listed in a new Schedule 15B of the Criminal Justice Act 2003 where the second offence is committed on or after 3rd December 2012. The Court considered some of the new provisions in *Saunders and others*, discussed in the text of the Review.

Confiscation has had an increased profile in CACD, aside from the effect of *Waya* (see "Cases of Note" at page 7) in general no single type of case imposes greater burdens in terms of preparation and hearing.

The overwhelming majority of legal representatives we deal with are anxious to get their applications right. However burdens are imposed by excessive and irrelevant paperwork. Good appellate paperwork is concise and easy to follow.

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[1] However for offenders not yet sentenced but convicted before 3rd December 2012 they remain an option.

Some jurisdictions impose a strict page count upon applicants and respondents[2]. This is an option but it should not be necessary if advocates remember two basic points:

1. Rule 68.3(2)(b) CPR requires grounds to "concisely outline each argument in support". That invariably means short and to the point. Long discursive documents, are not only unwise, they are not in accordance with the rules.

2. Excessive reliance on authority should be avoided. Advocates should consider the instruction given in the Criminal Practice Directions [2013] EWCA 1631 at D2-D4 about citing unnecessary authority.

Where fresh representatives are asked to look at a case after a trial R. v. Doherty & McGregor [1997] 2 Cr.App.R. 218 sets out the formal procedure on waiver but makes clear that it is perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds are lodged. I have noticed that this is no longer the norm, indeed there a tendency to avoid criticism of former representatives in Grounds, sometimes being specific that no criticism is made. If that is so I simply do not understand why former counsel is not put on notice and it can sometimes give rise to the unfortunate impression that such a stance is taken to circumvent any input from former counsel. This would be unwise and indeed can be fatal in fresh evidence cases; I have seen examples where the Grounds are drafted on a completely incorrect understanding of what was before the Court at first instance. I would suggest that the default position should be to run the proposed Grounds past former representatives.

Our relationship with the Criminal Cases Review Commission (CCRC) is a strong one; it is important that it is maintained. We continue to be greatly assisted by the CCRC in the essential matter of directed investigations under section 23A Criminal Appeal Act 1968 into allegations of jury impropriety and the Court has never failed to be impressed by the thoroughness of their investigations. Where the Commission refers a case it should be emphasised that our Court does not always quash the matter referred. This is as it should be; were it to be otherwise, it would be an indication that the Commission was setting the bar too high. **Voller [2013] EWCA Crim 159** is a good example of a case, properly referred, where the Court, having considered the Reference with care, upheld the convictions.

It is essential that this office continues to provide the quality of service that it does – the interests of justice demand nothing less. I have an exceptional staff and I am very lucky. My lawyers have long had a marvellous reputation which has been well earned over many years and that is a tribute to their training and their dedication. However I am sure that they will join me in acknowledging the massive contribution of my administrative staff who do so much to keep the Courts running. Without them the CACD could not function.

Master Egan QC
Registrar of Criminal Appeals

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[2] The Supreme Court of Victoria imposes a page limit and specifies the line spacing and font size.

Cases of Note

Confiscation: Post Waya

On 14th November 2012 a nine judge Supreme Court delivered judgment in the case of **R v Waya [2012] UKSC 51**. It was held that, contrary to former practice, the benefit to the defendant from mortgage fraud was not to be assessed as the value of the mortgage advance or the value in the market of the property obtained by means of the mortgage without reference to the underlying mortgage debt. Such an assessment was likely to lead to a disproportionate confiscation order in breach of Article 1, First Protocol ECHR. The Supreme Court found that the defendant did not "obtain" the sum of the loan as "property" for the purposes of section 76(4) Proceeds of Crime Act 2002 but a bundle of contractual or equitable rights whose value for the purpose of section 80 was likely to be nil at the date of purchase of the property with the tainted money. Accordingly, the defendant's benefit was in general to be assessed as the proportion of any increase in the value of the property represented by the original tainted investment. *Waya* was subsequently applied and interpreted by the Court of Appeal (Criminal Division) in a number of cases:

In **Harvey [2013] EWCA Crim 1104** the Court (Jackson LJ. Wyn Williams J and the Recorder of Preston) considered the status of a number of authorities decided prior to *Waya* and expressed the following conclusions:

(i) *Smith* [2001] UKHL 68, *May* [2008] UKHL 28 and *Morgan and Bygrave* [2008] EWCA Crim 1323 were still good law.

(ii) *Singh* [2008] EWCA Crim 243 was correctly decided.

(iii) *Xu and Xu* [2008] EWCA Crim 2372 was still good law as the reasoning of the Court of Appeal seemed to be entirely consistent with *Waya*.

(iv) *Baden Lowe* [2009] EWCA Crim 194 was probably no longer good law, as this was a case in which there was full restoration of the relevant property to the victim.

(v) *Del Basso and Goodwin* [2010] EWCA Crim 1119 was another case which was close to the line. It concerned "criminal lifestyle" where the statutory assumptions applied. The Court of Appeal proceeded on the basis that the expenses which the defendants incurred in administering the car park and the football club should not be deducted. *Waya*, specifically paragraphs 25 and 26, would seem to suggest that *Del Basso* was correctly decided. However the final decision did seem excessively harsh and might arguably be characterised as disproportionate.

(vi) *James and Blackburn* [2011] EWCA Crim 2991 was consistent with Waya and stood.

(vii) *Ahmad* [2012] EWCA Crim 391 would also appear to be consistent with the decision in *Waya*.

In **Jawad [2013] EWCA Crim 644** the appellant pleaded guilty to money-laundering offences involving the conversion of fraudulently acquired bank balances. He was made the subject of a confiscation order in the amount of £174,827, on the basis that he had a criminal lifestyle and that the relevant benefit was his benefit from his general criminal conduct. The sentencing judge additionally made a compensation order in favour of the bank in the sum of £64,086, which was the amount of the loss suffered by the bank.

It was submitted that the confiscation order coupled with the compensation order was disproportionate and an infringement of Article 1 First Protocol ECHR. The Court (VPCACD. Foskett J. and HHJ Radford) held that a compensation order and a confiscation order were two different things. They derived from separate statutes and served different purposes. A confiscation order was designed to remove from the defendant the fruits of crime; a compensation order had a different purpose. It was designed as a limited and summary method of ordering the defendant to repay the loser and was available to short-circuit a civil action against the defendant in straightforward cases. Because the orders served different purposes *Waya* required the court to consider whether a confiscation order was disproportionate. The court was satisfied that it generally would be disproportionate if it would require the defendant to pay for a second time money which he had fully restored to the loser.

In **Bestel, Naim Raza and Sajid Bashir [2013] EWCA Crim 1305** the Court (Pitchford LJ. Mitting and Openshaw JJ.) gave guidance on the relevant principles when considering whether to grant an extension of time to appeal against a confiscation order when the effect of granting the application would be to allow the applicant to take advantage of a change in the law. The Court, having reviewed a number of decisions (including Jawad in which the Court gave an obiter judgment on this issue), held that the finality principle was not considered in isolation from the justice of the case and almost without exception it was the Court's practice to examine the underlying justice of a conviction for a criminal offence. The applicants' submissions failed to recognise the principle of finality, namely that decisions made under the law as it was then understood should not be disturbed unless substantial injustice would follow. The decision in *Serious Organised Crime Agency v O'Docherty* [2013] EWCA Civ 518 applied where it was held that it could not be said to be necessary for the avoidance of injustice to re-open the refusal of permission by reference to a point of law that could have been but was not taken at the time. The relevant date was the date of the confiscation order, not of the enforcement proceedings. On the other hand, within the criminal jurisdiction, the enforcement proceedings and their consequences were relevant when considering whether a substantial injustice might follow if an extension of time was refused. The availability of an application under s.23 of the Proceeds of Crime Act to vary an order was also a relevant factor.

In **Mahmood Ziarat [2013] EWCA Crim 1291** the Court (Pitchford LJ. Mitting and Openshaw JJ.) considered a case in which an individual had fraudulently obtained a mortgage for the sole purpose of acquiring a property and renting it out. Rent payments received by him constituted proceeds of that fraud and a confiscation order had been made in the sum of £72,340. The appeal was allowed as a result of the decision in *Waya*. It was accepted by the prosecution that the money obtained by fraud by way of the mortgage advance was not a benefit under the Proceeds of Crime Act 2002 and that

that part of the order could no longer be justified. However, rent payments, totalling £8,100, were plainly part of the proceeds of the fraud. The scheme was fraudulent from the outset, the whole point of it being to acquire the property and rent it out. There was nothing disproportionate in holding that the sum paid by way of rent was part of the benefit figure. It was not possible for the appellant to offset the costs of the acquiring of criminal property, namely by using the rent payments to pay off the mortgage. The total sum of the benefit was the amount of the deposit paid plus the rent payments received, making a total of £22,747.90. Since the appellant had assets in that sum, the original confiscation order was quashed and a confiscation order in the sum of £22,747.90 imposed.

In **Paul Lee and Sharon Martin- Lee [2013] EWCA Crim 657** the married appellants (L1 and L2) appealed against confiscation orders imposed following their pleas of guilty to money laundering and L1's plea of guilty to conspiracy to rob. L1 had been part of a conspiracy to rob trailer loads of chocolate, and both L1 and L2 had admitted an offence of money laundering that constituted using some of the proceeds of L1's crimes towards a deposit on a house. The house was then purchased with the aid of a mortgage. Following *Waya* the Court (VPCACD. Cranston J. The Recorder of Redbridge) allowed the appeals in part. The mortgage advance, although obtained by L2 fraudulently overstating her income to a considerable extent, should not have been included in the benefit figures as L1 and L2 had never obtained the loan for themselves because it was paid directly to the vendor of the house. They therefore had no proprietary interest in it. Consequently, the benefit figure in each case was reduced accordingly.

Criminal Law

Witness Intimidation

In **ZN [2013] EWCA Crim 989** a number of individuals were arrested and charged with the assault and false imprisonment of the complainant. Thereafter the appellant sent messages to her Facebook account in which he pleaded with her to drop the charges including threats / warnings as to what would happen if she did not do so. The appellant was prosecuted for witness intimidation contrary to s.51(1) Criminal Justice and Public Order Act 1994. In evidence the complainant stated that she could not recall what effect the messages had had upon her. In rejecting a submission of no case to answer, the Judge, relying upon the decision in *Patrascu* [2004] EWCA Crim 2417, ruled that it was no answer for the appellant to say that the complainant was not frightened by his messages. It was submitted on appeal that the Judge was wrong in so ruling. The Court (PQBD. Leveson LJ. Rafferty LJ. Foskett J. Hickinbottom J.) held that on its ordinary and natural meaning, section 51(1) required the Crown to prove that the other person, whom the defendant intended to intimidate, was in fact intimidated. The *obiter* observation to the contrary in *Patrascu* was incorrect. If the other person was not in fact intimidated, but the other ingredients were proved, the defendant might be guilty of an attempt, as was held to be the position in the present appeal. A conviction for attempted witness intimidation was substituted.

