



## CRIMINAL BAR ASSOCIATION WINTER CONFERENCE

### KEYNOTE SPEECH

**Mrs Justice Cheema-Grubb DBE**

**24<sup>th</sup> November 2018**

1. I am doubly delighted to be speaking to you this morning. My first experience of the collective character of the criminal bar was in 1989 when the Head of the Chambers where I was doing pupillage, Michael Kalisher QC, invited me to a CBA meeting to present some statistical research I had done for him. I was struck by the qualities of friendliness, mutual respect, and dedication amongst those present, that impression was consolidated throughout my 26 years in practice and persists. The second reason is that the topic I am going to address is one of profound importance to many imprisoned people and their families and one for which this specialist organisation is in the vanguard.
2. I took part in the Cambridge Assizes earlier this year at the invitation of this Association. I was asked to respond to a paper given by (your past chairman) Francis Fitzgibbon QC in which he expressed disappointment at the lack of success in the Court of Appeal Criminal Division of out of time post *R. v Jogee* applications for permission to appeal in change of law cases. Amongst the excellent group of speakers that you have to look forward to this morning is Dr Beatrice Krebs, from whom you will hear an academic's analysis of recent case law in the field. But my contribution will be an attempt to provide some practical help to those of you who are instructed to advise convicted

defendants seeking to mount a challenge to the conviction in the Court of Appeal since a change in the law.

3. I have 5 keys to offer. They may be a helpful pre-application checklist. I cannot guarantee that the use of these 5 keys will inevitably unlock the door to a successful outcome, but I can promise that it will be a good start. And, as I did in Cambridge, I want to start by paying tribute to the role played by experienced advocates who fearlessly, and with skill and judgement advise on and present appeals before the Court of Appeal Criminal Division. We are all in the justice business. None of my generation of advocates and judges who were law students and young practitioners when the miscarriages of justice for the Guildford Four, the Birmingham Six, the Bridgewater Three, and others were exposed through the tireless persistence of the legal profession, is anything other than humbly aware of the potential fallibility of our systems. I encourage you to bring cases to the Court of Appeal Criminal Division's attention – we want your applications to be robust and persuasive. The court will allow any appeal where the criteria are met. Be in no doubt about that.
4. First, a brief introduction. In our jurisdiction the trial process is concluded with sentence. A right to appeal is not generally built into our system but must be justified on merit. Statutory time limits apply: s.18(2) Criminal Appeal Act 1968 requires that notice must be given within 28 days from conviction. By ss.(3) time may be extended either before or after it expires. How are such applications decided? The short answer is – with a degree of broad judicial discretion. Certainly, the court will have in mind the public interest in the finality of Crown court judgements, the interests of victims and other litigants, efficiency and good administration. These are all components that contribute

to the interests of justice, but the public interest also embraces the justice of the case and the liberty of the individual and so the underlying merits are inevitably critical in deciding whether to grant an extension of time (see *R v Thorsby* [2015] EWCA Crim 1, approved in *R v Welsh & Others* [2015] EWCA Crim 1516 and *R v Roberts & Others* [2016] EWCA Crim 71.)

5. An extra hurdle is present in the process of determining applications for leave to appeal out of time in “change of law” cases. The court will, only exceptionally, grant the extension of time – termed “exceptional leave to appeal out of time” – where persuaded that if it were not to do so, the applicant would suffer “substantial injustice.” This particular requirement has received much attention in the wake of the Supreme Court’s judgement in *R v Jogee, Ruddock v The Queen* [2016] EKSC 8, [2016] UKPC 7 (in which the Supreme Court restated the common law principles of joint enterprise, reversing the pre-existing law laid down in *Chan Wing-Siu v The Queen* [1985] AC 168 and *R v Powell, R v English* [1999] 1 AC 1). But this is not a new hurdle. There has been a need for exceptional leave to appeal out of time in change of law cases for many years. The Supreme Court did not anticipate that the approach of the CACD would be any different after this change (see para.100 of *R v Jogee*).
6. Let me draw our eyes back to some of those predicate authorities. An early example of the need for an extra hurdle to be negotiated was in *R v Lesser* (1939) 27 Cr. App. R. 69 where it was held that absent “special reasons” an application out of time would not be allowed. In *R v Cottrell & Fletcher* [2008] 1 Cr. App. R. 7 two otherwise unconnected cases following the decision of the House of Lords in *R v J* [2005] 1 AC 562, the court held that a “change

