[redacted]

PORTFOLIO – CRIMINAL CASE 1

[redacted]

Provide a concise description of the case, its progression and outcome

Date instructed: 10 January 2023

Enclosures:

- Application to vacate trial date
- Abuse of Process application

My client was charged with one offence of being unfit to drive through drink (contrary to Section 4(1) of the Road Traffic Act 1988). At a Preliminary hearing in the Magistrates' Court, the offence was changed to one of Driving Over the Prescribed Limit contrary to Section 5(1)(a) of the Road Traffic Act 1988.

The case was privately funded by the defendant's employers, [redacted] The defendant was not eligible for legal aid due to his income being higher than the income limit.

The Defendant was a full-time carer for [redacted] and had to commute daily from [redacted] to their home in what is classed as a "super rural" location and was therefore reliant on his driving licence. [redacted]

[redacted] the family had found it very difficult to find anyone with the defendant's skills, experience and judgement.

The defendant had one relevant previous conviction for driving a vehicle with excess alcohol dating back to November 2014 and an unrelated conviction for shoplifting in 2006. Given the previous drink drive conviction being dated within the previous 10 years, a further conviction would come under the 2nd offence within 10 years category. Given the level of alcohol in his case, the offence on conviction would attract a disqualification of 36 to 46 months. Clearly this would be devastating to both the defendant and his employers.

Offence Circumstances

The offence related to an incident in the early hours of [redacted]. The defendant was driving his car, when he lost control of the vehicle on a sharp bend and collided with the gates to the driveway of a house. The defendant left the car and walked home. After his arrival home, he went on to drink wine and spirits with a female friend that he had spent the afternoon and evening with.

The incident was reported to the Police by the neighbour of the house where the collision had taken place and the police conducted enquiries in relation to the registered keeper of the vehicle.

At approximately 02.30 hours the Police attended on the home of the defendant who stated that he had been drinking. The Police arrested the defendant on suspicion of driving whilst over the prescribed limit of alcohol.

He was taken to the Police Station and detained. At 03:51 the intoxilyzer procedure was performed. The defendant blew 81 micrograms of alcohol per 100ml of breath.

He was interviewed the following day.

Procedural Progression

The postal requisition was issued [redacted] and so was within the 6 month time limit for the information to be laid.

The case first came before the court on [redacted] when the defendant appeared unrepresented. He pleaded not guilty and a trial was listed on [redacted] At this hearing, the offence was changed to an offence of Driving Over the Prescribed Limit contrary to Section 5(1)(a) of the Road Traffic Act 1988. Incidentally, we were not advised of the change of the offence until we attended the hearing on [redacted].

On 10 October, the defendant emailed the court to request an extension of time, so that he could instruct an expert toxicologist[redacted].

On [redacted] the defendant sent a report by [redacted] to the court who confirmed receipt.

We were instructed on [redacted] and advised that a hearing was listed on 16 January. At an initial meeting with the defendant on 12 January, I learned that the hearing on 16 January was for trial. Following that meeting, I urgently wrote to the CPS to confirm that we were representing the defendant and to canvass their views on an application to vacate the trial date, providing details of further prosecution disclosure required and outstanding defence preparation.

We submitted a formal application to vacate the trial date to the court.

The trial was successfully vacated to 21 April [redacted] at which the defendant was acquitted.

Defendant's Account

The defendant's version of events was that he had spent the afternoon and evening with a friend and new girlfriend he had met earlier that day. They had been to [redacted] from 19.00 – 23.00 during which time he drank two pints of beer and coffee and ate tapas. He and the girlfriend got a taxi home and on route stopped at a cash machine to take out cash to pay for the taxi. The defendant's card was swallowed by the cash machine, so he decided to stay a while to try to retrieve his card whilst the girlfriend took the taxi to the defendant's home, paid the fare, then waited for him to return to the house on foot.

The defendant returned home but later in the evening decided to go back out in his car to the cash machine so that he could obtain money with a different bank card to repay the taxi money to his girlfriend. After he had left the house he realised that he had accidentally locked his girlfriend in the house and was worried that she may be frightened about being locked in the house. On his way back home from the cash machine, he lost control of the car as he was driving too fast because he wanted to get home quickly. His car collided with a fence and gates to a house.

The area was very quiet and the house in darkness. He did not want to knock on the door as it was dark. He was both concerned about his own safety and did not want to wake anyone up.

He decided to walk home to return the next morning to pick up the car and speak to the householder.
When he got home, he was in shock because of the accident. His housemate gave him a shot of Cachaca spirit and then he and his girlfriend drank wine and danced to music.

He described drinking 2 large glasses of white wine, 2 large glasses of red wine and a shot of Cachaca spirit.

The police attended and saw empty bottles of wine in the living room. He told the police that he had been drinking wine. He was then arrested and detained overnight at [redacted] police station. He was interviewed the following day without legal representation. He was released after interview.

My client's defence was that he had not drunk enough alcohol to be over the limit at the time of driving and that the reading was as a result of alcohol he had drunk after the incident.