Misconduct in Public Office

In **Cosford and Others [2013] EWCA Crim 466** all three appellants were employed in nursing roles inside a prison, one as a prison / hospital officer, the other two as nurses. They were all prosecuted for misconduct in public office after it came to light that one of the appellants was having a sexual relationship with a prisoner which the other two had deliberately covered up. Additionally, all three had either failed to report the prisoner's possession of a mobile phone or had facilitated his use of it. The primary defence of each of them was that none of them held a public office as each was acting solely as a nurse, albeit in a prison environment. In the Crown Court two separate Judges had rejected applications to dismiss and submissions of no case to answer made on this basis. The trial Judge was persuaded to leave to the jury the question as to what constituted 'public office'. On appeal, the Court (Leveson LJ. Mitting and Males JJ.), having reviewed a long line of authorities, held that the definition of 'public office' was to be strictly confined, not to the position held by the person carrying out the duty, but rather on the basis of the nature of the duty undertaken and, in particular, whether it was a public duty in the sense that it represented the fulfilment of one of the responsibilities of government such that the public might have a significant interest in its discharge extending beyond an interest in anyone who might be directly affected by a serious failure in the performance of the duty. The responsibilities of a nurse in a prison setting extended to a responsibility to the public for the proper, safe, and secure running of the prison in which they worked and therefore amply fulfilled the requirements of public office. It was said *obiter* that there should be no distinction between those employed in a prison run directly by the state and those employed in a prison run indirectly through a private company: It did not alter

the public nature of the duties of those undertaking the work. It was further held that decisions as to the existence or otherwise of a 'public office' were decisions of law and it was therefore overly favourable to the appellants to have left that decision to the jury. It was commented finally that it was unsatisfactory that in all recent decisions in this area the Courts had had to trawl through the authorities to try to discern a thread which accurately reflected the true position that could be translated into modern employment conditions. The Law Commission's intention to revisit the ambit of the offence was lauded.

Burden of Proof

Section 1(5) of the Firearms Act 1982 provided a defence to a defendant to show that he did not know and had no reason to suspect that an imitation firearm was so constructed or adapted as to be readily convertible. In **Williams [2012] EWCA Crim 2162** the Court (Davis LJ. Foskett and Sweeney JJ.) held that as a matter of ordinary interpretation the subsection imposed a reverse, legal, burden on the accused. In such circumstances article 6.2 of the ECHR had potential application. However, the reverse burden was to be justified as a necessary, reasonable, and proportionate derogation from the presumption of innocence. Firearms offences were a very serious problem and the need to protect the public was obvious, and the need for protection was no less in the case of readily convertible imitation firearms. The questions of knowledge and suspicion involved facts readily available to the accused but which, on the other hand, could be very difficult for prosecutors and would be a real deterrent to prosecution if the burden were on the Crown. The possession of a readily convertible firearm was so sufficiently out of the norm that there was no obvious unfairness or unreasonableness in requiring the possessor to justify such possession.

Consent

In **McNally [2013] EWCA Crim 1051** the female appellant when aged 13 and representing herself as a boy named "Scott" struck up an internet relationship with another girl, one year her junior. Over the next 3½ years the relationship became increasingly romantic and sexualised in nature, although conducted wholly over the internet and telephone. The appellant maintained her male identity throughout. After the complainant turned sixteen she and the appellant met for the first time. The appellant presented as a boy and wore androgynous clothing. Over the following months they engaged in sexual activity together, with the appellant engaging in both digital and oral penetration of the complainant but, according to the prosecution case, always ensuring that matters were arranged so her true identity as a female would not be discovered. However, her true identity did eventually come to light after she was confronted by the complainant's mother. The police were contacted and the complainant stated that she had only consented to the acts because she believed the appellant to be a boy. The appellant pleaded guilty to six counts of assault by penetration contrary to s.2 Sexual Offences Act 2003. She appealed on the basis that she had been incorrectly advised as to whether the elements of the offence had been made out, it being argued on appeal that the deception as to gender did not vitiate consent. The Court (Leveson LJ. Kenneth Parker and Stewart JJ.) held that whilst some deceptions (e.g. in relation to wealth) would not be sufficient to

vitiate consent, in the present case the sexual nature of the acts was different where the complainant was deliberately deceived into believing the perpetrator to be a male. The complainant chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception. It followed that deception as to gender could vitiate consent.

Capacity

In **Nursing [2012] EWCA Crim 2521** the appellant, a trained mental health nurse, was convicted of the wilful neglect of an elderly lady with a severe learning disability. The neglect upon which the Crown relied included inattention to both the hygiene of the person and the room in which she lived, failure to correctly administer medicines, and failures in the proper provision of food. The defence case was that the individual would sometimes refuse to accept help and it was felt that it was wrong to override her wishes. Following conviction the appellant appealed on the basis that the provisions of sections 2 and 3 of the Mental Capacity Act 2005 as to the definition of 'lack of capacity' in the context of the criminal offence created by section 44 of the Act were irremediably uncertain in their ambit. The Court (LCJ. Simon and Wilkie JJ.) held that although it was difficult legislation, the offence created by s.44 was not vague and its purpose was clear. Those in care who still enjoyed some level of capacity for making their own decisions were entitled to be protected from wilful neglect which impacted upon those areas of their lives over which they lacked capacity. However, the section did not create an absolute offence. Therefore, actions or omissions which reflected or were believed to reflect the protected autonomy of the individual needing care did not constitute wilful neglect. Within those principles, the issue in an individual prosecution would be fact specific. The Court held, however, that in the present case the Judge had misdirected the jury by stating that if the appellant had been motivated by the autonomy principle then any neglect would *not necessarily* have been proved to be wilful. A jury should be directed that if a defendant might be motivated by such principle then any area of apparent neglect so motivated would not be wilful for the purposes of the offence.

Perverting the Course of Justice

In **Kenny [2013] EWCA Crim 1** the appellant had breached a restraint order made under the Proceeds of Crime Act 2002 by loaning monies to the subject of the order for the payment of his legal fees (prohibited under the terms of the order) whilst falsely representing to solicitors that the payment was made by way of a gift (which would have been permitted). Repayment of the loans via a third party had the effect of reducing the sum available for confiscation. He was prosecuted for the offence of perverting the course of justice ('perverting') and, following a ruling from the trial Judge that the breach of the order was, without more (i.e. involving no illegality beyond the breach of the order itself), capable of constituting that offence, he changed his plea to guilty. He appealed against the ruling of the Judge submitting that the breach should be punished by way of contempt proceedings alone. The Court (Gross LJ. Burnett J. The Recorder of Bristol) held that a variety of conduct was capable of constituting the offence of perverting and there was no closed list of acts which might give rise to the offence. Focussing on the lack of previous prosecutions for the offence in these circumstances ran contrary to the

no "closed list" principle. However, any expansion of the offence should only take place incrementally and with caution, reflecting both principles of common law reasoning and the requirements of Art. 7 ECHR. The fact of overlap with other offences did not of itself mean that the offence of perverting would not have been committed. Nor did the fact that the express provisions of the restraint order (or Criminal Procedure Rule 59(6) from which they stemmed) warn only of the sanction of contempt preclude pursuit of other criminal proceedings. Contempt was the obvious sanction for breach but it was not the only sanction. It was not necessary to consider anything more than whether the acts under consideration had a tendency to, and were intended to, pervert the course of justice. There was no authority of principle which supported confining the requisite acts for the offence generally to those giving rise to some other independent criminal wrongdoing and there was no need for importing such a restriction into the elements of the offence where it arose in the context of breach of a restraint order. Accordingly, a breach of a restraint order was capable, without more, of constituting the offence of perverting the course of justice. The Court added that prosecutors were not to be encouraged to charge the offence of perverting where it was unnecessary to do so but the charge was not inappropriate in the present case so as to reflect the determined and sophisticated criminal conduct.

Regulation of Investigatory Powers Act 2000

In **Edmondson [2013] EWCA Crim 1026**, an appeal against a preparatory hearing arising out of the News of the World 'phone hacking' case, the appellant had been charged with conspiring unlawfully to intercept communications in the course of their transmission without lawful authority. He sought to argue that the words "in the course of a transmission" under section 1(1) of RIPA, as further defined by section 2(7) of the Act, did not extend to cover mobile phone voicemail messages once they had been accessed by their intended recipients. The Court (LCJ. Lloyd Jones LJ. Openshaw J.) held that there was no basis for reading into the statutory language a limitation restricting it by reference to the first occasion when the intended recipient had access to it. The words "intended recipients" were not meant to limit the ambit of the provision to the period prior to first access but were simply intended to identify the person to whom the message was addressed and who was entitled to access it. The words "has been transmitted" under s.2(7) made entirely clear that the course of transmission might continue notwithstanding the voicemail message had already been received and read by the intended recipient. The words in their natural meaning were entirely apt to cover such a situation.

Partial defence to Murder

In **Dawes and Others [2013] EWCA Crim 322** the Court (LCJ. Rafferty LJ. Simon J.) considered three appeals in which the trial Judge had either refused to leave to the jury the partial defence to murder of loss of control or had provided, what were submitted to be, insufficient directions in respect of the defence. In considering the provisions under ss. 54 and 55 of the Coroners and Justice Act 2009, the Court held that the defence must be left to the jury, whether or not it was positively advanced as a defence, if there was sufficient evidence for a jury to reasonably conclude that the defence might apply. In the case where there is an overlap with the principle defence of self-defence then,

almost always, the practical course, if the defence was to be left, was to leave it for the consideration for the jury after it had rejected self-defence. If the defence should have been left to the jury, but was not, then in most cases the conviction would be quashed and a re-trial ordered. In *Johnson* [1989] 89 Cr.App.R. 148 the Court had rejected the submission that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his own self-control, should result in the issue of provocation being outside the jury's consideration. The impact of that decision was now diminished but not wholly extinguished. As a matter of statutory construction, the mere fact that in some way a defendant was behaving badly and looking for and provoking trouble did not of itself lead to the disapplication of the qualifying triggers under s.55(3), (4) and (5) unless his actions were intended to provide him with the excuse or opportunity to use violence. For the trigger under s.54(4) to apply the defendant need not only have a sense of being seriously wronged but also such a sense must be justifiable and the circumstances extremely grave. These were matters that required an objective assessment by the Judge at the end of the evidence and, if the defence was left, by the jury in considering their verdict.

In **Asmelash [2013] EWCA Crim 157** the appellant had been convicted of murdering a friend whilst in drink. His defence at trial had been one of loss of control caused by the grave abuse the deceased had directed at him on the day of the killing. The Judge directed the jury that the test was whether a person in the same circumstances, but unaffected by alcohol, would not have reacted in the same way. It was submitted on behalf of the appellant that the direction was flawed as the fact of his drunkenness was one of the "circumstances" to be considered in accordance with s.54(1)(c) of the 2009 Act. In dismissing the appeal, the Court (LCJ. Rafferty LJ. Simon J.) held that they could find nothing to suggest that Parliament had intended that the normal rules which applied to voluntary intoxication should not apply to the defence of loss of control. If that had been the intention of Parliament then it would have been spelled out in unequivocal language. Faced with the compelling reasoning of *Dowds* [2012] EWCA Crim 281 in the context of diminished responsibility, it was inconceivable that different criteria should govern the approach to the issue of voluntary drunkenness, depending on whether the partial defence under consideration was diminished responsibility or loss of control. Such a conclusion did not deprive someone who had been drinking of the potential defence of loss of control. It simply meant that loss of control must be approached without reference to his voluntary intoxication.

In **Foye [2013] EWCA Crim 475** the appellant was suffering from an anti-social personality disorder at the time he engaged in the seemingly premeditated killing of a fellow prisoner. The question for the jury was whether there was a substantial impairment of mental responsibility for the act consequent upon his abnormality of mind. It was argued upon appeal that the statutory rule under s.2(2) Homicide Act 1957, namely that the burden of establishing diminished responsibility lay with the defendant, on the balance of probabilities, was incompatible with the presumption of innocence contained within article 6(2) ECHR and that it should be read down as imposing only an evidential burden. If evidence was raised it should be for the Crown to disprove it to the ordinary criminal standard. In dismissing the appeal the Court (Lord Hughes. Gloster LJ. Hickinbottom J.) held that it was bound by the earlier decision in *Ali and Jordan* [2002] QB 1112. The Court nevertheless addressed the principles involved. The relevant two stage

test was established by *Salabiaku v France* (1988) 13 EHRR 379: Firstly, did the legislation impinge at all upon the presumption of innocence and, if so, whether it was proportionate and thus justified. The Court considered that as diminished responsibility operated as an exceptional defence the better view was that section 2(2) did not impact upon the presumption of innocence at all. However, upon the alternative assumption that it might, the Court held that the reverse burden was justified given that the defence depended upon the highly personal condition of the defendant himself, viz. the internal functioning of his mental processes. A wholly impractical position would arise if the Crown had to bear the onus of disproving the defence whenever it was raised on the evidence; that would lead not to a fair, but to a potentially unfair, trial.

