Chapter 3

Appeals against conviction

INTRODUCTION

3.1 To succeed in an appeal against conviction, the applicant has to meet a single test: whether the conviction is unsafe.

THE MEANING OF 'UNSAFE'

3.2 Section 2(1) of CAA 1968, as amended by CAA 1995, provides that:

> 'Subject to the provisions of this Act, the Court of Appeal –
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> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
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> (b) shall dismiss such an appeal in any other case.'

3.3 The meaning of the term 'unsafe' was considered by Lord Bingham CJ, as he then was, in the judgment of the Court in *R v Criminal Cases Review Commission, ex p Pearson*[1] at para 10:

> 'The expression "unsafe" in section 2(1)(a) of the 1968 Act does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, or where the jury verdict, in the context of other verdicts, defies any rational explanation. Cases however arise in which unsafety is much less obvious: cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done (*R v Cooper [1969] 1 QB 267 at 271*). If, on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was

1 [2000] 1 Cr App R 141.

guilty of the offence of which he has been convicted, the court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances.'

3.4 An unsafe conviction, then, can be considered a wrongful conviction. Although Lord Bingham was careful not to seek to provide a comprehensive definition of the factors that might lead the Court to regard a conviction as unsafe, the passage outlines some of the key features of the test.

Error or new evidence giving rise to doubt as to guilt

3.5 Is a conviction unsafe only when there are grounds to doubt the guilt of the convicted person or does it involve wider questions of fairness and procedural regularity in the trial process? As Lord Bingham's speech from *Pearson* indicates, the Courts have come to embrace the broad understanding of the test; a conviction may be unsafe even where there is no doubt as to guilt, where the conviction has been obtained following a trial that was unfair.

3.6 However, it is only in rare cases that the Court will be prepared to find a conviction unsafe in the absence of any real doubt as to guilt. In most appeals, the Court's approach is to consider whether, had the error or irregularity not occurred, 'the only proper and reasonable verdict be one of guilty.' (*R v Davis, Rowe and Johnson*[2]). If the Court concludes that the verdict would still have been one of guilty, it is likely to find that the conviction is safe.

3.7 This approach has at times involved the Court placing itself in the position of the jury and asking how the matter that is the subject of the appeal may have led to its returning a different verdict. In another series of cases, however, the Court has made clear that it is they who decide which convictions are, or are not, safe.

3.8 In relation to grounds of appeal concerning a failure of disclosure, the Court should ask whether 'there was a real possibility of a different outcome – if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld material had been disclosed to the defence.'[3]

2 [2001] 1 Cr App R 8 at 132.

3 Lord Kerr, speaking in an extra-judicial capacity, at the Justice Scotland International Human Rights Day Lecture 2013, Miscarriage of Justice – When Should an Appellate Court Quash Conviction? 10 December 2013.

The jury impact test

3.9 The correctness of this 'jury impact' approach was considered in appeals that turned on the admission of fresh evidence. In *Stafford v DPP*,[4] the House of Lords held that when fresh evidence was received by the Court, the Court itself had to assess the impact of that evidence on the safety of the conviction and not what effect it might have had upon the jury.

3.10 In *R v Pendleton*,[5] the majority of the House of Lords found that whilst the fundamental question of whether the conviction was safe was for the Court itself, the Court might be at a disadvantage in relating that evidence to the evidence that the jury had heard. Therefore, in all but the clearest cases, it would be wise for the Court to consider whether the evidence might reasonably have affected the verdict of the jury.

3.11 In the subsequent case law differently constituted Courts emphasised either the potential jury impact of fresh evidence or the Court's own task of assessing for itself the potential impact of the evidence (see *R v Noye*[6]).

3.12 Although the two approaches will generally produce the same result there may be some benefit to the defence to frame arguments in terms of the potential jury impact of the error or new evidence that is the subject of the grounds of appeal. It may be cited so long as it is couched in the terms that were recognised as correct in *Pendleton* and the latter case law. However it is done, it remains crucial to address the strength of the prosecution evidence untouched by any legal flaw, failure in disclosure or whatever other ground is advanced. By whichever intellectual route the Court assesses what is 'unsafe', an appeal in which they form the impression that a convicted applicant was manifestly guilty is almost certain to fail.

'Unsafe' and 'unfair'

3.13 Article 6(1) of the European Convention of Human Rights, provides the right to a fair trial, with Article 6(3) providing a number of specific fair criminal trial guarantees. After the Human Rights Act brought the Convention into domestic force, an unfair trial was an unlawful trial and a conviction following such a trial is unsafe. This logic was not immediately recognised by the Court of Appeal in *R v Davis, Rowe and Johnson*[7] which, at para 135 stressed that an unfair trial and an unsafe conviction were two distinct concepts.

