Experts & circumstantial evidence

Aggregation of evidence is for the jury, not the expert, as Chris Pamplin explains

IN BRIEF

▶ In cases involving circumstantial evidence, experts must restrict themselves to the primary evidence within their field of expertise.

The case of *R v Olive and others* [2022] EWCA Crim 1141 gave the Court of Appeal the opportunity to restate the way experts should handle circumstantial evidence. While jurors can bring together strands of evidence, circumstantial or otherwise, from different experts to form a judgement, to what extent can experts do the same to support their opinions?

The facts of the case

The appellant, Micheala Olive, along with two others, had been convicted of murder following a fatal shooting. There were no witnesses to the shooting, but two witnesses had heard the shot, observed a white car with its engine running, and seen four or five unidentified men running from the crime scene. The other evidence in the case was CCTV footage of a similar white car, evidence obtained from mobile phone location tracking, spent firearm cartridges recovered from a drain, and gunshot residue (GSR) recovered from the suspect vehicle and another vehicle believed to have been used by the perpetrators.

A number of experts had been instructed, including one on the nature of the recovered cartridge case and three experts in GSR.

The quantity of GSR recovered from the vehicle consisted of just two particles. The defence had argued that the level of residue was so low that it was not probative of anything, and so was inadmissible. The judge, referring to the cases of *R v George* [2014] EWCA Crim 2507, [2014] All ER (D) 94 (Dec) and *R v Gjikokaj* [2014] EWCA Crim 386, [2014] All ER (D) 122 (Mar), rejected this argument, and accepted the prosecution's submission that it could be considered a component in the body of circumstantial evidence.

The experts had initially been told that no firearms officers had been involved in the case, and reports had been prepared on that basis. However, it later transpired that firearms officers had attended. Later that day, the 'scenes of crime officer' attended the address. He, too, had been told that no firearms officers had come into contact with the car. He opened the car and leaned inside to take a photograph. He was not wearing a body suit, but a fleece jacket. And he was wearing the same jacket the next day when he went to a police pound to carry out GSR tapings inside the car.

This was put to the experts at a late stage, and just before one of them was to give evidence. The presence of the firearms officers had introduced a further possible explanation for the GSR in the vehicle. The low levels of GSR might previously have been explained by one of the suspects having recently discharged a firearm or that it had got there purely by chance. There was now the third possibility: contamination by the officers.

One question for the court was the extent to which the GSR experts could offer a valid and admissible opinion on the three possible alternatives. If they were unable to do so, was the expert evidence admissible at all?

One of the experts said that she was unable to give an opinion, saying, effectively, that each of the three options was equally possible. Another expert considered that the actions of the officers were likely to have resulted in the contamination of the vehicle, from either themselves or their equipment. Both of these views were put to the jury by the trial judge in his summing up.

The court's ruling

The Court of Appeal held that, in this case, the judge had been entitled to admit the expert GSR evidence and that this had not been prejudicial. But the GSR evidence was not the only circumstantial evidence, and the jurors were entitled to consider this alongside the other firearms-related evidence when drawing their conclusions—something the experts involved in the case were not permitted to do.

The Court of Appeal thought that the approach to directing the jury taken by the trial judge in *Gjikokaj* was the correct one. The judge in that case had said that the central point for the jury to bear in mind was that: '[The expert] can only give his opinion from the evidence at his disposal. He cannot go beyond the evidence relating to the two particles, and because the amount of particles is low, he must necessarily be cautious. You can go further, as I have already observed. You can add one limb of evidence relating to firearms to another limb of evidence relating to firearms. That is your privilege and your right. You can aggregate evidence, [the expert] cannot' (at para [61]).

The trial judge's summing up in *Olive* had been consistent with this approach.

All the experts in these cases had acted properly and within the limits of their expertise. They had reached differing conclusions, but all were entitled to do so. This case does, however, serve as a useful reminder. In cases involving circumstantial evidence, experts must restrict themselves to the primary evidence within their field of expertise. They should not amalgamate evidence, nor look to other forms of circumstantial evidence for corroboration, nor allow this to colour or influence any opinion or conclusions they draw. Inconclusive expert evidence could be admitted where it forms part of a larger body of circumstantial evidence, but any aggregation of the evidence is for the jury alone and not the expert. NLJ

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