Reasonable belief in consent

In **B [2013] EWCA Crim 3** the appellant, who was suffering from paranoid schizophrenia, was convicted of counts of rape and assault against his partner. The appellant did not give evidence at trial but psychiatric evidence was called on his behalf to the effect that the acts of sexual intercourse might have been motivated by his delusional beliefs as to the beneficial effects of the intercourse but that such delusional beliefs would not have extended to a belief that she was consenting. The Judge declined to direct the jury that they were entitled to take the appellant's mental condition into account in considering the reasonableness of his belief in her consent. It was submitted on appeal that the Judge's refusal to direct the jury accordingly was wrong. In dismissing the appeal the Court (VPCACD. Macur and Maddison JJ.) held that the issue did not arise in the case given the psychiatric evidence that any delusion would not have affected his belief as to consent. However, if such delusional beliefs had led a defendant to wrongly believe that his partner was consenting, then such delusional beliefs could not in law render a reasonable mistaken belief as to consent. A delusional belief was, by definition, irrational and thus unreasonable. The Sexual Offences Act 2003 deliberately departed from the model that genuine belief in consent was enough. The Court commented however that it did not follow that there would never be cases in which the personality or abilities of the defendant might be relevant to whether his positive belief in consent was reasonable.

Evidence

DNA

In **R v B [2012] EWCA Crim 414** the respondent had been charged with anally raping a 66 year old female, who was alone in her home sleeping on 23 January 1997. The offence and associated offences were committed in the course of a burglary and the victim was left beaten, traumatised and imprisoned in a small cupboard for many hours until she was discovered by a neighbour. During the course of the police investigation, intimate swabs were taken from the victim and a DNA sample from the semen found on the swabs was placed on the National Database in April 1997. On 18 June 1999, the original trial Judge ruled that evidence of a DNA match (with a probability match of 1:17 million) of the DNA belonging to the respondent, should be excluded. That was for all purposes, a terminating ruling and resulted in the Crown offering no evidence. That ruling was found to be wrong by the House of Lords, who considered the issue in December 2000 in a Reference under Section 36 of the Criminal Justice Act 1972. Their Lordships unequivocally found that the DNA evidence was admissible (*A.G.'s Reference No 3 of 1999* [2001] 1 Cr App R 34). The respondent's acquittal still stood. However, as a consequence of Part 10 of the Criminal Justice Act 2003, the well-known common law principles against "double jeopardy" were abrogated and the Crown Prosecution Service reviewed this case. The evidence was re-examined and advances in DNA profiling now produced a probability match of 1:1 billion that the DNA found in the semen belonged to the respondent. The Court (LCJ. Macur and Saunders JJ.) granted the application to quash the acquittal pursuant to Section 76 of the Criminal Justice Act 2003 and ordered a retrial. The Court concluded that all of the DNA evidence was "new and compelling" under Section 78 of the 2003 Act, in that it had never been adduced at trial (as a result of the terminating ruling). The respondent was subsequently convicted and sentenced to life imprisonment on 28 June 2013.

In **R v Dlugosz and Ors [2013] EWCA Crim 2** the Court (PQBD. Kitchin LJ. and Cox J.) considered three separate cases which all concerned the admissibility of Low Template DNA evidence and the DNA derived from a mixed sample to which at least two or three persons had contributed. In each of the appeals it was not possible to provide a random match probability that the DNA belonged to the appellant or to tell when the DNA was deposited or how it had been deposited. The Court concluded that provided the analysis was properly supported by detailed evidence which made it possible to give an evaluative opinion such an opinion was, in principle, admissible.

Hearsay

The principle issue in **Shabir [2012] EWCA Crim 2564** concerned the admission of hearsay evidence where the main prosecution witness asserted that he would not give oral evidence at the trial "through fear". The Court (Aikens LJ. Andrew Smith J. HHJ Rook) said the framework when deciding whether to admit hearsay evidence was broadly: (1) The "default" position was that hearsay evidence was not admissible. (2) It was a pre-condition to the admission of a hearsay statement that the witness concerned was identified. (3) The necessity to resort to second-hand evidence must be clearly demonstrated. The more central the evidence that was sought to be admitted

as hearsay evidence was to the case, the greater the scrutiny that had to be undertaken to see whether or not it should be admitted as hearsay. (4) Although "fear" was to be widely construed in accordance with section 116(3) and, specifically, the fear of a witness did not have to be attributed to the defendant, a court had to be satisfied, to the criminal standard, that the proposed witness would not give evidence (either at all or in connection with the subject matter of the relevant statement) "through fear". Thus a causative link between the fear and the failure or refusal to give evidence must be proved. (5) How it was proved that a witness would not give evidence "through fear" depended upon the background together with the history and circumstances of the particular case. Every effort must be made to get the witness to court to test the issue of his "fear". The witness alleging "fear" might be cross-examined by the defence (if needs be in a *voir dire*), if necessary using "special measures" to assist the witness. That procedure might be possible but, in certain cases, might not be appropriate. (6) If testing by the defence was properly refused (after consideration) then "it is incumbent on the judge to take responsibility rigorously to test the evidence of fear and to investigate all the possibilities of the witness giving oral evidence in the proceedings". The manner in which that should be done would depend on the circumstances of the case and upon the witness and would necessarily involve discussions with counsel as to approach and questions to be asked. For example, if a court could not hear from a witness a tape recording or video of an interview on the question of his "fear" should, if possible, be made available. The critical thing was that "every effort is made to get the witness to court". (7) In relation to the "gateway" of section 116(2)(e), leave to admit the statement would only be given if the conditions for passing through a specific "secondary gateway" were satisfied. They were set out in section 116(4). Overall a court would only admit a statement under section 116(2)(e) if it considered that it was "in the interests of justice" to do so. In that respect, the court had to have specific regard to the matters set out in section 116(4)(a) to (c). (8) When a court considered section 116(4)(c), it should take all possible steps to enable a fearful witness to give evidence notwithstanding his apprehension. "A degree of (properly supported) fortitude can legitimately be expected in the fight against crime". A court must therefore have regard to whether (in an appropriate case), a witness would give evidence if a direction for "special measures" were to be made under section 19 of the Youth and Criminal Justice Act 1999. (9) In this regard it was particularly important that, before the court had ruled on the application to admit under section 116(2)(e), no indication, let alone assurance, was given to a potential witness that his evidence would or might be read if he said he was afraid, because that could only give rise to an expectation that this would, indeed, happen. If it does then the statement would have been admitted on an improper basis; the impact of the evidence would be diminished and that might have further consequences, eg. an application to the judge under section 125 at the end of the prosecution case to stop the case. (10) When a judge considered the "interests of justice" under section 116(4), although he was not obliged to consider all the factors set out in section 114(2)(a) to (i) of the CJA 2003, those factors might be a convenient checklist for him to consider. (11) Once the judge had concluded that the specific gateways in section 116(4) had been satisfied, the court must consider the vital linked questions of (a) the apparent reliability of the evidence sought to be adduced as hearsay and (b) the practicality of the jury testing and assessing its reliability. In this regard section 124 (which permitted a wide range of material going to credibility of the witness to be adduced as

evidence) was vital. (12) In many cases a judge would not be able to make a decision as to whether to admit an item of hearsay evidence unless he had considered not only the importance of that evidence and its apparent strengths and weaknesses, but also what material was available to help test and assess it, in particular what evidence could be admitted as to the credibility of the witness and the hearsay evidence under section 124. The judge was entitled to expect that "very full" enquires as to witness credibility would have been made if it was the prosecution that wished to put in the hearsay evidence and if it was the defence, they too must undertake proper checks.

Section 74, PACE

In **Clift and Harrison [2012] EWCA Crim 2750** the Court (LCJ. Fulford and Bean JJ.) considered the proper ambit of s.74(3) of the Police and Criminal Evidence Act 1984. Both appellants had been convicted of murder several years after they had inflicted what eventually proved to be fatal injuries on their victims. While their victims were still alive both appellants were convicted of violent offences contrary to section 18 of the Offences against the Person Act 1861. At their murder trials the respective judges allowed the Crown to adduce the convictions pursuant to section 74. This, the court said, was correct. The court said that the earlier conviction of the s.18 offence constituted admissible evidence to prove, following the death of the victim, that the defendant was guilty not merely of wounding or causing grievous bodily harm with intent, but of murder. The Crown was not required to prove all the matters already proved to the criminal standard, and the defendant was not prevented or excluded from denying them. In relation to matters already proved against him the burden of proof on a balance of probabilities then shifted to the defendant to prove that he did not inflict the grievous bodily harm or that he did not intend to do so.

Bad Character

In **Dizaei [2013] EWCA Crim 88** the appellant appealed convictions for misconduct in a public offence and perverting the course of justice. At trial bad character evidence concerning the complainant was before the jury. The defence sought leave to adduce further bad character evidence arising out of incidents with his girlfriend which had not lead to any charges or convictions. The Court (LCJ. Wyn Williams and Globe JJ.), in dismissing the appeal, said that when assessing the probative value of the evidence in accordance with s.100(1)(b) and s.100(3) of the Criminal Justice Act 2003, and consistently with s.100(2), among the factors relevant to the admissibility judgment, the court should reflect whether the admission of the evidence relating to the bad character of the witness might make it difficult for the jury to understand the remainder of the evidence, and whether its understanding of the case as a whole might be diminished. In such cases the conclusion might be that the evidence was not of substantial probative value in establishing the propensity in or lack of credit worthiness of the witness, or that the evidence was not of substantial importance in the context of the case as a whole, or both. If so, the pre-conditions to admissibility would not be established.

Procedure

Indication as to sentence

In **Nightingale [2013] EWCA Crim 405** the appellant, a serving army Sergeant, was overseas when his shared UK accommodation was searched. He was found to be in possession of a prohibited firearm and over 300 live rounds of ammunition. On 6th November 2012 he pleaded guilty on re-arraignment to offences under the Firearms Act 1968. However, following sentencing, he immediately appealed against his conviction on the basis that the Judge Advocate General had provided an uninvited indication as to sentence and in doing so had placed undue pressure on him to plead guilty. The Court (LCJ. Fulford and Bean JJ.) found on the facts that such an uninvited indication had been given. It was held that, save for in the circumstances of the specific exceptions identified in the case of *Goodyear* [2005] 1 WLR 2532, it was wholly inappropriate for a Judge to give, or insist upon giving, any indication of sentence. However, contravention of that principle would not, of itself, be decisive upon appeal. The question was whether the consequent impact of the indication created inappropriate additional pressures on the defendant so as to narrow the proper ambit of his freedom of choice. The Court concluded that the appellant's freedom of choice had been improperly narrowed and, accordingly, the plea of guilty was a nullity and the conviction quashed.

Lurking Doubt

In **Pope [2012] EWCA Crim 2241** the appellant was convicted upon a re-trial of a murder committed in 1996. The deceased's husband had been prosecuted and acquitted of the murder in 1997. The Crown's case against him had been a circumstantial one based on motive and opportunity. In 2006 the appellant's DNA was matched to two small blood stains on the deceased's inside trouser pocket and knickers. This formed the principal basis of the Crown's case against him at trial. In his defence he provided an innocent explanation for the presence of his blood and put forward a case that the deceased had probably been killed by her husband. He appealed on the sole ground that there was a lurking doubt as to the safety of the conviction in that it was incomprehensible that the jury could have excluded the real possibility that the deceased's husband had been responsible for the murder and, furthermore, the jury could not have safely rejected the appellant's explanation for the blood staining. Confirming the principles first identified in *Cooper* [1969] 1 QB 267 the Court (LCJ. Wilkie and Singh JJ.) held that the constitutional primacy and public responsibility rested with the jury. It was not open to the Court of Appeal to set aside a verdict on the basis of some collective, subjective judicial hunch. Where it arose at all, the 'lurking doubt' concept required a reasoned analysis of the evidence and / or the trial process, which lead to the inexorable conclusion that the conviction was unsafe. It could only be in the most exceptional circumstances that a conviction would be quashed on this ground alone, and even more exceptional if the attention of the Court was confined to a re-examination of the material before the jury. The Court concluded that the verdict was entirely supported by the evidence and the appeal was dismissed.