4 [1974] AC 878.
5 [2001] UKHL 66.
6 [2011] EWCA Crim 650.
7 See fn 2, above

However, without eliding the two tests, the Court has since made it clear that a trial that is unfair will almost certainly also be unsafe.

3.14 In *R v Togher*,[8] Lord Woolf CJ said: 'we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe.'

3.15 This principle was confirmed in subsequent cases such as *R v Forbes*[9] and the Privy Council case of *R v Randall*,[10] in which Lord Bingham made clear that in the absence of a fair trial a conviction was likely to be unsafe even in the face of strong evidence of guilt:

> 'There will come a point where the departure from good practice is so gross, or persistent, or prejudicial, or irremediable that an appellate Court will have no choice but to condemn the trial as unfair and quash the conviction as unsafe, however strong the grounds for believing the defendant to be guilty.'

3.16 This jurisprudence is consistent with the law in relation to abuse of process, which recognises that a prosecution may give rise to abuse of process if either a fair trial was not possible or it would not be fair to try the defendant (*R v Horseferry Road Magistrates' Court, ex p Bennett*[11]). The refusal of the trial judge to stay a case as an abuse of process may itself be the subject of appeal.

3.17 However, it is not every breach of the right to a fair trial that will render a conviction unsafe. It will only be if the trial itself could be said to be unfair that the conviction would be considered unsafe *(R v Togher*[12]). To take an obvious example, a trial that was so delayed as to lead to a violation of the Article 6 right to a trial 'within a reasonable time' will very rarely be the basis of a successful appeal if it was fair in all other regards, see *AG's Ref (No 2 of 2001)*.[13]

3.18 This is not to say that individual breaches of Article 6, particularly Article 6(3), cannot form the basis of successful grounds as long as the appellant has been able to show that had these breaches not taken place there was a real chance that he or she would not have been convicted or that the unfairness was so profound as to amount to an abuse of process.

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8 [2001] 1 Cr App R 33, para 30.
9 [2001] 1 Cr App R 31.
10 [2002] UKPC 19.
11 [1993] 3 All ER 138 (HL).
12 See fn 8, above.
13 [2004] 2 AC 72.

Procedural irregularity

3.19 When the Court can be satisfied that a procedural irregularity in the trial process materially disadvantaged a defendant such that in the absence of the defect the jury may have had a doubt as to their guilt, then the usual approach of considering whether there are real grounds to doubt the appellant's guilt can be applied without difficulty. An example of this approach in action can be found in relation to the judge's decision to allow an amendment to the indictment in *R v O'Connor*,[14] where the applicant would be expected to explain how the amendment was unfair and how it disadvantaged him or her in the conduct of the case.

3.20 In such cases, it will be important to be able to explain whether the procedural flaw was raised at trial and if so, why not. The Court will wish to know that the defence did not make a deliberate tactical decision not to raise the point, in the belief that this would give the defendant some advantage at trial, only to switch tactics on appeal; if the Court does form such a view, it will be much harder for any appeal to succeed.

3.21 If the defendant has suffered no clear disadvantage, will procedural irregularity lead to the conviction being quashed? The approach of the Courts is to ask whether it was the intention of Parliament that the failure to follow the procedure in question should render the proceedings a nullity. If so, then it is likely that the conviction will be unsafe. An example of this principle at work can be found in *R v Clarke and McDaid*[15] in which the House of Lords held that the failure to sign an indictment rendered the trial process a nullity because Parliament had provided in sections 1 and 2 of the Administration of Justice (Miscellaneous Provisions) Act 1993 that an indictment must be signed to be valid and a trial could only take place on the basis of a valid indictment.[16]

3.22 A further example is to be found in relation to misjoinder. When charges wrongly joined are therefore in breach of rule 9 of the Indictment Rules (*R v Smith (Brian Peter)*[17]), the misjoined charge will be quashed. However, this misjoinder will not render the proceedings a nullity and the remaining charges will be unaffected, unless prejudice is caused to the defence.

14 [1997] Crim LR 516 (CA).
15 [2008] UKHL 8.
16 However, following the Coroners and Justice Act 2009, s 116, it is no longer the case that an indictment must be signed in order for it to be valid.
17 [1997] 1 Cr App R 390 (CA).

'Lurking doubt'

3.23 Despite all that has been said above about the need to advance particular grounds, the Court may in rare circumstances be prepared to conclude that a conviction is unsafe, in the absence of either irregularity at trial or new evidence, if it nonetheless has some doubt or uneasiness about the verdict which makes the Court wonder if an injustice had been done.

