



## Issue 83 (December 2011)

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ROBERT CLARK AND CHRISTOPHER DRURY, ex-police officers, have been cleared on appeal having been falsely accused of conspiracy to supply class B drugs and perverting the course of justice. Clark and Drury had been jailed for 10 and 8 years respectively. The conviction hung on the testimony of Evelyn Fleckney, who became a 'supergrass' after her own 15-year sentence was reduced. Solicitors argued that Fleckney only gave evidence originally under inducement.

Fleckney went on to retract her evidence on release from custody. Mark Ellison, QC, for the Crown, said: "We consider that without Fleckney's willing evidence in this case, there is no longer a realistic prospect of conviction and it is our decision to offer no evidence against them." Clark & Drury's solicitors said that the pair are now calling for a thorough inquiry into how the prosecution has been permitted to rely on such discredited and tainted evidence in their own and other trials.

PETER WILSON, A TEACHER, has been cleared of sexually assaulting six of his pupils at the primary school where he taught. The pupils had claimed that he kissed them and touched their buttocks. Wilson denied there was any inappropriate contact and any touching was encouragement to the pupils and amounted to a clasp on the shoulder, a pat on the back or a hug. After the successful appeal, he said, "My greatest distress was that, as a result of these unfounded allegations, social services were present at the birth of our first child and I was required to sign an agreement to say that I could not live in the same house as my wife and new-born baby. This lasted eight months. Now that this horrible ordeal is finally over I look forward to rebuilding my life with my wife, new son and the rest of my family." SAFARI is often asked, "Why would children make such serious false allegations?" The answer is simple. Children often have little or no idea of the consequences to the defendant and his family of making false allegations. To them, what they're doing is not serious and they just like the attention they receive. Even the prosecution in this case accepted that it could have been just "playground gossip" and the jury would need to decide for themselves.

DEAN SMITHERMAN HAS BEEN CLEARED by a jury of 20 counts of rape and indecent assault against a 26-year-old woman. The woman had said he demanded sex to pay off a debt; Smitherman admitted having sex with the woman on three occasions because she threatened to tell his wife they were having an affair if he didn't. Smitherman denied all charges against him and said the woman had, in fact, been blackmailing him and drained him of between £2,000 and £3,000. The court heard how the woman had made a previous false rape claim, against an ex-boyfriend, that had not been investigated.

GLEN BOULTON, 46, A SENIOR POLICE OFFICER has been cleared of child sex offences. He had been charged with four counts of indecent assault and two counts of indecency with a child under the age of 13 between 1978 and 1984. At his first trial, his defence raised an abuse of process argument due to inconsistencies in one of the alleged victims' evidence; the trial judge then stayed (suspended) the proceedings in respect of that alleged victim. At the second trial the state of the second alleged victim's mental wellbeing was raised by expert evidence. A decision was then made not to proceed with the prosecution, as there no longer appeared to be a realistic prospect of conviction.

JESICA PAULEY, 21, has been cleared of unlawful wounding after hitting another woman with a glass in self-defence. Pauley told Bolton Crown Court that "[she] grabbed my hair and I fell to the ground. At one point I had one girl shouting at me and another girl kicking me. That's when I hit out with the bottle I had in my hand. I was very scared. I have never been in a fight before; I didn't know what to do. I just wanted to get the girls off me. I realise now I shouldn't have used the bottle, but I was scared." After the verdict, Judge Steven Everett said he hoped Miss Pauley had found the court process a "useful experience in life" and that she would think twice before carrying a bottle around with her in future. Miss Pauley said she has been struggling to come to terms with the incident and has been seeing a counsellor.

THE CRIMINAL RECORDS BUREAU, which was set up to vet those working with young people, has disclosed that 172 people in the 12-month period to March 31<sup>st</sup> 2011 were victims of it supplying incorrect details to employers. Sources said that most of the mistakes were when someone was wrongly given another person's conviction details because of a mix-up on a computer system.

AFTER ANDREW WALTON, 42, hurled a 'hard plastic slipper type shoe' at an officer while being questioned about £800 worth of tools stolen from a van, he plead guilty to common assault and to handling stolen goods and was jailed for a year. However, at the Court of Appeal his solicitor successfully argued that the two charges should have been put on separate indictments (and therefore *tried* separately), as they were not part of the same incident. Mr Justice Singh agreed and overturned the common assault conviction – despite Walton's guilty plea – meaning the 12-month term for the offence was also quashed. That left him to serve eight months for the handling offence. While this story doesn't come under the umbrella for false allegations, it is useful as a reminder to the innocent that you might be able to strengthen an appeal by using the same argument (if applicable) that charges relating to different incidents should have appeared on different indictments.