Committal for sentence

In **Bateman and Doyle [2012] EWCA Crim 2158** the Court (Moore-Bick LJ. Collins J. HHJ Cooke) held that where, on the committal of an offender to the Crown Court in respect of an offence committed during the operational period of a suspended sentence imposed by that Court, the Crown Court's powers of sentence in relation to other offences in respect of which the offender was committed under s.6 Powers of Criminal Courts (Sentencing) Act 2000 were limited to those of the magistrates' court. Section 7(2) of the 2000 Act did **not** have the effect of giving the Crown Court untrammelled powers of sentence in respect of all matters committed to it.

Restraining Orders

In **Smith [2012] EWCA Crim 2566** the appellant was acquitted, by reason of insanity, of the offences of criminal damage and interfering with the performance of the crew of an aircraft in flight. His defence at trial, supported by expert evidence, was that he had been suffering from a temporary psychosis brought on by a combination of exhaustion, dehydration, sleep deprivation, and sunstroke. This being the case, a medical disposal was deemed to be unnecessary and inappropriate. However, following the acquittal he was made subject to a restraining order under s.5A Protection from Harassment Act 1997 prohibiting him from travelling on any commercial airline for a period of 3 years. In imposing the order the Judge expressed concern at the appellant's extreme behaviour and wanted to ensure that, should he suffer a repeat episode, it would not take place aboard an aircraft. The appellant appealed against the making of the order. In allowing the appeal and quashing the order the Court (Toulson LJ. Langstaff J. HHJ Morris) held that it could not be rationally supposed that an order under s.5A need not identify the person, or group of persons, whom the order was intended to protect. The need for such identification reflected the underlying purpose of the legislation and an order made to protect the world at large was, accordingly, deficient. Furthermore, before making an order a court needed to be satisfied that a defendant was likely to pursue a course of conduct amounting to harassment. Pursuit of a course of conduct required intention. There was no basis for finding that there was a likelihood of intentional conduct by the appellant amounting to harassment. The word "necessary" in section 5A was not to be diluted. To make an order prohibiting a person who had not committed any criminal offence from doing an act which was otherwise lawful was an interference with that person's freedom of action which could be justified only when it was truly necessary for the protection of another. It was not the function of the section to be used as if it were an adjunct of the Mental Health Act as a means of protecting the public against the possible effects of a possible recurrence of a mental illness.

Juror Issues

In **CED [2012] EWCA Crim 2593** the applicant was convicted of child sex offences. At the opening of the trial a juror passed a note to the Judge in which she stated that she had been raped in the past and was not sure whether she could be totally unbiased. The Judge questioned the juror as to the latter part of her note and received an assurance that she would be able to address the issues in an unbiased way. The applicant sought

leave to appeal on the basis that the juror should have been discharged for the risk of bias, whether conscious or unconscious. The Court (LCJ. Simon and Wilkie JJ.) held that there were balancing considerations when a Judge had to decide whether or not to discharge a juror. A Judge was entitled to reflect on the anxieties of a troubled juror; and he was entitled, where necessary, to give advice, reassurance and encouragement to such a juror. It was clear that the juror approached her responsibilities with the utmost seriousness. The Judge examined the information with which he was provided and satisfied himself that the juror would and could approach the issues in a fair and unbiased way. There was no reason to discharge her. Furthermore, there was no need to discharge the juror because she had been the victim of a crime of a similar nature. That was not a requirement of a fair trial and it must not be assumed that a victim of crime would be less committed to the principles which governed trial by jury.

By way of contrast, in **Polladian-Kari [2013] EWCA Crim 158** the appellant had been convicted of being knowingly concerned in an attempt to export prohibited or restricted goods. During the trial one of the jurors sent a note to the Judge explaining his own specialist knowledge of similar transactions and, seemingly, how it appeared to him that the appellant's compliance procedures fell short of those employed in the company for which he worked. He expressed his concerns about not only his ability to set aside his own knowledge of how compliance procedures ought to operate but also that he might drive the discussions and conclusions of his fellow jurors. In refusing to discharge either the entire jury or the individual juror the trial Judge ruled that the careful and fair minded way in which the juror had brought the information to the Court's attention dispelled any possibility that he was biased against the appellant. That he had more in-depth knowledge of the specialist subject area was no reason to exclude him from jury service. Thereafter he directed the jury that one of their members had professional knowledge, that such knowledge was not an impediment to sitting on a jury, and that it might indeed be of some benefit. In allowing the appeal, the Court (LCJ. Wyn Williams and Globe JJ.) held, that although it was satisfied that the juror was not biased against the appellant, that did not resolve the question of whether a fair minded and informed observer would have concluded that there was a real possibility of unconscious bias. The juror was unequivocal in stating that the transactions would have been prohibited in his company and this would be "difficult to forget". Additionally, in his note he had expressly asked for the other jurors to be made aware of his knowledge. The Judge's direction failed to alert the jury to the caution they should exercise in relation to any views being expressed by the juror and, if anything, it did the reverse. The juror's special knowledge and experience was directly related to the issue which arose for decision in the trial. The issue of the juror's unconscious prejudice was not addressed in either the decision to permit the juror to remain on the jury or in the direction provided to the jury. On the particular facts, a fair minded and informed observer would have concluded that there was a real possibility of unconscious jury bias such that a fair trial was not possible.

In **Hopkinson [2013] EWCA Crim 795** the appellant was the mother of a two month old baby who died as a result of multiple injuries. Both the appellant and her partner were prosecuted for causing or allowing the death of a child under s.5 Domestic Violence, Crime and Victims Act 2004. The Crown's position all along had been that there was no sensible way of knowing which defendant had caused the fatal injuries. During the trial

the Judge decided that he would seek a special verdict, a proposal that was ultimately supported by the appellant but opposed by both the co-accused and the Crown. In due course the jury found the appellant guilty of the indicted offence and returned a special verdict that they all agreed that she had unlawfully caused the fatal injuries. At that stage they had failed to return a verdict in respect of the co-accused. The following day it came to light that two jurors felt that they had been subject to intimidation by persons unknown and that the perceived intimidation had begun prior to their having reached the verdict in respect of the appellant. The Judge discharged the jury from returning a verdict in respect of the co-accused who was to be re-tried. In doing so he expressed his surprise, bordering on astonishment, as to the special verdict that had been returned in respect of the appellant. The Judge issued a certificate that the case was fit for appeal. The Crown did not oppose the appeal. The Court (LCJ. Royce and Globe JJ.) held that both the conviction and special verdict had to be quashed in light of the Judge's findings of fact in relation to the jury intimidation pre-dating the verdict returned against the appellant. The Court commented that the mere fact that the trial Judge disagreed with the verdict of the jury provided no ground for quashing the convictions. Any such approach would undermine the essential constitutional principle that the responsibility for the verdict rested with the jury and must be respected. The Court further commented that special verdicts would only ever be used on very rare occasions in murder trials. Although the Court was not entitled to abolish the special verdict procedure it was suggested that it did not expect special verdicts to be sought in other cases. The taking of special verdicts had fallen into virtual desuetude. In particular it was inappropriate for a special verdict to be sought in the context of the offence under section 5 of the 2004 Act.

Victims of trafficking

In **L and others [2013] EWCA Crim 991** the Court (LCJ. Moses LJ. Thirlwall J.) offered guidance to the courts about how the interests of those who were, or might be, victims of trafficking, and who became enmeshed in criminal proceedings, should be approached after criminal proceedings against them had begun. Victims of trafficking should not be given immunity from prosecution or a substantive defence to a criminal charge merely because they had been trafficked. However, where victims of trafficking had been involved in criminal activities, the investigation, the decision as to whether to prosecute, and any subsequent proceedings, were required to be approached with the greatest sensitivity; the reason being that the culpability of any such victim might be significantly diminished and, in some cases, effectively extinguished both because of age (if a child victim) and because there was no realistic alternative but to comply with the demands of others. Those committing offences unconnected with the fact that they had been trafficked were not safeguarded from prosecution, although it might serve as mitigation. However, a level of protection from prosecution was required for trafficked victims who had been compelled to commit offences. Such protection was provided by the exercise of the "abuse of process" jurisdiction. A court would reach its own decision as to whether there had been an abuse of process in the decision to prosecute not on traditional *Wednesbury* grounds but on the basis of material advanced in support of and against the continuation of the prosecution. The prosecution would be stayed if the court disagreed with the decision to prosecute. When the defendant might be a child victim

of trafficking his age must first be determined and then the evidence that he had been trafficked must be assessed. A further distinct question is the extent to which the crime alleged against him was consequent on and integral to his exploitation. If there was doubt as to whether or not a defendant was a child then the presumption that he was must be applied and the defendant treated accordingly. The UK Border Agency was responsible for investigating whether or not an individual had been trafficked. Although the court was not bound by the Agency's conclusions it was likely that the courts would abide by the decision unless there was evidence to contradict it. The Crown was under an obligation to disclose all material bearing on the issues of age, trafficking, exploitation, and culpability. It was open to the court to adjourn proceedings to obtain further information from organisations and experts in the field but the ultimate responsibility for deciding upon the relevant issues could not be abdicated by the court. The Court was of the view that the legal professions were less well informed than they should be about the importance of the issues surrounding age of trafficking victims. The importance was obvious and should be determined at the earliest opportunity. Although the Court could not be prescriptive, if cases in which the victim was under such levels of compulsion that his culpability was effectively extinguished were prosecuted then an abuse of process submission was likely to succeed. In other cases, most likely where the defendant was not a child, culpability might be diminished but nevertheless significant and therefore prosecution might well be appropriate. Where criminality was unconnected to, and did not arise from, the defendant's victimisation then an abuse submission would fail.

Section 31, Immigration and Asylum Act 1999

In **Mateta and others [2013] EWCA Crim 1372** the Court (Leveson LJ. Fulford LJ. Spencer J.) considered the approach to be taken by the Court of Appeal (Criminal Division) when a defendant, following incorrect legal advice, has pleaded guilty to an offence under s.25 of the Identity Cards Act 2006 or s.4 of the Identity Documents Act 2010 if a defence under s.31 of the Immigration and Asylum Act 1999 was or may have been available to him or her. The Court set out the main elements of a defendant's entitlement to advice on the s.31 defence: (i) There was an obligation on those representing defendants charged with an offence of possession of an identity document with improper intention to advise them of the existence of a possible section 31 defence if the circumstances and instructions generate the possibility of mounting this defence, and they should explain its parameters; (ii) the advisers should properly note the instructions received and the advice given; (iii) if an accused's representatives failed to advise him about the availability of this defence, on an appeal to the Court of Appeal Criminal Division the court would assess whether the defence would "quite probably" have succeeded; and (iv) it was appropriate for the Court of Appeal to assess the prospects of an asylum defence succeeding by reference to the findings of the First Tier Tribunal (Immigration and Asylum Chamber), if available.

