**CODING SCHEME**

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| **SAMPLE DESCRIPTION** | |
| 1. Case | Kelly, R. v [2013] EWCA Crim 1893 |
| 2. Date of appeal hearing | 200718 |
| 3. Date of original trial/conviction | 031016 |
| 4. Keywords found in case | 8 |
| 5. Decision *Provide quote if short, otherwise summarise* | 1 |
| 6. Number of pages | 11 |
| **DEFENDANT DEMOGRAPHICS (code as 99 if not stated and cannot be inferred)** | |
| 7. Defendant’s gender? | 1 |
| 8. Defendant’s age (at time of offence)? | 99 |
| 9. Defendant’s nationality (at time of offence)? | 99 |
| 10. Defendant’s employment status (at time of offence)? | 5 |
| 11. Defendant’s education level (at time of offence)? | 99 |
| 12. Defendant’s relationship status (at time of offence)? | 2 |
| 13. Did defendant have any children (at time of offence)? | 99 |
| 14. Was defendant homeless (at time of offence)? | 99 |
| **APPEAL CASE/HEARING FACTORS (code as 99 if not stated and cannot be inferred)** | |
| 15. When was appeal initiated? (e.g., post-trial, post-conviction, post-sentence, other) | 3 |
| 16. Who is appellant? (e.g., prosecution, defence, other) | 1 |
| 17. What is appeal against? (e.g., conviction, sentence, both, other) | 1 |
| 18. What are the grounds/reason(s) for appeal? *Provide quote if short, otherwise summarise* | That the recorder erred in refusing to exclude the evidence of the contents of the BlackBerry. The defence counsel, making reference to Article 6 (of the Convention requires that the trial process must as a whole be fair to the accused), argued any expert instructed by a defendant should have equal treatment with any expert instructed by the prosecution. The defence expert should therefore have equal access to any exhibit and relevant material which is the subject of the prosecution's expert evidence. In a case where reliance is placed upon expert evidence the defence is entitled to understand the methodology used in order to ascertain whether the prosecution's witness had acted in a proper professional manner, and whether his reasoning was sound and his conclusions reliable. In cases where the nature of the process to be undertaken risked destruction of an exhibit, the defence should be informed so that they could make representations about having their own representative present. Where such a risk exists, it is essential for the prosecution's expert to keep a detailed record so that the defence expert can analyse precisely what was done. According to the defence there was an issue as to whether the experts who had decrypted the phone on behalf of the prosecution had done their work properly and reliably. Had defence been given full disclosure as sought, then they would have been in a position to make an abuse of process submission or to challenge the evidence of the prosecution experts. They contended that withholding the evidence on PII grounds placed the appellant at an unfair disadvantage, and that his convictions were therefore unsafe. |
| 19. Was fresh evidence presented at appeal? **19b.** If yes, was it Fingerprint/DNA/Digital evidence? **19c.** If no, what was it? | Q19: 2  Q19b: 99  Q19c: 99 |
| 20. Were new techniques used to re-examine old evidence at appeal? | 2 |
| 21. Were new Fingerprint/DNA/Digital experts consulted by defence after original trial? | 2 |
| 22. Were new Fingerprint/DNA/Digital experts consulted by prosecution after original trial? | 2 |
| 23. Did new prosecution Fingerprint/DNA/Digital experts present evidence at appeal hearing? | 2 |
| 24. Did new defence Fingerprint/DNA/Digital experts present evidence at appeal hearing? | 99 |
| 25. Was concern expressed at appeal hearing about qualifications, knowledge, skills or experience of any new prosecution Fingerprint/DNA/Digital expert(s)? | 2 |
| 26. Was any concern expressed at appeal hearing about qualifications, knowledge, skills or experience of any new defence Fingerprint/DNA/Digital expert(s)? | 1 |
| 27. Did prosecution and defence Fingerprint/DNA/Digital expert conclusions disagree at appeal hearing? | 99 |
| 28. What were the main areas of disagreement between prosecution and defence Fingerprint/DNA/Digital experts at appeal hearing? *Provide quote if short, otherwise summarise* | 99 |