The matter proceeded to a one-day trial at the local Magistrates' court. My client was represented by Counsel at the hearing.

Working meticulously with an expert forensic toxicologist, we were able to establish that the defendant had consumed alcohol after driving and before the evidential test, and that, had he not done so, the proportion of alcohol in his breath would not have exceeded the prescribed limit. The magistrates found that the defendants account aligned with the expert's findings and returned a verdict of not guilty.

A costs order was awarded to my client whose case was funded privately. An application for defence costs was successful and we recovered just over £ 2,000 which was returned to [redacted]

<u>Outline the law arising in the case and its application to the facts of the case</u>

Driving whilst over the prescribed limit is an offence under Section 5(1)(a) of the Road Traffic Act 1988. It is distinguished from the offence of being unfit to drive through drink (contrary to Section 4(1) of the Road Traffic Act 1988) as there is no requirement for the prosecution to prove impairment. The prosecution merely has to prove that the defendant drove on a public road when the proportion of alcohol in his breath exceeded the prescribed limit.

The legal drink driving alcohol limits are:

35 microgrammes of alcohol in 100 millilitres of breath
80 microgrammes of alcohol in 100 millilitres of blood
107 microgrammes of alcohol in 100 millilitres of urine

Mr [redacted] blew 81microgrammes of alcohol and therefore was over twice the legal limit.

It is a summary only offence which carries the Magistrates maximum sentence of 6 months custody and a mandatory disqualification of at least 12 months. For second offences within 10 years, the disqualification period increases to 36 – 60 months depending on the level of alcohol. Following conviction, it is possible to reduce the length of the ban by up to 25% by attending a drink rehabilitation course. This is only offered in the case of alcohol consumption (not drugs).

In rare cases, it may be possible to argue that special reasons apply such that the court has the discretion not to disqualify. The case of R – v – Wickens (1958) set out the criteria for a special reasons argument:

1. Be a mitigating or extenuating circumstance;
2. Not amount in law to a defence;
3. Be directly connected with the commission of the offence; and
4. Be one which the court ought to properly take into consideration when imposing sentence.

An example might be a genuine emergency where there is a threat to life and in circumstances where calling a private hire cab was not an option. The threshold for what amounts to “special reasons” is very high and such submissions often fail. This was not a case in which there were any special reasons available.

There are limited defences including procedural issues (where the procedure in taking the sample was not operating correctly or the testing equipment was not operating correctly or accurately). During the preparation of the case, I examined the police MGDD forms and was satisfied that the police had complied with the procedural requirements.

The defendant’s account was that he was sober when he had been driving but afterwards had consumed wine and spirits before the police arrived at his home. The issue in the case gave rise to the “hip flask” defence. This is where a person consumes alcohol after the driving has taken place and claims that the post-driving consumption of alcohol is what has resulted in the person being over the prescribed limit. It is a technical defence usually requiring expert evidence regarding the alcohol consumed and the effect it has on the test results.

Under Section 15(2) of the Road Traffic Offenders Act 1988, there is a Statutory Assumption that the amount of alcohol measured in a motorist’s breath, blood or urine is not less than the amount of alcohol in their system at the time of driving. It is a rebuttable presumption and it is for the defendant to rebut it by means of evidence. Because this is a reverse burden, ie the onus is on the defendant to establish that he was under the prescribed limit whilst driving, it must be proved on the civil standard, the balance of probabilities.

Section 15(3) of the Road Traffic Offenders Act 1988 sets out the basis of the hip flask defence and where the presumption under Section 15(2) can be rebutted if the accused person can prove (on the balance of probabilities):

- that he consumed alcohol before he provided the specimen or had it taken from him**,** and after the time of the alleged offence, and
- after he had ceased to drive, attempted to drive or be in charge of a vehicle on a road or other public place, and
- (b)that had he not done so, the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if it is alleged that he was unfit to drive through drink, would not have been such as to impair his ability to drive properly.

For the defendant to advance such a defence we needed an expert forensic toxicologist to conduct a BAC calculation to determine what his expected blood alcohol content would have been when he was driving. Such a calculation depends on several factors including what had been drunk and when, the time of the sample, the subjects age and height and weight (metabolic determinants).

If a toxicologist was able to confirm that the defendant would likely have been under the prescribed limit whilst driving, this would be difficult for the prosecution to refute and the defence would likely succeed as a complete defence.

Summarise the manner in which the instructions were received by you

My supervisor received initial enquiries from the defendant’s employer, Mr [redacted] on the evening of 10 January. We were informed that there was a hearing listed on 16 January [redacted] and on the basis of the instructions received, assumed that this was a preliminary hearing.

A meeting was set up for me to meet with the defendant and Mrs [redacted] on [redacted]. I conducted the initial consultation with the defendant and his employer Mrs [redacted] on my own. During that consultation, I obtained instructions and provided initial advice.