Reporting restrictions

In **Robert Jolleys ex parte Press Association [2013] EWCA Crim 1135** the Court (Leveson LJ. Irwin and Cranston JJ.) revisited the scope of reporting restrictions made under CYPA 1933. This was an instance where a reporting restriction had been made in the Crown Court to protect the 15 year old son of a former army officer who had been

convicted of fraudulently claiming boarding school fees to which he was not entitled. There had been reporting of the case prior to the order being made and two older sons, aged 20 and 22 respectively (for whom claims had also been made) were not protected by the order in any event. Allowing the appeal by the Press Association the Court confirmed that the phrase 'concerned in proceedings' in s.39 was defined and limited by the words that followed, namely "the person by or against, or in respect of whom proceedings are taken, or a witness therein" and did not extend to children or young persons who might be concerned in the more general sense of being affected thereby [the rationale for the order having been that it might be said that the boy's education had been funded as a result of his father's crime]. The court also reiterated that where orders are made restricting reporting they should be restricted to the language of the legislation and if anything novel is to be included it should be identified in ample time and notice provided as required by the Criminal Procedure Rules so that the press could consider the matter in good time. The Court also expressed the hope that the decision would be publicised sufficiently to ensure that the problem did not recur.

In **R (Press Association) v Cambridge Crown Court [2012] EWCA Crim 2434** the Court (LCJ. Gross LJ. and Mitting J.) allowed an appeal against a reporting restriction initially made under s.4(2) Contempt of Court Act 1981 imposing an indefinite prohibition on the publication of "anything relating to the name of the defendant which could lead to the identification of the complainant which could have serious consequences for the course of justice". An order in the same terms was made subsequently under s.1(2) Sexual Offences (Amendment) Act 1992. The orders underlined the issue raised in the appeal, namely the openness of the administration of criminal justice and the jurisdiction, if any, of the Crown Court to restrict publication of the defendant's name for the purpose of protecting the interests of others, in particular the complainant. In this particular case, although not seeking an order restricting the publication of the defendant's name, the Crown had drawn to the Judge's attention the concerns which would arise were the defendant's name to be published, so that he could alert the press to the risks involved. The Judge had thought that an order prohibiting publication of the name was being sought. The Court acknowledged that the Judge had proceeded with the best intentions and that he had underlined that there was freedom to report the facts of the case and the sentences imposed. The Press Association submitted that there was no power under either of the statutory provisions to make an order anonymising the defendant. The responsibility for ensuring the lifelong anonymity of the complainant under the 1992 Act lay with the editors and those reporting the crime. The issue was of major importance to the press who had expressed concern at the apparent willingness of some courts to make unnecessary orders or orders beyond their powers. The Crown conceded that there was no power to make the order but suggested that it was appropriate for the Judge to give guidance and directions as to the proper ambit of what could be reported. Counsel appointed by the Attorney General as a friend of the Court submitted that the Crown Court was vested with power to order at the outset of proceedings that a defendant should not be named in two limited circumstances, the first being the interests of justice and the second if it were satisfied that there was a real and immediate risk to the defendant's life. He agreed that the Crown Court lacked jurisdiction to order the non-publication of a defendant's name on the basis that it appeared desirable to do so. The Court agreed that the court lacked the necessary jurisdiction to impose the reporting

restriction, neither of the limited circumstances being applicable. It was for the press to decide how to ensure that any reporting complied with the statutory provision affording anonymity to the complainant and it was not for the court to instruct the press how to do so by making an order which in effect imposed a blanket ban on publication do the defendant's name.

Status of draft judgement

In **Noshad Hussain 2012/7191/C5** the Court (Treacy LJ. Edwards- Stuart J.) re-emphasised the purpose and status of draft judgments. The Court had followed the accepted practice of sending out a draft judgment on a prosecution appeal against a terminating ruling to legal representatives indicating that formal judgment would be handed down two days later. The Court noted that legal professionals understood that the draft was strictly confidential to Counsel and solicitors involved in the case and wider dissemination embargoed. The purpose of sending a draft in advance was to allow Counsel to comment on any important factual error or omission and also to give time to consider any applications that might arise from that judgment. In this instance by the afternoon of the draft judgment being sent out, the media were aware of the result notwithstanding that in addition the case involved complaints of a sexual nature. The harm was compounded by the solicitor for the defendant contacting the local newspaper to indicate that the defendant had been cleared in circumstances where the Court of Appeal's judgment amounted to no more than a finding that the trial Judge's ruling to prevent a further trial had not been unreasonable in the circumstances. The Court ordered those concerned to attend before it indicating that it treated such breaches of a court order extremely seriously. The facility could only work effectively if the terms on which such judgments are communicated were respected. If further breaches were to occur the Court might have to consider withdrawing the facility in the future. Those who enjoyed the facility were expected to understand the terms and conditions upon which it was granted and to abide by them. It was also necessary to ensure that employees were properly trained and instructed.

Third party wasted costs

In **Applied Language Solutions (now Capita Translating and Interpreting Ltd) [2013] EWCA Crim 326** the Court (PQBD. Swift and Cranston JJ.) allowed an appeal against an order for wasted costs made in the Crown Court against the appellant company who had an agreement with the Ministry of Justice to provide interpreters in criminal proceedings. In the instant case an interpreter had not attended due to an administrative mistake. As a consequence the case was adjourned. The Judge who was to have heard the proceedings made an order against the company under s.19B Prosecution of Offences Act 1985 to pay prosecution costs for the aborted hearing. The Judge had concluded that the appellant had won a contract under which it accepted responsibility as a go-between between the courts and interpreters. He found that the appellant had not done its job properly as a result of its own negligence; there was a duty not to waste court time and the negligence shown in this instance amounted to serious misconduct. The appeal was brought on the basis that the Judge had been wrong to find serious misconduct on the part of the appellant company. What constituted serious misconduct had been considered by the

Court in *Ahmati* [2006] EWCA Crim 1826 which had concluded "Misconduct… would include deliberate or negligent failure to attend to one's duties or falling below a proper standard in this regard". The Court noted that the provision of interpreters in criminal proceedings was an integral part of the state's obligation to provide a fair and just system of criminal justice. If a private company took on the discharge of a state obligation it assumed the responsibility to do so in accordance with the terms agreed. It was necessary in determining whether there had been serious misconduct to determine what the obligations were. The court noted that the agreement ran to 177 pages and expressed regret, that the Court having adjourned the hearing to enable argument to be developed, both the Ministry of Justice and Court Service had not attended to assist the Court, having been invited to do so. The Court was satisfied that a single failure of the kind that had occurred could not when viewed in isolation amount to serious misconduct. There was no evidence that the failure was anything other than an isolated instance. The Court did observe that a case of serious misconduct for the purposes of s.19B might arise where there was evidence that the non-attendance had occurred in circumstances where there had been a failure to remedy a defect in the appellant's administrative systems or where the same interpreter had failed to attend in the past. The Court also noted that for the future an order under s.19B should not normally be considered without clear evidence of serious misconduct. In any future case it would always be open to the Court to ask the appellant to attend and if necessary to make the appropriate disclosure.

Sentencing

Minimum Terms

In **Oakes and others [2012] EWCA Crim 2435** a five-judge Court (LCJ. Hallett LJ. Hughes LJ. Leveson LJ. Rafferty LJ.) considered sentences following the commission of very serious crimes for which life sentences were imposed. The appeals were particularly concerned with the judicial assessment of the minimum term to be served for the purposes of punishment and retribution before the possibility of release could be considered. The court observed that there was express statutory provision vesting the court with jurisdiction, in an appropriate case of exceptionally high seriousness, to make a whole life order. It noted that the language of Schedule 21 was not prescriptive. There was no statutory provision requiring the judge to impose a whole life order if the interests of justice did not require it. The Schedule provided an indication of appropriate starting points which applied to the assessment of the seriousness of the offence of murder, or its combination with other offences associated with it. It recognised that the level of seriousness might be so exceptionally high that the court should consider whether a whole life order would be appropriate. It was also clear from a series of decisions that the statute neither creates a sentencing straightjacket nor requires that a mechanical or arithmetical approach to the problem of the assessment of the minimum term might be taken. The court was satisfied that the provisions of Schedule 21 of the Criminal Justice Act 2003, and paragraph 4 which enabled the court to make a whole life order, were not incompatible with and did not contravene Article 3 of the European Convention of Human Rights.

Victim Personal Statements & Family Impact Statements

In **Perkins and others [2013] EWCA Crim 323** the Court (LCJ. Simon and Irwin JJ.) confirmed that a victim personal statement or family impact statement constituted evidence, must be in a formal witness statement, and must be served on the defendant's legal advisors in time for the defendant's instructions to be taken, and for any objection to the use of the statement, or part of it, if necessary, to be prepared. It would seldom be appropriate for a victim personal statement or family impact statement to be introduced at a sentencing appeal if it was not before the sentencing court. Occasionally an update to the statement would be appropriate, in which situation the formalities must continue to be observed. In the Court of Appeal the purpose of such a statement was, as in the lower court, to keep the court informed of the impact of the offence. It could not be used for arguing that the sentence was excessive or lenient. If, applying ordinary principles, the sentence appeared to this court to be excessive or wrong in principle, it must be reduced, irrespective of the views of the victim.

Forced or Compulsory Labour

In **Attorney-General's Reference (2-5 of 2013) [2013] EWCA Crim 324**, the Court (LCJ. Simon and Irwin JJ.) considered applications for leave to refer as unduly lenient sentences imposed on four of five defendants convicted of conspiracy to require a person to perform forced or compulsory labour, a substantive offence defined in s.71 of the Coroners

and Justice Act 2009. The defendants, members of a family involved in a building maintenance business, recruited vulnerable men with false promises of accommodation, food and reasonable payment. Once recruited, the men worked long hours, often 7 days a week, for meagre pay and without proper equipment. They lived in substandard accommodation that was sometimes without heating or running water. They were subjected to violence and intimidation and were told they could not leave. Section 71 of the 2009 Act created an offence capable of being committed in three different ways, namely (in descending order of seriousness) slavery, servitude and forced or compulsory labour. The maximum sentence for each offence is 14 years imprisonment. Where the other circumstances are broadly similar, an offence of slavery is likely to be more severely punished than one of servitude, and one of servitude more severely than one of forced labour. However, distinctions of this kind only apply where the manifestations of criminal behaviour, in the context, for example, culpability and magnitude and complexity and profit are indeed similar. The hierarchy of these offences does not necessarily define the criminal culpability of the offender and it is not the case that the maximum sentence for servitude must always be lower than that for slavery, and the maximum sentence for forced or compulsory labour lower than the maximum sentence for servitude. Assistance was derived from *Attorney General References Nos. 37, 38, 65 of 2010* EWCA Crim. 2880 in the analysis of some of the relevant factors which might assist in the assessment of the seriousness of an offence. The Court concluded that the trial judge was best placed to weigh the respective aggravating and mitigating features of the conspiracy, and declined to interfere with the sentences he imposed.

Victim Surcharge Orders

In **Stone [2013] EWCA Crim 723**, the Court (Pitchford LJ. Roderick Evans and Turner JJ.) considered victim surcharge orders. It made clear that a victim surcharge order wrongly made was subject to appeal to the Court of Appeal. The Court confirmed that no victim surcharge order could be made when any of the offences for which an offender fell to be sentenced was committed before 1 April 2007. Where sentence was imposed in respect of offences which were all committed between 1 April 2007 and 30 September 2012, a victim surcharge order of £15 must be imposed if a fine formed part of the sentence. That was a consequence of the Criminal Justice Act 2003 (Surcharge) (No 2) Order 2007, SI 2007/1079. Where an offender was sentenced for offences which were all committed after 1 October 2012, a victim surcharge order must be made in every case, with the exception of absolute discharges or disposals under the Mental Health Act 1983. That was a consequence of the Criminal Justice Act 2003 (Surcharge) Order 2012 SI 2012/1696. The Court confirmed that on an appeal to this court in a case where no victim surcharge order had been imposed as it should have been, this court would have no power to make such an order if the effect would be to increase the ultimate overall penalty. The Court expressed its view that the manner in which challenges to a victim surcharge order might be handled at the stage of consideration of an application for leave should be that the application for leave to appeal against sentence should be considered by the single judge on the papers in the usual way. If leave to appeal on other grounds was given, the appeal would be listed before the full court for oral argument. If, however, the only ground upon

which leave was given was the wrongful making of a victim surcharge order, then unless the application for leave was renewed on other grounds, the case should be listed as a non counsel hearing at which the quashing of the victim surcharge order, if it was indeed unlawful, could be made publicly. In **Hemsworth [2013] EWCA Crim 916** the Court (Elias LJ. Collins J. The Recorder of Preston) confirmed that no surcharge is payable where the court has also resentenced for breach of a community order imposed for offences committed before 1 October 2012. The Court (Leveson LJ. Sharp J. HHJ Bevan) in **Bailey, Kirk and Tote [2013] EWCA Crim 1551** took a similar view in respect of Suspended Sentences.