| 29. Did Fingerprint/DNA/Digital expert express his/her confidence in conclusion at appeal hearing? **29b.** If yes, how? *Provide quote if short, otherwise summarise* | Q29: 2  Q29b: 99 |
| 30. Were any new probabilities of Fingerprint/DNA match mentioned at appeal hearing? | 99 |
| 31. For DNA evidence, were any new contamination/error rates presented at appeal hearing? | 99 |
| 32. For Fingerprint evidence, were any (new) points of dissimilarity between sample and print presented at appeal hearing? **32b.** If yes, how many? | Q32: 99  Q32b: 99 |
| 33. Did appeal court raise concerns about prosecution or defence team misunderstanding fingerprint/DNA/Digital evidence? **33b**. If yes, who raised it? | 2 |
| 34. Did appeal court raise concerns about jury at original trial misunderstanding or having difficulty understanding fingerprint/DNA/Digital evidence? **34b**. If yes, who raised it? | 2 |
| 35. Did appeal court raise concerns about judge at original trial misunderstanding fingerprint/DNA/Digital evidence? **35b.** If yes, Who raised it? | 2 |
| 36. Did appeal court raise concerns about application of either wrong case law at original trial or ignoring right case law? If yes, who raised it? | 2 |
| 37. Did appeal court raise concerns about errors in judge’s summing up of case at original trial? **37b.** If yes, who raised it? | 1 |
| 38. Did appeal court raise concerns about judge’s instructions confusing jury at original trial? **38b.** If yes, who raised it? | 2 |
| 39. Did appeal court raise concerns about how fingerprint/DNA/Digital evidence was presented at original trial? 39b. If yes, who raised it? | 1 |
| 40. Did appeal court raise concerns that weight of fingerprint/DNA/Digital evidence was overstated in court by either prosecution/defence/judge at original trial? **40b.** If yes, who raised it? | 2 |
| 41. Did appeal court raise concerns about inadmissible evidence being presented at original trial? **41b.** If yes, who raised it? | 1 |
| 42. Did appeal court refer to any existing case law? **42b.** If yes, which? | Q42a: 1  Q42b: H [2004] 2 AC 134 |
| 43. Name of appeal judge(s) | Lord Justice Holroyde, Mr Justice Julian Knowles (Recorder) and Judge Melbourne Inman |
| 44. Name of lawyer(s) in appeal hearing, including who they represent | Mr B Richmond QC appeared on behalf of the Appellant. Mr D Atkinson QC and Mr H Gray appeared on behalf of the Crown |
| **ORIGINAL CASE/TRIAL CHARACTERISTICS (code as 99 if not stated and cannot be inferred)** | |
| 45. Date of crime (first date) | 091214 |
| 46. Was defendant immediately treated as a suspect? **46b.** If no, then how was defendant immediately treated? | Q46: 1  Q46b: 99 |
| 47. Were there other suspects (arrests)? | 2 |
| 48. Did the defendant plead guilty or was he/she convicted at trial? **48b.** If convicted, then was the jury verdict unanimous or other? | Q48: 1  Q48b: 99 |
| 49. Was this the first trial? | 1 |
| 50. What offence(s) was defendant convicted of/plead guilty to? | conspiracy to supply a controlled drug of class A; conspiracy to supply a controlled drug of class B; possession of a different drug of class A |
| 51. Was there circumstantial evidence in the case? **51b.** If yes, what? | Q51: 1  Q51b: Following a stop and search of a vehicle, for which the appellant was a passenger, police found: a gym bag containing a quantity of class A drugs; two mobile phones |
| 52. Was there any other evidence in the case? **52b.** If yes, what? | Q52: 1  Q52b: Expert evidence during trial from three digital experts who examined a mobile phone, one commissioned by the defence and two for the prosecution |
| 53. Did defendant provide an alibi for whereabouts at time of crime? **53b.** If yes, was it corroborated? | Q53: 1  Q53b: 1 |
| 54. What was the defendant’s original sentence? | 9 years imprisonment |
| 55. Was case originally tried in Crown court or magistrates’ court? | 1 |
| 56. Name of judge(s) in original trial | Mr Recorder Nuttall |
| 57. Name of lawyer(s) in original trial | Mr Richmond |
| **INVESTIGATIVE STAGE (code as 99 if not stated and cannot be inferred)** | |
| **COLLECTION** |  |
| 58. Was concern expressed at original trial or appeal about there being a chance of contamination of Fingerprint/DNA evidence prior to sample collection from the crime scene? | 99  **Annotations:** |
