Propositions of Law in Conviction Appeals

By **Francis Bennion**

A jury takes its law from the judge. On the usual appeal against conviction, the defence needs to show that the judge put the proposition of law (or legal rule) wrongly. The prosecution seek to rebut this.

The legal rule, whether common-law or statutory, applies not just to the facts of the instant case. It applies to a generalized band or segment of fact (the factual outline). The description of this is part of the rule. It identifies the situations that are subject to the legal consequence triggered by the rule.
When directing the jury on the proposition of law, the judge will have formulated this factual outline. He will have told the jury that the relevant legal rule (specified in the indictment) is triggered by actual facts falling within the outline. He will have added some remarks about how the particular facts in the instant case relate to the outline.

The main difficulty judges face in making such a direction appeal-proof lies in the formulating of this factual outline. *Although comprised in the rule, it is not always expressed by it.* When not so expressed, the outline is also likely to cause difficulty in the appeal. The present article addresses these difficulties, in the context of the recently-revised *Guide to Proceedings in the Court of Appeal Criminal Division*.[1]

The criminal appeal Guide

Paragraph 10.7 of the *Guide* states that, in addressing the Court of Appeal, counsel should assume that it is familiar with the facts of the case and the grounds as settled. The *Guide* goes on to say that in appropriate conviction appeals counsel should submit at the hearing four copies of a typed note tabulating the propositions upon which they seek to rely.

The last part of this apparently applies, as must be right, both to the appellant's counsel and counsel for the prosecution. The propositions to be thus tabulated are propositions of law. In what follows they are referred to as 'propositions of law on appeal'. In these propositions counsel for each side is required to set out what, in his contention, the law enjoins on the facts of the instant case.

In a foreword to the *Guide*, the Lord Chief Justice reminds counsel of the 'awesome volume of work' the Court of Appeal Criminal Division has to handle. He asks for careful preparation of well-drawn grounds of appeal, adding that these serve to shorten the hearing. Clearly this is intended to apply also to the propositions of law on appeal.

[1] Reprinted in [1983] Crim. L.R. 415-430.
It is contended that the system of formulating propositions of law on appeal can realise its potential value only if the 'typed notes' called for by the new *Guide* are structured on certain lines. Then the new system could be of considerable importance, not only in shortening hearings but in clarifying legal argument, improving the judgments delivered by the Court of Appeal Criminal Division, facilitating the conduct and decision of any further appeal to the House of Lords, and making clear the *ratio decidendi* of each appellate decision.

Suggested structure of a 'proposition of law on appeal'

It is suggested that, in relation to each point of law involved in the appeal, the 'typed note' required by the

new *Guide* should contain the following items in the order indicated.[2]

1. A *brief statement of the material facts*, generalized so far as can be done without putting any fact into more than one legally-significant category.

2. A *selective comminution of the relevant enactment* (that is a version of it which retains all the statutory words except those without relevance to the point under appeal).

3. An *articulation* of the words which, if he had intended to express the meaning of the enactment which is contended for by the appellant, the draftsman might suitably have used when framing it.

4. A list of the *factors* which, in accordance with the criteria applied by the courts in the interpretation of statutes, tell in favour of the appellant's articulation being taken as correctly expressing the legal meaning of the enactment.

5. A brief statement of the appellant's argument seeking to establish that the facts are not within the enactment as so articulated.

[2] The items are here presented as on behalf of the appellant, but like principles would apply to the prosecution. The presentation is in terms of an offence in statutory form, but a similar method can be used for common law offences.

A model proposition of law on appeal

As an illustration we may take the way the 'typed note' required by para 10.7 of the new *Guide* might have been expressed if the suggested system had been used on the facts and law arising in a recent leading case, *Re Attorney-General's Reference No 1 of 1979*.[3]

(1) Material facts

The appellant entered a house as a trespasser. On arrest, he made a statement which indicated that he entered intending to steal money if he could find any in the house. He neither knew nor believed that specific notes, coins or other money were in the house. He had no knowledge or belief as to that matter, but intended to steal money only if he should happen to find any. He did not intend to steal anything but money.