Days to Count / Qualifying Curfew

In **Hoggard [2013] EWCA Crim 1024** the Court (VPCACD. Sweeney J. HHJ Radford) allowed an appeal against sentence and gave guidance as to the operation of the provisions of s.240A of the Criminal Justice Act 2003, as amended by the Legal Aid Sentencing and Punishment of Offenders Act 2012 ('LASPO') for calculating the credit to be given for time spent on qualifying curfew and electronic monitoring conditions. It remains essential that every court imposing a curfew and tagging condition uses the Court Service form entitled Record of Electronic Monitoring of Curfew Bail, which must follow the defendant from court to court and that it was the responsibility of solicitors and counsel to ascertain from the defendant whether he had been subject to curfew and tagging and from the court record, for which periods. The CPS must also have a system for ensuring that such information is available. Consideration of steps 1-3 in s.109 of LASPO will be part of the post-conviction proceedings and thus not subject to the strict rules of evidence. The approach to admissibility should be that identified in *Clipston* [2011] 2 Cr. App. R. (S.) 101. If there is a dispute under step 2 and/or 3, the prosecution must prove to the criminal standard that the days sought to be deducted from the number of days identified under Step 1 are caught by the relevant Step. If the court is of the opinion that the resolution of the dispute would be likely to amount to the disproportionate use of time and expense then the dispute, or relevant part of it, should be resolved in the defendant's favour. The court is only likely to be of such an opinion if the number of days involved is relatively modest. The court will then deal with the maths required by Steps 4 and 5 and will thereafter give a direction – complying in the process with subsection (8). Save in a case where it is clear that there is no possibility of crediting a period of remand on bail, the order of the court should, in accordance with *Nnaji* [2009] 2 Cr. App. R. (S.) 107, and *Williams* [2012] EWCA Crim 1590, be along the following lines: "The defendant will receive full credit for half the time spent under curfew if the curfew qualified under the provisions of s.240A. On the information before me the total period is … days (subject to the deduction of ... days that I have directed under Step(s) 2 and/or 3 making a total of … days), but if this period is mistaken, this Court will order an amendment of the record for the correct period to be recorded." It remains the case that it ought not to be expected that the Court of Appeal will routinely grant long extensions of time to correct errors when no one has applied his mind to the issue until long after the event.

Life Sentences and Extended Determinate Sentences

In **Saunders and others [2013] EWCA Crim 1027**, the Court (LCJ. Lloyd Jones LJ. Openshaw J.) considered the correct approach to non-mandatory sentences of life imprisonment following the changes to the dangerous offender provisions found in chapter 5 of Part 12 of the Criminal Justice Act 2003, as amended by the Criminal Justice and Immigration Act 2008, effected by ss.122-124 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). In the absence of express statutory language, whether a new regime would be more or less draconian than the regime which was being replaced, the sentencing court was not entitled to anticipate new sentencing provisions before they actually came into force. The sentencing regime in force at the date of conviction applied. As a result of LASPO, for those convicted after 3 December 2012, there were four situations in which the sentence of imprisonment for life arose for consideration: (i) Following conviction for murder, a sentence of life imprisonment remained mandatory; (ii) Following conviction for a second listed offence under s.224A, of the 2003 Act, inserted by s.122 of LASPO, a sentence of imprisonment for life must be imposed, unless the particular circumstances would make it unjust; (iii) Following conviction for a specified offence, the sentence of life imprisonment under s.225 of the 2003 Act continued in force and could only be imposed if justified by reference to the seriousness of the offence and the protection of the public in accordance with s.225; (iv) Neither the 2003 Act nor the 2012 Act imposed any limit on the power of the Court to impose a sentence of life imprisonment in an appropriate case that did not fall within either (ii) or (iii). As a result of s.123 of LASPO, the sentence of imprisonment for public protection created for serious offences by s.225(1) and (3) of the 2003 Act was no longer available. The new statutory life sentence had not replaced imprisonment for public protection, as many offenders who represented a danger to the public may not qualify for the statutory life sentence; yet, for some offenders, the imperative of public protection continued undiminished, and was not wholly met by the 'new' extended sentence (2003 Act, s.226A). In cases in which, prior to the enactment of LASPO, the court would have concluded that imprisonment for public protection was required, the discretionary life sentence will arise for consideration and, if the necessary level of public protection could not be achieved by the new extended sentence, ordered. Accordingly, the 'denunciatory' ingredient identified to distinguish between the circumstances in which the discretionary life sentence rather than imprisonment for public protection should be imposed is no longer apposite, in that its absence did not preclude a life sentence. However, the life sentence remained the sentence of last resort.

Sexual Offences

In **Attorney-General's Reference (38 of 2013) [2013] EWCA Crim 1450** the Court (LCJ. Rafferty LJ. Macur J.) considered and granted an application for leave to refer as unduly lenient sentences imposed on the celebrity Stuart Hall following his pleas of guilty to 14 counts of indecent assault. He was sentenced to concurrent terms of imprisonment totalling 15 months. The victims were children or teenage girls. The Court found that the result of the offending taken as a whole was that a multiplicity of young girls were sexually molested over an 18 year period, some when they were very young, all when they were in one way or another vulnerable, and all when the offender was in a position

to misbehave because he was trusted as a friend or as a public figure. The Court held that the original sentence was inadequate and increased it to 30 months' imprisonment.

Conspiracy to defraud

In **Levene v. R [2013] and R v. Kallakis and Williams [2013] EWCA Crim 709** the court (Pitchford LJ. Roderick Evans and Turner JJ.) considered sentencing in respect of conspiracy to defraud. It clarified a number of issues: (i) whilst the Sentencing Guidelines Council guidelines for fraud did not apply to conspiracy to defraud judges could seek guidance on general principles from those guidelines; (ii) it clarified the definition of "most serious offence" when assessing the seriousness of an offence and thus the starting point in the sentencing range relying on dicta in *Bright* [2008] EWCA Crim 462; and (iii) reminded sentencers that the SGC's guideline on totality applied to all sentences passed after 11th June 2012 and judges had a positive obligation to review the aggregate and ensure that it was proportionate to the level of criminality. Furthermore there was no inflexible rule governing whether sentences should be structured as concurrent or consecutive and when sentencing on multiple counts a judge should first consider the sentence for each individual offence and then determine whether the circumstances called for concurrent or consecutive sentences and whether the sentence as an aggregate was ultimately a fair one.

Basis of plea

In **Cairns and others [2013] EWCA Crim 467** the Court (Leveson LJ. Mitting and Males JJ.) re-stated the approach to be taken where a court deals with a basis of plea. After a trial once the offence had been proved, in order to do justice, the judge had to determine the gravity of the offending and was both entitled and required to reach his or her own assessment of the facts, deciding what evidence to accept and what to reject. The conclusions must be clear and unambiguous not least so that both the offender and the wider public would know the facts which had formed the basis for the sentencing exercise. They also informed the Court of Appeal should the offender seek to appeal the sentence as wrong in principle or manifestly excessive, or the Attorney General seek to refer it as unduly lenient. The position was no different when an offender pleaded guilty. The admission comprised within the guilty plea was to the offence and not necessarily to all the facts or inferences for which the prosecution contended. The responsibility for determining the facts which informed the assessment of the sentence was that of the judge. In the normal course, when the contrary was not suggested, that assessment would be based on the prosecution facts as disclosed by the statements. If, however, the offender sought to challenge that account, the onus was on him to do so and to identify the areas of dispute in writing, first with the prosecution and then with the court. A basis of plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests; in cases involving multiple defendants, the bases of plea for each defendant must be factually consistent with each other. The written basis of plea must be scrutinised by the Crown with great care. If a defendant sought to mitigate on the basis of assertions of fact outside the prosecutor's knowledge (for example as to his state of mind), the judge should be invited not to accept this version unless given on oath and tested in cross examination. If evidence was not given in this way, then the judge might draw such inferences as he thought fit from that fact. The Crown advocate must

ensure that the defence advocate was aware of the basis on which the plea was accepted and the way in which the case would be opened. Where a basis of plea was agreed, having been reduced into writing and signed by advocates for both sides, it should be submitted to the judge prior to the opening. It should not contain matters that are in dispute. If it was not agreed, the basis of plea should be set out in writing identifying what was in issue; if the court decided that the dispute was material to sentence, it might direct further representations or evidence in accordance with the principles set out in *R v Newton* (1982) 77 Cr App R 13. Both sides must ensure that the judge was aware of any discrepancy between the basis of plea and the Crown case that could potentially have a significant effect on sentence so that consideration could be given to holding a Newton hearing. Even where the basis of plea was agreed between the prosecution and the defence, the judge was not bound by such agreement. But if the judge was minded not to accept the basis of plea in a case where that may affect sentence, he should say so. Following well established principles, the Court of Appeal would not interfere with a finding of fact made either following a trial or a *Newton* hearing provided that the judge had properly directed himself or, exceptionally, where the court was satisfied that no reasonable finder of fact could have reached that conclusion. It followed, therefore, that it was important for all involved in the exercise to ensure that it was conducted correctly and in accordance with principle.

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 85 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 2012/2013 legal year. 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. In **R v Khan [2013] EWCA Crim 1364** the Court in its Judgment was able to state that "The facts are set out in the full and careful summary prepared by the Court of Appeal Office and it… is annexed to this judgment".

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 are 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 was recognised by the Court in **R v. J O'C [2012] EWCA Crim 2458** where a conviction for rape was quashed after a CAO lawyer identified that at the time of the alleged offence the defendant was aged 10 or 11 years. This would have given the defendant an absolute defence since there was then an irrebuttable common law presumption that a child under the age of 14 was incapable of committing an offence; a point which had not been spotted by anybody else associated with the case.

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.

Judicial delegations from Uganda, Nigeria, Tanzania and Zambia

Lady Justice Hannah Okwengu, Kenya

Chief Justice Ramodibedi, Swaziland

Dr Lach (Judge from Germany)

Judges from Rome, Italy

Registrar from the Supreme Court, Singapore

Justice Elizabeth Curtain, Supreme Court of Victoria

Mr Justice Maxwell, President of the Court of Appeal, Victoria

Mr Justice Phillip Priest, Court of Appeal, Supreme Court of Victoria

Adrian Castle (Office of Public Prosecutions) Victoria & Tom Gyorffy, Crown Prosecutor, Victoria

Law Students from Syracuse University, New York and from Portsmouth University

Summary and Statistics

1 October 2012 to 30 September 2013

Overall number of cases received (see Annex A)

In summary:

- 6714 applications were received in total.
- 5156 sentence applications were received.
- 1558 conviction applications were received.

There has been an increase in the number of applications outstanding at the end of the year. There were 3447 cases outstanding at 30 September 2013, an increase of 262 cases compared with September 2012.

Applications for leave to appeal (see Annex C)

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 1209 conviction applications were considered in the reporting year;
- 170 (14%) were granted leave to appeal by the single Judge;
- 129 (11%) had their applications referred to the full Court by the single Judge or by the Registrar;
- 910 (75%) were refused by the single Judge.

