



News from Nine

Issue 1 October 2009



Anthony Berry QC has been Head of Chambers since 2000. In this profile, he shares the horrors of his first day on his feet, the qualities he finds most admirable in a judge and what Samuel Johnson and James Boswell can teach us all about a barrister's relationship with his lay client.

1. Tell us about your first day on your feet?

I will never forget my first ever case. I was led by William Rees-Davies QC MP in a privately instructed appeal in the Court of Appeal. He presented the appeal and before our opponent had even stood up he turned to me and said: 'You carry on from here old fruit, I'm off for lunch at the Greek Embassy.' It was a steep learning curve.

2. What quality do you most admire in an advocate?

Detachment and lightly worn enthusiasm embody a style that is not wearing, repetitive or obvious. I try to underplay my best points during the trial and only expand on them in the speech; I do this in the hope that the jury are led gently to the point without having it rammed down their throat.

3. And in a judge?

I was recently involved in a case tried by the most recent Master of the Rolls Lord Clarke of Stonecum-Ebony. He was charming, reasonable, correct and confident and commanded complete authority without fuss. It is not hard to see why he has been appointed to the Supreme Court.

4. How long have you been head of chambers and what is the biggest challenge of the job?

Since 2000 when Anne Rafferty was appointed to the High Court Bench. The biggest challenge has been continuing the growth of the set from a ramshackle assortment of rooms in Brick Court to the professional outfit that it is today with 51 juniors and 9 Silks.

5. What is the best answer you've ever heard to a question in court?

Leading Michael Borelli, now QC, in a double murder in Yorkshire, we were defending a man whose mother was in court and who was a Californian gypsy. As we were leaving the court room one day she grabbed hold of Michael and asked him how he thought the trial was going. He looked solemnly at her and said: "You're the one with a crystal ball."

6. You're prosecuting alleged treason in Malawi, tell us about that?

I was instructed in 2007 to prosecute the vice-president and another for conspiring to murder the

president and for high treason. I have been to Blantyre three times and each time the case has been stood out because of pre-trial issues that need to be considered by the Constitutional Court which rarely sits. At the moment it is hoped that the 4-6 week jury trial will get underway in Spring 2010.

7. What do you foresee as being the future for the Criminal Bar?

It is not an exaggeration to say that we have reached a crisis point. The latest proposed cuts would be catastrophic for the continuation of the profession and some real courage will need to be shown to face down those who do not care for future of the Bar.

8. How many times have you been asked what it's like to defend someone you know is innocent and how do you answer the question?

This is such an old chestnut that I can't improve upon Samuel Johnson's answer to James Boswell as recorded in his *Life of Samuel Johnson* published as long ago as 1791: Boswell: "Does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion, when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with friends?" Johnson: "Why no, Sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble on his hands when he should walk on his feet."

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INVESTOR IN PEOPLE

Welcome to the first edition of *News from Nine*. It is intended to be a useful publication published six times a year. Within its pages will be found a digest of recent case law helpfully condensed to basic principles by **Helen Lyle** and **Bethan Charnley**. Each edition will also feature commentaries on recent cases that members of chambers have been involved in. This inaugural edition considers the Court of Appeal's recent decision in the case of *O'Dowd* prosecuted by **Patricia May** and explores **John Cammegh's** experiences defending a war crimes trial. The newsletter will provide information about upcoming seminars and lectures given by members of chambers and about services and facilities offered within the set. Finally, each edition will conclude with a profile of a member of chambers commencing this month with its head **Anthony Berry QC**.

Max Hardy, Editor

Too much bad character? *Carrie Shorey* reflects upon *Regina v Kevin O'Dowd*, [2009] 2 Cr. App. R. 16

The Court of Appeal considered the dangers of satellite litigation caused by the admission of disputed bad character evidence when considering the safety of convictions for rape, sexual assault, false imprisonment, threats to kill and poisoning in a trial that took six and a half months.

Leave had been given to adduce evidence of three previous allegations which showed not only clear similarities to the allegations made by the complainant in the instant case but also in the way in which the allegations were defended. The defendant had been acquitted of the first rape allegation, convicted on the second and the third was stayed as an abuse of process after the complainant referred to the defendant's conviction for rape in cross-examination.

The bad character evidence lengthened the trial by sixteen days, despite the defendant instructing his legal team to concede no point. The defendant's own conduct, in sacking his barrister after an unsuccessful half-time submission, deciding to represent himself, then later re-instructing counsel "*undoubtedly caused significant and unforeseeable delay and understandable difficulty for the judge*" (per Mr. Justice Beatson para. 69). The defendant's complaints of ill health which necessitated several examinations by various doctors who found him fit to continue and a pre-booked juror holiday also contributed to the trial's overall length.

The Court of Appeal concluded that the defendant's convictions were unsafe due to the excessive length of the trial and the attendant difficulties the jury would have in keeping its '*eye on the ball*'. The admission of too much bad character evidence was highlighted as being the main contributing factor. This view was formed despite the Court acknowledging that the "*case was not in essence a particularly complex criminal case*" (para. 3) and accepting that "*there was a good case for some of the evidence to be before the jury*" (para.72).