During the meeting, I learned that the hearing listed in 4 days' time was for trial and not a preliminary hearing. I met with the defendant on the afternoon of Thursday 12 January and the trial was listed on Monday 16 January [redacted]

The defendant had not told his employers about the case until proceedings were well advanced because he had not wanted to worry them. He had been unable to afford legal representation but was over the income limit to apply for legal aid, so he had represented himself at the first hearing and in the months that followed.

On my examination of the prosecution papers served, it was apparent that there was key evidence that had not been disclosed including a witness statement by the neighbour who heard the impact and then went out in his car to confront the defendant, CCTV evidence, the record of police interview and body worn video footage of the officers who attended at the defendant's home.

A further issue was that, [redacted] I was advised that the expert who had prepared a report was not available to attend court on the trial date as he had not been warned.

Indicate the context in which the advice was provided.

Throughout the case, I advised Mr [redacted] at each and every stage, from our initial meeting to times when there was any development in the case: including the receipt of further evidence and on receipt of our expert's report.

In my initial meeting, I advised the defendant on the law and what the prosecution would have to prove for the court to convict him. I advised him that he was advancing a post driving consumption (or "hip flask") defence, which if accepted by the court would be a complete defence to the charge.

I advised that to advance such a defence he would need expert evidence to prove on the balance of probabilities that he had consumed alcohol after driving and before the evidential test and that had he not done so, he would have been under the prescribed limit. I advised the defendant that the findings of the expert whose report had already been served on the court were not helpful but that the expert had worked on what I perceived to be an incorrect factual basis (the amount of alcohol consumed). I advised that we needed to go back to the expert to ask him to prepare revised findings.

I assessed that there was important evidence including the neighbour's witness statement and CCTV footage that had not yet been served and that we would need this to prepare for trial. I advised the defendant that we ought to apply to vacate the trial which would mean applying to the court for further time to allow the Prosecution to serve all the evidence on us and for us to obtain further expert evidence.

On receipt of further evidence, in particular the statement of the neighbour, I set out my advice in writing.

We also met on several occasions with counsel to provide further advice and obtain instructions.

In the weeks leading up to the trial, I considered that the defendant's prospects at trial were reasonable, but less hopeful than I would have liked.

During the development of preparation to trial, I continually review my advice to my client. In this matter, and in consideration of a mechanism for the defendant to avoid a trial, I canvassed whether

he would be receptive to offering a plea to an alternative offence of careless driving (contrary to Section 3 Road Traffic Act 1988). Given that the defendant had lost control of his car and crashed it into a gate, it was my assessment that an offence of careless driving was satisfied. The Crown's case was far from complete in that certain evidence had still not been served and was potentially not available. I considered that a plea to careless driving may be an attractive prospect to the defendant. I set out my advice in writing by email and followed this up by telephone. I then arranged a further meeting with counsel a week before the trial when this advice was repeated.

I also met with the client in person two days before the trial date following service of the CCTV evidence. See below for details of the advice provided.

Summarise the procedural or process issues that arose in the case. Your answer should include the court.

The matter was tried summarily in the Leeds Magistrates' Court

Application to Vacate Trial

As set out above, during the initial consultation with the client, we learned that the hearing listed in 4 days' time was for trial and not a preliminary hearing. I met with the defendant on the afternoon of Thursday 12 January and the trial was listed on 16 January 2023. There was substantial evidence not yet served and issues in respect of expert witness attendance.

In accordance with the duty of direct engagement between the prosecution and defence and better case management, I emailed the reviewing CPS lawyer following the initial meeting with the defendant to progress matters. I confirmed that the defendant had been unrepresented to date due to lack of funding and that now we were representing the client. I advised that there was a significant amount of preparation to be carried out to be ready for trial including further work to be conducted by the expert forensic toxicologist and that he was unavailable to attend on the trial date.

I indicated that we intended to seek to apply to vacate the trial date and sought views on this and whether there would be any objection. I also requested confirmation on whether the CPS had received the report by Bericon Forensics as I had noted that the defendant had served it on the court but not the Prosecution. I requested the items of disclosure not yet served but relied on by the Prosecution.

I then followed up the email with a telephone call to the reviewing lawyer and discussed the matters above. She confirmed that the Crown had no objection to the application.

I then prepared the application to vacate the trial date.

The procedure for an application to vacate a trial date and the information required is covered under 24C.30-32 Part VI Trial, Criminal Practice Direction 2015.

Within the application, you must provide the reason(s) for an application to change the hearing date. In this case, the expert witness was not available to attend trial as the defendant had not realised that he would be required. Furthermore, there was further material from the CPS that had not yet been served.

Dates of availability for expert and defence counsel must also be provided so that a trial date can be identified. I obtained dates from defence counsel's clerk and the expert and provided a combined list of dates.

Further, a chronology of the case must be provided along with information as to why it is in the interests of justice to change the date.

I had a very restricted window of time (Friday 13th January) to draft the application whilst also seeking CPS views on the same and briefing Defence Counsel for the hearing as it was likely that the hearing would still go ahead on the Monday due to the time it takes for such applications to be determined.

The hearing remained listed and Mr [redacted] attended, represented by defence counsel.