BYRON DAVIES, 52, A COUNCIL CHIEF EXECUTIVE, has been cleared of raping a female colleague he met in a bar. While they did have sex, the jury found him not guilty of raping the colleague, who claimed she had no recollection of what happened and was too drunk to consent to sex. Speaking outside court, Mr Davies, who believed the alleged victim was not as drunk as she later claimed to be, said the investigation had left him "devastated" and "angry". Mr Davies said he had serious grievances against the Crown Prosecution Service and North Wales Police for their conduct during the case. He said a toxicology report had the wrong labelling, CCTV had the wrong timing, and described everything as "lazy policing". He also said he would take further action, through his solicitors, over actions of senior police officers in relation to the investigation.

NEIL WATERS, 50, has had his trial for possessing child pornography abandoned after it was discovered that videos seized from him were all recorded from terrestrial television and therefore could be legitimately and legally viewed by the public. The prosecution offered no evidence on the nine charges in the light of the judge's ruling and Waters was formally found not guilty. This demonstrates the difficulty in not having a legal official definition of an 'indecent picture'. Judges often state that it's 'for the jury to decide' whether or not they find a picture to be indecent; this results in different levels of justice depending on the personal feelings of individual jurors and is wholly wrong.

HOW TO APPEAL A CRIMINAL CONVICTION. This article follows a request from a SAFARI reader.

Within 28 days of your conviction (not necessarily sentence), you must apply in writing to the Crown Court by completing Form NG (Notice and Grounds) explaining why you feel the conviction was wrong. (After 28 days you can 'appeal out of time' but you must have good reason for missing the deadline – such as new evidence, which has now become available.) This is then forwarded to the Criminal Appeal Office (part of the Court of Appeal, based at the Royal Courts of Justice in London).

A Single Judge (SJ) then decides whether you should be allowed to appeal based on the information you provided on the NG form. Remember: 'the jury got it wrong' is not grounds for appeal – you need to be able to demonstrate either that something went wrong from a legal point of view (such as the judge mis-directing the jury) or provide new evidence that was not available at time of trial.

If the SJ gives leave to appeal, the Full Court then considers the appeal and either allows it (i.e. you win) or refuse it (i.e. you lose).

If the SJ refuses leave to appeal you can 'renew' your application (i.e. ask the full court to give you permission to appeal anyway) within 14 days of the SJ's decision. However, be careful with this – if your renewal request appears to be 'frivolous', the court can (although this is extremely rare) refuse and start your sentence from scratch again. So make sure any renewal request has some substance to it. Saying, for example, "The Single Judge was an idiot and doesn't know what he's talking about" is likely to be considered 'frivolous'!

If both the SJ and Full Court have refused permission to appeal, or if permission was granted but it fails at the Full Court stage, you can approach the Criminal Cases Review Commission (CCRC) either directly or via your solicitor. There is no time limit for doing this so try to ensure you have a good argument for the appeal to be allowed.

The CCRC then consider your case and decide whether to take it back to the Full Court. Note that most cases passed to the CCRC do not result in successful appeals (their web site states that of 13,282 applications made to them only 483 (3.6%) were even referred to the Full Court, let alone successful. This is because in the majority of cases, the CCRC are unable to find enough new evidence, which they feel would be sufficient to overturn a conviction. Referral from the CCRC to the full court is no guarantee of success but, thankfully, the majority of CCRC referrals do succeed.

If your appeal **does** reach the Full Court and is relatively straightforward, the judges can both give leave to appeal **and** quash the conviction at the same time. Otherwise, for more complex matters, leave can be given to appeal and the case returns to the full court at a later date for full consideration.

REMEMBER TO KEEP SAFARI INFORMED when you have any level of success in your own appeal as we (anonymously) use this information to help other readers with their own appeals.

TO CONTINUE TO CONFIRM that there are successful appeals against convictions month after month, here's a selection of recent ones:

R v JB [2011] EWCA Crim 2203 – Robbery - quashed on the basis that a previous conviction should not have been put before the jury effectively to bolster up a weak case. Reliance was placed on the case of Hanson [2005] 2 Cr App R 21 where it was stated: "The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged." In this case, nothing was known about the circumstances, so that they could not be said to be similar; there was no direct evidence to support the conviction, and only limited circumstantial evidence. It was ruled that the knowledge of the previous conviction may well have carried significant weight with the jury, and that the trial judge should not have allowed it to go before them.