3.24 This was recognised as a proper basis to quash a conviction in *R v Cooper*.[18] That this ground has survived the introduction of the new test of unsafety was indicated by Lord Bingham in *Pearson* although in *R v Pope*[19] the Court indicated that it would only be in the most exceptional circumstances that a conviction would be found to be unsafe on this ground alone.

Conclusion: 'unsafe' as a flexible test

3.25 The above comments are illustrations of how the Court has approached the question of unsafety in particular circumstances. They should not be regarded as immutable doctrines. The Court has repeatedly emphasised that there is a single statutory test of unsafety and has shown considerable flexibility in its application.

3.26 The Court does not always elaborate on the basis upon which it has concluded that the conviction is unsafe. This is often so when the Court finds that the conviction is unsafe because of the cumulative effect of a number of errors that are detailed in a number of distinct grounds.

3.27 When the Court's basis for finding a conviction to be unsafe is set out, the Court may approach the issue of fairness and jury impact in a number of different ways. For example, the closer that the error complained of goes to a core feature of a fair trial, the more likely it is that the Court will be prepared to find that the conviction was unsafe without extensive enquiry as to what the verdict might have been if the error had not been made. So, when the judge fails to direct the jury on the balance and burden of proof, it has been held only when the case was overwhelming that the conviction would be regarded as safe (*Davis, Rowe and Johnson*[20]).

3.28 This does not make it easy for lawyers who are asked to advise on appeal against conviction. Given that an unsafe conviction is a wrongful conviction, it may be helpful to consider, in each case, why is it that the

18 [1969] 1 QB 267 (CA) at 271.
19 [2013] EWCA Crim 2241.
20 See fn 2, above.

conviction must be regarded as wrongful. This is likely to provide the best guide to the way in which the Court will approach the case.

THE COURT'S APPROACH TO COMMON ISSUES

Appeal following a guilty plea

3.29 The fact that a defendant has pleaded guilty does not act as a bar to any appeal against conviction. However, the guilty plea is likely to be regarded by the Courts as a very significant factor in favour of the safety of the conviction. The Court has been prepared to allow appeals against conviction following a guilty plea, in the following circumstances:

(a) Guilty pleas will be treated as a nullity and quashed where they were equivocal. However, in those circumstances an application should first have been made to the Crown Court to re-open. Any appeal must be against the judge's ruling.

(b) Guilty plea following flawed legal advice: the advice must go to the heart of the guilty plea. The elements of the offence may do so, advice on the likely length of sentence will not (*R v Saik*[21]).

(c) Guilty plea following erroneous ruling by the judge may be regarded as giving rise to an unsafe conviction but only where the ruling has the effect of depriving the defendant of a real choice as to whether to plead guilty (*R v Chalkley and Jeffries*[22]).

(d) In *R v Togher*,[23] other defendants had secured a stay as a result of non-disclosure. At the time when he pleaded guilty, the appellant was not aware of the material upon which the abuse of process application was based. The Court found that it would be iniquitous for the conviction to stand.

(e) Lack of jurisdiction or procedural irregularity that rendered the proceedings a nullity (*R v Davies*[24]).

Trial rulings

3.30 There is a high threshold to cross when challenging the decision of a judge in relation to a ruling made at trial. How high is less clear. It is not sufficient that the Court may not have reached the same decision. What is less certain is whether the ruling must be so manifestly wrong as to be regarded as

21 [2004] EWCA Crim 2936.
22 [1998] 2 Cr App R 79.
23 See fn 8, above.
24 [1983] 76 Cr App R 120.

Wednesbury unreasonable or whether it was sufficient for the Court to form its own view that the decision was wrong. The better view seems to be that when the Court reaches the view that it is 'clearly wrong' it should go on to consider the safety of the conviction. This was the approach adopted in *R vMcCann*[25] in which it was said that:

> 'To reverse the judge's ruling it is not enough that the members of this Court would have exercised their discretion differently. We must be clearly satisfied that the judge was wrong; but our powers to review the exercise of his discretion is not limited to cases in which he has erred in principle or there is shown to have been no material on which he could properly have arrived at his decision. The Court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the judge's ruling may have resulted in injustice to the appellants. See *Evans v. Bartlam [1937] AC 473*.'

3.31 In the subsequent case of *R v Quinn*,[26] it was held that the Court of Appeal would not interfere with a ruling of the trial judge unless and until the judge failed to take into account relevant factors or took account of irrelevant factors. However, in *R v Hanson*[27] in relation to rulings on bad character, the Court held:

> 'If a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of noncompliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense.'