(2) Relevant enactment

'A person is guilty of burglary if he enters a building as a trespasser with intent to commit the offence of stealing anything in the building.'[4]

(3) Appellant's articulation of the enactment

'A person is guilty of burglary if he enters a building as a trespasser with intent to steal anything in the building, *being a specific identifiable object known or believed by him to be there*'.[5]

(4) Interpretative factor favouring the appellant's articulation

The words 'with intent to commit [the offence] of stealing anything in the building' in section 9 of the Theft Act 1968 are *ambiguous*. They may either mean 'with intent to steal anything in the building whether or not known or believed by him to be there' or they may mean 'with intent to steal anything in the building, being a specific identifiable object known or believed by him to be there'. Since this is a penal provision the ambiguity should be resolved in favour of the appellant.

[3] [1979] 3 All E.R. 143. The illustration is framed as if the case had been an ordinary appeal, and relies solely on the report. It assumes the law to be in the condition prevailing immediately before the decision in that case.

[4] Based on Theft Act 1968 s. 9(1)(a) and (2).

[5] The prosecution's rival articulation might run: 'A person is guilty of burglary if he enters a building as a trespasser with intent to steal anything in the building, *whether known or believed by him to be there or not*'.

(5) Appellant's argument

The facts are not within the appellant's articulation of the enactment because they show he neither knew nor believed that specific notes, coins or other money were in the house. He had no knowledge or belief as to that matter, but intended to steal money only if he should happen to find any. He did not intend to steal anything but money.

It will be seen that this method clearly puts before the court the rival factual outlines embodied in the rule of law at issue. These are-

(a) Entry of a building as a trespasser with intent to steal anything in the building, being a specific identifiable object known or believed to be there.

(b) Entry of a building as a trespasser with intent to steal anything in the building, whether known or believed to be there or not.

Another example

Here is another example of how a para 10.7 note might have been expressed if the system proposed had been used on the facts and law arising in a recent leading case, this time *Wills v Bowley*.[6]

(1) Material facts

Three constables saw and heard the appellant using obscene language in a street. When they tried to arrest her she became violent and assaulted them. She was charged with the offence restated in para 2(a) below, but was acquitted on the ground that no resident or passenger was proved to have been annoyed. She was also charged with the offence restated in para 2(b), and convicted. The appeal relates to this conviction.

(2) Relevant enactments

(a)'Every person who in any street, to the annoyance of the residents or passengers, uses any obscene language shall be [guilty of an offence]'.[7]

[6] [1982] 2 All ER 654.

[7] Based on the opening words of s. 28 of the Town Police Clauses Act 1847, coupled with part of the

offence in that section beginning 'Every person who publicly offers for sale...'
(b) 'Any constable shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits any such offence'.[8]

(3) Appellant's articulation of para (b)

(b) Any constable shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view *actually* commits any such offence.

(4) Interpretative factors favouring the appellant's articulation

1. The appellant's articulation reflects the *literal* meaning of section 28, whereas the prosecution, in order to sustain the conviction, must rely on a strained construction. The prosecution need to insert words so that para (b) is treated as reading something like-

(b) Any constable shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits *or gives ground for reasonable suspicion that he may be committing* any such offence.

2. If (which is denied) there is any doubt about the legal meaning of section 28 on this point it should, since this is a penal provision, be decided in favour of the appellant.

(5) Appellant's argument

The appellant will argue that the para (b) offence is committed only where the accused actually committed the para (a) offence. Since the appellant was acquitted of this, she could not properly be convicted of the para (b) offence. The appeal should therefore succeed.

The advantages of this technique

The essence of the technique now suggested is that the appellant's counsel places before the court a form of words which, in his submission, codifies the legal meaning of the enactment. Instead of the usual debate about what the enactment 'means', which can get very disorganized, the discussion in court is on whether or not the appellant's formula encapsulates the enactment's legal meaning. The formula should be narrow enough to determine the question at issue, but subject to that should be as general as the enactment itself.

