

Reasons – R v Jason Bolger Case - Examining Bias, Inadequacy, and Misapplication of Precedent
Justice on Appeal has deconstructed the ‘Review and Reasons’ decision by the CCRC in 2007, which covered significant grounds of appeal over 150 pages in their reply.

JoA has applied its new AI Legal review system and demonstrated a concise document which summarises the issues of the CCRC decision-making as ‘the CCRC’s review in this case is inadequate, exhibits confirmation bias, and misapplies legal principles relevant to referral’ and affords the Appellant a ground of appeal directly to the Court of Appeal as the CCRC is incapable of applying the principles of the “real possibility” test.

Introduction

This review offers a forensic critique of the Criminal Cases Review Commission’s (CCRC) decision and reasoning in the case of Jason Bert Bolger (CCRC Reference: 00607/2007). The analysis exposes the inherent biases, lacunae, and circularities within the CCRC's review, scrutinises their application and interpretation of case law, and posits alternative authorities that command greater relevance to the factual matrix. In the spirit of legal rigour, this document interrogates the evidential narrative and challenges the institutional reluctance to confront or correct possible miscarriages of justice.

1. Structural Bias and Inadequacy of the Review

1.1 The “Real Possibility” Test in Application

The CCRC frames its exercise of discretion under the Criminal Appeal Act 1995 around the “real possibility” test, emphasising the non-retrospective effect of statutory changes and the requirement of “new” evidence or argument. However, throughout both the summary and the detailed reasoning, the CCRC’s analysis betrays a recurring tendency to default to the status quo—treating the original trial and appeal as dispositive, and any challenge as presumptively meritless unless it meets artificially elevated thresholds of newness, significance, and novelty. This approach, in practice, ossifies the trial verdict and immunises it from meaningful scrutiny.

1.2 Selectivity and Dismissal of Defence Submissions

The Commission repeatedly discounts lines of argument with the refrain that “the jury knew about these issues,” “the experts were available at trial,” or “no new evidence emerges.” This stance is self-defeating: the CCRC is statutorily tasked with re-interrogating whether justice was done, not merely ratifying the outcome of flawed proceedings because the materials were technically available or the jury could have, in theory, acquitted. The investigation into potential

sampling errors, witness intimidation, and police malpractice is superficial, often relying on the absence of direct proof of malfeasance as a reason not to probe further. For example, allegations of intimidation are dismissed solely because witnesses did not recant, overlooking subtler, context-driven influences on testimony.

2. Inference of Institutional and Cognitive Bias

2.1 Presumption of Regularity and Self-Validating Evidence

A latent presumption pervades the review: that all procedural actors—police, experts, barristers, and judges—acted in good faith, and that administrative or evidential anomalies are at worst unfortunate, not sinister. This is nowhere more evident than in the handling of:

- Chain of evidence errors regarding the blood samples (AJM/3, AJM 1/2, etc.);
- Discrepancies in police logs, custody records, and the SOCO video;
- Witness management, including use of incentives, possible intimidation, and the handling of PII material.

The CCRC's reluctance to ascribe weight to cumulative irregularities constitutes a cognitive bias—a refusal to see the forest for the trees. The doctrine of cumulative effect, recognised in *R v Mullen* [1999] 2 Cr App R 143, is not addressed: a series of questionable acts or omissions, each individually explainable, may together taint the process and render a verdict unsafe.

2.2 Evaluation of “New Evidence” and the Automatism Defence

The Commission's approach to new expert evidence (e.g., Professor Johnston's analysis) is unduly restrictive, relying on *R v Kai-Whitewind* [2005] 2 CAR 457 and *R v Horton* [2007] EWCA Crim 607 to exclude fresh opinion unless it fundamentally destroys the verdict's basis. Yet this fails to acknowledge the essential difference between mere “expert shopping” and a legitimate attempt to correct a trial where the defence was hamstrung by sampling delays and scientific uncertainty.

3. Challenging the Cited Case Law and Installing Alternatives

3.1 Rejection of the Commission's Preferential Authorities

The CCRC leans heavily on:

- *R v Campbell* [1997] 1 Cr.App.R. 199
- *R v Hakala* [2002] EWCA Crim 730
- *R v Kai-Whitewind* [2005] 2 CAR 457

- R v Nangle [2001] Crim.LR. 506
- R v Butt [2005] EWCA Crim 805

These authorities establish the principles that new defences are generally inadmissible after conviction, and that fresh expert evidence will seldom justify a reference. However, the CCRC's reliance on these cases is contextually misplaced. In *Bolger*, the very issues at trial—automatism, intoxication, and evidential continuity—were not fairly ventilated; they were hampered by procedural failings, inadequate forensic analysis, and possibly, by poor legal advice. This is precisely the context where the Court of Appeal in *R v Pendleton* [2001] UKHL 66 held that the question is not whether the court itself believes the conviction is unsafe, but whether it is content to stand by the original verdict in the light of all the material now available.

