PUBLIC ANNEX A

sexual offences had been quashed because of the routine destruction of documents. Given the tendency of allegations of sexual offences to have a long gestation period, the Court urged police forces to consider keeping documents relating to complaints of sexual offences for a considerably longer period.

[Reported by Richard Percival, Barrister]

Henry Grunwald Q.C. for the appellant.
James Bullen for the respondent.

Commentary. Although factually similar to *D*, there is no suggestion that the defendant was prejudiced by a prosecutor reneging on a promise not to prosecute. The abuse of process in this case is based on two grounds. First, there is the absence of the police files relating to the earlier complaints, and second, there is the difficulty where the old complaints have been prompted by contemporary complaints against the defendant. Since both these issues could arise in many cases dealing with delayed allegations of sexual abuse the judgment is potentially significant.

As regards the absence of police files, Henry L.J. summarised the problem in one sentence: "there was an evidential hole at the heart of the case which was caused by police [destruction of files], and which could not be repaired by judicial case management". There must be many cases in which the allegations leading to the present proceedings were not the first to be made against the defendant. Complaints made decades ago might have failed to lead to a conviction for all sorts of reasons including a less sympathetic attitude to child complainants both before and at trial, and because of stricter corroboration rules. The absence of the records created uncertainty as to why the allegations did not result in a conviction: was it because the complainant was not believed (some of C's 1985 allegations of rape in this case were not charged as such at that time) or was it because they were not proved (as with the 1985 indecent assault in this case)? The best that the defendant placed in this situation can do is to suggest that the earlier complaints diminish the credibility of the complainant. In one sense this highlights a problem with all cases of delay. Where allegations are specific, the accused is less likely to be able to find witnesses, documents, etc., to refute them, and where they are general, *e.g.* "one Sunday morning when in the house alone"—it is impossible to refute them because they lack any detail. All that the defendant is able to do is attack the credibility of the witness rather than respond to the issues. Yet greater emphasis is therefore placed on the credibility of the parties; an aspect of a sexual offence trial which will already have achieved exaggerated significance. In consequence extra-special care is required in managing the case, and appropriate character directions become crucial.

In delayed abuse cases, there will be numerous agencies whose files on complaints made decades ago have since been destroyed (police, social services, education departments, etc.) Are these cases now likely to be stayed? It is arguable the destruction of files in this case presents a more acute problem for the defence because the files related to complaints by the same individual, occurring at the same time as those alleged in the present indictment, and which had actually got to the stage of prosecution. If these are not adequate grounds of distinction, then many delayed abuse prosecutions could be jeopardised.

The second difficulty, also characteristic of delay in sexual abuse trials, arose because allegations from C and D relating to the 1980s only came to light when

allegations of contemporary abuse were made by E. When the complaints by E were withdrawn, it became impossible for T to challenge the reasons for the delay by C and D, since that would leave open the risk that E's complaints would be exposed to the jury. Once again T is seriously impeded in the way he can conduct his defence. Unless the present case is felt to be a particularly strong example, perhaps because of the cumulative effect of the destruction of police files, it again provides a ground on which to challenge delayed prosecutions.

It remains to be seen whether the case is regarded as any more than a confirmation that the ultimate question is to what extent the trial judge is able to compensate for all the difficulties of delay by overall management of the case and, in particular, the degree of flexibility and pro-activity of the summing up. See *G (M)* [1999] Crim.L.R. 763; *JK* [1999] Crim.L.R. 740; *GY* [1999] Crim.L.R. 825 and commentaries.

[D.C.O.]

Appeal

Leave to appeal—where otherwise possible reference from Criminal Cases Review Commission—special and unusual facts of case
Approach of Court of Appeal—where rules relating to interrogation, etc., at trial different from those in force when appeal considered

R. v. King

Court of Appeal (Criminal Division): Lord Bingham of Cornhill C.J., Morison and Nelson JJ.: December 10, 1999.

In 1986 K and a co-accused, W, were convicted of murder. At the time of the trial, K was 22 and W was 12. W's appeal was allowed (on the basis that it relied on the evidence of an officer whose reliability had been undermined). K did not seek leave to appeal until 1999.