of law” in relation to sexual activity with underage girls as it had operated for virtually 50 years. *“It is artificial to pretend that the law was not changed, or to dress its impact in the jurisprudential disguise that the law had, in Blackstone’s word, been “discovered”.”* (para. 25.) The court stated (para. 42), *“these cases present issues of great sensitivity and latent tension. Those convicted on the basis of the old law assert that their convictions were based on an erroneous understanding of the criminal law and that they have therefore suffered an injustice. At the same time there is a continuing public imperative that so far as possible there should be finality and certainty in the administration of criminal justice. In reality society can only operate on the basis that the courts administering the criminal justice system apply the law as it is. The law as it may later be declared or perceived to be is irrelevant. Change of law appeals create quite different problems to those which arise in the normal case where an individual was wrongly convicted on the basis of the law which applied at the date of conviction. These tensions are not confined to England and Wales.”* The court summarised the position as follows: *“the general rule is simple. Without special or particular reasons an application for leave to appeal out of time on such change of law grounds will not be granted.”* (para. 45, cited with approval in *R v Welsh & Others supra.*)

7. So, the test post-*Jogee* is well-established and principled. As well as for joint enterprise and time bars on prosecution of unlawful sexual intercourse with a girl under 16 with the alternative charge of indecent assault (*R v J supra*), the need to obtain exceptional leave to appeal by satisfying the test has been required following appeals relating to the proportionate assessment of

confiscation orders (*R v Wya* [2012] UKSC 51) and, earlier, obtaining by deception (*R v Preddy* [1996] 2 Cr. App. R. 524). In *R v Hawkins* (1997) 1 Cr. App. R 234, a post-*Preddy* case, Lord Bingham CJ recognised that the test may “*on its face seem harsh*” but he went on to observe “*counsel submits – and in our judgement submits correctly – that the practice of the court has in the past, in this and comparable situations, been to eschew undue technicality and ask whether any substantial injustice has been done.*”

8. Whilst it is true that the principal is one developed by the courts, it does find its mirror in statute. Where an appeal against conviction has been referred by the CCRC on change of law grounds s.16C Criminal Appeal Act 1968 provides essentially the same test by referring to s.18 (3) a reference to the power to extend time to appeal.
9. So what amounts to substantial injustice? The court in *Jogee* cited *R v Mitchell* (1977) 65 Cr. App. R. 185 as an example. The judgment in *R v Goodchild (Kevin John) No.1* [1977] 1 W.L.R. 473 had concluded that the heads of cannabis plants did not contain cannabis because resin could not be extracted from them. Accordingly, possession of the flowerheads alone could not in law amount to possession of cannabis. At page 357 of the judgment in *R v Mitchell* the court said, “*if we were to refuse him the extension of time in which to appeal against conviction, we should be keeping him in prison, so to speak when we as a court were convinced that he had not committed an offence. That again is not an attractive proposition and it is one from which this Court resiles.*” (Another example is found in the conjoined applications of *R v Uthayakumar & Clayton* [2014] EWCA Crim 123 which concerned a clarification of the law by the Supreme Court in *R v Hughes* [2013] UKSC 56

as to defences available in death by driving cases, s.3ZB Road Traffic Act 1988.)

10. So, to the 5 keys. But first of all, do you know the door that you want to unlock? The court has given guidance in *R v Johnson & Others* [2016] EWCA Crim 1613. How strong is your argument that a case prepared, prosecuted, defended, and summed up consistently with the changed law would have made a difference to the verdict? So, if D participated in a crime of violence with P which the jury concluded it involved use of a weapon, and during that crime P killed, then the inference of participation with intent to cause really serious harm is strong. And remains so. By contrast, where D joined P in a crime not involving intended violence during which P killed it might be easier to demonstrate substantial injustice. The court will also have regard to whether the defendant admitted, or must be guilty of, other though less serious criminal conduct. The key is being able to demonstrate the difference which the change of law makes to the way in which the case would be prepared, prosecuted, defended and summed up today. *R v Crilly* [2018] EWCA Crim 168 is (so far,) the only example of a successful application in which the court granted a 12 year extension of time and allowed the appeal against conviction on post-*Jogee* change of law grounds. A retrial was ordered and subsequently the Crown accepted a plea of guilty to manslaughter. In her judgement, the VPCACD said, “*there is one principal reason for those conclusions and that is the extent to which the applicant’s case was perfectly properly, as the law then stood, presented to the jury as one of foresight. He was in a very different position from that of his co-accused. He was not accused of inflicting the violence and he was not accused of intending to*

