**CODING SCHEME**

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| **SAMPLE DESCRIPTION** | |
| 1. Case | Pabon, R v [2018] EWCA Crim 420 |
| 2. Date of appeal hearing | 130318 |
| 3. Date of original trial/conviction | 290616 |
| 4. Keywords found in case | 5 |
| 5. Decision *Provide quote if short, otherwise summarise* | 1 |
| 6. Number of pages | 19 |
| **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)? | 27 |
| 9. Defendant’s nationality (at time of offence)? | 2 |
| 10. Defendant’s employment status (at time of offence)? | 1 |
| 11. Defendant’s education level (at time of offence)? | 99 |
| 12. Defendant’s relationship status (at time of offence)? | 99 |
| 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* | On the basis of fresh evidence arising out of the retrial concerning the testimony from from an expert commissioned by the prosecution whose evidence conduct fell far below the standards expected of an expert witness in many different ways. The defence counsel advance that it was wrong for the Serious Fraud Office now to seek to downplay the significance of the expert’s evidence |
| 19. Was fresh evidence presented at appeal? **19b.** If yes, was it Fingerprint/DNA/Digital evidence? **19c.** If no, what was it? | Q19: 1  Q19b: 99  Q19c: The testimony from one of the experts being dishonest and, in part, outside of his area of expertise |
| 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? | 99 |
| 22. Were new Fingerprint/DNA/Digital experts consulted by prosecution after original trial? | 99 |
| 23. Did new prosecution Fingerprint/DNA/Digital experts present evidence at appeal hearing? | 99 |
| 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)? | 99 |
| 26. Was any concern expressed at appeal hearing about qualifications, knowledge, skills or experience of any new defence Fingerprint/DNA/Digital expert(s)? | 99 |
| 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: 99  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? | 99 |
| 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? | 99 |
| 35. Did appeal court raise concerns about judge at original trial misunderstanding fingerprint/DNA/Digital evidence? **35b.** If yes, Who raised it? | 99 |
| 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? | 2 |
| 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? | 99 |
| 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? | 99 |
| 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: R v Ghosh [1982] QB 1053; Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67; [2017] 3 WLR 1212; R v Gohil [2018] EWCA Crim 140; R v Harris [2005] EWCA Crim 1980; [2006] 1 Cr App R 5; R v B (T) [2006] EWCA Crim 417; [2006] 2 Cr App R 3; R v Robb [1991] 93 Cr App R Silverlock [1894] 2 QB 766, at 771; R v Pendleton [2001] UKHL 66; [2002] 1 WLR 72; Stafford v Director of Public Prosecutions [1974] AC 878; Dial v Trinidad and Tobago [2005] UKPC 4; [2005] 1 WLR 1660; R v Hakala [i.e., [2002] EWCA Crim 730]; Burridge v R [2010] EWCA Crim 2847 |
| 43. Name of appeal judge(s) | Lord Justice Gross, Mr Justice Sweeney and Mr Justice Haddon-Cave |
| 44. Name of lawyer(s) in appeal hearing, including who they represent | James Hines and Emma Deacon (instructed by the Serious Fraud Office) for the Crown. Tom Allen and Nicholas James (instructed by IBB Solicitors) for the Appellant |
| **ORIGINAL CASE/TRIAL CHARACTERISTICS (code as 99 if not stated and cannot be inferred)** | |
| 45. Date of crime (first date) | 010605 |
| 46. Was defendant immediately treated as a suspect? **46b.** If no, then how was defendant immediately treated? | Q46: 99  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: 1 |
| 49. Was this the first trial? | 2 |
| 50. What offence(s) was defendant convicted of/plead guilty to? | Conspiring to defraud |
| 51. Was there circumstantial evidence in the case? **51b.** If yes, what? | Q51: 1  Q51b: E-mail correspondence between the appellant and the defendants |
| 52. Was there any other evidence in the case? **52b.** If yes, what? | Q52: 1  Q52b: Expert evidence from (1) a professor in finance; and (2) a former trader who ran a company providing expert consulting and testimony in banking cases |
| 53. Did defendant provide an alibi for whereabouts at time of crime? **53b.** If yes, was it corroborated? | Q53: 2  Q53b: 99 |
| 54. What was the defendant’s original sentence? | 2 years and 9 months' imprisonment |
| 55. Was case originally tried in Crown court or magistrates’ court? | 1 |
| 56. Name of judge(s) in original trial | Judge Leonard |
| 57. Name of lawyer(s) in original trial | 99 |
| **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? | 99 |
| 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? | 2 |
| **ANALYSIS** |  |
