

SGK LLP

SHAW GRAHAM KERSH — CRIMINAL DEFENCE SOLICITORS

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Appeals and Analysis

Issue 1 · September 2026

Inside this issue

Six appeals from the Court of Appeal Criminal Division — poor representation at trial, the sentencing of children in the “Fordingbridge” case, abuse of process, voluntary intoxication, fitness to stand trial, and an unlawful IPP sentence.

As recognised by:



CONTENTS

<u>A note from the Editor</u>	3
<u>1. Case Analysis – Ahmed – Poor representation, fairness and safety</u>	4
<u>1.1 First instance proceedings</u>	4
<u>1.2 The grounds of appeal</u>	5
<u>1.3 The amended grounds of appeal</u>	6
<u>1.4 Enquiries pursuant to McCook</u>	6
<u>1.5 The CACD’s approach</u>	7
<u>1.6 Observations</u>	8
<u>2. Case Summary – “Fordingbridge” – Sentencing children</u>	9
<u>2.1 The facts</u>	9
<u>2.2 The sentence hearing</u>	10
<u>2.3 The aftermath</u>	12
<u>2.4 The appeal hearing</u>	12
<u>3. Appeal Cases of Interest</u>	15
<u>3.1 HGF [2026] EWCA Crim 570</u>	15
<u>3.2 Bottarelli [2026] EWCA Crim 383</u>	17
<u>3.3 Wood [2026] EWCA Crim 480</u>	22
<u>3.4 Haycock [2026] EWCA Crim 1105</u>	24
<u>About SGK LLP</u>	27

A NOTE FROM THE EDITOR

Welcome to Shaw Graham Kersh LLP's first edition of "SGK - Appeals & Analysis".

SGK launched its Appeal Department on 1 June 2026 with the aim of building out the firm's appellate practice and to take more cases to the Court of Appeal, Criminal Division (CACD), the Criminal Cases Review Commission (CCRC) and the Supreme Court where relevant.

Every quarter, we will provide our analysis of an appeal case with a focus on other wider aspects of the judgment, a detailed summary of an appeal which generated particular attention and summaries of other appeals of interest.

Our case analysis in this issue looks at Ahmed which concerns the impact of poor representation at trial. This appeal was decided in 2024 when the convictions were quashed, however, reporting restrictions were in place until the outcome of the retrial which was decided recently (prosecution offered no evidence).

Our detailed summary focuses on the so-called "Fordingbridge case" in which community sentences for sexual offences committed by children were challenged as "unduly lenient" by the Attorney General. The Court quashed the sentences for two of the child respondents and resented both to DTOs. The case generated huge attention - almost all negative - and remains highly controversial. Those who acted should be commended for their hard work in highlighting the unique sentencing principles relevant to children, the most vulnerable individuals in our criminal justice system. Notwithstanding the outcome, this case serves as a reminder of those principles.

The other appeals summarised are really interesting. They are also noteworthy in that they were brought before the CACD by a wide range of appellants: the prosecution; fresh representatives; a litigant in person who the Registrar went on to grant legal assistance; a parole board solicitor acting with counsel challenging an IPP sentence.

A quick note relating to proposed reform - the Law Commission's wide-ranging consultation on criminal appeals closed on 27 June 2025. The responses have been analysed, and the Commission is in the process of developing policy and drafting their final report. Due to the need to consider the impact of the Courts and Tribunals Bill (we now wait to see how our new Prime Minister will approach the more controversial aspects of the Bill), publication of the final report is now scheduled for early 2027. A stand-alone report on compensation and support for the wrongly convicted will be published by the end of 2026.

Recent notorious miscarriages of justice serve to remind us that that our criminal justice system is fallible. The Supreme Court's critique of the CACD's approach to confronting legal error in the case of Hayes and Palombo is striking. This followed Chris Henley KC's criticisms of the CCRC in his independent review of the CCRC's handling of the Andrew Malkinson case. We all must strive to do better to ensure that justice prevails. When it does not, our appeal system must intervene and restore justice. Mistakes should be addressed. Lessons must be learned. Where there has been fault there must be accountability. This coupled with reform is the key to a more robust system that will work for all.

Claire Bostock

Partner and Head of the Appeal Department at SGK LLP

1. CASE ANALYSIS

Poor representation, fairness and safety

In the case of Ahmed [2024] EWCA Crim 1372, (Lord Justice Warby, Mr Justice Goose and His Honour Judge Flewitt KC) trial counsel lodged an appeal against conviction arguing the trial judge's rulings in relation to applications made by the defence were wrong. The single judge granted leave but directed the Registrar to instruct fresh counsel who developed and expanded the grounds and submitted that cumulative failures by trial counsel rendered the trial unfair and the conviction unsafe. The CACD granted leave in relation to the revised grounds, considered them and quashed the convictions and ordered a retrial. Reporting restrictions pending the retrial were ordered. In the event, the prosecution offered no evidence, and the reporting restrictions were lifted.

In April 2023, the appellant was tried at Cardiff Crown Court and acquitted by the jury of counts alleging indecent assaults x 4 contrary to section 14(1) of the Sexual Offences Act 1956 against one complainant and found guilty by majority verdicts of three counts of rape contrary to section 1 of the 1956 Act against a separate complainant. He appealed against those convictions with the leave of the single judge on two grounds on the basis that they were unsafe because cross-examination of the second complainant (C) was wrongly curtailed, and the jury were wrongly deprived of the opportunity to consider other relevant evidence.

■ 1.1 First instance proceedings

The rape allegations were reflected in an indictment containing three single-counts of rape, each on different unspecified dates between C's 13th and 15th birthdays.

The prosecution case was that the rapes took place when C, born in 1983, worked at a shop owned and ran by the appellant between 1997 and 1998. In March 2020, the complainant made the allegations. In June 2020, she gave a video recorded interview. The prosecution relied on an edited version of the recorded interview at the trial. The complainant described her life as manic at the time. She hated being at home, rarely went to school, and was drinking a lot. She said that she worked mostly at the weekends. Medical records showed that she had taken a drug overdose and was taken to University Hospital of Wales in 1998. This was on the day after her 15th birthday. This became an agreed fact. The prosecution case, as opened to the jury, was that C had carried out the suicide attempt "effectively to put a stop to what the defendant was doing to her ..." and she had then decided never to go back to the shop.

The defence case was that the allegations were untrue – fabricated. The appellant gave evidence at his trial. He said C had worked for him for only two or three weeks.

The issue for the jury was whether they were sure that C's allegations were true.

In the course of cross-examination, the defence made two applications which went on to form the basis of the subject matter of the appeal.

The first was made orally and without written notice and on the footing that it fell under section 41 of the Youth Justice and Criminal Evidence Act 1999 which prohibits questions being asked about a complainant's "sexual behaviour" without the leave of the Court and restricts the circumstance in which leave can be given.

Social service records, dated 15 February 1999, were relied upon and the defence sought leave to cross-examine C about an allegation recorded that she had been “sexually assaulted” by her mother’s boyfriend, B. Defence counsel pointed to a passage in C’s recorded interview in which she had said that at the time of the alleged rapes in relation to the appellant she used to drink “to blot out other memories”. Defence counsel wanted to name B and to ask C if the bad memories included him [B], and whether those could explain her suicide attempt. The application was refused. The judge determined that C could be asked a general question about whether the reason she had taken an overdose was because of other “bad memories”. Such a question was asked and she denied this.