The victim, a 58-year-old widow, was crippled and lived alone. She was found on November 5, 1985. Her death was caused by at least four blows to the head with a blunt instrument and she had non-fatal stab wounds on her neck. A cushion was found on her chest, and there were medical indications that an attempt had been made to suffocate her. It was established that £270 had been stolen from the house. The prosecution case was that the previous evening, K, W and W's six–year–old brother were collecting money with a guy. When the deceased opened her door, they had entered and distracted her, with the aim of stealing money. She had been killed perhaps after realising that they were attempting to steal from her. The Crown case was that K hit her on the head with a hammer, and W stabbed her in the neck.

At the relevant time, although the Police and Criminal Evidence Act 1984 and the Codes made thereunder had not been brought generally into force, they were being implemented on a pilot basis in the police area concerned. (Provision for tape recording interviews had yet to be made.)

The only evidence against K was his admissions in interview. On November 15, he was seen by officers at home and taken to the police station on a voluntary basis. During the course of the day, he was interviewed 10 times between 11.35 a.m. and 11.07 p.m. In the first two interviews, he admitted leaving the house during the evening, and said he stole some tyres to put on a bonfire, but said he had not been

collecting with a guy. He was cautioned in respect of the theft. At subsequent interviews, he was reminded of that caution. In the third interview, he was subject to a protracted interrogation, during which he admitted being in the victim's road (following an assertion by the officer that there was a witness who had seen them there, which was a lie). He said he had knocked on the victim's door, but she had given them nothing and they had gone elsewhere. When told that the police would examine his clothing, he said that the victim had fallen over, and he had attempted to wake her up by slapping her, then hit her with a piece of wood. He then retracted what he had said, and said he had only gone to the victim's door. At the fourth interview, he was shown a large hammer found at his house, and admitted it was his. At the fifth interview he said the victim had refused to give them money and they had moved on.

Following this interview, W's solicitor observed that K was "a bit daft". As a result, it was arranged that a social worker should attend the sixth interview. At that interview, he said that they had made a guy but been unsuccessful in collecting money because it fell to pieces. He said he had lied earlier because he wanted to go home. In her evidence at trial, the social worker said that he had asked twice to go home, a fact not recorded by the police. After the interview, the social worker told officers K was not "sub-normal". K was put in the cells. At the seventh interview, after initially denying going to the victim's house, K gave an account similar to that in the confession in the third interview, except that he said he had hit her with an axe. He said they searched the house for money and, according to the single officer conducting the interview, described accurately the furnishings in the house. It was accepted at trial that an axe was not the murder weapon. At the ninth interview, he said he had used the hammer, not an axe, and the victim was alive when they left. Before the tenth interview, K was offered the services of a solicitor, which he declined, and was cautioned in general terms. He repeated his admissions. At the end of the interview, a statement was prepared, read and signed by K. He was then arrested for murder.

In respect of some of the interviews, there was either no contemporaneous record, or the record was much shorter than the account which appeared in the officers' witness statements. Three days after the interviews, K retained a solicitor and retracted his admissions. That remained his position at trial. There were no applications under sections 76, 77 or 78 of the Police and Criminal Evidence Act 1984.

No traces of blood were found as a result of scientific examination of K's clothing, footwear, and the hammer. At the time of the trial, there were three reports relevant to his intelligence in existence. All three concluded that he was of low average intelligence. K applied for an extension of time (12 years, six months), leave to appeal and leave to adduce new evidence.

Held, allowing the applications and quashing the conviction, (1) the extension of time sought was inordinate. There was no clear explanation for the delay at earlier stages. The court reminded itself that, if an extension of time were to be refused, the defendant could approach the Criminal Cases Review Commission, which could refer the case to the court. The case would then fall to be treated as an appeal. That process would itself cause further delay. Without willing to suggest a general willingness to grant extensions of time, let alone those of the length in this case, it was, on the special and unusual facts of the case, preferable to consider the substantial question of whether an injustice had been done, and the extension of

time was granted. There were matters worthy of consideration, and leave to appeal was granted.

(2) The court was invited by counsel to consider the general question of the approach of the court where a crime was investigated and a suspect interrogated and detained at a time when the rules governing investigation, interrogation and detention were different from those in force at the time of the appeal. The court's task was to determine whether or not a conviction was unsafe. The court would not consider a conviction unsafe simply because of a failure to comply with a statute in relation to such matters, which was not in force at the time. In considering the safety of convictions, it was relevant to consider whether a suspect may have been denied rights in force at the time, and whether he may have lacked protections which it was later thought right that he should enjoy. But the court was only concerned with the safety of the conviction, which was to be determined in the light of all the material before the court. If, in a case which relied wholly on a confession later retracted, it appeared that the confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary, that would be at least prima facie grounds for doubting the safety of the conviction—a very different thing from concluding that the defendant was necessarily innocent.