| 68. How much experience did the prosecution forensic examiner have? | One expert was described as being a professor, the second as a former trader who ran a company providing expert consulting and testimony in banking cases |
| 69. How much experience did the defence examiner have? | 99 |
| 70. Was concern expressed at original trial or appeal about the methods of Fingerprint/DNA/Digital analysis used? | 99  **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? | 99 |
| 77. For Fingerprint examination, how many points of similarity were found (if any)? | 99 |
| 78. Was Fingerprint/DNA/Digital evidence destroyed before trial? | 99  **Annotations:** |
| 79. Was concern expressed at original trial or appeal about the quality of notes taken/report of the Fingerprint/DNA/Digital examiner? | 99 |
| **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? | 99  **Annotations:** |
| 81. Was concern expressed at original trial or appeal about the qualifications, knowledge, skills or experience of prosecution Fingerprint/DNA/Digital expert(s)? | 99  **Annotations:** |
| 82. Was prosecution Fingerprint/DNA/Digital expert witness cross-examined by defence at original trial? | 99  **Annotations:** |
| 83. Did (main) defence Fingerprint/DNA/Digital expert present evidence at original trial? | 99  **Annotations:** |
| 84. Was concern expressed at original trial or appeal about the qualifications, knowledge, skills or experience of defence fingerprint/DNA/Digital expert(s)? | 99  **Annotations:** |
| 85. Was defence Fingerprint/DNA/Digital expert witness cross-examined by prosecution at original trial? | 99  **Annotations:** |
| 86. Was there a disagreement in conclusions made by prosecution and defence Fingerprint/DNA/Digital experts at original trial? | 99  **Annotations:** |
| 87. Was concern expressed at original trial or appeal about quality of prosecution expert reports? | 1 |
| 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. 99  Q90b. 99  **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? | 99 |
| 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? | 2  **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 evidence? *Provide quote if short, otherwise summarise* | 99 |
| **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: 2  Q102b: 99 |
| **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? | 2 |
| 104. For Digital evidence were there any concerns about data being missed during investigation? | 2 |
| 105. For Digital evidence, was any data hidden over the network? | 99 |
| 106. For Digital evidence was any data hidden inside storage areas to make them invisible to the system commands and programs? | 99 |
| 107. For Digital evidence, was any data corrupted? | 99 |
| 108. For Digital evidence, was there any residual data wiping? | 99 |
| 109. For Digital evidence, was concern expressed at the original trial or appeal about data sources being damaged? | 99 |
| **ANALYSIS** | |
| 110. For Digital evidence was any data encrypted? | 99 |
| 111. For Digital evidence was any data hidden in a carrier file without modifying its outward appearance? | 99 |
| 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? | 99 |
| 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.** | In opening the appeal judge highlighted two key considerations: First, the duty of an expert to the Court, in particular to stay within the area of his expertise. Secondly, the sole test for this Court when deciding whether to allow or dismiss an appeal against conviction: namely, whether that conviction is unsafe. Para 32. The serious fraud office (SFO) gave instructions to an expert (from a former trader who ran a company providing expert consulting and testimony in banking cases) to provide a report "*explaining the workings of an investment bank, inter-dealing brokerage and related financial instruments and trading terms used by individuals within these institutions*". The letter of instructions drew specific attention to the duty of an expert "*to give objective unbiased opinion on matters within their expertise*", together with the relevant provisions of the Crim PR. Para 34. In March 2016, the defendants in the trial sought a pre-trial hearing to exclude or restrict Rowe's evidence, on the ground of lack of expertise. Although it was accepted that Rowe had some general banking experience, it was contended that he had no direct experience of interest rate derivatives trading, cash trading or making LIBOR submissions. His evidence ought to be restricted to the "core" of his report, covering the structure of banks, financial concepts and an overview of the relevant financial instruments in the case. It was furthered that the expert in question, should be prevented from giving "inadmissible evidence as to the permissible approach to the LIBOR-setting process, the permissible extent of communications