The second was in writing, pursuant to section 100 of the Criminal Justice Act 2003, and two parts:

- In 2000 and 2001, C had contact with the Youth Offending Panel and National Probation Service as a consequence of convictions and she had not made any complaint about the defendant at this time despite the obvious opportunity to do so. The application was conceded by the prosecution and granted by the judge who went beyond what was sought concluding that a 2001 conviction for four counts of securing the remission of a liability by deception could be put before the jury.
- In 2019, C assaulted her neighbour, N, causing actual bodily harm. She was charged in June 2020. She initially denied the offending portraying herself as a victim not a perpetrator but then changed her plea to guilty in May 2021. In June 2021, she received a suspended sentence of imprisonment. C’s complaint against the appellant, in March and June 2020, had been made when she was facing criminal proceedings relating to N and her defence wanted to explore this with her. The written application was also advanced on the basis that defence wished to seek to undermine C’s credibility by suggesting that her allegations against N were false. In light of the guilty plea, an acknowledgment of culpability - this line of argument was abandoned. The judge refused the application.

■ 1.2 The grounds of appeal

The grounds of appeal were lodged by trial counsel. He submitted that each of the rulings was wrong, that each deprived the jury of information which ought properly to have been considered, and that the cumulative effect was to undermine the safety of the appellant’s conviction.

The Single Judge, Yip J DBE, said she was “not impressed by the grounds of appeal as drafted” but having considered the trial transcript she had some concerns about the way the applications were made and dealt with at the trial including the “dynamics” of the relationship between the judge and counsel for the appellant. She considered the issues may not have received sufficient attention at the trial and that the case merited review by the full Court. As regards to the allegations about B, the SJ commented that no attention had been paid to the following passage:

“normally ... questions or evidence about a failure to complain about the alleged assault, which is the subject matter of the charge, while complaining about other assaults, are not ones “about” any sexual behaviour of the complainant. They relate not to her sexual behaviour but to her statements in the past or to her failure to complain.

The Single Judge directed the Registrar to instruct fresh counsel. Mr Wainwright was instructed and he reviewed the perfected grounds, applied to amend those grounds as necessary and applied for leave to adduce fresh evidence.

■ 1.3 The amended grounds of appeal

In relation to ground one - the complaint about B - this was developed and expanded. Reliance was placed on:

- Additional disclosed unused material not deployed by trial counsel, namely police records. In summary: the complaint about B was that he raped her in 1995; C complained to her mother about B three months after her suicide attempt; her mother called 999 and reported the alleged rape by B to the police; C said she wanted to make an official complaint against B; she then resiled from/withdrew her support. This matter was NFA'd.
- A section of the recorded interview edited out of the version before the jury – relating to C not telling her mother [about the appellant] due to a previous incident [relating to B] which she had reported and in relation to which she was not believed.

It was submitted this was all relevant, not in the narrow way originally advanced at trial and pursuant to Section 41, but in the following three ways:

- The alleged rape by B provided a credible alternative explanation for the suicide attempt in a way that “bad memories” which were explored during cross examination could not. It was highlighted that the trial judge had been told, in relation to B, that the allegation concerned a sexual assault not a rape and section 41 was engaged in this specific context (see below).
- The evidence showed C working in the shop after the suicide attempt which cast doubt upon the alleged nexus with this and the alleged conduct of the appellant [she had indicated this is what stopped her from working in the shop].
- C had a clear opportunity to report the allegations against the appellant along with her complaint about B but did not: the alleged rape by B was said to have taken place in 1995; C took a drug overdose in 1998 and three months later she complained to her mum about B; her mum called the police; C did not complain to the police about the appellant at this time and the rapes he was alleged to have committed during the indictment period 1997 – 1998 even though she had a clear opportunity to do so and she made them in 2020 one year after making false allegations about her neighbour N.

The thrust of the appellants case was that C may have been mistaken about the true cause of her suicide attempt - she transposed the reason for that attempt from alleged sexual abuse committed by B to alleged sexual abuse by the appellant. Reliance on the complaint about B for this purpose would involve questions or evidence “about the sexual behaviour of the complainant” within the meaning of section 41: see *BJK* [2024] EWCA Crim 667 [33] [34]. The statutory restrictions would apply. Mr Wainwright submitted, however, that on a proper analysis such questions would be permissible under section 41(3) or (5) and that the Court’s discretion to grant leave would or should be exercised.

In relation to ground two - it was submitted that the second limb met the test of dishonesty due to the repeated false allegations about N and the account of N and his wife revealed bizarre behaviour by C. These were matters not confined to what was initially argued, namely that contact with the relevant agencies provided C with yet another opportunity to complain about the appellant.

■ 1.4 Enquiries pursuant to McCook

McCook enquiries were conducted. Criticism of the trial advocate was made, and the trial advocate was asked to comment on the accuracy of the grounds and to explain the reasons for not applying to adduce the material identified and whether the appellant was consulted.

■ 1.5 The CACD's approach

The Court noted that it is slow to allow appeals against conviction based on complaints about the conduct of the appellant's trial representatives and that as a general rule, grounds of this kind will succeed only if the course of action adopted fell outside the bounds of what a reasonably competent lawyer could have done in the light of the information available at the time, and it led to some identifiable error or irregularity that itself undermined the fairness of the trial or the safety of the conviction; second thoughts or second guesses about reasonable tactical decisions will not be enough: *Day* [2003] EWCA Crim 1060 [15].

The Court found that the grounds of appeal in this case identified multiple points that could have been taken at trial on the basis of material that was available to the trial advocate and concluded that each of the points was a cogent one. Some were taken but pursued in a way that was justly criticised as narrower and weaker than they should have been. Some of them were taken but then not pursued. Others were not taken at all. None of this was said to have been guided by tactical considerations or client instructions. Much of it was unexplained. The Court had no satisfactory explanation for any of it. It may be that none of the criticisms would, alone, have carried sufficient weight but their cumulative effect convinced the Court that the conduct of the defence case at trial was so deficient that these convictions could not stand.

The Court found that section 23 was met in relation to the fresh evidence noting that the factors in the section were not decisive. The Court indicated that safety was the question, not whether the jury might have reached a different conclusion, although it did state that "we can consider that issue".

In relation to ground one: the reporting of the rape allegations (point 3 above), the Court concluded this was relevant but did not engage section 41 and that as a matter of law questioning and evidence was permissible without the leave of the Court. There was a clear opportunity to report the appellant to the police. No attempt was made to cross examine her in this context. No explanation was given as to why.

The Court noted in evaluating the significance of this omission, that an application for leave to cross-examine C about other later opportunities to complain was made and granted and she had conceded that in general terms she has been in contact with authorities with whom she could have made such a complaint. However, events in 1998 were qualitatively different. This opportunity to complain was much closer in time to the period in which C alleged she was being repeatedly raped by the appellant. In this context, the Court noted this "... to be a striking feature of the case of which the jury should not, on a proper analysis, have been left in ignorance".