*cause grievous bodily harm himself. The case as presented to the jury was to all extents and purposes....on the basis of foresight.”*

11. The 1<sup>st</sup> key to the door is the preparation of a clear chronology. A perfect chronology, at least as far as this judge is concerned, is one that has cross-references to the rest of the material in your appeal bundle.
12. The 2<sup>nd</sup> key is the gathering of all relevant judicial material such as the written legal directions (or a transcript of them) and the Route to Verdict. Although it will not always arise in the type of appeal we are discussing, recent judgements (such as *R v James & Others* [2018] EWCA Crim 285) emphasise the particular diligence and care required by advocates considering pursuing grounds of appeal said to have been missed by trial lawyers. If privilege is waived, an Advice on Appeal provided at conviction may be extremely helpful.
13. This relates to the 3<sup>rd</sup> key, providing sufficient but not necessarily comprehensive notes of the way the case was opened, the relevant prosecution evidence for the Crown at trial, the relevant defence evidence if any and at the very least, the factual summing up. NB the Registrar for Criminal Appeals will only authorise those transcripts which she considers relevant: transcripts are expensive, and resources are thin. It should be possible for you to obtain this material without reliance on transcripts. If relevant, the applicant's evidence should be supplied with the significant parts highlighted. This was an important feature in *Crilly's* case and the judgement referred to and quoted significant passages.
14. The 4<sup>th</sup> key is an analysis of how the change of law would have made a difference to the directions and questions for the jury to resolve. This is the

heart of your application. In particular, you must analyse the factual findings the jury must have made in light of the verdict as set against the judge's directions. That is what the single judge, and then the court will do. This analysis should be pithy and pertinent to the test: it is essential to show the court how a different set of legal directions (consistent with the changed law) would have made a conviction unlikely. In a multi-handed case a realistic assessment of the type of crime envisaged by the applicant as compared with what actually happened is vital. In *R v Crilly* the crucial and valuable distinction between the way the case was put against him as opposed to his co-defendants, won the day. This is not an invitation to the court to speculate about the jury's reasoning. Your argument must be supported by an incontrovertible rationale.

15. Encapsulating the continuing impact of the conviction is the 5<sup>th</sup> key. This may be self-evident in murder cases, or where the sentence is still being served but it will need to be addressed in every case including those where convictions or pleas to other offences were part of the picture. In *R v Ordu* [2017] EWCA Crim 4, not a homicide, the court did not grant an extension of time recognising that if it did, "*the conviction will probably be found to be unsafe.*" (Para. 32). The court stated that "*as Mitchell makes clear, the continuing impact of a wrongful conviction on an application will be highly material in determining whether its continuation involves a substantial injustice.*" (Para. 20). In that case *Ordu* had lived through all the adverse consequences of his conviction and a successful appeal would not have remedied the unpleasant memories which were, by then the only legacy. Quashing the conviction would have made no real difference to his life, it was impossible to say that a



substantial injustice would occur if the appeal was not allowed to proceed. By contrast, in the recent case of *R v GS* [2018] EWCA Crim 1824, a people-trafficking case, the risk posed by the conviction to the applicant's immigration status would constitute substantial injustice. However, in the particular circumstances of that case the conviction could not be said to be unsafe and the extension of time was refused because it would be futile to grant it. I can be clear that the length of the extension of time within which to make an application for permission that is sought, is not a relevant feature, except insofar as it limits or extinguishes the impact of the conviction. So, collect your keys and make your applications: I do not doubt that there will be more successful appeals in this area.

16. I have been immensely proud to be a member of the criminal bar. Particularly as Treasury counsel I saw absorbing and stretching cases and worked with, and in opposition to, colleagues of the highest order. Earlier this year in Beijing I played a part in training its Supreme Court judges on our modern slavery and human trafficking legislation. You may all know that the role of those representing individuals charged with serious offences in China is very different from the fearless and robust testing of every disputed charge that we have in this country. From this side of the bench in the last three years I have sat on serious multi-handed cases which are an opportunity for counsel to display their talents like no other forum. I have been struck in every case by the quality of the professional work done by the criminal bar and I want to pay tribute to it. Citing my own examples would be invidious because somebody would identify the individuals concerned, so I asked some of my judicial colleagues for their experiences, entirely anonymised. But I am probably

speaking about you or someone that you know, and I hope that this necessarily small selection just helps to lift your heads because I know that there are many reasons why you might be bowed down.