between traders and LIBOR submitters, or whether conduct of any kind is or could be regarded as being dishonest". Rowe was not competent to provide opinion evidence on such matters. He had never worked as an interest rate derivatives trader, a cash desk trader or a LIBOR submitter and appeared to have no direct knowledge of the LIBOR submission process. He had not worked as a trader of any kind since 2000 and, from 2005 onwards, had acted as a professional expert witness on general banking disputes. Para 35. Resisting the defence application, the SFO response was that, as shown by the declaration in his expert's report, the expert understood his duty to the Court, including as to expressing his opinion (only) on matters within his expertise. The SFO pointed to the fact that he had given expert evidence in two previous LIBOR trials, apparently without challenge to his expertise. Nor had there been any challenge from the defence to the accuracy or reliability of the evidence proposed to be adduced by the expert. It would be open to the defence to cross-examine him at the trial on his alleged lack of expertise. Para 36. The matter was subsequently presented to the trial judge who observed that there was **no real dispute as to the principles governing the admissibility of expert evidence. The essential question was whether the witness was skilled, rather than the way he came by his skill.** The key passage in the Judge's ruling was as follows: ‘I cannot assess his [Rowe's] expert knowledge against that of any expert to be called by the defence, because the defence do not intend to call any expert evidence. Whether, as a result of cross-examination, deficiencies in his knowledge become exposed will have to wait for the trial process to resolve. Whether he is right in what he says, I cannot at this stage say, and in any event I should not usurp the task of the jury in this regard.’ he judge furthered that: ‘*I do not consider that I am in the area, as Mr Darbishire QC [for Reich] would put it, of hearing an expert in orthopaedics give evidence about cardiology, but rather that I have a witness who has an expertise in banking matters and, no doubt, more so in some areas than others. This is something that can be tested by the defence and the jury can decide what weight they should give to his evidence in respect of any particular point*.’ Upon the receiving further material from the SFO and expert the judge excluded the evidence concluding: " ….the lack of any detailed analysis by [the expert] in his report as to the basis for his opinion and, without any research being apparent into what was in fact happening at Barclays at the time on which he could have relied, leads me to rule that, as the report is presented, there is no admissible basis for his evidence on this issue." It surfaced that the sections of the experts report were not advanced by him but by another professional. Additionally, according to para 40, despite being explicitly told by the judge that he was not to discuss this case with anyone whilst his evidence was in progress, the expert communicated with three other individuals. The expert subsequently gave evidence that he ran a company providing expert consulting and testimony in banking cases. He had worked in the finance industry between 1989 and 2000. He gave evidence concerning various banking terms and concepts. The appeal court, making reference to an expert witness, averred to his conduct fall below the standards expected of an expert witness in many different ways. At the trial, in the absence of the fresh (disclosure) material, the Appellant's counsel had been inhibited in his ability to cross-examine Rowe as to his credibility or expertise It was now clear that Rowe's failings as an expert were extensive; thus: “….*he had signed documents stating that he had complied with his duties when he knew he hadn't; he had failed to report with any detail or accuracy as to how he reached his opinions; he secretly consulted with a number of undisclosed advisors; he blatantly disregarded the directions of a trial judge during the course of a criminal trial; and he knowingly gave evidence about matters outside his area of competence. These are deeply troubling failings that bring the system of justice into disrepute*…” The fresh material would have permitted devastating cross-examination. It did do just that at the retrial, where both defendants were acquitted. The duty resting on an expert witness is so fundamental that where it is abused, the entire process is affected: "….It leads to the peculiarity of a trial in which the prosecution seeks to prove the dishonesty of a defendant and in order to do so calls a dishonest expert as an essential building block of their case.