Turning to whether the defence could have questioned C regarding the rape allegations (point 1 above), the Court found that this bore on the point relating to "bad memories" and whether the defence ought to have been allowed to ask about this in the context of B and the suicide attempt – this should have been the subject matter of a section 41 application and reliance should have been placed on the other records. The purpose would not be to impugn C's "credibility as a witness" but to rebut or call into question the reliability of a specific aspect of her evidence, namely that her sexual experience of being raped by the appellant accounted for her suicide attempt. In light of the unsatisfactory *McCook* responses, the Court concluded this was overlooked.

In relation to ground two: bad character, whilst C was cross-examined regarding timing (part i), with respect to the neighbour incident (part ii), the intention behind the application had been to put to her that she had made false allegations against her neighbour N, and this lent support to the appellant's case that C's allegations against him were also false. Inexplicably this point was abandoned. C's credibility was central to the case. Considering matters in the round, the CACD found that had the application been pressed given the significance of the complaint against N and had the other evidence relied upon by fresh counsel that C was motivated by outlandish theories about Satanic behaviour in N's household that the application would have been and should have been granted.

The conviction was quashed and a re-trial ordered.

■ 1.6 Observations

The judgment is interesting for a number of reasons.

First, the reference to section 23 of the Criminal Appeal Act 1968 (admission of fresh evidence) with the Court noting that what is set out under the section is not decisive. In other cases, the CACD has approached this section and the factors set out, to include that the evidence must be capable of belief and that there must be a reasonable explanation as to why it was not presented at the trial, as strict hurdles which must be overcome. This approach has been criticised by lawyers and academics. The factors set out should in accordance with the statutory framework be approached as considerations which are not "decisive" and that ultimately it is "the interests of justice" that should determine admissibility. The Law Commission is considering section 23 as there is a need to ensure the test is applied properly and consistently in order to make it easier to correct wrongful convictions when fresh evidence emerges.

Secondly, the CACD reaffirmed that when fresh evidence is admitted the question is whether it affects safety, noting in this context that the question is not whether the jury might have reached a different conclusion but that the Court can consider this. Leading practitioners and others have consistently argued that the Court must apply the jury impact test which has systematically been watered down and undermined by the CACD. In short, rather than the Court giving its own subjective view, an evaluation of how a reasonable jury might approach the new evidence is what is required thereby allowing a fresh jury to consider this. The Law Commission is considering the test, its application and proposed reform.

Thirdly, in *Brooker* [2024] EWCA Crim 103, fresh representatives acting on behalf of the appellant submitted that that poor representation by his trial advocate had caused an unfair trial and an unsafe conviction. His appeal was dismissed notwithstanding that that Mr Brooker had as the CACD found been poorly represented. In *Brooker*, the Court ultimately did not consider the impact of poor representation on fairness and safety as they found that the conviction was safe as tactical decisions had been made with the appellant's participation and in effect that Mr Brooker was, in his appeal, attempting to have another bite of the cherry which the "one trial policy" does not allow. There was disquiet amongst appellate lawyers with the Court's reasoning in *Brooker* and when set in context with the CACD's reluctance to interfere in appeal cases where poor representation is alleged. However, in *Ahmed* the Court was willing to consider the cumulative impact of the errors and failings of the defence and to link this to fairness and safety. Where there is such a nexus *Ahmed* does show that poor representation remains a viable ground of appeal.

Finally, the approach of the Single Judge in directing the Registrar to instruct fresh counsel is noteworthy.

2. CASE SUMMARY

“Fordingbridge” - sentencing children

In the case of X, Y and Z [2026] EWCA Crim 845, or the so-called “Fordingbridge case” as it has become known, Fordingbridge being the locus in quo, the CACD (Lady Carr of Walton-on-the-Hill, The Lady Chief Justice of England and Wales, Lord Justice Edis the Vice President of the CACD and Ms Justice Norton) considered the sentences imposed on three child defendants in the Crown Court following a reference by the Attorney General pursuant to the unduly lenient sentencing provisions at section 36 of the Criminal Justice Act (1988).

On 5 March 2026, the defendants X, Y and Z were convicted of offences after a lengthy 29-day trial. Each had pleaded guilty shortly before trial to offences of taking indecent photographs of a child contrary to section 1(1)(a) of the Protection of Children Act 1978. X pleaded guilty to four such offences, Y and Z to one.

On 21 May 2026, sentencing for all offences and all three defendants took place.

■ 2.1 The facts

The offending – which all three deny and who are pursuing appeals against convictions – involved two incidents which took place on two separate occasions involving the complainant C1 and C2 who were not known to each other.

On 26 November 2024, C1 who was just passed her 15th birthday at the time was raped by X - 14 years of age at the time, and Y – also 14 years at the time. Both were 15 when convicted and sentenced.

On 17 January 2025, C2 who was 14 years at the time was raped by X, still 14, and Y, still 14, in the presence of Z, aged 13 at the time who assisted or encouraged the commission of the rapes perpetrated by Y with the necessary intention.

C1 - had previously been the victim of serious sexual offending, said she had met X on Snapchat. X asked if she would be his girlfriend – she thought it was a bit early but agreed to meet him. Y was present. There was a consensual sexual incident between C1 and X in the absence of Y (oral sex) and after this Y and another boy arrived and joined C1 and X. In the presence of Y and the other boy, C1 was orally raped by X which was recorded by Y. Y then orally raped and vaginally raped C1. They were at the Fordingbridge underpass where events took place for some 90 minutes. C1 later became aware the footage had been shared, and she received messages saying she was a slag.

C2 - went to the recreation ground at Fordingbridge with friends, said she had been forced at knife point to walk to the recreation ground. This was disproved by CCTV which captured her hugging and kissing X prior to the offending. C2 and X had oral sex which was recorded by Y - both X and Y were acquitted of rape in relation to this incident. X then vaginally raped C2. Y recorded this. Later after X went home footage recovered from Y's phone showed Y orally raping C2 whilst Z showed his erect penis. Other footage showed Y vaginally raping C2. These events took place in the dark.

■ 2.2 The sentence hearing

At the sentence hearing, VPSs by C1 and C2 set out the devastating consequence on them following the events. This was supported by other evidence.

There was also a wealth of information about X, Y and Z presented to the judge. In summary:

- X had been out of full-time education since he was 10. Psychological evidence was that he was immature and had a potential neurodevelopmental disorder, namely ADHD affecting thinking, impulse control and understanding;
- Y stopped attending full-time education when he was in year 4. Psychology assessment found that his IQ fell in the extremely low range. He was noted to have traits of ADHD and autistic traits.
- Z had no previous convictions, cautions or reprimands. He had a confirmed diagnosis of ADHD with dyslexia. He was home educated and had behaviour difficulties.

The prosecution and defence prepared sentencing notes – the CACD was critical of the note prepared by the former.

The Guidelines which were relevant and which the judge considered were:

- The overarching guideline, “Sentencing children and young people” in force from 1 June 2017 – “the Principal Guideline”.
- The guideline, “Sexual offences, Sentencing children and young people”, in force from 1 June 2017 - “the Child sexual offences guideline”.
- The guideline “Totality”, in force from 1 July 2023.
- The guideline “Reduction in sentence for a guilty plea - first hearing on or after 1 June 2017”, in force from that date.
- The guideline “Rape”, in force from 1 April 2014. This applies to offenders over the age of 18 – the “Adult rape guideline”.
- The guideline “Possession of indecent photograph of child/ Indecent photographs of children”, in force from 1 April 2014. This applies to offenders over the age of 18. Despite its name, this guideline applies to production of such images as well, which is what happened in this case. The images concerned resulted from filming of the rapes - the “Adult indecent image guideline”.