At the hearing, the application to vacate was granted, the bench found that it was in the interests of justice for the defendant to be afforded the time required to obtain an addendum to the existing report and to secure the attendance of the expert.

The trial was fixed for 21st April and the defendant was readmitted to unconditional bail until that date.

Abuse of process Application

Following the incident, the police were called by a witness, [redacted], who had heard a loud bang before looking from his bedroom window to see the aftermath of the collision. The witness provided the police with CCTV footage of the man he believed to be the driver of the car. He claimed that the man he identified as the driver was "walking in a drunk state". He also provided the police with a mobile phone video recording obtained by his wife taken from the bedroom window which showed a man leaving the car and a mobile phone voice recording of a conversation he had with the man in the street.

The CCTV and mobile phone recordings were potentially very important pieces of evidence, firstly in determining timings (which the defendant had never been clear on) and also in respect of the witness's assertion that the man he believed to be the driver was drunk.

From my initial engagement with the CPS, I had chased the Crown on numerous occasions to ask for the CCTV and other evidence to be disclosed. Following initial enquiries with the CPS, we had been advised that the Police had responded to say that the evidence was "not available" though the CPS did not confirm what that meant. We were unable to establish whether that meant that the evidence had been lost or whether it was temporarily unavailable. In any event, despite 10 attempts by email and telephone call to the CPS, 7 days before the trial date, the CPS had still not served the evidence on us.

I arranged a pre-trial conference with the defendant on 13 April. During that conference, we discussed the absence of crucial evidence and I proposed to counsel that we ought to draft an Abuse of Process application. Counsel agreed.

An application for making an abuse argument is governed by the Criminal Procedure Rules 2020, SI 2020/759 (CrimPR). The burden of proof is on the applicant, on the balance of probabilities. The Criminal Practice Directions, CPD I General matters 3C sets out the procedure to be adopted.

Where an abuse argument is anticipated, it must be included in the defence case statement which in Magistrates' Court proceedings must be served within 14 days of disclosure of unused material. We did not serve a defence case statement (see below) and an abuse argument was not anticipated as we had expected to receive the required evidence at some point well in advance of the trial date.

I prepared the skeleton argument, the basis of which being that the Police had failed to serve evidence crucial to assisting the defence in respect of timings and in relation to the defendant's demeanour (the witness stating that he looked drunk). I proposed that in not disclosing the evidence, despite clear and consistent attempts by the defendant's solicitors, the prosecution had failed to act in good faith and had failed not only to obtain and retain vital evidence but also to perform their duty of considering whether such evidence assists the defendant's case. The unavailability of the evidence requested denied the defendant the opportunity to adduce evidence which may have supported his account.

I made the submission that in the absence of this evidence, it was not possible for the Defendant to receive a fair trial and that the proceedings should therefore be stayed.

Within the application, I cited the relevant authority, R. (on the application of Ebrahim) v Feltham Magistrates' Court [2001] 2 Cr. App. R. 23, the leading case in relation to the obliteration of video evidence, and the duty on the investigating authorities under the Code of Practice (the 1997 code) published pursuant to ss23 and 25 of the Criminal Procedure and Investigations Act 1996, para 3.4 "to pursue all reasonable lines of enquiry whether these point towards or away from the suspect" and therefore to obtain material which may be relevant to the investigation.

The abuse application was served on the CPS copied to the court on 18 April 2023 with a letter requesting that the matter be urgently reviewed.

The CPS served all the outstanding evidence the following day, on 19 April 2023, 2 days before the trial date.

Interpreter

I had instructed a Portuguese/Brazilian interpreter to assist the witness [redacted] in our video conference and for trial. I sourced the linguist through an interpreting agency that I have used many time over the years at DACB.

During the video conference with the witness on 14 April, I considered that the interpreter and witness had a good rapport and understood each other very well. I asked the interpreter if she was available for the trial which was listed a week later. She confirmed her availability and advised me to make a formal booking online with the interpreting agency. I duly completed the booking online in the usual way and diarised to contact the agency mid-week to check that arrangements for the interpreter were in place.

I did not receive a response from the agency despite several chasers and so contacted the interpreter directly who advised me that the agency had not booked her for the trial and that she was now booked on another job on that date. I finally heard back from the agency the day before the trial and was informed, with apologies, that my booking had not been dealt with. They were unable to find an alternative Portuguese/Brazilian interpreter at such short notice and I had to try to source someone else from a different agency. Eventually, after around 4 hours of telephone calls, I was able to secure an interpreter.

Summarise the evidential issues that arose in the case and how you dealt with them

In order to advance a hip flask defence, we needed to obtain expert evidence from a professional forensic toxicologist to calculate a back calculation. Prior to our instruction, the defendant had researched online and found a company called Bericon Forensics. Mr [redacted] instructed Bericon Forensics who provided a report. Mr [redacted] served the report on the court in December 2022 (again, prior to our instruction)

On my initial review of the report, it was noted that the report was not helpful to the defendant's case.