[8] Based on the final passsage of the opening of s. 28 of the Town Police Clauses Act 1847, before the start of the list of the various offences created by that section.
Although the proposal does not depend on there being a prosecution version as well, it will be seen that the Court would be in the optimum position to reach a sound decision if from the start it were invited to choose between two opposing articulations of the enactment. The Court might of course prefer to adopt a third version of its own.

In *Wills v Bowley*[9] Lord Bridge ended his speech with his own articulation of the crucial provision in section 28 of the Town Police Clauses Act 1847.[10] This is now law, since Lord Bridge delivered the only speech on behalf of the majority. Tailored slightly to fit our para (b) it runs as follows-

(b) Any constable shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits any such offence, *or whom he honestly believes, on reasonable grounds derived wholly from his own observation, to have committed such an offence within his view*.

Lord Bridge produced his articulation because the Divisional Court, upholding the justices' decision to convict, had put a specific question to the House of Lords.[11] The articulation was in answer to this question.

It is respectfully submitted that the version given above as the prosecution's likely articulation is preferable to that of Lord Bridge. The former slots properly into the structure of section 28, and correctly identifies the nature of the offence.[12]

In stating that the grounds of belief must derive wholly from the constable's observation, Lord Bridge is more restrictive than the wording of section 28 appears to justify. These criticisms are stated only because they bring out one of the advantages of the system now proposed. *From the start of the hearing* the debate is conducted in terms of proffered articulations of the alleged legal meaning of the enactment.

Under the present system argument is not directed to the precise wording of the key passage in the judgment. Indeed counsel before the House of Lords in *Wills v Bowley* are unlikely to have had an opportunity to comment on Lord Bridge's formulation of the answer to the certified question. In most cases before the appellate courts there is not even the concentration of argument provided by such a question.

[9] [1982] 2 All ER 654.

[10] P. 682.

[11] P. 672.

[12] Lord Bridge's version as actually given in his speech (p. 682) refers to 'an offence' in general terms. There are other advantages in the proposed method. Through the effort of thinking out their respective articulations, counsel on each side are likely to form a more exact appreciation of what the enactment provides. This will help them to prepare a full and clear formulation of what, in the contention of each, the law really is.

The process of preparing the articulation, and the resulting ability to refer to it in argument before the court, would clarify counsels' minds and assist the cogency and certainty of their arguments. The difficulty of *correct* formulation of any legal argument based on statute law is formidable, and often underrated. Gordon Woodman has remarked that its intellectual difficulty is a characteristic of such argument not often explicitly discussed.[13]

Finally, there are obvious benefits where the Court includes in its judgment a fully-argued articulation of the legal meaning of the enactment. In deciding whether to take the case further, a party knows exactly what proposition of law he has to attack. In determining whether to grant leave to appeal, the House of Lords has a similar appreciation of the exact point at issue. When the decision is in later cases treated as a precedent there can be no doubt of the ratio decidendi. What is more it is likely to be in a clearer and more concise form than is always so at present.[14]

This latter point could benefit the development and ultimate codification of the criminal law. Much confusion arises from time to time over the effect of court decisions on points of statutory interpretation. If the method now proposed had been in use it is doubtful, for example, if we would have heard anything of the doctrine of 'conditional intention' which so annoyed Viscount Dilhorne and received its quietus in the first of the two cases used as examples above.[15]

With modifications, the suggested method could equally be used where the relevant law was in non-statutory form. This would require a formulation of the applicable rule of law as if for inclusion in a code.

[13] 'Dworkin's "Right Answer" Thesis' (1982) 45 M.L.R. 121, at p. 135.

[14] Sir Rupert Cross said 'there is no doubt that unnecessary uncertainty may be occasioned by the discursive nature of the judgments in appellate courts, and those sitting in such courts should take every possible step to avoid it' (*Precedent in English Law* (3rd edn. 1977), p. 102).

[15] *Re Attorney-General's References (Nos 1 and 2 of 1979)* [1979] 3 All E. R. 143, at p. 145.