The court gave two examples of the approach. First, if the court were to consider a conviction before the Criminal Evidence Act 1898, the fact that the defendant had not been able to give evidence would not of itself have rendered the conviction unsafe. But, in all the circumstances, the fact that he had been unable to give his account might provide a ground for considering the conviction unsafe. Secondly, if a defendant were convicted many years ago, when the need for a balanced summing-up were less appreciated, the fact that the summing up had been in effect a speech for the prosecution would not of itself render the conviction unsafe. But if it were a case in which public feeling was running high and there were reasonable points for the defendant which should have been made, there might, depending on the other evidence, be grounds for holding the conviction unsafe.

(3) The case against K relied only on the confessions. The rules in force at the time in relation to the interviews were clearly breached. He was not cautioned in respect of murder promptly when he admitted using violence on the victim and was not charged with murder when he first admitted the substance of that charge. He was detained although he was not under arrest and had made clear his desire to leave. He was not advised of his right to receive legal advice until after at least two interviews during which he had made extensive admissions. The absence of scientific evidence was not neutral, but told in favour of K, the circumstances of the killing being such that it would be expected that scientific links could be made.

The court received evidence from T, a psychologist, under the Criminal Appeal Act 1968, s.23. It was unnecessary to consider in detail the defendant's submissions in respect of the criteria in section 23 because the Crown did not contest the admission of the evidence. T's evidence was that K's intelligence was significantly lower than the evidence at trial indicated. The court accepted that evidence, preferring it to evidence adduced by the Crown on the basis of K's educational accomplishments in prison. The court did not consider these matters to be of major significance, however. There was nothing to stop his intelligence from being properly assessed at the time of the trial. He was not mentally handicapped, or even on the borderline of being so. The jury had the opportunity to judge him. Even if

his IQ had been misunderstood at trial, it would not be enough to cast doubt on the conviction.

There was, however, an additional finding that K was suggestible and compliant to an abnormally high degree. This was not a matter which could, practically speaking, have been assessed or quantified in 1985 or 1986, when the assessment of suggestibility was at an embryonic stage. Nor was it an easy matter for the jury to assess, because at trial K did not accept what was put to him by the prosecution in evidence. A jury considering the psychological evidence would have had to consider whether he would have reacted in a different way when alone in a police station.

In the light of the new evidence, the case was still one relying solely on K's admissions. They were obtained in breach of the rules then prevailing, and there was now new evidence showing K to be significantly less intelligent and more vulnerable to suggestion than had been understood at the time. Crown counsel submitted that nothing had changed he gave answers indicating details which would be known only to the murderer, the jury had every opportunity to form an impression of him, and the delay in the appeal undermined his credibility. These were fair points, and it could not be said that it was a case in which the innocence of the appellant had been established. But the Court was concerned not with innocence but with the safety of the conviction. Had the defence had the new expert evidence at trial, there would have been strong grounds for seeking the exclusion of the confession evidence under the Police and Criminal Evidence Act 1984, ss.76 and 78, and possibly even section 77. Had the jury heard both the confession evidence and the new psychological evidence, it would have been rightly very hesitant indeed to convict.

[Reported by Richard Percival, Barrister]

Vera Baird and *P. Wilcox* for the appellant.
Roger Thorn, Q.C. and *Christopher John Prince* for the Crown.

Commentary. See *O'Brien* [2000] Crim.L.R. 676; *Bentley* [1999] Crim.L.R. 330 and commentaries.

What to do with convictions based on old law? There appear to be a number of different situations and it is not clear that they have yet been distinguished with sufficient clarity to allow for adequate analysis of the problem. The three main types of case might be described as follows:

(1) Cases where new evidence has come to light, *i.e.* material that was not available at the time of the trial—which casts doubt on the conviction.
(2) Cases in which no new material has come to light, but there is a new understanding of material in existence at the time of the trial, *e.g.* as in the present case and *O'Brien*. There has since been a change in the law's approach or attitude to evidence that was available. As the Lord Chief Justice explains here, the "appellant is now scientifically shown as he could not have been shown at the time, to be highly abnormal in respects directly related to the reliability of the confessions and in a way which throws doubt on their reliability". Other examples of this might include the law's stricter approach (post *Devlin*–Committee) to eyewitness identification in the light of the psychological material demonstrating unreliability.

