Sappers and underminers: fresh evidence revisited

Henry Blaxland QC

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Cases cited
R. v Garland (Jason) [2016] EWCA Crim 1743; [2017] 4 W.L.R. 117; [2016] 11 WLUK 543 (CA (Crim Div))
R. v Pendleton (Donald) [2001] UKHL 66; [2002] 1 W.L.R. 72; [2001] 12 WLUK 388 (HL)
Stafford v DPP [1974] A.C. 878; [1973] 10 WLUK 67 (HL)

Legislation cited
Criminal Appeal Act 1966 (c.31)

***Crim. L.R. 537** In *Garland* [1] the Court of Appeal considered the correct test in an appeal based on non-disclosure of material and in the process confirmed that the jury impact test is not determinative in an appeal based on fresh evidence. This article considers how, since the decision of the House of Lords in *Pendleton* , [2] the appellate courts have re-established the authority of its earlier decision in *Stafford v DPP* . [3] It argues that that decision was based on a fundamental misconception of the significance of the statutory test on an appeal against conviction first introduced by the Criminal Appeal Act 1966 .

In 1978 Lord Patrick Devlin, by then 15 years into his retirement from the judicial committee of the House of Lords, delivered a lecture at All Souls College Oxford under the heading "Sapping and Undermining". The following year it was published in a collection of essays titled *The Judge*. [4] The subject of the lecture was the decision of the House of Lords in the case of *Stafford and Luvaglio* on the test in an appeal based on fresh evidence. Against this decision Lord Devlin levelled "a charge of heresy … that has affected, albeit unobtrusively, the constitutional right to trial by jury in a criminal case." The reference to sapping and undermining was drawn from a citation from Blackstone:

"So that the liberties of England cannot but subsist so long as this Palladium remains inviolate; not only from all open attacks… but also from all secret machinations, which may sap and undermine it …".

The "heresy" propounded in *Stafford* was the substitution of the jury impact test by a test which allowed the appellate court greater latitude in its assessment of the correctness of the conviction. In Viscount Dilhorne's opinion, the statutory test for allowing an appeal against conviction first introduced in 1966 and then appearing in s.2 of the consolidating Criminal Appeal Act 1968 meant that:

"Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial 'they think' the verdict was unsafe or unsatisfactory. They have to decide and Parliament has not required them or given them power to quash a verdict if they think ***Crim. L.R. 538** that a jury might conceivably reach a different conclusion from that to which they have come."

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This approach was based in part on reliance on the seminal decision in *Cooper* ,[5] in which the Court of Appeal had decided that the new statutory test meant that the court had to ask itself a subjective question and consider whether "there is not some lurking doubt in our mind which makes us wonder whether an injustice has been done". *Cooper* is a scantily reasoned decision in a difficult identity case, at a time when there was increasing awareness of the dangers of wrongful conviction in cases of fleeting identification. Ultimately it took the decision in *Turnbull* [6] to put in place the appropriate safeguards in such cases.

In *Stafford* Viscount Dilhorne took the Court of Appeal's decision in *Cooper* to its logical conclusion and stated that:

"The Act thus gives a wide power to the Court of Appeal and it would in my opinion be wrong to place any fetter or restriction on its exercise. The Act does not require the court, in making up its mind whether or not a verdict is unsafe or unsatisfactory, to apply any particular test. The proper approach to the question they have to decide may vary from case to case and it should be left to the court, and the Act leaves it to the court, to decide what approach to make. It would, in my opinion, be wrong to lay down that in a particular type of case a particular approach must be followed."

According to this approach the doctrine of precedent in criminal cases would be redundant. All that is required in a given case is for the appellate court to decide what it "thinks".

The appellants in *Stafford* relied on the established law under the Criminal Appeal 1907 as applied in fresh evidence cases, most clearly expressed by Lord Parker CJ in the case of *Parks* ,[7] in which it was held that the court had first to decide whether the fresh evidence was credible and, if so, would quash the conviction if the evidence might have created a reasonable doubt in the minds of the jury. Further, it was submitted in *Stafford* that this approach was consistent with the time-honoured test in *Woolmington* [8] and *Stirland* [9] to the effect that in a case based on a complaint of trial irregularity the appellate court had to decide whether the jury, acting reasonably, would nonetheless inevitably have convicted if the irregularity had not occurred. Viscount Dilhorne disagreed with this analogy on the basis that in a case based on a complaint of material irregularity something had gone wrong at trial, whereas in a fresh evidence case the trial had been perfectly regular.