| 59. For DNA evidence, was concern expressed at original trial or about where the DNA came from? **59b.** If yes, where? | Q59. 99  Q59b. 99  **Annotations:** |
| 60. Was concern expressed at original trial or appeal about there being potential for evidence tampering/planting? | 2 |
| 61. Was there over a week delay between crime being committed and collection of Fingerprint/DNA or Digital evidence from crime scene? | 99 |
| 62. How many Fingerprint/DNA samples were taken from crime scene? | 99 |
| 63. Was only one method used to collect the sample(s) or multiple methods? | 99 |
| 64. Was concern expressed at original trial or appeal about the method(s) used to collect the sample? | 99 |
| 65. Was the Fingerprint/DNA sample or Digital evidence in question considered by either the prosecution or defence experts to be partial or ambiguous? | 2 |
| 66. Were evidence requests made according to the legal rules? | 1 |
| 67. Was concern expressed at original trial or appeal about broken chain of custody i.e., who was looking after the Fingerprint/DNA sample(s) or Digital evidence after they were collected? | 1 |
| **ANALYSIS** |  |
| 68. How much experience did the prosecution forensic examiner have? | The second expert was described as having certain knowledge which the defence expert lacked and that the method/technique he used was highly confidential |
| 69. How much experience did the defence examiner have? | Described as lacking specialist knowledge |
| 70. Was concern expressed at original trial or appeal about the methods of Fingerprint/DNA/Digital analysis used? | 1  **Annotations:** |
| 71. Was concern expressed at original trial or appeal about there being a chance of the Fingerprint/DNA samples being degraded? | 99  **Annotations:** |
| 72. Did analysis involve ‘cold’ match from a database or comparison against a suspect? | 2  **Annotations:** |
| 73. Did initial examination of sample lead to conclusion that origin could not be determined? | 99  **Annotations:** |
| 74. Did initial examination of sample lead to conclusion that sample originated from defendant? | 99  **Annotations:** |
| 75. Was sample re-examined? **75b.** If yes, did re-examination change initial conclusion? | Q75. 99  Q75b. 99  **Annotations:** |
| 76. Was Fingerprint/DNA/Digital examiner opinion/conclusion verified by another examiner? | 1 |
| 77. For Fingerprint examination, how many points of similarity were found (if any)? | 99 |
| 78. Was Fingerprint/DNA/Digital evidence destroyed before trial? | 2  **Annotations:** |
| 79. Was concern expressed at original trial or appeal about the quality of notes taken/report of the fingerprint/DNA/Digital examiner? | 2 |
| **EVIDENTIARY STAGE (code as 99 if not stated and cannot be inferred)** | |
| **EXPERT TESTIMONY** |  |
| 80. Did (main) prosecution Fingerprint/DNA/Digital expert present evidence at original trial? | 1  **Annotations:** |
| 81. Was concern expressed at original trial or appeal about the qualifications, knowledge, skills or experience of prosecution Fingerprint/DNA/Digital expert(s)? | 2  **Annotations:** |
| 82. Was prosecution Fingerprint/DNA/Digital expert witness cross-examined by defence at original trial? | 2  **Annotations:** |
| 83. Did (main) defence Fingerprint/DNA/Digital expert present evidence at original trial? | 1  **Annotations:** |
| 84. Was concern expressed at original trial or appeal about the qualifications, knowledge, skills or experience of defence fingerprint/DNA/Digital expert(s)? | 1  **Annotations:** |
| 85. Was defence Fingerprint/DNA/Digital expert witness cross-examined by prosecution at original trial? | 2  **Annotations:** |
| 86. Was there a disagreement in conclusions made by prosecution and defence Fingerprint/DNA/Digital experts at original trial? | 1  **Annotations:** |
| 87. Was concern expressed at original trial or appeal about quality of prosecution expert reports? | 2 |
| 88. Was concern expressed at original trial or appeal about quality of defence expert reports? | 2 |
| 89. Were probabilities of fingerprint/DNA match mentioned at original trial? | 99  **Annotations:** |