Sentence applications:

- A total of 4209 sentence applications were considered in the reporting year;
- Of those 1053 (25%) were granted leave to appeal by the single Judge;
- 288 (7%) had their applications referred to the full Court by the single Judge or by the Registrar;
- 2868 (68%) were refused by the single Judge.

Average waiting times (see Annex B)

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

- 9.3 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 increase of 1.5 months in the average waiting time compared with that of the preceding year. In sentence cases the average waiting time remained the same.

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 **(see Annex D)**

- A total of 358 conviction appeals were heard;
- A total of 1640 sentence appeals heard.

Success rate of appeals (see Annex D)

- Of the 358 appeals against conviction (i.e. where leave to appeal had been granted) which were heard by the Court this year, 122 (34%) were allowed and 236 (66%) dismissed.
- Of the 1640 appeals against sentence which were heard by the Court this year, 1121 (68%) were allowed and 519 (32%) were dismissed.

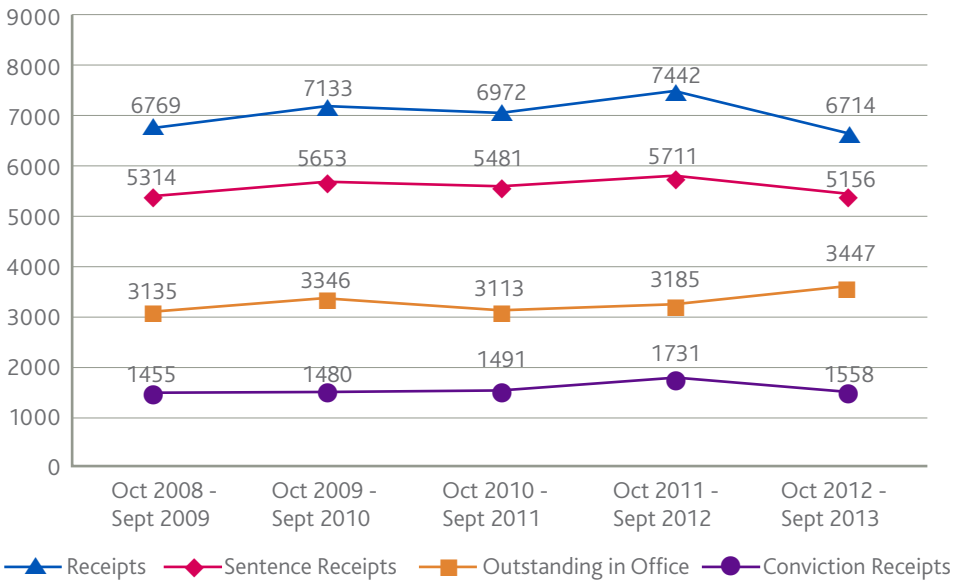
Listing

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

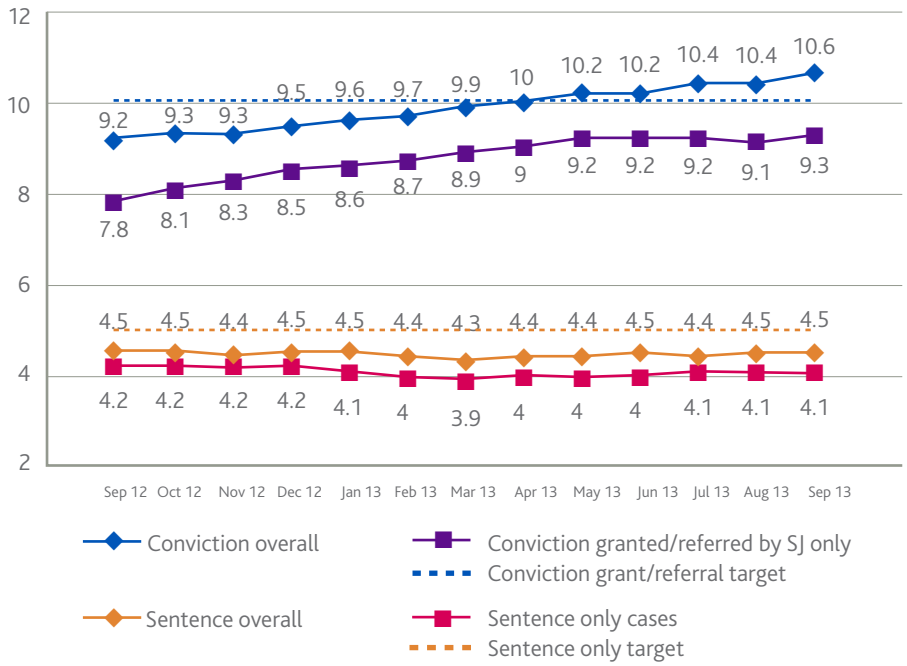
	Lord Justice		**High Court Judge (including Retired Judges)**		**Circuit Judge**	
	CT	**RD**	**CT**	**RD**	**CT**	**RD**
2012-2013	566	497	1012	794	222	193

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

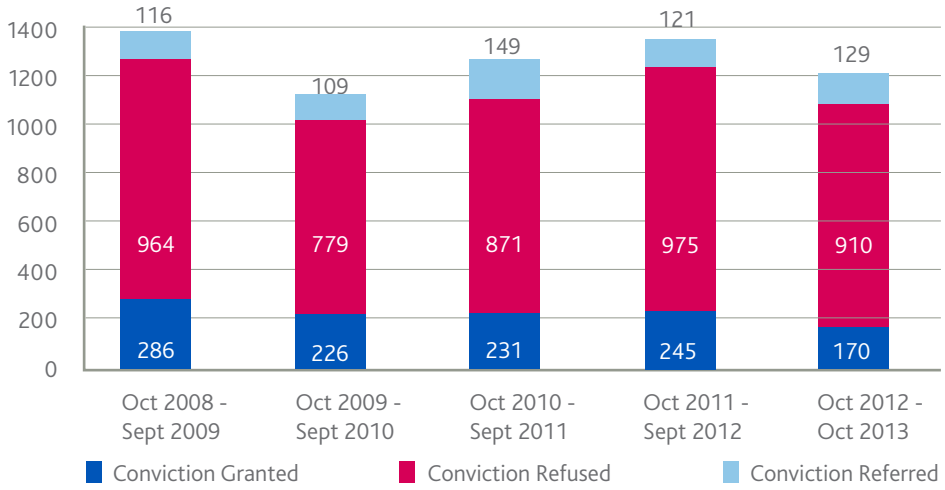
Applications Received and Outstanding in Office



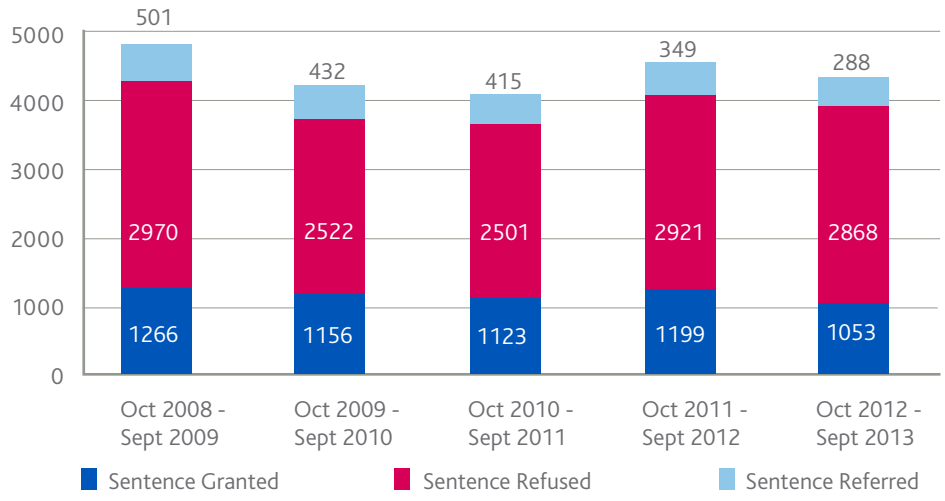
Average Waiting Times (in months)
Rolling average of cases disposed by full court over previous 12 months

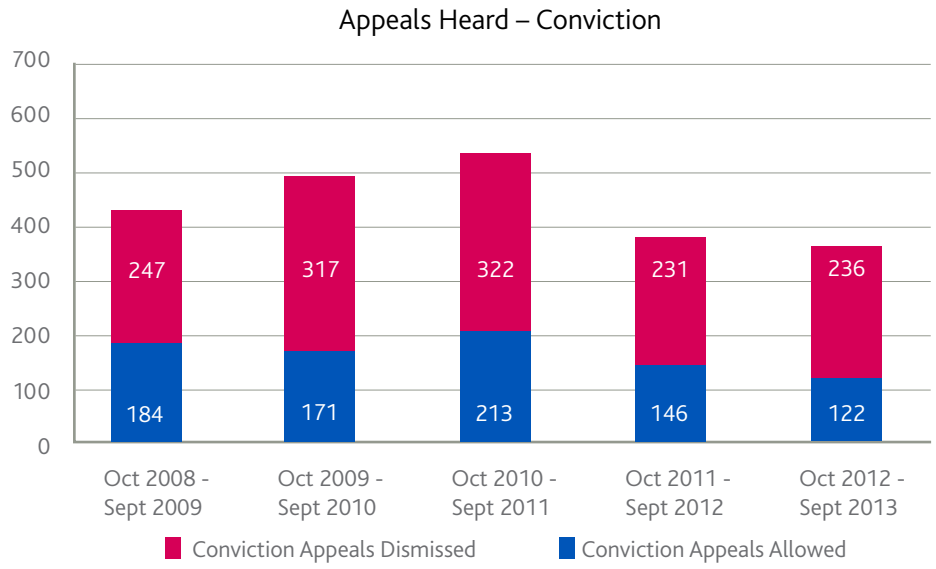


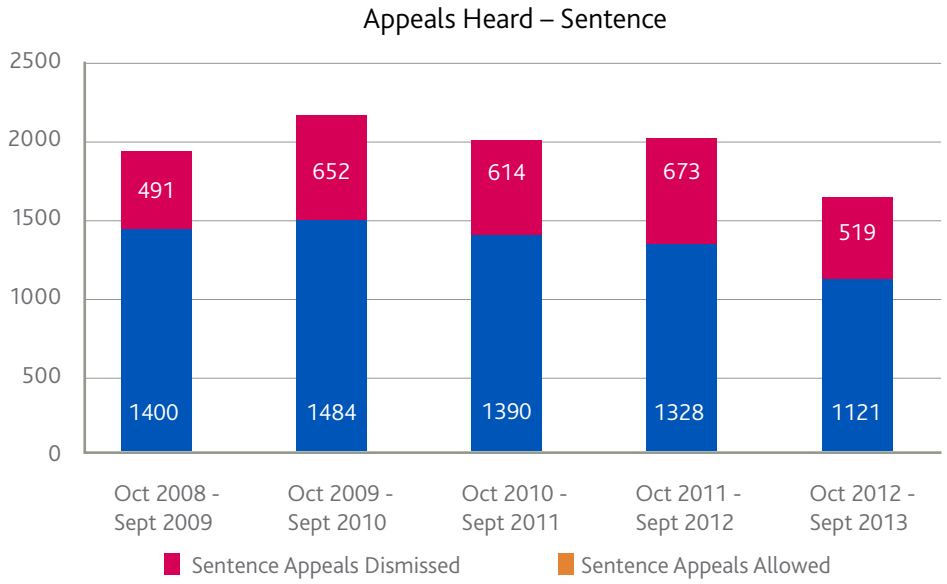
Section 31s – Conviction Applications dealt with