R v W [2011] EWCA Crim 2289 – Rape – CCRC application – Complainant's evidence at court conflicted with evidence provided by her to a doctor. The CCRC had also obtained evidence from the Council showing that she had been evicted from her home and appeared to be using the rape allegation to increase her priority of being rehoused. It was further discovered that she had previously made allegations of violence against her male partners, including in one case alleging multiple burning, in order to advance her claim for accommodation. It was considered that had all this material been available to the judge at time of trial it may well have resulted in his refusing to allow the prosecution to adduce the appellant's previous convictions which may well have had a major impact on the jury's deliberations.

R v ALI DEMIRCI & METIN BOLAT [2011] EWCA Crim 1710 – Possession of a Class B controlled drug (cannabis) with intent to supply, possession of criminal property, contrary to section 329 of the Proceeds of Crime Act 2002, possession of a firearm with intent to endanger life – Leave to appeal granted (this means the three judges allowed the appeal to go forward on the grounds offered – it does not necessarily mean the case will go on to be successful. Indeed, the defendants pleaded guilty to *some* of the charges against them). The trial judge was wrong to disallow evidence that another person's DNA was on the gun so the jury were not able to consider this evidence. Trial judge also failed to discharge the jury and order a retrial when details of an earlier shooting, which had nothing to do with the current case, were accidentally brought up; this was important as it would have been very difficult for the jury to simply ignore it when making their deliberations. He also erred in law in directing the jury that it was open to them to draw an adverse inference from the applicant's alleged failure to mention certain matters in his Defence Statement.

R v SCOTT TREVOR HAYES [2011] EWCA Crim 2680 – Wounding with intent – Conviction quashed because the judge failed to direct the jury to acquit if they felt that the defendant might have been acting in self-defence. Interestingly, the judges *did* refer to self-defence in relation to other charges (on which not-guilty verdicts were returned) but in any event, appeal judges ruled that the direction on self-defence the Judge gave in relation to those was defective. In this case, a re-trial was ordered.

PLEASE NOTE: Your solicitor should be able to access all the above cases but due to legal reporting restrictions, you might not be able to locate some yourselves. Although SAFARI generally does hold all these transcripts on file, we are sadly not able to provide full or part copies to readers because of those same reporting restrictions, so please don't ask!

ACCORDING TO THE MINISTRY of Justice's 'Criminal Statistics: England and Wales 2009' document, there were 1,400 appeals against conviction in 2009 (just over 2% of all convictions in the Crown Court), of which 430 were heard at the Full Court. Of those, 38% (we calculate that as 163 successful appeals) resulted in a quashed conviction. So 163 successful appeals out of 1,400 is nearly 12% success rate.

So what can you do to increase your own chances of being successful at appeal? In most cases, you need to be able to provide enough new information which, had the jury known at the time of the trial, they would have most likely have returned a **not guilty** verdict. Minor information such as "the claimant was unreliable because they were an alcoholic, drug addict, etc." or "the claimant was proved to have lied about where they were earlier in the day so we can't trust any of their evidence" etc. is rarely good enough. Although it might help a little. Concentrate on much more powerful evidence. Has a new motive for the false allegation been discovered? Have they made false allegations in the past? Has a new witness been discovered who can cast serious doubt on their evidence etc.?

SWEARING RULING. Here's an interesting, if not a rather odd case. The Court of Appeal has now ruled that shouting obscenities in public should no longer necessarily be considered offensive as teenagers and police officers have heard it all before!

Under the Public Order Act, swearing becomes an offence only where it is likely to cause "harassment, alarm or distress". Denzel Harvey, 20, successfully appealed against a £50 fine for swearing at officers in 2009. At the time, magistrates found him guilty after hearing that Harvey had sworn as a group of teenagers stood nearby. At appeal, Justice Bean overturned the conviction, stating that it was "quite impossible to infer that the group of young people who were in the vicinity were likely to have experienced alarm or distress at hearing these rather commonplace swearwords used". While this story may seem frivolous, it does remind us all of one very important legal point; Many laws do not need to be *changed* to achieve overturned convictions but merely reconsidered in the light of current views.