The judge referred to one further guideline, “Sentencing offenders with mental disorders, developmental disorders, or neurological impairments”. As the CACD pointed out, this does not apply to children. This appears from a drop-down section accessed by clicking on “Applicability” when viewing this guideline. It says:

“In accordance with s.120 of the Coroners and Justice Act 2009 (CJA 2009), the Sentencing Council issues this definitive guideline. It applies only to offenders aged 18 and older, who are sentenced on or after 1 October 2020, regardless of the date of the offence. This guideline must not be used for offenders under the age of 18, as mental health and related issues can be substantially different in both diagnosis and impact for children and young people. Courts should instead refer to the Sentencing children and young people guideline, particularly sections 1.11 to 1.14.”

The CACD also noted that this is pointed out twice in the Bench Book “Child Defendants in The Crown Court”, although it does not seem to be mentioned in the “Youth Court Bench Book”.

The trial judge made the following findings of fact:

- C1 had consensual sexual activity with X prior to any offending behaviour.
- C2 had not been forced at knife point to go with the offenders and participate in nonconsensual activity. An implement may have been used to cut her leggings.
- C2 had consensual sexual activity with X prior to any offending behaviour.
- Initial consent to sexual activity provided no mitigation but depending on the interpretation of the verdict may reduce culpability.
- He described as cogent an interpretation of the verdicts that consent had been withdrawn due to filming.
- The defendants were not aware of C1's and C2's backgrounds.

The judge began with the Principal Guideline reminding himself of the overriding principle of the youth justice system which is to prevent re-offending as well as the statutory duty to have regard to the welfare of the child and the need to avoid criminalising children unnecessarily, and to pass a sentence that where possible focussed on rehabilitation.

He then turned to the Child Sexual offences guideline, he followed the five steps set out:

- Step 1 - he found the offences “fall more obviously” into the second category of offending for which a custodial sentence may be justified.
- Step 2 - he considered aggravating and mitigating factors the former being that the defendants were acting together and the offences were filmed and the film circulated, the latter being the absence of previous findings of guilt.
- Step 3 - he considered the personal mitigation of each defendant. He found that X was under peer pressure. Y had extreme neurodevelopmental impairments. Y had responded positively to bail. Z had low intellectual capacity.
- Step 4 - this did not apply to the lead offences as there had been no guilty pleas.
- Step 5 - he concluded that the offences passed the custody threshold. He ruled out dangerousness pursuant to section 255 of the Sentencing Act 2020. He referred to the Principal guideline para 6.45 - he said he did not need to consider the adult rape guideline but he did refer to it so that the sentence imposed could be understood- categorising the offending in bracket 3A – and although the custody threshold was met for X and Y, he stated he was not bound to impose immediate custody noting that parts of the guideline state the opposite and he felt satisfied that a YRO was required in each case for X and Y.

With respect to Z, he concluded that the custody threshold was not met.

X was sentenced to a 3-year Youth Rehabilitation Order with ISSP for 180 days concurrent for each offence with a range of components including supervision, 3 months electronically monitored curfew at his home address, Specialist Harmful Sexual Behaviour Intervention, a Prohibited Activity Requirement – no contact with either complainant, Supervised contact between him and Y and Z, Activity Requirement – 30 Days.

Y was sentenced to a 3-year Youth Rehabilitation Order with ISSP for 180 days concurrent for each offence with the following components: Supervision, 3 months electronically monitored curfew at his home address, Specialist Harmful Sexual Behaviour Intervention, a Prohibited Activity Requirement – no contact with either complainant, Supervised contact between him and X and Z, Activity Requirement – 30 Days.

Z was sentenced to an 18-month Youth Rehabilitation Order concurrent for each offence with a range of components including Supervision, Curfew at his home address with a doorstep condition, Specialist Harmful Sexual Behaviour Intervention, a Prohibited Activity Requirement – no contact with either complainant, Supervised contact between him and X and Y, Activity Requirement 15 days restorative justice supporting education, Activity Requirement Restorative Justice.

■ 2.3 The aftermath

The CPS issued what transpired to be a factually incorrect statement immediately after the sentence hearing – considered “egregious” by the CACD - which was not corrected until almost three weeks after the hearing. The sentences attracted widespread and very unfavourable media coverage both nationally and beyond. Public attention was given to the case, as evidenced by the backlash on social media. Comments on LinkedIn and other professional platforms were also largely negative. The sentencing judge was openly criticised. One victim spoke anonymously to the press with her parents by her side with words that viscerally resonated - the sentence felt like “a rock in her face”.

References [for all 3 defendants] were made under section 36 of the CJA 1988 which the CACD noted was for “the purpose of avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the court in a case of this particular type”. The Court referred to what had been emphasised in *Mohammed Arfan* [2022] EWCA Crim 1416 at [34] that sentencing is an art and not a science and leniency itself is not a vice. The Court confirmed that for appellate interference to be justified the sentence in question must be not only lenient but unduly so.

On behalf of the Attorney General, it was submitted that the offending was so serious that the only appropriate sentence for each offender was detention. Both culpability and harm were relevant to this assessment pursuant to the Sentencing Act 2020. There were multiple rapes many committed as part of a group and both victims were particularly vulnerable and suffered severe psychological harm as a result. The judge was wrong to conclude that a community sentence could be justified and had he properly assessed the seriousness of the offending he could only reasonably have concluded that lengthy sentences of detention were required. It was also submitted that the judge failed to have proper regard to the Sentencing Guideline for rape offences committed by adults and to the limited extent he did he wrongly categorised the rape offences within that guideline.

Just for Kids Law applied to intervene in the proceeding but this was refused.

■ 2.4 The appeal hearing

Updated reports were before the Court of Appeal in relation to all parties – complainants and appellants. Both complainants were not doing well. X and Y were responding well to their sentences.

The Sentencing Act 2020 was referred to and the sections where the purpose of sentencing is set out including for those under 18 and where it sets out how to approach seriousness.

The Court considered the Principal Guideline noting that the established sentencing principles with the key elements being:

- it is important to avoid criminalising young people unnecessarily;
- the primary purpose of the youth justice system is for young people to take responsibility for their own actions and promote re-integration into society rather than punish;
- the welfare of the child;
- the age of the child or young person – chronological, developmental and emotional;
- the seriousness of the offence;
- the likelihood of further offence being committed;
- the extent of harm from further offending.

Aggravating and mitigating factors are set out to include respectively:

- the victims being particularly vulnerable, the prolonged nature of the offences, deliberate humiliation - filming; group offending; circulating videos.
- the age of the offender, chronological, development and emotional; mental health concerns.

The Court referred to the table in the guideline setting out what custodial sentences are available for children and young people both in the Youth Court and the Crown Court.

The Court referred to the fact that the guideline sets out that custodial sentences must only be imposed as a “measure of last resort” and if a custodial sentence is unavoidable, it should be the shortest commensurate with the seriousness of the offence. The Court also confirmed that in considering the adult guideline the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds for those 15 – 17 and less for those under 15.