What appears to have prompted Lord Devlin's critique of *Stafford* was the continuing concern about the safety of the convictions in the case of Cooper and McMahon, convicted of the Luton post office murder. Their appeals against conviction were dismissed by the Court of Appeal on no fewer than five occasions. The criticism of the reliance on *Stafford* as a means of dismissing apparently meritorious appeals reached its height in the wake of the appeals of the Birmingham ***Crim. L.R. 539*** Six in 1988, [10] in which the Court of Appeal eschewed the jury impact test. Following the quashing of the convictions of the Guildford Four in 1989 and the setting up by the Home Secretary of the Royal Commission on Criminal Justice, the case of the Birmingham Six returned to the Court of Appeal for the third and final time. [11] In its judgment the court analysed the role of the court and stated that "whereas the Civil Division of the Court of Appeal has appellate jurisdiction in the full sense, the Criminal Division is perhaps more accurately described as a court of review." The report of the Royal Commission subsequently considered that there was force in Lord Devlin's critique of the decision in *Stafford* . [12]

In *Pendleton* the House of Lords was asked to consider whether in *Stafford* the House had correctly defined the test to be applied in a fresh evidence case. Lord Bingham, who delivered the leading speech, described the historical development of the Court of Appeal and stated: "Although the 1907 Act has been repeatedly amended, the scheme of the Act has not been fundamentally altered." He went on to agree that it was right to emphasise the central role of the jury in trial on indictment and that

"trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury." [13]

However he declined to hold that in *Stafford* the House of Lords had laid down any incorrect principle "so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty." He then explained that the twin virtues of the jury impact test are that it reminds the Court of Appeal that it is not the primary decision maker and that it has an imperfect understanding of the processes, which led the jury to convict. He concluded by stating that it would usually be wise in "a case of any difficulty" for the Court of Appeal to test its own provisional

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view by asking whether the evidence if given at trial "might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe". [14]

The decision in *Pendleton* thus clarified the decision in *Stafford* without overruling it. The jury impact test was accorded due respect as a route to the appellate decision. What was not explained, however, is what was meant by "a case of any difficulty". Further, although Lord Bingham's analysis of the role of the Court of Appeal established a continuum from 1907 through to the Criminal Appeal Act 1995 , he did not directly grapple with the central issue in *Stafford* , which was whether the new statutory test in the 1966 Act had fundamentally revised the role of the court. ***Crim. L.R. 540***

The decision in *Pendleton* led to an increased deployment of the jury impact test in fresh evidence cases and played a part in the decision, posthumously, to quash the convictions of Cooper and McMahon. However, because *Stafford* remained the leading authority, the Court of Appeal continued on occasion to reassert, most notably in *H* , [15] that the jury impact test could not supplant the court's own responsibility for determining the safety of the conviction. This trend gained momentum following the decision of the Privy Council in a Caribbean death penalty case *Dial* , [16] in which the Board was divided 3:2 in favour of dismissing an appeal against conviction where the only identifying witness had subsequently retracted his evidence and had been conclusively demonstrated to have lied about an important detail in his evidence. The Board referred to *Pendleton* but at [31] of the majority judgment delivered by Lord Brown stated:

"If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and not what effect the fresh evidence would have had on the mind of the jury."

The first of these sentences is, of course, inconsistent with Lord Bingham's observation in *Pendleton* that the question for the appellate court is whether the conviction is safe not whether the accused is guilty. In strongly worded dissenting judgments Lords Steyn and Hutton disagreed with the majority as to the effect of the fresh evidence on the safety of the convictions. Inexplicably Lord Bingham was party to the majority decision.

Bolstered by the decision in *Dial* the Court of Appeal has taken to putting the jury impact test firmly in its place. [17] In *Ahmed* [18] Hughes LJ commented:

"But in most cases of arguably relevant fresh evidence it will be impossible to be 100% sure that it might not possibly have had *some* impact on the jury's deliberations since, *ex hypothesi*, the jury has not seen the fresh material."