Defective summing up

Judge commenting on the evidence

3.32 The judge is entitled to comment on the facts. It is the role of the judge to provide guidance on factual as well as legal issues. However, these comments should not jeopardise the jury's own consideration of the evidence by being clearly partisan. The judge should direct the members of the jury that they were the judges of fact and should only take into account views expressed by the judge to the extent that it agreed with their own. If this direction is provided, it will be regarded by the Court as an important factor in considering whether any comments made by the judge might have improperly influenced

25 (1991) 92 Cr App R 239.
26 [1996] Crim LR 516.
27 [2005] EWCA Crim 824, para 15.

the jury. However, in a case in which the judge's comments were particularly extreme or damaging, the conviction will not be made safe by the parrot-like recitation that 'it is matter for you, the jury'; see Lord Bingham in *R v Bentley*,[28] citing with approval the judgment of Lloyd LJ in *Gilbey*.[29]

3.33 As always, the key test is whether the judge's conduct is such as to render the conviction unsafe. Appeals may succeed if the judge has made clear his or her preference for the prosecution case (see *R v Bryant*[30]), has undermined the advocate in the eyes of the jury, or has interrupted so much as to prevent the defence from being able to properly advance its case (see *R v Lashley*,[31] another successful appeal from the same trial judge as in *Bryant*).

Summing up on a different basis to that advanced at trial

3.34 There is no bar to the judge summing up the prosecution case on a different basis to that which it was put by the prosecution at trial. However, the judge must proceed with caution. There is an obvious danger that the fairness of the trial will be prejudiced where the judge introduces lines of argument to which the defence have had no opportunity to respond to (*R v Falconer-Atlee*[32]).

Leaving alternative verdicts to the jury

3.35 Whether to leave alternative, lesser counts to the jury is a matter that the judge should raise with counsel but is ultimately a matter for the judge. It should generally be done where it obviously arises on the evidence. A failure to do so is highly likely to lead to a verdict being quashed (*R v Coutts*[33] and *R v Foster*[34]) though the Court of Appeal will often defer to the view of the trial judge, who has had the advantage of hearing and seeing the evidence.

Getting the law wrong

3.36 As discussed above at **3.27**, a failure to properly direct the jury on the balance and burden of proof will be regarded as highly likely to render a conviction unsafe. Other failures in directing the jury on the law, such as to correctly identify the elements of the offence or the defence relied upon may

28 [2001] 1 Cr App R 21.
29 (unreported) 26 January 1990.
30 [2005] EWCA Crim 2079.
31 [2005] EWCA Crim 2016.
32 (1974) 58 Cr App R 348.
33 [2006] UKHL 39.
34 [2007] EWCA Crim 2869.

provide powerful grounds of appeal. However, it should never be assumed that such errors will automatically lead the Court to conclude that the conviction is unsafe. If the judge has not provided the correct wording in a particular passage, the Court will look to the summing up as a whole to see whether it provided the jury with the appropriate guidance. Even in those cases where it failed to do so, the Court is likely to consider whether, in the circumstances of the case, there is a real risk that it leads the jury to adopt the wrong approach.

The significance of 'specimen directions'

3.37 The Court of Appeal has made it clear that the specimen directions are not blueprints that must be slavishly followed (*R v Millard*[35]). In the forward to the *Judicial Studies Board Crown Court Bench Book* (2010), the Lord Chief Justice placed increased emphasis on the importance of the judge crafting his or her own directions:

> 'We are all familiar with the so-called "specimen directions" for juries. We read of them in the news. We hear much about them in the Court of Appeal. And, of course, we use them in the Crown Court. But the great value of the specimen direction has also the potential to be a weakness. What was intended to provide guidance and assistance to judges has, on many occasions, to all intents and purposes, operated as if judges were bound by them when they were preparing their summing up and sometimes the specimen directions have been incanted mechanistically and without any sufficient link with the case being tried.
>
> In this Benchbook, the objective has been to move away from the perceived rigidity of specimen directions towards a fresh emphasis on the responsibility of the individual judge, in an individual case, to craft directions appropriate to that case.'

3.38 It is clear from this that a failure to follow the specimen directions that are contained in the Bench Book will not itself render a direction defective. A direction will be defective only to the extent that it fails to clearly and accurately set out the relevant law as the jury should apply it (*R v Keene*[36]).

Grounds in relation to the jury

Jury selection

3.39 Irregularities in the selection of the jury may give rise to an appeal. In certain circumstances the failure to follow the correct procedure for jury

35 [2003] EWCA Crim 3629.
36 [2010] EWCA Crim 2514, para 20.

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