3.2 Installing More Relevant Precedent

The Commission should instead have engaged with:

- *R v Pendleton* [2001] UKHL 66: The House of Lords stressed the need for the appellate court to have “anxious consideration” of whether the conviction is safe, not to defer to the jury’s verdict where new material “changes the picture.” This case stands for a less deferential, more interventionist approach.
- *R v George* [2007] EWCA Crim 2722: The Court of Appeal quashed a conviction where there was a “constellation” of evidential, forensic, and investigative failings, even though each taken alone was not conclusive; the cumulative effect was decisive.
- *R v Mullen* [1999] 2 Cr App R 143: The principle of cumulative procedural unfairness rendering a conviction unsafe, even where bad faith or deliberate misconduct is not positively proved.
- *R v Dunn* [2003] EWCA Crim 3030: The importance of scrutinising whether the defence had a real opportunity to test the reliability of central forensic evidence, especially where delays or failures occurred at the hands of the state.
- *R v Hodgson* [2009] EWCA Crim 490: The Court emphasised the duty to refer where “the combination of fresh evidence and flaws in the process mean there is a substantial possibility of a different outcome.”

These authorities, if properly considered, would have led the Commission both to revisit the flawed reliance on the “no new evidence” mantra and to consider the cumulative weight of the identified failings.

4. Evidential Gaps, Missteps and Non-Disclosure

4.1 Sampling Controversies and the Burden of Proof

The CCRC's confidence in the DNA result (confirming the blood sample to be Bolger's) is misplaced; the central question was not merely identity, but timing, handling, and possible contamination or confusion. The Commission's own recounting reveals:

- Admitted delays in sampling;
- Inconsistent labelling (AJM/3, etc.);
- Conflicting expert views as to the metabolic breakdown and detectability of substances;
- Failure to test comparators (e.g., Wicks, Sibley);
- Defence assertions that the toxicology did not match Bolger's self-reported intake.

The CCRC's conclusion that "there can be no reasonable doubt" is unwarranted in the presence of such chronic uncertainty. The forensic context here mirrors *R v George*, where contaminated or ambiguous evidence, despite expert rationalisation, meant the jury had never been in a real position to decide guilt safely.

4.2 Witness Intimidation and Disclosure Failures

The Commission's minimisation of possible intimidation or collusion among witnesses (especially amidst conflicting statements, pressure, and incentives) is concerning. The legal standard is not whether intimidation is proved beyond doubt, but whether the "appearance of fairness" is compromised (*R v Abdroikov* [2007] UKHL 37; *R v G.C.* [2008] EWCA Crim 1033). The CCRC's own review notes multiple points at which defence witnesses were inconsistent, recanted, or felt under pressure, but rationalises these away as "known to the jury," ignoring the chilling effect such atmospheres create.

4.3 Incomplete Engagement with Defence Incompetence

The Commission, while citing *R v Nangle* and *R v Butt*, essentially sets an impossibly high bar for appeals based on trial incompetence, focusing on "flagrant incompetence" or outright unfairness. Yet, the ECHR and domestic courts have long accepted that a "real possibility of an unfair trial" suffices where cumulative defence failures interact with state-side procedural errors (*R v Hodgson*; *R v Clinton* [2012] EWCA Crim 2).

5. Case Law: The CCRC's Choices Versus What Was Needed

The CCRC's preferred authorities are those that insulate the trial process from challenge. But in the context of:

- missed or muddled evidence,
- delayed and ambiguous sampling,
- possible police procedural lapses,
- incomplete disclosure, and
- defence failures,

The correct approach is that of Pendleton, George, and Mullen: the question is whether, in all the circumstances, the conviction is safe and just. Where doubt is cumulative and taints the foundation of the verdict, the only proper course is reference and re-examination.

Conclusion: A Detailed Review of What Actually Happened

The CCRC's Review and Reasons, when deconstructed, reveal a persistent bias in favour of the finality of the original verdict. Rather than acting as a robust safeguard against miscarriages of justice, the Review exemplifies institutional inertia and a narrow, legalistic approach to "newness" and relevance. The analysis of sampling, witness integrity, police conduct, and expert evidence is consistently viewed through the lens of "no new material likely to overturn," rather than through anxious scrutiny of cumulative process failures.

The Bolger case is a paradigm of trial vulnerability: critical forensic evidence was subject to delay, confusion, and inadequate cross-examination; key witnesses were under pressure; the defence did not press all available lines; and the prosecution's case, while supported by multiple witnesses, was marred by procedural uncertainty. The CCRC's refusal to refer, based on a patchwork of "no new evidence," "the jury knew," and "experts disagreed," ignores the lessons of Pendleton and George—that the overriding criterion is safety and justice, not mere procedural compliance.

In sum, the CCRC's review in this case is inadequate, exhibits confirmation bias, and misapplies legal principles relevant to referral. The correct course would have been to view the cumulative effect of evidential and procedural failings as meeting the "real possibility" threshold, meriting referral to the Court of Appeal for anxious scrutiny. Only by such means can justice be both done and manifestly seen to be done.