The Court recorded its disagreement with the judge’s conclusions about categorisation. In their opinion each of the rape offences was a Category 2A offence on the basis that:

- The offenders acted together and recorded the offending – degradation and humiliation;
- The complainants were raped multiple times.
- The complainants were raped in the presence of others who filmed and exposed themselves and masturbated.
- The incidents were sustained.
- The victims were particularly vulnerable and sustained severe psychological harm. The trial judge was wrong to treat the vulnerability of the victims as being irrelevant because the defendants did not know this – an offender’s lack of knowledge in this context was irrelevant to harm.

The Court also noted:

- X was convicted of rape arising from the first incident against C1 and a further offence of rape against C2 arising from the second incident.
- Y was convicted of six rapes in total – three against each complainant.
- The offending was filmed and the parts they played in this was relevant.
- Each incident involved rape by more than one offender and was extremely serious.
- Both X and Y had repeated their behaviour – the CACD considered this to be crucial to each of their cases.

In the Courts view, significant sentences of detention for X and Y were in the circumstances unavoidable. The sentences for X and Y were quashed and replaced by sentences of 4 years' detention under section 250 of the Sentencing Act 2020 concurrently on each count of rape with no separate penalty in respect of the productions of images of children. The Court did not interfere with Z's sentence.

3. APPEAL CASES OF INTEREST

3.1 HGF [2026] EWCA Crim 570

The prosecutor sought leave to appeal against the decision of a judge to stay the proceedings as an abuse of process under section 58 of the Criminal Justice Act 2003 and at a rolled-up hearing the CACD granted leave to appeal, but went on to dismiss the appeal.

The complainant, C, was staying at a hotel with two of her children, her niece and her father after a football match. The defendant – the respondent in the appeal – was her father’s friend and attended the same match. They all went to a hotel after the match where C and her father were to stay. The adults had a drink together on the ground floor of the hotel. The defendant went to purchase food for the adults, took C’s food to her in her room and then went to his room. At some point C left her room and went to the defendant’s room. As C stepped into the room, the defendant was said to have grabbed her neck, thrust his crotch into her pelvic area, and placed his hand on her crotch before she pushed him away. She complained to her father. The defendant was confronted and initially denied she had been in the room. C made a 999 call, as did the defendant. He complained in the call that a false allegation had been made against him and cameras in the lobby would support his account that C had come on to him and came into his room. He was arrested, taken to a police station, interviewed and during the interview he asked the police to obtain the CCTV. He was reassured that the CCTV would be obtained. Subsequent requests were made. The police made no effort to retrieve the CCTV. By the time a request was made, the CCTV was no longer in existence.

At first instance proceedings, defence counsel sought to argue that there had been an abuse of process and that as a consequence the defendant could not have a fair trial on either or both of the two well-known limbs. It was submitted that the police conduct amounted either to a failure causing such irreparable damage that a fair trial was no longer possible or bad faith or serious default such that the administration of justice would be brought into disrepute. Defence counsel submitted that no direction regarding the missing CCTV could remedy the unfairness and would be an invitation to the jury to speculate as to what the CCTV would have shown.

The judge agreed. Limb 1 was satisfied and the absence of the CCTV footage rendered a fair trial impossible. The judge did not in the circumstances go on to consider limb 2.

The prosecutor sought leave to appeal against the decision of the judge to stay the proceedings as an abuse of process under section 58 of the Criminal Justice Act 2003. The Registrar referred the appeal to the full Court of Appeal. At a rolled-up hearing, leave to appeal was granted and the Court proceeded to consider the merits.

The appellant submitted that:

- The judge did not consider all relevant case law and did not sufficiently take into account that staying proceedings as an abuse was a remedy of last resort.
- The real issue was factual – the CCTV did not cover where the events were said to have taken place.
- The judge failed to have regard to the other credible evidence including the immediate complaint and marks to the complainant’s neck.
- The judge erred in determining the trial process could not adequately and sufficiently address the issues raised by the defence.

The respondent contested all four grounds and submitted in the alternative that the Court of Appeal should find that limb 2 was satisfied.

The Court of Appeal referred to a recent case which had considered the issues: *Ng and O'Reilly* [2024] EWCA Crim 493, where it was emphasised that the power to stay proceedings was a measure of last resort and

- where a fair trial is not possible, or
- where the court's sense of justice and propriety or public confidence in the system would be undermined.

The burden of establishing abuse and unfairness lies on the defendant.

The Court then considered *ex parte Ebrahim* [2001] EWHC (Admin) 130 where the principles underlying the first limb were reviewed by the Divisional Court.

Ebrahim was followed by the CACD in *Dobson* [2001] EWCA Crim 1606 in the context of police failures and where the following questions were posed:

- What was the duty of the police in the circumstances?
- Did the police fail in their duty?
- If so, was the prejudice suffered serious to the extent that a fair trial was not possible as a result.

Ebrahim was also considered by the CACD in *Ali v Crown Prosecution Service* [2007] EWCA Crim 691, where it was stated that: "The rationale for refusing a stay is the existence of credible evidence, itself untainted by what has gone missing."

In this appeal, the Court found that the failure by the police to secure the CCTV was a serious dereliction of duty. The CCTV was central to the case which turned on credibility. The respondent, the defendant, said it showed them together before the alleged incident. It was not evidence that might or might not have supported the prosecution case. The respondent was prejudiced by being unable to challenge the evidence and a fair trial in the circumstances was not possible. This was not a case where the relevant question was that posed in *Ebrahim*, namely whether there was sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction. Rather, the relevant question here was that posed in *Ali*, namely was the missing evidence important material by which C's credibility could be assessed. Implicitly, the CACD found that the judge at first instance concluded it was and they agreed with her. The Court of Appeal rejected the appellant's arguments and the appeal was dismissed. The Court did not go on to consider limb 2.

3.2 Bottareli [2026] EWCA Crim 383

Fresh representatives submitted that the trial judge ought to have specifically directed the jury in relation to voluntary intoxication and intent in relation to attempted murder, notwithstanding that the appellant accepted forming the intent for wounding in the alternative. Although permission to appeal out of time against the convictions was granted, the appeal was dismissed with the appellant seeking leave to certify a point of law of general public importance to the Supreme Court.

On 11 October 2023, the appellant pleaded guilty to:

- two counts of wounding with intent (counts 4 and 6)
- one count of affray (count 7)
- one count of having an offensive weapon (count 8).

The pleas to wounding with intent were not accepted and so he faced a trial on four counts:

- three counts of attempted murder (counts 1, 3 and 5)
- one count of attempting to cause GBH (count 2).

The appellant was acquitted of count 1 but convicted of counts 2, 3 and 5. He was sentenced to 30 years' imprisonment. He sought permission to appeal out of time against counts 2 and 3 (attempted murder) and the sentence.

The appellant, aged 46 at the time of the appeal, was working as a gardener and maintenance man at Central Middlesex Hospital. He was a conscientious worker but described as someone with personality issues and sometimes became angry and shouted, but he had never been violent.