The expert had conducted a forward calculation, on the basis of the stated alcohol consumption before driving (2 pints of lager between 19.00 and 23.00) and a back calculation to calculate the alcohol proportion that would have been present at the time of driving (eliminating the post consumption drinking).

The key calculation is the back calculation. The expert concluded that on the defendant's own figures (amount of alcohol consumed after driving), he would have been over the limit at the time of driving. For the defendant's account to be correct, he must have consumed additional alcohol after driving.

I noted that the expert had worked on the basis that the glasses of wine were 175ml and the shot 25ml. I asked the defendant about his instructions to the expert to establish where the expert had obtained the information regarding the amounts of alcohol.

The defendant confirmed to me that he instructed the expert that the glasses were "large" glasses of wine. We needed to establish an amount for calculation purposes. I was aware that a standard large measure in a pub is 250ml and that a large wine glass can hold up to 300ml. Furthermore, a shot could be anything up to around 50ml. People tend to drink larger measures at home than they might in a pub or restaurant.

I took the defendant's instructions on this and asked him to fill a glass with water to around the volume of wine he was drinking that night. The defendant thereafter confirmed that the amounts of wine consumed were more like 250ml and not 175ml and that the shot was more likely to be around 40ml This was an additional 315ml of alcohol consumed and this difference would undoubtedly effect the expert's findings.

There was also a difference in timings. Bericon Forensics had worked out the back calculation on the understanding that the defendant was driving the car at around 00.00. Throughout the case, the defendant had been unsure about the time of the collision but on further probing decided that it had been around 00.20. In fact, the prosecution evidence suggested that the accident took place much later, at approximately 01.30 hours. This of course would have allowed a much narrower window of time for the defendant to consume the stated amounts of alcohol and would further affect the back calculation (allowing less time for alcohol elimination). I questioned the defendant on many occasions regarding the timings and at one point arranged a conference with defence counsel to clarify this and other points. The witness stated that he heard the impact at around 01.30 hours and the police storm log indicated that the 999 call was at around 01.40. We were still missing the CCTV footage that would potentially resolve any timing queries. The defendant maintained that he believed the collision happened much earlier but said that he could not be sure about the times because he was not checking the time during the evening in question.

I considered whether to instruct a new expert, but for the sake of continuity and to mitigate costs, I went back to Bericon Forensics with further instructions. I asked the expert to provide revised findings based on the slightly altered time of 00.20 and the increased amounts of alcohol consumed.

The expert provided an addendum report which in my opinion was completely contradictory.
On the one hand the expert was saying that allowing for the elimination of alcohol over time *at the most likely rate of 8ug% per hour*, the reading would have been between 6ug% and 31ug% at the time of driving (under the limit).

However, conversely, he then went on to say that the reading would only have been below the limit if Mr [redacted] eliminated alcohol at the very low end of the range of rates. He stated that whilst this was possible it was statistically unlikely and evident in less than 10% of the population. He went on to say that that if he eliminated alcohol at 8ug% per hour (as stated above), for his reading to accord he would have needed to have consumed more alcohol after driving (another 80ml of the spirit or its alcohol equivalent).

The report made little sense to me as the conclusions directly contradicted each other. There was also the caveat that the pattern of drinking only accorded at a low rate, but not at the most likely rate, of elimination. I considered that the prosecution was likely to seize on this point and use it to its advantage. I also noted that the expert did not appear to have calculated any elimination for the time from when the police attended at the defendant's home to the time of the evidential breath sample being provided at 3.53am.

I contacted the expert to discuss my concerns and to seek some clarity and explanation in respect of the apparently contradictory findings. The report was very difficult to follow, and I needed the assurance that the expert could explain it to me so that I would have the confidence that he could explain it to the court. During a frustrating telephone conversation, I pointed out the apparent anomalies in the report and the only explanation that the expert could provide to me was that I didn't understand rates of elimination because I was not an expert. The expert did not properly explain his methodology to me, and I was not confident that he would be a reliable witness at court.

I recommended to the client that we commission an alternative expert from one of our preferred tried and tested experts to prepare a comparable report. I was aware that Keith Borer Consultants were experts in this field and I had worked with them on many occasions at DACB with excellent outcomes. Their reports were simple to understand and their witnesses robust at court. I sought a quotation from Keith Borer in advance to assist my client in deciding whether to proceed.

The client agreed and we commissioned Keith Borer Consultants to prepare a report from scratch.

The expert's finding in respect of the forward calculation were that zero to 15 ug% alcohol may have remained at the time the post driving description was consumed.

The expert concluded that the stated drink intake would have given rise to an evidential test result of between 55ug% and 94ug%. The test result was 81ug% and was therefore within the calculated range. Had the stated post-driving alcohol not been consumed the expert concluded that his test result would have been zero.

In respect of the back calculation, the expert set out her methodology very clearly. To calculate the likely level at the time of driving, she added the eliminated alcohol to the test result and subtracted the contribution of the post-driving drinks which would not yet have been consumed at the time of

driving. She concluded that the defendant's breath alcohol level at the time of driving would have been between 2µg% and 26µg%.