Whether or not the convictions are unsafe is open to argument. As **Patricia May** for the Crown observed in the appeal, there are many trials involving charges of sexual offences by a number of complainants where the jury is able to cope and in this case there were no indications from the jury that they were not focused or were struggling with the evidence.

This truly was a case where the Crown had to deploy all the evidence it had at its disposal to ensure the avoidance of doubt. If ever there was a case that ought not to be used by an appellate court to exemplify the dangers of satellite litigation this was it. This is especially so when, as has been noted by Professor Michael Hurst, "*a defendant whose own tactics and behaviour contributed so heavily to the prolongation of the trial, eventually had his conviction quashed because his trial was unduly prolonged*" (Blackstone's Criminal Practice Bulletin Issue 4, July 2009). **Carrie Shorey**

Members Of Chambers				
Anthony Berry QC	Jane Lockyer	Lee Karu	Samantha Cohen	Sean Sullivan
Charles Garside QC	Shane Sheridan	David Whittaker	Anne Faul	Fayza Benlamkadem
Steven Kay QC	Jane Mirwitch	David Young	Lawrence Selby	Maximilian Hardy
Elizabeth Marsh QC	Owen Williams	John Cammegh	Yogain Chandarana	Ruth Jones
Richard Carey-Hughes QC	Derek Zeitlin	Louise D'Arcy	Matthew Banham	Richard Paton-Philip
Paul Watson QC	David Burgess	Simon Stirling	Charlotte O'Connor	Harry Bentley
Antony Chinn QC	John Traversi	Jane Bickerstaff	Camilla de Silva	Helen Lyle
Robert Fortune QC	Louis French	Benjamin Squirrell	Will Noble	Carrie Shorey
Abbas Lakha QC	David Hughes	Peter Glenser	Mustapha Hakme	Bethan Charnley
Patricia May	Matthew Kennedy	Jonathan Akinsanya	Polly Darling	
Richard Germain	Justin Rouse	Edmund Vickers	Stuart Jessop	Senior Clerk
Roger Carne	John King	Stephen Akinsanya	Aisha Khan	Michael Eves
	Adrian Amer	Anita Arora	Daniel Higgins	



THE SPECIAL COURT: VICTOR'S JUSTICE?

John Cammegh conveys the frustrations but also the excitement of defending a war crimes trial.

The Special Court of Sierra Leone followed an agreement between the government and the UN Security Council to try those responsible for the civil war, whilst promoting the rule of law in a country ravaged by an endless cycle of corruption and violence. As a warning to failed African states of the international community's new stand against impunity it may eventually prove successful, but in terms of providing justice I believe it was a wasted opportunity.

I acted as Lead Counsel for Augustine Gbao, the former Overall Security Commander of the Revolutionary United Front, in one of the longest war crimes trials since Nuremburg. Generally, the four SCSL trials have been heralded as a triumph for international criminal justice and human rights: the Prosecution, in particular, has boasted widely about conviction rates. Meanwhile, the US, remaining politically opposed to membership of the International Criminal Court, championed the SCSL as a worthy alternative- confident that no ad hoc tribunal will ever attempt to indict US political or military figures. Perhaps that's why they funded most of it.

I took this case without international experience; it was a professional challenge and a personal adventure. Life in an immediately post war setting was exciting and often dangerous, particularly during investigative missions into former rebel heartlands near the Liberian border. Freetown, where the Special Court was situated, remains a desperate city without regular running water or electricity. Jobs are scarce and living conditions are dire; average life expectancy is only 44 years. Against this landscape the SCSL was welcomed as a god-send, bringing temporary security and hope. Unfortunately that came at a price in the courtroom.

The SCSL's purpose immediately appeared pre-ordained. Defence resources were pitifully inadequate compared to those allocated to the Prosecution; on an official visit then UN Secretary General Kofi Annan insensibly denounced those on trial as 'criminals', and the Sierra Leonian judge in the RUF Trial Chamber was widely criticised 3 years into the case when he faced recusal following repeated reference to RUF 'evil' in his written judgement in the trial of former pro-government Civil Defence Force leaders. Meanwhile, Prosecution counsel continued to 're-proof' witnesses shortly before they were due

to testify, miraculously adding fresh allegations to previous statements while denying the Defence proper notice. Many 'insider witnesses' were war criminals themselves with plenty to gain from the protective measures, payments and benefits bestowed by the Office of the Prosecutor for their cooperation. One example was Charles Taylor's former army chief General John Tarnue who, during heated cross examination, admitted to organizing battalions of child soldiers prior to Liberia's invasion of Sierra Leone in 1991: before openly boasting of his relocation to Baltimore-home of *The Wire*- where he now practises as a lay preacher.