| 90. Did Fingerprint/DNA/Digital expert express his/her confidence in conclusion at original trial? **90b.** If yes, how? | Q90. 1  Q90b. The second prosecution digital expert said a person would not be able to tell just by looking at the handset that there was a sophisticated security package on it. It was only when trying to use the phone that a person would realise he or she was locked out. He also said the work he had done that it was a very delicate process and there was a risk that the chip would be damaged and data lost in the course of carrying it out.  **Annotations:** |
| 91. For DNA evidence, were probabilities of match presented by prosecution expert at original trial? | 99 |
| 92. For DNA evidence, were contamination/error rates presented at original trial? | 99 |
| 93. For Fingerprint evidence, did the prosecution expert declare a match/individualisation at original trial? | 99 |
| 94. For Fingerprint evidence, how many points of similarity between sample and print were presented at original trial? | 99 |
| 95. For Fingerprint evidence, were any points of dissimilarity presented at original trial? | 99 |
| 96. Did (prosecution or defence) Fingerprint/DNA/Digital experts try to explain any inconsistencies in evidence at original trial? | The second prosecution digital expert accepted that any change to the data should be recorded, that he hadn’t changed or modified any data that he had "sucked out" all the information. What he reviewed was what was there to be seen. He acknowledged there may have been some lost data and that he could not account for any lost data. He further acknowledged that he did not know whether data protected by PGP could be accessed by more than one phone. He therefore could not say whether, if someone lost the mobile, he would still be able to access the emails on it by using another phone. |
| 97. Was hearsay evidence presented at trial? | 2  **Annotations:** |
| 98. Was any bad character evidence presented at trial? | 2  **Annotations:** |
| 99. Did prosecution team fail to share relevant information with defence team before original trial? | 1  **Annotations:** |
| **JUDGE’S INSTRUCTIONS/JURY BEHAVIOR** |  |
| 100. Were visual images used to present Fingerprint/DNA/Digital evidence at original trial? | 99 |
| 101. How did judge instruct jury to deal with Fingerprint/DNA/Digital evidence? *Provide quote if short, otherwise summarise* | In open court the recorder gave his ruling. Although the recording of his ruling is incomplete, the recorder was later able to provide a draft note of what he said. The note shows that he concluded in these terms: *"I do not consider that the admitting of the evidence of the prosecution will have an adverse effect on the fairness of the proceedings. Nor do I find that the prosecution have, in the context of the issue being raised in this case, failed to disclose all that they need to."* |
| **ADDITIONAL DIGITAL QUESTIONS** | |
| **APPEAL CASE/HEARING FACTORS (code as 99 if not stated and cannot be inferred)** | |
| 102. For Digital evidence, were any technical problems presented at the appeal hearing? If yes, what? Provide a quote if short, otherwise summarise | Q102: 1  Q102b: One of the experts encountered difficulties decrypting the messages |
| **DIGITAL - INVESTIGATIVE STAGE (code as 99 if not stated and cannot be inferred)** | |
| **COLLECTION** | |
| 103. For Digital evidence, was concern expressed at original trial about problems securing the data? | 1 |
| 104. For Digital evidence were there any concerns about data being missed during investigation? | 1 |
| 105. For Digital evidence, was any data hidden over the network? | 2 |
| 106. For Digital evidence was any data hidden inside storage areas to make them invisible to the system commands and programs? | 2 |
| 107. For Digital evidence, was any data corrupted? | 2 |
| 108. For Digital evidence, was there any residual data wiping? | 2 |
| 109. For Digital evidence, was concern expressed at the original trial or appeal about data sources being damaged? | 2 |
| **ANALYSIS** | |
| 110. For Digital evidence was any data encrypted? | 1 |
| 111. For Digital evidence was any data hidden in a carrier file without modifying its outward appearance? | 2 |
| 112. For Digital evidence, was any techniques used to obfuscate the source of the attack? | 99 |
| 113. For Digital evidence, did the investigator have to analyse high volumes of data? | 2 |