The report was not only extremely helpful but also clear in its explanations and methodology. I assessed that the expert would be robust and credible in her evidence under examination and cross examination. I served the report on the Crown and Court and confirmed that we would be relying on the expert's evidence at trial. I de-warned Mr [redacted] of Bericon Forensics.

Witness Evidence

The defendant's instructions were that when he returned to the house following the collision, his housemate, [redacted], gave him a shot of Cachaca spirit and then left him and his girlfriend in the lounge and retired to his room. Potentially this could be an important witness in respect of the defendant's demeanour and whether he was drunk.

The witness no longer lived with the defendant and had moved to Manchester. I obtained his contact details from the defendant and arranged a teams video call with him. During that call it was very apparent that [redacted] spoke very little English. I was able to establish that he remembered Mr [redacted] coming home after the accident and being in shock. He offered him Cachaca to calm him down. When I asked if the defendant was drunk he was adamant that he was not. He said that he had seen him drunk but this time he was not drunk at all. Clearly, an important witness. The language barrier was obstructive and I could not obtain a very detailed account and so I considered it would be necessary to arrange a further video meeting with an interpreter.

I asked [redacted] if he would be willing to attend the trial but he said that it was too far for him to travel and he would have to take a day off work. I said that I would find out if we could cover his expenses and loss of earnings and would arrange a further call with an interpreter.

I arranged a further video meeting with the witness on 14 April. I had confirmed with the defendant's employers that they would be content to pay his travel expenses to attend court and so I was able to confirm this to him. I obtained a detailed account from the witness which was extremely helpful to the defendant's case.

At the trial, this defendant was a key witness. He was adamant that when he first saw [redacted] that night, he was completely sober. He had seen [redacted] drunk in the past and he could say that on this occasion he was not drunk. The prosecution put to him that he was just trying to protect his friend but the witness stood his ground. In returning their verdict, the magistrates said that they accepted [redacted]'s evidence, that the defendant was sober when he returned home after the accident.

Electronic Evidence Served 2 days before trial

The CCTV evidence and other electronic evidence was served following the service of our Abuse of Process Application, only two days before the trial date.

A mobile phone recording indicated that the collision had taken place at 01.40.

The CCTV showed the defendant walking away from car and then starting to jog. Three mins later he ran back to car and back again. There was no suggestion on this footage that the defendant looked impaired in any way. He was walking steadily and normally.

There was an audio recording from the mobile phone of the witness driving in his car. He could be heard winding down a window and speaking to a male who sounded like the defendant. The male could be heard saying “it’s not my car”.

There was also body worn video footage of police officers when they attended at the defendant’s home.

The late service of this evidence gave us very little time to obtain the client’s instructions, particularly in relation to the timings, the restricted window of time to consume the alcohol and the unhelpful comment of “it’s not my car”. I arranged a meeting with the defendant on 20 April.

I also contacted the expert to ask her to consider the revised timings to provide amended findings. My own rough maths suggested that the difference in time meant less alcohol elimination from the time of driving to the evidential test (which would make the back calculation lower)

The expert concluded that the stated drink intake would have given rise to a calculated evidential test result of between 71µg% and 94µg%. The actual test result was 81µg%. This fell squarely within the calculated range and so the revised intake was consistent with the test result.

She concluded that Mr [redacted]s breath alcohol level at the time of driving would have been between zero and 12µg%, if he had not consumed the post-drive drinks.

The fact that the accident took place later than the defendant had believed was more consistent with the stated consumption and test result.

I met with the defendant on 20 April to go through the newly served evidence together and obtain further instructions. On arrival, he told me that [redacted] wouldn’t be joining us because he needed to talk about something personal with me. He told me that he was ready to tell me the whole story and that he had remained silent on these matters before now because he is a private person.

The defendant advised that he knew for sure that he had stopped drinking after the two pints at the restaurant. He also understood that, as the timings had been clarified, there was a large amount of time unspoken for. He said that during the evening he had been very careful about his behaviour with the girlfriend. He had just met her and was getting close to her and expected to go to bed with her later that night. Alcohol made him “clumsy” and he could not perform well after drinking. So, he was avoiding alcohol that night.

He said that during the time period from getting back from the tapas restaurant to the crash, he had been with his girlfriend kissing, talking and dancing with an expectation of how the rest of the evening would take shape.

However, he was worried about his bank card being taken by the machine as his housemate had told him that it could be a scam. Then his girlfriend said that she needed the £ 10 back that she had used to pay for the cab. When she went to the toilet, he decided to go out quickly in his car to the cash point to take money out with another card. Without thinking, he locked the door behind him out of habit and drove off to the petrol station.

He then realised that he had locked the door of the house and he was worried that his girlfriend would be anxious. So he was in a rush.

I then took the client through the newly served evidence and obtained his further instructions.

He accepted that he had run from the scene and explained that he likes to run anyway – he likes to stay fit – but mainly because he was in a rush to get home. He accepted that the voice on the mobile phone recording was his. When asked why he said it was not his car he told me that he was not thinking straight and wanted to get back home and he didn't want to waste time talking to anyone.