(3) Cases where no new material has come to light, but there has been a change in the law's attitude which has been prompted by purely legal developments (*e.g.* more liberal procedures or changes driven by international obligations such as the ECHR). These include changes in admissibility and of the trial procedure. Examples might include allowing defendants to testify (Criminal Evidence Act 1898), providing fair and balanced summings up (*cf. Bentley*); providing good character directions (*Vye* [1993] 1 W.L.R. 471); providing access to legal advice (PACE 1984, s.58); providing broad disclosure of unused material (*Ward* (1993) 96 Cr.App.R. 1 and under the Criminal Procedure and Investigations Act 1996).

In categories 1 and 2 there is no doubt of the desirability of an appeal based on the "new evidence". The challenge does not imply that the law at the time was wrong but that the conviction was based on incomplete or inaccurate facts or an incorrect understanding of them. There can be no doubt that such convictions are potentially "unsafe" in even the narrowest sense of that word. In some cases it might be questionable whether there is truly a "new" understanding or simply an attempt to rely on a ground which it was decided not to rely on at trial: although a more relaxed attitude to this might be appearing: *Cairns* [2000] Crim.L.R. 473; *Loughran* [1999] Crim.L.R. 404.

Cases in category 3 are more difficult for a number of reasons. First, because they are not always clearly distinguishable from cases in category 2; some changes that appear to be "purely" legal may owe much to a better understanding of psychology or science. Secondly, allowing an appeal in this category is more difficult because it causes the court to admit that the law was wrong. Most significantly, allowing appeals in category 3 requires us to be specific about the meaning of "unsafe". If D was convicted after a perfectly appropriate trial but without the opportunity of, say, the right to a good character direction, are we acknowledging that his conviction is "unreliable", or that it is, in more general terms, unsatisfactory, or lacking in moral justification? Findings of unsafe in this broader sense are certainly still possible under the unified ground of appeal in the Criminal Appeal Act 1995 (see *Davis, Rowe and Johnson*, July 17, 2000, preferring *Mullen* [1999] 2 Cr.App.R. 143 to *Chalkley and Jeffries* [1998] 2 Cr.App.R. 79). Some instances of law reform will reflect a safeguard against unreliability, *e.g.* the confirmation in *Woolmington* of the prosecution's burden, or the tightening up of the disclosure regime post-*Ward*. Others appear to be based more on the grounds of improved fairness to the accused rather than unreliability *per se*—as with good character directions. Many legal changes will have been driven by a desire to both improve reliability and fairness *e.g.* more balanced summings up (*cf. Bentley*).

If the Court of Appeal is prepared to quash convictions as "unsafe" because the law has changed its perception of what is "fair" to defendants, irrespective of whether that also undermines the reliability of the conviction, this really opens up the floodgates. Are all pre-*Vye* cases in which the accused had a good character open to challenge? Furthermore, how is a change in attitude about the fairness of the procedural law to be distinguished from a change in attitude about the "fairness" of the substantive law? Should all those whose defence of provocation failed at trial but would now succeed in the light of the House of Lords' decision in *Smith (Morgan)*, *The Times*, July 25, 2000 be appealing? Their injustice is often made more acute because the defendant maintains his plea of innocence and thereby forsakes, the chance of parole.

Another anomaly arises where the modern procedural rules are less advantageous to the defendant, as for example with corroboration after the Criminal Justice and Public Order Act 1994. If the appeal is based on a change in the law's attitude to vulnerable witness's confessions, as in the present case, but there was at trial corroborative evidence of the accused's involvement as an accomplice, is the Court of Appeal to apply the advantageous new rules regarding vulnerability, whilst simultaneously ignoring the abolition of the strict requirement of corroboration for accomplices? Is it legitimate to pick and choose in this way? This anomaly is largely academic since the change in the corroboration rules (or, for example, those on silence) will not form the basis of the appeal. Nevertheless, it highlights another dimension of the problem of appeals on old and new rules.

The present case. So much for what the position of hearing appeals might be, but how far does the present case go? On one reading the case is a very limited example of a case falling into category 2 above. However, the decision leaves open three areas of ambiguity.