| 114. For Digital evidence, were the investigators restricted to analysing only recent data stored on volatile memory? | 99 |
| 115. Were there any Co-defendants? 115b. If yes, how many? | Q115. 2  Q115b. 99 |
| 116. Where the case involved co-defendant/s, was there a mixed verdict? 116b. If Yes, what were the verdicts? | Q116. 99  Q116b. 99 |
| **NOTES – PLEASE WRITE ANYTHING THAT YOU THINK IS IMPORTANT BUT WHICH IS NOT CODED ABOVE. THIS MAY INCLUDE QUOTES.** | "There is an issue to be resolved as to whether the experts for the Crown conducted their work properly and reliably. In order to be properly advised by our expert, the defence need to know the precise processes which were followed (including a step by step description of each stage of the process and the names of programmes used). As yet our expert has been unsuccessful in obtaining these working notes or this information. We request its provision to the defence." Para 19. The defence counsel placed reliance on a number of the provisions of the ACPO Guidance in relation to disclosure of digital material (the "Good Practice Guide for Digital Evidence" published by the Association of Chief Police Officers)… the defence counsel further contended that there was no proper audit trail of the work done by the prosecution experts. Retrieving emails from one of the mobile phones was difficult owing to two levels of encryption. First, there was a level of encryption which was a standard feature of the phone and which in this case had been activated. Secondly, there was an additional level of encryption provided by software known as "PGP" which had been added to the phone. PGP stands for "Pretty Good Protection". The first expert who examined the phone on behalf of the prosecution was unable to get past the PGP. He found that there were 28 emails on the BlackBerry device, three of which had been deleted, but he was unable to read the emails because the encryption prevented him from reading them. A further expert witness instructed by the prosecution was more successful. He was able to read and to take screenshots of 23 emails passing between someone who had been using the phone.During the trial, there was a difference between the findings of the first expert and the findings of the second expert as to the number of deleted emails. PII application: the prosecution made an application to withhold details of one of the digital expert’s methods on the grounds of public interest indicating that PGP was rarely encountered by the police but was known to be used by persons engaged in high level drug dealing. The prosecution submitted that the ACPO Guidance had been complied with, and that the mobile in question had been made available to the defence digital expert for examination, but the specialist lacked knowledge which had enabled their expert (but not him) to decrypt the messages. It was submitted that the method used by their expert was highly confidential and that if it became known to more people there was a risk that the information would fall into the hands of criminals. It was therefore submitted that disclosure of their expert's precise methodology would run the risk of serious prejudice to an important public interest, namely the prevention and detection of crime. The court was accordingly invited to rule that their expert's methodology should be protected by public interest immunity. The recorder conducted the PII hearing in the absence of the defence and subsequently permitted the prosecution to withhold any further material relating to their digital expert’s methodology. The trial proceeded with the prosecution expert giving evidence, but without the obligation of explaining precisely what technique he had used. One of the police officers who gave evidence at the trial and who was experienced in drugs cases gave evidence that the PGP security cost in excess of £1,000 for 12 months. Part 19.4(4) of the Criminal Procedure Rules relating to expert evidence: where a defendant seeks to exclude from expert evidence on grounds of non-disclosure, the challenge may be made either as a challenge to admissibility on the basis of non-compliance with rule 19.3(3) or as an application to exclude the evidence on grounds of fairness |