I advised the defendant that in cross examination the prosecution would probably ask why everything changed when he arrived home, ie why did he suddenly start drinking. D told me that after the crash everything changed. He was very upset and worried. He started drinking because he thought it might make him feel better.

I asked why he had only just told me the explanation regarding not drinking. He explained that he is a very private and personal "gentleman" and he doesn't feel that it is proper to talk about those things in public. I advised that he would have to be candid about this at court and he understood this.

I advised the defendant that it was not too late for him to change his mind to plead guilty. I advised that given the late service of what is very important evidence we could possibly argue that he ought to be eligible for full credit or almost full credit for a guilty plea. The defendant was adamant that he was innocent and that he would never drink and drive. Having completed the alcohol rehabilitation course 7 years earlier and lost his licence for 20 months, he had learned his lesson.

I advised D on the weaknesses in his case and asked how he would respond if these points were put to him at the trial.

I then advised him in respect of the trial procedure.

I advised D that I could not guarantee an outcome and that conviction was a real risk. I advised him to prepare mentally for a disqualification and he accepted this.

Provide a Summary of any ethical or conduct issues that arose in the case and how you dealt with them

Throughout the preparation of the case, the defendant had said that he was unsure about timings of events and, in particular, the time the collision took place. When advised that the key witness had put the collision at 1.30 he said that he believed that it was around an hour earlier. The importance of the timing impacted on any potential back calculation but also the available window of time in which the defendant had consumed the stated alcohol.

It was known that the police attended on the defendant's home at approx. 02.30 hours. If the witness's account was correct, then that allowed a window of around 40 minutes in which the defendant had consumed a relatively large amount of alcohol.

On several occasions, I probed the defendant on this point, both on my own and also with counsel in conference, but he advised that he could not be sure about the times because he had been enjoying the evening and not keeping track of time.

When the electronic evidence was served two days before the trial date, I was satisfied that the timing of the collision was in fact one hour later than the defendant had believed. When I met with the defendant and obtained his further instructions, I gave careful consideration to my duties to the

court. I advised the defendant that I had a duty not mislead the court and that I had to be sure that he was not orchestrating his account to provide himself with a defence.

The defendant assured me that he had never been sure about the timings of events as he did not clock watch when he was having a good time and that now the evidence was clear on this, he felt relieved because he understood better what had happened. When asked about the shortened window of time to consume the alcohol, he assured me that this was not an issue – he could easily drink those amounts within that timeframe.

Having probed the defendant on these issues, I was sure that he was presenting a credible account and that he had not manipulated his story to fit the evidence.

Provide a Summary of the Funding issues that arose in the case and how you dealt with them

During my initial meeting with the client, the subject of public funding availability had been raised. I explained that my firm did not have a legal aid contract but that if he was eligible there were firms that I could recommend to approach that would be able to facilitate a legal aid application.

I advised that the criteria for eligibility for legal aid was determined by a two limbed test: the interests of justice test and secondly the means of the defendant.

The interests of justice test determines the merits of the case and matters such as whether the defendant may lose their liberty and whether the case involves some complexity such that a skilled legal representative would be required and whether a substantial question of law may be involved.

It was my assessment that the matter satisfied the interests of justice test. However, the defendant would fail to meet the means test as his income was in excess of the maximum limit of £ 22,325. He was therefore not eligible to apply for legal aid.

The defendant's employers had offered to provide the funding for his representation. My supervisor provided them with an approximate quotation of fees to trial. A portion of fees was requested in advance and then monthly bills sent to the employer with requests for further payments where necessary.

At the end of the trial and as the defendant was acquitted, we were able to make an application for a defendant's costs order.

Where a defendant is acquitted of an offence, an application can be made to recover the costs of their representation under Section 16 of the Prosecution of Offences Act 1985. If successful, the costs are paid out of central funds. I had previously advised Mr [redacted]s employers that if we were able to make such an application, successful recovery of costs would be limited to legal aid rates and so they would not be able to expect a full reimbursement.

I prepared the DCO2 claim form which is a non-fastrak application (as the claim was over £ 2,000) along with supporting documents including a synopsis, disbursements schedule and bills. We received funds as claimed which were duly sent to the defendant's employer.

<u>Outline any research that you undertook into law or procedure when handling this case</u>

It had been some time since I had prepared a "hip flask" defence case, primarily because most of the work conducted at my previous employers had been insurer funded. The majority of insurers will not

cover criminal defence costs in drink drive prosecutions as insurance policies usually carry exclusion clauses for being over the prescribed limit for alcohol or drugs.

I researched the legislation that provides for the defence including the Statutory Assumption regarding the amount of alcohol measured being not less than that at the time of driving under the Road Traffic Offenders Act and the evidence required to rebut said presumption including the reverse burden of proof.

I also considered the calculations that the toxicologist would have to make in order to determine what the blood content would have been at the time of driving and the factors that would have to be taken into account. This assisted me in drafting my instructions to the expert.