On 21 June 2023, whilst in possession of a mattock (similar to a pickaxe) and a scalpel he attacked and attempted to attack several co-workers. The attacks were unprovoked and motiveless. Prior to the events, the appellant had been to his home and taken a very large quantity of Class A drugs and then returned to work.

Mr Q walked past him and made an innocent comment, and the appellant ran back towards him with the mattock raised and ready to strike. Mr Q turned around and made light of the situation. The appellant did not strike Mr Q. The matters were the subject of counts 1 attempted murder (acquitted) and 2 attempted GBH (found guilty).

The appellant then went to the canteen. Mr T was having lunch. Mr T commented on the mattock. The appellant left the mattock near a door. He then put one hand on the back of Mr T's neck and using the scalpel which he routinely carried for his work in his other hand he stabbed Mr T in the throat. Mr T ran away and the appellant chased him with the mattock which he had picked up, but Mr T was able to escape. He was treated in A & E at the hospital and had sustained a 1-centimetre graze to his Adam's apple, a superficial cut to the front of his neck requiring 8 sutures and a wound to his left index finger. These matters were the subject of counts 3 (attempted murder which he denied) and 4 (wounding with intent – guilty plea entered).

The appellant then attacked Mr M by striking him twice to the head with the mattock. He sustained serious injuries: a depressed skull fracture, a left eye socket fracture, a contusion of his brain and a traumatic subarachnoid haemorrhage. These matters were the subject of counts 5 (attempted murder – denied) and 6 (wounding with intent – guilty plea entered).

The prosecution case was that the appellant tried to kill Mr T and Mr M as well as Mr Q. He was charged with attempting to murder all three with alternative counts of wounding with intent in relation to Mr T and Mr M. As noted, the appellant entered not guilty to the attempted murder charges but guilty to the wounding charges. He accepted forming the required intent for these offences indicating he was emotionally distraught and affected by drugs. Regarding Mr Q, he pleaded not guilty to both counts on the basis that he had no intention to harm him – he had been able to control himself and withdrew. He was not able to say why he assaulted his colleagues. He believed that his work colleagues somehow knew about the cameras in his ceiling and someone was watching what he was doing.

The appellant gave evidence at his trial.

In the judgement, the CACD notes that there was no psychiatric evidence that could be relied upon before the jury.

The judge directed the jury as follows:

“Intention – how must you approach reaching a conclusion on what, if any, intention the [appellant] had? The defence has not made any substantial challenges to the prosecution evidence of what took place on 21 June of last year. However, it is submitted on behalf of the defence that the evidence does not prove the [appellant] had the intentions alleged by the prosecution. The prosecution relies on the totality of the evidence of the [appellant's] conduct before, during and after the attacks as demonstrating that the [appellant] knew what he was doing and what he intended to do at the time he carried out the attacks. It is the prosecution case that the irresistible inference from the totality of the evidence provides overwhelming proof that the [appellant] intended to kill or at least to cause grievous bodily harm to Mr Q and that he intended to kill Mr T and Mr M.

You must decide the [appellant's] intention in respect of each of the four counts you are considering in this trial. You must decide the [appellant's] intention at the time he was holding the raised mattock as he approached Mr Q from behind – did he intend to kill him; did he intend to cause him really serious bodily harm; or may he have had neither intention? You know that the [appellant] has pleaded guilty to having the intention to cause Mr T and Mr M grievous bodily harm – that is really serious bodily harm. In his evidence to you he said he only had the intention to cause some harm. When he attacked and injured Mr T and Mr M using weapons to do so the decision for you to make is whether it was his intention to go further and kill them or either of them; or may he only have intended to cause them grievous bodily harm or just some harm?

It is agreed evidence that the [appellant] had voluntarily consumed drugs at some point on 21 June and before the events with which this trial was concerned, but this is not a case where the [appellant] can say, or even has said, that drugs made him incapable of making decisions because you know, on his own admissions, he has agreed that he intended to inflict harm on two of his colleagues. The law is clear – voluntarily consumed drugs does not provide the [appellant] with a defence. It is no defence for a defendant to say that he would not have acted in a particular way, or he would not have formed an intention to kill or to cause really serious harm if he had not been under the influence of drugs. The law is that an intention to kill or to cause really serious harm is nevertheless an intention, even though a person would not or may not have formed that intention had he been sober and not under the influence of drugs.

So, you decide the [appellant's] intention by examining the whole of the evidence and that requires you to examine the [appellant's] behaviour and what he said and did, both before, during and after each incident; what weapons he used; the nature of any injuries he caused; the nature of any force he used to inflict those injuries.

In any case where there is an issue as to what was the defendant's intention, it is likely that there will be no direct evidence such as a defendant announcing, for example, he intends to kill. Jurors are invited to draw an inference from the whole body of the evidence, and this is just such a case. You examine the whole of the evidence and drawing the various pieces of evidence together you will be able to decide whether the prosecution has proved the intention alleged in the count on the indictment you are considering.”

The sole ground of appeal against the convictions was that the judge failed adequately to direct the jury in relation to voluntary intoxication in the context of an offence of specific intent. *Sheehan and Moore* (1974) 60 Cr App R 308, *R v Aidid* [2021] EWCA Crim 581, and paragraphs 9.4 and 9.5 of the Crown Court Compendium – a passage which was approved in *Aidid* – were relied upon. It was submitted that attempted murder is an offence of specific intent, that the appellant was heavily intoxicated by drugs at the material time (which was not in issue), and that there was plainly sufficient evidence to make his state of intoxication from drugs a potential issue as regards intent and that the judge ought to have directed the jury to decide whether the appellant had the intention to kill Mr T and Mr M not merely by reference to all the circumstances of the case, but specifically including reference to the appellant's intoxication, in accordance with the directions indicated in *Sheehan and Moore* and *Aidid*, and that the judge's failure to do so renders the convictions for attempted murder unsafe.

The direction which it was submitted should have been given is in two limbs as follows:

“... first, to warn them that the mere fact that the [appellant's] mind was affected by drink [or drugs] so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.

Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to intoxication, to draw such inferences as they think proper from the evidence and on that basis to ask themselves whether they feel sure that at the material time the [appellant] had the requisite intent”.

It was submitted that there was a distinction between intent required for wounding with intent and intent required for attempting to kill.

The CACD considered the case law adopting the analysis in *Aidid*.

At [86] Lord Justice Fulford, giving the judgment of the Court, said:

“... The position is straightforward if the accused's case is that he or she was too drunk to know what he or she was doing and had not formed the necessary intent. A direction is then clearly necessary.
...”

He went on to refer to the second situation:

“However, the difficulty arises when it is not part of an accused's case that as a result of intoxication he or she was incapable either of forming the relevant intent or knowing what he or she was doing. In these circumstances, there is tension in the jurisprudence.”