Equally disturbing was the prosecution's determination to try Gbao for attacks on UN peacekeepers despite possessing a statement from a high ranking UN eyewitness that absolved Gbao of wrongdoing. Following the statement's eventual disclosure-months after the Prosecution's case had closed- I personally invited the Chief Prosecutor to withdraw his allegations. He refused, as was our consequent abuse of process motion. Gbao was duly convicted and astonishingly received 25 years for what amounted to aiding and abetting the slapping of two UN soldiers and the abduction of one. Some have suggested that had the mass attacks on the peacekeepers in 2000 not occurred the SCSL might never have been set up: one can only speculate as to how free it really was from political influence. The Chief Prosecutor, meanwhile, was rewarded by his recent appointment as President Obama's ambassador for War Crimes.

Ultimately, Gbao was acquitted of personal involvement in every act of violence as alleged within the multifarious indictment (save for the UN incident). His acquittal of involvement with child soldiers was especially pleasing.

Controversially, however, the Trial Chamber's majority held Gbao liable under the drag-net doctrine of Joint Criminal Enterprise for mass execution, mutilation, forced labour (including diamond mining), burning villages and forced marriage. Guilt was determined on the basis that Gbao was the RUF's 'Ideologist': a fiction never suggested by the Prosecution, nor by the 200-odd witnesses that testified during 4 years of trial. With the presiding judge's 'fundamental dissent', Gbao was concurrently sentenced to another 25 years. We trust the

Appeals Chamber will shortly reverse this- as well as the peacekeepers conviction- and that Gbao may soon be freed.

Experience demonstrates that international criminal justice still has much to learn. Trials must observe fundamental principles of fairness, impartiality and equality of arms if growing accusations of 'victor's justice' are not to gradually erode their integrity. Defendants have human rights too. What future can the rule of law have in failed states like Sierra Leone unless it is imposed without the impunity it set out to prevent?

Case Update: A digest of some of the Summer's most important cases

Manchester City Council v Manchester Magistrates' Court and others EWHC 1866 (Admin) 15 July 2009

ASBOs / DEFENCE COSTS: Proper for defence costs not to be awarded following the withdrawal of ASBO proceedings where withdrawal is due to the good progress of the respondents.

R v Charles [2009] EWCA Crim 1570, 28th July 2009

ASBOs / BURDEN OF PROOF: It is for the Crown to prove that the defendant did not act with reasonable excuse when breaching an anti-social behaviour order. The defendant bears an evidential burden but the Crown bears the legal burden.

R (on the application of B) v Secretary of State for Justice QBD (Admin), 4th September 2009

PRISON LAW / HUMAN RIGHTS: Transgender prisoner's article 8 rights breached by the refusal to transfer her to a female prison and thereby enable her to progress her gender reassignment.

Mason v Director of Public Prosecutions [2009] EWHC 2198 (Admin)

EVIDENCE / DRIVING: Opening a car door does not constitute an attempt to drive for the purposes of s.5 (1) (a) of the Road Traffic Act 1988, attempting to drive a motor vehicle while over the prescribed alcohol limit. The Court of Appeal stated that the offence could not have been committed unless the act in question was one directly related to putting the car in motion.

R v Yemoh & Others [2009] EWCA Crim 930

EVIDENCE / JOINT-ENTERPRISE / MAN-SLAUGHTER: The test as to whether the act carried out by another is fundamentally different from the one foreseen by a defendant applies to manslaughter in the same way as it does to murder
POLICE SERVING ON JURIES: Presence of police officer on jury unknown to all parties until

after deliberations had begun did not violate the fairness of the proceedings. The Court did not discount the possibility that a like situation could violate the fairness of proceedings or at least create an appearance of unfairness.

R v J CA (Crim Div), 29 July 2009

POLICE SERVING ON JURIES: Presence of a serving police officer did not create unfairness as no issue between the evidence of the police witnesses and the defendant in regards to the offence indicted.

R v Greene CA (Crim Div), 6 August 2009

EVIDENCE / HOSTILE WITNESSES: Reiterates the need for an appropriate direction to the jury to treat a witness's evidence with caution when the prosecution have been allowed to treat a witness as hostile.

Carroll v DPP [2009] EWHC 544 (Admin), 4th March 2009

EVIDENCE / DRUNK & DISORDERLY: The *mens rea* for being drunk and disorderly relates to the voluntary consumption of alcohol. There is no mental element required in relation to being disorderly; what is required is proof that the defendant was guilty of disorderly behaviour.

R v Downer [2009] EWCA Crim 1361, 6th July 2009

EVIDENCE / CO-DEFENDANT'S PLEAS: The appellant was charged with burglary. His co-defendants had pleaded guilty to aggravated burglary. Their pleas were not probative of the appellant's guilt, could be prejudicial and should have been excluded under s.78 PACE.

R v Girma & Ors [2009] EWCA Crim 912, 15th May 2009

EVIDENCE / CO-DEFENDANT'S PLEA: One of the co-accused pleaded guilty on a limited basis. The issue in the trial was the state of mind of the co-accused and to which the plea was irrelevant and thus should not have been admitted into evidence. Furthermore, due to its limited basis the plea was not relevant to some issues in the case.



Save time and money: Videoconference from 9 Bedford Row. Contact Julian on 020 7 489 2809, or julian.bradley@9bedfordrow.co.uk