I also reviewed the criteria for making an abuse of process argument including the governing criminal procedure rules and the criminal practice directions to confirm the procedure to be adopted. I also read the key leading authority relevant to the case.

Summarise any decisions you had to make, how you made them and whether you had to take any advice on strategic issues in the case.

Whilst the advocacy at court was dealt with by Counsel, the preparation of the matter including the key decisions in the case were conducted by myself, occasionally with referral to my supervisor to check her views.

At the outset, I had to act very quickly in my decision to apply to vacate the trial date (as detailed above)

There were also key decisions which have also been set out above in respect of the expert evidence. In relation to the decision to instruct a fresh expert, it was my view that this was not a fishing expedition, but rather an essential exercise to inform the court. The report previously obtained was unclear in its methodology and the expert was unable to properly explain his approach. Ultimately, the expert evidence eventually relied on by the defendant was key to his acquittal.

We also had to decide whether to serve a defence statement, a procedure that is obligatory in Crown Court matters but discretionary in the Magistrates' Court. This document outlines the defence strategy to be used during trial and is provided to the Prosecution and Court in advance of the trial.

A defence statement should include the nature of the defence, any relevant facts that validate the defence, any relevant points of law, the issues in dispute and the names and addresses of any defence witnesses.

It is my experience that usually defence advocates usually prefer not to serve a defence statement in the Magistrates' Court. The key disadvantage of serving a defence statement is that it can give rise to adverse inferences (Section 11 CPIA 1996) if the defendant fails to mention something in the statement upon which he later relies during the trial, or if he gives evidence during the trial that is inconsistent with the defence statement.

At the time of considering whether to serve a defence statement, there was key evidence we still had not seen and there were factual matters not yet reconciled (including the timings of events). It was my assessment that there were areas within the defendant's account about which he was uncertain. I considered that there was a very real prospect that there was a realistic risk that a defence statement could back fire at trial and so it was my view that it was not in his interests to provide one.

The advantage of a defence statement is that it should prompt further disclosure that may either undermine the prosecution case or assist the defence. Whilst we were seeking disclosure of the electronic evidence including the CCTV, it was my assessment that this evidence was “used” prosecution evidence that ought to have been served along with the initial details of the prosecution case under S3(1) CPIA 1996 and that it did not require a defence statement to prompt disclosure.

I discussed the matter with the defendant and he was in agreement not to serve a defence statement.

It was also my decision to advance an application to stay the case as an abuse of process on the basis that evidence seized by the police had apparently been lost. In any event it hadn’t been served on us.

I was aware that such applications are rarely granted as even where evidence has been lost, the court must consider the importance of the missing evidence in the context of the case as a whole. Usually a court would decide that notwithstanding an abuse of process had transpired, the defendant was not so prejudiced that he could not have a fair trial.

I took the view that the application had sufficient grounds and was in the defendant’s best interests and therefore served the application prior to the trial date. Whether or not the eventual disclosure one day later was triggered by service of the application, or a matter of coincidence is not known, but I can be satisfied that I acted in my client’s best interests.

On receipt of the electronic evidence 2 days before the trial date, Counsel felt that considerable time would be required to go through the newly served evidence with the defendant. I had suggested to counsel that we arrange a teams meeting but Counsel resisted this as he felt it would be inappropriate. He was also mindful that if time was needed at court to go through the evidence with the defendant there might not be sufficient court time to conclude the trial that day. If the court ordered the case to run over to the Monday, Defence Counsel would not be available. Counsel was leaning towards an application to vacate the trial date.

I considered the merits of making an application to vacate the trial at this stage. It would have been a third application to vacate the trial date. I took the view that the court would be unlikely to agree to an application given that it had already been vacated twice already. Whilst the CPS has dragged their heels, they would say that they had provided the time of incident and time of the 999 call from the start. It was my view that additional time would not put us in any better position.

I was conscious that the defendant was anxious to get the trial over with. I decided to speak to the defendant to outline the position and options available to us to go through the evidence. I suggested to the defendant an urgent meeting with me the following day so that I could obtain further instructions. I also canvassed the expert to consider revised timings. I undertook to provide counsel with an updated brief following my meeting with the defendant.

The meeting with the defendant was extremely productive and I was able to provide further instructions to counsel and the trial proceeded on time.

Summarise any training or development needs you identified arising out of your advice, assistance or representation in this case.

Where an abuse argument is anticipated, it must be included in the defence case statement which in Magistrates’ Court proceedings must be served within 14 days of disclosure of unused material. We

did not serve a defence case statement and an abuse argument was not anticipated as we had expected to receive the required evidence at some point well in advance of the trial date.

However, in hindsight I am of the view that we ought to have served the abuse of process application much earlier in these proceedings. This may have prompted the CPS to press the police for the evidence much sooner which would have averted the urgent last-minute preparation required.

DECLARATION

I confirm that the information contained on this form is accurate to the best of my knowledge and belief.

Signed: Leah Hester Date 28 December 2023