He went on to refer to cases which had fallen on different sides of the line as to when a specific direction as to intoxication should be given. He continued:

“On the basis of these authorities, it would appear that the potential significance of clear evidence of varying degrees of drunkenness or the effects of drugs may be neutralised by the accused's case that he or she had sufficiently known what they were doing (for instance, by acting in self-defence) thereby rendering a direction unnecessary. On the other hand, the decisions in *Sheehan and Moore*, *Bennett*, *Brown* and *Stratton*, *Groark* and *Mohamadi* indicate that if there is evidence of drunkenness/intoxication which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally be given to the jury that (i) a drunken intent was nevertheless an intent, but (ii) that they had to feel sure, having regard to all the evidence, that the defendant had had the intent. In these five authorities, the court reached this conclusion even though it was not the accused's defence that he or she had been so affected (in *Sheehan and Moore*, *Bennett*, *Brown* and *Stratton and Groark*, the defendants said they knew what they were doing notwithstanding the consumption of alcohol and in *Mohamadi* the defendant said he had not been present). This court determined a direction, nonetheless, should have been given, leaving it for the jury to decide, on the basis of their conclusions on the evidence, whether intoxication may have resulted in the accused not having the necessary intent.”

Lord Justice Fulford went on to explain that before the threshold, which requires such a specific direction about alcohol (or drug) consumption to be given, is crossed, there must be an issue in the case about that – that is to say, about whether alcohol or drug consumption had extinguished the defendant's necessary mens rea.

The CACD referred to the conclusions reached in this case:

“Juries in criminal cases are not limited in their consideration of the evidence to the arguments advanced by the prosecution and the defence. They are the finders of fact, and it is open to them to reach conclusions that do not match the particular contentions advanced by the parties. They are free, for instance, to reject an accused's account but nonetheless to acquit him or her (or convict of a lesser charge) because they conclude that they are unsure that one or more of the ingredients of the offence of specific intent have been made out. A defendant, for instance, who had been drinking heavily may have advanced a case that he or she knew exactly what was happening when the victim was killed, and that they had acted in lawful self-defence. If the jury reject self-defence, they would still need to consider whether they were sure he or she had the intent to kill or to cause really serious bodily harm, notwithstanding the consumption of alcohol or drugs. The judge must avoid conjuring fanciful factual scenarios, but if there is sufficient evidence as to the consumption of alcohol or drugs such as to make it, viewed realistically, a potential issue as regards intent, then regardless of the nature of the accused's defence, in our judgment the correct position was described by Waller LJ in *Groark*: 'if there is evidence of drunkenness which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally be given to the jury that a drunken intent was nevertheless an intent, but that they had to feel sure, having regard to all the evidence, that the defendant had had the intent'. Or as the court observed in *Bennett*, 'voluntary

intoxication had to be treated like any other evidence which tended to show the defendant may have lacked the state of mind necessary to support the offence”.

The CACD rejected the appellant’s submission noting that the appellant's defence was not that voluntary intoxication by taking drugs had made him incapable of forming the necessary intent, but that the intention which he had formed was to cause really serious bodily harm and not to kill. The Court further found that even if the direction to specifically consider the appellant’s intoxication when deciding on the issue of intention ought to have been given, that fact it was not given in the circumstances of this case did not render the conviction unsafe.

With respect to sentence the CACD found that there was no basis to conclude that the sentence was manifestly excessive and that in the circumstances there was no purpose in granting an extension of time which was refused.

The CACD granted the appellant permission to certify a point of law of general public importance and the Supreme Court will now consider the issue.

3.3 Wood [2026] EWCA Crim 480

In what the CACD describes as an “unusual case with challenging features” a litigant in person appealed against a conviction for arson being reckless as to whether life was endangered on the basis that he was not fit to stand trial. At the behest of the Registrar he was assisted by new representatives and although the conviction was quashed because the appellant was unfit, the CACD found that he “did the act” but made no separate order.

On 10 January 2019, in the Crown Court at Sheffield the appellant was convicted of arson being reckless as to whether life was endangered contrary to section 1(2) and (3) of the Criminal Damage Act 1972 and on 7 February 2019, having been found to be a dangerous offender, the appellant was sentenced to an extended sentence of 9 years’ imprisonment comprising a custodial term of 6 years and an extended licence period of 3 years.

In 1970, the appellant was diagnosed with a disorder of speech and language: dyspraxic speech, with a subsequent secondary stammer. He turned to alcohol as a means of coping and was, in 1987, diagnosed with alcohol dependency syndrome. In 2015 he had a fall causing traumatic brain injury. He was subsequently diagnosed with a mental disorder: dysexecutive syndrome consequential to the brain injury which causes difficulties in planning, organising and managing different tasks, mood instability, disinhibition, confabulation, problems with judgment and deficits in short term and long-term memory. The appellant accrued a number of convictions from 2001 including making nuisance calls to the police, but following the head injury these became more prolific.

On 7 June 2017, he was convicted of attempted arson relating to an incident on 7 February 2017 when he contacted the police indicating that he intended to set fire to his curtains. Officers attended - he appeared to have been drinking - and in the presence of the officers he attempted to set fire to the curtains. He was arrested, charged, pleaded guilty and was sentenced to a Suspended Sentence Order of 14 months suspended for 2 years.

On 1 April 2018, officers were again called to the appellant’s home address. He appeared sober but upset. He was prevented by an officer who had attended his home on previous occasions from setting fire to curtains. On 3 April 2018, passers-by noticed smoke coming from what transpired to be the appellant’s bungalow. He was found unconscious by the fire brigaded in an armchair. He was hospitalised and detained under a deprivation of liberty order. He was assessed by a psychiatrist who considered that he had no capacity to make decisions about various needs and should be treated as someone with a head injury, dysexecutive syndrome and alcohol dependant syndrome. He was discharged from hospital on 16 May 2018, arrested, interviewed under caution and gave no comment, charged and remanded into custody.

During the proceedings there were concerns about the appellant’s fitness to plead; he was assessed by a psychiatrist who formed the view he was fit to plead, but the psychiatrist was not aware of the 2015 head injury. The issue of an intermediary was raised and considered, but in the event, there was no intermediary and the trial went ahead. Early in the proceedings, one juror raised concerns about the mental health of the appellant in a note.

The appellant was convicted. After receiving negative advice on appeal from his trial team, he lodged his own appeal. Once it became aware that he was suffering from severe cognitive difficulties the Registrar granted him a Representation Order and fresh solicitors and counsel assisted with the appeal.

Expert reports were obtained, comprising reports from two psychiatrists and a report from a neuropsychologist. The consensus of the medical experts was that by reason of severe and permanent cognitive impairment caused by a combination of brain damage due to a fall and chronic alcohol dependency, the appellant was not fit to stand trial in 2019, but that the conditions from which he suffers are not treatable by means of a hospital order. He did not meet the requirements for detention under the Mental Health Act 1983 and had been assessed as having mental capacity to make decisions. The CACD admitted the fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968.

The CACD was satisfied that the appellant was under a disability that made him unfit to stand trial in accordance with the Pritchard criteria and the guidance set out in *M* [2003] EWCA Crim 3452. The appellant may have been able to understand the charges against him and decide whether to plead guilty or not, but he was incapable of giving instructions to his lawyers and giving evidence in his defence. It was also doubted that he could have followed the proceedings. The situation was exacerbated by the lack of an intermediary. The Court was satisfied that this amounted to a significant procedural injustice rendering the conviction for arson reckless as to whether life was endangered unsafe. The Court was, however, sure on consideration of all the evidence that the appellant “did the act” complained of. The Court considered section 6 (1)(b) of the Criminal Appeal Act 1968 and having found that this was not a case in which there should have been a verdict of acquittal, but that the accused was under a disability and he did the act disposals were limited to:

- A hospital order
- A supervision order
- An order for an absolute discharge.