First, is it necessary for there to have been a deficiency at the original trial under the rules then in existence before the conviction can be deemed unsafe? Or is it sufficient that although the original trial was faultless, things would now be done differently? Lord Bingham states that "[i]n looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time *and* whether and to what extent he may have lacked protections which it was later thought right that he should enjoy" (emphasis added). The present case and the example given by the Lord Chief Justice suggests that this is a prerequisite: " . . . if in a case where the only evidence against a defendant was his oral confession which he had later retracted, it appeared that such confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought to be necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the conviction—a very different thing from concluding that the defendant was innocent." However, one of his Lordship's further examples—the inability to testify pre-1898—would *not* involve a breach of the law in existence at the time and yet would be considered as potentially "unsafe". His Lordships' second example relating to the unfair summing up is ambiguous since the summing up may have been improper for its time, as in *Bentley.* Surely there must be some form of limitation imposed, otherwise faultless trials will all be open to challenge? Is there a distinction to be drawn between changes that would now admit new evidence (*e.g.* defendant's testifying under the 1898 Act, scientific evidence of unreliability of vulnerable confessions) and those in which there would merely now be a different procedural approach (*e.g.* more balanced summings up)? There is support for this distinction from the fact that Lord Bingham signals that for a less balanced summing up to create unsafety, there must have been "public feeling [running] high and . . . points fairly to be made for the defendant, which were not adequately presented in the summing up". The question remains whether such a division is universally applicable—what, for example, of the good character direction? Is this new evidence of the defendant's character, or something merely procedural? It is submitted that this issue will require further examination.

Secondly does it matter whether the changes that have occurred since the trial are common law or statutory changes? The Lord Chief Justice states that "we should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a *statute* governing police detention, interrogation and investigation, which

was not in force at the time" (emphasis added). This suggests that an appeal based on a failure to afford access to legal advice or any of the other PACE safeguards will not get very far. It is submitted that the fact that the change is statutory ought not to be a primary consideration. One example of potential unsafety given by the Lord Chief Justice is based on statutory change—the inability to testify before the 1898 Act—although that statutory change does not relate to the detention and questioning of suspects. A distinction between statutory and common law changes would seem untenable. What approach should be taken to the disclosure rules which were initially reformed by common law (*Ward*) but have now been amended by statute (Criminal Procedure and Investigations Act 1996)?

Thirdly, despite what the 1995 Act says and what the courts have concluded that the Act meant to say, is the question one of unsafety or unreliability? Those cases falling in category 1 or 2 above will create a danger of unreliability. Those in category 3 may do so. Even if that category is restricted to cases of potential unreliability, it would leave an enormous number of cases open to challenge—for example, all convictions based on old disclosure rules.

With the volume of cases being processed by the Criminal Cases Review Commission, there is a good chance that these issues will have to be resolved. The Court of Appeal will have the unenviable task of explaining what was and is and ought to be fair.

[*D.C.O.*]

Costs

Whether magistrates having jurisdiction to award costs following application for access orders—whether proceedings criminal proceedings—Value Added Tax Act 1994, Sched. 11, para.11(1)—Costs in Criminal Cases (General) Regulations 1986, reg.3—Prosecution of Offences Act 1985, s.19

H.M. Customs and Excise v. City of London Magistrates' Court and others

Divisional Court: Lord Bingham of Cornhill C.J. and Morison J.: May 17, 2000.

Customs and Excise made an application for access orders against three banks and a public limited company under paragraph 11 of Schedule 11 to the Value Added Tax Act 1994 having given notice to the respondents. A date for the hearing was set for May 7, 1999 at 2 p.m. with a half day time estimate. Solicitors acting for the second to fifth respondents applied to the court for an adjournment on May 5, contending that a whole day of the court's time would be required to hear the matter and that it would save unnecessary expense if the adjournment was to be agreed. Customs and Excise did not agree and, on May 7, the respondents against made an application for an adjournment. The justices decided to proceed, but by the time they had reached that conclusion, it was clear that there was insufficient time to hear the substantive applications. Thus, it was ordered that the hearing should be adjourned to May 24 and that a full day should be set aside for the hearing. The respondents applied for an order for costs under section 19 of the Prosecution of Offences Act 1985 and regulation 3 of the Costs in Criminal Cases (General)