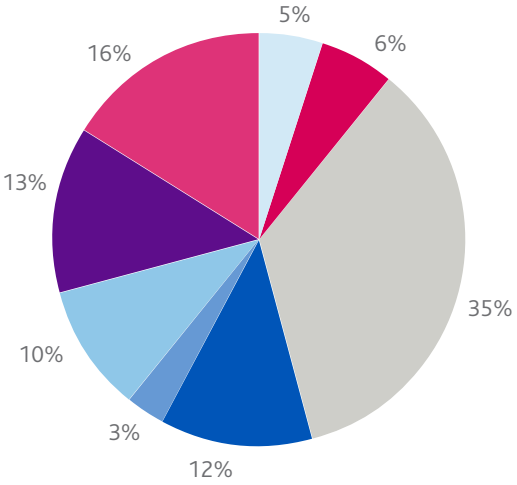
Section 31s – Sentence Applications dealt with



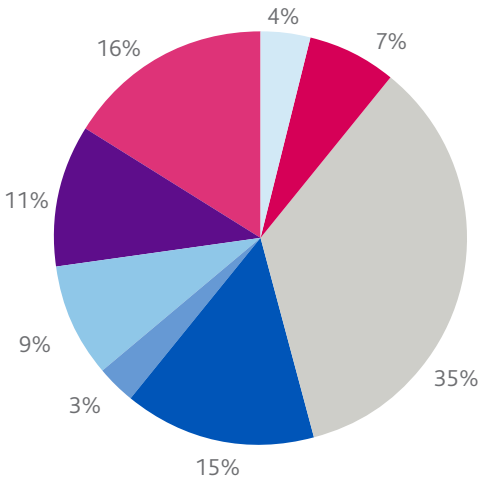

Appeals Heard – Conviction
700
600
500
400
300
200
100
0
247
317
322
231
236
184
171
213
146
122
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Oct 2011 - Sept 2012
Oct 2012 - Sept 2013
Conviction Appeals Dismissed
Conviction Appeals Allowed


Appeals Heard – Sentence
2500
2000
1500
1000
500
0
491
652
614
673
519
1400
1484
1390
1328
1121
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Oct 2011 - Sept 2012
Oct 2012 - Sept 2013
Sentence Appeals Dismissed
Sentence Appeals Allowed

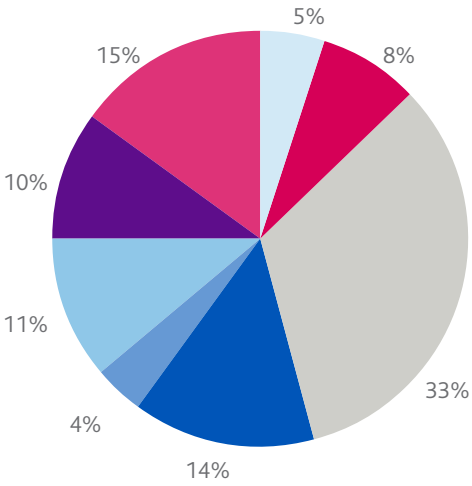
October 2008 - September 2009



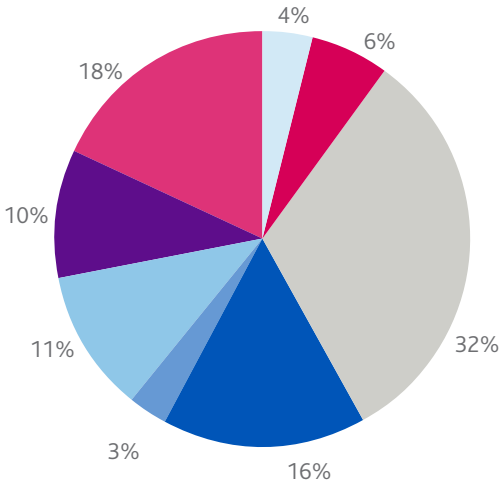
October 2009 - September 2010



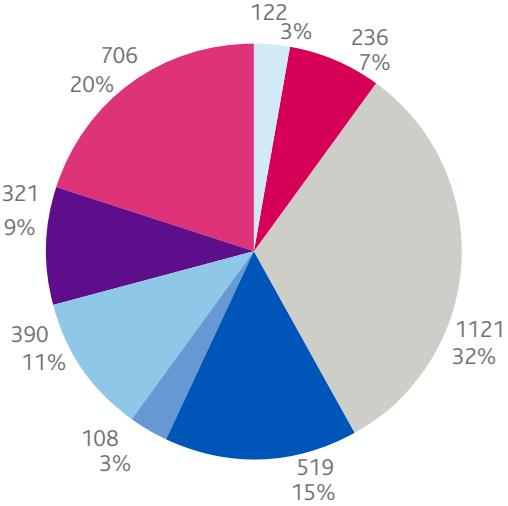
October 2010 - September 2011

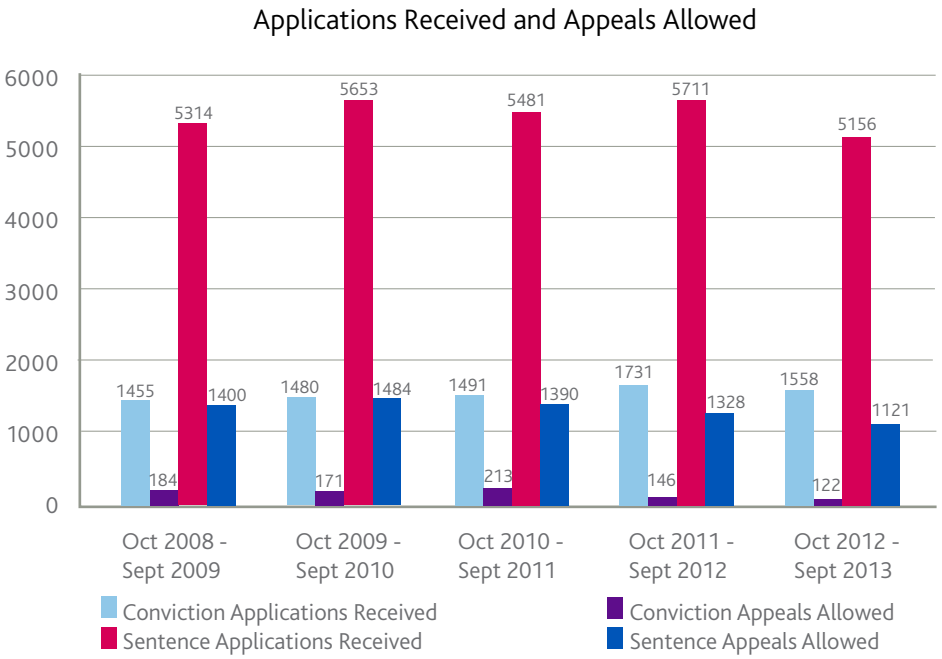


October 2011 - September 2012

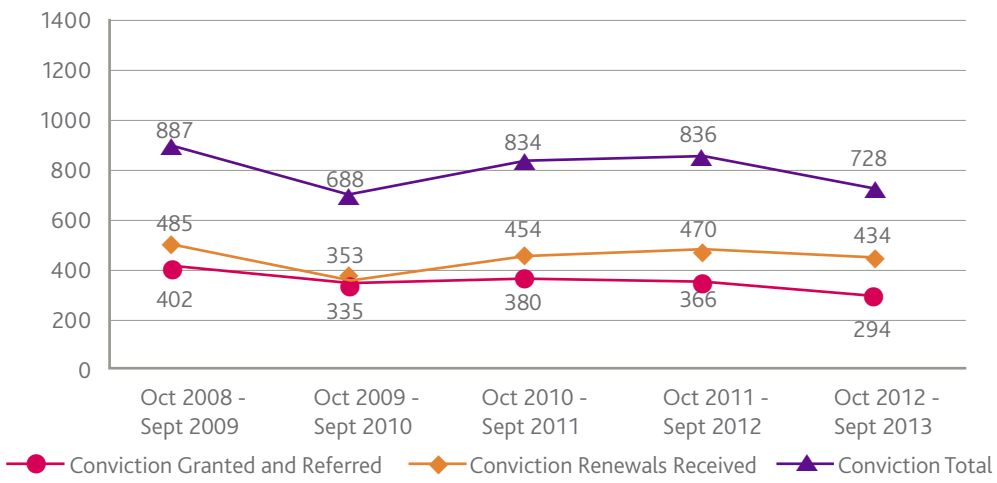


October 2012 - September 2013

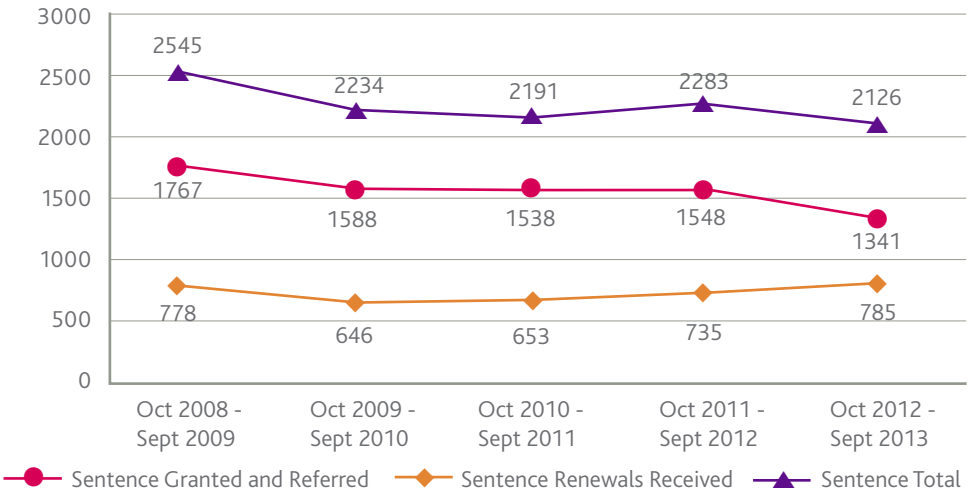



Applications Received and Appeals Allowed
6000
5000
4000
3000
2000
1000
0
1455
184
5314
1400
1480
171
5653
1484
1491
213
5481
1390
1731
146
5711
1328
1558
122
5156
1121
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Oct 2011 - Sept 2012
Oct 2012 - Sept 2013
Conviction Applications Received
Sentence Applications Received
Conviction Appeals Allowed
Sentence Appeals Allowed

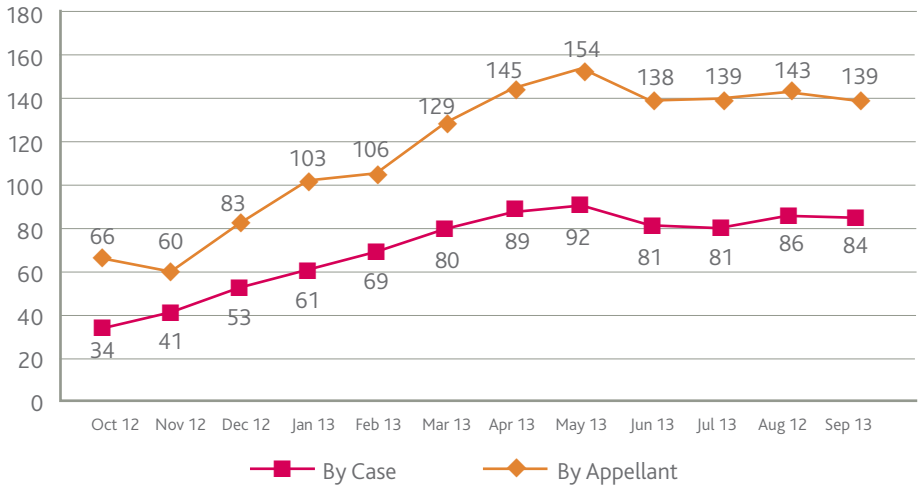
Applications Granted / Referred and Renewals Received (Conviction)



Applications Granted / Referred and Renewals Received (Sentence)



Conviction Old Cases – Outstanding over 10/13 months



Sentence Old Cases – Outstanding over 5 months