The experts did not consider 1 an option as the appellant's disorders were not treatable by means of such an order. The Court despite its best efforts could not impose 2 because the relevant authorities could not undertake to supervise the appellant. The Court had no option but to order an absolute discharge. The CACD was troubled by the legal and practical hurdles and the position of the authorities but had no choice but to make such an order.

3.4 Haycock [2026] EWCA Crim 1105

The appellant sought to appeal against an unlawfully imposed IPP sentence which was identified by his parole board solicitor almost 20 years after events and the CACD quashed the sentence and substituted it with a custodial term of 5 years and an extension of 2 years.

On 21 March 2006, in the Crown Court at Kingston upon Hull, the appellant, then aged 27, pleaded guilty to three offences: one count of controlling prostitution for gain, contrary to section 53 of the Sexual Offences Act 2003 (count 1); and two counts of assault occasioning actual bodily harm (counts 4 and 5). He was formally acquitted of count 2 (robbery) and count three (attempting to cause grievous bodily harm with intent), on each of which the Crown had offered no evidence.

The appellant had controlled his particularly vulnerable partner's prostitution and her by rationing her drugs, intimidation and resorting to abuse and violence. Count 1 related to a period spanning 1 March 2005 to 27 September 2005. Counts 4 and 5 related to serious assaults carried out by him on her during the same period which were aggravated as she was pregnant and he kicked her with force in her vagina. He had 27 prior convictions for 70 offences including a previous serious assault on his former wife also pregnant at the relevant time who had beaten with a chair leg inflicting blows to her stomach.

On 27 April 2006, the matter came on for sentence, and the appellant was sentenced to IPP on count 1. In explaining his calculation of the minimum term, the Recorder stated that had he not been imposing a sentence of IPP he would have considered the appropriate sentence on count 1 to have been one of five years' imprisonment after credit for the appellant's early guilty plea and taking account of a course of conduct which had included the offences charged by counts 4 and 5 (hence his imposition of concurrent sentences on those counts). The sentence imposed was IPP for 2.5 years. The appellant was advised that there were no arguable grounds of appeal against the sentence imposed.

As the law stood at the time of the sentencing hearing, section 225(1) of the Criminal Justice Act 2003 provided that an IPP sentence could be imposed only where a person aged 18 or over had been "convicted of a serious offence committed after the commencement of this section". Section 225 came into force on 4 April 2005. By section 224(2) of the 2003 Act, "serious offence" was defined to mean an offence which was both a "specified offence" and one punishable by imprisonment for life, or for a determinate period of ten or more years. Section 224(1) defined "specified offence" to mean a "specified violent offence" or a "specified sexual offence", each such term being defined in section 224(3). Parallel provision was made by section 226 of the 2003 Act for a sentence of detention for public protection (DPP) to be imposed on an offender who had been convicted of a serious offence when under the age of 18.

By paragraph 140 of Schedule 15 to the 2003 Act, the offence charged by count 1 was a specified sexual offence. It was not, however, a serious offence, as defined by section 224(2), because it carried a maximum sentence of seven years. For the sake of completeness, the offence charged by counts 4 and 5 was a specified violent offence, by virtue of paragraph 20 of Schedule 15 to the 2003 Act. That offence carried a maximum sentence of five years' imprisonment, for which reason it, too, was not a serious offence as defined. It follows that, as a matter of law, it was not open to the court to impose an IPP sentence for any of the three offences of which the appellant had been convicted in March 2006.

In April 2026, the appellant's solicitor acting in a Parole Board hearing noticed the error of law in the IPP and he instructed counsel and the matter was quickly brought before the CACD – almost 20 years' out of time. His legal team was commended by the CACD. The Court took the view that notwithstanding the error of law and

that the IPP had to be quashed, the Recorder was entitled to consider that the appellant posed a significant risk to members of the public of serious harm occasioned by his commission of further offences. In such circumstances, at the relevant time section 227(2) of the 2003 Act obliged the court to impose an extended sentence of imprisonment the term of which was equal to the aggregate of: (a) the appropriate custodial term and (b) an extension period for which the offender was to be subject to a licence and which was of such length as the Court considered necessary for the purpose of protecting members of the public from serious harm occasioned by his commission of further specified offences. Per section 227(4), the extension period could not exceed five years, in the case of a specified violent offence, or eight years in the case of a specified sexual offence. Furthermore, section 227(5) provided that the term of an extended sentence of imprisonment could not exceed the maximum term permitted for the relevant offence. The sentence was substituted with an extended sentence for imprisonment of seven years – a custodial term of 5 years and extension of 2 years. He had recently been released on licence by the Parole Board – the decision meant that he was free from that licence.

In summary, save for a short period between late December 2023 and March 2024, when he was released on licence before being recalled to prison, the appellant has been incarcerated for a period:

- almost triple the length of the maximum determinate sentence which lawfully could have been imposed for the relevant offence;
- four times the length of the period after which he would automatically have been released on licence, had he not been considered suitable for release at an earlier stage; and
- eight times the length of the period after which, on the sentence which this court has substituted, he would first have become eligible for release on licence. The appellant's detention has extended beyond that date by a period approaching 18 years.

The final three paragraphs of the judgment are worth setting out in full:

22. Where an appeal against the imposition of an IPP or DPP sentence has been made to this Court, and where an application for a review has been made to the Criminal Cases Review Commission ('CCRC'), there is a mechanism through which the existence of the sentence is apparent and its lawfulness may be considered, if and as appropriate. The three referrals in *R v Davis* show that this is now happening. But this court has no means of identifying — or, thus, considering the lawfulness of — those sentences which have never been the subject of an application for leave to appeal, with the potential consequences of which this case provides a stark and disturbing example. The case of *Tolbert*, see paragraphs [126]-[129] of the judgment in *R v Davis*, is another. We have no way of knowing whether there are other such cases, or what proportion of the current IPP/DPP population they may represent if there are.

23. The CCRC is, as we have said, undertaking very valuable work which is producing a significant number of referrals of these cases, but its statutory remit is to address cases where there has been an unsuccessful appeal process. Cases such as the present are beyond its powers. It is, nevertheless, carrying out effective outreach work within the prisons system to inform people who have not appealed of the possibility that they may still be able to do so and to address the cases they see where there has been no appeal. It is the view of this court that there is a clear and urgent need for a system to be put in place by which all cases in which those who remain subject to an IPP or DPP sentence and who have not appealed, should be identified and made aware of the availability of advice.

24. We would not wish to give the impression that the court will allow appeals in all cases where such sentences were passed. In many of them there will have been no error, and the law may have permitted or even required, an indeterminate sentence to be passed. In some of the cases, a discretionary life sentence would have been imposed if the IPP/DPP had not existed, see the discussion of the relationship between these different sentences in AG's Ref No 43 of 2009 (Craig Joseph Bennett); *R v Wilkinson* [2009] EWCA Crim 1925; [2010] 1 Cr. App. R. (S.) 100. While hoping that consideration of potential appeals will take place we wish to avoid giving rise to false hopes in cases where appeals cannot succeed.

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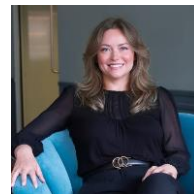
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