17. In a case from the North, criminal barristers on both sides of a child cruelty case showed sensitivity by meeting the children before commencing. When they children asked if they could be in the same room as the advocates during the s.28 pre-recording so they could understand the questions more easily, counsel agreed with alacrity. Without needing further directions, they took little child seats in the video room (like the child), abandoned their laptops and got on with it, helping the children when it was obvious they were struggling to understand (there were language difficulties too), by re-phrasing or encouraging the child to use other words. All the while securing good quality evidence.
18. Praise is due to those barristers, who recognise how difficult it is for a conscientious judge doing a long PTPH list and who go to the trouble of writing helpful notes on the DCS to assist the judge preparing for his day.
19. Late returns persist as a challenge to the criminal bar. Judges told me of hastily convened conferences with police, and discussions between counsel and witnesses which lead to re-vamping of Openings or the indictment. The same applies where CPS reviewing lawyers have not bent their minds to disclosure. Sensible hard-working counsel have spent weekends or nights reviewing material to keep the show on the road, to take up the slack from other agencies, often with no extra payment. I quote one Midlands judge, "*the gold standard service provided by the Bar which allows most trials to*

*proceed smoothly is provided by barristers using their own time and resources.”*

20. In another example from closer to where I stand, disclosure in a historic sex case was wanting. Counsel worked overnight to ensure all obligations were fulfilled and kept the trial going. We all know how errors of this sort can be catastrophic.
21. In an appeal against sentence in a death by dangerous driving case the Crown had failed to instruct counsel despite indicating they wished to be represented. The case was adjourned until 2pm by which time alternate counsel, from the same circuit, some distance from London, had been found, picked up the case and was ready to go. It was seamless, he was on top of the brief and made full submissions on behalf of the Respondent.
22. In a particularly complex gangland murder appeal where the appellant was extremely suspicious of the actions of the prosecution and the police, counsel on both sides dealt with each other in a spirit of transparent co-operation which reassured the appellant.
23. Whilst it should not be routine, when unusual circumstances mean that work has to be done extensively at weekends and late at night, we all have experience of the very high level of commitment often shown by counsel, eg through the exchange of emails between the parties into the early hours, especially in the most serious cases.
24. In an aggravated burglary with a very distressed and vulnerable complainant counsel for one defendant was professionally embarrassed after cross-examination was completed. Initial counsel, solicitors or chambers could not

assist in obtaining new representatives, but the same day, co-defending counsel and solicitors found a separate firm and counsel able to take over. They helped create a trial bundle and co-defending counsel took it to the new team himself that day. Prosecution counsel contacted them and talked through it all. The court arranged a conference in the cells. The trial recommenced with 1 1/2 days' break without the upset witness having to be recalled. All this is noticed. Your work is appreciated, and you are valued.

25. And finally, I want to applaud the criminal bar on its approach to vulnerable witness training. In 2016 the Inns of Court College of Advocacy (ICCA), supported by the Bar Council and CBA, established a pan-disciplinary working group under the chairmanship of HHJ Peter Rook QC to design and build what is now the "Advocacy and the Vulnerable" course. The course was then developed with the assistance of section 28 Pilot Judges, leading QC's and senior juniors, and a number of experts in child and vulnerable witness questioning. The course is being delivered via the Inns, the six Circuits and individual chambers. 366 unpaid specially trained facilitators, mainly drawn from your number have helped and so far, (over the past 18 months) approximately 4000 members of the bar have benefited from that training, all delivered without charge.

26. The training uses a realistic case study of an historical sex case; films and podcasts; expert input about child development & current awareness. You undertake 4-6 hours of preparation, including drafting three sets of cross-examination. You then attend a 3 hrs face-to-face session where questions construction, signposting and specialist advocacy techniques are honed.

Finally, you view five films demonstrating best practice and the role of registered intermediaries.

27. I am particularly proud of all this because I had a small part to play in the genesis of this work when I chaired the Advocacy Training Council's working group which produced the "Raising the Bar – The Handling of Vulnerable Witnesses, Victims and Defendants in Court" Report in 2011.

28. The judge now in overall charge of this, HHJ Simon Drew QC told me, "*The criminal bar needs to be congratulated for the way they have set about learning a new set of skills; in particular how to cross-examine vulnerable witnesses. It is difficult, and I think the general view of the judges is that most people are trying very hard to improve and get it right.*"

29. Amen to that. Keep up the good work.