…There may be circumstances in which that state of affairs does not impinge upon the safety of the conviction. But this was not one of them."The appeal court ultimately asserted that the expert “had not complied with his duties as an expert.” In summing up the trial judge averted: " ….you have heard from two experts, who gave evidence on behalf of the prosecution about banking concepts and practice relevant to this case. Expert evidence is permitted to assist you with matters which are likely to be outside your experience and knowledge. As with any evidence, it is for you to decide what you accept and what you reject….You should take account of their qualifications and to what extent their practical experience equipped them to give evidence on the topics they were asked about.’ Para 50. The expert was subject to cross-examination, which included his duties as an expert, and the declaration in his report, required by the Crim PR. The Judge's summing-up at the retrial said: "*Despite that catalogue of experience, you may have formed a judgment that he knew very little about the duties of being an expert……he seems to have been perfectly content to sign a standard declaration in which he declared that he had read the Criminal Procedure Rules which govern his conduct as an expert, both before trial and in giving evidence, and the booklet on his duties of disclosure without doing anything really to familiarise himself with either of those documents…. Any expert is entitled to research a topic on which he is to give evidence and obtain the views of others, including work colleagues, about it to enhance his opinion, so long as he records where he went for that advice and so long as it is to enhance an expertise he already has, rather than to become an expert on a subject where he has no knowledge whatsoever……There seems to be no dispute that he has a general expertise in banking and finance and that many of the issues he dealt with involved basic matters which are not in dispute.……But there are other areas of his evidence where you would be entitled to conclude that he has gone beyond his general knowledge of banking into very specific areas, which were at the very edge of or beyond his knowledge.* Para 53 adduces the legal framework (Part 19 of the Crim Procedure Rules) covering an expert witness’s duties to the court: (1) An expert must help the court to achieve the overriding objective – (a) by giving opinion which is – (i) objective and unbiased, and (ii) within the expert's area or areas of expertise…..(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid. (3) This duty includes obligations – (a) to define the expert's area or areas of expertise – (i) in the expert's report, and (ii) when giving evidence in person (b) when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise…." Guidance Booklet for Expert's Disclosure: Experts' Evidence, Case Management and Unused Material. Para 54. The essence of the matter is straightforward. As explained in the "standard" direction given to juries in respect of expert evidence (see above, for the direction given by the Judge at the trial), expert evidence is adduced to assist with matters likely to be outside their experience and knowledge. A partisan expert is quite incapable of furnishing such assistance, quite apart from the breach of ethical and legal duties thus entailed. So too, to state the obvious, expert evidence must be expert; it can only be such if it is within the expert's area/s of expertise; if the so-called expert witness gives evidence outside of his area/s of expertise it is both of no use to the jury and corrosive of the trust placed in such witnesses. Referring to case law (para 55) Silverlock [1894] 2 QB 766, at 771" ….It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business……"In the appeal court summing up the judge asserted: We accept that the principal reason for the SFO calling [the expert] to introduce to the jury essentially uncontroversial banking and trading concepts. Thus far, as the Judge observed in the summing-up in the retrial, he had sufficient general expertise to act as an expert. Where [the expert] went wrong – gravely wrong, as we have concluded – was to go further and enter into debate on topics, beyond or at the very outer edge of his expertise. The SFO conducted an internal discussion following the expert’s presentation and condemnation by the appeal court, they subsequently concluded that the experts *conduct resulted from a failure of integrity on his part rather than a failure of SFO policies or procedures*. The SFO undertook to look again at the matter to see whether there was any way in which it could reinforce expert witnesses' awareness of their obligations under the Crim PR…..On an endnote the judge asserted that ‘*this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre*.’ |