These authorities (and more) were extensively reviewed in *Garland* . The particular question in that case was the approach to be adopted by the Court of Appeal in a case where the complaint was non-disclosure by the prosecution at trial of relevant material. The respondent referred the court to the decision of the Supreme Court in the Scottish case of *McInnes v HM Advocate* [19] in which Lord Hope had stated:

"The question which lies at the heart of it is one of fairness. The question which the appeal court must ask itself is whether after taking full account of all circumstances of the trial, including the non-disclosure in breach of the appellant's Convention right, the jury's verdict should be allowed to stand. That question will be answered in the negative if 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. ***Crim. L.R. 541*** "

In other words, culpable non-disclosure on its own would not render the trial unfair and the conviction unsafe, unless the material which had not been disclosed might, in the assessment of the appeal court, have caused the jury to acquit. Another way of considering it is that non-disclosure in itself may do no more than satisfy one of the conditions for the receipt of fresh evidence, that there is a reasonable explanation for it not having been adduced at trial, but the ultimate question is not why the material was not introduced at trial, but what effect the material might have had on the verdict. The Court of Appeal, however, disagreed that *McInnes* correctly stated the law in England and Wales in so far as it established the jury impact test as the exclusive means of determining the second question.

Conclusion

It is now clear that, whereas it was thought at the time that *Pendleton* had gone a long way to establishing the jury impact test as the preeminent means by which the safety of convictions in fresh evidence cases should be assessed, in reliance on *Stafford*

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it has now been relegated to a merely optional route to judgment. In so doing the courts have failed directly to address the fundamental problem at the heart of the decision in *Stafford* , which is that it fails to reflect the role of the Criminal Division of the Court of Appeal as a court of review and not a primary fact finder.

In all fresh evidence appeals the appellate court has to adopt a two stage process. The first stage involves deciding whether to receive the new evidence by applying the criteria in the Criminal Appeal Act s.23 , which includes deciding whether the evidence is "capable of belief". [20] That means deciding whether the jury, as the tribunal of fact, may reasonably believe or accept it. In assessing the probative value of the fresh evidence the Court of Appeal has to use its own judgment as a fact finding tribunal as was explained by Judge L.J. in *H* : "It is integral to the process that if the fresh evidence is disputed, this court must decide whether and to what extent it should be accepted or rejected", [21] provided that the process of deciding whether to accept or reject the evidence is conducted through the prism of the capability of belief test.

The second stage requires the court to exercise its judgment in deciding the weight of the fresh evidence in the context of the other evidence, which was before the trial jury. The exercise of that judgment necessarily requires the court to put itself in the position of the jury, but reminding itself that it is not the primary decision maker and has not heard or seen the whole of the evidence. The jury impact test perfectly expresses the means by which that judgment is to be exercised.

The statutory test for deciding appeals against conviction, now reduced through the 1995 Act to the single criterion of safety, does not itself circumscribe the means by which the court is to determine in a given case on what basis it "thinks" that the conviction should be set aside. The principles developed through the case law of the appellate courts guide the court in how it should structure its thought process in arriving at its decision. Why, in a fresh evidence case, the Court of Appeal ***Crim. L.R. 542*** should not apply a particular test is hard to follow. There is no reason in logic or principle why the *Stirland* test should not apply equally in fresh evidence cases. Other than in *Ex p. Bennett* [22] type abuse of process cases the Court of Appeal conventionally has to assess the significance of an error in the trial process by asking itself whether the jury acting reasonably would nonetheless inevitably have convicted. Why should this ‘thought process’ not be equally applied in fresh evidence cases?

The problem with the decision in *Pendleton* is that it did not grasp the nettle and overrule the decision in *Stafford* . [23] That decision was based on a misinterpretation of the ambit of the changes brought about by the new statutory test in the 1966 Act , which transformed "lurking doubt" into something akin to lurking certainty. The result is that in every fresh evidence case the court now has to go through the cumbersome process of deciding whether to "test its own provisional view" by applying the jury impact test and in so doing has to decide whether the facts pose "a case of any difficulty". The law as stated in *Parks* and *McInnes* , in addition to being based on sound legal principle, had the virtue of clarity and simplicity, whereas *Stafford* , by letting loose judicial subjectivism, muddied the waters.

What needs to be remembered is that the "heresy" of the decision in *Stafford* played a significant part in a series of decisions of the Court of Appeal in the 1980s, which so lowered the reputation of the criminal justice system in the public eye that it was deemed necessary to set up a Royal Commission. The criticism of the decision in *Stafford* was that it appeared to allow the Court of Appeal to decide for itself whether it thought the appellant was guilty, as opposed to limiting itself to deciding whether the conviction was safe, a point recognised by Lord Bingham in *Pendleton* . Following the report of the Royal Commission it would not have been difficult for the appeal courts to have taken the opportunity to revert to the law as established pre *Stafford* . In clinging on to that decision the impression is given that the appellate courts are again using it as a means of dismissing meritorious appeals. That is as unfortunate as it is unnecessary. It may very well be that the outcome of the appeals in which the court has declined to apply the jury impact test would have been the same had they done so. [24] After all, in exercising its judgement concerning the impact of fresh evidence on a jury’s verdict, the court has to consider the evidence as a whole as it appears on the papers. That provides it with a wide margin of appreciation. In *Garland* , for example, the court’s decision about the weight and admissibility of the non-disclosed material is difficult to fault. It is to be hoped, therefore, that in future the Court of Appeal would be more ready to acknowledge that the vast majority of cases in which the court receives new evidence are cases "of difficulty" and therefore to be decided by determining whether the trial jury might reasonably have acquitted had it considered the evidence. In so doing it would reintroduce the simplicity of the old law and avoid creating the suspicion that it is failing to correct wrongful convictions.

Henry Blaxland QC

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Footnotes

1 *Garland [2016] EWCA Crim 1743* .
2 *Pendleton [2001] UKHL 66; [2002] 1 W.L.R. 72; [2002] 1 Cr. App. R. 34* (p.441).
3 *Stafford v DPP [1974] A.C. 878; (1974) 58 Cr. App. R. 256* .
4 *P. Devlin, The Judge (Oxford: Oxford University Press, 1979)*.
5 *Cooper [1969] 1 Q.B. 267; [1969] 53 Cr. App. R. 82* .
6 *Turnbull [1977] Q.B. 224; (1976) 63 Cr. App. R. 132* .
7 *Parks [1961] 1 W.L.R. 1484; (1962) 46 Cr. App. R. 29* .
8 *Woolmington v DPP [1935] A.C. 462; (1936) 25 Cr. App. R. 72* .
9 *Stirland v DPP [1944] A.C. 315; (1945) 30 Cr. App. R. 40* .
10 *Callaghan (1989) 88 Cr. App. R. 40* .
11 *McIlkenny [1992] 2 All E.R. 417; [1991] 93 Cr. App. R. 287* .
12 Chapter 10 paras 62–63.
13 *Pendleton [2001] UKHL 66; [2002] 1 W.L.R. 72; [2002] 1 Cr. App. R. 34* (p.441) at [17].
14 *Pendleton [2001] UKHL 66; [2002] 1 W.L.R. 72; [2002] 1 Cr. App. R. 34* (p.441) at [19].
15 *H [2002] EWCA Crim 730; [2002] Crim. L.R. 578* .
16 *Dial v Trinidad and Tobago [2005] UKPC 4; [2005] 1 W.L.R. 1660* .
17 In *Burridge [2010] EWCA Crim 2847; [2011] 2 Cr. App. R. (S.) 27* (p.148), cited in *Garland [2016] EWCA Crim 1743* , the author's invitation to the court to decline to follow *Dial* was politely but firmly declined.
18 *Ahmed [2010] EWCA Crim 2847* .
19 *McInnes v HM Advocate [2010] UKSC 7; 2010 S.C. (U.K.S.C.) 28; [2010] H.R.L.R. 17* (p.409).
20 The capability of belief test was inserted by amendment to s.23 brought about by the 1995 Act . It replaced the "likely to be credible" test on the basis that it made it clear that the decision for the Court of Appeal was whether the jury might reasonably have accepted the evidence.
21 *H [2002] EWCA Crim 730 at [11]; [2002] Crim. L.R. 578.*
22 *Horseferry Road Magistrates' Court Ex p. Bennett [1994] 1 A.C. 42; (1994) 98 Cr. App. R. 114* .
23 Given the logic of the analysis conducted by Lord Bingham it is not clear why he did not go the whole hog and overrule *Stafford [1974] A.C. 878; (1974) 58 Cr. App. R. 256* . It is at least possible that their Lordships were concerned that such an important change in the law would have opened the floodgates of appeals in old cases.
24 Although one would like to think that, had the jury impact test been applied in *Dial [2005] UKPC 4; [2005] 1 W.L.R. 1660* , that the majority would have aligned themselves with the views of Lords Steyn and Hutton.

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